**Florida A & M University Law Review**

Volume 3 | Number 1 Article 5

Spring 2008

# Extraterritorial Reach of the Great Writ at Common Law: The Constitution Guarantees the Guantanamo Bay Detainees a Right to Habeas Corpus

Abigail S. Kurland

# THE EXTRATERRITORIAL REACH OF THE GREAT WRIT AT COMMON LAW: THE CONSTITUTION GUARANTEES THE GUANTANAMO BAY DETAINEES A RIGHT TO HABEAS CORPUS*

*Abigail S. Kurland***



---

* This comment was written prior to the Supreme Court's decision on this issue.

** Abigail S. Kurland graduated *magna cum laude* and was awarded the Order of the Coif from Georgetown University Law Center. Prior to entering law school, she worked as a legislative correspondent for a United States Senator. Ms. Kurland currently works at a law firm in Washington, D.C. and she will clerk for a federal district court judge for the 2008-2009 term and a federal circuit judge for the 2009-2010 term. Ms. Kurland would like to thank Professor Neal Katyal for his guidance and suggestions.

> Judges will construe the law as liberally as possible in favour of liberty, but they cannot make laws; they are only to expound them: particular cases must yield to the law, and not the law to particular cases. — *Opinion on the Writ of Habeas Corpus*, 97 Eng. Rep. 29, 48 (H.L. 1758).

In the wake of the Supreme Court's decision in *Hamdan v. Rumsfeld,* Congress answered the Court's challenge to provide the Bush Administration with the legal authority to try Guantanamo Bay detainees in the War on Terror in military commissions.[1] The Military Commissions Act of 2006 ("MCA") was signed into law by President Bush a few months after the *Hamdan* decision.[2] Controversial on many levels, the MCA purports to strip the federal judiciary's and the Supreme Court's jurisdiction over the habeas corpus petitions of the detainees.[3] Specifically, MCA section 7(a) provides that "[n]o 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 by the United States who has been determined by the United States to have been properly detained as an enemy combatant."[4] During the Senate's consideration of the bill, the Senate narrowly defeated an amendment offered by then-Chairman of the Senate Judiciary Committee, Arlen Specter, aimed at retaining the Court's habeas jurisdiction by striking MCA section 7 in its entirety.[5] Thus, assuming the MCA is construed as stripping the detainees of the right to habeas relief, the roughly 400 alien Guantanamo Bay detainees must contend with the procedures laid out by Congress in the MCA and those procedures alone.[6]

While a plain reading of the MCA suggests that Congress intended to strip the federal courts' statutory habeas jurisdiction over

---

1. Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2775 (2006). "Absent a more specific congressional authorization, the task of this Court is . . . to decide whether Hamdan's military commission is so justified."

2. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. § 948a); *See also* S. 3930, 109th Congress (as passed by the Senate, September 28, 2006 and as passed by the House of Representatives, Sept. 29, 2006).

3. Military Commissions Act of 2006 § 7(a) (codified at 28 U.S.C. §2241).

4. *Id.* at § 7(a). Section 3, delineating the finality of Commission proceedings, contains language parallel to section 7, stripping federal court jurisdiction over "any claim or cause of action whatsoever . . . relating to the prosecution, trial, or judgment of a military commission . . . including challenges to the procedures of military commissions under this chapter." Military Commissions Act of 2006 § 3 (codified at 10 U.S.C. § 950j).

5. S. Amdt. 5087 to S. 3930, 109th Congress (defeated Sept. 28, 2006). This amendment was defeated 51-48 primarily along party lines.

6. *See* GlobalSecurity.org, *Top U.S. Court Declines to Hear Guantanamo Prisoners' Appeal*, http://www.globalsecurity.org/security/library/news/2007/04/sec-070402-voa03.htm (last visited April 2, 2007).

the claims of the detainees,[7] the Act does not purport to alter a detainee's constitutional claim to habeas corpus. The Constitution provides that 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."[8] Although the MCA modifies section 2241 of Title 28 of the United States Code, the section of the code enumerating the federal judiciary's power with respect to the Writ,[9] it does not make the requisite findings of "rebellion" or "invasion" necessary for the suspension of the Writ. Therefore, despite stripping the federal courts of their statutory grant to issue habeas corpus writs,[10] the MCA leaves the constitutional right to habeas intact. Of course, this presupposes that an alien prisoner confined by the United States in a United States' military base in Cuba *does* have a constitutional right to habeas corpus.

In a 2-1 decision the D.C. Circuit ruled otherwise, holding that the alien detainees in Guantanamo Bay do not have a constitutional right to habeas corpus.[11] Shortly thereafter the Supreme Court denied one group of prisoners' expedited petition for certiorari.[12] The Court initially voted 6-3 to reject certiorari, observing in one statement for Justices Stevens and Kennedy that the petitioners must first exhaust the procedures provided for in the MCA.[13] The three dissenting jus-

---

7. *See* Boumediene v. Bush, 476 F.3d 981, 988 (D.C. Cir. 2007).

8. U.S. CONST. ART. I, § 9, cl. 2.

9. Although beyond the scope of this paper, there is a robust argument regarding whether absent the statutory grant to issue writs of habeas corpus the courts could rely simply on the Suspension Clause as a source of authority to issue the Great Writ. *Compare* INS v. St. Cyr, 533 U.S. 289, 337 (2001) (Scalia, J., dissenting) (arguing that the Constitution does "not guarantee any content to (or even existence of) the writ of habeas corpus"), *with* St. Cyr, 533 U.S. at 304 n.24 (contending that the Framers could not have intended for the Writ to be permanently suspended absent Congressional action). *See also Ex Parte Bollman*, 4 Cranch 75, 95 (1807) (noting that the first Congress "must have felt . . . the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted"). Various jurists and commentators have utilized Chief Justice Marshall's somewhat ambiguous language in *Ex Parte Bollman* to support the argument that the Constitution at a minimum guarantees the right to the Writ regardless of an authorizing statute, as well as the opposing view that the right can only be activated by Congressional action. For the purposes of this paper, I assume the Suspension Clause is self-executing.

10. *See* Boumediene, 476 F.3d at 988, 994. Both the majority and dissent concluded in *Boumediene* that the MCA did strip statutory habeas jurisdiction.

11. *Boumediene*, 476 F.3d at 992-93.

12. Hamdan v. Gates, 127 S.Ct. 1507, 2007 WL 632778 (U.S.), 75 USLW 3473 (March 5, (2007). Justices Souter and Breyer would have granted to the motion to expedite consideration.

13. Boumediene v. Bush, 127 S.Ct. 1478, 2007 WL 957363, (U.S. April 2, 2007).

tices would have granted the petition to determine whether the MCA's habeas-stripping provisions were constitutional and to "help establish the boundaries of the constitutional provision for the writ of habeas corpus."[14] Still, the majority left the door open to future certiorari petitions, noting simply that the detainees' failure to exhaust the available remedies made it inappropriate for the court to review the case "*at this time*."[15]

In an unusual reversal, on June 29th, 2007, the Court voted to reconsider its order denying certiorari and voted to hear the detainees' petition.[16] Oral arguments were held on December 5th, 2007.[17] From oral arguments, it is clear that in reaching its decision the Court will engage in an in-depth historical analysis to determine whether the Suspension Clause, as understood by the Framers as incorporating the English common law's conception of the Great Writ, constitutionally guarantees the detainees' right to habeas review.[18] If so, the Court should reach the issue as to whether the MCA validly suspended the Writ, or in the alternative, whether the MCA provides an adequate substitute forum in which to vindicate the detainees' rights, thereby abrogating the need for Congressional suspension. Therefore, a clear understanding of the scope of the Writ at English common law will play a paramount role in the Court's decision.

This article will analyze whether alien detainees held at the military base in Guantanamo Bay, Cuba, have a constitutional right to habeas corpus by examining the extraterritoriality of the Writ as it existed in England as understood by the Framers. Part I briefly reviews the Supreme Court's habeas corpus jurisprudence. Part II discusses the evolution of the Great Writ at common law. Part III compares the historical extraterritorial reach of the Great Writ to the detention at Guantanamo Bay, arguing that the common law understanding of the Writ would reach the detainees' claims because: (A) Guantanamo Bay is part of the United States' domain, (B) the prolonged imprisonment of the detainees by the United States has created an association analo-

14. *Id.* at 1479.

15. *Id.* at 1479 (emphasis added).

16. William Glaberson, *Supreme Court to Hear Guantanamo Detainees' Case,* N.Y. TIMES, June 29, 2007, *available at* http://www.nytimes.com/2007/06/29/washington/29cndgitmo.html?ex=1340769600&en=192c9901fcfba1e6&ei=5088&partner=rssnyt&emc=rss.

17. Robert Barnes, *Justices Appear Divided on Detainees' Rights*, N.Y. TIMES, Dec. 6, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/12/05/AR2007120500257.html.

