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# United States Constitutional Habeas Corpus and Rasul: A Case of Misapplied History

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# UNITED STATES CONSTITUTIONAL HABEAS CORPUS AND *RASUL*: A CASE OF MISAPPLIED HISTORY

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## INTRODUCTION: THE 2004 *RASUL* DECISION

In 2004, the United States Supreme Court considered whether an alien detained at the U.S. naval base in Guantanamo Bay, Cuba was entitled to a constitutional right of *habeas corpus*.[1] After careful consideration of the historical traditions and applications of common law *habeas corpus* writs under English and early American jurisprudence, the Court held that constitutional *habeas corpus* did extend to non-U.S. citizens detained by the U.S. government at the Guantanamo Bay facility.[2]

In deciding this case, the Court primarily addressed the argument that the Guantanamo Bay base should be considered sovereign American territory and thus constitutional *habeas* rights should undoubtedly apply to persons held there.[3] The Court began its analysis by looking at traditional *habeas corpus* under English common law.[4] The majority noted "[a]t common law, courts exercised *habeas* jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called 'exempt jurisdictions,' where ordinary writs did not run, and all other dominions under the sovereign's control."[5] The Court then cited numerous English and early American cases[6] which, the Court argued, evidenced the fact

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1. Rasul v. Bush, 542 U.S. 466, 466–70 (2004).

2. *Id*. at 466. Although the *Rasul* case dealt primarily with the issue of whether U.S. courts had jurisdiction to issue the *habeas* writ at the petition of aliens detained at Guantanamo Bay, the court nonetheless addressed the issue of whether constitutional *habeas* rights extended to those confined individuals. The courts findings in *Rasul* were subsequently affirmed four years later in *Boumediene v. Bush* where the court explicitly held that aliens at Guantanamo had constitutional *habeas* rights. *Id. See* Boumediene v. Bush, 553 U.S. 723 (2008).

3. *Id.* at 472–73.

4. *Id.* at 473–74

5. *Id.* at 481–82.

6. The cases cited by the *Rasul* majority are the same cases that I argue remain distinguishable and inapplicable to the facts of Rasul's particular detainment at Guantanamo Bay in my Court opinion comprising the first part of this paper (*Schiever, Sommersett, Hottenton Venus, Villato, D'Olivera, Izard, Bourn's Case, Alder, Jobson's Case, Overton,* and *Salmon*).

that "the reach of the [*habeas*] writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the crown.'"[7]

The Court then determined that the Guantanamo Bay naval base was, for all intents and purposes, sovereign American territory.[8] The Court felt that the lease agreement between the U.S. and Cuba, signed in 1903, clearly evidenced the intent of both nations to transfer "complete jurisdiction and control" of the leased area to the United States.[9] Further, the Court found important the fact that the subsequent treaty agreement between the U.S. and Cuba provided for the continuation of such jurisdiction and control indefinitely—and even permanently—should the U.S. so desire.[10] Consequently, the Court concluded, "[a]liens held at the [Guantanamo Bay] base, no less than American citizens, are entitled to invoke [constitutional *habeas corpus* rights]."[11]

This article argues the *Rasul* ruling was ultimately inconsistent with the historical understandings of *habeas corpus* upon which the U.S. constitutional notion evolved. It begins by re-writing the 2004 *Rasul* Supreme Court opinion in order to reach the proper result as informed and dictated by the history of the *habeas corpus* concept and the established judicial precedent applicable to *Rasul's* unique factual scenario. The article then compares this new decision with the 2004 *Rasul* opinion in order to elucidate where the Supreme Court's analysis erred. Finally, the article concludes by reaffirming that the 2004 holding was the result of a misapplication of *habeas corpus* both as it presently exists within the U.S. Constitution and as it historically evolved from the common law of England.

*Rasul*, 542 U.S. at 481 n.11 (2004). *See infra* notes 132–38 and accompanying text discussing the holdings in those cases and why I find them inapposite to the particular factual situation present in *Rasul*.

7. *Rasul*, 542 U.S. at 482.
8. *Id.* at 480.
9. *Id.*
10. *Id.*
11. *Id.* at 481.

The "New" *Rasul*:

Supreme Court of the United States
Sharif RASUL et al.,

v.

George W. BUSH, President of the United States, et al.
Nos. 03-334, 03-345
Decided December 16, 2011

Chief Justice STEVENS delivered the opinion of the court.

This case presents a novel issue of critical importance in understanding the United States Constitution—the highest and supreme law of our nation—with regards to what many have considered the "best and only sufficient defense of personal liberty:" the Great Writ of *habeas corpus*.[12] The constitutional issue directly considered by the court today is a specific and narrow one: do alien, non-U.S. citizens, seized under the authority of our government's Executive branch and imprisoned outside of the territorial United States, retain a constitutional right to *habeas corpus*?[13]

There are, we determine, only three possible ways for the petitioner to realistically argue entitlement to this constitutional privilege: (1) he may assert that the constitutional protections of *habeas corpus* are intended to apply to all persons, and not merely to citizens of these United States of America; (2) he may observe that the common law purpose of the *habeas* writ is to check Executive power to detain arbitrarily and without justification, and thus prudence requires that this common law understanding of *habeas*—which our Constitution reflects— be expanded to apply to Executive detention of aliens abroad; or (3) he may contend that the particular facts of this case implicitly demand constitutional *habeas corpus* protections because the petitioner, although an alien, is detained by the Executive in an area that should be considered, under the common law tradition of the *habeas* writ, sovereign U.S. territory.[14]

12. *Ex parte Yerger*, 75 U.S. 85, 95 (1868).

13. *Rasul*, 542 U.S. at 475.

14. *Id.* at 481; *see generally* Hamdi v. Rumsfeld, 541 U.S. 507 (2004). We wish to note here that although the petitioner has confined his appeals argument to the third point of inquiry (the extra-territorial application of constitutional *habeas corpus* to areas where the United States lacks ultimate sovereignty but maintains plenary control and jurisdiction), we will nonetheless address what we consider to be all three of the possible arguments for expanding constitutional *habeas* rights to aliens detained outside the absolute sovereignty of U.S. soil. We do so in order to fully and finally remove any lingering confusion regarding the applicability of constitutional *habeas corpus* rights to aliens detained abroad and establish a definite and unquestioned legal precedent to henceforth guide this nation's courts.

We find that (1) constitutional *habeas corpus* rights extend only to citizens of the United States and not to all persons generally; (2) the common law purpose of the *habeas* writ in checking Executive detention powers neither requires nor justifies the extension of constitutional *habeas* rights to aliens confined abroad; and (3) common law and constitutional *habeas corpus* rights do not, and were never intended, to apply to aliens confined in areas lacking actual and complete United States, or English in examining *habeas* under English common law, sovereignty.[15]

The District Court and the Court of Appeals found against the petitioner and determined that there was no constitutional right of *habeas corpus* for aliens captured and held outside the sovereign territory of the United States.[16] We granted certiorari to definitively determine this issue,[17] and now, agreeing with the lower courts, AFFIRM.

Our analysis will proceed as follows. In Section I, we will briefly recount the facts of the case. In Section II, we will determine where the constitutional understanding of *habeas corpus* actually lies. In Sections III, IV, and V we will consider the petitioner's first and second arguments by looking at the detailed historical record, of both English common law *habeas* and its subsequent development in the Colonial and founding eras of American history, to determine whether *habeas corpus* applies to Executive powers of confinement and to whom the writ offers its protection. In Section VI we will consider the petitioner's third and final argument by determining whether the right of *habeas corpus* has ever applied, or is intended to apply, to aliens detained in areas where there is practical, but not actual or complete, national sovereignty. Finally, in Section VII we conclude and reaffirm our holding.

## I. FACTS

On September 11, 2001, the United States was attacked by an international terrorist organization known globally as "al Qaeda."[18] The unprecedented attack on American soil left over 3,000 innocent civilians dead, resulted in hundreds of millions of dollars in property damage, and severely affected the

15. *See generally Rasul*, 542 U.S. at 488 (Scalia, J., dissenting). "The court recognizes and believes that a different analysis would be appropriate if an alien was seized and detained within the sovereign territory of the United States. However, this is not the issue before the court today. Petitioner Rasul concededly was not seized or detained within the exclusive and undisputed territory of the United States government at any time (his argument that Guantanamo Bay is sovereign American territory can hardly be said to be undisputed, as it forms a key element of his argument and our opinion)." *See also* Section VI *infra* for our detailed discussion of Guantanamo Bay and U.S. sovereignty.

16. *Id.* at 466.

17. *Id.*

18. *Id.* at 470.

