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Recommended Citation
Brian Farrell, Habeas Corpus in Times of Emergency: A Historical and Comparative View, Pace Int'l L. Rev. Online Companion, Apr. 2010, at 74.

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PACE UNIVERSITY
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INTERNATIONAL LAW REVIEW
ONLINE COMPANION

Volume 1, Number 9 April 2010

HABEAS CORPUS IN TIMES OF EMERGENCY: A HISTORICAL AND COMPARATIVE VIEW

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The right to a judicial determination of the legality of an individual's detention, commonly known as the right to habeas corpus, is considered to be one of the most fundamental guarantees of personal liberty. By allowing an independent judge to review the basis of a person's detention and order the detainee's release if the grounds are unlawful, habeas corpus serves as a bulwark against arbitrary arrest, torture, and extrajudicial killings.[1] This right, whose evolution was largely driven by historic struggles to impose limits on the power of the monarch, is today widely protected in domestic and international law.[2]

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[1] In the United States federal system, the role of habeas corpus includes use as a postconviction remedy.

[2] *See generally*, Brian Farrell, *From Westminster to the World: The Right to Habeas Corpus in International Constitutional Law*, 17 MICH. ST. J. INT'L L.

Questions regarding the proper scope of habeas corpus have been brought into sharp focus in the past decade. In the years since the September 11, 2001 terrorist attacks, hundreds of people have been detained by the United States government as part of its "war on terror" at locations such as the Guantanamo Bay Naval Base in Cuba and Bagram Airfield in Afghanistan.[3] Most of these detainees face indefinite detention and have neither been charged with a crime nor afforded prisoner of war status.

Many Guantanamo Bay and Bagram detainees have sought to use habeas corpus proceedings to challenge the legality of their detention. The United States government initially took the position that habeas corpus was not available to detainees because of their status as "enemy combatants" and their location outside of the sovereign territory of the United States.[4] In 2004, the United States Supreme Court held in *Rasul v. Bush*[5] that non-citizen detainees at Guantanamo Bay were entitled to file habeas corpus petitions in federal courts. Congress subsequently made a political determination as to the appropriate scope of habeas corpus and passed legislation that, in part, stripped federal courts of jurisdiction to hear habeas corpus petitions brought by enemy combatants.[6] The United States Supreme Court found this jurisdiction-stripping provision unconstitutional in its 2008 ruling in *Boumediene v. Bush*.[7]

Despite these Supreme Court rulings as to Guantanamo Bay detainees, the government also continues to resist access to habeas corpus for detainees in Afghanistan. On April 2, 2009, the federal district court for the District of Columbia held that habeas corpus was available to non-Afghan citizens detained at Bagram Airfield pursuant to the Supreme

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551 (2009).

[3] *See* Steve Vogel, *Afghan Prisoners Going to Gray Area: Military Unsure What Follows Transfer to U.S. Base in Cuba*, WASH. POST, Jan. 9, 2002, at A1; Eric Schmitt, *U.S. to Expand Detainee Review in Afghan Prison*, N.Y. TIMES, Sept. 12, 2009, at A1.

[4] Memorandum from Patrick Philbin and John Yoo, Dep. Asst. Att'ys Gen., U.S. Dep't of Justice, to William Haynes II, Gen. Counsel, Dep't of Defense, Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba 1 (Dec. 28, 2001) [hereinafter Memo of Dec. 28, 2001], *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/01.12.28.pdf.

[5] Rasul v. Bush, 542 U.S. 466 (2004).

[6] Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600, 2608-09 (2006) (codified in scattered sections of 10, 28 & 42 U.S.C.).

[7] Boumediene v. Bush, 128 S.Ct. 2229 (2008).

Court's *Boumediene* decision.[8] Within days, the government moved for certification to appeal and for a stay of proceedings, both of which were granted.[9] It argued, in part, that habeas corpus petitions would interfere with military operations and Executive Branch authority.[10]

The question of whether detainees such as those at Bagram and Guantanamo Bay should have access to habeas corpus is a complex one. It involves issues of territorial jurisdiction, effective control, separation of powers, and the status of the individuals. It implicates domestic statutory law, case law, and constitutional law, as well as international humanitarian law and, arguably, international and regional human rights law.

However, at a more basic level, this question must be postured as an inquiry as to the nature of the right of habeas corpus and the applicability of the rule of law during national security emergencies. At this level, the situation presented by detainees at Guantanamo Bay or Bagram is not entirely unique. It represents another example of those situations in which governments have attempted to deny the availability of habeas corpus based on real or perceived threats to national security.

This article does not attempt to resolve the many legal questions surrounding availability of habeas corpus under American jurisprudence. Instead, it strives to provide perspective for the ongoing legal and political debate by analyzing the nature of the right to habeas corpus by reference to the history of the right and through comparative examples. The article begins with a look at the historical development of the right to habeas corpus. It then examines the role that habeas corpus has played during emergency situations in several countries. Finally, based on these illustrations, the article draws conclusions as to the nature of the right and the consequences of its suspension.

I. THE ORIGINS AND DEVELOPMENT OF HABEAS CORPUS

The genesis of habeas corpus lies in the establishment of a central court system which was superimposed over England's existing local courts after the Norman Conquest in 1066.[11] A procedure was needed to

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[8] *See* Al Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C. 2009).

[9] *Id.* at 57-58.

[10] Brief for Respondents-Appellants at 44, 54-55, Al Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C. 2009), *appeal docketed*, No. 09-5265 (Cir. D.C. 2009).

[11] WILLIAM DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 14 (1980).

summon an individual before these central courts, and this was accomplished through the creation of a device commanding the sheriff to bring the party to the judge. By the early thirteenth century this procedure was firmly established and was known as the writ of *habeas corpus*, the Latin for "you have the body."[12] Habeas corpus, the great bulwark of liberty, thus originated as an exercise of the crown's authority, and only issued at the court's prerogative.

