OF ALIENS AND TERRORISTS: JUDICIAL REVIEW OF EXECUTIVE ACTION IN THE THIRD MILLENNIUM

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I Introduction: Interesting times

> There is a Chinese curse, which says, 'May he live in interesting times'.
> Like it or not, we live in interesting times...[1]

We do still live in interesting times, where everything old is new again. The historically rooted prerogative writs of prohibition, mandamus, certiorari and habeas corpus have been given new life revitalised as the vehicles through which delineation between executive action and judicial review are being sketched.

In the third millennium the fundamentals of our social structure, such as the separation of powers and the rule of law, previously defined in ancient Greece and Rome, and again in revolutionary Europe and America, are undergoing re-examination. Like those before it the current re-examination is taking place across a spectrum of venues - on the street, in courtrooms, the media and the houses of government and power. In what current neo-conservatives label a quest for clear boundaries between judicial and executive responsibilities which others may call a grab for unadulterated control, executive action concerning border protection programs and the 'war on terror' in particular, have become the frontline in courtroom argument of administrative law.

The highest federal courts in Australia and the United States of America (the Courts) have been repeatedly challenged to delineate the rule of law and provide continued authority for judicial review of executive action. At the centre of the current reformation of prerogative powers and writs is the eerie logic of the American and Australian executive governments whose use of laws governing both aliens (asylum seekers) and terrorists, tests the extent to which the legislative branch of government can restrict judicial review before 'our democratic values' are diminished so as to be without value.

This article considers constitutional sources of judicial review. It then examines some interesting cases which are (re)defining fundamental conceptions of law while breathing new life into ancient precepts and simultaneously weakening the possible scope of their modern application. It will be argued that when considering the issue of judicial review over an exercise of non-statutory executive powers, the judiciary in both Australia and America have made the principles of legal interpretation overly complex, in an attempt to stave off a direct confrontation with the political branches of government. Consequently, the Courts' actions have allowed governments to enact legislation that does not mean what it says thereby setting complex, intriguing and possibly bad law as precedent.

These are indeed interesting times. Perhaps, it is time for the Courts to take a bold step and strike down the Executive's encroachment upon the quasi-judicial.

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Judicial review and sources of power

The Australian and American Constitutions form a blue print for their respective nations system of democratic rule. At the heart of both systems is the principle of the separation of powers, in the form of an elected legislative and executive; and an independent judiciary. The judiciaries are granted the power to review certain actions taken by the executive and legislative. Therefore, if the courts in the two countries are to retain their 'political legitimacy',[2] they must justify their power to review executive action.

To quote Gleeson CJ, 'The word legitimacy implies an external legal rule or principle by reference to which authority is constituted, identified and controlled.'[3] The source of the power to review may derive from the Constitution, legislation, the common law or a combination of the fore-mentioned. It should be noted that the common law cradles both nations' constitutions influencing how each instrument is read and interpreted. In the *Communist Party Case*,[4] Dixon J (soon to be CJ) remarked that the Constitution 'is an instrument framed in accordance with many traditional conceptions … [a]mong these I think it may fairly be said that the rule of law forms an assumption.'[5]

The common law influence and the rule of law

Judicial review remedies exist at common law, having long and proud traditions. The oft-espoused principle of the rule of law is an imperative part of the common law and said to be central to political and legal philosophy in Australia and the USA.[6] It is also a principle central in administrative law. Ironically though while litigants and other social spokespeople claim to trumpet the rule of law it is a phrase which remains ill defined.

Professor Aronson[7] has said:

> [i]t is now trite law that jurisdiction to engage in judicial review on constitutional grounds is sourced ultimately to the separation of powers, and that this jurisdiction is entrenched."[8] In this respect also our Constitution is heavily influenced by the jurisprudence of Marshall CJ,[9] who once said: "The distinction between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes, the law.[10]

Justices of the Supreme Court[11] and judges of the High Court have been very fond of the rule of law. The natural inclination of judges is, unsurprisingly, to see judicial review as a paramount feature of the rule of law. It is beyond the scope and parameters of this essay to present a singular definition of the rule of law however, certain characteristics need to be discussed.

General requirements of the rule of law are that laws be prospective, general, clear, fairly stable and publicised. Further, 'the Courts [should] be able to review legislative and administrative action to ensure conformity to the rule of law'.[12] The notion that the law be clear, understandable and open is vital for democracy. A citizen should be able to engage with the law outside of the courtroom. For example, a reasonable person, if so inclined should be able to read the law and take it at its face value.

> [T]he essence of the rule of law is that all authority is subject to, and constrained by, law…authority could not satisfy the requirements of the rule of law merely by being able to point to a fundamental law which empowered it to act in an arbitrary manner.[13]

It is on this point that administrative law has experienced its rapid growth in volume of cases and in the nature of their importance.

> If [the rule of law] is recognized as an essential element of constitutional government generally and of representative democracy particularly, then it has an obvious part to play in political theory. It may be

> invoked in discussions of the rights of citizens and beyond that of the ends that are served by the security of rights.[14]

Surely being unable to take the plain meaning of the law, as is now the case in the two areas being examined by this essay is arbitrary in some manner. Especially as laws governing suspected illegal entrants and alleged terrorists (groups which are incontestably vulnerable to discrimination) strike at other fundamentals of not only our legal and political systems but also our humanity.

