Guantanamo Bay, habeas corpus and the Texan who would be king: Some legal observations

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I have been following the excellent coverage by the WSWS of the barbaric detention by the US government of the 660 odd prisoners at Guantanamo Bay, Cuba for over two years. As a lawyer, I would like to contribute some observations regarding the legal and historical issues to your comprehensive reporting on this extraordinary state of affairs.

So far all legal attempts to release the Guantanamo Bay prisoners or to have them dealt with according to law, have failed. Litigation has been brought both in the United States and the United Kingdom, but without success. Citizens of the UK and Australia are amongst those incarcerated at Guantanamo Bay.

Whilst the conduct of the US administration in Guantanamo Bay is viewed universally as an affront to human rights and the rule of law, it is in fact symptomatic of a broad repudiation by erstwhile bourgeois democratic states throughout the world to legal-constitutional principles of government.

What we are witnessing is a crisis of bourgeois rule—manifested in the juridical sphere—of world historical significance. The Bush administration and other governments, including the Australian government, are seeking to change the relationship between individuals and the state—in fact, seeking to reverse it completely—and to turn the clock back 800 years on fundamental legal conceptions that have governed individual-state relations. The Bush administration wants to return relations of power to the position possibly pre the Magna Carta of 1215, and certainly pre 1640.

Arbitrary indefinite detention is now widespread. In Australia hundreds of asylum seekers are detained and many have been incarcerated for years with no apparent prospect of release because the government has refused to give them visas and no state on the planet will receive them. It is truly a nightmarish condition that not even Kafka could have imagined. Writs of habeas corpus have been issued in various cases to seek the release of such people on the basis that, simply put, a human being, having committed no crime and being stateless, is entitled to his liberty.

People are being held in various countries on the pretext of "anti-terrorism". The same arbitrary exercise of power by the executive is holding sway. In Australia, as in the United States, laws have been implemented that suspend the rights of the individual to legal process and subject them to executive power with impunity. The WSWS has comprehensively reported on these developments. What is important to understand is that there is a unifying process at work here—whether it be detention centres set up by the Australian government in Nauru or Papua New Guinea to detain asylum seekers and deny them a jurisdictional connection with the Australian legal system, or Guantanamo Bay—to deny access to the US legal system. The underlying process is the destruction of the established legal and constitutional framework.

The prisoners at Guantanamo Bay are presently held in custody upon the order and direction of the US president, George W. Bush. They are not held according to any stated law, domestic or international. They are held, in the language of kingly rule "at his majesty's pleasure". No charges have been laid in two years, although apparently charges are being formulated by Pentagon lawyers in conjunction with Paul Wolfowitz.

The US administration has decreed that the prisoners are not "prisoners of war" and therefore not entitled to be treated according to the Geneva Conventions. If that is so, then they are subject to no legal process apart from arbitrary direction of the executive. That would take us back to the dark ages, to the period prior to the Magna Carta.

Whilst the Taliban militia may not have constituted a formal army of a sovereign state in a classical sense, a reasoned interpretation of the Geneva laws of war would plainly extend its application to the Guantanamo detainees. Alternatively, other international law would apply. The US administration is completely isolated in its interpretation of the legal position and all eminent international law jurists have insisted on the application of the Geneva Protocols or general international law (such as the International Covenant on Civil and Political Rights).

Putting the issue of the application of international law aside, the fundamental question remains—are these prisoners subject to law or to the whim of the executive? There is a lot at stake in this issue—principally the question of whether the democratic or the authoritarian principle will be ascendant in social relations today.

The freedom of the individual from arbitrary imprisonment was established as a principle of law binding the king by the Magna Carta in 1215. That law is still the law in the English-speaking world today and is embodied doctrinally in the ancient writ of "habeas corpus" based on principles of Roman law—which means, literally, "to have the body"—that is; to be free.

Several cases have been mounted based on the writ of habeas corpus on behalf of several of the Guantanamo detainees. In the case of *Shafiq Rasul, et al. v. George W. Bush, et al*. the US Court of Appeal for the District of Columbia dismissed the applications that they be dealt with under US law and released on the grounds of lack of jurisdiction. The petitioners have appealed to the US Supreme Court and they have been granted leave to have those appeals considered in 2004.

At the time of writing this article, the California Ninth Circuit Court of Appeal ordered that the Guantanamo Bay detainees be provided access to civilian lawyers. This represents a significant breach in the Bush administration's position—but is still far short of obtaining full due process according to law and release of the detainees. Nevertheless, the order inherently concedes some application of law—at least the right to counsel—to the petitioners. In an extraordinary and brazen display of reaction the administration has announced that it will appeal the decision granting access to civilian lawyers!

