

HABEAS CORPUS, JUSTICIABILITY AND FOREIGN AFFAIRS

*Matthew Groves**

The prerogative writ of habeas corpus historically served the important constitutional function of allowing people who were imprisoned by the executive government to challenge the legality of their detention. The central requirement of the writ, which is that those who detain a person must prove the lawfulness of that detention, long provided applicants for the writ with a greater scope to challenge official decisions than was possible in an application for judicial review. This aspect of habeas corpus has assumed renewed importance in modern "transnational" applications for the writ (in which the applicant seeks habeas corpus against a government or official who is not the custodian of the applicant but may be able to exert influence over another government which has detained the applicant). This article argues that these "transnational" applications for habeas corpus suggest that the writ remains an important constitutional protection that should be preserved. It also argues that, whereas the requirements of habeas corpus have remained relatively constant, in recent decades, the principles of judicial review have shifted into closer alignment with them and the courts have become more willing in that context to grapple openly with questions of foreign relations or other politically sensitive issues.

I INTRODUCTION

The prerogative writ of habeas corpus has long been lionised in legal circles and regarded by judges as a remedy "effectual to an extent never known in any other country".¹ The writ actually had an obscure and chequered history before it attained this position as a constitutional bulwark. The early history of habeas corpus suggests that it initially functioned to facilitate the detention of people rather than to facilitate their release.² The obscure period during which the writ moved from a tool of the executive to a weapon that could be used against the executive is beyond the scope of this

* Associate Professor, Faculty of Law, Monash University.

1 *R v Batchelor* (1839) 1 Per & Dav 516 (QB) at 567 per Lord Denman CJ.

2 A point made in the first modern history of the writ: Edward Jenks "The Story of the Habeas Corpus" (1902) 18 LQR 64 at 65.

article but there is no doubt that the writ was rebooted.³ Habeas corpus secured its central place in the legal folklore after the tumult of the Elizabethan and Stuart eras, when English politics was a murderous business.⁴ The writ provided a civilised forum for the rough and tumble of domestic politics, in which many disputes about the extent to which the sovereign or the royal council could imprison people without question were played out in the courts of common law.⁵ In the settlement of the so-called Glorious Revolution, the writ secured its position as a cornerstone of liberty and as a means of judicial control over the arbitrary behaviour of the executive government.⁶

Habeas corpus was regularly used after the English civil war ended.⁷ The very potential for its issue remained important and it occasionally surfaced in an important political cause.⁸ The prose in which the writ was discussed became increasingly purple. Lord Halsbury LC stated that habeas corpus was "one of the most important safeguards of the liberty of the subject".⁹ Lord Birkenhead went a step further and suggested that habeas corpus was "perhaps the most important writ known to the constitutional law of England".¹⁰ The writ attracted similar reverence in the colonies.¹¹ But as

3 Jenks, above n 2, at 64, suggests that this period of the writ has not been neglected by accident, explaining that:

... those who then knew most and felt most strongly about the writ ... had the best of reasons for discouraging antiquarian research. It is not likely that Coke and Selden and Prynne were really ignorant on the subject. But they often speak as though they were.

4 Though it is clear that the writ existed for several centuries before this time: Judith Fabrey and RJ Sharpe *The Law of Habeas Corpus* (3rd ed, Oxford University Press, Oxford, 2011) at 2.

5 The most important example was *Darnel's case* (1627) 3 St Tr 1 (KB) which led to the Petition of Right. The substantive application in *Darnel's case* failed, which accords with suggestions that the writ was often denied in celebrated cases: David Clark and Gerald McCoy *The Most Fundamental Legal Right – Habeas Corpus in the Commonwealth* (Clarendon Press, Oxford, 2000) at 1.

6 Many key victories were secured before 1688, notably by enactment of the Habeas Corpus Act 1679 (UK). That statute codified important aspects of the writ which had been established by the courts in key cases, and also cured various problems which had been revealed in other cases.

7 A masterful historical account is provided in James Halliday *Habeas Corpus – From England to Empire* (Harvard University Press, Cambridge (Mass), 2010) at 319–334. Halliday examined applications for the writ made in England between 1500–1800 and found among other things that a significant number of applications were made after 1689.

8 Such as the notable case which declared slavery was illegal in England: *Somerset v Stewart* (1772) 20 St Tr 1, (1772) 98 ER 499 (KB).

9 *Cox v Hakes* (1890) 15 App Cas 506 (HL) at 527.

10 *Secretary of State for Home Affairs v O'Brien* [1923] AC 603 (HL) at 609 cited with approval by the United States Supreme Court in *Fay v Noia* 372 US 391 (1963) at 400.

11 See for example *Hamdi v Rumsfeld* 542 US 507 (2004) at 554–555 where Scalia J stated that the "very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive." Those sentiments had a limited influence because Scalia J was content to deny the writ in *Hamdi* and other recent cases about anti-terrorism legislation.

the reputation of habeas corpus was finally secured, its use began to wane. Applications for the writ slowly declined, particularly in cases of high public importance. By the end of the twentieth century even some judges called for the writ to be abolished.¹² It was said to be an historical relic that added nothing significant to the burgeoning principles of judicial review.

In the 20 years since those arguments first arose, the scope and intensity of judicial review has continued to grow. This should strengthen arguments to abolish habeas corpus. But the very opposite appears to have happened. Calls to abolish or trim habeas corpus have vanished and some recent cases appear to have affirmed the value of the writ.

This article cites some key recent cases in which either the writ of habeas corpus or the High Court's powers of judicial review have been sought to aid people detained by a foreign government. It will be argued that these cases suggest that courts are increasingly prepared to examine issues concerning foreign affairs but that the jurisdiction to do so does not necessarily depend on any qualities unique to habeas corpus. It will be argued that the principles of habeas corpus have remained remarkably constant and that in fact the requirements of judicial review may have shifted into closer alignment with some of the principles governing habeas corpus.

More particularly, it will be suggested that, in the habeas corpus context, recent cases in which the courts have considered questions of foreign relations in applications relating to persons detained by foreign governments do not necessarily represent significant doctrinal advances. Matters affecting foreign relations or other politically sensitive issues have long been examined by the courts when considering applications for habeas corpus. By comparison, the courts have only recently become more willing to grapple openly with questions of foreign relations or other politically sensitive issues in judicial review cases. The requirements of habeas corpus predate those developments in judicial review but appear much less radical now because they align more closely with wider trends of justiciability in judicial review.

To understand that argument we must first examine the principles of justiciability, which have long placed foreign affairs beyond the reach of judicial review, and the more adventurous approach that developed in habeas corpus cases long ago.

II QUESTIONS OF JUSTICIABILITY IN JUDICIAL REVIEW

The justiciability of a decision refers to its reviewability by the courts. When courts decide whether a decision is justiciable they determine two related questions: whether a decision can and should be subject to review. The "can" question raises issues of the jurisdiction of courts to hear a case. The "should" question reflects the related issue of whether the matter is suitable for resolution

12 See Simon Brown "Habeas Corpus – A New Chapter" [2000] PL 31. See also Andrew Le Sueur "Should We Abolish the Writ of Habeas Corpus?" [1992] PL 13.

by the courts.¹³ The notion of justiciability has long guided questions about the scope of judicial review even though it is arguably an empty concept that is much more a statement of conclusion than of reasoning. McGoldrick has suggested that "justiciability is neither a concept nor a principle, but merely a category of argument into which a number of specific arguments fit."¹⁴ Macklem and Scott have similarly suggested that:¹⁵

"Justiciability" is a deceptive term because its legalistic tone can convey the impression that what is or is not justiciable inheres in the judicial function and is written in stone. In fact, the reverse is true: not only is justiciability variable from context to context, but its content varies over time. Justiciability is a contingent and fluid notion dependent on various assumptions concerning the role of the judiciary in a given place at a given time as well as on its changing character and evolving capacity.

The suggestion that justiciability contains several distinct concepts can explain both the indeterminate nature of the doctrine (because the notion has always embodied many interlocking factors) and the clear narrowing of decisions as to what is now regarded as non-justiciable (because the increasing unwillingness of courts to hold matters non-justiciable reflects a shift in the emphasis in the particular factors used to decide whether a matter is justiciable). The interlocking factors which have always influenced decisions about justiciability continue to exert influence but the level of influence that particular factors exert has changed over time.

Professor Mullan has suggested that the continued hesitance of courts to review decisions made in the exercise of "high executive powers" reflects a long-standing judicial acknowledgement of the:¹⁶

... divide between law and politics and an associated sense of the illegitimacy of the courts engaging with the political world, as well as perceptions of practical and functional limits on the institutional competence of the courts to evaluate the merits of decisions taken at that level.

The extent to which such divisions can rest on politics is questionable. If one accepts that public law is ultimately a form of politics,¹⁷ there can never be a clear distinction between legal and political questions in public law. The wider context of public law decisions, particularly those which raise questions of justiciability, means that questions of law are rarely just that. They are typically

13 The interwoven nature of these two issues is examined in Paul Daly *A Theory of Deference in Administrative Law* (Cambridge University Press, Cambridge, 2012) at 267–286.

14 Dominic McGoldrick "The Boundaries of Justiciability" (2010) 59 ICLQ 981 at 983.

15 Patrick Macklem and Craig Scott "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1994) 141 Univ Penn LR 1 at 27.

16 David Mullan "Judicial Review of the Executive – Principled Exasperation" (2010) 8 NZJPIL 145 at 161.

17 A suggestion made in Thomas Poole "Judicial Review at the Margins: Law, Power, and Prerogative" (2010) 60 UTLJ 81 at 82.

"intertwined with considerations of policy and public interest remitted to other public officials to determine."¹⁸

Decisions involving foreign affairs were long seen to contain a peculiar mix of politics, policy and public interest factors that rendered them unsuitable for judicial review. The refusal of courts to examine such issues manifested in several related principles, such as the general rule that issues involving the sovereign acts of a foreign government or state were non-justiciable.¹⁹ The reluctance of English courts to consider such issues has arguably "encouraged the notion that public law stops at the border".²⁰ But for a long time there were reciprocal limits *within* the border. To the extent that decisions concerning foreign relations were made by domestic officials within the jurisdiction, it seemed logical that the courts should also refuse to examine the decisions of domestic officials because those decisions were just the other side of the same coin. If the actions of a foreign government could not be questioned in a domestic court, it seemed logical that the actions of domestic officials concerning relations with other such nations should also remain beyond review by the courts.

Several different factors have driven a change in judicial attitudes about where and how the dividing line between law and politics, and the more general fault lines of justiciability, should be drawn. For justiciability, the most significant early steps in the last century occurred when the courts trimmed the sails of apparently broad and unfettered statutory powers of public officials. In the wartime case of *Liversidge v Anderson*, the House of Lords had read a ministerial power to order detention without charge subjectively rather than objectively, which essentially precluded any real review of the Minister's decision.²¹ The majority was clearly troubled by judicial scrutiny of executive decisions made during wartime. Lord Atkin dissented and would have read the power, which was conditioned upon the Minister having "reasonable cause" to believe the detainee was aligned with the enemy, objectively. That objective approach would have enabled the Court to subject the decision to some level of effective review.²² Lord Atkin's approach was shunned for a

18 TRS Allan "Deference, Defiance and Doctrine: Defining the Limits of Judicial Review" (2010) 60 UTLJ 41 at 42.

19 See for example *Buttes Gas & Oil Co v Hammer (No 3)* [1982] AC 888 (HL).

20 Campbell McLachlan "The Allocative Function of Foreign Relations Law" (2012) 82 BYIL 349 at 357.

21 *Liversidge v Anderson* [1942] AC 206 (HL).

