

## ORIGINALISM AND HISTORY: THE CASE OF *BOUMEDIENE V. BUSH*

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Originalism in theory is one thing. Originalism in practice may be something else again. To interpret the Constitution in light of history, which is what originalism amounts to, you have to interpret history. How well you perform the task of the historian will determine how accurately you interpret the Constitution. This should be an obvious point, but too little has been made of it. The Supreme Court's opinion in *Boumediene v. Bush*,<sup>1</sup> decided in 2008, nicely illustrates how historical interpretation can support or distort constitutional analysis.

*Boumediene* was the third in the trilogy of habeas corpus cases in the Supreme Court brought by detainees at the Guantanamo Bay Naval Base.<sup>2</sup> The question in the first two cases was whether the habeas statute<sup>3</sup> entitled the detainees to challenge their confinement. Our court twice said no, the Supreme Court twice said yes, and each time Congress reversed the Supreme Court.<sup>4</sup> I wrote the opinions in our court's first two Guantanamo habeas cases, and then in *Boumediene*, and the Supreme Court reversed all three times. With this in mind, you can consider my remarks about the Supreme Court's performance as

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1. 553 U.S. 723 (2008).

2. The first two cases were *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2006, and *Rasul v. Bush*, 542 U.S. 466 (2004), *superseded by statute*, Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, 1001-06, 119 Stat. 2680, 2739.

3. 28 U.S.C. § 2241 (2006).

4. See *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd* 548 U.S. 557 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd sub nom.* *Rasul v. Bush*, 542 U.S. 466 (2004), *superseded by statute*, Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, 1001-06, 119 Stat. 2680, 2739.

sour grapes or, as I prefer, you can treat my comments as informed criticism.

The issue in *Boumediene* was whether the statutes depriving federal courts, judges and justices of jurisdiction over Guantanamo habeas actions<sup>5</sup> violated the Suspension Clause of the Constitution.<sup>6</sup> The Clause reads: “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.”<sup>7</sup> The Suspension Clause is a riddle. It limits the instances when Congress may suspend the writ without guaranteeing the writ will exist. The Supreme Court has not done a good job of solving the riddle, but that is not the interpretive problem I want to focus on.<sup>8</sup> All the Justices in *Boumediene* accepted the proposition that the Suspension Clause at least preserved the common law writ of habeas corpus as it existed in 1789.<sup>9</sup> This raises an interesting question for originalism theory.

Suppose we agree that the correct approach is the original public meaning of the text, not the original intent of the Framers.<sup>10</sup> So we must conduct a hypothetical interview of the reasonably informed man in the street in 1789 to find out what the Suspension Clause preserved. We ask Mr. Citizen to speak into the microphone: “What do you think the writ of habeas corpus entails? Does it reach beyond the sovereign territory of England?” He might reply, “Don’t ask me, ask the lawyers,” or perhaps, “I don’t have a clue.” No Justice in *Boumediene* took this approach, and no Justice mentioned the original public meaning theory. Both the majority and the dissent thought it proper to rely on the legal authorities of the day rather than on our mythical common man.<sup>11</sup>

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5. 28 U.S.C. § 2241(e) (2006).

6. U.S. CONST. art. I, § 9, cl. 2.

7. *Id.*

8. See Stephen I. Vladeck, *The Riddle of the One-Way Ratchet: Habeas Corpus and the District of Columbia*, 12 GREEN BAG 2D 71 (2008).

9. See *Boumediene v. Bush*, 553 U.S. 723, 746 (2008) (citing *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)); *id.* at 815 (Roberts, C.J., dissenting); *id.* at 844 (Scalia, J., dissenting).

10. See John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 758–65 (2009).

11. See *Boumediene*, 553 U.S. at 746–51; *id.* at 844–47 (Scalia, J., dissenting).

In *Boumediene*, the first question under the Suspension Clause was how far geographically the writ of habeas corpus reached in 1789. Guantanamo is not now, and never has been, part of this country's sovereign territory. Congress recognized this when it defined "United States" to exclude Guantanamo Bay in the statute overruling the first Supreme Court Guantanamo decision.<sup>12</sup>

I remember working at home on the geographical-scope issue. The language of the Suspension Clause—suspend in times of invasion or rebellion<sup>13</sup>—seemed to contemplate a writ confined to United States territory. It struck me that I ought to look at the lectures on English law that Sir Robert Chambers gave at Oxford between 1767 and 1773.<sup>14</sup> (Chambers took over the Oxford lectureship from Blackstone.) Pretty contemporary I thought. So I pulled these volumes off the shelf in my library and cracked open volume two.