18. *Id.* Justice Scalia pressed petitioners' lawyer Seth Waxman to cite a single case in 500 years of English law permitting the extension of habeas to foreigners detained beyond the Crown's territory.

gous to the subject-sovereign relationship necessary for the extraterritorial extension of the Great Writ at common law; and (C) denial of the Writ's application to Guantanamo Bay perpetuates the existence of a legal vacuum at the military base. Finally, this section argues that the minimal scope of review afforded by the MCA falls short of the process afforded to habeas petitioners at common law, concluding that because the MCA does nothing to close the legal black hole at Guantanamo Bay, it is not an adequate substitute for the constitutional rights guaranteed by habeas corpus.

## I. THE HISTORY OF HABEAS CORPUS IN THE UNITED STATES: FROM RATIFICATION TO TODAY

This section briefly outlines the history of habeas corpus, beginning with the inclusion of the Suspension Clause at the Constitutional Convention. It then discusses the Supreme Court's reliance on history when decoding the scope of the Great Writ.

### *A. Inclusion of the Suspension Clause*

In 1787, the Framers met in Philadelphia to address the failures of the Articles of Confederation; the result was the Constitution. There was little debate surrounding the adoption of the Suspension Clause at the Constitutional Convention. A nineteenth century Harvard Law professor opined that the Suspension Clause was included, in part, as a reaction to a 1777 Act by Parliament targeting the rebellious colonists by declaring them traitors and authorizing the seizing and imprisonment of those suspected of treason.[19] The 1777 Act further provided that the accused colonists should remain in custody for a number of months and that no judge could issue bail or hold a trial without the permission of the Privy Council.[20] This was an affront to the colonists because the Writ had operated in all thirteen colonies at a minimum since 1707 when it was extended officially by Queen Anne,[21] although it was utilized in the colonies well before the official extension.[22] It was against this backdrop that Charles Pinck-

19. *See* 17 GEO. III chap. 9; JOEL PARKER, HABEAS CORPUS AND MARTIAL LAW 21 (John Campbell, Philadelphia, 1862).

20. *Id.*

21. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 100 (Greenwood Press 1980) (hereinafter DUKER); WILLIAM S. CHURCH, A TREATISE OF THE WRIT OF HABEAS CORPUS 34 (2d ed., Bancroft-Whitney Co. 1893).

22. James Oldham & Michael J. Wishnie, *The Historical Scope of Habeas Corpus and INS. v. St. Cyr*, 16 GEO. IMMIGR. L.J. 485, 496 (2002).

ney of South Carolina first introduced a motion on May 29th, 1789, to include a provision in the Constitution guaranteeing the right to habeas corpus.[23] The original language, proposed a few months later, stated that the legislature could suspend the Writ only "upon the most urgent and pressing occasion and for a time period not exceeding XXX months."[24] Another delegate to the Convention, Mr. Rutlidge, advocated that the Writ was inviolable.[25] By September 1787, the Suspension Clause's language reached its current form and the Committee on Style and Arrangement moved it from Article III, that enumerates the power of the judiciary, to its current placement in Article I.[26]

### *B. The Role of Historical Analysis in Habeas Corpus Jurisprudence*

The Supreme Court has employed historical analysis as a tool of constitutional construction when deciphering the scope of the constitutional right to habeas corpus.[27] In *Swain v. Pressley*, three justices noted that "the sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was

---

23. DUKER, *supra* note 21, at 127.

24. *Id.* After it was referred to the Committee on Detail, Mr. Pinckney brought the matter again to the Convention floor and contended that the Writ could only be suspended for twelve months. ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT 12 (New York University Press 2001).

25. *Id.* at 12-13.

26. Tor Ekeland, *Suspending Habeas Corpus: Article I, Section 9, Clause 2, of the United States Constitution and the War on Terror,* 74 FORDHAM L. REV. 1475, 1486 (2005). William Duker noted that while some commentators viewed that the placement of the Suspension Clause in Article I signaled the Founders' intention that the clause operated as a restriction on Congress' power to suspend state habeas for federal prisoners, other historians deemed the placement "irrelevant" when considered in the context of Section 9. DUKER, *supra* note 21, at 131-32. The modern view is that the placement of the Suspension Clause in Article I reflects the Founders' "conscious determination" to limit Congress' authority. *Boumediene*, 476 F.3d at 998 (Rogers, J., dissenting). The Suspension Clause's placement in Article I suggests that, absent exigent circumstances, only an Act of Congress can effectuate the clause. This is consistent with English common law whereby only the Parliament could suspend the Great Writ. Hamdi v. Rumsfeld, 542 U.S. 507, 563 (2004) (Scalia, J., dissenting). Justice Scalia went on to note that "[i]f the Suspension Clause does not guarantee the citizen that he will either be tried or released, unless the conditions for suspending the writ exist and the grave action of suspending the writ has been taken; if it merely guarantees the citizen that he will not be detained unless Congress by ordinary legislation says he can be detained; it guarantees him very little indeed." *Hamdi,* 542 U.S. at 575.

27. Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2516-17 (1998).

drafted."[28] Twenty-five years later, in *INS v. St. Cyr*, the Court opined that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789,'" the date of the Judiciary Act.[29] Indeed, in *Rasul v. Bush*, the Court contended that the point of reference for examining the scope of the Writ was the historical reach of the Writ at common law.[30] The *St. Cyr* Court went on to note that the fundamental principle of the writ of habeas corpus was to challenge and review the legality of executive detention "and it is in this context that its protections have been strongest."[31] The Court also asserted that the Writ was available as of 1789, both in the colonies and in England, to review the detention on non-enemy aliens and citizens alike.[32]

While agreeing that history holds the key to unlocking the scope of the writ of habeas corpus, the judiciary has disagreed widely about what that history actually illustrates. In numerous cases, courts cite the same seventeenth and eighteenth century cases to reach vastly different conclusions. For example, in *Rasul*, the majority cited Lord Mansfield's opinion in the 1759 cases *Rex v. Cowle* and *Rex v. Schiever,* to support its holding that the application of the habeas statute to the Guantanamo Bay detainees was consistent with the Writ at common law.[33] Yet, in his dissent, Justice Scalia utilized the same cases to argue that the extraterritorial application of the habeas statute was *inconsistent* with the historic reach of the Great Writ.[34]

A glaring example of widely disparate interpretation of historic precedent is *Boumediene*, the recent D.C. Circuit case holding that the Guantanamo detainees do not have a Constitutional right to habeas corpus. Writing for the two judge majority, Judge Randolph also cited *Cowle* and *Schiever*, as well as *The Case of the Three Spanish Sailors*,[35] to bolster his holding that the Constitution does not extend extraterritorially to the detainees. Indeed, Judge Randolph echoed Justice Scalia's observations in *Rasul* when he contended that he could not

28. Swain v. Pressley, 430 U.S. 372, 384 (1977) (Burger, C. J., concurring in part and concurring in the judgment).

29. *St. Cyr.*, 533 U.S. at 301. In a footnote, the Court observed that the difficult inquiry into the scope of the Suspension Clause is what spurs courts to avoid this constitutional issue by holding that statutes do not bar habeas review in its entirety. *Id.* at 301 n.13. Therefore, it is logical to assume that some members of the Court will try to construe the MCA as not stripping statutory habeas jurisdiction so as to avoid reaching this momentous and contentious constitutional issue.

30. Rasul v. Bush, 542 U.S. 466, 481 (2004).

31. *Id.* at 474.

32. *Id.* at 473.

33. *Rasul*, 542 U.S. at 482-83.

34. *Id.* at 502 (Scalia, J., dissenting).

35. *Boumediene*, 476 F.3d at 989-99.

find a single case where a Writ was issued to an enemy alien detained on the authority of the Crown, but detained outside the territorial ambit of England and its domains.[36] In dissent, Judge Rogers argued that the majority had "fundamentally misconstrue[d] the nature of suspension" and had misread the historical record.[37] As the Supreme Court noted in *St. Cyr*, Judge Rogers acknowledged that "assessing the state of the law in 1789 is no trivial feat," opining that "the court's analysis today demonstrates how quickly a few missteps can obscure history."[38] Noting that the majority did not cite a single case in which an enemy being detained by the Crown was *not* considered within the Crown's domain, and therefore within the reach of the Writ, Rogers cited the same cases utilized by the majority to support her conclusion that the constitutional reach of the Writ extends to the detainees.[39]

While it is clear that historical analysis is the appropriate interpretative tool a court will employ when analyzing the scope of the constitutional right to habeas corpus, eminent jurists have scrutinized the same history and have reached different conclusions. The following section will examine the history relied upon by both sides to provide a base from which to compare the detainees' situation to the early cases, and thereby to the historic reach of the Great Writ.

## II. The Evolution of the Great Writ at Common Law

At common law, the writ of habeas corpus was a procedural device whereby the Writ functioned "as an assertion of popular liberties against the Crown."[40] While the Writ has evolved, its historic core function — to determine the legality of executive detention — has emerged unchanged.[41] Indeed, A.V. Dicey argued that "the authority to enforce obedience to the writ is . . . [the power to] prevent any punishment which the Crown or its servants may attempt to inflict in opposition to the rules of law as interpreted by the judges."[42] The essential function of the Great Writ was to bring the prisoner before the court and to permit the court an opportunity to "obtain knowledge of the reason why [the individual] is imprisoned" and to either set the

36. *Id.* at 5.