22 The extent to which Lord Atkin would have actually reviewed the Minister's decision is unclear. In his detailed examination of the case, Simpson argues that Lord Atkin's judgment is largely incoherent and lacks a guiding principle: AWB Simpson *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* (Oxford University Press, Oxford, 1992) at 333–341 and 362–366. Another sceptical assessment of Lord Atkin's reasoning is provided in David Dyzenhaus "Cycles of Legality in Emergency Times" (2007) 18 PLR 165 at 168–170.

time, as was his Lordship,²³ but his approach is now orthodox.²⁴ That change of approach clearly reflected Lord Hewart's famous concern from earlier in the twentieth century about the despotism of the avalanche of discretionary powers that had arisen.²⁵

Lord Atkin's reasoning foreshadowed the growing willingness of the courts to subject even the most broad and unstructured discretionary powers to some level of judicial oversight. That trend found expression in the landmark Canadian case of *Roncarelli v Duplessis*, where the Supreme Court of Canada emphatically declared that "there is no such thing as absolute and untrammelled 'discretion'".²⁶ That conclusion was not a narrow one of statutory construction. The Court clearly also relied upon deeper value-laden common law principles which reflected judicial views about the appropriate level of scrutiny by the courts.²⁷ In the Australian context that approach is given added impetus by separation of powers considerations arising from the division and allocation of powers in the Australian Constitution. That doctrine has enabled Australian courts to suggest that a truly unfettered discretion would invalidly exceed the limited constitutional grant of legislative competency made to the parliament under a written constitution which allocates limited powers to each branch of government.²⁸ Recent British cases suggest that such reasoning does not necessarily depend on the existence of a written or entrenched constitution because the courts may instead be able to define and confine the reach of apparently broad powers in order to protect fundamental rights.²⁹

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- 23 Lord Atkin was not only ignored by his judicial colleagues but suffered a (then) grave indignity when a colleague wrote to *The Times* to complain about Lord Atkin's remarks during the hearing: see J Neville Turner and Pamela Williams *The Happy Couple – Law and Literature* (Federation Press, Sydney, 1994) at 268.
- 24 *R v Inland Revenue Commissioners, ex parte Rossminster* [1980] AC 952 (HL) at 1011; *George v Rockett* (1990) 170 CLR 104 at 112; and *Reade v Smith* [1959] NZLR 996 (CA) at 1001.
- 25 Gordon Hewart *The New Despotism* (Benn, London, 1929). The notable sequel was the Committee on Ministers' Powers *Donoughmore Report* (Cmnd 4060, 1932).
- 26 *Roncarelli v Duplessis* [1959] SCR 121 at 140 per Rand J. That basic point was affirmed in *Dunsmuir v New Brunswick* 2008 SCC 9, [2008] 1 SCR 190 at 211 per Bastarache and Fish JJ.
- 27 An argument made in David Dyzenhaus "The Deeper Structure of *Roncarelli v Duplessis*" (2004) 53 UNBLJ III.
- 28 *Gerlach v Clifton Bricks Pty Ltd* [2002] HCA 22, (2002) 209 CLR 478 at [69]–[70]; *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2, (2003) 211 CLR 476 at [99]–[102]; and *Plaintiff M61/2010E v Commonwealth [Offshore Processing case]* [2010] HCA 41, (2010) 243 CLR 319 at [56]. These cases disapproved of the notion of absolute or unreviewable discretionary powers but were guarded on the nature and extent of judicial oversight of very broad and unstructured discretionary powers.
- 29 *R (Jackson) v Attorney-General* [2009] UKHL 45, [2010] 1 AC 345 at [102], [104]–[107] and [159]. See also *AXA General Insurance Ltd v Lord Advocate (Scotland)* [2011] UKSC 46, [2012] 1 AC 868. Such cases are made controversial by hints that United Kingdom courts might review the validity of legislation.

The acceptance that all statutory powers were somehow limited, and therefore subject to review, saw the courts emphasise the effect that the exercise of apparently unfettered statutory powers could have. That focus proved equally important to non-statutory powers. In a remarkable period of change to the common law during the 1980s, the prerogative powers exercised by the executive government were held amenable to review by final courts of appeal in England,³⁰ Canada,³¹ Australia³² and New Zealand.³³ The review of decisions made under exercise of prerogative powers, like those made under statutory powers, was held to depend largely on the effect of the respective exercise of power rather than its source. Such reasoning greatly narrowed both the scope of decisions that might be accepted as non-justiciable and the principles by which courts could uphold claims of non-justiciability.

Nevertheless, the courts remained mindful of the concerns of the executive and suggested that a range of politically sensitive or complex issues should remain beyond review, such as the award of honours,³⁴ the appointment of ministers,³⁵ or a declaration of war.³⁶ Another area where the courts remained reluctant to intervene was the conduct of foreign affairs, which was seen as "vital to the survival and welfare of the nation".³⁷ The logic by which an increasingly small range of decisions remained beyond the reach of the courts was never clearly explained, though a common theme in such cases appeared to be the political sensitivity of the subject matter.

Another influence on the changing boundaries of justiciability has been the courts' own perceptions of their proper role. One illustration is the modern willingness of judges not to simply acknowledge their law-making function but also to embrace it. More than a decade ago, the Chief Justice of Canada asserted the legitimacy of judicial law-making where there was "a pressing and important social problem, broad support for change, adherence to fundamental values and

30 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL).

31 *Operation Dismantle Inc v R* [1985] 1 SCR 441.

32 *R v Toohey, ex parte Northern Land Council* (1981) 151 CLR 170; and *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.

33 *Burt v Governor-General* [1992] 3 NZLR 672. The exercise of prerogative powers in New Zealand also became amenable to challenge under the New Zealand Bill of Rights Act 1990: Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson, Wellington, 2007) at 693–694.

34 *Black v Canada (Prime Minister)* (2001) 54 OR (3d) 215 (ONCA). That decision is subject to compelling criticism in Lorne Sossin "The Rule of Law and the Justiciability of Prerogative Powers: A Comment on *Black v Chrétien*" (2002) McGill LJ 435.

35 *Stewart v Reynolds* (2009) 76 NSWLR 99 at 112 (NSWCA).

36 *R v Jones* [2006] UKHL 16, [2007] 1 AC 136; and *R (Gentle) v Prime Minister* [2008] UKHL 20, [2008] 1 AC 1356.

37 *Council of Civil Service Unions v Minister for the Civil Service*, above n 30, at 410.

principles, and the need to act in the absence of legislative solutions in areas."³⁸ A recently retired member of the House of Lords advocated a strikingly similar philosophy.³⁹ Such assertions reflect an increasing judicial self confidence in law making, at least in limited circumstances.

When courts operate within the parameters of a written constitution which provides entrenched recognition of the judiciary, that function can be cast as one of duty rather than of discretion. The exemplar of this approach is the High Court of Australia, which has affirmed the constitutionally entrenched nature of its supervisory jurisdiction in recent years.⁴⁰ However, similar remarks are now made even by judges from jurisdictions without a written constitution.⁴¹ When the judicial function is explained as a *duty*, doctrines such as justiciability, which provide a discretionary means for courts to decline jurisdiction, appear increasingly out of place.⁴² The modern rhetoric of the constitutional judicial duty to decide can only serve to marginalise traditional expressions as to the wisdom of judicial abstinence.

The boundaries of justiciability have also been affected by the bills or charters of rights which have been enacted in most common law jurisdictions. Although the precise status and content of each such instrument is unique, all have had a profound effect on public law and judicial perceptions of the legitimate scope of judicial oversight of executive decision-making. Such changes are evident in English law since the commencement of the Human Rights Act 1998 (UK).⁴³ Many commentators have argued that the Human Rights Act (UK) marks a fundamental shift in relations between the different arms of government. According to this view, the Act expands both the range of government decisions which may be challenged in the courts and the constitutional competence

38 Beverley McLachlin "The Supreme Court and the Public Interest" (2001) 64 Sask LR 309 at 319.

39 Robert Walker "Developing the Common Law: How Far is Too Far?" (2013) 37 Melb ULR 232.

40 That jurisdiction precludes legislation imposing substantive or significant procedural restrictions on the High Court's entrenched functions and jurisdiction: see respectively *Plaintiff S157/2002 v Commonwealth*, above n 28; and *Bodruddaza v Minister for Immigration and Multicultural Affairs* [2007] HCA 14, (2007) 228 CLR 651.

41 See for example Johan Steyn "Guantanamo Bay: The Legal Black Hole" (2004) 53 ICLQ 1 at 2; and Johan Steyn "Dynamic Interpretation Amidst an Orgy of Statutes" (2004) 35 Ottawa LR 163.

42 That should not obscure the obvious discretion that lies within formal constitutional structures for judges to determine the nature of relationships between institutions. See Adrienne Stone "Judicial Review without Rights" (2008) 28 OJLS 1 and the reply in Jeffrey Goldsworthy "Structural Judicial Review and the Objection from Democracy" (2010) 60 UTLJ 137.

43 The New Zealand and Canadian experiences are respectively discussed in Philip Joseph and Thomas Joseph "Human Rights in the New Zealand Courts" (2011) 18 Aust J Admin L 80 arguing that the New Zealand instrument is encouraging a move towards a natural law conception of law; and David Mullan "The Canadian Charter of Rights and Freedoms: A Direct Driver of Judicial Review of Administrative Action in Canada?" in Linda Pearson, Carol Harlow and Michael Taggart (eds) *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, Oxford, 2008) 123 arguing that the Canadian instrument is causing a focus on rights in judicial review.

of the courts to discharge that task.⁴⁴ That constitutional shift arguably began several years earlier with the rise of so-called common law constitutionalism, when many English judges and scholars invoked deeply rooted or fundamental common law values as a basis for judicial review and the developments of new principles of review.⁴⁵ Indeed, the shift arguably began even earlier in the post-war period when the courts greatly expanded the scope of review.⁴⁶ The Human Rights Act (UK) arguably provided a statutory foundation to continue and expand these developments. The extent and legitimacy of these changes are deeply contested, at least to the extent that they are explained as a consequence of the Human Rights Act (UK). Some argue that English public law is adding a new dimension of rights-based review.⁴⁷ Others have suggested that the change is more elemental. A new order of rights-based review is refashioning the landscape of public law and assuming a central role within it.⁴⁸

There is also considerable dispute about whether the rhetoric of these rights-focused cases matches the reality of their results. Professor Poole has suggested that the final bastions of non-justiciability are crumbling, though only in a superficial sense. He argues that virtually all decisions which have historically been regarded as beyond the scope of review would now be regarded as

44 The idea was first developed by Jeffrey Jowell in "Judicial Deference and Human Rights: A Question of Competence" in Paul Craig and Richard Rawlings (eds) *Law and Administration: Essays in Honour of Carol Harlow* (Oxford University Press, Oxford, 2003) 67; and Jeffrey Jowell "Parliamentary Sovereignty Under the New Constitutional Hypothesis" [2006] PL 562. See also Elizabeth Wicks *The Evolution of a Constitution – Eight Key Moments in British Constitutional History* (Hart Publishing, Oxford, 2006).

