



NORTH CAROLINA LAW REVIEW

Volume 94 | Number 5

Article 3

6-1-2016

The Magna Carta Betrayed?

Jed S. Rakoff

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Jed S. Rakoff, *The Magna Carta Betrayed?*, 94 N.C. L. REV. 1423 (2016).

Available at: <http://scholarship.law.unc.edu/nclr/vol94/iss5/3>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

THE MAGNA CARTA BETRAYED?*

JED S. RAKOFF**

The year 2015 marked the eight hundredth anniversary of one of the most celebrated, and least read, of the world's legal texts: the Magna Carta. The great twentieth-century British jurist Lord Denning described the Magna Carta as “the greatest constitutional document of all times—the foundation of the freedom of the individual against the arbitrary authority of the despot.” But it was not always held in such high repute. Pope Innocent III, in annulling the Magna Carta just a couple of months after it was promulgated (though it was later reinstated), declared that the charter was “not only shameful and demeaning but also illegal and unjust.” And as a peace treaty between King John and certain rebel barons—which was its purpose—it was something of a flop, with the rebellion continuing even after John's death in 1216.

The Magna Carta was reputedly drafted by Stephen Langton, the archbishop of Canterbury, and while his authorship has been called into question regarding the overall document, it seems likely he was responsible for the very first operative clause or “chapter.”¹ That chapter affirms that “the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired.” However, while Chapter 1 might be read as a statement of religious freedom, this does not appear to have been the chief concern of the barons who negotiated the charter: for what follows, in Chapters 2–8, are a series of protections for the barons' widows and heirs against attempts by King John to seize the barons' lands and properties upon their deaths. Given what one suspects was the modest life expectancy of the

* © 2016 Jed S. Rakoff.

** Reprinted from *The New York Review of Books*. The Article is based on remarks given October 2, 2015, by Judge Rakoff at the *North Carolina Law Review's* symposium, *Eight Hundred Years of Magna Carta*. As a reprint, it does not follow the *North Carolina Law Review's* standard citation and style practices.

1. In his marvelous commentary to the 2015 Penguin Classics edition of the Magna Carta, David Carpenter writes that while Langton's input into the Magna Carta was mostly indirect, “it was Langton who crafted and inserted what now became the first clause,” which “was of overwhelming importance for the Charter's future.”

Incidentally, the numbering and separation of the chapters of the Magna Carta were added much later by the great eighteenth-century English jurist William Blackstone. The original was one long, continuous text.

average English baron in those days, it was probably these provisions that were uppermost in the barons' minds.

But what if the baron died while still indebted to those medieval moneylenders, the Jews? Chapters 10 and 11 provide protection for a baron's wife and children against having to pay interest for a time on debts owed to Jews (though in Chapter 11 also to others). It is remarkable, and disappointing, that so little attention has been paid by subsequent commentators to these discriminatory and rather cavalierly derogatory chapters.² In fairness, however, the real purpose of these clauses was, as indicated, to prevent a baron's property from falling into the hands of the king after the baron's death. This was because Jews in medieval England were forbidden to own property. Indeed, Jews themselves were considered to be a form of property: "chattels" belonging to the king. Thus, if a baron or his heirs defaulted on a debt by not paying interest, the property securing the debt became the property of the king.

For this reason, John viewed the Jews as useful tools (unlike John's famous predecessor Richard the Lionheart, who went out of his way to encourage their murder); and thus these chapters of the Magna Carta may even be viewed as providing a certain legal validation, not otherwise always provided, of debts owed to Jews. But even if read generously in this way, these provisions hardly presaged a greater acceptance of Jews by either the barons or the Crown. Seventy-five years later, in 1290, King Edward I issued an order expelling all Jews from England.

The next twenty-five chapters or so are chiefly concerned with taxes, fines, and other assessments by the Crown, and are not without relevance to future laws forbidding excessive fines and the like, or even, in Chapter 12's prohibition of "scutage" (a tax levied in lieu of military service) without consent, the doctrine of no taxation without representation. But it is only when we get to Chapter 39 that we find the language for which the Magna Carta is chiefly known. Chapter 39 reads:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force

2. Thus, for example, Dan Jones, in his recent and otherwise very well crafted history of the Magna Carta, largely relegates to a footnote his discussion of the role of the Magna Carta in reinforcing the harsh treatment of the Jews of medieval England. See Dan Jones, *Magna Carta: The Birth of Liberty* (Viking, 2015), pp. 46–47.

against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.

Much of what we would today refer to as the right to due process and, more broadly, the rule of law are neatly summed up in this one sentence.