U.S. economy.[19] Shortly following these events, the United States Congress authorized the President to use "all necessary and appropriate force against those nations, organizations, or persons he determine[d] planned, authorized, committed, or aided the terrorist attacks…or harbored such organizations or persons."[20] Under that authority, United States military forces entered the Middle Eastern nation of Afghanistan to seek out al Qaeda and the governing Taliban regime that had supported its activities.[21]

Rasul, the petitioner here, is a British citizen who was captured during the military campaign in Afghanistan.[22] Although Rasul maintains he was in Afghanistan with Taliban forces as a captive, the government stresses that he was detained during direct and armed conflict with the U.S. military.[23] Following capture, Rasul was transferred to the United States naval base located at Guantanamo Bay, Cuba.[24]

This base, commonly known as "Gitmo," is a forty-five square mile military installation along the southeastern coast of Cuba.[25] The base was created in 1903 pursuant to a lease agreement between the United States and the newly independent Cuban government.[26] The lease contract explicitly states "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]" and "the Republic of Cuba consents that during the period of the occupation by the United States…the United States shall exercise complete jurisdiction and control over and within said areas."[27] In a supplemental agreement, the United States also agreed to pay an annual rental fee of $2,000 in gold coin and maintain permanent fences around the leased facilities.[28] Finally, in 1934, the two nations entered into a further agreement by which each settled that the lease would remain in effect so long as the United States did not abandon the Guantanamo Bay naval base.[29]

After detainment in this military facility for a prolonged period, Rasul, through family, filed a *habeas corpus* petition in the U.S. District Court of

19. *Id.*

20. Authorization for Use of Military Force, Pub. L. No. 107-40, §§ 1-2, 115 Stat. 224 (2001).

21. MATTHEW C. WEED, CONG. RESEARCH SERV., R43983, 2001 AUTHORIZATION FOR USE OF MILITARY FORCE: ISSUES CONCERNING ITS CONTINUED APPLICATION 3 (2015).

22. *Rasul*, 542 U.S. at 470–71, n.1.

23. *Id.* at 470–71, n.4.

24. *Id.* at 471.

25. *Id.*

26. *Id.*

27. Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, U.S.-Cuba, Feb. 23, 1903, art. III, T.S. No. 418.

28. Lease of Certain Areas for Naval or Coaling Stations, U.S.-Cuba, July 2, 1903, art. I-II, T.S. No. 426.

29. Relations with Cuba, U.S.-Cuba, May 29, 1934, art. III, T.S. No. 866.

Columbia seeking to challenge the legality of his detention.[30] The District Court, and subsequently the Court of Appeals, found that they lacked any jurisdiction to hear, and the petitioner lacked any constitutional right to bring, the *habeas corpus* claim.[31]

## II. *HABEAS CORPUS* IN THE CONSTITUTION (THE SUSPENSION CLAUSE)

Rasul claims that he has a right, under our national Constitution, to the writ of *habeas corpus*.[32] The United States Constitution mentions the right of *habeas corpus* only once: Article I, section 9, clause 2 states 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."[33] Interestingly, this constitutional reference to *habeas corpus* is not an affirmative grant of a right to the American people; rather, the reference is contained in the section of the Constitution dedicated to describing the powers denied to Congress.[34] Yet, if the Constitution does not affirmatively indicate that the American people actually have a right to *habeas corpus*,[35] why would there be a need for a limitation against the government's ability to suspend it? What is the point of a constitutional clause claiming to restrict the ability of Congress to suspend a right that the people do not actually possess?

The answer, of course, is that the American people were presumed to enjoy the right of *habeas corpus*.[36] However, this inevitably leads to a more crucial question: since this right of *habeas corpus* is not actually described in the Constitution itself, where must one look to understand what that right actually encompasses?[37] The answer lies in considering other rights, also omitted in the

30. *Rasul*, 542 U.S. at 471.

31. *Id.* at 472–73.

32. *Id.* at 472.

33. U.S. CONST. art. I, § 9, cl. 2.

34. Jeremy Byellin, *Today in 1861: Habeas Corpus is Suspended for the First Time*, LEGAL SOLUTIONS BLOG (April 27, 2012), http://blog.legalsolutions.thomsonreuters.com/legal-research/today-in-1861-habeas-corpus-is-suspended-for-the-first-time/.

35. Rex A. Collings Jr., *Habeas Corpus for Convicts – Constitutional Right or Legislative Grace*, 40 CALIF. L. REV. 3, 345 (1952).

36. Byellin, *supra* note 34.

37. *See Letter from James Madison to M. L. Hurlburt* (May 1830), *in* 4 THE FOUNDERS' CONSTITUTION 362 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter Letter from James Madison]. James Madison argued that the Constitution should be understood and interpreted in light of three essential principles: "the evils & defects for curing which the Constitution was called for & introduced. . .the comments prevailing at the time it was adopted. . .[and] the early, deliberate & continued practice under the Constitution." Letter from James Madison, *supra.* We very much agree with Madison's assessment of the potential sources of constitutional understanding and throughout the course of our inquiry, we consider all of these areas in the following forms: the historical English common law reasons for *habeas* rights, the understanding

Constitution insofar as their scope is not affirmatively described, which were nonetheless considered by the founders to have been retained by the people.[38] Two such rights prove particularly enlightening on this point.

First, consider the constitutional prohibition against *ex post facto* laws. Again, although Article I, § 10, clause 1 clearly states, "No state shall…pass any…ex post Facto law…" the Constitution remains silent as to what actually compromises such a law.[39] Consequently, the court in *Calder v. Bull* held that such laws applied only to criminal cases.[40] The court made this determination by explicitly relying on the historical, common law understanding of *ex post facto* laws.[41] Second, the Fourth Amendment's prohibition against overly generalized warrants was subsequently defined to mirror the English historical tradition of rejecting general warrants "to apprehend all persons suspected, without naming or particularly describing any person in special."[42] Under the English common law, such warrants were deemed "illegal and void for its uncertainty" and the ambiguity of the Constitution's reference to prohibited warrants was clarified on the basis of this common law understanding of impermissibly vague general warrants.[43]

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of *habeas* during the Constitution's founding, and conceptions of *habeas corpus* in state ratifying conventions and the years shortly following the adoption of the Constitution.

38. *See generally* U.S. CONST. amend. IX; *see also* 1–5 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987).

39. U.S. CONST. art. I, § 10, cl. 1.

40. Calder v. Bull, 3 U.S. 386, 399 (1798); *see generally* Charles Pinckney, *South Carolina Ratifying Convention* (May 20, 1788), *in* 3 THE FOUNDERS' CONSTITUTION 395 (Philip B. Kurland & Ralph Lerner eds.1987).

41. *See generally Calder*, 3 U.S. at 399. In the *Calder* case, Justice Chase noted, "I shall endeavor to show what law is considered, an *ex post facto* law, within the words and meaning of the prohibition in the Federal Constitution. The prohibition, 'that no state shall pass any *ex post facto* law,' necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing." *Id.* at 390. Additionally, Chase looked to the constitutions of the states themselves to determine the common law meaning of *ex post facto* laws: "I also rely greatly on the definition or explanation of *ex post facto* laws, as given by the Conventions of [several states]; in their several Constitutions, or forms of Government." *Id.* at 391. Likewise, Justice Patterson also stressed the need to understand *ex post facto* laws in terms of their common law meaning, as evidenced by the state constitutions and understandings of that term; he noted "I am convinced, that *ex post facto* laws must be limited in the manner already expressed; they must be taken in their technical, which is also their common and general, acceptation. . ." *Id.* at 397.

42. William Blackstone, *Commentaries* 3:288, 4:286—90 (1768–69), *in* 5 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987).

43. Blackstone*, supra* note 42. Subsequently, St. George Tucker would also comment on the use of English traditions of common law to inform the Constitution's prohibition against generalized warrants: "The case of general warrants, under which term all warrants not comprehended within the description of the preceding article may be included, was warmly contested in England about thirty or thirty-five years ago, and after much altercation they were finally pronounced to be illegal by the common law. The Constitutional sanction here given to the same doctrine. . .can not be too highly valued by a free people." St. George Tucker, *Blackstone's*

These kinds of non-self-executing constitutional clauses are unique in that they require a consideration of the historical context surrounding and informing their meaning at the time the Constitution was actually formed.[44] The *habeas corpus* suspension clause is such a non-self-executing clause.[45] Thus, a consideration of what it meant—and, most importantly, to whom it applied—requires us to delve into the common law understanding of the writ leading to, surrounding, and immediately following the creation of the Constitution itself.

