The U.S. Constitution as an Atlantic Document

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Does history really matter? As a historian, and more importantly as a teacher of history, I have become convinced of the need to raise this question in my introductory classes. Too often this fundamental query is left for upper-division "theory" courses, or never broached at all. At a certain point historians, like most of us I imagine, stop asking why we do what we do and just get on with doing it. But with history, the question of why we engage in it or whether it is worthwhile at all is absolutely vital.

In his 1926 address to the 41st annual meeting of the American Historical Association, Carl Becker offered a persuasive answer to this question.[1] Becker asserted that historians do not (indeed cannot) simply assemble all the facts surrounding a given event and then "let the facts speak for themselves." Rather, the historian must engage his or her subject, make choices about which facts are significant and which are extraneous, and provide a context in order for those facts to make sense. The facts alone, Becker pointed out, are meaningless. For example, the fact that Caesar crossed the Rubicon River in 49 B.C. is undisputed. Yet this event means very little (if anything at all) unless one understands something about the context: that Caesar was a successful general with rising political ambitions, that the Rubicon marked the border between Rome proper and the frontier, that the Senate had instructed Caesar to return from his campaigns in Gaul without his army, and that Caesar intended to return to the capitol with his forces intact. In that context, it becomes evident that when Caesar stood on the banks of the Rubicon in 49 B.C., he wasn't just thinking about crossing a river; he was contemplating an invasion that would have world historical ramifications, ending the Roman Republic and ushering in the Empire. It is the historian's task to establish this context so that the otherwise mute "fact" of a man fording a river on a certain day speaks to us and has significance. In short, Becker reminds us, the historian is engaged in creating meaning.

This essay pursues two points along these lines. The first is that yes, history really does matter for exactly the reasons Becker pointed out. The second theme to be developed here is that considering the U.S. Constitution as an Atlantic document (that is, in its Atlantic context) is a good example of precisely why history matters. In viewing the Constitution in this manner, I am utilizing the methods of what has come to be called Atlantic history.[2] For about three decades now, historians in this sub-discipline have been illustrating the value of transcending the boundaries of nation states and continents surrounding the Atlantic Ocean and considering the Atlantic region as a unit. The edges of nations and continents are of course quite permeable, and ideas, people, beliefs, trade goods, diseases all cross borders regularly. This is true almost everywhere on the globe, but the Atlantic region has proven to be a particularly fruitful system to study in this light. Whether we celebrate or condemn them, the voyages of Columbus in the late fifteenth century suddenly transformed the Atlantic Ocean from a barrier separating the Americas from Europe and Africa, into a highway which has connected them ever since. Although the histories of the continents and nations surrounding the Atlantic have long been considered separately in academic programs (American history, European history, and so on), Atlantic history insists that beginning with the early modern period, these geographic units are most usefully considered as a system. The merits of this approach may be illustrated by setting that quintessentially American document, the U.S. Constitution, in its Atlantic context.

To begin, I draw upon H. Robert Baker's 2008 article, "The Supreme Court Confronts History."[3] In his

article, Baker explores the Supreme Court's use of history to argue a landmark case. The utilization of historical arguments to justify interpretations of the Constitution and thus to decide cases is nothing new, but the 2008 Supreme Court case, Boumediene v. Bush, provides an excellent example of how historical analysis was used to justify both a majority court decision and one of the dissents to the ruling as well. The case also illustrates some of the strengths of the Atlantic perspective.

The central issue in Boumediene was whether habeas corpus applies at Guantanamo Bay. Many of the suspected terrorists apprehended in the "War on Terror" and jailed at the U.S. detention center at Guantanamo Bay, Cuba, beginning in 2002, had not been formally charged with any crime. Government prosecutors suggested they needed to hold these individuals while they built legal cases against them. Did these Guantanamo Bay detainees have the right to make habeas corpus appeals and demand that they either be charged or else released?