45 The most notable early proponent of this theory was Sir John Laws in the following articles: John Laws "Is the High Court the Guardian of Fundamental Constitutional Rights?" [1993] PL 59; John Laws "Judicial Remedies and the Constitution" (1994) 57 MLR 213; John Laws "Law and Democracy" [1995] PL 72; John Laws "The Constitution: Morals and Rights" [1996] PL 622. The arguments of Laws were countered in JAG Griffith "The Brave New World of Sir John Laws" (2000) 63 MLR 159. A consistent critic of common law constitutionalism is Thomas Poole in: "Back to the Future? Unearthing the Theory of Common Law Constitutionalism" (2003) 23 OJLS 453; Thomas Poole "Questioning Common Law Constitutionalism" (2005) 25 Legal Studies 142; and Thomas Poole "Legitimacy, Rights and Judicial Review" (2005) 25 OJLS 697.

46 See for example *Council of Civil Service Unions v Minister for the Civil Service*, above n 30, at 414 where Lord Roskill acknowledged that the significant extension of review undertaken in that case could only be understood as a result of post-war decisions that had seen a "dramatic and radical change in the scope of judicial review". The extent to which this expansion relied on any clear or unifying principle can be questioned.

47 See for example Michael Taggart "Reinventing Administrative Law" in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing, Oxford, 2003) 311.

48 See for example Thomas Poole "The Reformation of English Administrative Law" (2009) 69 CLJ 142. Such arguments are not universally welcomed: see Jason Varuhas "The Reformation of English Administrative Law? 'Rights', Rhetoric and Reality" (2013) 72 CLJ 369.

justiciable on most, or even all, of the grounds of review.⁴⁹ For Poole, this modern acceptance of the availability of review is undercut by the deferential approach that the courts take to both the grounds of review and the award of relief. This conclusion builds upon the useful distinction drawn by Harris between primary and secondary justiciability.⁵⁰ Primary justiciability refers to the type or category of a decision. Secondary justiciability refers to the grounds of review and the intensity with which they are applied by the courts. The secondary category is flexible and adjusted by the court in each case, usually by reference to matters such as the complexity or political sensitivity of the case.⁵¹ Dyzenhaus has suggested that such secondary notions of justiciability are the most dangerous of all because they create a legal grey hole.⁵² A legal black hole is one where the law, as that administered by the courts, essentially does not apply.⁵³ The grey hole is a more pernicious void in which the muted involvement of the courts means they function as little more than "a rubber stamp for executive decisions", and "give to official lawlessness the facade of legality."⁵⁴

In short, notions of justiciability may remain inexact but there are clear modern trends in the doctrine. The range of cases that courts refuse to examine by reason of justiciability has narrowed. That trend is apparent across different jurisdictions with different constitutional structures, which calls into question the extent to which the increased reluctance of courts to hold particular cases or issues to be non-justiciable can be explained entirely by domestic constitutional considerations. The increased willingness of courts to constrain the exercise of broad discretionary powers and the greater emphasis they place upon the protection of rights also influence the conception of justiciability.

III HABEAS CORPUS AND ITS REQUIREMENTS

Although, until the later parts of the twentieth century, the doctrine of justiciability continued to impose significant restraints on the scope of judicial review, habeas corpus seems to have cast off those limits much earlier. The willingness of courts to examine otherwise non-justiciable questions when considering habeas corpus cases is perhaps one of several instances where the writ has been at

49 Poole, above n 17. The same view is taken in Paul Daly "Justiciability and the 'Political Questions Doctrine'" [2010] PL 160 at 168.

50 Bruce Harris "Judicial Review, Justiciability and the Prerogative of Mercy" (2003) 62 CLJ 631.

51 This point lies at the heart of the attack made upon notions of deference, however that concept is defined, by Allan, above n 18.

52 David Dyzenhaus *The Constitution of Law – Legality in a Time of Emergency* (Cambridge University Press, Cambridge, 2007) at 3.

53 There must always be some form of law surrounding a so-called black hole, such as an arrest warrant or a statute drafted in oppressive terms, both of which would facilitate placing people in detention. The black hole – or the absence of the rule of law – usually arises when there is no form of oversight by the courts to ensure the legality of such processes.

54 Dyzenhaus, above n 52, at 3 and 207.

odds with, and in advance of, the mainstream of judicial review. The writ was, for example, a vehicle for courts to examine exercises of prerogative power well before the mainstream of judicial review took that step.⁵⁵ But habeas corpus was not without its own particular requirements, which are often difficult to satisfy.⁵⁶ The two practical requirements examined in this article are the related ones that an application must name an appropriate respondent, and that the respondent must hold sufficient custody over the person sought to be released.

A The Proper Respondent to an Application for Habeas Corpus

The proper respondent for an application for habeas corpus is whoever can obey an order to release the applicant (normally the manager of the prison in which the applicant is held). This is because the immediate custodian of the applicant is the person who can secure the applicant's release.⁵⁷

This requirement is not taken too literally. There have been many applications directed to someone who has control or influence over the custody, rather than immediate physical custody, of the applicant. The crucial issue is often, therefore, control, not custody. An application can fail if the respondent never had the required control,⁵⁸ or has lost it.⁵⁹ Whether control does not exist or has been lost can be questions of fact that require investigation.⁶⁰ The requirement of control explains why prison officials and government ministers are often named as respondents to habeas corpus applications. These and other senior public officials can usually secure an applicant's release very

55 The paradox was that although habeas corpus is itself a prerogative writ, all of which were historically available only to the Crown, it was long also used as "the great engine for defeating the king's own orders": Jenks, above n 2, at 64. The prerogative writs became available to subjects during the sixteenth century: HWR Wade and CF Forsyth *Administrative Law* (10th ed, Oxford University Press, Oxford, 2009) at 500.

56 It is the only prerogative writ with no standing requirement. That was clear from older leading cases such as *Somerset v Stewart*, above n 8; and *Ashby v White* (1705) 14 St Tr 696, (1703) 92 ER 126 (QB). The lack of a standing requirement has been affirmed in recent cases. See for example *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* [2000] HCA 11, (2000) 200 CLR 591 at 600 per Gleeson CJ and McHugh J, 627 per Gummow J, 653 per Kirby J and 670 per Callinan J; and *Ruddock v Vadarlis* [2001] FCA 1329, (2001) 110 FCR 491 at 509 per Black CJ.

57 The United States Supreme Court affirmed the rule that applications for the habeas corpus should normally be directed to the immediate custodian of the applicant in *Rumsfeld v Padilla* 542 US 426 (2004) at 446–447 and 451.

58 See for example *Gargan v DPP* [2004] NSWSC 10 at [24]–[25] where an application that named the Director of Public Prosecutions as respondent was held to be wholly misconceived because the Director had no control over the detention of the applicant.

59 *Barnardo v Ford* [1892] AC 326 (HL) at 333; and *Jones v Skelton* [2007] 2 NZLR 178 (NZSC) at 187–188.

60 *Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs* [2011] EWCA Civ 1540, [2012] 1 WLR 1462 at [41].

easily.⁶¹ Where there is doubt as to whom of several people exercises control, the courts have generally accepted that all should be named as respondents.⁶² In complex cases this may lead to a "kitchen sink" approach, whereby a vast list of respondents is named out of caution.⁶³

In most cases where the control alleged to be exercised by a respondent is political (or, rather, stems from deductions made about the power held by a politically powerful official), the courts seem willing to accept the presumed power of that respondent. Sometimes officials who appear to have political control may not be the appropriate respondents. That problem arose in *Alsali v Manager, Baxter Immigration Detention Facility*, where the applicant was detained in one of Australia's immigration detention centres.⁶⁴ The applicant was clearly detained according to provisions of the Migration Act 1958 (Cth) but there was little clarity beyond that. Selway J reasoned that the Minister of Immigration was not a suitable respondent because the migration legislation did not make the Minister custodian of detainees nor the manager of whoever was the custodian.⁶⁵ His Honour held that the Attorney-General or the Commonwealth itself were more appropriate respondents. That reasoning implies that the likely political responsibility of the Minister was not sufficient reason for him to be a respondent.⁶⁶ A case such as *Alsali* illustrates that determining

61 The courts now assume that public officials who can ensure an applicant's release will actually do so.

62 See for example *Jones v Skelton*, above n 59, which was essentially a family law case of child abduction. Much of the evidence was unclear or disputed but the Court was satisfied that several people were involved in the child's abduction. The Court held that all of those people could be named as respondents because they all knew where and in whose custody the child was, so all could exercise some level of influence over the custodian of the child.

63 But the list may still be incomplete. In the notorious Tampa case, the applicants joined every minister whose department was involved, including: the Minister and the Secretary for Immigration and Multicultural Affairs (that department administered the refugee visa system that the asylum seekers wished to use and the immigration detention centres they would be kept in while their applications were processed), the Minister for Defence (the navy held the Tampa under guard), the Attorney-General (whose department advised others involved in the case) and the Commonwealth itself. The captain of the MV Tampa was not made a respondent, perhaps for fear that this would draw his government (Norway) into the affair. That omission was strange because the captain did not relinquish command when the vessel was boarded by armed troops, and it was he who refused to let the asylum seekers make or receive calls to assist their claims. Beaumont J thought the failure to join the captain was a serious defect: *Ruddock v Vadarlis*, above n 56, at 518. Black CJ and French J appeared untroubled by the point.

64 *Alsali v Manager, Baxter Immigration Detention Facility* [2004] FCA 352, (2005) 136 FCR 291 at 294.

65 The issue is typically simpler in prison cases because correctional legislation normally vests the custody of prisoners in either the individual manager of each prison or the head of the prison system.

66 But that very political responsibility would surely have spurred the Government to ensure obedience to any issue of the writ. A failure to do so would have subjected the Minister to a humiliating public acceptance that he could not control key issues within his portfolio. See also *Rumsfeld v Padilla*, above n 57. The applicant in that case was held on a United States navy ship and named the Secretary of Defense (Rumsfeld) as respondent. The Supreme Court held that the proper respondent was the ship's captain because she clearly held control over the applicant. The Court was also mindful that the ship's location was easy to

who is an appropriate respondent to an application for habeas corpus can increase in difficulty in accordance with the complexity of the custody arrangements in which the applicant is held.

B Custody and Control in Transnational Applications for Habeas Corpus

Questions about control become more difficult if the applicant is not within the jurisdiction. Habeas corpus is usually issued on the assumption that the detained person is within the jurisdiction of the court. The writ normally becomes impossible to perform when the detained person is held outside the jurisdiction.⁶⁷ The possibility that a person might be removed from the jurisdiction was the central issue in many earlier cases. During centuries of domestic turmoil in England, it was common for prisoners to be moved around the country and thereby placed beyond the reach of local courts.⁶⁸ Much of the early history of the writ reflected the struggle to ensure that prisoners were not placed beyond the reach of the courts by surreptitious transfer.⁶⁹ These issues were problematic even in the relatively small physical confines of England because travel and communication were difficult, especially in times of disturbance or civil war when the writ was usually sought. Historically, these practical problems removed the need for courts to consider questions about the reach of habeas corpus. The writ was limited by practical issues.

Quite different problems arose in several cases during colonial times when the writ was sought in England to release prisoners held elsewhere in the British Empire. The prisoners in such cases were not normally removed from the jurisdiction. They had never been in it. The requirement of control was difficult in such cases. The legal and political accountability of colonial officials to their English superiors did not always provide sufficient control for habeas corpus to be sought against

establish. Both the majority and minority of the Supreme Court accepted that an application for the writ could name as respondent someone who was not the applicant's immediate custodian, at least in exceptional circumstances. One of the many issues the Supreme Court divided over was whether the case at hand was exceptional.