## III. HISTORICAL UNDERSTANDINGS OF *HABEAS CORPUS*

The writ of *habeas corpus* has historically remained one of the most important common law rights for securing individual liberty.[46] Literally, the Latin phrase *habeas corpus ad subjiciendum* translates "you should have the body for submitting."[47] Although the exact origins of the writ remain debated,

*Commentaries* 1:App. 301–4 (1803), *in* 5 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987). This idea–that many constitutional ideas were intended to be defined according to their meaning under English common law–was also seen in the constitutional understanding of impeachment and Rawle remarked, "Impeachments are thus introduced as a known definite term, and we must have recourse to the *common law of England* for the definition of them." (emphasis added). William Rawle, *A View of the Constitution of the United States* 210–219 (1829), *in* 2 THE FOUNDERS' CONSTITUTION 167 (Philip B. Kurland & Ralph Lerner eds., 1987).

44. The idea that American constitutional interpretation should be based on historical—and thus English—common law understandings was further advocated by James Iredell in 1799. *See* James Iredell, *Charge to the Grand Jury, in Case of Fries* (1799), *in* 5 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987). Iredell argued that the United States' constitutional understanding of freedom of the press derived from English common law principles:

> "We derive our principles of law originally from England. . .The definition [of freedom of the press] is, in my opinion, nowhere more happily or justly expressed than by the great author of the commentaries on the laws of England, which book deserves more particular regard on this occasion, because for nearly thirty years it has been the manual of every student of law in the United States, and its uncommon excellence has also introduced it into the libraries, and often to the favourite reading of private gentlemen; so that his views on the subject could scarcely be unknown to those who framed the amendments to the Constitution. . ." *Id.*

45. Stephen I. Vladeck, Case Comment, *Non-Self-Executing Treaties and the Suspension Clause After St. Cyr*, 113 YALE L.J. 2007, 2007–13 (2004).

46. *See generally* Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.).

47. Although there were technically various kinds of *habeas* writs in England, it was the *habeas corpus ad subjiciendum* form that finally became synonymous with the writ as a means of requiring government officials to produce a detained individual and explain the reasons justifying continued detention. MERRIAM-WEBSTER DICTIONARY, "habeas corpus ad subjiciendum", http://www.merriam-webster.com/dictionary/habeas%20corpus%20ad%20subjiciendum;
Rebecca Lee, *The Writ of Habeas Corpus: No True Privilege for Guantanamo Detainees*, 1 LINCOLN MEMORIAL UNIV. L. REV. 156, 157 (2014).

it is generally agreed that by the mid Fourteenth century, the writ of *habeas corpus* was beginning to take its modern form as a means of requiring justification for the continued detention of an incarcerated or otherwise held individual.[48] In 1340 the writ of *habeas corpus* was first recorded as being used, in conjunction with a writ of *certiorari*, to require a local sheriff to produce an imprisoned defendant in court.[49] The use of the *habeas* writ in this case was novel at the time because it was granted pursuant to the defendant's own petition and the court implicitly indicated its intent to consider the legitimacy of the imprisonment.[50]

However, it was not until 1629 that the writ of *habeas corpus* became irrevocably marked as the " 'highest remedy in law, for any man that is imprisoned.'"[51] In a landmark case in the development of English common law, a London merchant was granted a writ of *habeas corpus* to challenge his imprisonment for speaking out publicly against Britain's customs and importation fees.[52] Subsequently, England passed the "Habeas Corpus Act of 1641" both to solidify the purpose of the writ as a protection against unlawful imprisonment and also to punish lackadaisical judges who might arbitrarily deny such *habeas* writs.[53]

After a period of civil war and internal strife throughout England led to relaxed *habeas* requirements, the writ was vigorously renewed in the infamous "Habeas Corpus Act of 1679."[54] The act was clear in its meaning: the writ of *habeas corpus* was a fundamental right of all English subjects that would remain as widely available to them as practical.[55] Specifically, the 1679 Act sought to solidify the paramount importance of the *habeas* writ by ensuring its

48. The idea that a person should not be arbitrarily detained finds its roots earlier than the Fourteenth century; in 1166, the "Assize of Clarendon," an act of Henry II of England, mandated that when a prisoner was apprehended, the sheriff had a legal obligation to inform the nearest judge and, upon asking, bring that detainee before the judge. Theodore F. T. Plunkett, *A Concise History of the Common Law* 108 (1936), *in* 5 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987).

49. Y.B. 14 Edw. 3, fol. 20, Trin., pl. 12 (1340) (Eng.), *reprinted in* 204 EYRE AND SPOTTISWOODE 204 (1888).

50. *Id.*

51. WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 47 (Greenwood Press 1980) (quoting "Proceedings," 3 State Trials 95).

52. Chamber's Case, (1629) 79 Eng. Rep. 717 (K. B.) 717.

53. *See* Habeas Corpus Act, 1640, 16 Car. 1, c. 10 (Eng.). According to the Act, any judge who refused to grant *habeas* writs for reasons contrary to the "true meaning" of the law would be liable for treble damages to the wrongfully imprisoned defendant. *Id.* at § 6.

54. Scott J. Shackelford, Book Note, *Habeas Corpus Writ of Liberty, Boumediene and Beyond*, 57 CLEV. ST. L. REV. 671, 677 (2009) (reviewing ROBERT S. WALKER, REVIEW OF HABEAS CORPUS WRIT OF LIBERTY: ENGLISH AND AMERICAN ORIGINS AND DEVELOPMENT (2006)).

55. *See generally* Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.).

availability even during periods of judicial vacation,[56] making the writ available to issue from more courts,[57] requiring immediate compliance with the writ,[58] ensuring quick judicial determinations of the merits of the petition,[59] and providing that successful *habeas* petitioners were free from re-incarceration for the same issue.[60] Further, the Act strengthened the writ by prohibiting the removal of prisoners beyond the jurisdictional reach of the writ[61] and making judges personally liable for flagrantly unjustified denials of such writs.[62] Ultimately, the Habeas Corpus Act of 1679 served to "find itself a place in the [English] constitution and in the popular conception as a fundamental guarantee of liberty, and to demonstrate that abuses with respect to *habeas corpus* would not be tolerated."[63] Although later *habeas* acts were passed in the English Parliament, it was the Act of 1679 that remained the backbone of common law *habeas corpus* and defined the meaning of that right as understood by the English Colonial predecessors to our American founding generation.[64]

## IV. APPLICABILITY OF ENGLISH *HABEAS CORPUS*

There are indications that the *habeas corpus* writ in England applied at an early stage to unlawful and arbitrary detention by the government, and specifically by councils claiming royal authority.[65] Even before the Habeas Corpus Act of 1641, legal arguments were being made that, under common law *habeas corpus* protections, English subjects could not be held indefinitely under a claim of royal prerogative.[66] The *Case of Five Knights* (or *Darnel's Case*) arose in 1627 after five English knights were imprisoned "by special command of his majesty" because they refused to pay the King's forced

56. Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.). Section 9 of the act provided that the *habeas* writ should not be denied simply because the court–or the particular judge–of whom it is requested is in vacation. *Id.* § 9. This privilege was limited, however, in that prisoners detained for "two terms" without requesting a *habeas* writ then forfeited their right for such application during times of judicial vacation. *Id.* § 3.

57. *Id.* § 2.

58. *Id.* § 1.

59. *Id.* § 2.

60. *Id.* § 5.

61. *Id.* § 11.

62. Habeas Corpus Act, 1679, 31 Car. 2, c. 2, § 9 (Eng.). This section specifically provided for punitive damage awards against judges who would arbitrarily deny *habeas* writs, with little or no actual reasoning, during times of vacation. *Id.*

63. JUDITH FARBEY & R. J. SHARPE WITH SIMON ATRILL, THE LAW OF HABEAS CORPUS 16 (3d ed. 2011).

64. FARBEY ET AL., *supra* note 63, at 17.

65. FARBEY ET AL., *supra* note 63, at 2.

66. FARBEY ET AL., *supra* note 63, at 4.

loans.[67] After their *habeas* petition was refused on grounds that the King had explicitly ordered their confinement, the defense counsel replied, in what was a revolutionary legal argument, that the King's order remained insufficient to overcome the privilege to the writ (and the corresponding legal duty to comply with the writ, bring the prisoners before the court, and determine the validity of their confinement).[68]

However, it is also evident that this early argument was applicable strictly to English subjects.[69] In their formal statement to the court, the defense in *Darnel's Case* specifically argued that this *habeas* writ was "the only means the *subject* hath to obtain his liberty…."[70] Further, this particular case dealt only with English subjects as defendants seeking the *habeas* writ. In fact, it was because of the King's recognition of those men as subjects of England that he had required them to pay loans, the refusal of which had led to their imprisonment in the first place.[71]

Subsequently, the Habeas Corpus Act of 1641 brought life to the novel legal arguments advanced in *Darnel's Case* over a decade before. The Act specifically addressed the growing issue of arbitrary detentions commanded by the "Court of Star Chamber." As the personal judicial arm of the royal branch of the English government, this chamber served as the King's court of ultimate jurisdiction and had the authority to both confine without reason and deny *habeas* petitions seeking justification for such confinement.[72] The Act of 1641 explicitly abolished this court, noting that it had functioned as "an intolerable burthen to the subjects, and the means to introduce an arbitrary power and government."[73]

67. *See* Darnel's Case, (1627) 3 St. Tr. 1 (K.B.) 1–3.