37. *Id.* at 9 (Rogers, J., dissenting).

38. *Id.* at 14 (Rogers, J., dissenting).

39. *Id.* at 14-17.

40. Edward Jenks, *The Prerogative Writs in English Law*, 32 Yale L.J. 523, 526 (1923).

41. R. J. Sharpe, The Law of Habeas Corpus 92 (Claredon Press, 2d ed., 1989).

42. A.V. Dicey, Introduction to the Study of the Law of the Constitution 135 (Liberty Classics, 1982) (1885). Thus, habeas corpus exemplifies the role of the judiciary in the separation of powers: it serves as a check on executive authority.

prisoner free "or else see that he is dealt with in whatever way the law requires."[43] This section will trace the evolution of the Great Writ, beginning with *Darnell's Case* and the formal introduction of the Great Writ by Sir Edward Coke, and culminate in a discussion of the cases relied upon by United States jurists whereby the seventeenth and eighteenth century English judges tested the extraterritorial breadth of habeas corpus.

### *A. The Emergence of the Great Writ in Seventeenth Century Common Law England*

The writ of habeas corpus existed well before the introduction and ratification of the formal statutes in the seventeenth century.[44] Indeed, the origins of the Great Writ can be traced at least as far back to the thirteenth century and the Magna Carta.[45] The twenty-ninth section of the Magna Carta presages the formal Writ, declaring that "[n]o freeman shall be seized, . . . nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land."[46] But some form of securing personal liberty against government detention occurred as early as the twelfth century under the reign on King Henry II.[47] Several cases are reported where the King's Bench issued the Writ throughout the fourteenth century up to the formalization of the Writ in the seventeenth century.[48]

The streamlining of the Writ was prompted by the famous 1627 *Darnell's Case* (also known as the *Five Knights* case). King Charles I detained five knights who refused to pay forced loans to the Crown to fund a war with Spain and France.[49] The prisoners were not indicted upon any charge, but were detained *"per speciale mandatum Domini Regis,"* or by "special command of the King."[50] The prisoners filed a petition for habeas corpus with the King's Bench, squarely presenting the issue of whether a citizen could be detained solely on the order of

43. *Id.* at 129.

44. *Id.* at 130.

45. CHURCH, *supra* note 21, at 3.

46. *Id.* One scholar notes that the evolution of the Great Writ in seventeenth century England can been viewed as a "revival" of the Magna Carta and the notion that "no man shall be taken except by the law of the land, translated as due process of law." DANIEL JOHN MEADOR, HABEAS CORPUS AND MAGNA CARTA 4 (The University Press of Virginia, 1966).

47. *See e.g.*, CHURCH, *supra* note 18, at 4; DUKER, *supra* note 18, at 15.

48. DUKER, *supra* note 21, at 25.

49. Louis A. Knafla, *The Writ of Habeas Corpus in Early Modern England: A View from Within*, *in* LAW POLICY AND INTERNATIONAL JUSTICE 368-69 (McGill-Queen's University Press, William Kaplan & Donald McRae eds., 1993).

50. MEADOR, *supra* note 46, at 13.

the King and putting the Bench in the awkward position of setting the prisoners free and thereby defying their King in a time of war.[51] Employing rather circular reasoning, the Bench ruled that it did not have authority to issue a Writ, holding that "[i]f a man be committed by the commandment of the king, he is not to be delivered by a Habeas Corpus in this court, for we know not the cause of commitment."[52] The King's Bench had ruled that arbitrary detention was a part of the common law and within the King's authority.

*Darnell's Case* prompted a public outcry and put the issue of executive detention on the national stage, culminating in the passage of several habeas corpus acts over the next century. Chief among the Bench's critics was Sir Edward Coke, the former Chief Justiceship of the King's Bench and Member of Parliament who marshaled through the early habeas corpus acts. First, in 1628, Parliament enacted the Petition of Right, arguing that (1) the King did not have the authority to detain a free person absent a lawful charge, (2) detainees were entitled to a hearing before judges, and (3) detention with no temporal limits was "against reason."[53] Section 3 of the 1628 Act stated,

> your subjects have of late been imprisoned without any caused showed . . . no cause was certified, but that they were detained by your majesty's special command . . . and yet were returned back to several prisons, without being charged with anything to which they might make answer according to the law.[54]

Because Charles I ignored this law, several refinements were made to the Great Writ in the Habeas Corpus Act of 1640.[55] The 1640 Act provided the Writ to any prisoner detained by an order of the now-abolished Star Chamber or by an order of the King or Privy Council, and importantly, it also provided for treble damages for any violation of the law.[56] Despite its provisions, the 1640 Act was still flawed and a stronger law guaranteeing some process in the face of executive detention was passed in 1679.[57]

---

51. *Id.* at 13-15. This case was recognized as a great constitutional issue at the time. Indeed, the King "packed" the court with favorable jurists by elevating Crown sympathizers to the Bench to ensure remand of the petitioners.

52. *Id.* at 18.

53. DAVID CLARK & GERARD MCCOY, THE MOST FUNDAMENTAL LEGAL RIGHT: HABEAS CORPUS IN THE COMMONWEALTH 37 (Claredon Press, 2000).

54. 3 CAR. I., c. 1. *See also* CLARK, *supra* note 53, at 36.

55. Ekeland, *supra* note 26, at 1481-82.

56. CHURCH, *supra* note 21, at 12-13.

57. *See* A.H. Carpenter, *Habeas Corpus in the Colonies*, 8 AM. HIST. REV. 18, 19 (1902) (noting that the 1679 Act did not create any new law, but merely made the Writ "more efficient").

### 1. The Habeas Corpus Act of 1679

The Habeas Corpus Act of 1679, officially entitled "An Act for the Better Securing the Liberty of the Subject, and for the Prevention of Imprisonment Beyond the Seas,"[58] serves as the foundation for the common law understanding of the Writ.[59] Like its predecessors, the Act aimed at "improving the legal mechanism by means of which the acknowledged right to personal freedom may be enforced."[60] The Act was extremely popular amongst the English and faced little opposition from King Charles II because at the same time the Act was being considered, the King was appealing to Parliament to resolve the thorny issue of his successor; he was choosing his battles carefully.[61] The preamble to the 1679 Act states:

> Whereas, great delays have been used by sheriffs, jailers and other officers, to whose custody any of the *king's subjects* have been committed for criminal or supposed criminal matters, in making the return of writs of habeas corpus . . . contrary to their duty and the known laws of the land, whereby many of the *king's subjects* have been and hereafter may be long detained in prison, in such cases where by law they are bailable, to their great charges and vexation.[62]

The Act guaranteed that the accused be indicted "within one term or session after commitment" and tried or released within two terms.[63] Furthermore, the Act also provided that the Writ must be returned within the range of three to twenty days of issuance, depending upon whether the prisoner was located within twenty to one-hundred miles of the issuing authority.[64] The Act included a remedies provision to ensure compliance with its measures and levied fines of up to 500 pounds for multiple infractions.[65] The Act applied to persons accused of the most serious crimes against the Crown, including treason.[66]

Unlike the Constitution's silence regarding the scope of the Writ's reach, the 1679 Act specifically defined the territorial ambit of the Great Writ. The Act declared that the Writ ran to "places within

---

58. *Id.* at 48.

59. Ekeland, *supra* note 26, at 1481-82.

60. DICEY, *supra* note 42, at 134.

61. CHURCH, *supra* note 21, at 23.

62. 31 CAR. II., A.D. 1679 (emphasis added).

63. 31 CAR. II., A.D. 1679; SHARPE, *supra* note 41, at 137.

64. 31 CAR. II., A.D. 1679. The military base at Guantanamo Bay is roughly 125 miles off of the coast of Miami, Florida. Baher Azmy, *Rasul v. Bush and the Intra-Territorial Constitution*, 62 N.Y.U. ANN. SURV. AM. L. 369, 372 (2006).

65. 31 CAR. II., A.D. 1679.

66. 31 CAR. II., A.D. 1679.

the kingdom of England, dominion of Wales, or the town of Berwick-upon-Tweed, and the islands of Jersey or Guernsey."[67] Nearly a century after the passage of the 1679 Act, the House of Lords proposed ten questions to the King's Bench regarding the Act in relation to legislation currently pending before Parliament, resulting in the 1758 *Opinion of the Writ of Habeas Corpus*.[68] In response to one query, Justice Wilmont declared that habeas corpus was a "writ of such a sovereign and transcendent authority, that no privilege of person or place can stand against it. It runs, at the common law, to all domains held of the Crown. It is accommodated to all persons and places."[69] To further ensure that all of the King's subjects could avail themselves of the Writ's protections, the 1679 Act made it *per se* illegal, under the pains of hefty penalties, to remove the prisoner to Scotland, Ireland, Tangier, "or places beyond the seas" to avoid the reach of the Writ.[70] This section of the Act was passed to quash the common practice of relocating the prisoners to countries and plantations far beyond the territorial realm of England.[71] This is consistent with the purposes of the Act, which were to cure the defects of prior incantations of the habeas right whereby officials would evade returning a properly issued Writ.[72] Indeed, there are some reported instances where fines were levied for failure to comply with the law.[73]

With the passage of the 1679 Act, the writ of habeas corpus had taken on many of the features still recognizable in its modern form. Because England did not have a formally scribed Constitution,[74] the 1679 Act, representing the culmination of the evolution of the Great Writ from the Magna Carta through its passage, is the analogue for the Founder's conception of habeas corpus at common law. Like its present day ancestor, the 1679 Act protected the King's subjects from illegal executive detention and provided a process for effectuating that right. The questions, however, remain: how far is the reach of the

67. 31 CAR. II., A.D. 1679.