Prerogative writs

The old prerogative writs, which were born out of England's battles between Crown and Parliament, represent a check placed on government authority through the courts. In England, the courts examination of the legality of government action is an *inherent power,* quite separate from normal jurisdiction.[15] Thus the 'common law empowers superior courts of record to grant the prerogative writs.'[16] These historic moments progressively brought the power of the executive within the constraints of the rule of law.[17] The historical gains were implanted in Australia and America through colonisation. This is the view espoused by Brennan J (later CJ) in *Church of Scientology v Woodward,*[18] when he said:

> [j]udicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the power and functions assigned to *the Executive* by the law and the interests of the individual are protected accordingly.[19]

In Australia and America prerogative (or constitutional) writs, including prohibition, mandamus, certiorari and habeas corpus are sourced from the relevant constitution. The legislature can *theoretically* remove any legislative or common law source of power to review. The legislature cannot without great difficulty remove any powers of review guaranteed under the constitution. The presumption of reviewability[20] and canons of statutory construction designed to avoid preclusion, have given rise to countless ingenious judgments in courts throughout Australia and America designed to avoid such preclusion.[21]

A notable difference between the American and Australian constitutions is that the American Constitution was drafted to include the 'suspension clause' concerning habeas corpus which states:

> ...the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.'22

In Australia habeas corpus is not mentioned in the constitution. Traditionally therefore it is not seen as a form of judicial review.[23]

The mention of habeas corpus in the American Constitution and its availability against the President[24] means that it has been available in circumstances beyond the reach of the *Administrative Procedure Act* (US)[25] or any other remedy.

Marbury v Madison: A case on the American Constitution

No case is more important to the powers of judicial review under a federal constitution than *Marbury v Madison*.[26]

On 3 March 1801, John Adams was the President of the United States of America; John Marshall was his Secretary of State. Whilst President, Adams had nominated four men, including William Marbury, to newly created offices as justices of the peace, with the advice and consent of Congress. He had signed the commissions. They had been sealed but they had not been delivered.

On 4 March 1801 Thomas Jefferson was inaugurated as President of the United States America; James Madison was his Secretary of State. John Marshall was Chief Justice of the Supreme Court. Jefferson and Madison refused to deliver the commissions, claiming they were 'nullities'. Marbury sought to compel Madison to deliver his commission.

Marshall CJ delivered the opinion of the Court. It has been described as 'a Solomonic blend of diplomacy and defiance.'[27]

He concluded that Marbury had a right to the commission. The appropriate remedy was by writ of mandamus. However, mandamus is issued by courts exercising original jurisdiction. The Court held that the conferral upon it by the *Judiciary Act 1798* of the power to issue a writ of mandamus contradicted the Constitution, which did not *in those circumstances* confer original jurisdiction on the Court.

The Constitution was the original and supreme will of the people of America. It organised the government into separate departments. It prescribed limits on the powers of each department. A law passed by parliament, but repugnant to the Constitution, was void. It was 'emphatically the province and duty of the judicial department to say what the law is'.[28] The Constitution bound all departments of government. The Constitution could not be overlooked no matter how compelling the case. Mr Marbury had filed in the wrong court despite it being the highest court of the land.

The Australian Constitution

Almost a century later**,** *Marbury v Madison* would have a profound impact in shaping the Australian Constitution. The majority of founders saw it as necessary to avoid the lack of jurisdiction experienced in *Marbury v Madison*. The High Court as a similar creature to the Supreme Court, namely a creature of the Constitution for whom the Constitution is the source of its jurisdiction, was judged to need its original jurisdiction guaranteed.

Hence s 75(v) of the Australian Constitution was drafted. It provides that in:

> all matters … in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth … the High Court shall have original jurisdiction.

The debates surrounding s 75(v) show that some of the framers saw its inclusion as unnecessary but prudent [29] while some saw it as dangerous.[30] There was concern about the omission of habeas corpus which was seen as being enshrined in the US Constitution by the suspension clause.[31] Therefore, 'f]rom an administrative-law point of view, the most significant provision is s 75(v), which confers the High Court with 'original jurisdiction'.'[32]

It was undoubtedly beyond the forecast of the founders that the importance of these words would be argued a century on, most often in relation to aliens who would come to Australia's shore without invitation.

II Alien cases

Two recent immigration cases - one in the Supreme Court of America, one in the High Court of Australia – highlight the examined legislative clauses which purported to remove all review jurisdiction from the Courts. In each case, this raised the question whether there was some core constitutional guarantee of judicial review of executive action.

Plaintiff S157 v Commonwealth[33]: background

Since 1992 Commonwealth Parliament had been progressively restricting the courts jurisdiction of judicial review.[34] By emphasising economic rationalism, tribunals were advocated by the Government as a cheaper quicker alternate to courts. Arguably, there were those in government who believed tribunals were where the rushed and questionable decisions of departments would face less scrutiny than in the courts. Tribunals and further restriction of judicial review were in vogue.

Also, the *Migration Act 1958* (Cth) had become perhaps the most litigated statute in Australian administrative law.[35] Migration was seen as a perfect area to push for further limitations of judicial review, as the electorate was disengaged and uninterested if not hostile to would be migrants petitioning for rights. The political cynic might suggest that keeping unwanted migrants out of *our* courts would only enhance public relations with the electorate. After all 'today invasions don't have to be military. They can be of diseases, they can be of unwanted migrants'.[36]

In an apt summary of the development of s 75(v) of the Constitution, McHugh and Gummow JJ said in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002:*[37]

> Section 75(v) of the Constitution entrenches a minimum measure of judicial review. The parliament may legislate to provide in a broader measure for federal review. In some respects, the parliament did so when enacting the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act) and conferring jurisdiction thereunder on the Federal Court. Subsequently, the parliament legislated to contract the scope of the ADJR Act has attached added significance to s 75(v).

