

Preserving Freedom

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Humanity's first steps toward freedom, taken again and again in pockets of history throughout the world, affirmed the power of the people to create laws that governed everyone, even the king.

As we prepare to celebrate our Independence Day, we are connected by our values, our longings, and our history to people in all places and all times who seized their freedom with both hands—sometimes using their power to throw the king into a bog.

America's founders were uniquely conscious of this history. In the Declaration of Independence, they chose, with intention, words that resonated with the long struggle for human freedom.

But it was only after their bloody war of liberation, only after their unsuccessful experiment with a loose confederation of 13 states, that they gathered together with their knowledge and their life-experience to write an amazing document that begins, "We the People."

"We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

"We the people."

Today we call it the rule of law: a written Constitution that sets out the duties, powers, and limitations of government. And our particular constitution, the one that is the model for so many others all over the world, *our* Constitution divides the power once given to the monarch among three branches of government.

Separation of powers.

Why is this *history*, why are these *choices*, important to us today?

America was created by people fleeing religious persecution. The idea of religious freedom is deeply embedded in our history and in our laws. Our Constitution was not the light work of a few men over a few days; it was a new hope of freedom birthed in blood and struggle.

These drafters of the document that begins "We the People" did not write those words casually or because they liked how they sounded. William Penn, the Quaker who founded Pennsylvania a century before, had been jailed by London authorities who abhorred his dissenting religious beliefs. Those who put him in jail insisted that

he—William Penn, the Quaker—was a danger to civil society.

Those disruptive Quakers, always talking about peace and equality.

When William Penn founded the colony of Pennsylvania, he created a charter—a constitution—that guaranteed to Pennsylvania’s citizens the rights he had been denied.

Freedom of speech. Freedom of religion. For those accused of crime, due process of law:

- Trial by jury.
- The right to be represented by counsel.
- The right to know the witnesses against them.
- The right of habeas corpus, which means the right to be seen and heard in a public court.

The founders of America knew from bitter *personal* experience what happens when the laws, and the rights guaranteed by law, are not observed. It was not an easy choice to declare Independence and throw off by force of arms the rule of the English King.

And when they came together to correct the flaws and failures of the weak Articles of Confederation—when they decided to write a Constitution that created a strong central government—they were more conscious than any of us could possibly be of the dangers a strong central government might pose to freedom.

Their freedom, so hard-won.

Their children’s freedom.

Our freedom.

They divided the power into separate branches of government. And they put at the Constitution’s heart the one rule they considered most essential—the rule they thought would take care of all the other due process rights that William Penn had written out a hundred years before.

The right of *habeas corpus*. The right of any prisoner to demand to be seen by a regular public court. The right to have a judge, not an administrator, decide whether the imprisonment was according to law.¹

It was only after a few more years of discussion and debate they decided to spell out the rights William Penn had included in Pennsylvania’s constitution. They added the Bill of Rights, the first 10 amendments, the amendments that list the due process rights that the drafters had thought were at the core of the Constitution because of the *habeas* clause.

What does it say:

“The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.” (Article I, §9, ¶2)

Rebellion or invasion. These writers, America’s founders, knew about rebellion. They understood invasion. They had lived through both.

They understood that in the middle of a rebellion (like the one they had accomplished), or while repelling invasion (which they had done), the civil courts might not be able to hear habeas petitions from every suspected spy or out-of-uniform saboteur.

They knew, from experience, that the courts might be in a shambles, or transportation might be disrupted, or events might be moving so fast that there would not be time for the courts’ deliberate process toward justice. And they knew that if the country faced a rebellion or an invasion there would be a struggle and then there would be an outcome.

They could not know whether “government of the people, by the people, for the people” could “long endure.”² But if their new hope survived rebellion, survived invasion, then there would be time to return to Constitutional order and the right of public trial.

It was Abraham Lincoln, who understood “government of the people,” who understood democracy, who cherished freedom for *all* people, who first tried to suspend the writ of habeas corpus.³ Lincoln’s America was “engaged in a great civil war,”⁴ one that tested the survival of the new nation. But when he issued a presidential decree suspending habeas corpus, there was a huge outcry.⁵

Why?

Because the Constitution does not give the President the power to suspend habeas corpus. The founders, writing from their life-experience, did not give the Executive Branch the power to suspend habeas. That power is given to Congress. It is placed in Article I. It is not a power of the Presidency.

Lincoln was wrong.

And he knew it, immediately.⁶ He admitted it. He went to Congress, a supplicant, and asked that branch of the American government to suspend habeas for the duration of the rebellion.⁷

And Congress did. Habeas was suspended until the Civil War ended.