By the mid-fourteenth century, however, this was changing, primarily as a result of judicial rivalry. Cases from the time show that the writ of habeas corpus was being issued at the request of persons in jail who were awaiting civil trials in the lower courts.[13] While the central courts' true motivation was often to divest the lower court of its jurisdiction and generate increased revenue for itself,[14] two important transformations were occurring. An individual could now initiate a habeas corpus proceeding, and the courts were now using habeas corpus to examine the grounds for the individual's detention.

By the time Parliament took actions to curb abuses in the central courts' use of habeas corpus,[15] their supremacy over the older local courts had already been established. The central, or superior, courts next began to use habeas corpus as a means of challenging each others' authority. In particular, the courts of common law used the writ to review the legality of imprisonment ordered by the ecclesiastical court, courts of admiralty, and chancery.[16]

The reach of habeas corpus continued to extend and by the late sixteenth century it was being used to inquire into detentions ordered by the king's Privy Council, an administrative body that exercised both judicial and executive functions.[17] These inquiries might have had little imme-

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[12] *Id.* at 15-17.

[13] Y.B. 14 Edw. 3, Trin. 1 (1340) (Eng.).

[14] DUKER, *supra* note 11, at 29.

[15] *See, e.g.*, Statute of Leicester, 1414, 2 Hen. 5, c. 2, § 4 (Eng.); 1433, 11 Hen. 6, c. 10 (Eng.); 1554, 1 & 2 Phil. & M., c. 13, § 7 (Eng.); 1601, 43 Eliz., c. 5, § 2 (Eng.).

[16] *See, e.g.*, Y.B. 22 Edw. 4, Mich. 21 (1483) (Eng.); Thomlinson's Case, (1605) 77 Eng. Rep. 1379 (K.B.); Glanville v. Courtney, (1610) 80 Eng. Rep. 1139 (K.B.); Addis' Case, (1610) 79 Eng. Rep. 190 (K.B.); Chancey's Case, (1612) 77 Eng. Rep. 1360 (K.B.); King v. Dr. Gouge, (1615) 81 Eng. Rep. 98 (K.B.); Hawkeridge's Case, (1617) 77 Eng. Rep. 1404 (C.P.).

[17] DUKER, *supra* note 11, at 40.

diate importance, as the courts tended to give the Council great deference.[18] Historically, however, they represented a watershed moment, as they marked the dawn of judicial scrutiny of detentions ordered by the executive.

By the early seventeenth century, the judicial development of habeas corpus was supplemented by Parliamentary concern about the authority of the monarch. In 1628, Parliament addressed executive detention by passing resolutions calling for habeas corpus to be available in all cases of detention, and for the release of any imprisoned person if no lawful grounds existed for the detention.[19] As a compromise, the King accepted, in the so-called Petition of Right, the proposition that he could no longer imprison without showing cause.[20] Although its legal force was initially questioned,[21] this proposition came to be generally accepted with the passage of time.[22] The role of habeas corpus in reviewing detentions ordered by the king was slowly becoming established, through judicial development and later through legislative action.

Even during the eleven year suspension of Parliament by King Charles I from 1629 to 1640, habeas corpus continued to be employed to review most executive orders of imprisonment.[23] A notable exception was those detentions ordered by the Court of Star Chamber, a secretive political court renowned for its abuses of power,[24] with which the com-

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[18] *See* Hellyard's Case, (1587) 74 Eng. Rep. 455 (K.B.); Peter's Case, (1586) 74 Eng. Rep. 628 (1586); Howel's Case, (1586) 74 Eng. Rep. 65 (K.B.) (holding the committal valid after being informed the action had been taken by the entire Council); *but see* Search's Case, (1586) 74 Eng. Rep. 65 (K.B.) (holding insufficient a return citing letters patent from the Queen as the basis for imprisonment).

[19] *See* Darnell's Case, 3 St. Tr. 1 (1627).

[20] R.J. SHARPE, THE LAW OF HABEAS CORPUS 13-14 (1989).

[21] *See* Six Members' Case, 3 St. Tr. 235 (1629).

[22] SHARPE, *supra* note 20, at 14. The Petition of Right is also responsible for the association between habeas corpus and the Magna Carta. As they sought to strengthen habeas corpus, members of Parliament embraced the romantic notion that the Magna Carta was the source of the writ. DUKER, *supra* note 11, at 45. Most modern scholars now conclude that habeas corpus did not have its origins in the Magna Carta. *See* J.C. HOLT, MAGNA CARTA 11 (1965); DUKER, *supra* note 11, at 45; Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. SCH. J. HUM. RTS. 375, 377 (1998).

[23] *See* Chambers's Case, (1628) 79 Eng. Rep. 717 (K.B.); Lawson's Case, (1638) 79 Eng. Rep. 1038 (K.B.); Barkham's Case, (1638) 79 Eng. Rep. 1037 (K.B.); Freeman's Case, (1640) 79 Eng. Rep. 1096 (K.B.).

[24] *See* HAROLD POTTER, A HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 135-36 (1932); GOLDWIN SMITH, A CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 258-59 (1955).

mon law courts were reluctant to interfere.[25] The development of habeas corpus was no longer solely driven by the judiciary, though, and Parliament again strengthened the writ upon reconvening in 1640. The Habeas Corpus Act of 1640 abolished the Star Chamber[26] and provided that any person imprisoned by executive organs could seek review by the common law courts via habeas corpus.[27] The Act set a time limit of three days for the court to act and imposed damages on judges who failed to comply.[28]

The tension between king and Parliament grew, and in 1641 Parliament issued its list of complaints against the king known as the "Grand Remonstrance."[29] Among the charges leveled at the monarch were his disregard for the Petition or Right and his unjust imprisonment of subjects.[30] Civil war erupted in 1642 and Charles I was beheaded in 1649.[31] Despite the removal of the monarch, unlawful imprisonment continued, with courts often unwilling to act or intimidated into compliance by the new executive.[32]

Attempts to evade the reach of habeas corpus were common following the restoration of the monarchy. Prisoners were transferred to Scotland or overseas in an effort to put them beyond the writ's scope, or were continually moved to thwart service on the right custodian.[33] Increasingly, Parliament intervened, going so far as to impeach the Lord High Chancellor for causing subject to be "imprisoned against law, in remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law," amongst other charges.[34] Still, it could not close many loopholes that limited the effectiveness of habeas corpus despite

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[25] *Chambers's Case*, 79 Eng. Rep. at 747.