To my delight, I found a discussion directly on point. Among other authorities, Chambers relied on an opinion of Lord Chief Justice Mansfield.<sup>15</sup> Lord Mansfield was the greatest lawyer of eighteenth-century England.<sup>16</sup> He delivered a lengthy opinion in 1759 stating that the Habeas Corpus Act of 1679, which Blackstone described as the bulwark of English liberties,<sup>17</sup> provided that the writ of habeas corpus did not extend beyond England's sovereign territories.<sup>18</sup> And so, for at least a generation leading up to the adoption of our Constitution, English lawyers educated at Oxford were instructed that the writ did not extend beyond the King's dominions.

I thought it legitimate to rely on Chambers even though his lectures were not published here until 1986, and even though I do not know whether any of the Framers ever read or sat in on his lectures. Of course, I also relied on Lord Mansfield, along

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12. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(g), 119 Stat. 2680, 2743.

13. U.S. CONST. art. I, § 9, cl. 2.

14. ROBERT CHAMBERS, A COURSE OF LECTURES ON THE ENGLISH LAW DELIVERED AT THE UNIVERSITY OF OXFORD 1767-1773 (Thomas M. Curley ed., 1986).

15. *Id.* at 7-8.

16. 2 JOHN CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 303 (London, John Murray 1849).

17. 1 WILLIAM BLACKSTONE, COMMENTARIES \*137.

18. *Rex v. Cowle*, (1759) 97 Eng. Rep. 587 (K.B.).

with other historical material, to hold that the constitutional writ did not extend to Guantanamo.<sup>19</sup>

In the Supreme Court, despite dozens of amicus briefs from the leading lights of academia, all in favor of the detainees in *Boumediene*, no one was able to cite a single case or any contemporary commentary indicating that habeas reached beyond the nation's sovereign territory in 1789.<sup>20</sup> I gave a few speeches at law schools about the *Boumediene* case while it was pending in the High Court. I said there was no getting around this history. I was wrong.

One of the classic books on historical research and analysis is David Hackett Fischer's *Historians' Fallacies: Toward a Logic of Historical Thought*, published in 1970.<sup>21</sup> Professor Fischer lists 112 common fallacies in historical scholarship.<sup>22</sup> The majority opinion in *Boumediene* managed to commit a good many of them. To illustrate, the Court's opinion states: "Lord Mansfield can be cited for the proposition that, at the time of the founding [1789], English courts lacked the 'power' to issue the writ to Scotland [or other regions beyond England's sovereign territory, which] Lord Mansfield referred to as 'foreign.'"<sup>23</sup> Note the Court's wishy-washy phrasing: "can be cited for the proposition." What about "establishes"?

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19. *Boumediene v. Bush*, 476 F.3d 981, 988–90 (D.C. Cir. 2007), *rev'd* 553 U.S. 723 (2008).

20. See Brief of International Humanitarian Law Experts as Amici Curiae Supporting Petitioners, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Nos. 06-1195, 06-1196); Brief of Professors of Constitutional Law and Federal Jurisdiction as Amici Curiae Supporting Petitioners, *Boumediene*, 553 U.S. 723 (Nos. 06-1195, 06-1196); Brief of Legal Historians as Amici Curiae Supporting Petitioners, *Boumediene*, 553 U.S. 723 (Nos. 06-1195, 06-1196); Brief on Behalf of Former Federal Judges as Amici Curiae Supporting Petitioners, *Boumediene*, 553 U.S. 723 (Nos. 06-1195, 06-1196); Brief of Federal Courts and International Law Professors as Amici Curiae Supporting Petitioners (Geneva Enforceability), *Boumediene*, 553 U.S. 723 (Nos. 06-1195, 06-1196); Brief of Specialists in Israeli Military Law and Constitutional Law as Amici Curiae Supporting Petitioners, *Boumediene*, 553 U.S. 723 (Nos. 06-1195, 06-1196); Brief of 383 United Kingdom and European Parliamentarians as Amici Curiae Supporting Petitioners, *Boumediene*, 553 U.S. 723 (Nos. 06-1195, 06-1196); Brief of Canadian Parliamentarians and Professors of Law as Amici Curiae Supporting Reversal, *Boumediene*, 553 U.S. 723 (Nos. 06-1195, 06-1196).

21. DAVID HACKETT FISCHER, *HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* (1970).

22. See *id.* at 337–38.

23. *Boumediene*, 553 U.S. at 749.

