

# KEEPING THE COURTS OPEN IN MARCH SUSTAINED HABEAS CORPUS

The upcoming deadline for government funding at the end of September has renewed the debate over whether Democrats should help keep the government open or not.

I'll come back to the debate itself – I think lefty pundits are misconstruing the key issues before Democrats in Congress, and therefore making the debate more contentious than it needs to be. I think they're also misunderstanding how best to fight fascism.

But I want to examine one part of the debate: whether Schumer was right to let the GOP keep the government open in March, in part, to keep the courts open.

In a rambling and often confused post, Ezra Klein described that keeping the courts open was one of Schumer's justifications for allowing Republicans to fund government back in March.

The argument Schumer made was threefold. First, Trump was being stopped in the courts. There were dozens of cases playing out against him, and he was losing again and again and again. Shut down the government, and you might shut down the courts.

But, Klein opined, that argument no longer holds because *Trump is not losing at the Supreme Court*.

Not a single argument Schumer made then is valid now. First, Trump is not losing in the Supreme Court, which has weighed in again and again on his behalf. Instead of reprimanding Trump for his executive order unilaterally erasing the

14th Amendment's guarantee of citizenship to all born here, it reprimanded the lower courts for imposing a national freeze on his order in the way they did. It has shown him extraordinary deference to the way he is exercising power.

[snip]

Schumer's argument in March was that the courts were stopping Trump; let them do their work. What we can say in September is that no, John Roberts is not going to stop Donald Trump.

I've *never* argued the Supreme Court was going to save us and don't think Schumer did either. It is certainly true that SCOTUS has used its shadow docket to override lower court orders upholding the plain letter of the law, perhaps most egregiously by endorsing suspicionless searches of Latinos today. Though there are still cases – most notably the tariff challenge – where SCOTUS may treat Trump more skeptically.

But even with SCOTUS' repeated interventions to overrule lower courts since March, it remains a significantly different question whether keeping the courts open has value.

That is best shown, in my opinion, by the JGG immigration case, a case filed just hours after Democrats let Republicans pass a continuing resolution funding government.

Stephen Miller had schemed for years to use the Alien Enemies Act as a way to carry out deportations with no due process; he saw it as a way to bypass habeas corpus, the very foundation of Anglo-American law enshrined in the Magna Carta. On March 15, Trump invoked AEA with the gang Tren de Aragua, based on claims his spooks told him before and would tell him again afterwards were false. Then DHS started packing hundreds of Venezuelan men onto planes based on little more than their tattoos, sending them to Nayib Bukele's concentration camp as part of a

quid pro quo designed to hide Bukele's own ties to gangs.

Kilmar Abrego Garcia, who continues to fight to vindicate his legal rights almost six months later, was also on one of those planes.

We would learn, months later, that at a meeting on March 14 – the same day Democrats let Republicans fund government – Emil Bove demanded that those flights “needed to take off, no matter what.” Bove even stated that if a court tried to enjoin the flights, DOJ would have to tell the court, “fuck you.”

ACLU filed that lawsuit and asked for a Temporary Restraining Order overnight after the CR passed the Senate. DC Chief Judge James Boasberg moved quickly, scheduling first a Sunday hearing then rescheduling it for Saturday at 5PM. At the hearing, Boasberg certified a class – including all Venezuelans covered by the AEA declaration – and halted the hearing to find out whether more detainees were being sent to CECOT. After DOJ dodged in response (and, according to Erez Reuveni, lied), Boasberg ordered that, “any plane containing these folks that is going to take off or is in the air needs to be returned to the United States, but those people need to be returned to the United States.”

Emil Bove ordered the men to be unloaded from the planes anyway.

This was not an instance of the courts working. Trump blew off the courts, and when Boasberg later tried to hold DOJ in contempt for ignoring his order, two Trump appointees stalled, then overturned that effort, though a motion for an en banc review remains pending.

Bove has since been rewarded for illegally sending men to a concentration camp with a lifetime appointment on the Third Circuit.

But the courts *did* have an effect, with SCOTUS reaffirming detainees' right to challenge their deportation, then intervening on an Easter

Saturday to stop another effort to ship men away under the AEA with no due process. Both Trump judges and (this week) the Fifth Circuit have since ruled against Trump's use of the AEA in this context.

SCOTUS may well intervene again on the Fifth Circuit order, but at the very least this entire set of cases has delayed the use of AEA by six months.

Meanwhile, Boasberg's order almost certainly created the political problem for Trump that led Trump, ultimately, to have the Venezuelans shipped back to Venezuela, after months of enduring Bukele's concentration camp. Other detainees who've been shipped off to third countries have largely disappeared from consciousness. Not those men, most of whom are free to tell their stories right now.

Just as importantly, having a court available on a weekend to enjoin those flights has created a bunch of political and legal problems for Trump, problems that could have ramifications down the road (and could also be the basis for accountability if we ever get beyond fascism). Donald Trump shipped a bunch of mostly innocent men to a concentration camp, where they were tortured, in defiance of a court order. That could be actionable in the future in a way that merely shipping people to a third country would not, *especially* because Trump did it in defiance of an order.

Even as SCOTUS continues to override lower courts, those lower courts *do* continue to rule in favor of plaintiffs. Just last week, in a showdown similar to the one in March (with DOJ lawyer Drew Ensign in a key role again), Judge Sparkle Sooknanan temporarily prevented the government from deporting a bunch of Guatemalan kids, and like the Venezuelan precedent, the aftermath has led to further visibility about what happened, which can be a tool for political pressure.

We don't know how many of the judicial

interventions that have slowed Trump down since March DOJ would have been able to thwart with Executive decisions about personnel covered by shutdowns. Even before the CR, Trump had done two things that tested his ability to shut down courts via secondary means – first, having GSA shut down an actual federal building housing courts, and politicizing the deployment of US Marshals. If the government shuts down this month, I would be unsurprised if he repeats both tactics as a means to shut down access to courts.

And while DOJ wouldn't have been able to shut down court rooms immediately, they can pick and choose which of their *own* employees are deemed non-essential. What DOJ can do – has already been able to do, in the wake of purges at DOJ – is to ask for delays in scheduling due to the fact they're short-handed. We know from Erez Reuvani that DOJ *was counting on* just such a delay with the JGG case, just 48 hours so they could get their innocent men into Bukele's concentration camp without legal review first.

That didn't happen in March. It may well happen in September during a shutdown.

We're not in the same place we were in March, for a variety of reasons (again, I plan a follow-up). The question before *both parties* in Congress is whether Congress will reaffirm the power of the purse at all in the wake of Trump's rescissions. That makes this decision far different than the one Congress faced in March.

But what the last six months have shown may well be the opposite of what Klein argues on the courts. Yes, SCOTUS has repeatedly intervened to help Trump. Even in the face of that, though, the courts remain one tool that people are using to fight fascism. There are people alive and free today who bear witness to that.

And that tool may get a lot more scarce if the government shuts down at the end of the month.