Habeas corpus, Baker points out for those of us whose Latin is rusty, means "have the body," as in a command for the jailor to present the defendant before a judge in order to show the defendant is alive and well, and to explain why the person is being detained. In this case, the pivotal question was whether the government could "strip federal courts of jurisdiction to entertain prisoners' applications for habeas corpus."[4] The issue centers on Article I, section 9, paragraph 2 of the Constitution: the so-called "Suspension Clause," which expressly forbids congress from suspending habeas corpus "unless when in cases of rebellion or invasion the public safety may require it." Without digressing into the legal details here, the case turned on the question of sidestepping the suspension clause. Rather than charge Guantanamo Bay detainees with a specific crime, could the government deny their habeas corpus rights (and thus hold them for an indefinite period of time without filing criminal charges) by labeling them "enemy combatants" and putting them in military tribunals? The court in this case said no, though only by one vote.

The court split five to four against the government. Legal niceties aside, this case reveals a great deal about the significance of historical understanding in arriving at these legal decisions. In responding to the ruling, both Justice Anthony Kennedy, writing for the majority, and Justice Antonin Scalia, who wrote a dissent to the ruling, turned to history to justify their respective positions. Moreover, in developing his history of habeas corpus, Kennedy set the Constitution squarely in an Atlantic context, one which establishes the U.S. Constitution in a tradition that goes back to the English Civil Wars and even to the English Magna Carta of 1215.

In his majority opinion, Kennedy stakes out special ground for habeas corpus. How does he do this? It has long been noted that the Suspension Clause does not grant an affirmative right to habeas corpus. It is housed in the same article that forbids congress from granting titles of nobility, preferring one state's ports over another's, and from tinkering with the slave trade for twenty years. As Baker puts it, "This is hardly the architectural design of a palisade for fundamental rights."[5] Nevertheless, Kennedy suggests that "the writ [of habeas corpus] had a centrality that must inform proper interpretations of the Suspension Clause."

By way of proving this centrality, Kennedy delves into a history of habeas corpus. He traces its textual roots across the Atlantic all the way back to the English Magna Carta of 1215. The more immediate – and to the American colonists, the more historically significant – context was that of the long and often bloody seventeenth-century battles in England between Parliament and the absolutist Stuart kings. Among the tactics most reviled by their critics, the Stuarts brazenly attempted to fund unpopular policies by raising revenue without Parliamentary consent (an early version of "taxation without representation"). When subjects objected, King Charles I had them jailed and held without charges. There were many other complaints against the Stuarts, but the 1627 Petition of Right, the Habeas Corpus Act of 1679, and the English Bill of Rights in 1689 all spelled out the right to habeas corpus, suggesting that the King's strategy of jailing enemies without charges was considered a particularly grievous abuse of power. Kennedy examines all of these details in his brief, concluding that the American founding fathers were well aware of the history of what had become an important safeguard against tyranny when they included habeas corpus in the Constitution.

But Kennedy goes further. He points to the ratification struggle of 1787-88 as additional proof of how central the idea of habeas corpus was to the American framers of the Constitution. Defenders of ratification were put on the defensive in the state ratification conventions. Critics charged that the new federal government was an attempt to substitute a novel American tyranny for the old British one! Wasn't the introduction of a new federal government simply an attempt to undermine states' (and thus individuals') rights? Kennedy turns to Alexander Hamilton, who answered this objection in Federalist no. 84. To demonstrate that a federal government would be no tyranny, Hamilton underscored the many protections of individual liberty in the Constitution, especially habeas corpus, which he calls one of the greatest "securities to liberty and republicanism" in the document.[6] Kennedy insists that his historical analysis proves Hamilton and others realized the place habeas corpus held in the historical imagination. Despite its negative formulation in Article I, the right of habeas corpus was not included in the Constitution haphazardly. On the contrary, the historical context suggests that the protection was considered by the founding generation to be one of the most reliable checks against tyrannical power. Thus, Kennedy concludes, the bar for superseding habeas corpus must be set exceedingly high.