68. *See* PARKER, *supra* note 19, at 14.

69. *Opinion on the Writ of Habeas Corpus*, 97 ENG. REP. 29, 36 (H.L. 1758).

70. 31 CAR. II., A.D. 1679. Curiously, the Act lists Jersey and Guernsey among the places to which prisoners cannot be moved despite the fact that the Act's earlier provisions expressly declare that the Writ reaches these lands.

71. *See* CLARK, *supra* note 53, at 145.

72. *See* DICEY, *supra* note 42, at 131.

73. *See* CLARK, *supra* note 53, at 145.

74. The United Kingdom, U.S. Department of State (February 2007), *at* http://www.state.gov/r/pa/ei/bgn/3846.htm. Britain does not have a formally written constitution. Rather, its laws are an amalgam of Parliamentary statutes, the common law and treaties.

Great Writ and who are the King's subjects that enjoy this fundamental privilege?

### 2. Calvin's Case

Prior to the formalization of the Great Writ in the three seventeenth century habeas acts, Sir Coke grappled with the reach of the Writ in 1608 in *Calvin's Case*.[75] *Calvin's Case* provided an analytical framework for discussing the scope of English common law's reach into foreign lands. The plaintiff Calvin was born in Scotland after the two Kingdoms were unified by the succession of James VI of Scotland to the British throne.[76] One of the issues before the Exchequer Chamber was whether Calvin could benefit from English law; this issue turned on whether he was considered an alien.[77] Because Calvin was born after the ascent of King James I, he was a subject of both Scotland and England and therefore could avail himself of English law.[78]

In reaching this holding, Sir Coke differentiated between land acquired by descent, as was the case with Scotland, and land acquired via conquest. The citizens of kingdoms acquired by descent were subjects of the monarch because the lands became a part of England's realm; therefore both parties were bound by the laws of the English realm and any changes to the laws could only be effectuated by the Parliament.[79] For lands acquired by conquest, on the other hand, the King had the absolute authority to "to give the conquered territory whatever law he chose" within certain limitations.[80] Coke further divided lands acquired by conquest into two categories: Christian lands and "infidel" lands. For Christian conquests, local laws remained in effect until the King decided otherwise.[81] Once the laws of England were extended to the conquered Christian land, as with a land acquired by descent, only an act of Parliament could alter the legal regime.[82] For conquered infidel lands, the local laws were immediately abolished and the King and his appointed judges could mete out justice as deemed fit until a new code was adopted.[83] Thus, in the 1694 case of

75. NASSER HUSSAIN, THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW 45 (The University of Michigan Press, 4th ed., 2006).

76. *See* DUKER, *supra* note 21, at 95.

77. *Id.*

78. HUSSAIN, *supra* note 75, at 45.

79. *Id.*

80. *Id.*

81. *Id.*

82. *See* DUKER, *supra* note 21, at 95.

83. *See id.*

*Blankard v. Galdy*, the court ruled that because Jamaica was a conquered land, "not pleaded to be parcel of the kingdom of England, but part of the possessions . . . of the Crown, the laws of England did not take place there, until declared so by the conqueror or his successor."[84] This case illustrates that in infidel conquered lands, an ad hoc system of justice would remain until the King, or one of his agents, applied law to the acquired land. The colonies were considered infidel kingdoms and it was not until the passage of the 1772 *Privy Council Memorandum* that it was made clear that in conquered territory, with either no law or governed by non-Christian law, that the laws on England would immediately become the law of the land.[85]

Thus, the nature of the relationship between the conquered land and England determines the scope of the Writ's reach. Still, the history is not uniform. For example, in 1971, the Queen's Bench ruled that the Writ did not extend to Northern Ireland.[86] Yet, the Writ had previously been issued to this same land in the seventeenth and eighteenth centuries.[87] And after the Isle of Man was purchased by the Crown in 1765, although it was not considered a colony or a part of the United Kingdom, because it was considered a dominion of the Crown, the Writ reached that land.[88] Similarly, the Writ reached the Channel Islands after the land was annexed to the English Crown even though these islands were not a part of the United Kingdom.[89] Finally, while the Great Writ did not extend to Scotland before the union of the thrones, the ascension of King James I did not alter Scotland's legal regime for the purposes of the writ of habeas corpus because Scottish law prevailed.[90]

It is against this background of the evolution of the writ of habeas corpus that this paper will examine some historical cases in an effort to decipher the Founders' understanding of the extraterritorial reach of the Great Writ.

---

84. *See* DUKER, *supra* note 21, at 96.

85. *Id.* at 97.

86. *See* SHARPE, *supra* note 41, at 192.

87. *See* CLARK, *supra* note 53, at 171. *See also* King v. Cowle, 97 Eng. Rep. 587, 600 (1759) (noting that the Writ reached Ireland).

88. *See* CLARK, *supra* note 53, at 26.

89. *See* SHARPE, *supra* note 41, at 192.

90. *Id.* at 191.

### *B. The Extraterritorial Reach of the Writ of Habeas Corpus at Common Law*

There are numerous cases that shed light on the territorial ambit of the Great Writ at common law. This portion of the paper will review two of these cases and explore the reach of habeas corpus in eighteenth century India.

In the 1759 case *Rex v. Cowle*, the issue before the King's Bench was whether the Writ reached Berwick, land formerly under Scottish control that had become part of the King's dominion with the unification of the thrones. Rejecting Coke's reasoning in *Calvin's Case*, Lord Mansfield ruled that the Writ reached Berwick.[91] Although the Writ did not traditionally run to Scotland because the land had retained its own local courts, Berwick itself was not subject to Scottish law and, therefore, had no court from which to issue the Writ locally.[92] Thus, Lord Mansfield was vexed by the notion that but for the reach of the Writ from the English courts, no law would apply in Berwick.[93] He expressed his concern that the people of Berwick had "no criminal law, but the law of England; and no criminal jurisdiction, but with such reference to the law of England," which included the King's Bench.[94] This led him to conclude that "such a creature of law must necessarily be collected, as part of a kingdom, and subordinate."[95] Therefore, reading the scope of the Writ broadly, Lord Mansfield noted that the Great Writ reached "where the place is under the subjection of the Crown of England."[96] Indeed, while Lord Mansfield noted that the Writ would not extend to "foreign dominions[ ] which belong to a prince who succeeds to the throne of England," he continued on to describe the broad reach of the Writ, noting that it extended to the plantations (colonies), Ireland, the Isle of Man, and the recently annexed territories of the Duchy of Normandy.[97] Finally, Lord Mansfield contended that despite

91. *Cowle*, 97 Eng. Rep. at 600-05.

92. James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 CORNELL L. REV. 497, 512-13 (2006). While Berwick did have a Court of Sessions, Lord Mansfield noted the corporation-justices at Berwick were not competent to adjudicate Cowle's case in part because the justices had predetermined the petitioner's guilt "without waiting for a trial on the indictment." *Cowle*, 97 Eng. Rep. at 604. This was because the charge of assault against Cowle arose from a riot that ensued "at an assembly of the corporation, in consequence of a violent division which engaged the whole body." *Cowle*, 97 Eng. Rep. at 603 (internal citations omitted).

93. *Cowle*, 97 Eng. Rep. at 601.

94. *Id.* at 599.

95. *Id.* at 598.

96. *Id.* at 599.

97. *Id.* at 599-600.

what authority a court may have to issue the Writ, if the court could not adjudicate the issue or enforce a proper remedy, the court should decline to issue the Writ.[98]

Lord Mansfield again tackled the extraterritorial reach of the Great Writ in the 1774 case *Mostyn v. Fabrigas.* Although this case involved a tort suit for false imprisonment, it is illustrative of the extraterritorial reach of habeas because the "remedy of habeas corpus for wrongful imprisonment was thought to be necessarily concomitant with the recognition of civil liability for the same trespass."[99] Plaintiff-Fabrigas, a native of Minorca, had won in a suit against the Military Governor Mostyn for false imprisonment and trespass.[100] Minorca had been ceded to England by the Spanish in 1713.[101] On appeal, Mostyn argued that English courts had no jurisdiction over a cause of action arising in Minorca.[102] Rejecting this argument, Lord Mansfield upheld a native-born subject's right to sue in English courts, even though the subject was born and located outside of the territorial ambit of England.[103] Echoing his reasoning in *Cowle*, Lord Mansfield reasoned that unless the Military Governor could demonstrate that a local court would have jurisdiction over the tort, the King's Bench would assert jurisdiction and apply English common law.[104] Because only an English court was competent to review the authority delegated to a military governor by the King, no local court could have asserted jurisdiction over the claim, thereby vesting jurisdiction in the English courts.[105] At the same time, Lord Mansfield emphasized that Fabrigas, though a native Minorcan, was clearly among the King's subjects.[106]

Although Britain did not assert formal sovereignty over India until the Act of 1813, English courts extended the writ of habeas corpus to India during the time when the Moghul Empire was officially recognized as retaining sovereignty, but while the East India Trading Company was actually controlling the laws.[107] Beginning with its first

98. *Id.* at 600.