Against this background and in wake of the 'Tampa crisis',[38] discussed below, the Prime Minister of Australia told parliament; it was critical that the removal of boats from Australian waters 'not be challenged in any court' because 'the protection of our sovereignty…is a matter for the Australian government and this parliament.'[39]

The Australian Government had passed legislation to preclude review by any court of decisions made under the *Migration Act 1958*.[40] A privative clause provided that a decision made under the Act 'must not be challenged, appealed against, reviewed, quashed or called into question in any court; and is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.'[41] Interestingly, there was no mention of the writ of habeas corpus.

Plaintiff S157 v Commonwealth: the case

Plaintiff S157 had received a decision from the Refugee Review Tribunal, affirming a decision of a delegate of the Minister of Immigration, refusing him a refugee protection visa. He commenced proceedings in the High Court, contending that the privative clause was invalid.

Gleeson CJ applied well-known principles of statutory construction to the privative clause: courts do not impute to the legislature an intention to abrogate or curtail fundamental rights and freedoms unless that intention is 'clearly manifested by unmistakeable and unambiguous language';[42] and the legislature is presumed not to intend to deprive citizens of access to the courts, other than to the extent expressly stated or necessarily implied.[43]

He also cited two former chief justices of the High Court in saying that the Australian Constitution is framed upon the assumption of the rule of law, and judicial review is the enforcement of the rule of law over executive action. Section 75(v), he said, 'secures a basic element of the rule of law.'

The Court found that judicial review of executive decisions infected by jurisdictional error was guaranteed by the Constitution. Three aspects of the Constitution supported this finding: the inclusion of s 75(v); the conferral of the judicial power of the Commonwealth upon the courts by Ch III; and the assumption of the rule of law upon which it was framed. The majority said of s 75(v):

> [it] is a means of assuring all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them.[44]

If such a privative clause were given full effect, the majority reasoned:[45]

> [It] would confer authority on a non-judicial decision-maker of the Commonwealth to determine conclusively the limits of its own jurisdiction and, thus, at least in some cases, infringe the mandate implicit in the text of Ch III of the Constitution that the judicial power of the Commonwealth be exercised only by the courts named and referred to in s 71.

The plaintiff argued that the clause ought to be read literally. It contradicted s 75(v) of the Constitution's guarantee of the enumerated remedies. It was therefore invalid.

The Court made use of the principle that legislation should be read in a way which does not contradict the Constitution, where such a reading is fairly open.[46] The Court then pronounced that decisions infected by jurisdictional error were not decisions 'made under' the Act; they were not protected by the privative clause. Therefore, the privative clause did not breach the Constitution and was allowed to stand. On reading this seems like a refusal to acknowledge the obvious.[47]

The question of whether such a reading was *fairly open* in relation to the privative clause contested in *Plaintiff S157* will be debated for a long time to come. The decision in itself and through its application of *R v Hickman; Ex parte Fox*[48] also raises concerning questions about how explicit parliament must be for a 'fairly open reading' not to be available.

Requiring the Parliament to be *so* blatant in its intent to remove an individual's right to seek judicial review and/or bypass the Constitution seems naive if not irresponsible. History is littered with acts of government subversion of constitutions and over zealous legislation; they rarely started with blunt declarations of intent.

Counsel for the plaintiff in *Plaintiff S157* have compared the decision to *Marbury v Madison* because of the courts adroit avoidance of a direct confrontation with the executive.[49] Although somewhat biased, the comparison is apt. The latter decision enshrined the role of the Supreme Court and, by inheritance, the High Court, in examining the constitutionality of legislation. The former has done the same thing for the High Court in relation to judicial review of administrative action.

Calcano-Martinez v INS; INS v St Cyr: background

In 2001, the US Supreme Court faced a similar problem to that surrounding *Plaintiff S157*. Tension had been building over the effect of 'jurisdiction-stripping' provisions in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[50] The growing number of individuals crossing into America had become a political hotcake. The Court decided to hear *Calcano-Martinez v INS*[51]*(Calcano-Martinez)* and *INS v St Cyr*[52] (*St Cyr)* together. The two cases concerned illegal immigrants' right to judicial review.

Jurisdiction to grant writs of habeas corpus is conferred upon the Supreme Court and federal district courts by 28 USC § 2241. Amendments to the *Immigration and Naturalisation Act* (INA) in 1961 set up an exclusive scheme of judicial review for exclusion and deportation orders, effectively removing judicial review under the *Administrative Procedure Act* (US)

(APA). [53] The scheme specified an exception for review by habeas corpus: 'any alien held in custody pursuant to an order of deportation *may obtain judicial review thereof by habeas corpus proceedings'.* [54]

Reacting to the Oklahoma bombing Congress enacted the *Antiterrorism and Effective Death Penalty Act* (AEDPA).[55] Section 507(e), entitled 'Elimination Of Custody Review By Habeas Corpus' removed the habeas corpus exception. Section 1252 of IIRIRA, enacted later in 1996, provided for judicial review of final orders only. Section 1252(a)(2)(c) stipulated that 'no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed' an enumerated offence. An enumerated offence could fall under the AEDPA.