- 67 A point conceded by Brennan J in *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523 when he acknowledged that "habeas corpus is not an effective remedy once the person arrested is taken out of the jurisdiction".
- 68 Such problems illustrated a wider struggle between local and central authorities. Habeas corpus was one means by which the central courts of the Crown slowly established their primacy over local courts: Fabrey and Sharpe, above n 4, at 4–5.
- 69 WS Holdsworth *History of English Law* (3rd ed, Little Brown & Co, Boston, 1923) vol IX at 116–117. Holdsworth notes that the writ was used to correct many other problems, such as imprisonment by the monarch without sufficient cause or the incorrect refusal of bail: 108–125. The surreptitious movement of prisoners within England was essentially ended by the Habeas Corpus Act 1679 (UK) 31 Cha II, c 2. Section 8 of that Act provides that people who are committed on a criminal matter to the custody of a particular person or place cannot be removed from that custody except by way of habeas corpus or other prerogative writ. The effect of this provision is largely overtaken by modern prison legislation which grants prison officials wide discretionary powers to transfer prisoners between prisons.

English officials to compel release of people held by colonial officials. Questions of control could sometimes be resolved by a novel application of existing principles. The applicant in *R v Earle of Crewe, ex parte Sekgome* was detained in South Africa, by order of the local High Commissioner.⁷⁰ The applicant sought the writ against the British Colonial Secretary, arguing that he could advise the King to revoke the detention order. There was no question that the King would follow any ministerial advice but the Court agreed on little else. Vaughan Williams and Kennedy LJ concluded that the Colonial Secretary could not secure the applicant's release. The former was influenced by the fact that the Secretary did not have the actual power to order the applicant's release,⁷¹ while the latter held that it was because the detaining authorities were clearly obliged to obey any revocation of the order.⁷² Farwell J was content to rest more upon politics, noting that the High Commissioner was accountable to the Colonial Office and therefore also to the Secretary, whose bidding he would surely do.⁷³

These points become messy when the control exercised by the respondent is political rather than legal. The more political the control, the messier the question. In the leading case of *R v Secretary of State for Home Affairs, ex parte O'Brien*, there was no question that the British Government had delivered the applicant illegally to the Government of the Irish Republic.⁷⁴ The problem was how to secure his release from internment in Ireland by an application for habeas corpus to an English court. The uncertain status of the applicant's custody was amplified by the existence of a standing agreement between the Home Secretary and the Irish authorities, which provided that the Irish authorities would release internees when recommended by an Irish advisory committee. The agreement also provided that the Home Secretary would abide by any recommendations of the committee. The Home Secretary argued that performance of the writ was impossible because the applicant was clearly beyond English territory and the reach of its courts. Strictly speaking, the Home Secretary was right to say that he could not *order* the Irish authorities to release the applicant but it was clear that the British Government had considerable political influence over the Irish Government. The Home Secretary had even boasted as much shortly before the application for habeas corpus was made.⁷⁵

Gunboat diplomacy was out of the question for the Government, and the Court faced a similar obstacle in any attempt to simply barge into events in Ireland. The Habeas Corpus Act 1862 (UK)

70 *R v Earle of Crewe, ex parte Sekgome* [1910] 2 KB 576 (CA).

71 At 592.

72 At 629.

73 At 618.

74 *R v Secretary of State for Home Affairs, ex parte O'Brien* [1923] 2 KB 361 (CA).

75 He had publicly proclaimed that the British Government had "not lost control" in Ireland: *Ex parte O'Brien* (CA), above n 74, at 398.

prevents English courts from issuing the writ to "any colony or foreign dominion of the Crown" in which there is a court able to grant the writ.⁷⁶ That Act precluded any issue of the writ against Irish authorities but not against an English minister. The Court of Appeal held that the political influence held by the Minister provided a sufficient basis on which to issue the writ against him, which enabled the Court to deftly side-step the fact that the Home Secretary had no direct legal control over the applicant. The Court of Appeal held that it was sufficient that the Home Secretary *might* obey the writ and *might* be able to secure the applicant's release.⁷⁷ The precise basis of the Court's reasoning was not entirely clear. Bankes and Atkin LJ stressed the need to show that the respondent exercised "power or control" over the detainee.⁷⁸ Scrutton LJ adopted the slightly more expansive criteria of "custody, power or control" but also conceded that none of the different formulations used by the Court explained "the exact degree of power over the body which justifies the issue of the writ."⁷⁹ The important point that *O'Brien* did clarify is that the writ can be issued for the benefit of someone held outside the jurisdiction if there is someone within the jurisdiction who can help to achieve that person's release. What remained unclear was the level of control or influence required for habeas corpus to issue.

The finer edges of *O'Brien* were not clarified by several later cases in which the writ was sought in English courts to secure the release of people detained in the colonies.⁸⁰ Such cases arguably did not raise questions of foreign relations because the colonies were clearly part of the British Empire. Those cases arguably also suggested that some elements of foreign relations were not beyond the reach of the courts. The cases did not adopt the terminology of justiciability but instead appeared to proceed upon the assumption that the actions of domestic officials who were within the jurisdiction

76 That statute was provoked by a case in which an English court issue the writ to release a person held in an English colony: *Ex parte Anderson* (1861) 3 El & Bl 487 (QB). The efforts to narrow the scope of *Anderson* began almost as soon as it was delivered: *Re Mansergh* (1861) 1 B & S 400 (QB) at 410–411. They have continued. See for example *Re Keenan* [1972] 1 QB 533 (CA); *Zwillinger v Schulof* [1963] VR 407 (VSC) at 412–413; and *Glasson v Scott* [1973] 1 NSWLR 689 (Fam Law Div) at 698–701. The Habeas Corpus Act 1862 (UK) prevents English courts from issuing writs of habeas corpus to other countries but, oddly, does not impose an equivalent restriction on the courts of those other countries.

77 Atkin LJ made clear that these questions about custody and control on the part of the Home Secretary were ultimately ones of fact: *Ex parte O'Brien* (CA), above n 74, at 398. The answer became clear upon the writ's return in the Court of Appeal. The Home Secretary produced the applicant who was released. That doomed the Home Secretary's appeal: *Secretary of State for Home Affairs v O'Brien* (HL), above n 10.

78 *Ex parte O'Brien* (CA), above n 74, at 381 per Atkin LJ and 398 per Bankes LJ.

79 At 391.

80 See for example *Ex parte Mwenya* [1960] 1 QB 241 (CA) where the Divisional Court refused an application for the writ to release from detention someone held by order of the Governor of Northern Rhodesia. The Court accepted that the Colonial Secretary could have advised the Queen to order the applicant's release but was not satisfied that this would actually secure his release.

were properly within the scope of habeas corpus, even if those officials were involved in colonial affairs.

The first significant post-colonial case of *Re Sankoh* suggested that such principles were not limited to colonial matters.⁸¹ Mr Sankoh was a warlord held by local officials in Sierra Leone. Mrs Sankoh argued that involvement of the British army in local peacekeeping provided sufficient control for issue of the writ in Britain because the Minister could direct the army to negotiate with officials in Sierra Leone for the release of her husband. The Court of Appeal flatly rejected those suggestions, largely because the only evidence of British involvement with Mr Sankoh was that it had once provided him with medical care and transported him a few times (over short distances) at the request of local officials.⁸² Importantly, the Court of Appeal did not suggest that the writ could not issue in such a transnational application if stronger factual claims could be made on the issues of custody and control.

The British Government had never exercised direct custody or control in the subsequent case of *Abbasi v Secretary of State*.⁸³ Mr Abbasi was an English citizen transported to Guantánamo Bay eight months before he sought judicial review of the failure of the British Foreign Office to make representations on his behalf to the United States authorities. The Court of Appeal was gravely concerned that the lack of review mechanisms in the United States meant that Mr Abbasi faced indefinite detention.⁸⁴ The Court declined to issue relief because it was satisfied that the Foreign Office had in fact considered the request to make representations. The Court was guarded on the issue of whether the case might have succeeded if there had been an application for habeas corpus, but stressed the importance of the writ and its potential role in vindicating the fundamental point that every imprisonment was unlawful in English law unless supported by clear authority.⁸⁵ The apparent lack of authority led the Court of Appeal to state:⁸⁶

81 *Re Sankoh* [2000] EWCA Civ 386.

82 The Court of Appeal was so dissatisfied with the evidence led in support of the claim of custody and control on the part of the British Government that it awarded indemnity costs against the applicant. Such orders are almost unheard of in habeas corpus cases. The longstanding refusal of courts to award costs against applicants in failed claims for habeas corpus has continued even in New Zealand despite the surge in applications that country has experienced since the passage of the Habeas Corpus Act 2001. That Act excludes the normal rule in Commonwealth countries, by which costs follow the event, but New Zealand courts have also maintained the traditional reluctance to award costs in habeas corpus cases. The key reason given is that the right of liberty is so important that applicants should not be dissuaded by the possibility of adverse awards of costs: *Manuel v Superintendent, Hawkes Bay Regional Prison* [2006] 2 NZLR 63 (CA) at 63 per Anderson P and Robertson J.

83 *Abbasi v Secretary of State* [2002] EWCA Civ 1598.

84 At [66] and [107].

85 At [59]–[63].

86 At [64].

... 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 Abbasi is at present arbitrarily detained in a "legal black hole".

The Court of Appeal acknowledged modern advances in justiciability. In accordance with the orthodox English approach, the Court accepted that the important issue was not the source of power under which any decision about representations to a foreign government would be made but the subject matter of that power.⁸⁷ The Court also noted that "where fundamental rights are in play", the act of state doctrine would not preclude judicial examination of "the legitimacy of the actions of a foreign sovereign state."⁸⁸ It followed that any reliance by the Government upon prerogative or other unusual powers could not alone provide a reason for the Court to decline review. The Court of Appeal did, however, accept that the cases involving such powers often involved sensitive or difficult issues that were unsuited to review, such as decisions on whether to enter an international treaty, or whether to declare or cease war. The Court explained:⁸⁹

The Secretary of State must be free to give full weight to foreign policy considerations, which are not justiciable. However, that does not mean the whole process is immune from judicial scrutiny.

The question involved the resolution of competing considerations. On the one hand, the level of injustice raised by a particular case could be vital.⁹⁰ The implication seemed to be that the greater the injustice, the greater the case for the government to consider whether to make representations and also the greater the imperative for judicial oversight of that process. But the Court of Appeal conceded that the special qualities of foreign policy would remain relevant and could override other considerations. The Court also accepted that the discretion such reasoning preserved in cases involving foreign affairs would not prevent judicial review in an appropriate case, such as one where a decision or inaction was shown to be irrational or contrary to the legitimate expectations of an applicant.⁹¹ The Court of Appeal found that the foreign office had adopted a policy that could support a legitimate expectation that the British Government would consider making representations to another government on behalf of a British citizen where it was believed that other government was in breach of its international obligations.⁹²

This reasoning represents a novel application of the legitimate expectations doctrine, which had been dramatically extended only a few years earlier by the Court of Appeal in *R v North and East*

87 At [83]–[85] referring to *Council of Civil Service Unions v Minister for the Civil Service*, above n 30.

88 At [53].

89 At [99].

90 At [100].

91 At [106].

92 At [90].

Devon Health Authority, ex parte Coughlan.⁹³ The legitimate expectation traditionally protected expectations about procedure, such as the right to a hearing before a longstanding policy might be changed, but *Coughlan* signalled the willingness of English courts to protect the substantive benefit that lay underneath any expectation. This move to protect substantive expectations has largely been rejected in the Commonwealth,⁹⁴ but has thrived in England.⁹⁵ In the wake of *Coughlan*, the legitimate expectation accepted in *Abbasi* was the less adventurous procedural variety (that the Foreign Office would *consider* making representations), rather than a substantive one (which could require consideration of the content and adequacy of any representations).