[26] An Act for the Regulating the Privie Councell and for taking away the Court commonly called the Star Chamber, 1640, 16 Car., c. 10, § 1 (Eng.), *available at* http://www.british-history.ac.uk/report.asp?compid=47221.

[27] *Id.* § 6.

[28] *Id.*

[29] Grand Remonstrance (1641), *reprinted in* CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 1625-1660, at 209-10 (Samuel Gardiner ed., 1906).

[30] *Id.* arts. 11-12, 14-15.

[31] GOLDWIN ALBERT SMITH, A HISTORY OF ENGLAND 325, 339 (1949).

[32] *See* Streater's Case, 5 St. Tr. 366 (1653); Lilburne's Case, 5 St. Tr. 371 (1653); Cony's Case, 5 St. Tr. 935 (1655).

[33] SHARPE, *supra* note 20, at 18; DUKER, *supra* note 11, at 52-53.

[34] *See* Edward Earl of Clarendon's Trial, 6 St. Tr. 291 (1667).

repeated attempts.[35]

Finally in 1679, Parliament passed comprehensive legislation enhancing habeas corpus. The Habeas Corpus Act of 1679 limited movement of prisoners, prohibited imprisonment in Scotland, Ireland, the islands, and overseas, required judges to consider habeas corpus petitions in a timely manner, set time limits for the production and, if ordered, release of prisoners, and guaranteed speedy trials.[36] The Act marked the full arrival of habeas corpus and firmly established its status as a check against the illegal deprivation of liberty by the State.

Habeas corpus continued to develop in English law[37] and was eventually exported to British colonies and beyond. The earliest constitutional guarantee of habeas corpus occurred in the United States in 1789. Article I of the United States Constitution guarantees that "[t]he 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."[38]

The right to habeas corpus has spread worldwide in the past two centuries as a result of the influence of Anglo-American law and the inclusion of habeas corpus principles in post-World War II international and regional human rights instruments.[39] Today, sixty-four national constitutions contain an express right to habeas corpus.[40] Four prohibit the suspension of habeas corpus.[41] Another fifty contain both a guarantee of

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[35] Attempts to strengthen habeas corpus were made in 1668, 1669, 1673, 1675, 1676 and 1677. *See* DUKER, *supra* note 11, at 53-58; Helen Nutting, *The Most Wholesome Law – The Habeas Corpus Act of 1679*, 65 AM. HIST. REV. 527, 528-43 (1960). In addition to loopholes leaving habeas corpus open to abuse, it was also uncertain whether writs of habeas corpus could be issued by courts out of their regular term. *See* Jenkes' Case, 6 St. Tr. 1190 (1676).

[36] Habeas Corpus Act 1679, 31 Car. 2, c. 2 (Eng.), *available at* http://british-history.ac.uk/report.asp?compid=47484.

[37] *See* Habeas Corpus Act 1816, 56 & 57 Geo. 3, c. 100 (Eng.) (allowing the court to examine the truth of facts set forth in a return and to hold proceedings to controvert the facts recited in the return); Habeas Corpus Act 1862, 25 & 26 Vict., c. 20 (Eng.) (prohibiting issuance of writs from English courts into any colony with a competent court); Administration of Justice Act 1960, 8 & 9 Eliz. 2, c. 65, §§ 14-15 (Eng.) (limiting repeat applications and providing procedure for appeals).

[38] U.S. CONST. art. I, § 9, cl. 2.

[39] For a discussion of the spread of habeas corpus from English law to diverse legal systems around the world, *see generally* Farrell, *supra* note 2, at 556-65.

[40] *Id.* at 564.

[41] *Id.*

liberty and a guarantee of judicial redress for violations of the right.[42]

II. HABEAS CORPUS IN EMERGENCIES

On March 1, 1689, a royal messenger appeared in the House of Commons to report that a number of persons in London had been arrested for conspiring against the king.[43] He warned that the conspirators could use habeas corpus as a means of securing their release and continuing their plot.[44] Despite opposition, Parliament followed the king's recommended plan of action. Less than a decade after the passage of the landmark Habeas Corpus Act of 1679, the right to habeas corpus was suspended for the first time due to the existence of a state of emergency.[45]

Since 1689, countries where the right to habeas corpus is guaranteed have experienced a variety of threats and other emergencies. This section will look at five examples to illustrate the role of habeas corpus in such emergencies. It will examine the actions taken with regard to habeas corpus access during emergency situations in India, Brazil, Israel, the United Kingdom, and the United States.

A. India and The Emergency

The modern Indian legal system was largely based on the English model established during the colonial period. The Habeas Corpus Act of 1679 was incorporated into Indian law in the late nineteenth century.[46] Following independence in 1947, the right to habeas corpus was guaranteed in the Indian Constitution.[47]

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[42] *Id.*

[43] *See* ANCHITELL GREY, 9 PARL. HIST. ENG. (1689) 129-30, *available at* http://www.british-history.ac.uk/report.asp?compid=40490.

[44] *Id.*

[45] An Act for Impowering His Majestie to Apprehend and Detaine such Persons as He shall finde Just Cause to Suspect are Conspireing against the Government, 1689, 1 W. & M., c. 7 (Eng.), *available at* http://www.british-history.ac.uk/report.asp?compid=46293.

[46] The Code of Criminal Procedure Act, No. 5 of 1898; INDIA CODE CRIM. PROC. (1967), v. 2, ch. XXXVII, § 491.

[47] *See* INDIA CONST. arts. 21, 32, 226.