Calcano-Martinez v INS; INS v St Cyr: the cases

In *Calcano-Martinez*, three permanent residents with past criminal convictions had each filed a petition for review in the Second Circuit Court of Appeals and a habeas corpus petition in the District Court. The Government argued that no court had jurisdiction to hear any action for judicial review. The petitioners argued that constitutional considerations and principles of statutory construction required that they be afforded some form of judicial review. The majority[56] agreed, stating that 'leaving aliens without a forum for adjudicating claims would raise serious constitutional questions.'[57]

As in *Plaintiff S157*, the petitioners argued that the amendments, if read literally would exclude all review including habeas corpus. As a result the suspension clause, Article III or the due process clause, all Constitutional guarantees would be violated. The Court agreed. Congress had intended to preclude review by direct petition but had 'not spoken with sufficient clarity to strip the district courts of jurisdiction to hear habeas petitions.'[58] The Court did not pronounce what would constitute sufficient clarity if not the current facts.

In *INS v St Cyr*, the majority explained that where an interpretation of a statute 'invokes the outer limits of Congress' power, a clear indication is required.'[59] Similarly, if an interpretation raised serious constitutional problems, and an alternative construction which was 'fairly possible' did not, the latter was to be preferred.[60] The 'fairly possible' in *INS v St Cyr* bears striking similarities to *Plaintiff S157's* idea of 'fairly open' and both leave the commonsensical interpretation of the relevant legislation to the side.

The majority cited an early migration case, *Heikkila v Barber*,[61] for the proposition that some judicial intervention in deportation cases was required by the Constitution. This principle, in combination with the suspension clause, required an interpretation, if possible, which did not remove habeas corpus jurisdiction otherwise the law would have to be struck down as unconstitutional. Once again nimble movement and poise was shown by the Court to forestall a row with Congress.

In 1953, Professor Davis wrote that the effort to distinguish habeas corpus from judicial review in *Heikkila* was futile because it ran against the habits of courts and lawyers. He pointed out that judicial review in § 10(b) of the APA, the provision then under consideration, explicitly included habeas corpus as a form of judicial review.

Ironically, the majority in *St Cyr* relied upon *Heikkila* for the proposition that habeas review was distinct from 'judicial review.'[62] The court found sufficient lack of clarity to avoid confronting the constitutional question. Habeas review was not precluded.

Scalia J was indignant in his dissent: '[t]he Court's efforts to derive ambiguity from this utmost clarity are unconvincing'.[63] The doctrine of constitutional doubt did not excuse violating the statutory text. That doctrine was 'a device for interpreting what the statute says

– not for ignoring what the statute says in order *to avoid the trouble of determining whether what it says is unconstitutional*'.[64]

The approach of Scalia J lacks tact, but seems to be correct. One can only wonder what he would say of the High Court's manoeuvres in *Plaintiff S157*, which was surely a clearer statement still by the legislative. The canons of construction applied in both cases were very similar, if not identical. Marshall CJ stated in *Marbury v Madison,* 'It is emphatically the providence and duty of the judicial department to say what the law is'.[65] But surely when such legalistic gymnastics are employed the judicial department is not saying what the law is but rather what the law will be in order to avoid the trouble created when a law (on such a politically contentious issue) is declared unconstitutional.

Adding to Jeremy Kirk words 'aided by hindsight it can be said that the approach by Dixon J [in *Hickman,* the High Court in *Plaintiff S/157* and the Supreme Court in *Calcano-Martinez v INS; INS v St Cyr*] represented a wrong turning in Australian [and American] law'.[66] These cases represent a turn when plain meaning was removed from interpretation of the law. These cases represent a turn towards appeasement rather than engagement.

III Case studies: some recent habeas corpus cases

The factual matrix: when alien and meets terrorist

The repeated failure of governments to acknowledge the distinction between government and sovereignty has justified many questionable political causes.[67]

On 26 August 2001, John Howard was Prime Minister of Australia; Philip Ruddock was his Minister for Immigration. At the request of Australian authorities Captain Arne Rinnan of the MV *Tampa* (a Norwegian container ship) led his crew to rescue 433 Afghan refugees from a sinking wooden boat.[68] Captain Rinnan tried to land the MV *Tampa* on Christmas Island. He was refused permission to land by the Australian Government.

On 31 August 2001, Eric Vadarlis and the Victorian Council for Civil Liberties Incorporated, acting for the refugees, sought orders from the Federal Court in the nature of writs of habeas corpus and mandamus against Ruddock and the Commonwealth.

On 11 September 2001, North J made the orders sought. Subject to appeal, the Government was to bring the refugees to the mainland of Australia.[69]

On the same day George W. Bush was President of the United States of America; Donald Rumsfeld was Secretary of Defence; and nearly 3,000 American civilians were killed.[70] The day came to be better known as 9/11. The world at large was told, re-told and told again that things would never be the same. Across western democracies the not so new world order turned to parliament to enact special measures which would allow antiquated military responses to terrorism on the home fronts. A week after 9/11, Congress passed a resolution, the Authorization for Use of Military Force (AUMF),[71] authorising President Bush to;

> use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks [or] harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

On 13 September 2001, the then Minister for Defence Peter Reith, in an interview on 3AK radio unashamedly suggested terrorists pose as asylum seekers to gain entry to Australia.[72] Under the popular alarm of 9/11 the American Congress passed AUMF. On the same day the Full Australian Federal Court overturned the decision of North J.[73] By this time the

Government had authored the 'Pacific Solution'. Claims for refugee status would be assessed 'offshore' in Nauru, an independent nation which was not a signatory to the *Refugees Convention*.[74]

On 7 October 2001, the President of America 'dispatched the armed forces of the United States to Afghanistan to seek out and subdue the al Qaeda terrorist network and the Taliban regime[75]'. American and British forces began air strikes on Afghanistan. The 'war on terror' had begun.