The reliance on the legitimate expectation arguably enabled the Court in *Abbasi* to move into the novel terrain of examining issues about diplomatic representations, under cover of an established legal doctrine.⁹⁶ The result of these competing principles was that the normally "forbidden area" of foreign policy could be offset and become more amenable to review, in a suitable case, by the compelling considerations relating to the situation of a particular person. The processes of diplomacy and foreign policy would not be "trumped" or overridden in such cases; they would simply be outweighed by other considerations. In *Abbasi* itself, the claim failed because the Court was satisfied that the Foreign Office had considered the request and the Court felt it could not normally expect, nor order, anything more. The reasoning in *Abbasi* arguably suggests that modern developments in judicial review have enabled courts to consider issues that were previously beyond their reach but, as with applications for habeas corpus, the success of those steps still depends greatly on the facts of each case.

93 *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 (CA). A key case cited by the Court of Appeal was the Australian case of *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. Only months after *Abbasi*, above n 83, the *Teoh* case was strongly doubted by the Australian High Court: see Matthew Groves "Unincorporated Treaties and Expectations – The Rise and Fall of *Teoh* in Australia" (2010) 15 JR 323.

94 For Canada and Australia respectively, see: *Mount Sinai Hospital Centre v Quebec (Minister of Health and Social Services)* 2001 SCC 41, [2001] 2 SCR 281; and *Re Minister for Immigration and Multicultural and Indigenous Affairs, ex parte Lam* [2003] HCA 6, (2003) 214 CLR 1.

95 The House of Lords referred to *Coughlan*, above n 93, with apparent approval in *R v East Sussex County Council, ex parte Reprotech (Pebsham) Ltd* [2002] UKHL 8, [2003] 1 WLR 348 at [24]; *R (Mullen) v Secretary of State for the Home Department* [2004] UKHL 18, [2005] 1 AC 1 at 30 and 41; and *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95 at 139. The House of Lords endorsed the doctrine of the substantive enforcement of legitimate expectations without mentioning *Coughlan* in *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2008] UKHL 28, [2008] 1 AC 1003 at 1015–1017 and 1025.

96 The similarities of *Abbasi* with *Coughlan*, above n 93, were all the more apparent because the Court of Appeal described the balancing of competing considerations in similar terms to the assessment of competing policy issues made in *Coughlan: Abbasi*, above n 83, at [100]. It is very likely that the Court would be less prepared to second guess a decision about making representations to a foreign government than a decision to close a local health care facility for severely impaired people (the decision in *Coughlan*).

IV THE LIMITS OF HABEAS CORPUS

The preceding examination of justiciability and the requirements of habeas corpus reveal clear trends. The scope of decisions that are regarded as non-justiciable has clearly narrowed, mainly because the courts place much greater weight on the impact of decisions rather than the source of authority under which the decisions are made. That shift in focus clearly works in the favour of a finding of justiciability in cases where a decision may have a significant impact on the individual. On the other hand, the requirements of habeas corpus have long had a different focus. The writ traditionally latches onto more practical questions, such as whether the respondent against whom the writ is sought is the correct person to achieve or influence release of the person.

These issues highlight a common theme between the requirements of habeas corpus and the doctrine of justiciability. Decisions concerning foreign affairs have long been regarded as non-justiciable in judicial review. Similar concerns arise in applications for habeas corpus which involve questions of foreign affairs, notably when the person sought to be released is not detained in the jurisdiction in which the writ is sought. The courts have long appeared to take a different approach when such issues arise in claims for habeas corpus. They do not dismiss such claims as non-justiciable but consider the practical problem of whether domestic officials can in fact achieve the release of a person in another jurisdiction. This question appears to have been approached as one of practicality rather than principle in habeas corpus cases. The courts are not troubled by the possibility that issue of the writ might intrude into matters of politics and foreign relations. In other words, habeas corpus cases have long touched on issues of foreign affairs in a tangential manner but have never suggested that the involvement of questions about foreign relations make the consideration of claims for the writ impossible or inappropriate for reasons of justiciability. The habeas corpus cases also seem to presume that the issue of relief against a domestic official in a case involving transnational officials can be an entirely appropriate order.

That approach naturally limits the ability of government officials to argue for the wholesale exclusion from judicial oversight of any action or refusal to act which might include issues of foreign relations. The same trend has become apparent outside habeas corpus cases in recent times. That accords with *Abbasi*, even though relief was refused in that case. The Court of Appeal declined relief only after finding that the diplomatic officials had considered whether to act. The forbidden tree was shaken a little, even if its fruit did not fall. The next cases that are examined show that the courts are beginning to shake things a little more. It will be argued that developments in justiciability have informed, arguably perhaps increased, the receptiveness of the courts to consider questions of foreign affairs in habeas corpus cases, and in other claims seeking orders against domestic officials as a means to effect the release of people held by foreign governments.

A Hicks v Ruddock

Hicks v Ruddock was an early notable transnational application for habeas corpus involving people held at Guantánamo Bay,⁹⁷ though it is important to note a related case decided by the High Court of Australia in the same year. That related case was *Thomas v Mowbray*, in which the High Court upheld the constitutional validity of legislation that created offences of terrorism and procedures for their determination.⁹⁸ Jack Thomas was arrested in 2004 and charged with attending an Al Qa'ida training camp. There seemed little dispute that Thomas' confession was extracted under torture while he was held by foreign authorities. Thomas sought to prevent his retrial on terrorism offences by challenging the constitutional validity of the terrorism legislation and the alleged involvement of Australian authorities in turning a blind eye to his torture.⁹⁹ The High Court avoided a direct examination of the alleged complicity of Australian authorities but made it clear that assessments about the likely participation of people in terrorist activities were justiciable.¹⁰⁰

The alleged role of Australia in such activities abroad was confronted more directly in the subsequent case of *Habib v Commonwealth*.¹⁰¹ In that case the Full Court of the Federal Court considered whether the act of state doctrine prevented the courts from determining Mr Habib's claim that (unknown) Australian officials were complicit in his torture by officials of another country. It held that the act of state doctrine did not preclude judicial determination of the issues because the

97 *Hicks v Ruddock* [2007] FCA 299, (2007) 156 FCR 574.

98 *Thomas v Mowbray* (2007) 233 CLR 307.

99 A key question was whether the Australian Constitution enabled the imposition of the administrative penalties common in terrorism cases, such as restrictions upon a person's movements within and outside the country. The High Court held that such measures were permissible because they did not necessarily constitute a punishment (which can only be imposed if the requirements for the exercise of judicial power have been met). Protective measures typically do not meet that requirement. In England these measures are imposed in the guise of "control orders", the validity of which depends on whether they are "unlawful" deprivations of liberty for the purposes of the Human Rights Act 1998 (UK). There is no easy answer to that question. See for example *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440 (daily curfew of 14 hours not an unlawful deprivation of liberty); *Secretary of State for the Home Department v JJ* [2007] UKHL 45, [2008] 1 AC 385 (daily curfew of 16 hours was unlawful deprivation of liberty).

100 Gleeson CJ drew an interesting parallel with cases in which the courts imposed preventive detention orders, or extended the imprisonment of convicted people, where it was concluded that the person was likely to engage in compulsive sexual offending: *Thomas v Mowbray*, above n 98, at [28].

101 *Habib v Commonwealth* [2010] FCAFC 12, (2010) 183 FCR 62. In a sequel to this case, Mr Habib challenged the refusal of Australian authorities to grant him a new passport. He was refused a passport under provisions of the Australian Passports Act 2005 (Cth) which enable such actions if it is decided that a person may engage in harmful conduct while overseas. The information upon which such a judgement is based need not be fully disclosed to the person. In *Habib v Minister for Foreign Affairs and Trade* [2010] FCA 1203, (2010) 192 FCR 148 at 159 Flick J expressed great concern about this restriction but held that Mr Habib was given enough of the gist of the reasons to have received some explanation of the decision.

alleged actions fell clearly within the constitutionally entrenched jurisdiction to review the actions of an "officer of the Commonwealth".¹⁰² The Full Court held that the judicial power entrenched in ch III of the Australian Constitution was neither precluded nor greatly restricted in a case which alleged that Commonwealth officers had exceeded the scope of lawful authority provided by Commonwealth law.¹⁰³

The Full Court gave several related reasons for this conclusion. The first was the nature of the constitutional role allocated to the courts. The principle established by *Marbury v Madison* confirmed that it is "the province and duty of the judicial department to say what the law is."¹⁰⁴ The Full Court noted that Australian courts had adopted this principle to explain "the capacity of the judiciary to review the legality of administrative action."¹⁰⁵ Importantly, the Full Court characterised this role as an "obligation".¹⁰⁶ The Court reasoned that, just as its entrenched role could not be removed or limited by statute, this obligation could not be defeated by judicial principles such as the act of state doctrine. The Full Court reasoned that allowing the act of state doctrine to preclude judicial determination of a claim that federal officers had acted unlawfully would contradict the rule in *Marbury* and curtail the Constitution. Perram J held that this argument should "be rejected in a fashion as complete as it is emphatic."¹⁰⁷ The narrower point made by the Full Court was that the act of state doctrine could not operate so as to confer on the Australian Commonwealth any immunity from suit. According to the Court's approach, Mr Habib's claim did not question the actions of foreign governments and their officials but was rather directed to the alleged illegal activities of Australian officials.¹⁰⁸

102 The entrenched jurisdiction is conferred by the Australian Constitution, s 75(v), which grants the High Court of Australia original jurisdiction in "any matter" involving an "officer of the Commonwealth". Additional original jurisdiction is conferred upon the High Court by s 75(iii) in cases "in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party". This jurisdiction and its wider context is explained in Cheryl Saunders "Constitutions, Codes and Administrative Law: The Australian Experience" in Christopher Forsyth and others (eds) *Effective Judicial Review – A Cornerstone of Good Governance* (Oxford University Press, Oxford, 2010) 61.

103 *Habib v Commonwealth*, above n 101, at 70–72 per Perram J, and 99–100 per Jagot J and Black CJ agreeing.

104 *Marbury v Madison* 5 US 137 (1803) at 177 per Marshall CJ.

105 *Habib v Commonwealth*, above n 101, at [25]. The key Australian case in which the *Marbury* doctrine was transposed to judicial review of administrative rather than legislative action was *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35–36 per Brennan J.

106 At [25].

107 At [29]. The Court also rejected submissions that a distinction should be drawn between suits made directly under its constitutionally entrenched judicial review jurisdiction and an action in tort (the latter was claimed by Habib).

108 At [25]–[29] per Perram J, and [115] per Jagot J and Black CJ agreeing. Jagot J expressly held that it did not matter that the alleged acts of Australian officials occurred wholly or partly outside Australia: at [135].