68. *See id.* at 6–7. The defense made the case that "the Writ of Habeas Corpus is the only means the subject hath to obtain his liberty, and the end of this Writ is to return the cause of the imprisonment, that it may be examined in this court, whether the parties ought to be discharged or not: for the cause of the imprisonment of this gentleman at first is so far from appearing particularly by it, that there is no cause at all expressed in it." *Id.* Unfortunately, the legal development of the *habeas* writ had not yet reached such an understanding; as such, the court, following the established legal policy of the time, denied the writ and maintained the confinement of the knights. *See* DUKER, *supra* note 51, at 44. Nonetheless, this case was an important step in the development of the *habeas* writ as a weapon against unlawful and arbitrary government confinement.

69. *See* DUKER, *supra* note 51, at 44.

70. Darnel's Case, (1627) 3 St. Tr. 1 (K.B.) 2–3.

71. *Id.* at 1–2.

72. *See* DUKER, *supra* note 51, at 46–47. The common law courts, as late as 1630, had referred to the Court of Star Chamber as the "high and honorable Court of Justice." Chamber's Case, (1629) 79 Eng. Rep. 717 (K. B.) 717.

73. *See* Habeas Corpus Act, 1641, 16 Car., c. 10, § 2(3) (Eng.).

The Act further declared that "any subjects of this kingdom"[74] who were detained by a court claiming royal authority—or even a warrant and consequent confinement ordered directly by the King or his council—would remain entitled to petition for *habeas corpus* in order to have the reasons for their detainment explained.[75] Additionally, the Act punished judges who arbitrarily denied *habeas* writs when their courts were in vacation.[76] Yet, even this provision was explicitly made applicable only to English subjects petitioning for *habeas*.[77] In the end, the 1641 Act furthered the *Darnel's Case* argument that the common law writ of *habeas corpus* could be used as a way to force the royal authority to explain their detentions; it further clarified that this writ was a privilege reserved to English *subjects*.[78]

The official codification of common law *habeas* understanding into the English legal annals became permanent with the passage of the Habeas Corpus Act of 1679.[79] The 1679 Act specifically addressed the growing problem of royal authorities removing subjects beyond the territorial reach of traditional *habeas* petition.[80] Following the passage of the 1641 Act, the King had responded by simply removing subjects from English lands and holding them indefinitely in these extra-territorial locations.[81] The major failing of the 1641 Act was that it failed to effectively address this loophole around the writ of *habeas corpus*; by simply removing the prisoner from England and holding them elsewhere, the writ no longer served as a viable check against such arbitrary confinements.[82]

Perhaps the clearest indication of this devious royal mechanism for avoiding the *habeas* writ was the 1663 impeachment of the Lord High Chancellor of England, the Earl of Clarendon.[83] The impeachment complaint specifically asserted that the Chancellor—the highest member of the King's royal courts—"hath advised and procured divers of his majesty's subjects to be imprisoned against law, in remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law, and to produce precedents for the

74. *Id.* § 5.

75. *Id.* § 8(3); *see also* DUKER, *supra* note 51, at 47.

76. *See* Habeas Corpus Act, 1641, 16 Car., c. 10, § 9 (Eng.).

77. As was observed by Lord Coke, "the [*habeas*] writ is to be granted. . .so as the Subject being wrongfully imprisoned, may have justice for the liberty of his person as well as in the Vacation time as in the Term." EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 53 (5th ed., 1671).

78. *See* Habeas Corpus Act, 1641, 16 Car., c. 10 (Eng.).

79. *See* Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.).

80. *See* Habeas Corpus Act, 1679, 31 Car. 2, c. 2, § 1 (Eng.).

81. *See* DUKER, *supra* note 51, at 51–52.

82. *See* FARBEY ET AL., *supra* note 63, at 15.

83. *See* Proceedings in Parliament against Edward Earl of Clarendon, Lord High Chancellor of England, (1663–67) 6 St. Tr. 291, 291–92.

imprisoning of any other of his majesty's subjects in like manner."[84] This fear of imprisonment at the King's whim, without the invaluable check of the *habeas* writ, was at the forefront of arguments by those favoring the passage of the 1679 Act.[85] Sir Thomas Lee, a member of the English House of Commons from 1660-85, implored:

> "He that is sent to Jersey or Guernsey, may be sent to Tangier, and so never know what his crimes are, and no *Habeas Corpus* can reach him. All convictions must be by a Plebian Jury, which now they cannot have… [the 1679 Act] does not take away the King's power at all, but secures the subject."[86]

Thus, the 1679 Act emerges through the historical record as both reaffirming the existence of *habeas corpus* as a check on royal powers to detain without explanation and also indicates that the writ remained applicable solely to English *subjects*.[87] The official name of the 1679 Act—"An act for the better securing the liberty of the subject, and for the prevention of imprisonments beyond the seas"—evidences both that it applied only to English *subjects* and also that it was aimed at preventing the King from unlawfully imprisoning those English subjects abroad, without the protections of the *habeas* writ.[88]

## V. THE FOUNDERS' *HABEAS CORPUS*

Traditionally, English practice regarding laws in force in newly acquired lands depended on the type of territory that had been conquered.[89] For example, the same year the Virginia Colony was founded in American, the English case of *Robert Calvin* was decided.[90] The *Calvin* court held that a Scotsman was entitled to the protections of an English subject and proceeded to differentiate between English conquests of other Christian lands—where the indigenous legal regime remained until altered by England—and conquests of "infidel" kingdoms—where the indigenous laws were "instantly abrogated" and the King adjudicated disputes according to equity until a new legal code was adopted.[91]

84. *Id.* at 330.

85. *See* DUKER, *supra* note 51, at 53.

86. DUKER, *supra* note 51, at 53 (citing 1 ANTICHELL GREY, DEBATES OF THE HOUSE OF COMMONS 237 (1763)).

87. *See* Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.).

88. *Id.*

89. *See* WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND § 4, 106–08 (laying down the general principles for the introduction of English law into a 'settled' as distinct from a 'conquered' colony).

90. *See* Calvin's Case, (1572) 77 Eng. Rep. 377 (K.B.) 377–78; *see also* DUKER, *supra* note 51, at 95.

91. Calvin's Case, (1572) 77 Eng. Rep. 377 (K.B.) 397–98; DUKER, *supra* note 51, at 95.

This idea was furthered in the 1694 case of *Blankard v. Galdy*, where the court held that English common law was immediately applicable to any newly discovered lands claimed by English subjects.[92] Regardless of which type of territory the Colonies were considered, it was generally understood that the laws and rights of English subjects extended directly to the American Colonies.[93] By the early Eighteenth century, there was no doubt that English common law was applicable throughout Colonial America.[94] Still, as with the English common law *habeas* writ, the colonial understanding of the common law right to *habeas corpus* remained limited to subjects of the English crown.[95] As South Carolina's colonial assembly observed in 1712, "the inhabitants of Carolina shall be of the King's allegiance; which makes them subject to the laws of England."[96] By remaining subjects of the English King, these colonials likewise were entitled to the protections of the English common law *habeas* writ.[97]

Thus, while Colonial America likely did not enjoy the security of actual statutory *habeas* protections, that is to say, colonists were not entitled to English *habeas* writs established under law, they nonetheless enjoyed an

92. Blankard v. Galdy, (1694) 91 Eng. Rep. 356 (K.B.) 356–57.

93. There is some disagreement about whether the American Colonies were considered the conquered lands of infidels (the Native Americans) or whether they were newly discovered lands. Blackstone argued that the Colonies were conquered infidel nations and hence common law applied there only once the King so declared; meanwhile Story would subsequently argue that the Colonies were uninhabited lands and thus English common law applied immediately. *See* DUKER, *supra* note 51, at 96 (citing WILLIAM BLACKSTONE, 1 COMMENTARIES 106–08 and JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, §156, at 101–02). In either case, Story observed, the individual charters of the Colonies explicitly made English common law applicable: "there is. . .an express declaration, that all subjects and their children inhabiting therein shall be deemed natural-born subjects and shall enjoy the privileges and immunities thereof." STORY, *supra*, at 105. Again, we see that the early colonial charters extended English common law rights to the colonists insofar as they were English *subjects*.