On 13 November 2001, President Bush issued a military order to govern the 'Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism' (*November 13 Order*).[76] It applied to any non-citizen if the President determined there was reason to believe that they had engaged or participated in terrorist activities harmful to the United States of America. Such individuals were to be tried and sentenced by military commission.[77]

From July 1994, the US Government began housing Haitian refugees at its military base in Guantanamo Bay, Cuba.[78] The base is on land leased from Cuba under a 1903 agreement. The agreement states that America has 'complete jurisdiction and control over' the base however Cuba retains 'ultimate sovereignty'.[79]

Between November 2001 and June 2002, numerous people were captured in Afghanistan and detained by American forces. America began transporting those detained to the U.S. naval base at Guantanamo Bay, Cuba on 11 January 2002.[80] Included amongst those transferred were: David Mathew Hicks and Mamdouh Habib, Australian citizens; Shafiq Rasul and Asif Iqbal, UK citizens; Salim Ahmed Hamdan, a Yemeni citizen; and Yaser Esam Hamdi, an American citizen.

On 3 July 2003, President Bush announced his determination that Hamdan, Hicks and four other detainees were subject to the *13 November Order*, and therefore could be tried by military commission.

The next day, in his Independence Day message, President Bush said:

> We are winning the war against enemies of freedom, yet more work remains. We will prevail in this noble mission. Liberty has the power to turn hatred into hope.
>
> …
>
> Drawing on the courage of our Founding Fathers and the resolve of our citizens, we willingly embrace the challenges before us.81

One of those Founding Fathers, Alexander Hamilton, had served as chief of staff to George Washington during the Revolutionary War. He wrote 52 of the *Federalist Papers*.[82] In the eighth of these, Hamilton wrote:

> Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.83

Ruddock v Vadarlis[84]: Prerogative power

The first section of Ch II of the Australian Constitution is s 61. It says:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

In *Ruddock v Vadarlis*, the Full Court of the Federal Court decided by 2-1 majority that the section included a prerogative power to repel aliens at the border during peacetime. This was so despite the extensive provisions of the *Migration Act 1958* which appear to exhaust the prerogative through their detail and scope. The majority found that the prerogative power was central to the sovereignty of the executive.[85] Short of clear abrogation by statute, the prerogative power lived on in s 61.[86] The majority therefore found s 61 empowered the executive to detain the refugees for the purpose of repelling them.

In his dissenting judgment, Black CJ identified sources of executive power under s 61: it can derive from the prerogative power or be conferred by statute. By reference to ancient and modern authorities, he demonstrated that statutes eat away at the prerogative power, and that once it is gone it does not return.[87] He referred to British opinion already over 100 years old: 'whether they be innocent immigrants or sojourners or fugitive criminals of the deepest dye, their right to land or remain upon British soil depends not upon the will of the Crown but upon the voice of the legislature'.[88]

The *Migration Act 1958* is detailed and extensive. On its face *Migration Act 1958* is clear. If the *Migration Act 1958* does not eat away prerogative power the question must be put; what will?

Rasul v Bush[89]: jurisdiction of aliens

In February 20002, The Centre for Constitutional Rights filed for writs of habeas corpus in the District of Columbia Circuit Court in respect of; Hicks and Habib (Australian); Rasul and Iqbal (British); and others (Kuwaiti citizens).[90] They alleged that the *November 13 Order* violated the Constitution as it authorised indefinite detention without due process.

The legal director of the Centre for Constitutional Rights, Bill Goodman outlined the historical perspective of *Rasul v Bush:*

> From the abuses of the Alien and Sedition Acts to Haymarket Square to the Palmer Raids to the McCarthy period, fears of foreigners and of real and imagined dangers, have fuelled attempts to do unreasonable and unnecessary harm to the Bill of Rights. For that reason, we are participating in this attempt to require the President of the United States to articulate a sound legal basis for holding these prisoners.[91]

The Bush Administration's primary argument was that *Johnson v Eisentranger*[92]applied to deny U.S. courts jurisdiction over the 'enemy combatants' being held at Guantanamo Bay. The Administration argued that in *Eisentrange* the Supreme Court had held that U.S. courts lacked jurisdiction in cases concerning non-US miliatary prisioners. The prisoners in *Eisentrange* were German soldiers caputred and tried in China and imprisioned in Germany by US forces. At no time had the soldiers been on American sovereign territory. The District Court and District Circuit Court of Appeals accepted this argument. The case was appealed to the Supreme Court.

The majority of Supreme Court rejected the Administrations application of *Eisentrange.* The majority distinguished the petitioners in *Eisentrange* from those in *Rasul* stating:

> They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against this country; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control. [93]

In essence, the Court found that the petitioners were being held in custody by the US Executive, contrary to US law. Consequently, 28 US § 2241 conferred habeas jurisdiction upon federal courts.[94] The Court held U.S. district courts also had jurisdiction to consider challenges by habeas corpus to the legality of foreign nationals captured abroad and detained at Guantanamo Bay under 28 U.S.C. § 1331 and § 1350, the Alien Tort Statute. It cited *INS v St Cyr* for the proposition that the writ had, at its historical core, served to review the legality of executive detention. It was in that context that its protection was strongest.[95]

On 9 March 2004, Shafiq Rasul and Asif Iqbal were flown to London at the request of the British Government. The next day they were released without charge.[96] Ironically, a little over a month later, on 28 June 2004, the decision in *Rasul* recognising their right to seek habeas corpus was handed down.[97] The petitions requesting the release detainees, among many others, remain pending before the District of Columbia District Court[98].