The Emergency, which has been called "the darkest hour of India's history after Independence,"[48] began following the June 12, 1975 conviction of Prime Minister Indira Gandhi by the Allahabad High Court for election misconduct. Although Gandhi was ordered removed from her post, the judgment was stayed pending appeal.[49] On June 25, 1975, India's president declared a state of emergency on the advice of the prime minister, citing national security concerns and an economic crisis.[50] Elections were postponed, civil liberties were curtailed, and the government claimed extraordinary powers.

Among the rights suspended by the proclamation was the right to liberty, found in Article 21 of the Indian Constitution. Many people were detained by police pursuant to the Maintenance of Internal Security Act, and a number of them filed petitions for habeas corpus challenging their detention. The government argued that habeas corpus was unavailable due to the suspension of Article 21.[51] Nine of India's high courts rejected this argument, holding that even if the fundamental right to liberty was suspended, a detainee was entitled to a judicial determination that the order of detention complied with the law and was made in good faith.[52]

The Indian Supreme Court reversed the high courts and held that no person had standing to even petition for habeas corpus in light of the presidential order declaring the emergency.[53] Given the suspension of the right to liberty, it reasoned that a detainee could not even inquire as to which provision the detention was authorized under, or question whether the formalities of that provision had been complied with. Essentially, it held that not only was there no longer a right to liberty, but that no legal source was necessary to authorize detentions.

The lone dissenting justice, H. R. Khanna, argued that even if Article 21 was suspended, it was a basic premise that the state could only perform an act – such as arresting an individual – if some authority for the act existed in the law. He wrote:

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[48] H.M. SEERVAI, THE EMERGENCY, FUTURE SAFEGUARDS AND THE HABEAS CORPUS CASE: A CRITICISM 3 (1978).

[49] *Id.* at 4.

[50] *Id.* at vii.

[51] *Id.* at 8.

[52] *Id.*

[53] A.D.M. Jabalpur v. Shivkant Shukla, 1976 A.I.R. 1207 (Del.) 1392.

> The power of the courts to issue a writ of habeas corpus is regarded as one of the most important characteristics of democratic states under the rule of law. The principle that no one shall be deprived of his life or liberty without the authority of law is rooted in the consideration that life and liberty are precious possessions.[54]

A person was, therefore, entitled to find out what authority the government was acting on, and to ensure the government complied with that authority, even absent the right to be free.

The Emergency ended in early 1977. Facing public pressure, Gandhi called elections and was soundly defeated. Before leaving office, she advised the president to withdraw the proclamation.[55]

The 44th Amendment to the Indian Constitution subsequently made it impossible to suspend habeas corpus.[56] As a result, in situations where the military and police have broad powers pursuant to emergency legislation – even including the right to shoot to kill based on mere suspicion that it is necessary to do so to maintain public order – habeas corpus has been singled out as the "only remedy available" for the protection of the individual.[57]

B. Brazil's Military Government

In 1830 Brazil became the first Latin American county to guarantee the right to habeas corpus. The habeas corpus provisions of Brazil's 1830 Penal Code and 1832 Code of Criminal Procedure were based on British law.[58] Habeas corpus eventually became a constitutional guarantee, and its application to actions of the executive was established by the late nineteenth century.[59]

In 1964, Brazil's military seized government power in a coup. The

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[54] *Id.* (Khanna, J., dissenting).

[55] SEERVAI, *supra* note 48, at viii.

[56] Constitution (Forty Fourth Amendment) Bill of 1978, § 40(a); BRIJ KISHORE SHARMA, INTRODUCTION TO THE CONSTITUTION OF INDIA 56 (2005).

[57] SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTER, ARMED FORCES SPECIAL POWERS ACT: A STUDY IN NATIONAL SECURITY TYRRANY, § 4, *available at:* http://www.hrdc.net/sahrdc/resources/armed_forces.htm.

[58] Phanor Eder, *Habeas Corpus Disembodied: The Latin American Experience*, *in* LAW AND DEVELOPMENT IN LATIN AMERICA: A CASEBOOK 99 (Kenneth Karst & Keith Rosenn eds., 1975).

[59] *Id.* at 100.

legislature was rendered impotent while the new president, selected by the military, was given expanded powers.[60] Political rivals and leftists were detained.

Among those arrested was a university professor charged with promoting violent subversion. While detained, he filed a petition for habeas corpus. Examining his case in 1964, the Supreme Federal Tribunal, Brazil's highest constitutional court of appeal, found that the criminal case lacked just cause, and ordered his release.[61] The court granted numerous other habeas corpus petitions in 1964 and 1965, including several filed by prominent political enemies of the military regime.[62] When the military regime attempted to try corruption and subversion cases before military courts, the Supreme Federal Tribunal granted habeas corpus petitions on the grounds that the charges were beyond the scope of military courts' jurisdiction under the National Security Law of 1953 and removed the cases to civilian courts.[63]

The military government attempted to pack the Supreme Federal Tribunal in 1965 by increasing its size from eleven to sixteen members.[64] It also increased the jurisdiction of military courts while restricting that of civilian courts.[65] The exemption of certain government actions from judicial review was formalized in the 1967 constitution.[66]

Though the Supreme Federal Tribunal was now "undeniably more favorably disposed toward the revolutionary government," the courts were not reduced to a rubber stamp for the government.[67] A district court ordered the release of a prominent journalist in 1967,[68] and in

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[60] Martin Feinrider, *Judicial Review and the Protection of Human Rights under Military Governments in Brazil and Argentina*, 5 SUFFOLK TRANSNAT'L L. REV. 171, 177-78 (1981).

[61] S.T.F., H.C. No. 40.910, Relator: Sergio Cidade de Rezende, 24.8.1964, 5 S.T.F.J. 7 (Braz.), *reprinted in English in* Karst & Rosenn, *supra* note 58, at 210-13.

[62] Feinrider, *supra* note 60, at 178-79.

[63] *Id.* at 179.

[64] Karst & Rosenn, *supra* note 58, at 214. Rosenn observes that, interestingly, the junta filled the new positions with respected judges, some of whom were critics of the government. Keith S. Rosenn, *Judicial Review in Latin America*, 35 OHIO ST. L.J. 785, 813 (1974).