The Court then purports to blunt this powerful history by noting “the possibility” that the English courts were “motivated . . . by . . . prudential concerns” rather than “formal legal constructs.”<sup>24</sup> And, the Court adds, Scotland was not really a foreign country vis-à-vis England when Lord Mansfield wrote his opinion.<sup>25</sup> These few lines are critical to the Court’s historical analysis, and yet they contain no less than four different historians’ fallacies. The Court rounds off this short discussion with a glaring error of historical fact.

I will deal with the logical fallacies first. Perhaps the most obvious is the fallacy of the metaphysical question.<sup>26</sup> In framing the issue in terms of the real “motivations” of the judges of the Court of King’s Bench in mid-eighteenth-century England, the Supreme Court majority set up an impossible inquiry: What were the motives of English judges 250 years ago?<sup>27</sup> How can anyone know this today? (Indeed, how could anyone have known back then?) We do not even know the real motivation of the five Justices who signed on to the *Boumediene* majority opinion, although you may have your suspicions.

The Court’s next misstep was subscribing to the fallacy of the false dichotomy, a mistake Professor Fischer calls so serious that it “deserves to be singled out for special condemnation.”<sup>28</sup> The Court’s statement assumes there are only two possibilities: either the English courts were motivated by formal legal constructs (whatever that means), or they were motivated by prudential concerns (whatever that means).<sup>29</sup>

But there is a third explanation, a conclusive one. As Lord Mansfield recognized, the English courts limited their habeas jurisdiction to sovereign territory, and they did so in compliance with the Habeas Corpus Act of 1679.<sup>30</sup> That does not strike me as a legal construct or a prudential concern.

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24. *Id.* at 749.

25. *Id.*

26. FISCHER, *supra* note 21, at 12–14.

27. *See Boumediene*, 553 U.S. at 748–50.

28. FISCHER, *supra* note 21, at 9.

29. *Boumediene*, 553 U.S. at 748–50.

30. *See Philip Hamburger, Beyond Protection*, 109 COLUM. L. REV. 1823, 1884–85 (2009).

A third fallacy in the quoted passages is the fallacy of the negative proof. As Professor Fischer explains, this fallacy occurs “whenever the historian declares that ‘there is no evidence that X is the case,’ and then proceeds to affirm or assume that not-X is the case.”<sup>31</sup> The *Boumediene* majority suggests that there is no evidence that Lord Mansfield or the other judges of the Court of King’s Bench were applying the requirements of the law.<sup>32</sup> Hence, the Court concludes, they must have been doing something else.<sup>33</sup> This line of reasoning is a clear “attempt to sustain a factual proposition merely by negative evidence.”<sup>34</sup> But “not knowing that a thing exists,” Professor Fischer tells us, “is different from knowing that it does not exist.”<sup>35</sup> One is reminded of Alice in *Through the Looking Glass*:

“I see nobody on the road,” said Alice.

“I only wish I had such eyes,” the King remarked in a fretful tone. “To be able to see nobody! And at that distance too!”<sup>36</sup>

The Court’s fourth mistake embodies the fallacy of the possible proof.<sup>37</sup> This particular blunder infects much of the *Boumediene* opinion. “Valid empirical proof,” Professor Fischer writes, “requires not merely the establishment of possibility, but an estimate of probability.”<sup>38</sup> The Court mentions the possibility that Lord Mansfield was mistaken about the scope of habeas, but it does not bother to assess its probability.<sup>39</sup> In fact, there is no evidence to support the Court’s “possibility,” and the overwhelming historical evidence is that habeas corpus did not reach beyond England’s sovereign territory.

This brings me to the Court’s massive error of fact. Lord Mansfield’s mid-eighteenth-century opinion stated that the writ was geographically confined and did not extend to Scot-

31. FISCHER, *supra* note 21, at 47.

32. *See Boumediene*, 553 U.S. at 748–50.

33. *Id.* at 749–50.

34. *See* FISCHER, *supra* note 21, at 47.

35. *Id.* at 48.

36. LEWIS CARROLL, *ALICE’S ADVENTURES IN WONDERLAND, AND THROUGH THE LOOKING GLASS* 171 (Lothrop Publishing Co. 1918) (1898).

37. *See* FISCHER, *supra* note 21, at 53 (“The fallacy of the possible proof consists in an attempt to demonstrate that a factual statement is true or false by establishing the possibility of its truth or falsity.”).