Hamdi v Rumsfeld[99]: rule of law in detaining the home grown

Upon learning that Hamdi was an American citizen, in April 2002 the US transferred him to a naval brig in Norfolk, Virginia.[100] In June 2002, his father filed a petition for a writ of habeas corpus in the District Court for the Eastern District of Virginia.[101] The majority in *Hamdi* found that his detention was authorised by the AUMF. However they found that due process was required and applied the balancing test in *Mathews v Eldridge*[102] to arrive at appropriate requirements.

The primary position of the Administration was that the Executive possessed 'plenary authority to detain pursuant to Article II of the Constitution.'[103] This was rejected. The second position was that separation of powers required the courts to, at most, apply a very deferential 'some evidence' standard,[104] but preferably to focus only on the legality of the broader detention scheme, not on the features of the individual case.[105] The majority also rejected this position. They said such an approach would have the effect of condensing power into a single branch of government.[106]

In regard to the rule of law (due process) the majority held that a 'citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification and fair opportunity to rebut the Government's factual assertions before a natural decision maker.'[107]

Scalia J held in dissent that Hamdi was entitled to be released unless criminal proceedings were brought immediately. He accused the majority of a 'Mr Fix-it mentality' for providing the necessary due process ingredient to avoid finding his detention unconstitutional.[108]

Thomas J, also in dissent, found that the detention fell 'squarely within the Federal Government's war powers' and that the Court therefore lacked any authority to review it.[109]

Hamdan v Rumsfeld[110]: the legality of the system

Hamdan's case received global publicity.[111] It was claimed Hamdan had been Osama Bin Ladin's driver. He faced the charge of conspiracy.[112] On 6 April 2004, Hamdan's counsel filed a petition for writs of mandamus and habeas corpus.[113]

On 30 December 2005, the President signed the *Detainee Treatment Act* (DTA)[114] making it law. The DTA sought to restrict judicial review of detention at Guantanamo Bay to limited review of a final decision of the military commission.

Section 1005(e) of the DTA purported to remove jurisdiction from all courts to hear habeas corpus applications. Hamdan argued that s 1005(e) was an unmistakably clear statement

which if given a literal reading had the effect of being constitutional repugnant.[115] The Court applied a process of statutory construction to read the preclusion clause as not applying to pending cases.[116]

The majority of the Supreme Court found the military commissions set up under the *November 13 Order* to be unlawful. The Government had argued that the courts lacked jurisdiction to hear the matter, at least until the commission process was complete.[117] It failed to convince the court.

Scalia J, dissenting, referred to an 'ancient and unbroken line of authority' that statutes unambiguously ousting jurisdiction apply equally to pending cases.[118] He would have found that the Court lacked jurisdiction.[119] Thomas J, also in dissent, agreed. The fact that the President was exercising wartime commander-in-chief authority under Ch II, with the support of Congress, meant that Congress conferred a wide discretion on him. The Court according to Thomas J should have regarded that discretion with the greatest deference.[120]

In response to this decision, Congress passed the *Military Commissions Act 2006* (MCA),[121] which the President signed into law on 17 October that year.

Boumediene v Bush[122]: the MCA background

The MCA grants jurisdiction to the military commission to try any offence made punishable by the MCA 'or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.[123]" The MCA applies to those deemed 'unlawful enemy combatants'.

Section 7 (e)(1) of the MCA states:

> No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Boumediene v Bush: the case

In the Federal Appeals Court in Washington D.C additional briefs were filed by plaintiffs in two related cases challenging detentions at Guantanamo, *Al Odah v Bush[124]* and *Boumediene v Bush[125]*. Counsel argued that the MCA's apparent habeas-stripping provision did not apply to pending cases. They further argued that even if the *Military Commissions Act 2006*, § 7[126] were deemed to apply to existing cases, it would be unconstitutional. The arguments were rejected. The Court found that the MCA had stripped the US federal courts entirely of jurisdiction to hear habeas corpus petitions.[127]

Concerned that proceeding through the usual course of action would leave the petitioners without remedy for longer than was necessary (or for that matter for longer than was in the interest of justice) counsel for Al Odah and Boumediene filed petitions for a writ of certiorari and an expedite argument hearing in the Supreme Court.[128]

Four justices of the Supreme Court are required to vote in favour of a request to expedite argument for it to be heard.[129] Justices Breyer, Souter and Ginsburg voted in favour of the petitions. The case will now proceed through the usual course of action delaying remedy for the petitions by at least one year.

The majority for whom Stevens and Kennedy JJ wrote, stated;

> Despite the obvious importance of the issues raised in these cases, we are persuaded that traditional rules governing our decisions of constitutional questions and our practice of requiring the exhaustion of available remedies as a precondition to accepting jurisdiction over applications for a writ of hhabeas corpus, make it appropriate to deny these petitions at this time.[130]

Only ten of the roughly 385 detainees at Guantanamo Bay have been charged. The decision of the majority appears to only delay the inevitable. The Supreme Court will have to answer the questions raised in *Boumediene v Bush* as the DTA strikes at the nub of the right to court access.[131]

Hicks v Ruddock[132]: homecoming

On 6 December 2006, John Howard was still Prime Minister of Australia, Philip Ruddock was Attorney-General and Alexander Downer was Minister for Foreign Affairs. After being held for over five years by American forces, Hicks filed a statement of claim in the Federal Court of Australia, seeking declarations and a writ of habeas corpus against Ruddock, Downer and the Commonwealth of Australia.