99. HUSSAIN, *supra* note 75, at 74.

100. Pfander, *supra* note 92, at 510-11.

101. HUSSAIN, *supra* note 75, at 77.

102. *Id.*

103. *Id.* at 78.

104. Mostyn v. Fabrigas, 98 Eng. Rep. 1021, 1028 (K.B. 1774).

105. *Mostyn*, 98 Eng. Rep. at 1028-29.

106. HUSSAIN, *supra* note 75, at 78.

107. Kal Raustiala, *The Geography of Justice,* 73 FORDHAM L. REV. 2501, 2530 (2005). Britain delayed declaring formal sovereignty over India until the Act of 1813. During that time, the Mohgul Empire still retained "formal sovereignty" over India, but laws were also

Royal Charter in 1765, the East India Trading Company assumed sovereignty over its trading posts in India and promulgated laws applicable to its representatives in the Company's territories, including large portions of land beyond the actual trading posts.[108] A mixed system of Indian and British laws existed until the 1773 Regulating Act established English law throughout Calcutta.[109] The 1773 Act established a Governor-General in Bengal and empowered him to issue Company regulations, enforceable in Company courts, as well as laws for the "presidency town."[110] At the same time, the 1773 Act created a Supreme Court in Calcutta to adjudicate specific English laws that reached the British occupied territories as well as certain fundamental common law concepts.

Thus, while the 1773 Act did not specifically state that the Court was authorized to issue the Great Writ, the Calcutta Court's jurisdiction was construed to possess the authority to issue writs of habeas corpus over a narrow class of people.[111] The Calcutta Supreme Court's criminal jurisdiction reached both British and natives in Calcutta alike and British subjects throughout India.[112] Still, as the stronghold of the Mughal Empire over India collapsed in the later half of the eighteenth century, it was unclear whether British occupied territories were to be ruled by the law of the Company or by the law of the Crown.[113]

Regardless of the confusion, English courts issued writs of habeas corpus to India. Sir Elijah Impey was installed as the Calcutta's Court's first Chief Justice in 1774.[114] In 1775, Sir Impey issued a writ of habeas corpus and sent a letter to the Governor-General stating:

> though the natives are without Question under your General Protection, they are more immediately so under the laws. I have no doubt but the laws will be found to be in practice what they are

---

meted out by the Crown and the East India Trading Company. *Id.* See also Boumediene, 476 F.3d at 1003-04 (Rogers, J., dissenting).

108. *See generally* Elizabeth Kolsky, *Codification and the Rule of Colonial Difference: Criminal Procedure in British India,* LAW & HIST. REV. 631, 643-45 (2005); Amicus Curiae Brief of Legal Historians, Rasul v. Bush, 542 U.S. 466 (2004), 2004 WL 96756 (submitted Jan. 14, 2004).

109. *See* HUSSAIN, *supra* note 75, at 146.

110. *Id.* at 80.

111. *Id.* at 79; CLARK, *supra* note 53, at 21.

112. *See* HUSSAIN, *supra* note 75, at 80. This Calcutta court remained in operation until 1861 when the Indian High Courts Acts established a new system of courts. *Id.* at 81.

113. *See, e.g., id.* at 80-81; Amicus Brief for Legal Historians, *supra* note 108, at *15 nn.49-52.

114. *See* HUSSAIN, *supra* note 75, at 80.

> universally esteemed in theory, a better security to the people than the discretionary power of any council.[115]

That same year Sir Impey issued a writ of habeas corpus to the Company, demanding the production of Kemaluddin Khan, a revenue collector detained over a financial dispute.[116] Sir Impey rested his authority to issue the Writ on Blackstone's *Commentaries*, which noted that the judges of the King's Bench[117] could issue such Writs to "all parts of the King's dominions, for the King is entitled . . . to have an account of why the liberty of any of his subjects are restrained."[118] Yet, it is unclear whether Khan was in fact one of the King's subjects as he was merely an employee of sorts of the Company – he collected the Company's revenues. Still, when the Company failed to return the Writ, a second Writ was issued and the Company was held in contempt.[119] Another Writ was issued in 1777 by the Calcutta Court to test the legality of the detention of a native imprisoned by a local court in Bengal.[120] Still, the scope of the Calcutta Court's jurisdiction was narrow, reaching only Calcutta residents, "Company servants," and British born subjects residing in occupied territories; it had no authority over the local criminal courts or the Company's civil and criminal courts for natives.[121] The Court's practice of issuing writs of habeas corpus to challenge the detention of Company employees was limited by a 1781 Act, prompted by complaints to Parliament by the Company's Governor-Generals, which restricted the Court's jurisdiction over revenue collectors.[122]

This brief survey of the extraterritorial application of the Great Writ by the English courts demonstrates that while the Writ did have great reach, the length of the court's arm was not infinite; it depended upon what was considered the "King's dominion" and whom was considered to be a subject of the King. The following section will analogize these cases to the detainees' confinement in Guantanamo Bay, concluding that the Supreme Court should hold that the Great Writ extends to the military base.

---

115. *Id.* at 81.

116. *Id.*

117. *Id.* The judges on the Calcutta Court were selected from the King's Bench. Therefore, Sir Impey had the requisite authority to issue the Writ.

118. *Id.*

119. Amicus Brief of Legal Historians, *supra* note 108, at 12-14.

120. *Id.* at 14 n.44.

121. HUSSAIN, *supra* note 75, at 82.

122. *Id.* at 83.

## III. THE EXTRATERRITORIALITY APPLICATION OF THE GREAT WRIT REACHES GUANTANAMO BAY

History suggests that the common law writ of habeas corpus would extend to the detainees in Guantanamo Bay. This section will explore how the history supports the contention that the extraterritorial ambit of the Great Writ reaches the military base by arguing first that the Guantanamo Bay is for all intents and purposes part of the United States. Next, this section notes that, like the non-English subjects who could avail themselves of the Great Writ's protections, the detainees at Guantanamo Bay have a similarly close relationship with the United States such that they too fall within the Writ's reach. Finally, this section contends that if the Writ does not reach the military base, Guantanamo Bay remains a legal black hole, the very evil Lord Mansfield condemned in his seventeenth century habeas opinions.

### *A. Guantanamo Bay Is Part of the United States' Domain*

The United States has formally occupied the military base at Guantanamo Bay Cuba since executing a lease in 1903.[123] Cuba and the United States entered into a treaty in 1934 providing that the U.S. could maintain its base until it was voluntarily abandoned.[124] Pursuant to the 1903 Lease, while Cuba retains ultimate sovereignty over the land, "the United States shall exercise complete jurisdiction and control over and within said areas."[125] The detainees currently held at the military base and petitioning the Court for habeas corpus are not United States citizens.[126] Thus, the statutory habeas-stripping provisions of the MCA raised the issue of whether the constitutional right to habeas corpus reaches to those aliens detained by the United States in Guantanamo Bay. As noted above, two judges on the D.C. Circuit recently held that it does not.[127]

Some jurists and scholars emphatically argue that the historical record does not support the extension of the Great Writ to the detainees' claims.[128] In *Johnson v. Eisentrager*, the Court noted that it

123. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T.S. No. 418 (hereinafter "1903 Lease").

124. Treaty Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, Art. III, 48 Stat. 1683, T.S. No. 866.

125. 1903 Lease, *supra* note 123.

126. *See e.g.* Boumediene, 476 F.3d at 984.

127. *Id.*

128. *See e.g.*, J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 521-22 (2007); *Boumediene*, 476 F.3d at 990-91.

was unaware of any "instance where a court, in this or any other country . . . has issued [the Writ] on behalf of an alien enemy, who, at no relevant time and in stage of his captivity, has been within its territorial jurisdiction. Nothing in the Constitution extends such a right."[129] In doing so, the Court ruled that it had no jurisdiction to review the habeas petitions of German nationals tried by a United States military commission in China and confined to serve their sentence in a German prison.[130] In *Rasul*, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, reaffirmed *Eisentrager* and engaged in an in-depth historical analysis to conclude that the Writ would not have extended at common law to the detainees.[131]

*Eisentrager's* holding has been called into question by *Rasul*. In his decisive *Rasul* concurrence, Justice Kennedy distinguished *Eisentrager*, noting that Guantanamo Bay "is in every practical respect a United States territory" because the United States enjoys unfettered use of the land at the United States pleasure.[132] Justice Kennedy also reasoned that unlike the German prisoners in *Eisentrager*, who had already had their status adjudicated by a military commission, the detainees at Guantanamo were subject to indefinite pre-trial detention as there was no process in place to determine their status as enemy combatants or to adjudicate their guilt or innocence; indeed, most detainees were not charged with any specific crime.[133] Despite this permissive language, since the passage of the MCA, opponents of habeas application to the detainees have pointed to the "ultimate sovereignty" language of the 1903 Lease and *Eisentrager's* dicta that the Constitution does not extend habeas to aliens detained on foreign soil to support the notion that the federal courts do not have jurisdiction to review detainees' petitions. Since *Rasul,* Justice O'Connor, who voted with the majority, has retired and Chief Justice Roberts and Justice Alito have been appointed to the bench. Therefore, Justice Kennedy's opinion on the constitutional basis for the territorial ambit of the Great Writ may turn out to be more crucial than ever before.