In the United Kingdom applications for release based on habeas corpus

writs have been brought in the case of *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs.* In this case brought in the English courts on behalf of a British national captured by US forces in Afghanistan, the prisoner sought an order to compel the United Kingdom Secretaries of State to make representations on his behalf to the United States government. The claim was based on the contention that his "fundamental human right" not to be arbitrarily detained had been infringed because he had been denied access to a court of law. The US District Court for the District of Columbia having dismissed Abbasi's habeas corpus application in *Rasul et al. v. Bush*, his submission was that in these circumstances, the Secretaries of State owed him a duty under English law to take steps to redress the position. The English court agreed with him. But the US government has not heeded any requests made by the British government.

In the case, the English Court of Appeal held that the denial of access to a court to Abassi was in conflict with the fundamental principles of English law and of public international law. In its judgment the English Court of Appeal said:

"What appears to us to be objectionable is that Mr Abassi should be the subject of indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal.... It is important to record that the position may change when the appellate courts in the United States consider the matter.... We do not find it possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles recognised by both jurisdictions and by international law, Mr Abassi is at present arbitrarily detained in a legal black hole".

Elsewhere the Court of Appeal said:

"The position of detainees at Guantanamo Bay is to be considered further by the appellate courts in the United States. It may be that the anxiety we have expressed will be drawn to their attention. We wish to make it clear that we are only expressing an anxiety that we believe was felt by the court in *Rasul*. As is clear from our judgement, we believe the United States courts have the same respect for human rights as our own."

The English Law Lords may be mistaken.

The origin of the writ of habeas corpus, which is to be found in the Magna Carta, was a constitution wrested from the Crown by the English nobles in the year 1215. It was a statute that was never meant to be repealed.

Article 1 of the Magna Carta states that "all freedoms set out herein are given to all free-men of our realm, for us and our heirs forever."

Article 29 provides that "no Freeman shall be taken, or imprisoned, or be dispossessed of his freehold, or liberties, or free customs, or be enslaved or exiled, but by lawful judgment of his Peers or by the law of the land."

In the classic text *The History of English Law* by Frederick Pollock and Frederic Maitland (1923) the writers said, "[Magna Carta] becomes, and rightly becomes a sacred text, the nearest approach to an irrepealable 'fundamental statute' that England has ever had.... For in brief it means this, that the King is and shall be below the law."

It was in the sixteenth century that the writ of habeas corpus first began to be used consistently as a means of testing the validity of executive committals to imprisonment and in the seventeenth century, in the struggle between the Crown and the emerging bourgeoisie, that its use assumed a revolutionary dimension.

In *Darnel's* case in 1627, King Charles I (of the Stuart dynasty) had imprisoned five knights as a result of their refusal to contribute to repay a forced loan he had taken out. The knights sought their freedom by issue of writs of habeas corpus and in response the king simply detained them *per speciale mandatum domini Regis*. In the case, the court ruled in favour of the king but in retaliation the parliament passed the Habeas Corpus Act in 1640 to reverse that decision and curtail the power of arbitrary executive detention. The Habeas Corpus Act of 1640 provided that "any person imprisoned by Order of the King or Council should have habeas corpus and be brought before the court without delay with the cause of imprisonment shown."

In 1679, a second Habeas Corpus Act was passed which made it clear that the territorial scope of the protections afforded by habeas corpus—the guarantee against arbitrary detention—was intended to be broad. The preamble described the act as "An Act for the better securing of the liberty of the subject, and for the prevention of imprisonment beyond the seas."

So well entrenched by the nineteenth century was the habeas corpus law against unlawful detention that in 1816 the Parliament had to pass a special law to deal with the case of Napoleon Bonaparte. Lawyers for Bonaparte brought proceedings in England for his release on the grounds of unlawful detention. The parliament passed an act entitled "An Act for the more effectually detaining in custody Napoleon Buonaparte" (56 Geo.3.c.22 (1816)(Eng.) and was passed specifically to render lawful the continued detention of Bonaparte, notwithstanding the end of the Napoleonic wars, by deeming him to be a "prisoner of war" and so have no right to habeas corpus.

It has long been part of the law of habeas corpus in the UK, US and Australia that:

a. the place of incarceration is irrelevant;

b. the citizenship of the prisoner is irrelevant;

c. sovereignty over the place of confinement is unnecessary; and,

d. the only issue is whether effective control over the person detained is exercised by an entity subject to the power of the court whose jurisdiction is invoked (for example, an executive authority).

In 1923, the English House of Lords described the ambit and power of the writ of habeas corpus in the following way:

"We are dealing with a writ antecedent to statute, and throwing its root deep into the genius of our common law.... It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by courts of law as a check upon the illegal usurpation of power by the Executive at the cost of the liege."