On 8 March 2007, Tamberlin J of the Federal Court of Australia dismissed an application by the Commonwealth for summary judgment *Hicks v Ruddock*.[133]

Hicks was seeking declarations that the Australian Government had taken into account legally irrelevant factors in considering whether to take steps to protect him by seeking his release from Guantanamo Bay and repatriation to Australia.[134]

He was to seek an order in the nature of mandamus to compel the Attorney-General and Minister for Foreign Affairs to reconsider making a request without taking into account legally irrelevant factors. He also was to seek an order for relief in the nature of habeas corpus against the Commonwealth, on the basis that they have the power to successfully request the US authorities to release him.[135]

His argument was that the duty of the executive to protect its citizens, whilst being an imperfect obligation, is exercised under s 61 of the Constitution. Being an exercise of constitutional jurisdiction, it could be judicially reviewed. Tamberlin J accepted that the point was arguable.[136]

The Government argued that the matter was non-justiciable.[137]

Heavy reliance was placed upon the decision of the English Court of Appeal in *Abbasi v Secretary of State*.[138] In *Abbasi* an English citizen detained in Guantanamo Bay had sought to compel the Foreign Office to make representations to the United States in accordance with his request for assistance. The Court rejected the claim because the United Kingdom authorities had considered the request. Also, after having regard to extensive evidence, they concluded that if the Foreign Office were to express a view as to the legality of the detention, it might undermine the negotiations which were then underway. Abbasi had been in detention for eight months.

Tamberlin J noted the sharp distinctions between that case and the one before him. It is well known in Australia that the Government has not requested the release of David Hicks, who has remained in Guantanamo Bay longer than five years.

The case is now moot owing to the guilty plea entered by Hicks at the military commission. However it serves to offer a sliver of light on the future of judicial review. The law is fighting back and government action reviewed.

Judicial review of executive action beyond statutory ultra vires

In *Abbasi*, the Court referred to the House of Lords decision in *CCSU v Minister for the Civil Services*.[139] In that case, their Lordships pronounced that considerations of reviewability of prerogative powers should focus not on their source but on their subject matter and suitability for review by a court. The Court in *Abbasi* observed that the process of considering whether to make the request was in this sense justiciable, and therefore not immune from judicial scrutiny.

In *Minister for Arts, Heritage and Environment v Peko Wallsend Ltd*,[140] the Full Court of the Federal Court applied *CCSU* in the Australian context. Wilcox J pointed out that a matter might be justiciable in the *CCSU* sense, but contain some feature, such as a relationship to national security concerns, which rendered judicial review inappropriate.[141]

In *Re Refugee Review Tribunal & Anor; Ex Parte Aala*[142], the High Court examined the writs listed in s 75(v). Henceforth, the Court pronounced, they should be called 'constitutional writs'.[143] The power to issue the writs derived not from the prerogative, but from the Constitution.

Gaudron and Gummow JJ mentioned in passing that 'an officer of the Commonwealth may be restrained by prohibition in respect of activity under an invalid law of the Parliament *or of activity beyond the executive power of the Commonwealth identified in s 61 of the Constitution.'* [144] For example:

> where an officer of the Commonwealth executes an executive power, not a power conferred by statute, a question will arise whether that element of the executive power of the Commonwealth found in Ch II of the Constitution includes a requirement of procedural fairness.145

In *Re Ditfort: Ex parte Deputy Commissioner of Taxation*,[146] a decision relied upon in *Hicks v Ruddock*,[147] Gummow J noted that s 61 empowers the executive to undertake appropriate action in areas such as international relations. If a plaintiff could establish standing, he could see no reason why such a matter, being a dispute under the Constitution, should not be justiciable by the courts.

In *Hicks v Ruddock*, Tamberlin J noted that the justiciability of executive action under s 61 in the area of foreign relations was far from settled. Indubitably, another case allowing that discussion to take place in the High Court will arise before too long. At such a time the Court should take the opportunity to enunciate some principles about the role of judicial review of action executed solely under s 61 authority.

Section 75(v) entrenches judicial review in the Australian Constitution. Under the US Constitution, habeas corpus is the only writ mentioned.

In the cases examined, one can see a strong parallel between the jurisprudence in Australia around the 'constitutional writs' and that in the US around the 'great writ'. This is to be expected. Separation of powers and the rule of law are philosophical concepts which can justify judicial review in the abstract, but the mention of these writs in the respective Constitutions gives courts a peg to hang their justifications upon.

The scope of review under habeas corpus is undoubtedly no different to that conducted under other heads of judicial review. However, as Scalia J has asserted,[148] there is no reason to exclude it from categories of judicial review. The considerations are often the same: for example, whether the executive is acting within a validly conferred power. Its focus upon the detained individual rather than the government allows the court to look at executive action which might otherwise fall outside the scope of judicial review.

In 1627, Charles I was King of England and had dissolved Parliament. He arrested Sir Thomas Darnel and four other knights who had refused to give him money under a system of compulsory 'loans', not authorised by statute. They sought the writ of habeas corpus. The court refused to issue the writ on the basis that they were held at the King's command.

This upset the Parliament. Eventually, as Julian Burnside so elegantly put it in a recent piece he did for ABC's Radio National[149]:

> Tensions between the king and the parliament increased; Charles eventually declared war on his parliament. He lost the war, the crown and his head.