The right of a prisoner to demand a court hearing has been suspended only three other times. In 1871, Congress agreed to suspend habeas in nine counties in South Carolina where the activities of the Ku Klux Klan amounted to a rebellion. In 1905 Congress suspended habeas in the Phillipines during the conflict there. During World War II, following the bombing of Pearl Harbor, Congress suspended habeas in Hawaii.⁸

Preserving freedom.

The people who wrote the Constitution lived through the loss of their freedom and understood what is needed to preserve it.

Their grandparents, or their parents, or they themselves had come to America for religious freedom. They knew from personal experience, from family history, that the right to a public trial by a jury of peers is the ultimate tool for preserving freedom.

And they were right.

If we need a touchstone, a reality check, to evaluate their vision, consider the Nazi government's administrative detention policy, adopted in 1941, that was called "Night and Fog":

"Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminals do not know the fate of the criminal. ... [T]hese measures will have a deterrent effect because - A. The prisoners will vanish without a trace. B. No information may be given as to their whereabouts or their fate."⁹

Night and fog.

The "disappeared." They languish in prison, unheard, without a voice, their fate unknown.

The founders of America understood "night and fog." Whatever reason a government official may assert to put people in jail, whether it be their Quaker faith or their bad poetry, the writ of habeas corpus brings them out of the night and fog and into the sunshine, into the public court.

It was only a few weeks ago that our Court of Appeals for the 4th Circuit ordered the public trial of a prisoner originally arrested in Peoria, Illinois for domestic crimes and then turned over to military authorities on the request of a US official in the Executive branch. The prisoner has been held for more than four years without trial, without a clear statement of the basis for his detention.

But our judges read the Constitution. In the words of Fourth Circuit Judge Diana Gribbon Motz:

"For over two centuries of growth and struggle, peace and war, the Constitution has secured our freedom through the guarantee that, in the United States, no one will be deprived of liberty without due process of law."

So the law stands. The court relies on the Constitution to preserve our freedom.

This ruling is not about a single prisoner detained by a single bad decision. It is connected to the whole history of the human struggle for freedom, and how—once

obtained—freedom must be preserved.

Each prisoner held in night and fog is connected to each of us. We, the religious community, blessed by the religious freedom guaranteed in America’s Constitution, are always and ever charged with preserving freedom.

We do not alone call for justice, or justice for only ourselves. But each time we stand for justice, we act to preserve our own freedom along with that of all others.

We stand for justice, so that this America, history’s new hope of freedom, “shall not perish from the Earth.”¹⁰

¹ See *Ex Parte Merryman*, 17 Fed. Cas. 144 (No. 9487) (C.C.D. Md. 1861) (US Supreme Court Chief Justice Roger B. Taney, sitting as a Circuit Judge, ruled that the President’s suspension of habeas was invalid, noting:

The right of ... habeas corpus, it must be recollected, was one of the great points in controversy, during the long struggle in England between arbitrary government and free institutions, and must therefore have strongly attracted the attention of the statesmen engaged in framing a new and, as they supposed, a freer government than the one which they had thrown off by the revolution. From the earliest history of the common law, if a person were imprisoned, no matter by what authority, he had a right to the writ of habeas corpus, to bring his case before the king's bench; if no specific offence were charged against him in the warrant of commitment, he was entitled to be forthwith discharged; and if an offence were charged which was bailable in its character, the court was bound to set him at liberty on bail. The most exciting contests between the crown and the people of England, from the time of Magna Charta, were in relation to the privilege of this writ, and they continued until the passage of the statute of 31 Car. II., commonly known as the great habeas corpus act.”

² Abraham Lincoln, Gettysburg Address (1863).

³ J. Randall, *Constitutional Problems Under Lincoln* (Rev. Ed. 1951), pp. 118-39.

⁴ Abraham Lincoln, Gettysburg Address (1863).

⁵ See Randall (note 3); *Ex parte Merryman*, 17 Fed. Cas. 144 (No. 9487) (C.C.D. Md. 1861) (US Supreme Court Chief Justice Roger B. Taney, sitting as a Circuit Judge, ruled that the President’s suspension of habeas was invalid). The case of *Ex parte Merryman* illustrates how the “writ” of habeas corpus is issued by a court to the jailer holding the prisoner and orders the jailer to bring the prisoner into court. Here is the Merryman writ:

“The United States of America, to General George Cadwalader, Greeting: You are hereby commanded to be and appear before the Honorable Roger B. Taney, chief justice of the supreme court of the United States, at the United States courtroom, in the Masonic Hall, in the city of Baltimore, on Monday, the 27th day of May 1861, at eleven o'clock in the morning, and that you have with you the body of John Merryman, of Baltimore county, and now in your custody, and that you certify and make known the day and cause of the caption and detention of the said John Merryman, and that you then and there, do, submit to, and receive whatsoever the said chief justice shall determine upon concerning you on this behalf, according to law, and have you then and there this writ. Witness, the Honorable R. B. Taney, chief justice of our supreme court, &c. Thomas Spicer, Clerk. Issued 26th May 1861.”