[65] Karst & Rosenn, *supra* note 58, at 214.

[66] Feinrider, *supra* note 60, at 180.

[67] Karst & Rosenn, *supra* note 58, at 214.

[68] J.F.-4, Relator: Helio Fernandes, 3.7.1967, 219 R.F. 385 (Brazil), *cited in* Feinrider, *supra* note 60, at 180.

1968, the Supreme Federal Tribunal granted writs of habeas corpus to a former minister of the ousted government, a student union leader, and a group of students jailed for holding a forbidden meeting.[69] Still, the court was reluctant to interfere in other politically sensitive cases.[70]

In late 1968 the government implemented Institutional Act No. 5, which "removed virtually all institutional restraints on the executive's exercise of power."[71] Habeas corpus was suspended in all cases of crimes against national security, the social order, and the economy.[72] The Supreme Federal Tribunal was purged and the court's president resigned in protest.[73] In early 1969, the military government promulgated Institutional Act No. 6, which altered the composition of the court, limited its appellate jurisdiction, and completely eliminated its jurisdiction to hear review national security cases that had been tried before military tribunals.[74] While the latter restriction was removed in 1969, and the courts did continue to entertain habeas corpus petitions, Institutional Acts No. 5 and 6 essentially signaled that the government would no longer attempt to exercise control through the judicial system, but would instead act outside of it.

C. Israel and the Occupied Territories

The territory of Israel, the West Bank, and Gaza, was administered by the United Kingdom as a League of Nations mandate following the Ottoman defeat in World War I.[75] Upon achieving independence in 1948, Israel incorporated most elements of the British legal system. The Israeli judiciary, particularly its Supreme Court, is highly regarded at home and abroad.[76]

Since 1948, a state of emergency has existed in Israel. It has fought

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[69] Karst & Rosenn, *supra* note 58, at 214.

[70] *Id.*

[71] *Id.* at 214-15.

[72] *Id.* at 215.

[73] Feinrider, *supra* note 60, at 184.

[74] Karst & Rosenn, *supra* note 58, at 215.

[75] Emma Playfair, *Introduction* to INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES: TWO DECADES OF ISRAELI OCCUPATION OF THE WEST BANK AND GAZA STRIP 1, 5 (Emma Playfair ed., 1992).

[76] *See* Dan Simon, *The Demolition of Homes in the Israeli Occupied Territories*, 19 YALE J. INT'L L. 1, 22 (1994).

several active wars during that time and has formally been at war with one or more of its neighbors throughout its existence. Israel has suffered frequent attacks inside its borders from terrorist organizations which, in the words of the Israeli Supreme Court, "have set Israel's annihilation as their goal."[77] Israeli forces have occupied the West Bank and Gaza since its victory in the Arab-Israeli War of 1967.[78] A military government administers the territories, with legislative powers held by the military commander and judicial power exercised by military courts.[79] The Israeli Supreme Court has jurisdiction to review actions of the military government.[80]

Israeli law and military regulations provide for arrest in the criminal context, and also for administrative detention, which is often used in the anti-terrorism context in both Israel and the occupied territories.[81] In 2002, the Israeli Knesset passed the controversial Incarceration of Unlawful Combatants Law authorizing the detention of "enemy combatants" whose release would harm state security, even if that individual does not pose any actual security threat.[82] In all of these situations, the detainee is entitled to a review of the lawfulness of his detention by an independent judicial officer.[83] Both within Israel or the occupied territories, a detention order upheld at the first judicial review may be appealed

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[77] HCJ 5100/94 Pub. Comm. Against Torture in Israel v. Israel [1999] IsrSC 53(4) 817, ¶ 1.

[78] *See* DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 4 (2002).

[79] *See generally* Brian Farrell, *Israeli Demolition of Palestinian Houses as a Punitive Measure: Application of International Law to Regulation 119*, 28 BROOK. J. INT'L L. 871, 872-84 (2003).

[80] *See* HCJ 302/72 Khelou v. Government of Israel [1972], 27(2) 169, 176, *summarized in English in* 5 ISR. Y.B. HUM. RTS. 384 (1975).

[81] *See* Brief of Amici Curiae Specialists in Israeli Military Law and Constitutional Law in Support of Petitioners at 8-14, Boumediene v. Bush, 128 S. Ct. 2229 (2008) [hereinafter Brief of Amici Curiae].

[82] Incarceration of Unlawful Combatants Law, 5762-2002, (2002) (Isr.), *reprinted in* 32 ISR. Y.B. HUM. RTS. 389 (2002). The law would, for example, authorize the continued detention of a person for purposes of a prisoner exchange even though the person himself did not pose a security threat.

[83] In the occupied territories, reviews are conducted by military judges. While the Israeli Supreme Court has found military judges to be "independent of the investigators and prosecutors," HCJ 3239/02 Marab v. IDF Commander in the West Bank [2003] IsrSC 57(2) 349, ¶ 35 [hereinafter Marab, 57(2)], concerns have been raised that military judges cannot be sufficiently independent to provide meaningful review.

to a court of appeals and, eventually, to the Israeli Supreme Court.[84]

Criminal suspects in Israel are entitled to judicial review within twenty-four hours, and for administrative detainees the period is forty-eight hours.[85] In the occupied territories, judicial review of both criminal and administrative detentions must occur within eight days.[86] Orders of detention for enemy combatants pursuant to the 2002 law must be reviewed by a civilian district court within 14 days.[87]

Israeli courts have generally rejected the argument that practical obstacles prevent such review. For example, during a major military operation in the West Bank in 2002, the Israeli Defense Forces, finding it difficult to process the reviews of approximately 1,600 detainees, extended the period for review from eight to eighteen days.[88] The Israeli Supreme Court held that the eighteen-day period was excessive, notwithstanding the existence of combat conditions.[89] While conceding that detentions during combat are different than an arrest by police, and that it could not expect judges to accompany combat forces, the court held that judicial review of detention could wait only until detainees are removed from the battlefield to a location where review could be carried out.[90] Moreover, the judicial review of detention has been granted even if the detention occurs outside of Israel or the occupied territories.[91]

D. Martial Law and Emergencies in the United Kingdom

The outright suspension of habeas corpus, an action reserved for Parliament, has been a rare occurrence in the United Kingdom. The threat presented by James II led to another suspension of habeas corpus in 1696, seven years after the first.[92] In the eighteenth century, Parlia-

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[84] STATE OF ISR., MINISTRY OF JUSTICE, FOREIGN RELATIONS & INT'L ORG. DEP'T, THE LEGAL FRAMEWORK FOR THE USE OF ADMINISTRATIVE DETENTION AS A MEANS OF COMBATING TERRORISM 4 (Mar. 2003).