While it is true that history supports the notion that the Writ would only extend extraterritorially to the King's domains and would

129. Johnson v. Eisentrager, 339 U.S. 763, 768 (1950).

130. *Id.* at 790.

131. *Rasul*, 542 U.S. at 502-06 (Scalia, J., dissenting).

132. *Id.* at 487 (Kennedy, J., concurring in the judgment).

133. *Id.* Only a handful of the detainees were charged with a crime before the passage of the MCA. *See* Azmy, *supra* note 64, at 374.

not reach foreign lands,[134] because of the 1903 Lease's unique history, Guantanamo Bay is best characterized as part of the United States' domain. The majority in *Rasul* seems ready and willing to accept this very notion.[135] The land at Guantanamo Bay was first occupied by the United States after its victory in the Spanish-American War in 1898.[136] As a condition of the United States' withdrawal of its military forces and its simultaneous recognition of Cuba's independence, the Cuban government executed the 1903 Lease.[137] Thus, the 1903 Lease was not a bargain entered into by two equal parties. Rather, the quid pro quo occurred between a conquered territory emerging as a new nation and the occupying authority. Indeed, Guantanamo Bay is best characterized as a spoil of the Spanish-American War.[138] Thus, the United States has maintained uninterrupted and exclusive control over Guantanamo Bay since the late nineteenth century. Beyond the clause in the 1903 Lease granting a right of reversion in the event that both parties to the contract agree to terminate the lease, the independent nation of Cuba has never had any meaningful legal authority over the land. From this perspective, Guantanamo Bay is as much a part of the United States "domain" as Minorca, captured by England during the War of Spanish Succession and ceded to victorious Britain as part of the Treaty of Utrecht, was considered to be part of England.[139] Just as the Writ reached from England to this conquered and ceded land, the Writ should reach Guantanamo Bay.

Furthermore, a wide variety of "foreign lands" were considered to be within the Crown's domain. Indeed, the Writ reached to foreign lands acquired by conquest and annexation. The Writ reached the conquered colonies in North America, the purchased Isle of Man, and the annexed Channel Islands. Before the Irish Parliament passed its own habeas act in 1782, the Writ was issued by the English courts to this

134. *See Opinion on the Writ of Habeas Corpus, supra* note 66, at 599-600; *Cowle*, 97 Eng. Rep. at 601.

135. *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring in the judgment). Concurring in the judgment, Justice Kennedy argued that the United States had exercised "unchallenged and indefinite control" over the military base, leading him to conclude that Guantanamo Bay "belongs to the United States."

136. Raustiala, *supra* note 107, at 2536.

137. *See e.g.*, Azmy, *supra* note 64, at 383. Professor Azmy notes that this type of lease agreement was "a common feature of colonial era arrangements, where colonial powers indulged in a fiction of the occupied territory's independence, pursuant to which such territory might actually engage in a meaningful surrender of its rights."

138. *See* Raustiala, *supra* note 107, at 2536 (noting that the 1903 Lease is a "direct legacy of a colonial relationship").

139. HUSSAIN, *supra* note 75, at 77.

foreign land.[140] The Writ was also issued in narrow circumstances in India during a period where control over the law and the natives was shared by the declining Mogul Empire, the East India Trading Company and the Crown. Admittedly, Justice Scalia would contend that in all of these cases the territory to which the Writ extended was within the King's domain, and therefore, was not considered a foreign land.[141] Yet, if the writ of habeas corpus extended to the purchased Isle of Man, why not extend the same right to the leased land at Guantanamo Bay?

Guantanamo Bay is analogous to these lands considered part of the King's domain in that whatever law existed prior to the King's acquiring of the territory was abrogated by the Crown's authority. Like the above noted cases, Cuban law is inoperative within the territorial ambit of the base.[142] Indeed, like English law in the colonies, the Isle of Man, and the Channel Islands, United States law has completely abrogated the pre-1903 Lease law as it existed.[143] With the exception of the detainees, United States law, including criminal and labor law, applies to both the actions of United States citizens and aliens that occur within the confines of the base.[144] Furthermore, Sharpe notes that consistent with the 1679 Habeas Act, "the mere fact that the place where the prisoner is held is outside the ambit of the Writ will not necessarily deprive the court of the power to act."[145] Rather, what is more determinative than locus of imprisonment is whether "there is someone within the jurisdiction who can be made respondent to the writ . . . . and whether he . . . has the power to bring the detention to an end."[146] This conception of Guantanamo Bay is consistent with the 1772 *Privy Council Memoramdum*, which noted that in conquered territory, where no law applied, the laws of England would immediately become effective. The same logic applies to the military base because the 1903 Lease immediately abrogated Cuban law and declared that the United States would exercise absolute control over the jurisdiction.

---

140. CLARK, *supra* note 53, at 170.

141. *Cf.*, The Writ did not reach Scotland because it was considered a foreign land outside the King's dominion. SHARPE, *supra* note 41, at 191.

142. Azmy, *supra* note 64, at 385-87.

143. *Id.*

144. *Id.* at 385.

145. SHARPE, *supra* note 41, at 199.

146. *Id.*

### *B. The Relationship Between the Detainees and the United States Is Analogous to the Historical Subject-Sovereign Association that Justified the Extension of the Writ to Non-English Subjects*

The historical case law suggests that the Writ reached only subjects of the King. Justice Scalia and D.C. Circuit Judge Randolf thereby argue that the detainees do not enjoy a constitutional right to habeas corpus because they are aliens. While it is true that the historical cases involve the King's subjects, the prolonged confinement of the detainees by the United States has created a similar relationship, supporting the notion that the Writ would reach the detainees at common law despite their alien status.

The subject-sovereign relationship justifying the extraterritorial reach of the Writ at common law to natives of "foreign lands" was not entered into by consent. Rather, the subject-sovereign association was foisted upon non-English subjects by the Crown. For example, in *Cowle*, the petitioner became the King's subject because of the ascension of King James I to the English throne. In *Mostyn*, the plaintiff was a subject of the Crown because Minorca was captured by the British Navy in 1708 during the War of the Spanish Succession.[147] In the Khan case, Sir Impey classified the petitioner as a subject of the majesty because he was a "Company servant."[148] In all of these cases, where the Writ was applied to natives who were deemed subjects of the Crown, none of the natives chose to enter into the subject-sovereign relationship with the King. Rather, they were subjects of the Crown *because* they were under the control of the King's representatives and of the Crown's laws. Indeed, they had no choice but to be subjects of the Crown. The natives of Scotland, Minorca and India enjoyed the privilege of the Writ, despite the fact that at no time were they considered English – they were merely under the Crown's control. In the same vein, the detainees are subjects of the United States.

While the detainees remain citizens of other countries, a subject-sovereign relationship has been foisted upon the Guantanamo Bay prisoners because they are at the exclusive mercy of the United States government's prerogative. The detainees are being held in a United States military prison separated from their native lands by an ocean. They have been detained incommunicado for over five years, having little to no contact with their families or with their own governments.[149] Furthermore, the detainees are subject to United States law

147. HUSSAIN, *supra* note 75, at 77.

148. HUSSAIN, *supra* note 75, at 82.

149. *See e.g,* Azmy, *supra* note 64, at 431 n.100.

in the form of the Military Commissions Act: their enemy combatant status is determined by the United States government and they are subject to tribunals presided over by the United States military. In the military tribunals, the government builds a case against the detainees and holds the prisoner accountable for violations of United States law.[150] As Justice Brennan noted in his dissent in *Verdugo-Urquidez*, the United States' actions with respect to the imprisoned aliens have made them among the "governed."[151] Indeed, it is the United States treatment of the detainees as members "of our community for the purposes of enforcing our laws," and the fact that the detainees "may well spend the rest of [their lives] in a United States prison," that created the relationship necessary to support extension of the Writ to the detainees' claims.[152] Therefore, while the detainees remain aliens, their legal status *vis-à-vis* the United States is identical to the status of the Scottish, Minorcan and Indian natives *vis-à-vis* the Crown. Thus, a sufficient nexus exists between the detainees and the United States to invoke the Writ.