The extra-territorial power of the writ of habeas corpus that prevents attempts to subvert the jurisdiction of the courts (such as the detention at Guantanamo Bay) has been at the heart of Anglo-American law for centuries. As indicated, the second Habeas Corpus Act of 1679 was specifically directed toward detention "beyond the seas".

An example of the broad territorial reach of the writ of habeas corpus is the case of *Ex Parte Anderson* (1861). In this case the English High Court issued a writ to the sheriff of the County of York in Canada, and to the keeper of the gaol of Toronto in that country, to bring up the body of an American slave, John Anderson. The High Court held that irrespective of the legislative and judicial independence of the colony the appellate English courts had not abrogated the right to issue the writ of habeas corpus. The court held "writs of habeas corpus have been and may be issued into all parts of the dominions of the Crown of England, whenever a subject of the Crown is illegally imprisoned or kept in custody.... We think that nothing short of legislative enactment would justify us in refusing to exercise the jurisdiction—when called upon to do so for the protection of the personal liberty of the subject."

Significantly, as Anderson was an American slave, it is evident that the use of the term "subject" was not equated with the status of citizenship.

US legal precedents are consistent with the law in the UK and other commonwealth countries. In the 1950 case of *Johnson v. Eisentrager* the US Supreme Court referred to the English origins of habeas corpus and the harmony between the relevant laws of the two jurisdictions—including

the extra-territorial reach which was so central to the development of the law in England because of its history as an imperial power exercising authority over territories outside the United Kingdom—including territories over which it did not assert sovereignty but over which, through its own executive officers, it exercised power and control.

In the landmark Supreme Court case of *Fay v. Noia* (1963) Justice Brennan referred to the "extraordinary prestige of the great writ in Anglo-American jurisprudence and its Anglo-American development". In the judgement Brennan declared:

"It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and of liberty clash most acutely, not only in England in the seventeenth century, but also in America from our very beginnings, and today."

Guantanamo Bay represents an attempt by the Bush regime to place itself above the law in a manner unprecedented since the seventeenth century crisis, which produced the English civil war and the beheading of Charles I.

Guantanamo Bay is just one of a series of actions taken by the Bush administration since September 11 to suspend individual rights, due process and constitutional safeguards against abuse of state power.

Laws have been enacted such as the Homeland Security Act and the Patriot Act which have resulted in the arbitrary arrest and detention of hundreds of people across the US. By presidential decree branding a person an "enemy combatant" the executive has aggregated to itself the power to suspend an individual's constitutional rights, including the right to liberty.

Similar developments are taking place in the UK and Australia with the enactment of so-called "anti-terrorist" legislation.

The trajectory of the Bush administration is clear. It wishes to institute a repressive authoritarian apparatus of rule in the United States. In that process it is abandoning even notional adherence to legal and constitutional norms. Indeed, there is a kind of glee detectable in numerous members of the Bush administration in their reckless assault on democratic principles and practices. The US regime looks increasingly like a junta ruling through extra-constitutional and "emergency" powers.

But whilst the administration and its allies in the press promote the propaganda campaign about "the war on terror", the real reason for the establishment of authoritarian rule becomes clearer each day. The vast inequality that has become the central feature of social and political life in the US is the real driving force propelling the most rapacious and aggressive elements within the ruling class to establish forms of rule to deal with the social revolt that they sense approaching.

As Plutarch once said, "the gravest danger to the republic is great inequality." The spectre of fascist rule in the United States looms on the horizon.

In many ways the history of the US Supreme Court is the history of the United States. The decision of the Supreme Court in the Guantanamo Bay case may mark a significant turning point in US history, and therefore, in world history.

There has been an enormous outcry throughout the English-speaking world about what the Bush administration is doing in Guantanamo Bay.

Lawyers' associations, human rights groups, eminent jurists and indeed the liberal intelligentsia as a whole have condemned the actions of the Bush administration and other governments. In Australia recently a retired judge stood in a cage protesting the detention of asylum seekers. The various administrations have thumbed their noses at this sort of protest with complete indifference. And the fact is that these protests are utterly impotent in the face of the onslaught against democratic rights and the rule of law.

It is quite apparent that powerful social forces are operating on the legal sphere and a far more weighty social force than the liberal intelligentsia will be needed to defend the rights of the population against the state. Today the defence of democratic rights is a revolutionary question. The destruction of democratic rights is not just an idea pursued by reactionary elements, it is essential for the social programme that a powerful section of the ruling class is pursuing: the insatiable enrichment of an oligarchy at the expense of the masses, including by means of war.