Neither *Thomas* nor *Habib* were applications for habeas corpus but each made it clear that ambit claims by the executive in cases which involve issues of national security or foreign affairs cannot succeed in excluding judicial scrutiny of those decisions, particularly if they greatly affect the rights of an individual. *Hicks v Ruddock* was such a case and explored those issues as part of an application for habeas corpus. David Hicks is an Australian citizen who had been detained by the United States Government without charge for more than five years.¹⁰⁹ He eventually commenced an application for habeas corpus in the Federal Court of Australia and named the federal Attorney-General as respondent.¹¹⁰ The Attorney-General applied for summary dismissal of the application, partly because of the custody requirement. The Attorney argued that it was simply impossible to conclude that he held any form of custody or control over the applicant. This argument essentially relied upon and distinguished *O'Brien*, by asserting that whatever control or influence the Australian authorities held with their United States counterparts, it was far less than in that case. The applicant replied that issues of custody were ones of fact and degree, which he should at least be allowed to make submissions upon.

Tamberlin J declined to dismiss the case but made few concrete findings about the facts or the law. He did, however, confirm that questions about the level of control required for habeas corpus depend heavily on the facts of each case. That was apparent from the distinctions Tamberlin J drew with other cases on the issue. *O'Brien* and *Sankoh* respectively showed a strong and weak level of control on the part of the British Government so they could easily be distinguished, but *Abbasi* was another matter. That case was far more similar to the facts of *Hicks* itself, yet Tamberlin J saw many points of difference. An important factual one was that the Court in *Hicks* lacked specialist evidence from diplomatic officials and government ministers. Such evidence was clearly important to the acceptance in *Abbasi* that coercive orders by the Court of Appeal might unduly impede the conduct of foreign relations.¹¹¹

It is not clear why the Australian Government did not make more detailed submissions on the question of what might have happened had the Court compelled the Government to make

¹⁰⁹ The first attempt to charge Hicks was legally flawed. Revised charges were instituted and Hicks eventually pleaded guilty to those charges but later made several attempts to overturn his plea. During his lengthy detention, Hicks unsuccessfully tried to claim British citizenship: *Secretary of State for the Home Department v Hicks* [2006] EWCA Civ 400. That claim was clearly designed to provide the foundation for a request to the British Government to make representations on behalf of Hicks, as occurred in *Abbasi*, above n 83.

¹¹⁰ The power of the Federal Court to issue habeas corpus is unclear. See David Clark "Jurisdiction and Power: Habeas Corpus and the Federal Court" (2006) 32 Monash LR 275. The High Court has held that the issue of habeas corpus is one of the constitutionally protected functions of state supreme courts: *Kirk v Industrial Relations Commission (NSW)* [2010] HCA 1, (2010) 239 CLR 531 at 581 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. That finding depended on the express and implied recognition of state supreme courts in the Australian Constitution and does not extend to the Federal Court.

¹¹¹ *Hicks v Ruddock*, above n 97, at [79]–[81].

representations to the United States authorities about releasing Hicks (which almost certainly would have been required if the case had continued and the writ was issued). Tamberlin J wisely remained silent on this issue.¹¹² He simply held that the act of state doctrine was not itself sufficient reason to order summary dismissal of the case.¹¹³ It was at least clear that the Australian Government *could* have exerted an influence over the United States authorities because both Australian and United States officials had made many public statements about the special relationship that the two countries enjoyed. If the Australian Government had sought to resile from those statements at a substantive hearing of the *Hicks* case, it could only have done so after a humiliating public reversal of those statements. The Australian Prime Minister had famously declared that his country was "America's sheriff" in the South Pacific. Any admission that Australia had no influence over its United States friends would have made its leaders little more than the United States' poodle.¹¹⁴ Secondly, there is an important distinction between the question of whether the Australian Government *should* influence United States authorities and whether it *could*. There seems no good reason why political embarrassment should justify refusal of habeas corpus where the requirements of the writ are satisfied.

Tamberlin J was also mindful of the very different constitutional framework of Australian cases. He hinted that English courts approached questions about foreign relations differently because they were not subject to a formally entrenched separation of powers.¹¹⁵ One might think that the Australian constitutional framework would impose clearer limits on the courts because of the relative limitations that system imposes on the different arms of government. Tamberlin J thought

112 Later cases suggest that Australian courts are reluctant to impose any meaningful restrictions upon political and diplomatic officials who deal with foreign governments. In *Habib v Commonwealth*, above n 101, at 364–365 Perram J rejected a submission that the Commonwealth owed a fiduciary duty to citizens, by which it should act on behalf of and for the benefit of a particular citizen. Perram J essentially held that the Commonwealth should not be constrained by the courts when balancing individual and broader governmental interests. See also *Rush v Commissioner of Police* [2006] FCA 12, (2006) 150 FCR 165 where Finn J rejected a suggestion that Australian citizens had a legitimate expectation about how Australian authorities would deal with foreign governments during transnational criminal investigations.

113 *Hicks v Ruddock*, above n 97, at 587.

114 That possibility did not arise in *O'Brien*, above n 10, because the Home Secretary denied having influence over Irish officials when he gave evidence. Those denials were clearly at odds with his parliamentary boasts about Britain's influence in Ireland but such parliamentary statements were inadmissible in the habeas corpus application by reason of art 9 of the Bill of Rights 1689 (UK). Article 9 precludes the questioning of statements made in parliamentary proceedings and therefore made it impossible for the Home Secretary to be cross-examined over his remarks in Parliament. In contrast, the relevant boasts in *Hicks v Ruddock*, above n 97, were made in press conferences and other non-privileged events.

115 *Hicks v Ruddock*, above n 97, at [80].

otherwise. His Honour reasoned that the notion of a "forbidden area", which so concerned the English Court in *Abbasi*, expressed the issues "far too generally". He explained that:¹¹⁶

... such a broad proposition will not readily apply in Australia where executive power is vested by and subject to the limitations spelt out in s 61 of the Australian Constitution.

What could easily have been cast as a limitation upon the Court was explained as a duty, and a constitutional one at that. Tamberlin J suggested that the exercise of this duty was all the more imperative because the injustice faced by Mr Hicks was far greater than Mr Abbasi. After all, Abbasi had been detained for several months, while Hicks had been held for over five years. The *Abbasi* case arose while a constitutional challenge to military commissions remained in the planning but the *Hicks* case arose after that challenge had succeeded. That meant that Hicks was without real hope, while *Abbasi* had some hope (at least at the time).¹¹⁷ Those obvious injustices led Tamberlin J to dismiss concerns that the Court might enter uncharted waters if it allowed the application for habeas corpus to be considered. His Honour explained:¹¹⁸

The modern law in relation to the meaning of "justiciable" and the extent to which the court will examine executive action in the area of foreign relations and Acts of State is far from settled, black-letter law. Likewise, in relation to the elements of and the reach of the habeas corpus writ regarding control and unlawfulness, the authorities are far from settled and clear. The law has developed greatly. There are no bright lines which foreclose, at this pleading stage, the arguments sought to be advanced in the present case.

Such reasoning and the more general approach of the courts in *Habib* and *Hicks v Ruddock* rebuts the argument of Murray Hunt about the supposedly destructive influence that notions about the institutional allocation of powers have exerted. Hunt argues that doctrinal approaches to the separation and allocation of powers have infected and stunted judicial innovation throughout the Commonwealth.¹¹⁹ The Australian experience suggests something of the opposite. While there is no doubt that the widespread acceptance in that country of principles which support the entrenchment of judicial power also limit its scope,¹²⁰ those same principles ensure a strong form of judicial

116 At [85].

117 At [86].

118 At [93].

119 Murray Hunt "Sovereignty's Blight" in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing, Oxford, 2003) 337 at 346–347. This argument influenced Allan, who railed against "dubious 'spatial language of areas or margins of discretion', indicating exclusive zones of competence": TRS Allan "Human Rights and Judicial Review: a Critique of 'Due Deference'" (2006) 65 CLJ 671 at 672.

120 See for example Matthew Groves "Federal Constitutional Influences on State Judicial Review" (2011) 39 Federal L Rev 399.

supervision over the illegal actions of government officials.¹²¹ The relevance of habeas corpus to this strong conception of the judicial function is another matter. The writ is not one of the remedies expressly mentioned or otherwise entrenched by the Australian Constitution.¹²² Tamberlin J gave no indication in *Hicks v Ruddock* that the need to ensure the compliance by public officials with the law became more imperative if that duty was sought to be enforced by habeas corpus. It is therefore arguable that the *Hicks* decision reveals much more about the deeply entrenched position of Australian courts than it does about the position of habeas corpus.

B The Khadr Case

Omar Khadr has had a complex life.¹²³ He was captured by coalition forces in Afghanistan in 2002 and quickly transferred to Guantánamo Bay. Khadr was 15 years old at the time but was soon charged with serious criminal offences, including a charge of homicide based on allegations that he threw a grenade which killed a United States soldier. Khadr was still a minor the following year when he was visited by two officials from the Canadian intelligence services. Those officials interviewed Khadr about his activities and the charges against him. The Canadian officials quickly shared the information they had obtained with United States intelligence officials. Perhaps the "success" of that interview was why other Canadian officials interviewed Khadr again in 2004. An important aspect of this second round of interviews was that the Canadian officials certainly knew by that time that Khadr had been tortured by sleep deprivation.

By this time, Khadr sought protection in the courts. In one hearing, an interim injunction was issued to prevent the Canadian officials from returning to Guantánamo Bay to interview Khadr.¹²⁴ In a remarkable sequel to that case, the Supreme Court of Canada ordered the Canadian security forces to disclose their records of interviews with Khadr to his lawyers.¹²⁵ This first decision of the Supreme Court was not an application for habeas corpus but instead a case brought under the

121 The same reasoning arguably also underpins the judgment of the European Court of Human Rights in *Al-Skeini v United Kingdom* (2011) 53 EHRR 18 (Grand Chamber, ECHR) where it was held that Iraqi citizens killed by British forces who were on patrol in Basra fell within the United Kingdom jurisdiction for the purposes of the Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953). The Court noted that any finding that a member state was exercising jurisdiction extra-territorially depended heavily on the facts of each case. The Court explained its finding of jurisdiction in that case partly on the need for oversight of possible illegal actions by governments and their officials.

122 Mark Aronson and Matthew Groves *Judicial Review of Administrative Action* (5th ed, Thompson Reuters, Sydney, 2013) at 839.

123 The travails of his brother, Abdullah Khadr, are explained in Kent Roach "Substitute Justice? Challenges to American Counter-Terrorism Activities in Non-American Courts" (2013) 82 Mississippi LJ 3 at 33–37.

124 *Khadr v Canada* 2005 FC 1076, [2005] FCR 505.

125 *Canada (Justice) v Khadr* 2008 SCC 28, [2008] 2 SCR 125.

Canadian Charter of Rights and Freedoms. The Court found that the Charter applied to the security officials while they were at Guantánamo Bay. The Supreme Court also found that the case engaged the right to liberty protected by s 7 of the Charter. The Court was clearly mindful of the serious effect that the conduct of the security officials had on Khadr's rights, particularly as by that time the conduct had also been found to violate United States law.¹²⁶ Those concerns led the Supreme Court to bluntly sweep aside arguments that disclosure would somehow impede international relations. The Court concluded:¹²⁷

The principles of international law and comity of nations, which normally require that Canadian officials operating abroad comply with local law, do not extend to participation in processes that violate Canada's international human rights obligations.

The Supreme Court also reasoned that the extent of any disclosure ordered by the Court should reflect the gravity of the conduct of the Canadian officials. The Court explained:¹²⁸

The scope of the disclosure obligation in this context is defined by the nature of Canada's participation in the foreign process. The crux of that participation was providing information to US authorities in relation to a process which is contrary to Canada's international human rights obligations.