[85] *See* Criminal Procedure (Enforcement Powers – Detention) Law, 5756-1996, § 29(a) (1996) (Isr.); Emergency Powers (Detention) Law 1979, S.H. 76, § 2(c).

[86] *Marab*, 57(2), ¶¶ 5, 29, 36.

[87] Incarceration of Unlawful Combatants Law, 5762-2002, § 5(a).

[88] *Marab*, 57(2), ¶ 28.

[89] *Id.* ¶ 36.

[90] *Id.* ¶ 30.

[91] *See* Brief of Amici Curiae, *supra* note 81, at 7.

[92] 1696, 7 & 8 Will. 3, c. 11 (Eng.).

ment suspended habeas corpus due to the fear of invasion from France,[93] the threat of rebellion in Scotland,[94] and the revolution in the American colonies.[95] During World War II, Parliament suspended Article 8 of the Habeas Corpus Act of 1679 to allow the detention of British subjects on the Isle of Man.[96]

In situations where habeas corpus has not been suspended, the determination of the legality of a person's detention may nonetheless be impacted by a declaration of martial law or emergency. During the Boer War, Britain declared martial law in South Africa.[97] During that conflict, British courts continued to issue writs of habeas corpus but made no further inquiry if the return established that martial law exists and the petitioner was detained in a martial law area.[98] In essence, the existence of martial law served as a sufficient basis for the detention.

During World War I, the Home Secretary was given complete discretion to detain persons of "hostile origin or association" without trial.[99] Rejecting the claim that this amounted to a suspension of habeas corpus, Lord Atkinson found that the subject "retains every right" conferred by the habeas corpus statutes.[100] The writ of habeas corpus could still issue to the custodian, he reasoned; all the regulation had done was temporarily make detention without trial lawful under certain circumstances.[101]

At the onset of World War II, a regulation was promulgated providing, in part:

> If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations, or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm, or in the preparation or instigation of such acts, and that by reason thereof it is necessary to exercise control over him, he may make an order against that person di-

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[93] 1744, 17 Geo. 2, c. 6 (Eng.).

[94] 1746, 19 Geo. 2, c. 1 (Eng.).

[95] 1777, 17 Geo. 3, c. 9 (Eng.).

[96] *See* Isle of Man (Detention) Act, 1941, 5 & 6 Geo. 6, c. 16 (repealed 1947) (Eng.).

[97] *See* DAVID CLARK & GERARD MCCOY, THE MOST FUNDAMENTAL RIGHT 64-68 (2000).

[98] Marais v. Gen. Officer & AG, [1902] A.C. 109, 114-15 (P.C.) (appeal from S. Afr.) (U.K.); R v. Becker, R v. Naude 1900 (17) S.C. 340, 343-44 (Cape S.C.).

[99] Defence of the Realm (Consolidation) Regulations, 1915, Stat. R. & O. 551, 14B (promulgated pursuant to Defense of the Realm (Consolidation) Act, 1914, 4 & 5 Geo. 5, c. 29, s. 1) (U.K.).

[100] R v. Halliday [1917] A.C. 260, 272 (H.L.) (appeal taken from Eng.).

[101] *Id.*

recting that he be detained.[102]

The regulation further provided that a "person detained in pursuance of this regulation shall be deemed to be in lawful custody . . . ."[103]

The question for courts in ensuing habeas corpus challenges was whether to apply an objective or subjective standard in reviewing whether a detainee presented a security threat. The House of Lords concluded that it should "presume that the Secretary of State, acting under a regulation having the force of law, had what he considered reasonable cause for his belief."[104] Thus, habeas corpus was not available where the Secretary indicated that he was satisfied his belief was reasonable.[105]

E. Wartime Suspensions in the United States

The right of habeas corpus has been suspended during wartime in the United States on several occasions. Two situations which were examined by the federal courts provide insight into the constitutionality of the suspension of habeas corpus.

Within weeks of the beginning of the American Civil War in April 1861, President Abraham Lincoln issued orders to his military commanders authorizing them to suspend the writ of habeas corpus.[106] Later that year, the Chief Justice of the United States Supreme Court, sitting as justice of the federal Circuit Court of Appeals for Maryland held that the power to suspend habeas corpus was vested in Congress and, therefore, the president lacked the authority to suspend.[107] The court acknowl-

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[102] Defense (General) Regulations, 1939, Stat. R. & O. 1681, 18B(1) (promulgated pursuant to Emergency Powers (Defense) Act, 1939, 2 & 3 Geo. 6, c. 62, s. 1) (U.K.).

[103] *Id.* at 18B(8).

[104] Greene v. Secretary of State for Home Affairs [1942] A.C. 284, 295 (H.L.) (appeal taken from Eng.).

[105] *See generally id.*; Liversidge v. Anderson [1942] A.C. 206 (H.L.) (appeal taken from Eng.) (considering Regulation 18B in a false imprisonment case). The *Liversidge* "no review of subjective satisfaction" doctrine was followed during and after the war in Australia, New Zealand, Northern Ireland, India, Singapore, Malaysia, Hong Kong, Ghana, Nigeria, Cyprus, Zambia, Sierra Leone, and Tanzania. CLARK & MCCOY, *supra* note 97, at 113-14. While British courts have turned away from the rule in most situations, it has yet to be repudiated in national security cases. *Id.* at 113-22.