94. In 1702, English Attorney General Edward Northey voiced his opinion that the Virginia Colony remained bound by English common law, absent express assembly or parliamentary declaration to the contrary. *See* DUKER, *supra* note 51, at 98 (citing to GEORGE CHALMERS, 1 OPINIONS OF EMINENT LAWYERS 18–22 (1814)). In 1703, the English Solicitor General noted that English laws need not be specifically enacted in English colonies because they were "declaratory of the common law" and hence already applied in those places. Then, in 1720, the counsel to the Colonial Board of Trade stated "[t]he common law of England, is the common law of the plantations, and all statutes in affirmance of the common law, passed in England, antecedent to the settlement of a colony, are in force in that colony. . .Let an Englishman go where he will, he carries as much of law and liberty with him, as the nature of things will bear." DUKER, *supra* (citing to GEORGE CHALMERS, 1 OPINIONS OF EMINENT LAWYERS 194 (1814)).

95. *See* Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.).

96. DUKER, *supra* note 51, at 103 (citing to 2 STATUTES OF SOUTH CAROLINA 74 (Thomas Cooper ed., 1838)).

97. DUKER, *supra* note 51, at 103.

unimpeded right to common law *habeas corpus*.[98] Indeed, there are numerous examples of colonial courts granting and denying *habeas* writs in the ordinary course of their legal duties.[99] Ultimately, leading to the constitutional convention of 1787, the general consensus was that "[t]he Common Law of England [was] generally received" throughout the American Colonies.[100]

After achieving their independence from England, the constitutional convention decided to include the writ of *habeas corpus* in the text of the new United States Constitution.[101] Just four days into the convention, inclusion of the common law right to *habeas corpus* was raised by Charles Pinckney.[102] Pinckney again raised the issue of protecting *habeas* rights when he proposed that the Constitution include an express guarantee of the writ, stating "[t]he privileges and benefits of the writ of *habeas corpus* shall be enjoyed in this government in the most expeditious and ample manner: and shall not be suspended by the Legislature except upon the most urgent and pressing occasion and for a time period not exceeding _____ months."[103] After some minor debate over whether a time limit for *habeas* suspension by the national government should be included, the clause as it currently exists was agreed to.[104] Interestingly, neither Pinckney, nor any other delegates, voiced any recorded objections to the fact that the clause as accepted failed to include an affirmative confirmation of the existence of the right to the *habeas* writ.[105] It seems that the convention unanimously understood the *habeas* right to be one existing at common law to all American citizens.[106]

98. The fact that the American Colonies could not claim *habeas* rights under English statutory provisions—specifically the auspices of the 1679 Act—was made clear by the English courts when they rejected an attempt by the Massachusetts Bay Colony in 1692 to enact a law which mirrored, nearly word for word, the 1679 *habeas* Act: "Whereas. . .the writt of Habeas Corpus is required to be granted in like manner as is appointed by the Statute 31 Car. II in England, which privilege has not yet been granted to any of His Majesty's Plantations, It was not thought fitt in His Majesty's absence that the said Act should continue in force and therefore the same was repealed." A. H. Carpenter, *Habeas Corpus in the Colonies*, 8 AM. HIST. REV. 18, 21 (1902) (citing 1 ACTS AND RESOLVES OF THE PROVINCE OF MASS. 99 (1892)).

99. *See* United States v. Villato, 2 Dall. 370 (Pa. 1797), *infra* note 122; *see also* Ex Parte D'Olivera, 1 Gall. 474, n.123 (Mass. Dist. Ct. 1813); *see also* Wilson v. Izard, 30 F.Cas. 131, n.124 (C.C.D.N.Y. 1815) (describing the basic holdings in these early American *habeas corpus* cases).

100. This was the sentiment of well-respected legal scholar William Smith in 1756. *See* DUKER, *supra* note 51, at 111.

101. U.S. CONST. art. I, § 9, cl. 2.

102. *See* MAX FARRAND, THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787 604–09 (1937).

103. FARRAND, *supra* note 102, at 341 (1937).

104. FARRAND, *supra* note 102, at 435.

105. *See* FARRAND, *supra* note 102, at 435.

106. *See generally* FARRAND, *supra* note 102.

In the end, the Constitution mentions the right to *habeas corpus* only insofar as it restricts the ability of the national government to suspend that right; the document, and the men responsible for its creation, implicitly assumed that, under the common law, a right to *habeas* undoubtedly existed.[107] Furthermore, it seems that the American founders considered the *habeas* writ to be essential to individual liberties for the same reasons as their English predecessors.[108] Martin Luther, commenting on the Constitution's suspension clause in 1788, noted the value of the *habeas* writ in preventing the government from "imprison[ing] them during its pleasure in the remotest part of the union, so that a citizen of Georgia might be bastiled in the furthest part of New Hampshire; or a citizen of New Hampshire in the furthest extreme to the south, cut off from their family, their friends, and their every connexion…."[109] America's founders, like the Englishmen responsible for the Habeas Corpus Acts of 1641 and 1679, were largely concerned with checking the power of the government to arbitrarily detain citizens in distant lands and deprive them of the *habeas* writ.[110] Also, the American framers, like the English, understood common law *habeas* protections to apply to United States citizens alone.[111] Luther explicitly referred only to imprisonment of citizens in distant parts of the union at the command of the national government.[112] Likewise, during the Massachusetts ratifying debates, it was urged, in favor of the Constitution's implied guarantee of common law *habeas* protections, that

107. It is also very likely that the framers of the Constitution considered the right to *habeas corpus* to be protected under the statutory provisions of the constitutions of the individual states as well. In the New York ratifying convention, one delegate remarked "[w]hat clause in the Constitution, except this very clause itself, gives the general government a power to deprive us of that great privilege, so sacredly secured us by our state constitutions?" JONATHAN ELLIOT, 2 DEBATES OF THE STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 399 (1861). The idea that ratifying conventions should remain an important source in determining constitutional meaning was strongly supported by James Madison. Madison believed that the ratifying conventions were a more legitimate source of constitutional understanding than even the constitutional convention itself. JAMES MADISON, THE WRITINGS OF JAMES MADISON 9:72 (1821), *reprinted in* 1THE FOUNDERS' CONSTITUTION c.2, (Gaillard Hunt ed., 1910) (Madison noted in a letter to Thomas Ritchie, "the legitimate meaning of the [Constitution] must be derived from the text itself; or if a key is to be sought elsewhere, it must be. . .in the sense attached to it by the people in their respective State Conventions where it recd. all the Authority which it possesses").

108. *See id.*

109. MARTIN LUTHER, GENUINE INFORMATION (1788), *reprinted in* 3 THE FOUNDERS' CONSTITUTION art. I, § 9, cl. 2, doc. 9 (Herbert J. Storing ed., 1981).

110. *See* DUKER, *supra* note 51, at 126.

111. *See* DUKER, *supra* note 51, at 97 (citing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 156, 10 (1851)).

112. *See* LUTHER, *supra* note 109.

"the *citizen* had a better security for his privilege of the writ of *habeas corpus* under the federal than under the state constitution."[113]

Ultimately, the fact remains that the United States Constitution was created to protect the rights of its citizens. The Constitution itself begins by clearly establishing that the American people are creating the Constitution so that their rights and liberties might be most effectively secured: "We *the People of the United States*…[to] secure the Blessings of Liberty to *ourselves and our Posterity*, do ordain and establish this Constitution for the United States of America."[114] This idea was reaffirmed in 1820 when William Eustis, speaking of the inherent privileges of citizenship, noted, "By whom, and for whose use and benefit, was the Constitution formed? By the people, and for the people, inhabiting the several [United] States."[115] Further, the finalized text of the United States Constitution seems to inescapably support this view that constitutional protections apply only to American citizens: provisions like the Privileges and Immunities clause, and half of the Bill of Rights Amendments, refer directly to the rights of citizens alone.[116]

In the end, the historical record of both English and American common law conceptions of *habeas corpus* rights were certainly directed at controlling the unchecked powers of the King (or the Executive branch under the American Constitution) to detain without cause or justification.[117] However, the record is also clear that this *habeas* protection remained applicable only to subjects of the English King, or citizens of the American States.[118] As such,

113. JONATHON ELLIOT, DEBATE IN MASSACHUSETTS RATIFYING CONVENTION (1788), *reprinted in* 3 THE FOUNDERS' CONSTITUTION art. I, § 9, cl. 2, doc. 10 (1888).