38. *Id.*

39. *See Boumediene v. Bush*, 553 U.S. 723, 748–50 (2008).

land because it was a foreign country.<sup>40</sup> In order to disprove this, the Supreme Court majority charged Lord Mansfield with having made a mistake of law—Scotland was not then “foreign.”<sup>41</sup> Professor Philip Hamburger has thoroughly explained why the error was the Supreme Court’s, not Lord Mansfield’s.<sup>42</sup>

There is another fact that should be added. Of all the legal authorities in eighteenth-century England, Lord Chief Justice Mansfield would know best the status of Scotland. He was not merely the greatest lawyer of his time, but, obviously unknown to the *Boumediene* majority, Lord Mansfield was himself a Scot.<sup>43</sup>

At the end of its historical inquiry, the Court majority said that the “conception of sovereignty does not provide a comprehensive or altogether satisfactory explanation for the general understanding that prevailed when Lord Mansfield considered issuance of the writ outside England.”<sup>44</sup> Not an “altogether satisfactory explanation for the general understanding”? Satisfactory to whom? It was surely satisfactory to the English barristers and judges in the eighteenth century. So what are we to make of the Supreme Court’s remarks? Maybe the Court thinks it is engaging in literary criticism. It is certainly not engaging in objective historical analysis.

The Court majority’s other point is stranger still. It says it cannot reach a conclusion about the geographical scope of habeas because the historical record is not complete.<sup>45</sup> That is, not all eighteenth-century habeas proceedings were reported.<sup>46</sup> If one took this rationale seriously, then originalism is a dead letter. The historical record will never be complete.

With the deck thus cleared, the majority declares the original meaning of the Suspension Clause ambiguous.<sup>47</sup> If the Court

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40. That limitation on habeas explains why Lord Mansfield wrote that, “[t]o foreign dominions, which belong to a prince who succeeds to the throne of England, this Court has no power to send any writ of any kind. We cannot send a habeas corpus to Scotland . . . .” *Rex v. Cowle*, (1759) 97 Eng. Rep. 587, 599–600 (K.B.).

41. *Boumediene*, 553 U.S. at 750.

42. Hamburger, *supra* note 30, at 1886–88.

43. CAMPBELL, *supra* note 16, at 303.

44. *Boumediene*, 553 U.S. at 751.

45. *Id.* at 752.

46. *Id.*

47. *Id.*

had been faced with an ambiguous statute interpreted by an administrative agency, it would have recognized that the choice of meanings was a policy choice and would therefore have deferred to the agency.<sup>48</sup> Here the Court was faced with an ambiguous provision of another law, the Constitution. Why not defer to the legislature's choice, which clearly rested on foreign policy considerations and judgments about the security of the nation? Do Justices John Paul Stevens, Anthony Kennedy, Ruth Bader Ginsburg, David Souter or Stephen Breyer have any expertise on these subjects?

No matter. The Court majority plunged ahead with what it termed a functional analysis.<sup>49</sup> In doing so the Court distorted *Johnson v. Eisentrager*<sup>50</sup> beyond recognition. The case was directly on point, and so, in his typically restrained fashion, Justice Scalia called the majority's statements portraying the case as something else "patently false."<sup>51</sup>

The majority had to face another issue—whether the Detainee Treatment Act, in providing review in the D.C. Circuit,<sup>52</sup> was an adequate substitute for common law habeas.<sup>53</sup> The Court majority must have grown weary of all this historical stuff and so gave up on its originalist pretense altogether. The Act was an inadequate replacement for common law habeas, the Court held,<sup>54</sup> but it refused to tell us what common law habeas entailed.<sup>55</sup> It left that task to the district and circuit judges in the D.C. Circuit.<sup>56</sup>

George Orwell was right. "Who controls the past controls the future: who controls the present controls the past."<sup>57</sup> It is easy to distort history. Professor Fischer gives us 112 ways to do it, and there are many more.<sup>58</sup> Originalism cannot confine the

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48. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

49. *Boumediene*, 553 U.S. at 763–64.

50. 339 U.S. 763 (1950).

51. *Boumediene*, 553 U.S. at 838 (Scalia, J., dissenting).

52. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2)(C), 119 Stat. 2680, 2742.

53. *Boumediene*, 553 U.S. at 771–72.

54. *Id.* at 792.

55. See *id.* at 757.

56. *Id.* at 792.

57. GEORGE ORWELL, 1984, at 32 (Signet Classic 1961) (1949).

58. FISCHER, *supra* note 21, at 337–38.

willful judge; no theory of interpretation can. The *Boumediene* majority found ambiguity where none existed. But even this should not have led to its result. I agree with Judge Wilkinson that “[w]hen a constitutional question is so close, when conventional interpretive methods do not begin to resolve the issue decisively, the tie for many reasons should go to the side of deference to democratic processes.”<sup>59</sup>

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59. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 267 (2009).