### C. *Guantanamo Bay Is a Legal Black Hole without Habeas Corpus*

Without the application of the constitutional right to habeas corpus, Guantanamo Bay exists in a legal vacuum. Of the 400 prisoners currently detained at Guantanamo Bay, only a mere ten were charged with crimes before the passage of the MCA.[153] The remaining prisoners had been classified under the unilateral authority of the Bush Administration as "unlawful enemy combatants," thereby condemning the prisoners to indefinite detention.[154] The detainees' status as enemy combatants was confirmed by a Combatant Status Review Tribunal ("CSRT"), an ad hoc tribunal established in the wake of the *Rasul* decision.[155] While designation as an enemy combatant results in indefinite detention until such time as the "War on Terror" is won or until the Administration determines that the detainee is no longer a threat,[156] these individuals have not been indicted for any crime.[157] Still, a detainee who is classified as an enemy combatant may be sub-

150. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2624-31 (2007) (codified at 10 U.S.C. § 950p) (listing the substantive offenses).

151. United States v. Verdugo-Urquidez, 494 U.S. 259, 284 (1990) (Brennan, J., dissenting).

152. *Id.*

153. Azmy, *supra* note 64, at 374.

154. *Id.*

155. *Id.* at 399-400.

156. *See* Azmy, *supra* note 64, at 430-31.

ject to trial by military commission.[158] Yet the Administration has intimated that they plan to refer only sixty to seventy prisoners to the commissions for trial.[159] Prosecution pursuant to the authority granted to the Executive Branch in the MCA has been initiated against only three detainees.[160] Furthermore, the MCA does not require that a CSRT determine a detainee's status.[161] Indeed, the President can unilaterally designate a detainee an enemy combatant.[162] Section 7(a) of the MCA strips the federal courts' habeas jurisdiction to hear detainees' claims challenging their status as enemy combatants, and section 3 removes federal court jurisdiction over any claim challenging "the prosecution, trial, or judgment of a military commission."[163] The MCA also strips jurisdiction over detainees whose status has not yet been determined by a CSRT.[164] Therefore, the MCA permits pre-charge, indefinite executive detention while simultaneously forestalling any judicial review of the basis for detention. In turn, hundreds of detainees have been held by the United States for more than five years without being charged with a crime and without having a meaningful opportunity to challenge their status as enemy combatants. The majority of Guantanamo Bay detainees will languish, branded as enemy combatants but never charged with a crime nor brought to trial. If the constitutional right to habeas corpus does not extend to Guantanamo Bay, prisoners claiming innocence have no judicial forum in which they can dispute their classification and confinement. Indeed, the MCA

157. Jonathan Hafetz, *Vindicating the Rule of Law*, 31-WTR FLETCHER F. WORLD AFF. 25, 35 (2007).

158. Military Commissions Act of 2006 § 3(a) (codified at 10 U.S.C. § 948c).

159. Jim Garamone, *Office of Military Commissions Refers Charge Against "Australian Taliban,"* March 1, 2007, http://www.globalsecurity.org/security/library/news/2007/03/sec-070301-afps01.htm.

160. Only five detainees, David Hicks, Omar Ahmed Khadr, Salim Hamdan, Almend Mohammed Ahmed Haza al Darbi, and Mohammed Kamin have been charged with crimes pursuant to the MCA. Commission Cases, Department of Defense, at http://www.defenselink.mil/news/commissions.html. In March 2007, Hicks plead guilty and was sentenced to nine months in prison, to be served in his native Australia. Detainee Convicted of Terrorism Charge at Guantanamo Trial, Department of Defense (March 30, 2007) at http://www.defenselink.mil/releases/release.aspx?releaseid=10678. Khadr and Hamdan are still awaiting trial.

161. Michael C, Dorf, *The Orwellian Military Commissions Act of 2006*, 5 J. INT'L. CRIM. JUST. 10, 15-16 (2007).

162. *Id.*

163. Military Commissions Act of 2006 §§ 7(a), 3 (codified at 10 U.S.C. §§ 2241, 950j).

164. Military Commissions Act of 2006 § 7(a)(1) (codified at 10 U.S.C. § 2241).

forestalls "even a threshold determination by the courts as to the *bona fides* of their detention."[165]

The MCA's court-stripping provisions perpetuate the legal black hole that has been characteristic of Guantanamo Bay from the beginning of the detentions. This is the very sort of executive action that the seventeenth century habeas acts aimed to cure. Yet, without the constitutional application of habeas to the detainees' claims, there is no court competent to issue the Great Writ. Thus, denying the detainees the right to petition for habeas corpus runs afoul of one of the justifications for extraterritorial application of the Great Writ: the concern over a geographically defined law-free zone in which the King could detain individuals outside of the confines of the rule of law. In both *Cowle* and *Mostyn*, Lord Mansfield expressed his concern that if the English common law Writ did not reach Berwick and Minorca, there would be no court that had jurisdiction to hear the petitioners' grievances.[166] This concern echoed the principles embodied in the Magna Carta and in the seventeenth century habeas acts. Both were concerned with a person's fundamental right to freedom. The habeas acts were enacted in order to cure the evil of the executive's deprivation of an individual's liberty without legal cause.[167] Justice Kennedy mirrored this reasoning in *Rasul* when he noted disturbingly that the detainees were subject to pre-trial detention in perpetuity. Similarly, because Cuba exercises no legal authority over the detainees' claims and because the MCA strips the federal judiciary's jurisdiction, Guantanamo Bay is a law free zone where individuals designated as enemy combatants can be detained in perpetuity.

The fact that the MCA affords detainees some legal process does not weaken the conclusion that, absent the constitutional application of habeas to the prisoners, Guantanamo Bay is a legal black hole, be-

165. Amicus Curiae Brief of Bruce A. Ackerman, et al., *Hamdan v. Gates*, 127 S. Ct. 1507, 2007 WL 1050158, *15 (submitted March 29, 2007).

166. *Cowle*, 97 Eng. Rep. at 601; *Mostyn*, 98 Eng. Rep. at 1028.

167. The Bush Administration chose to imprison the detainees at Guantanamo Bay because the Administration believed the military base would be beyond the jurisdictional reach of United States courts. *See* David G. Savage, *Habeas Corpus Rights of Guantanamo Detainees are Still Up in the Air*, 16 A.B.A. J. E-REPORT 3 (April 20, 2007). This runs contrary to one of the main reforms contained in the 1679 Habeas Act, that made it illegal for officials to relocate prisoners to lands where the Act would not reach to avoid return of a duly issued Writ. Indeed, Parliament considered this practice as so contrary to the fundamental rule of law that it provided for severe economic damages, as well as contempt of court, for officials who violated this provision. The Guantanamo Bay detainees could similarly argue that relocating them from the various countries in which they were captured into a land the Bush Administration believed was beyond the jurisdiction of United States courts violates at the very least the spirit of habeas corpus as enshrined in the 1679 Act.

cause the MCA's provisions are not co-extensive with the rights guaranteed by the common law Writ. At its core, habeas corpus entailed an independent judicial review and challenge to the practice of without-cause detention by the Crown.[168] The seventeenth century habeas acts were "calculated to set bounds to the arbitrary proceedings . . . and preserve to those who fell under [the Crown's] displeasure from being sent into banishment or otherwise imprisoned, without cause, measure, or relief."[169] Thus, the 1679 Act permitted a prisoner to review a copy of the warrant detailing the cause for his commitment.[170] Astonishingly, the warrant must have been produced within *six hours* of the request "under a penalty of 100 pounds to the prisoner."[171] This is a far cry from the multi-year pre-indictment detention to which the Guantanamo Bay prisoners are subjected.

Furthermore, one of the greatest reforms of the 1679 Act was to provide for a speedy trial.[172] The Act demanded that a detained individual either be indicted for a crime within "one term or session after commitment . . . and to be either tried within two terms or sessions or discharged."[173] In the *Opinion of the Writ of Habeas* Corpus, it was noted that petitions should receive a "speedy and immediate execution."[174] Thus, the "design of the Act was to prevent a man's lying under an accusation . . . above two terms."[175] As Professor Sharpe noted, the 1679 Act served two purposes: the first was to "test the validity of the warrant and charges from the moment of incarceration," and the second was to ensure that "if these preliminary grounds for detention were found to be sufficient, the accused was then able to demand to be either brought quickly to trial . . . or released."[176] The MCA falls far short of both these purposes. Nearly all of the detainees have not been indicted; rather, they have merely been designated by the CSRTs as enemy combatants. Moreover, the MCA denies detainees the right to a speedy trial.[177] Indeed, after five years of imprisonment, a time period far exceeding the duration of permissible detention under

168. *See e.g.,* Church, *supra* note 21, at 137-38.

169. *Id.* at 16.

170. 31 CAR. II., A.D. 1679; *See* Church, *supra* note 21, at 26.

171. Church, *supra* note 21, at 26.

172. 31 CAR. II., A.D. 1679. Military Commissions Act of 2006 § 3(a)(1) (codified at 10 U.S.C. § 950g).

173. SHARPE, *supra* note 41, at 137.

174. *Opinion on the Writ of Habeas Corpus*, 97 Eng. Rep. 29, 32 (H.L. 1758).