114. U.S. CONST. pmbl. (emphasis added).

115. WILLIAM EUSTIS, ADMISSION OF MISSOURI: HOUSE OF REPRESENTATIVES (1820), *reprinted in* 4 THE FOUNDERS' CONSTITUTION art. 4, § 2, cl. 1, doc. 14 (1856); *see also* ST. GEORGE TUCKER, 1 BLACKSTONE'S COMMENTARIES 301–04 (1803) (advocates of the Alien-Sedition Acts argued that " 'the Constitution was made for citizens, not for aliens, who of consequence have no rights under it, but remain in the country, and enjoy the benefit of the laws, not as a matter of right, but merely as a matter of favour and permission").

116. The Constitution's Privileges and Immunities clause refers solely to the "privileges and immunities of *citizens of the United States*" and the 14th Amendment begins by noting, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United StatesFalse" Further, the 1st ("right of the people to peaceably to assemble. . ."), 2nd ("right of the people to keep and bear arms. . ."), 4th ("right of the people to be secure in their persons, houses, papers, and effects. . ."), 9th ("others [rights] retained by the people") and 10th ("powers not delegated to the United States. . .are reserved to the States respectively, or to the people") Amendments comprising the original Bill of Rights are, by their very language, made directly applicable only to "the people." *See* ASHUTOSH BHAGWAT, THE MYTH OF RIGHTS 263–64 (2010) (citing directly to the Bill of Rights). Considered in their proper context—the entire Constitution—it is evident that "the people" referred to are the same people mentioned in the constitutional preamble, that is to say, "the People of the United States."

117. *See* DUKER, *supra* note 51, at 53, 126.

118. *See* BHAGWAT, *supra* note 116, at 263–64; *see also* DUKER, *supra* note 51, at 44.

Rasul's first argument—that constitutional *habeas corpus* protections should be read as generally applicable to aliens—is contrary to established common law[119] and thus is rejected by this Court.

Likewise, Rasul's second argument—that the Court should reevaluate common law *habeas corpus* and, in light of the writ's historical purpose to check government power to arbitrarily detain, find it applicable to aliens detained abroad[120]—remains unpersuasive. Although the historical purpose of the *habeas* writ is to prevent government—and here, Executive—abuses of power, that purpose remains applicable only to situations involving citizens or subjects in the case of the writ under English common law.[121] As such, this Court refuses to diverge from centuries of established common law *habeas* understanding and jurisprudence by expanding the constitutional grant of *habeas* rights to non-citizens detained outside of the United States.[122]

## VI. GEOGRAPHIC REACH OF *HABEAS CORPUS*

Rasul's final argument is that the facts of this case are sufficiently unique to warrant an extension of constitutional *habeas corpus* protections to non-U.S. citizens detained under the authority of the U.S. government in areas where the United States maintains essential, but not official, sovereignty.[123] In considering this contention, we must begin by again looking at the English history of the *habeas* writ.

As discussed in detail earlier, the English common law writ of *habeas corpus* began as a way to require subjects to appear before the King's court, but by the mid Seventeenth century the writ had become the primary means of preventing unlawful detention and imprisonment by the King (or courts acting under royal authority).[124] The Habeas Corpus Act of 1641 began to address this issue of royal abuse, and the subsequent passage of the 1679 Act solidified the *habeas* writ as a primary common law means of curbing unlawful detention by

119. *See* BHAGWAT, *supra* note 116, at 263–64.

120. *See* Rasul v. Bush, 542 U.S. 466, 475 (2004).

121. *See* DUKER, *supra* note 51, at 126.

122. We also implicitly reject any hypothetical arguments that allowing the Executive to detain aliens abroad without regard to constitutional *habeas corpus* rights will inevitably lead to an eventual usurpation of the *habeas* rights of United States citizens, whether abroad or domestically. There is no reason to believe that merely because aliens detained abroad do not have constitutional *habeas corpus* rights, the President will subsequently, and in blatant disregard of the express terms of the Constitution, begin detaining American citizens and denying them the protections of the *habeas* writ. Speculation and conjecture alone are surely insufficient to warrant a holding in favor of Rasul today. *Rasul*, 542 U.S. at 480–84.

123. *Id.*; *see also* Ex Parte D'Olivera, 1 Gall. 474 (Mass. Dist. Ct. 1813).

124. Wilson v. Izard, 30 F.Cas. 131 (C.C.D.N.Y. 1815).

the King and his royal courts.[125] The English Habeas Corpus Act of 1679 was enacted specifically in response to a growing concern of English subjects: the King, and royal courts, were increasingly detaining subjects in distant lands and "beyond the seas"[126] in order to avoid having to grant *habeas* petitions and justify the reasons for that detainment.[127] Ultimately, the 1679 Act concluded, "*habeas corpus* according to the true intent and meaning of this act, may be directed and run into any county palatine, the cinque-ports, or other privileged places within the kingdom of *England*…."[128] Subsequent legal commentators would confirm that common law *habeas*, codified in the 1679 Act, was "a high prerogative writ…running into all parts of the king's dominion."[129] Blackstone summarized the state of English common law *habeas* by merely reciting the eighth and ninth sections of the 1679 Act: "this writ of *habeas corpus* shall run into the counties palatine, cinque ports, and other privileged places, and the islands of Jersey and Guernsey.[130] That no inhabitant of England…shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the king's dominions…."[131]

This historical fact—that the reach of common law *habeas corpus* extended to all parts of the English kingdom—was further supported by jurisprudence at the time. Cases such as *King v. Schiever*,[132] *Sommersett v. Stewart*,[133] and the *Case of Hottentot Venus*[134] all evidenced that common law *habeas corpus* extended even to aliens detained in areas where the English King reserved sovereignty. This English precedent was later followed by early

125. The 1679 Act specifically observed that, "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." Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.).

126. *Id.* § 11.

127. *See supra* notes 83–84 and accompanying text (recalling the impeachment charge against the English Lord High Chancellor, the Earl of Clarendon, claiming that he "hath advised and procured divers of his majesty's subjects to be imprisoned against law, in remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law, and to produce precedents for the imprisoning of any other of his majesty's subjects in like manner").

128. Habeas Corpus Act, 1679, 31 Car. 2, c. 2, § 10 (Eng.).

129. WILLIAM BLACKSTONE, COMMENTARIES, 3:129–37 (1768), *reprinted in* 3 THE FOUNDERS' CONSTITUTION (Herbert J. Storing ed., 1981).

130. BLACKSTONE, *supra* note 129 (quoting Habeas Corpus Act, 1679, 31 Car. 2, c. 2, § 9 (Eng.)).

131. BLACKSTONE, *supra* note 129 (quoting Habeas Corpus Act, 1679, 31 Car. 2, c. 2, § 9 (Eng.)).

132. Rex v. Schiever, (1759) 97 Eng. Rep. 551 (K.B.) 551–52 (In this case, a *habeas* petition was taken from a French prisoner of war captured by the English navy).

133. Somerset v. Stewart, (1772) 20 How. St. Tr. 1 (K.B.) 79–82 (English courts allowed a *habeas* petition by an African slave purchased in Virginia and confined on a ship docked in England).

134. The Case of the Hottentot Venus, (1810) 104 Eng. Rep. 344 (K.B.) (English courts permitted a *habeas* petition from a native of South Africa who was held in private custody).

American courts. Cases such as *Villato*,[135] *Ex Parte D'Olivera*,[136] and *Izard*[137] saw U.S. courts hold that non-citizens were entitled to *habeas corpus* review. Additionally, there is an abundance of other recorded cases lending support to the notion that common law *habeas corpus* could extend into dominions of the English King even where the crown lacked absolute sovereignty.[138]

However, despite this wealth of jurisprudence favoring Rasul's contention that common law *habeas* historically applied to aliens detained abroad[139], a closer inspection indicates that, in reality, the above cases remain totally and utterly distinct from the instant circumstances surrounding aliens detained by the U.S. government at Guantanamo Bay, Cuba.

First, in each of the English cases where *habeas corpus* petitions were permitted to imprisoned aliens, the alien was detained on territory that was indisputably under the complete and total sovereign jurisdiction of England.[140] In *Schiever*, the petitioner was being detained in the renowned English city of Liverpool at the time he sought *habeas corpus* protections under the common law.[141] Meanwhile, *Sommersett* involved a slave who was being confined aboard an English ship in the service of the British government and docked in an English port.[142] Finally, the *Case of Hottentot Venus* dealt with the *habeas* petition of a young woman who had been taken from her home in South Africa and made to perform as a sexual exhibitionist in the English capital city of London.[143] Certainly, all of these cases involved aliens detained on what was undeniably English sovereign territory: Liverpool, an English ship, and the English capital of London.[144] Conversely, in the instant case, Rasul is detained on property that, according to the lease agreement between Cuba and the United States, remains under the "ultimate sovereignty" of the Cuban

135. United States v. Villato, 2 Dall. 370 (Pa. 1797) (Holding that *habeas* relief was available for a Spanish-born prisoner).