The government's argument in this case was that habeas corpus should not apply at Guantanamo Bay. Their lawyers suggested that much of the evidence against the detainees involved sensitive material, or had not been accumulated yet, so formal charges could not be filed against them. If the government were not allowed to hold the Guantanamo Bay detainees indefinitely without formally charging them, dangerous terrorists might be freed. That ominous possibility was simply too great to allow the detainees access to habeas corpus appeals.

Justice Scalia's dissenting brief drew on this line of reasoning, and he, like Justice Kennedy, turned to history for a justification of his views. However, Scalia's focus is on much more recent history. The primary context for Scalia in this case was the modern "War on Terror." He writes, "America is at war with radical Islamists. The enemy began by killing Americans and American allies abroad: 241 at the Marine barracks in Lebanon, 19 at the Khobar Towers in Dharan, 224 at our embassies in Dar el Salaam and Nairobi, and 17 on the U.S. Cole in Yemen." On September 11, 2001, he continues, "the enemy brought the battle to American soil." Scalia goes on to claim that the majority's opinion in this case "will make the war harder on us. It will almost certainly cause more Americans to be killed."[7]

The history utilized here is problematic on a number of levels. To begin with, the claim that the decision in favor of Boumediene will result in American deaths is an emotional argument, rather than a historical (let alone a legal) one. Furthermore, Scalia's list of attacks lumps various Sunni and Shiite rebel groups together with Al Qaeda and assorted other entities with varying degrees of attachment, grouping them all into one reductive "enemy," when they actually have significant differences and severe disagreements amongst themselves. As Baker suggests, Scalia portrays this as a war of civilizations, America versus "all who hate us," glossing over any historical subtlety or context. In the end, as Baker notes, "technical merits of his opinion aside, Scalia's use of history is an utter failure."[8]

The specific questions surrounding the scope of habeas corpus relating to Guantanamo Bay and the "War on Terror" are still being scrutinized. Boumediene v. Bush, while a landmark case, is only one part of what is already proving to be a substantial, complicated body of detainee jurisprudence relating to the U.S. government's antiterrorism efforts. What I hope to have suggested here is that this case helps illuminate how our understanding of the Constitution's use of habeas corpus has much to do with the larger Atlantic context within which it was developed. Also, it is apparent from these Supreme Court briefs that history really does matter, as evidenced by the repeated appeals to history in establishing the different arguments in the case. It is indeed heartening to a historian to see Supreme Court justices recognizing the significance of history in crafting their decisions.

Intriguingly, even this short examination of the U.S. Constitution as an Atlantic document highlights not only some of the strengths, but also a potential weakness of the Atlantic approach. Some scholars have suggested that a shortcoming of Atlantic history lies in its seemingly indefinable parameters. That is, the question arises: Where does the Atlantic, and thus Atlantic history, end? Doesn't the Atlantic, through continental and oceanic

connections, extend ultimately into world history? After all, even this limited consideration of habeas corpus and its Atlantic connections has introduced global politics and terrorist groups centered in the Middle East and Asia. But in the end, in this global age is this really a weakness of the Atlantic model, or one its great strengths?

Endnotes

1.The address was later published under the title, "What Are Historical Facts?" in The Western Political Quarterly, Vol. VIII, Sept. 1955, no. 3.

2.The idea of Atlantic history stems from work begun in the 1980s by Bernard Bailyn of Harvard University and Jack P. Greene of the Johns Hopkins University, among others. Useful overviews of the field are Bernard Bailyn, Atlantic History: Concept and Contours (Cambridge, MA and London: Harvard University Press, 2005) and Jack P. Greene and Philip D. Morgan, eds., Atlantic History: A Critical Reappraisal (Oxford: Oxford University Press, 2009).

3.H. Robert Baker, "The Supreme Court Confronts History," www.common-place.org, vol. 8, no. 4, July 2008.

4.Baker, p. 1.

5.Baker, p. 3.

6. Baker, p. 3, quoting Hamilton.

7. Baker, p. 5, quoting Scalia.

8. Baker, p. 5.

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