175. Id. at 137 (quoting *Crosby's Case*, 12 Mod. 66 (1694).

176. *Id.* at 138.

177. Military Commissions Act of 2006 (codified at 10 U.S.C. § 948(b)(d)(A).

the 1679 Act, only three detainees have been indicted on criminal charges.

The legal process provided for by the MCA and the CSRTs, discussed *infra*, do not resemble the procedural protections typical of habeas corpus at common law. Therefore, in addition to perpetuating the legal black hole at Guantanamo Bay, the minimal process afforded to the detainees is not an inadequate substitute for habeas.[178] Sir Matthew Hale, Chief Justice of the King's Bench from 1671-1676, noted that the purpose of the Writ was to determine "whether the imprifonment be good or erroneous."[179] At common law, a court reviewing a habeas petition would look beyond the Crown's charge and engage in a searching factual inquiry to ascertain whether detention was justified.[180] Habeas "provided a remedy where pre-trial proceedings had been defective."[181] This inquiry occurred both when the imprisoned was charged with a crime and when "an accused person was committed for trial without preliminary proceedings of a judicial character."[182] At this early stage, a prisoner could challenge "that the evidence was too weak to warrant pre-trial detention or that the charges were deficient in law."[183] The jailor, in turn, had an opportunity to justify the legal and evidentiary basis for committal.[184] Thus, a seventeenth century habeas court would examine the "caufe of the fufpicion" relied upon to justify pre-trial confinement.[185] Indeed, in the *Opinion of the Writ of Habeas Corpus*, Justice Wilmot contended that the court need not rely exclusively on the assertions of the Crown in support of imprisonment.[186] Rather, a judge reviewing a habeas petition is not

> so bound by the facts in the return to the writ . . . that they cannot discharge the person brought before them, if it shall most manifestly appear to the Judges . . . that such return is false in fact, and that the person so brought up is restrained of his liberty by the

178. *Swain*, 430 U.S. at 381 (holding that a "remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus").

179. SIR MATTHEW HALE, 1 HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 583 (The Lawbook Exchange, Ltd *reprinted* 2003) (1736).

180. *See* SHARPE, *supra* note 41, at 129.

181. *Id.* at 128.

182. *Id.* at 129.

183. *Id.*

184. *See* SHARPE, *supra* note 41, at 64.

185. SIR MATTHEW HALE, 2 HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 110 (The Lawbook Exchange, Ltd *reprinted* 2003) (1736).

186. *Opinion on the Writ of Habeas Corpus*, 97 ENG. REP. 29, 36 (H.L. 1758).

> most unwarrantable means, and in direct violation of law and justice.[187]

For even serious allegations of wrongdoing, the habeas court would review the depositions "to see whether there [was] sufficient evidence to detain [the accused] in custody."[188] If the charges were deficient, or if there was inadequate evidence to support the allegations, the court would order the prisoner released.[189]

The CSRTs fall short of the legal process guaranteed by the seventeenth century habeas acts. While the Administration would contend that a CSRT's determination that a detainee is an unlawful enemy combatant provides a sufficient substitute for habeas review, this argument is not persuasive because the Tribunals afford the detainees little process. First, when a CSRT designates a detainee as an enemy combatant, the proceedings do not result in the detainee being indicted for a crime. As noted above, the seventeenth century habeas acts were enacted to eliminate prolonged pre-indictment and pre-trail detention. Second, the CSRT proceedings are not akin to the independent judicial determination of the legal basis for detainment, characteristic of common law habeas review, where the government and the accused engage in an adversarial process. Rather, more often than not, the CSRTs are merely a means to justify continuing the imprisonment of the detainees.

A recent review of 102 CSRT proceedings is illustrative. For example, in eighty-nine percent of the hearings no evidence was presented on behalf of the detainee.[190] Furthermore, in all of the Tribunals, the government did not call any witness on its own behalf, relying instead on "the presumption that the classified evidence was sufficient to establish that the detainee was an enemy combatant."[191] In the rare instances in which declassified evidence was presented to the CSRT, the evidence did not contain "any specific information about the Government's basis for the detainee's detention as an enemy combatant."[192] Indeed, in the three instances where a CSRT determined that a detainee was not an enemy combatant, the detainee was not

---

187. *Id.*

188. SHARPE, *supra* note 41, at 128 (quoting Rex v. Horner, 1 Leach 270, 270-71; 168 E.R. 237 (1783)).

189. *Id.* at 129.

190. Marx Denbeaux, et al., *No-Hearing Hearings, CSRT: The Modern Habeas Corpus?* 3 (Seton Hall University School of Law), *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

191. *Id.* at 5.

192. *Id.*

informed of this result and subsequent CSRTs were convened until the initial determination was reversed.[193]

The flawed process whereby a detainee is deemed an enemy combatant is exacerbated by the fact that the detainee has no meaningful way to challenge the designation. MCA section 9, which slightly modifies Detainee Treatment Act ("DTA") section 1005(e)(3), does provide for a limited review exclusively in the D.C. Circuit for a detainee challenging his enemy combatant status.[194] The MCA confers a similarly narrow right to review a military commission's determination in the D.C. Circuit.[195] This review, however, does not resemble common law habeas. Rather, the restrictive scope of review limits the D.C. Circuit to analyzing whether "the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals."[196] The D.C. Circuit may not inquire into the factual basis for detention or into the strength of the evidence. This limited scope of procedural review is much different than the searching factual inquiry undertaken by common law habeas courts. Furthermore, this narrow review occurs only after a CSRT makes a "final decision" on a detainee's status,[197] or until after the detainee exhausts the appellate procedures set forth in the MCA.[198] This finality requirement runs contrary to the practice at common law whereby an accused could challenge the legality of an imprisonment almost immediately upon committal.

The MCA's limited judicial review and jurisdiction-stripping provisions exacerbate the legal black hole swallowing the detainees' claims. Indeed, the process afforded to the detainees is an inadequate substitute as compared to the common law practice whereby prisoners could challenge the sufficiency of the charges and the evidence levied against them before trial. In combination, the MCA and the DTA provide no meaningful, independent judicial venue whereby detainees can challenge the very designation that results in their indefinite detainment. This lack of legal process belies the very purpose of the Great Writ as understood at common law. Indeed, if the constitutional guar-

193. *Id.* at 6.

194. Military Commissions Act of 2006 § 9; Detainee Treatment Act of 2005 § 1005(e)(3), Public Law 109-148, 119 Stat. 2740 (2007) (codified at 10 U.S.C. § 801).

195. Military Commissions Act of 2006 § 3(a)(1) (codified at 10 U.S.C. § 950g).

196. Detainee Treatment Act of 2005 § 1005(e)(2)(C)(i) (codified at 10 U.S.C. § 801(e)(2)(C)(i).

197. Detainee Treatment Act of 2005 § 1005(e)(2) (codified at 10 U.S.C. § 801(e)(2)(A).

198. Military Commissions Act of 2006 § 3(a)(1) (codified at 10 U.S.C. § 950g).

antee of habeas corpus does not reach the detainees at Guantanamo Bay, there will be no independent court to examine the United States' charges against the detainees and, if appropriate, grant relief. In such a case, Lord Mansfield's fears will have been realized. Without habeas corpus, Guantanamo Bay exists in a legal vacuum.

## IV. CONCLUSION

History demonstrates that the Great Writ, as understood by the Founders during the Constitution's framing, would have extended extraterritorially to Guantanamo Bay. The reach of the Writ extended to all lands within the King's domain and to all of the Crown's subjects. Similarly, the unique history surrounding Guantanamo Bay leads to the conclusion that it is as much a part of the United States' domain as Minorca and India were a part of England's territory. Additionally, the United States government's prolonged detention of the detainees has created a sufficient nexus between the aliens and the United States, mirroring the subject-sovereign association deemed necessary at common law to permit the extension of the Writ to natives of foreign lands. Furthermore, without the constitutional application of habeas corpus to the detainees' claims, Guantanamo Bay exists in a legal vacuum.

The seventeenth century habeas acts were aimed at eliminating arbitrary imprisonment and regulating lawful detentions by affording the accused processes guaranteed by the rule of law. Yet, hundreds of detainees have been imprisoned at Guantanamo Bay for over five years without being charged with a crime. Rather, they have been deemed unlawful enemy combatants by the Executive Branch, and are thereby subject to indefinite detention. This is the very abuse of executive authority that habeas corpus evolved to quash. Moreover, if the constitutional guarantee of habeas corpus does not extend to Guantanamo Bay, the MCA's limited scope of review and court-stripping provisions seals the detainees to a fate of extensive pre-indictment and pre-trial detention, as well as indefinite imprisonment. For all of these reasons, the Supreme Court should rule that the constitutional application of the Great Writ extends to Guantanamo Bay. Such a holding would recognize the detainees' fundamental right to challenge their status as unlawful enemy combatants and to demand that any further detention be based upon a criminal charge. By acknowledging the reach of habeas corpus to the detainees, the Court would restore the rule of law to Guantanamo Bay.

***