The Supreme Court remitted the case to the Federal Court to decide the precise extent of disclosure of the material gained during interrogation. In that Court, Mosley J balanced the competing factors relevant to disclosure by conceding that disclosure might cause "some harm" to Canada's relations with the United States, but concluded:¹²⁹

... that effect will be minimized by the fact that the use of such interrogation techniques by the US military at Guantanamo is now a matter of public record and debate. In any event, I am satisfied that the public interest in disclosure of this information outweighs the public interest in non-disclosure.

The focus upon the disclosure of information explains why this case was not an application for habeas corpus. The writ functions to release people and not documents. It cannot provide a means to obtain and disclose information, even though that might happen during the course of an application. Nor could the issue of habeas corpus provide a means to force the Canadian officials to cease or alter their offending behaviour because those remedies could not have served the central purpose of releasing Khadr.

126 The Court made clear that the Canadian Charter of Rights and Freedoms would have had no extra-territorial application if the activities of Canadian officials in the Guantánamo Bay facility met Canada's international legal obligations: at [18]–[20]. In other words, the Canadian Supreme Court found the Charter applicable because no other legal protections seemed to apply and the law had clearly been violated.

127 At [2].

128 At [32].

129 *Khadr v Canada (Attorney General)* 2008 FC 807 at [89].

These and related proceedings were clearly a sideshow to the main purpose of the litigation commenced on Khadr's behalf, which was to force his return to Canada.¹³⁰ Despite several embarrassing and highly public losses in the courts, the Canadian Government remained steadfastly opposed to that option. A further decision of the Federal Court of Canada offered a solution, when the Court found that the Canadian Government had a "duty to protect" Mr Khadr and that this duty was violated by its continued refusal to seek his return.¹³¹ That decision was affirmed by the Federal Court of Appeal, which held that the duty to protect arose from the special circumstances of the case.¹³² The Appeal Court was particularly influenced by the fact that the Canadian security officials knew by the time of their second round of interviews that Khadr was a member of the so-called "frequent flyer" program, which involved sleep deprivation and related torture.

The Supreme Court upheld that decision but amended the remedy essentially to soften the initial order which directed the Canadian Government to approach the United States Government and seek the return of Khadr.¹³³ That modified order reflected the balance that the Supreme Court thought should be struck between the need to ensure judicial scrutiny of executive action even over very sensitive issues, such as the conduct of foreign relations, and the protection of the rights found in the Canadian Charter. The Supreme Court upheld the finding that Khadr's Charter rights had been violated but left it to the Government to decide the appropriate course of action. In other words, the Government could decide how to act and perhaps also whether to act. The Supreme Court explained that:¹³⁴

... the conduct of foreign affairs lies with the executive branch of government. The courts, however, are charged with adjudicating the claims of individuals who claim that their *Charter* rights have been or will be violated by the exercise of the government's discretionary powers ...

The Court continued:¹³⁵

The prudent course at this point, respectful of the responsibilities of the executive and the courts, is for this Court to allow Mr Khadr's application for judicial review in part and to grant him a declaration advising the government of its opinion on the records before it which, in turn, will provide the legal

130 Khadr also made several unsuccessful applications for habeas corpus in the United States District Court but failed: *OK et al v Bush* 377 F Supp 2d 103 (2005); and *Khadr v Bush* 377 F Supp 2d (2008).

131 *Khadr v Canada (Prime Minister)* 2009 FC 405, [2010] 1 FCR 34. This alleged duty of protection was also founded on s 7 of the Canadian Charter.

132 *Khadr v Canada (Prime Minister)* 2009 FCA 246, [2010] 1 FCR 73.

133 *Canada (Prime Minister) v Khadr* 2010 SCC 3, [2010] 1 SCR 44.

134 At [40].

135 At [47].

framework for the executive to exercise its functions and to consider what actions to take in respect of Mr Khadr, in conformity with the *Charter*.

The issue of declaratory relief by the Supreme Court attracted mixed views. Kent Roach argued that the remedy amounted to an abdication by the Court of its central function and that the less intrusive remedy issued by the Supreme Court was at odds with the importance the Court has attached to remedies in other cases involving the violation of fundamental rights.¹³⁶ By contrast, Lorne Sossin suggested that declaratory relief was "entirely appropriate" because it enabled the Court "to determine rights and obligations ... which governments must then implement."¹³⁷ Sossin's suggestion must be understood within the context of his wider argument that Canadian law recognises two different or competing possible approaches to cases which raise largely political questions. One approach rejects the notion that the courts should not determine highly political cases or questions because such matters are more appropriately left to the legislative or executive branches of government. The second approach holds that highly political cases or questions do not contain a sufficiently clear legal component as to properly engage the courts.¹³⁸ The second view provides the courts with significant discretion to decline to adjudicate extremely sensitive issues, particularly because the court must ultimately decide the presence or absence of those issues affecting the suitability of the case for judicial determination. The relief issued in the second *Khadr* case, which saw the Supreme Court "advise" the Government of its views but leave the consequential action in the hands of the Government, provides at the remedial stage a level of a discretion that does not exist elsewhere. That approach may be tactful but it falls well short of an effective remedy.

C Secretary of State for Foreign and Commonwealth Affairs v Rahmatullah

Both *Hicks v Ruddock* and the *Khadr* case received very little attention in the similar English case of *Rahmatullah*.¹³⁹ The applicant in that case sought habeas corpus to release his brother, who had been captured in Iraq by the British army and transferred to the United States authorities. Mr Rahmatullah remained in United States custody in Afghanistan while the application was heard.

136 Kent Roach "The Supreme Court at the Bar of Politics: The Afghan Detainee and Omar Khadr Cases" (2010) 28 Nat J Const Law 115.

137 Lorne Sossin *Boundaries of Judicial Review – The Law of Justiciability in Canada* (2nd ed, Carswell, Toronto, 2012) at 216. Sossin made a similar argument prior to the *Khadr* case in Lorne Sossin "Redress for Unjust State Action: An Equitable Approach to the Public/Private Distinction" in David Dyzenhaus and Mayo Moran (eds) *Calling Power to Account* (University of Toronto Press, Toronto, 2005) 196.

138 This analysis of justiciability is made at length in Sossin *Boundaries of Judicial Review*, above n 137, at 159–254.

139 *Secretary of State for Foreign and Commonwealth Affairs v Rahmatullah* [2012] UKSC 48, [2013]1 AC 614. *Hicks v Ruddock*, above n 97, was not cited at all by the Court of Appeal in the case below: *Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs* (CA), above n 60.

That arrangement led the British Government to oppose the argument in part because the beneficiary of the writ was not in the custody or control of the British Government. The applicant raised a key piece of evidence that was curiously omitted from *Hicks v Ruddock*, namely that a series of international treaties and two memoranda of agreement between the British, United States and Australian governments enabled the British Government to seek the release of the detainee. The agreements included detailed arrangements for the transfer of prisoners between signatory countries. The existence and content of those agreements were crucial to the United Kingdom Supreme Court's rejection of arguments that the British Government did not exercise sufficient control over the detainee's custody,¹⁴⁰ and that issue of the writ would lead the Court into non-justiciable terrain by requiring the British Government to make diplomatic overtures to another government.¹⁴¹

In a finding that echoed the reasons why Tamberlin J refused to strike out the *Hicks* case, both the Court of Appeal and the Supreme Court appeared to accept that there was sufficient uncertainty about the custody and likely release of the detainee to justify issue of the writ.¹⁴² The Court of Appeal reasoned that habeas corpus could and "normally should ... issue where uncertainty arises from a need to investigate the facts".¹⁴³ The Supreme Court similarly held that this uncertainty on the facts surrounding the case served to highlight the important:¹⁴⁴

... factual nature of the inquiry that must be made as to whether a sufficient degree of control exists. It is not simply a question of the legal enforceability of any right to assert control over the individual detained.

Importantly, the Supreme Court rejected suggestions that the issue of relief against British officials represented a judicial interference with the conduct of foreign relations. Lord Kerr gave two interconnected reasons. The first was that the case, or any order issued by the Court, did not call into question the legality of the actions of United States officials.¹⁴⁵ The second reason was that any

140 At [60]–[64] per Lord Kerr, Lords Dyson and Wilson agreeing, [98] per Lord Phillips, [109]–[111] per Lord Reed and [123] per Lord Carnwath and Lady Hale.

141 At [65]–[70] per Lord Kerr, Lords Dyson and Wilson agreeing, [114] per Lord Reed, and [129]–[130] per Lord Carnwath and Lady Hale. The Court of Appeal had held that the United Kingdom Government had not explained how or why a request to United States authorities to seek the release of a detainee might damage relations between the two countries: *Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs* (CA), above n 60, at [55].

142 This finding was reached more clearly in the Court of Appeal: *Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs* (CA), above n 60, at [33] per Lord Neuberger MR, Kay and Sullivan LJ agreeing.

143 At [44] per Lord Neuberger MR, Kay and Sullivan LJ agreeing.

144 *Secretary of State for Foreign and Commonwealth Affairs v Rahmatullah* (UKSC), above n 139, at [48] per Lord Kerr, Lords Dyson and Wilson agreeing. Lord Reed reached a similar conclusion at [110].

145 At [38]–[40], [53] and [70].

relief issued would not require British officials to act in a particular way but would simply operate to require them to "show by whatever efficacious means they could, whether or not control existed in fact".¹⁴⁶

A related problem arose as to whether the writ would be futile. The Court of Appeal initially rejected claims of futility, largely because they were not clearly explained.¹⁴⁷ The reason for the claim of futility became clear in a second Court of Appeal hearing where a letter from the United States authorities was tendered. That letter was written in polite but firm terms. It contained very little clear information and delicately suggested that the United States authorities simply would not transfer Mr Rahmatullah. The lack of detail or clarity in the letter clearly puzzled the Court of Appeal, but the Court accepted that the language of diplomats and lawyers could often be quite different, even when discussing exactly the same issue.¹⁴⁸ The Court of Appeal was not prepared to attempt to decipher the letter and accepted that the reply effectively ended the case, at least from a judicial view.¹⁴⁹

The obscure language of the diplomatic letter provoked a sharper range of views in the Supreme Court. Lord Kerr, with whom Lords Dyson and Wilson agreed, reached a similar view to the Court of Appeal. They accepted that the meaning of the "diplomatic silence" in the letter on key issues was unmistakable when considered in its wider context.¹⁵⁰ Lord Kerr suggested that the absence of any clear explanation in the letter on questions of control of Mr Rahmatullah, particularly whether he could or would be returned to British custody, was not without meaning. He reasoned:¹⁵¹

A diplomatic silence on that question does not necessarily indicate a lack of interest in the subject. It is at least as consistent with a profound disagreement with the view that the United Kingdom could assert entitlement to control but that this, in the interest of diplomacy, was better left unexpressed.

Lord Carnwath and Lady Hale thought that the Court should not take the diplomatic correspondence at face value and that the important issues at stake should not dissuade the Court from requiring the British Government to make a revised request to the United States authorities.

146 At [60].

147 *Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs* (CA), above n 60, at [39] per Lord Neuberger MR, Kay and Sullivan LJ agreeing.

148 *Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs* [2012] EWCA Civ 182 at [11] per Lord Neuberger MR, Kay and Sullivan LJ agreeing.