136. Ex Parte D'Olivera*,* 1 Gall. 474 (Mass. Dist. Ct. 1813) (Deciding that *habeas* required the release of Portuguese detainees).

137. Wilson v. Izard, 30 F.Cas. 131 (C.C.D.N.Y. 1815) (The court determined that they would consider the *habeas* petitions of persons considered enemy aliens).

138. *See e.g.,* Bourn's Case, (1619) 79 Eng. Rep. 465 (K.B.), Alder v. Puisy, (1671) 89 Eng. Rep. 10 (K.B.), Jobson's Case, (1626) 82 Eng. Rep. 325 (K.B.), King v. Overton, (1668) 82 Eng. Rep. 1173 (K.B.), and King v. Salmon, (1669) 84 Eng. Rep. 282 (K.B.).

139. Rasul v. Bush, 542 U.S. 466, 481–82 (2004).

140. *See* cases cited *supra* notes 132–37 and accompanying text.

141. Rex v. Schiever, (1759) 97 Eng. Rep. 551 (K.B.) 551.

142. Somerset v. Stewart, (1772) 20 How. St. Tr. 1 (K.B.) 79.

143. The Case of the Hottentot Venus, (1810) 104 Eng. Rep. 344 (K.B.).

144. *See* cases cited *supra* notes 141–43 and accompanying text.

government.[145] At best, the applicability of these cases appears a reaching stretch when applied to the U.S. naval base at Guantanamo Bay.[146]

Next, in considering the subsequent American cases evidencing the possibility of *habeas* rights for aliens on sovereign American lands, we find similar difficulties. In *Villato*, the petitioner had sworn an oath to the state of Pennsylvania prior to being imprisoned for treason on board a ship owned by the state of New York.[147] *D'Olivera* concerned a *habeas* petition by a foreign national being held in Boston, Massachusetts,[148] and the detainees seeking *habeas* relief in *Izard* were serving as volunteer soldiers in the United States military and were stationed in New York at the time they sought *habeas* protections.[149] Again, and like their English predecessors, these American cases evidence only that an alien detained on what is clearly sovereign U.S. territory may be entitled to constitutional, common law *habeas corpus* rights.[150] The degree of control exercised by the United States at the Guantanamo Bay naval base is undeniably extensive, but it is nonetheless a leased tract of land for which the U.S. pays an annual rent[151] and may abandon at any time with no consequences to either the United States or Cuba.[152]

The second grouping of cases—seeming to support the argument that the common law *habeas* writ extended to areas where the English crown retained less than absolute sovereignty—also, upon closer inspection, prove uncompelling. Each of the cases apparently favoring this proposition remains highly distinguishable from the current situation of aliens detained at

145. Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, U.S.-Cuba, Feb. 23, 1903, art. III T.S. No. 418.

146. The status of the U.S. naval base at Guantanamo Bay, Cuba is certainly distinct from these English cases; whereas the detainees in those cases were clearly being confined in sovereign English territory, the situation in Guantanamo Bay remains, at the very least, far more complicated. *See* cases cited *supra* notes 141–43 and accompanying text.

147. *See* United States v. Villato, 2 Dall. 370 (Pa. 1797). "[T]he petitioner in this case was filing for a writ of *habeas corpus* under the express statutory provisions of a Pennsylvania state law, and not under the common law principles directly applicable to constitutional *habeas corpus*." *Id.*

148. *See* Ex Parte D'Olivera, 1 Gall. 474 (Mass. Dist. Ct. 1813).

149. *See* Wilson v. Izard, 30 F.Cas. 131 (C.C.D.N.Y. 1815).

150. *See* cases cited *supra* notes 147–49 and accompanying text.

151. Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, U.S.-Cuba, Feb. 23, 1903, art. III, T.S. No. 418. (the lease agreement required the United States to pay Cuba an annual rent of "two thousand dollars, in gold coin of the United States" and to maintain "permanent fences" around the naval base).

152. Subsequent treaty agreements provided that the land would remain a U.S. naval base so long as America did not abandon the area. *See* Rasul v. Bush, 542 U.S. 466, 481–82 (2004). However, none of the agreements between the two nations actually required the United States, or Cuba, to take any other affirmative steps to ensure continued U.S. presence in Guantanamo Bay. *Id.*

Guantanamo Bay.[153] *Alder* and *Bourn's Case* involved running *habeas* writs to "cinque-ports;" these small areas were intimately connected with the English crown, acquiring legal privileges, such as *habeas* rights, and seats in Parliament in exchange for allowing the English navy full use of their docking bays.[154] *Jobson's Case*, meanwhile, concerned *habeas* writs in the "County Palatine" of Durham.[155] These counties were merely areas of English land in which the King permitted local nobles to rule and manage daily affairs.[156] Finally, the cases of *Overton* and *Salmon* each dealt with the extension of *habeas corpus* rights into the Isle of Jersey.[157] This island is the largest of the present day Channel Islands and remains a protectorate of the English government, a crown dependency, and entirely reliant on England for its national defenses.[158] Furthermore, each of these cases involved *habeas* petitions filed by persons considered to be, at the very least, English subjects.[159] In the end, all these cases show is that common law *habeas corpus*

153. *See e.g.,* Bourn's Case, (1619) 79 Eng. Rep. 465 (K.B.), Alder v. Puisy, (1671) 89 Eng. Rep. 10 (K.B.), Jobson's Case, (1626) 82 Eng. Rep. 325 (K.B.), King v. Overton, (1668) 82 Eng. Rep. 1173 (K.B.), and King v. Salmon, (1669) 84 Eng. Rep. 282 (K.B.).

154. *See* WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 78–79 (1768). Blackstone noted that these areas remained "exempt" from English authority insofar as they constituted local franchises granted to nobles where the crown allowed local court authorities unlimited jurisdiction to deal with private disputes. *Id.* Nonetheless, these local independent courts were still subject to review by English royal courts via writ of error petitions. *Id.* at 79. Certainly Guantanamo Bay was not formed by such delegation of sovereign judicial authority by the Cuban government to the United States, or vice versa.

155. Jobson's Case, (1626) 82 Eng. Rep. 325 (K.B.).

156. The counties palatine, much like the Cinque-Ports, were based on a delegation of English sovereign power to local authorities. Those local authorities, however, ultimately remained subject to the check of English courts of appeal. *See* BLACKSTONE, *supra* note 154, at 78–79.

157. *See* King v. Overton, (1668) 82 Eng. Rep. 1173 (K.B.); King v. Salmon, (1669) 84 Eng. Rep. 282 (K.B.).

158. BLACKSTONE, *supra* note 89, at 102–05. In general, many areas of the expansive English Empire were considered "dominions of the crown of Great Britain" despite not actually be located within England proper (areas like Scotland, Ireland, Wales, and even the American Colonies). *Id.* at 93. Nonetheless, these areas remaining outside of the British Isles were nonetheless subject to the political dictates of the English King. Conversely, Guantanamo Bay remains Cuban property *leased* to the United States for operation as a military base; at no point did Cuba, or the U.S., claim that this small coastal area was being brought within the protection or dominion of the United States.

159. The court here understands that there is certainly a distinction between what it meant to be an English *subject* and what now it means to be an American *citizen*. The use of the term *subject* was far more widely used than is the term citizen today. *See* PAUL HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 34–35 (2010). Nonetheless, what matters for our purposes in analyzing the reach of common law *habeas corpus* is that both *subjects* and *citizens* are quintessentially those persons who come under the legal jurisdiction, protection, and authority of the "mother-country" (either England, or the United States, in our considerations); *see also infra* notes 113 &114 and accompanying text (discussing Justice Scalia's dissenting opinion in *Rasul*

rights extended to areas and lands remaining dependent upon the English state for their basic survival.[160] Further, even if the cases are treated as indicative of the applicability of common law *habeas corpus* to territories where England retained only de facto sovereignty, Rasul's final argument still fails because each of the aforementioned cases concerns *habeas* writs filed by English *subjects*.[161]

In the present case, Guantanamo Bay is neither a U.S. protectorate, nor a sovereign land owing any independent allegiances to the United States.[162] Instead, this area of Cuba is most accurately described as ceded territory,[163] in which case, Blackstone notes, "the common law [of the U.S. Constitution]…ha[s] no allowance or authority there *per se*: 'they being no part of the mother country, but distinct (though dependent) dominions'."[164] In the case of Guantanamo Bay, this area is certainly not part of the "mother country," the U.S., and is instead the result of a simple property lease agreement between two totally distinct and independent sovereign nations.[165]

and his argument that *habeas* petitions were allowed to the individuals in these particular cases because they were all, by virtue of the status of the territory they resided in, considered to be *subjects* of the English crown).