[106] Habeas corpus was suspended in Maryland and Florida in late April and early May, 1861. 16 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 16-18 (James Richardson ed. 1896).

[107] *See Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861).

edged its inability to compel either the military or the president to comply with its order, but reminded the chief executive "of his constitutional obligation to 'take care that the laws be faithfully executed.'"[108]

Undeterred, Lincoln continued issuing suspension orders throughout the first two years of the war.[109] Only in March 1863 did the potential constitutional crisis pass when Congress enacted a law expressly authorizing the president to suspend habeas corpus "whenever in his judgment the public safety may require it" in any part of the country.[110]

Following the Pearl Harbor attack marking the American entry into World War II, habeas corpus was suspended in the Territory of Hawaii. In the law establishing the territory, Congress had empowered the territorial governor to:

> In case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory or any part thereof, under martial law until communication can be had with the President and his decision thereon made known.[111]

On December 7, 1941, the governor placed the territory under martial law and suspended habeas corpus.[112] The president subsequently approved the action.[113]

In April 1944, before any executive action had been taken proclaiming an end to martial law or restoring habeas corpus, an individual convicted of assault by a military court two months earlier petitioned the United States District Court for the District of Hawaii for a writ of habeas corpus.[114] The court sustained the writ, held that martial law did not exist despite the executive proclamation, and discharged the petitioner.[115] The United States Supreme Court affirmed the district court's rul-

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[108] *Id.* at 153.

[109] DUKER, *supra* note 11, at 167-68 n.110.

[110] 12 Stat. 755 (1863). Following the war, Congress passed a law allowing suspension of habeas corpus by presidential proclamation in areas where the threat of rebellion existed. An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, ch. 22, 17 Stat. 13, 14-15 (1871). Pursuant to this law, the president suspended habeas corpus in ten counties in South Carolina in 1871. *See* Proc. 4 & 7, 17 Stat. 951-54 (1871).

[111] Hawaii Organic Act of 1900 § 67, 48 U.S.C. § 771 (1940).

[112] Charles Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253, 1290 (1942).

[113] *Id.*

[114] Duncan v. Kahanamoku, 327 U.S. 304, 310-11 (1945).

[115] *Ex parte* Duncan, 66 F.Supp. 976, 981-82 (D. Haw. 1944).

ing that martial law did not exist when there was no immediate threat of invasion and the civilian courts were open. It did not, however, decide whether the continued suspension of habeas corpus was lawful since habeas corpus had been restored before the case reached the court. [116]

III. THE MEANING AND ROLE OF HABEAS CORPUS

In January 2007, then-Attorney General Alberto Gonzalez testified before the United States Senate Judiciary Committee that "there is no expressed grant of habeas in the Constitution." [117] He went on to point out that "the Constitution doesn't say every individual in the United States or every citizen is hereby granted or assured the right to habeas."[118] Gonzalez's statement sparked controversy, with lawyers and scholars weighing in on the constitutional status of habeas corpus in the United States.

The debate over habeas corpus at Guantanamo Bay focused on the status of detainees, the degree to which they deserved protection from the risk of arbitrary detention, the government's need to interrogate or incapacitate individuals it considered dangerous, and the scope of the applicable habeas corpus statutes. Rightly, the liberty interests of the individual detainees and the interests of the United States in successfully prosecuting the war on terror remain at the forefront of the discussion as the administration, Congress, the courts, and the public turn their attention to Bagram Airfield.

Perhaps, though, these questions about the availability of habeas corpus at a particular location, to a particular detainee, or during a particular time in a nation's history can cause us to lose sight of the greater significance of habeas corpus as a barometer for the legitimacy of government and the existence of the rule of law. The lessons of history and the experiences of other nations may be useful in illustrating this deeper meaning of habeas corpus. This section will attempt to extract some general principles about habeas corpus from the previous two sections.

Habeas corpus protects the individual, and it is usually considered

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[116] *Duncan*, 327 U.S. at 313 n.5.

[117] *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 39 (2007) (testimony of Attorney General Alberto Gonzalez).

[118] *Id.*

in relationship to the individual. The history of the writ's development, however, suggests that there is another, equally important relationship at issue – that between the executive and the legal order. Habeas corpus originated, after all, not as a protection for the individual, but as a procedure for the judiciary to issue a command to the executive in the person of the sheriff. As habeas corpus evolved into a process to examine the basis of a person's detention, the real target of the writ was not the detainee, but the government officer called on to justify the basis of his or her authority to detain.

By the seventeenth century, Parliament, motivated by its desire to place limits on the authority of the king, took steps to strengthen the judicially-developed writ of habeas corpus. It issued the Petition of Right and passed the Habeas Corpus Act of 1640, which expressly allowed anyone imprisoned by the king or his agents to file a habeas corpus petition.[119] The seeds of separation of powers and checks and balances were sown as the legislature endorsed judicial review of executive actions.

The full arrival of habeas corpus occurred at the end of the century. The significance of the Habeas Corpus Act of 1679 was not simply the protections it gave for individuals. Its enactment marked a major milestone, perhaps only matched by the signing of the Magna Carta, in the submission of the king to the rule of law.

The export of habeas corpus around the world and its adoption by diverse legal systems, particularly democracies, has only enhanced this connection to the rule of law. In many ways, habeas corpus serves as a barometer for the existence of respect for the rule of law and, by extension, the legitimacy of a government's authority. The five situations outlined above serve to show how this relationship has played out in a variety of contexts.

The 1975 *Jabalpur* judgment of the Indian Supreme Court[120] was roundly criticized at the time it was issued and in the intervening years.[121] Of course, the absence of habeas corpus relief was decried as an injustice to those detained. More than that, though, the denial of habeas corpus called into question the basic legitimacy of Prime Minister Gandhi's authority to govern. Essentially, the judgment conceded that

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[119] *See supra* text accompanying notes 19-28.

[120] A.D.M. Jabalpur v. Shivkant Shukla, A.I.R. 1976 S.C. 1207, 1392.