But how were these rights to be enforced? After a bunch of other chapters—dealing with such “pressing” matters as removing from public office the kinsmen of Gerard de Athée (Chapter 50), who was one of King John’s favorite hit men, and releasing from hostage the sisters of King Alexander II of Scotland (Chapter 59), whom John wanted to prevent from marrying French nobles with whom the rebellious Scots sought to ally—the Magna Carta creates an executive committee of twenty-five elected barons to administer its provisions. In practice, however, this proved unwieldy and ultimately unworkable.

To actually realize the promise of Chapter 39, two things were, at a minimum, necessary: first, an acknowledgment by the holder of executive power that he was subordinate to the law of the land, and must not only abide by it but also enforce it; and second, a mechanism by which those who were wrongly detained by the executive in violation of the law of the land might be brought before a court and freed. In the United States, part of the first requirement was met, broadly speaking, by the enactment of the Constitution and by Chief Justice John Marshall’s declaration in *Marbury v. Madison* that ultimate authority for the interpretation of the Constitution lay with the Supreme Court. But this is not to say that our chief executives always accepted the rule of law. Indeed, many of our strongest executives would, on occasion, defy it. Thus when the Supreme Court held in 1832 that Indian tribes must be treated as sovereign nations, President Andrew Jackson allegedly responded by saying: “John Marshall has made his decision; now let him enforce it.” And when the Civil War broke out, President Abraham Lincoln unconstitutionally suspended the writ of habeas corpus, leading his secretary of state, William Seward, to boast to a British minister: “I can touch a bell . . . and order the imprisonment of [US citizens], and no power on earth, except that of the President of the United States, can release [them].”

Which brings us to the second requirement of the rule of law, namely, a mechanism by which a court can free those who are wrongly imprisoned by the executive in violation of the law. The chief

such mechanism, of course, is the writ of habeas corpus, by which a court can require that a detained or imprisoned person be brought before a court, so that the law of the land can be applied to her case. Contrary to what some writers and even judges have sometimes implied, the writ itself is not to be found in the Magna Carta. Indeed, it was not meaningfully developed until several centuries later. But the development of the writ was a necessary requirement if the rights put forth in Chapter 39 of the Magna Carta were to be realized. As Justice John Paul Stevens, quoting Justice Robert H. Jackson, wrote for the Supreme Court in the 2004 case of *Rasul v. Bush*:

Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint.

But does the Great Writ still serve this vital function, or has it been compromised to the point of ineffectuality? I suggest that there is at least some cause for concern, and in that regard, I would mention two rather different examples: the detention camp at Guantánamo and the statute known as the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

In some respects, the legal history of the Guantánamo detention camp illustrates the continuing power, not just of the writ of habeas corpus, but also of the Magna Carta. In the four years between 2004 and 2008, the Supreme Court considered four cases involving Guantánamo, culminating in the great decision *Boumediene v. Bush*. The plaintiff, Lakhdar Boumediene, had filed a habeas petition in federal district court, alleging that he was not in fact an enemy combatant and was being detained at Guantánamo without being given any opportunity to prove his innocence in a court of law. But in reaction to earlier petitions from Guantánamo detainees, Congress had passed a statute providing that “no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained . . . as an enemy combatant.”

In a 5–4 decision, the Supreme Court held the statute unconstitutional. Writing for the majority, Justice Anthony Kennedy expressly relied on the role of the writ in enforcing the fundamental principle of Chapter 39 of the Magna Carta that no one may be

imprisoned except by the law of the land. While Congress, unlike the president, had the power to suspend the writ, Congress could do so only in “cases of rebellion or invasion,” neither of which were present in the contemporary American situation. And, the Court continued, the writ extended not just to American citizens, but also to aliens being held on US territory, which Guantánamo was for all practical purposes.

As a theoretical matter, it is hard to overestimate the importance of *Boumediene*, for it asserted the power of the Court to guarantee the right to the writ of habeas corpus, and hence the right to the protection of the laws, even in situations arising from the so-called War on Terror. One has only to contrast *Boumediene* with the failure of the Supreme Court to hold Lincoln’s suspension of the writ unconstitutional until the Civil War was over, its failure to address the questionable legal validity of the Vietnam War, and, most shamefully, its validation of the detention of Japanese-Americans during World War II, to see how groundbreaking was the Court’s decision in *Boumediene*. And the force of the Court’s reasoning lay, first and foremost, in its reliance on the principles set forth in Chapter 39 of the Magna Carta and its recognition of the essential role of habeas corpus in making those principles a reality. As Justice Kennedy wrote for the Court:

Magna Carta decreed that no man would be imprisoned contrary to the law of the land. . . . Important as the principle was, the Barons at Runnymede prescribed no specific legal process to enforce it. . . . [But] gradually the writ of habeas corpus became the means by which the promise of Magna Carta was fulfilled.

It was to fulfill that promise that the Court, in *Boumediene*, rejected Congress’s attempt to deny habeas relief to the prisoners in Guantánamo.