General Cadwalader sent a written answer, saying that “he is duly authorized by the president of the United States, in such cases, to suspend the writ of habeas corpus, for the public safety. This is a high and delicate trust, and it has been

enjoined upon him that it should be executed with judgment and discretion, but he is nevertheless also instructed that in times of civil strife, errors, if any, should be on the side of the safety of the country. He most respectfully submits for your consideration, that those who should cooperate in the present trying and painful position in which our country is placed, should not, by any unnecessary want of confidence in each other, increase our embarrassments. He, therefore, respectfully requests that you will postpone further action upon this case.”

Chief Justice Taney then asked if Gen. Cadwalader had also sent John Merryman to court along with this reply (the literal meaning of “habeas corpus” is “bring forth the body”). Told “no” by the officer who had delivered the General’s statement, Taney said, “General Cadwalader was commanded to produce the body of Mr. Merryman before me this morning, that the case might be heard, and the petitioner be either remanded to custody, or set at liberty, if held on insufficient grounds; but he has acted in disobedience to the writ, and I therefore direct that an attachment be at once issued against him, returnable before me here, at twelve o'clock tomorrow.”

The marshal assigned to carry this message to the General was not admitted to the military base. (The next day in court, Taney said that he understood the marshal’s decision not to go back to the base with a posse to arrest the General.) Taney announced from the bench two Constitutional principles: “1. That the president, under the constitution of the United States, cannot suspend the privilege of the writ of habeas corpus, nor authorize a military officer to do it. 2. A military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offence against the laws of the United States, except in aid of the judicial authority, and subject to its control; and if the party be arrested by the military, it is the duty of the officer to deliver him over immediately to the civil authority, to be dealt with according to law.” In the written opinion that followed, Taney added:

“I understand that the president not only claims the right to suspend the writ of habeas corpus himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him. No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the president claimed this power, and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands, that the privilege of the writ could not be suspended, except by act of congress.”

Taney recalled the presidency of Thomas Jefferson, when the President asked Congress to suspend habeas to aid in investigation of the treasonous conspiracy led by Aaron Burr. Taney said, “And in the debate which took place upon the subject, no one suggested that Mr. Jefferson might exercise the power himself, if, in his opinion, the public safety demanded it.”

⁶ Justice Taney sent President Lincoln a copy of his decision ordering the release of the prisoner held by the military under the President’s authority. Taney said: “It will then remain for that high officer, in fulfilment of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced.” *Ex parte Merryman*, 17 Fed. Cas. 144 (No. 9487) (C.C.D. Md. 1861).

⁷ Act of March 3, 1863, 1, 12 Stat. 755. See Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by Congress*, 1 U. Wis. History Bull. 213 (1907).

⁸ Findlaw, <http://caselaw.lp.findlaw.com/data/constitution/article01/46.html>, Act of April 20, 1871, 4, 17 Stat. 14 (Ku Klux Klan in 1871); Act of July 1, 1902, 5, 32 Stat. 692 (Phillipines, 1905; see *Fisher v. Baker*, 203 U.S. 174 (1906); Hawaiian Organic Act, 67, 31 Stat. 153 (1900) (Hawaii in WWII, see *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), allowing the wholesale detention of Americans of Japanese descent; not one of the finer moments in American history).

⁹ “Night and Fog” quotation is from Wikipedia, at http://en.wikipedia.org/wiki/Night_and_Fog_decree:

“On December 7th, 1941, SS Reichsführer Heinrich Himmler issued the following instructions to the Gestapo: "After lengthy consideration, it is the will of the Führer that the measures taken against those who are guilty of offenses against the Reich or against the occupation forces in occupied areas should be altered. The Führer is of the opinion that in such cases penal servitude or even a hard labor sentence for life will be regarded as a sign of weakness. An effective and lasting deterrent can be achieved only by the death penalty or by taking measures which will leave the family and the population uncertain as to the fate of the offender. Deportation to Germany serves this purpose."

Field Marshall Wilhelm Keitel issued a letter stating: "Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminals do not know the fate of the criminal. The prisoners are, in future, to be transported to Germany secretly, and further treatment of the offenders will take place here; these measures will have a deterrent effect because - A. The prisoners will vanish without a trace. B. No information may be given as to their whereabouts or their fate."

¹⁰ Abraham Lincoln, Gettysburg Address (1863).