[121] *See, e.g.*, *Fading Hope in India*, N.Y. TIMES, Apr. 30, 1976, at 21; SHARMA, *supra* note 56, at 56; SEERVAI, *supra* note 48.

the government would not even attempt to comply with the low legal thresholds it had itself established.

The ruling cast doubts upon the strength of India's democratic system. A contemporary editorial in the New York Times suggested that "[t]he submission of an independent judiciary to absolutist government is virtually the last step in the destruction of a democratic society; and the Indian Supreme Court's decision appears close to utter surrender."[122] The legitimacy of Gandhi's government was, in fact, undermined, and her party suffered a historic defeat after being pressured to call elections in 1977.

In Brazil, habeas corpus existed in a meaningful way in the late 1960s despite the fact that a military government held power. In Brazilian tradition, the junta sought to demonstrate that its exercised legitimate authority despite the absence of a democratic mandate. The military government initially operated within the established legal system and generally respected decisions of the courts, even unfavorable ones.

Eventually, though, the government found the judiciary to be an obstacle to its agenda. The intention of the military leaders to simply circumvent the courts was signaled by the imposition of severe limitations on the Supreme Federal Tribunal's habeas corpus jurisdiction. The military government's decision to excuse itself from accountability via habeas corpus corresponded with the evaporation of the last pretenses that it was exercising legitimate authority.

A stark contrast is presented by Israel's guarantee of judicial review for all persons detained by the state "regardless of nationality or the circumstances of their seizure."[123] Israel demonstrates that alleged practical obstacles to review of detentions are not truly an impediment, even in challenging circumstances. It maintains a detention review regime in spite of a declared emergency, and even during actual combat and outside of its territorial jurisdiction.

The refusal to suspend judicial review contributes immensely to the perceived legitimacy of Israel's security operations, even when other aspects of those operations are frequently criticized. This demonstrates the legitimizing power of judicial review of detention and adherence to the

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[122] *Fading Hope in India*, N.Y. TIMES, Apr. 30, 1976, at 21.
[123] Brief of Amici Curiae, *supra* note 81, at 8.

rule of law, even in situations where the "life of the state" might otherwise present a convenient excuse to take the opposite path. This is reflected in the Israeli Supreme Court's statement that "there is no more potent weapon than the rule of law."[124]

Historically, the United Kingdom and United States have abided by this principle, with the formal suspension of habeas corpus only occurring on a geographically limited basis during wartime when the life of the nation arguably was implicated. In the United Kingdom, the only recent suspension occurred during World War II, when the country truly faced a mortal threat to its existence. Even then, the suspension was limited to the detention of Britons on the Isle of Man.

In the United States, the unilateral suspension of habeas corpus by the executive during the Civil War nearly precipitated a constitutional crisis. A century and a half later it remains as a black mark on the record of one of the nation's most highly regarded leaders. This incident, it must be remembered, occurred against the backdrop of a war that was the bloodiest in the country's history and occurred on American soil. The suspension of habeas corpus in Hawaii followed the Pearl Harbor attack at a time when the threat of invasion was real. In both situations suspension corresponded with the existence of or immediate threat of "rebellion or invasion" as required by the constitution.[125]

The formal suspension of habeas corpus in the United States suggests that the rule of law and democratic order are being temporarily sacrificed in order to preserve the existence of the state. Such situations have been extremely rare. Perhaps it is telling that, even when it its suspended, habeas corpus has been the means by which the very constitutionality of its suspension has been challenged.[126]

Some argue that the British emergency detention legislation during the World Wars was tantamount to a suspension of habeas corpus. By granting the executive broad – even unlimited – authority to detain, the "legality of detention" portion of a habeas corpus inquiry is circumscribed. Even in these situations, though, habeas corpus arguably plays a role in the maintenance of the rule of law. There is, after all, a difference – albeit delicate – between the absence of any need to demonstrate legal

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[124] HCJ 320/80 Kawasme v. Minister of Defense [1980] IsrSC 35(3) 113, 127.

[125] U.S. CONST. art. I, § 9, cl. 2.

[126] *See* Boumediene v. Bush, 128 S.Ct. 2229 (2008); *Ex parte* Duncan, 66 F. Supp. 976, 981-82 (D. Haw. 1944).

authority for detention and a legitimate grant of authority to detain, even if that encompasses broad, subjective grounds.

The latter acknowledges that government agents cannot detain without some legal authority. This provides the justification for the argument that habeas corpus should have been available in the Indian case, even in the absence of a right to liberty. By analogy, even though there is no right to be free from taxes, the executive may not simply collect money from some citizens without any authorization. Instead, the executive action of collecting taxes is based on some grant of authority.

Habeas corpus requires a demonstration of the source of that authority. Presupposing the existence of an independent judiciary, this provides an opportunity for a judicial review of the source of that authority.[127] In the British World War cases, the courts had the opportunity to scrutinize the very broad grant of authority to detain given to the executive by the legislature. Though some may disagree with Parliament's decision to grant this authority, or the courts' determination that it was valid, the availability of habeas corpus confirmed that the authority existed. Importantly, habeas corpus provides an opportunity for the courts, including a state's highest court, to ascertain whether the authority to detain comports with basic constitutional rights or – increasingly – international or regional human rights instruments.

IV. CONCLUSION

This discussion is not meant to overlook the importance of habeas corpus to an individual detainee. To the contrary, in most systems habeas corpus remains the single most potent weapon in vindicating personal liberty. This discussion is, however, meant to suggest that habeas corpus has a much greater meaning than its impact on an individual basis. Perhaps more than any other legal concept, habeas corpus represents the acknowledgement that the executive is subject to the rule of law. As such, habeas corpus may also very well be the canary in the mine for the abrogation of the rule of law and the erosion of government legitimacy.

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[127] In the British system, this is also the case when martial law has been declared, as the writ continues to issue so that a determination can be made as to the existence of martial law. A significant difference, however, is that the source of the authority in this situation comes from the executive rather than the legislature.