As a practical matter, however, the effect of *Boumediene* has been much more limited. Seven years later—despite the president’s pledge to shut down Guantánamo and free its detainees—nearly one hundred persons remain in detention there, most of whom have never had access to an Article III court and half of whom have never been charged with any crime in the decade or more that they have been there. And in every case in which any of these so-called “forever prisoners”—neither charged with a crime nor cleared for release—has filed a habeas petition, the government has opposed the petition, arguing that the resolution of such petitions should await the outcome

of the pledge to close Guantánamo. Such opposition from the government, combined with repeated congressional opposition to the detainees' release and rather obvious foot-dragging by the Department of Defense, has rendered the promise of *Boumediene* materially unfulfilled.

This brings me to my second example. The ability of Congress and the executive to effectively hamstring habeas relief is nowhere better illustrated than in the case of AEDPA. This statute was enacted, with strong bipartisan support, in 1996, and although the title of the act begins with the word "Antiterrorism," the rest of the title, "Effective Death Penalty Act," gives away the statute's primary immediate purpose: to reduce the ability of state prisoners facing the death penalty to obtain federal habeas relief. Specifically, even before the Innocence Project revealed that dozens of state prisoners sentenced to death were factually innocent of the crimes of which they were accused, the federal courts were sufficiently skeptical about the processes used by many states that they granted federal habeas relief in a substantial number of such cases. The unstated purpose of AEDPA was to narrow federal habeas relief so that more such people could be promptly executed.

More broadly, the purpose of AEDPA was to reduce access to the federal courts by those convicted of any kind of crime in state courts, by limiting the scope of habeas review. To put this in perspective, the mid-1990s were the heyday of the so-called "war on crime" that led to mandatory minimum sentences and other onerous statutes designed to reduce rising crime rates and that resulted in the devastating mass incarceration of which many Americans are now beginning to become aware. Also, as more and more persons were incarcerated, many for prolonged terms, more and more habeas petitions were filed, leading to calls from even the judiciary to find ways to stem this "flood."

Ironically, the statistics I have seen suggest that AEDPA has not led to a decrease in habeas petitions, but only to a decrease in the percentage of successful petitions. Even before the enactment of AEDPA, certain decisions of the Rehnquist Court had narrowed the reach of those Warren Court cases that had extended fundamental due process to the states, so that successful habeas petitions had declined prior to AEDPA's enactment to only 1 percent of those filed. But after AEDPA was passed, successful habeas petitions declined to a minuscule one third of 1 percent. Why this precipitous decline?

First and foremost, it is because of AEDPA's requirement that a habeas petition not be granted unless the state court decision that is being challenged is either contrary to, or an unreasonable application of, Supreme Court precedent. The Supreme Court has repeatedly interpreted this requirement so as to limit successful habeas petitions to those in which the alleged violations are so blatant as to be totally indefensible. The practical effect is to halt the prior federal practice of employing habeas review to bring new conditions of fairness to the steamroller systems of criminal justice found in too many states.

In addition to severely limiting the scope of habeas review, AEDPA greatly narrows habeas in other ways. For example, it requires total exhaustion of state review before the petition can be filed, and then requires that the petition be filed within one year of that exhaustion. As a result, 22 percent of all habeas filings are dismissed as untimely. AEDPA also places stringent restrictions on the petitioner's ability to file a second or subsequent habeas petition; it limits the circumstances under which a federal district court can convene an evidentiary hearing to assess any factual issues raised by the petition; and it places numerous other hypertechnical hurdles in the way of habeas review of the merits.

Often the only way to avoid these technical hurdles is to allege ineffective assistance of counsel. For example, if the failure to exhaust state remedies, or to raise a crucial issue while pursuing state remedies, was a function of counsel's failure to do so, then a habeas petition alleging ineffective assistance of counsel might prevail. The result is that an increasing number of instances of habeas review that get beyond procedural defects focus on whether defense counsel acted properly rather than on whether the state's own practices and procedures are fair. Although such cases are often categorized by government statisticians as "reaching the merits," in fact such cases do little to change substantive law.

This does not appear particularly to bother the Supreme Court, which has, on the whole, been supportive of AEDPA against the few attacks that have made it to the top court. Perhaps this is because AEDPA serves as a protector of states' rights, a cause close to the heart of the Court's conservative majority, which views the right of individual states to exercise plenary oversight of their criminal justice systems as fundamental to federalism. It is worth noting in this connection that *Boumediene* was solely concerned with federal power.

The result is that in most criminal cases today, the real "law of the land," so far as fundamental fairness is concerned, is the law of

each individual state, bereft of any effective federal oversight. More fundamentally, what this means is that Congress, with the Supreme Court's acquiescence, has arrogated to itself the power to greatly limit the scope of habeas relief. This, I respectfully suggest, is totally inconsistent with the fundamental principles enunciated in Chapter 39 of the Magna Carta.