149 The letter also made it clear that the British Government did not have custody or de facto control of the prisoner: *Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs* [2012] EWCA Civ 182, above n 148, at [9] per Lord Neuberger MR, Kay and Sullivan LJ agreeing.

150 *Secretary of State for Foreign and Commonwealth Affairs v Rahmatullah* (UKSC), above n 139, at [83]–[85].

151 At [83].

They also held that the United States Government very likely had a clear position which it would have no difficulty expressing with suitable clarity.¹⁵² The important consequence of this finding is that two members of the Supreme Court were not prepared to accept foreign diplomatic correspondence, or its interpretation by domestic officials, at face value. This willingness to second guess the language of diplomats surely points the way to a greater willingness to second guess the actual behaviour of diplomats that lay behind their correspondence.

The Supreme Court also affirmed the distinct and special role of habeas corpus. This endorsement of the writ was notable because during the 1990s a series of English cases appeared to distinguish judicial review and habeas corpus, suggesting that the standard remedies of judicial review would not issue on the same grounds as habeas corpus.¹⁵³ The rationale of these cases was not entirely clear but it seemed that the courts wished to ensure that challenges to detention were made via judicial review unless the case was a clear cut one for the issue of habeas corpus (which were those rare cases in which it was argued that the respondent had no power at all to order or maintain the detention of the applicant).¹⁵⁴ The implication seemed to be that there was a distinction between cases where the custodian never had authority to hold the applicant and cases where power existed but was either lost or somehow misused.

The proposals to abolish habeas corpus, which began to surface around this time, are explicable in light of this emphasis on procedural uniformity.¹⁵⁵ Le Sueur was influenced by these considerations when he suggested that the writ should be abolished in light of two (then) recent decisions of the English Court of Appeal, which took a fairly restrictive approach to the scope of review available in

152 At [129]–[130]. Lord Carnwath and Lady Hale also suggested that the United States Government would not have "any diplomatic problem in expressing its opinion clearly": at [129].

153 The key cases were *R v Secretary of State for the Home Department, ex parte Cheblak* [1991] 1 WLR 890 (CA); *R v Secretary of State for the Home Department, ex parte Muboyayi* [1992] 1 QB 244 (CA); *R v Secretary of State for the Home Department, ex parte Rizrani* [1995] Imm AR 396; *Re S-C (Mental Patient: Habeas Corpus)* [1996] QB 599 (CA); and *R v Oldham Justices, ex parte Cawley* [1997] QB 1 (CA). These cases were decided under the now repealed Rules of the Supreme Court (UK), the most notable of which were O 53 (governing judicial review) and O 54 (governing habeas corpus). Both are now governed by the Civil Procedure Rules (UK). The new rules for judicial review applications have been changed in minor ways but the previous rules governing habeas corpus remain unchanged.

154 See for example *Muboyayi*, above n 153, where the Court stressed the benefits of the requirement of leave, which applied to applications for judicial review but not habeas corpus. Empirical analysis of that requirement showed that leave to proceed was refused in just over one third of all judicial review applications: Andrew Le Sueur and Maurice Sunkin "Applications for Judicial Review: The Requirement of Leave" [1992] PL 102.

155 This trend can largely be traced to *O'Reilly v Mackman* [1983] 2 AC 237 (HL) where the House of Lords interpreted the prevailing O 53 of the Rules of the Supreme Court (UK) as requiring its use as the exclusive procedure for judicial review. That interpretation led to much pointless procedural litigation, which was regarded by many as the most significant problem in English public law of the day: HWR Wade *Administrative Law* (6th ed, Clarendon Press, Oxford, 1988) at viii.

an application for the writ.¹⁵⁶ Le Sueur argued that the narrow approach adopted in these cases lessened the difference between proceedings for habeas corpus and judicial review so much that the writ had been overtaken and essentially made redundant by judicial review. He suggested two possible reforms to habeas corpus. One was extensive procedural reform. The other was abolition of the writ.

The England and Wales Law Commission rejected Le Sueur's suggestion that habeas corpus had been effectively outflanked by judicial review but that did not end the debate.¹⁵⁷ Another senior judge made a more subtle attack on habeas corpus. Simon Brown LJ argued that the best days of the writ lay in its past and that it should not continue to exist as a separate remedy.¹⁵⁸ This argument was based on a strong faith in judicial review as much it was based on the decline of habeas corpus. The two avenues cannot be easily compared, though it is not hard to find evidence that the two avenues can easily overlap, or rather that many cases could be commenced under habeas corpus or judicial review.¹⁵⁹ That does not mean that the two should become one.

The messy requirement of procedural exclusivity has since been excised from English law.¹⁶⁰ So also, it seems, has any belief that there is a meaningful distinction between the different sorts of possible challenges to detention. The United Kingdom Supreme Court recently rejected the significance of any distinction between cases where there was a complete lack of power from the outset and those where the error arose later in the decision-making process.¹⁶¹ That step was taken in a false imprisonment case where the remedy sought was damages, but the Supreme Court subsequently faced the issue squarely in *Rahmatullah*.

156 Andrew Le Sueur "Should We Abolish the Writ of Habeas Corpus?" [1992] PL 13. The two troublesome decisions of the Court of Appeal were *Cheblak*, above n 153; and *Muboyayi*, above n 153. These cases are defended, though not with complete success, in Simon Brown "Habeas Corpus – A New Chapter", above n 12, at 36–39.

157 England and Wales Law Commission *Administrative Law: Judicial Review and Statutory Appeals* (Report 226, 1994) at 92–97. A vigorous defence of the writ was also made in Michael Shrimpton "In Defence of Habeas Corpus" [1993] PL 24.

158 Brown, above n 12.

159 See for example *Cartwright and Knowles v Superintendent of HM Prison (The Bahamas)* [2004] UKPC 10, [2004] 1 WLR 902 at [16] where the Privy Council accepted that many decisions of governments and their agencies could be challenged under either judicial review or habeas corpus, or both.

160 The change began with the reform of the rules made in the Civil Procedure Rules (UK), pt 54. See also *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988 (CA).

161 *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245. That distinction was also rejected in Australia in *Kirk v Industrial Relations Commission (NSW)*, above n 110, at 569–570.

Lord Kerr rejected suggestions that habeas corpus should not be available where judicial review was possible.¹⁶² In other words, he did not accept the underlying point of the older cases that the remedies of habeas corpus and judicial review could not be broadly equated. Lord Kerr noted that in cases where detention was questioned, proceedings in judicial review and habeas corpus would both aim towards the same ultimate goal but do so by challenging the particular issues to which each remedy was best suited. In the case at hand, judicial review could be used to challenge the decision of the British Government not to press the United States Government to return Mr Rahmatullah. By contrast, an application for habeas corpus would compel the British Government to exert its control to cause Mr Rahmatullah's release or his return by the United States Government. An application for habeas corpus could, in the alternative, require the British Government to explain why those solutions were not possible. Lord Kerr reasoned that, if it was established in a habeas corpus application that Mr Rahmatullah's detention was illegal *and* the United Kingdom Government could somehow end the detention, it would be "inconceivable" that the United Kingdom Government would decline to do so. But he reasoned that same course could almost certainly not be challenged as unreasonable in judicial review.¹⁶³ Lord Kerr also suggested that the non-discretionary nature of habeas corpus might provide another important distinction with judicial review.¹⁶⁴ Those remarks suggest that the future of habeas corpus as a separate and more forceful writ is secure and that modern proposals for its abolition are an aberration that may now be consigned to history.

V CONCLUDING OBSERVATIONS

The possibility of transnational disputes about allegedly unlawful detention is not new. In the early days of the United Nations, Professor Kutner suggested the solution of a "worldwide" version of habeas corpus, to be administered by an agency of the United Nations.¹⁶⁵ The proposal initially gained currency but fell victim to predictable problems. The most notable was securing international agreement to establish a specialist body to administer a transnational writ. A greater obstacle would surely have been securing the agreement of the more powerful nations, who would have had to accept the issue of the writ against them in politically difficult cases. Another problem would have arisen in attempts to enforce the writ during times of extreme disorder. The very times when a transnational version of the writ would be sought would also be when the enforcement of such a writ

162 *Secretary of State for Foreign and Commonwealth Affairs v Rahmatullah* (UKSC), above n 139, at [72]–[74].

163 At [74].

164 At [74].

165 Luis Kutner "A Proposal for a United Nations Writ of Habeas Corpus and an International Court of Human Rights" (1954) 28 *Tulane LR* 417. This was the first of several articles in which Kutner proposed the remedy.

was most difficult.¹⁶⁶ These problems remain and make the creation of a transnational remedy unlikely, whatever its name.

Some of the recent cases about habeas corpus suggest that a transnational version of the writ may not be required because the core function of habeas corpus might shift in an important way. The classic version of the writ is designed to seek the release of people from wrongful detention or prevent their wrongful removal from the jurisdiction. The more recent cases involve applications designed not to prevent removal of people *from* the jurisdiction but achieve their transfer *into* the jurisdiction. Whether the writ will manage completely to achieve that function remains to be seen but there can be little doubt that even a failed application for habeas corpus by people held outside the jurisdiction can greatly increase the level of judicial scrutiny of their status and treatment.

The basis of the steps taken in *Rahmatullah* on these issues is a curious mixture of formalism and pragmatism. The formalist element lies in suggestions that judicial scrutiny of the actions of domestic officials involved in foreign affairs does not lead courts into the supposedly forbidden areas of foreign affairs. That is arguably an artificial conception of the conduct of foreign affairs, which seeks to distinguish the conduct of domestic officials from the conduct of officials from different countries, despite the close interaction between the two that necessarily occurs in the conduct of foreign affairs. But the judicial scrutiny of the domestic side of foreign affairs shows a practical recognition by courts of the extent to which they can, and arguably should, examine the conduct of public officials. Given that much about the conduct of foreign affairs is ultimately grounded in domestic politics and government power, it would be odd if the courts were to cede entirely such issues to the realm of non-justiciability when they examine virtually all other conduct of domestic officials. The advances of judicial review in this area may strengthen the role of habeas corpus because modern developments in justiciability can, and arguably have, increased the willingness of courts to consider questions of foreign affairs that may arise in habeas corpus cases. If so, the requirements of habeas corpus may continue unchanged, as they appear to have done for a lengthy time, but be informed by developments in judicial review.

Kent Roach has suggested that the proceedings launched by people detained by foreign powers, whether commenced as applications for habeas corpus or otherwise, represent a form of "substitute justice".¹⁶⁷ He argues that such cases enable the victims of unlawful government activity to achieve a level of justice outside of the United States that is currently impossible within the United States. The colonial cases examined in this article suggest that such problems are not entirely new. People have long sought recourse in the courts of one country to correct allegedly unlawful detention or other injustices occurring in other countries. Roach did not suggest that habeas corpus was the best or only relief that people detained by foreign governments could obtain. He instead argued that

¹⁶⁶ The model is assessed in Vicki Jackson "World Habeas Corpus" (2005) 91 Cornell LR 303.

¹⁶⁷ Roach, above n 123. This brief description does not do full justice to Roach's careful analysis.

some form of last or extraordinary line of legal defence must remain when all else fails and that courts should not shy away from developing novel solutions. The cases examined in this article suggest that both habeas corpus and judicial review can adapt to provide some level of redress in the courts. If even failed claims provide an important level of redress by enabling a level of public accountability that would not otherwise occur, it surely does not matter whether those claims are ones of habeas corpus or judicial review.