160. *See e.g.,* Bourn's Case, (1619) 79 Eng. Rep. 465 (K.B.), Alder v. Puisy, (1671) 89 Eng. Rep. 10 (K.B.), Jobson's Case, (1626) 82 Eng. Rep. 325 (K.B.), King v. Overton, (1668) 82 Eng. Rep. 1173 (K.B.), and King v. Salmon, (1669) 84 Eng. Rep. 282 (K.B.).

161. Despite the historical difference between English subjects and American citizens, it remains clear that Rasul would not, under even the most generous of definitions, be considered an American citizen. The facts of the case make clear that Rasul has never claimed American citizenship, he has never been detained or confined on American soil, and he has no political allegiance or connection with the United States government aside from his imprisonment at Guantanamo Bay. *See* Rasul v. Bush, 542 U.S. 466, 470–71 (2004).

162. Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, U.S.-Cuba, Feb. 23, 1903, art. I, T.S. No. 418.

163. Guantanamo Bay is leased property and thus may certainly qualify as "ceded," at least in a conditional sense. As a piece of Cuban land leased to the United States for compensation (the annual rent), Guantanamo Bay seems most appropriately viewed as land ceded by Cuba to the United States on a conditional basis (the conditions being stated in the original lease agreement and subsequent treaty between the nations: specifically, the payment of the annual rent, the maintenance of permanent fences around the base, and the continued American presence within the leased area). As such, Blackstone makes clear that the common law of the "mother-country" (here, the United States) remains *per se* inapplicable without a manifest intent to make it applicable to that ceded territory. The Constitution, created over a century before this territory was even formed, certainly failed to manifest such intent; accordingly, the common law *habeas* rights of the U.S. Constitution remain inapplicable to aliens detained within the Guantanamo Bay territory absent such constitutional intent to allow *habeas* rights to run to such territory. *Id.*

164. DUKER, *supra* note 51, at 44.

165. Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, U.S.-Cuba, Feb. 23, 1903, art. I, T.S. No. 418.

## VII. CONCLUSION

In sum, this Court finds that the constitutional right to *habeas corpus* review, understood according to its traditional and historical common law meaning, does not apply to aliens detained at the United States naval base in Guantanamo Bay, Cuba. Petitioner Rasul is neither a U.S. citizen, nor is he detained on territory over which the United States retains sole, absolute, and unequivocal sovereignty.[166] Rather, petitioner Rasul remains an alien detained on Cuban property ceded, via a lease agreement, to the United States.[167] As such, petitioner's request for constitutional *habeas corpus* is hereby DENIED.

## STEVENS' *RASUL* VERSUS THE "NEW" *RASUL*

The U.S. Supreme Court's and my own analysis of the *Rasul* case began in the same way; first, we both agreed that constitutional *habeas* claims must be considered in terms of the common law, both in historic English practice and subsequently in the colonial and founding eras of American judicial development.[168] Further, both agreed that the historical cases indicated that the traditional, common law *habeas* writ did extend to areas beyond the immediate sovereign territory of the British Isles or continental United States.[169]

However, it is at this point that our analyses diverge. While the Stevens' Court found that the historical record indicated that common law *habeas* ran into areas where the English crown (and, subsequently, the United States government) retained only practical control and jurisdiction,[170] my own inquiry determined that the cases evidenced that common law *habeas* writs ran into those places remaining unquestionably under the sovereign control of the English crown and United States government.[171] Although the premise of the Stevens' Court—that common law *habeas* rights could issue in lands not under the immediate and absolute sovereignty of the nation granting that writ[172]—remains plausible in theory, I simply was unable to find a single case that supports such a possible understanding of common law *habeas corpus*.[173]

166. *Rasul*, 542 U.S. at 490.

167. *Id.* at 501–02.

168. *Id.* at 473–74.

169. *Id.* at 482, n.14.

170. *Id.*

171. *See id.* at 481–82, nn.12–13 (discussing cases in support of the idea that common law *habeas* ran into territory where something less than ultimate sovereignty by the mother-country existed).

172. *Rasul*, 542 U.S. at 481–82.

173. This is a fact alluded to by Justice Scalia in his dissenting opinion in *Rasul*. *See id.* at 501–03. Indeed, much of my analysis of the historical record is guided by the discussion of the majority's cited cases by the *Rasul* dissent. Justice Scalia correctly observes "[t]he Court cites not a single case holding that aliens held outside the territory of the sovereign were within reach of the writ." *Id.* at 505, n.5.

Ultimately, the fact remains that the cases cited by the *Rasul* majority do not withstand closer scrutiny regarding their actual applicability to the factual situation in *Rasul*.[174] The dissenting opinion of Justice Scalia also points out that those cases are inapplicable because they all involve only two situations.[175] In the first set of cases[176] the *habeas* writ was permitted to individuals who were detained on what was undeniably English (or American)[177] sovereign territory. In the second set of cases,[178] the court determined that the petitioners were entitled to the *habeas* writ because they were each considered subjects of the English crown. In no case, Justice Scalia observed, did the Stevens' majority uncover evidence that the common law *habeas* writ extended to a non-English subject (or non-American citizen) who was detained in a territory not explicitly within the absolute and uncontested sovereignty of the mother-country against whom the *habeas* writ was sought.[179]

Finally, the particular facts of the *Rasul* case seem to remain sufficiently distinct from all the cases cited by the Stevens' Court to warrant finding against the extension of constitutional *habeas* rights.[180] Again, as the dissent observed:

> All of the dominions in the cases the Court cites—and all of the territories Blackstone lists as dominions—are the sovereign territory of the crown: colonies, acquisitions and conquests, and so on. It is an enormous extension of the term to apply it to installations merely leased for a particular use from another nation that still retains ultimate sovereignty.[181]

174. *See supra* notes 132–38 and accompanying text describing my analysis of the Stevens' Court's cases, and discussing why those cases remain inapplicable and unpersuasive.

175. *Rasul*, 542 U.S. at 502–03.

176. *See supra* notes 141–43 and accompanying text describing the cases of *Schiever, Sommersett,* and *Hottentot Venus*.

177. *See supra* notes 147–49 and accompanying text describing the majority opinions in *Villato, D'Olivera,* and *Izard*.

178. These cases were *Bourn's Case, Alder, Jobson's Case, Overton,* and *Salmon*. Each case dealt with *habeas* petitions by persons considered to be English subjects by virtue of the intimate relationship between their domicile and the English crown. *See* 3 BLACKSTONE, *supra* note 154, at 131 (noting that *habeas* "run[s] into all parts of the king's dominions [because] the king is at all times entitled to have an account why the liberty of any of his *subjects* is restrained"); *see also supra* note 92. Furthermore, as described in detail in my "new" *Rasul* opinion, these cases remain further inapposite because they concerned territories where the English crown continued to retain ultimate sovereignty. *See* cases cited *supra* note 138 and accompanying text.

179. *Rasul,* 542 U.S. at 504.

180. *See* Johnson v. Eisentrager, 339 U.S. 763 (1950) (holding that German nationals held in Germany had no right to writ of habeas corpus); *see also* Ahrens v. Clark, 335 U.S. 188 (1898) (holding that the District Court of Columbia lacked jurisdiction to hear 120 German detainees' habeas claims).

181. *Rasul*, 542 U.S. at 503.

The naval base at Guantanamo Bay is, in the end, merely a leased tract of coastal property located in a foreign nation owing no allegiance to the United States and under no other political or social obligations (aside from the specific, contractual lease agreement terms) with the U.S. government.[182]

## CONCLUSION: REAFFIRMING HISTORY

Thus, in considering the historical records of common law *habeas corpus*—as developed in England and further advanced in colonial and founding American jurisprudence—it remains evident that constitutional *habeas corpus* rights do not run to aliens detained in territories where the United States exercises substantial, but not official or ultimate, sovereignty. As such, I believe that the Stevens' Court incorrectly decided *Rasul*—and subsequently *Boumediene*[183]—and instead a holding akin to my own analysis, and that of Justice Scalia's dissent in *Rasul*,[184] form a more proper understanding of *habeas corpus* rights under the United States Constitution.

182. Lily Rothman, *Why the United States Controls Guantanamo Bay*, TIME (Jan. 22, 2015), http://time.com/3672066/guantanamo-bay-history/.

183. Boumediene v. Bush, 553 U.S. 723 (2008).

184. *See Rasul*, 542 U.S. at 501.