The reverse holds true in recent US history. The Supreme Court has found that habeas corpus can be issued despite the fact that people are held at the President's command. With the MCA, Congress has (for the moment) legislated to remove the habeas corpus jurisdiction. The High Court's jurisdiction to review executive action by the constitutional writs has been assured. The Supreme Court will surely issue certiorari in *Boumediene v Bush*.

Congress has responded to the Supreme Court's construction of the DTA preclusion clause in *Hamdan v Rumsfeld* by making it clear that the MCA preclusion clause applies to all review of pending decisions. As the Court of Appeals said, '[I]t is almost as if the proponents of these words were slamming their fists on the table shouting "When we say 'all' we mean all – **without exception**!'[150] The question will arise whether the suspension clause implies a core constitutional guarantee of habeas review of executive action. It remains to be seen whether the Supreme Court will sidestep the issue by some contorted method of construction or whether they will address it head on, as the High Court eventually did in *Plaintiff S157*.

In his dissent in *Hamdan*, Thomas J opined that the Court should respect a wide discretion granted by Congress upon the President in relation to a traditional executive head of power. The same considerations were evident in the majority opinion in *Hamdi*, finding the military commissions to be authorised by the AUMF.

In the *Communist Party Case*, the High Court held invalid legislation which conferred a wide discretion upon the executive because it effectively allowed the executive to decide upon 'constitutional facts', the existence of which determined Parliament's power to pass the law in the first place.[151]

Having opined that the Parliaments of the United Kingdom or the Australian States, wielding plenary power, could validly have passed the Act, Fullagar J said:

> If the great case of *Marbury v Madison* had pronounced a different view, it might perhaps not arise even in the case of the Commonwealth Parliament; …
>
> [I]n our system the principle in *Marbury v Madison* is accepted as axiomatic, modified in varying degree in various cases (but never excluded) by the respect which the judicial organs must accord to opinions of the legislative and executive organs.152

Conclusion

Is it a bird? A plane? No it is…interesting law

It is not always true that great cases and hard cases make bad law.[153] In fact as we have seen above they make interesting law. Students of legal history will know in interesting times come interesting cases and often in interesting cases constitutional jurisprudence develops.

It is fascinating that the source of power to review was, in all the cases discussed here, derived from the old writs. The ADJR and the APA are easily removed, whereas the old writs have found a home in the written constitutions. More fascinating still is the fact that the legal professionals acting in these cases have in some circles been labelled radical.

It has been shown that the old tenants of the law carry practical ramifications for the individual as well as a nation's democratic will. 'Identifying the scope and boundaries of judicial review lies at the heart of the separation of powers'.[154] Adam Tonkins has written that the rule of law 'governs the relationship of the executive to the law. The rule of law provides that the executive may do nothing without clear legal authority first permitting its actions.'[155]

Professor Aronson has remarked that '[j]usticiability is an issue which can arise whether the power in question be constitutional, statutory, or prerogative or common law'.[156] He argues that the concept of justiciability should be reframed so that government decisions are only immune where there are sufficient political reasons, including the need for the Court not to devalue its own currency, or where courts are ill-equipped to engage in review of a particular decision.[157] The source of the power itself should be irrelevant. He gives a good example of why this is so. If a prerogative power is truly non-justiciable, it is difficult to see what difference its transformation into the statute books should make.[158] He also makes the point that s 61 of the Australian Constitution may render some areas of executive power justiciable which would not be so in England.[159] The same point applies in the United States, albeit through the lens of habeas corpus review.

In decisions of both the High Court and Supreme Court references have been made to separation of powers and the rule of law as justifying judicial review. If these constitutionally enshrined principles require judicial review, why should there be a distinction between executive action pursuant to statute, and that empowered solely by Chapter II or Article II of the relevant Constitution?

In interesting times society turns to its institutions for clear guidance. It is time for the Supreme Court and High Court to provide clarity (as they are instructed to do under their respective Constitutions). In *Marbury v Madison*, Marshall CJ enshrined the role of the Supreme Court as ultimate arbiter of the Constitution. In *Plaintiff S157*, the High Court said:

> In any written constitution, where there are disputes … there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function.[160]

Boumediene v Bush presents the Supreme Court with the opportunity to make explicit a constitutional foundation of habeas review of executive action, which cannot be removed except by congressional suspension. In *Hamdi*, the Court cited their opinion in *St Cyr* in support of the proposition that:

> Unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining [the] delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions.161

In *Aala*, the Court interred the 'prerogative' in 'prerogative writ'. It is possible they will also take the 'prerogative' out of the s 61 power, reducing it to a constitutional source. The High Court will again have to adjudicate on the power of the Executive's prerogative concerning aliens. Hopefully when that time comes the court will offer a clear reading of the law rather than one which is 'fairly open' by disregarding plain English.

Since Charles I lost his head, there has been movement away from prerogative powers towards written laws. This journey was recounted by Black CJ in his dissent in *Ruddock v Vadarlis*. The written Constitutions are part of this process. The Courts are the voices of the

Constitutions. In time they will surely find a holistic approach to judicial review of all executive action, whether exercised pursuant to statutory or non-statutory authority, based solely upon amenability to judicial process and overt political considerations.

> Eventually, the courts have to engage in a tidying-up exercise to fit as many of the pieces as possible together (and discard or explain away the others). If not, the cost to the community in uncertainty eventually outweighs the benefits in terms of flexibility[162].

We live in interesting times when interesting law is being made. The definition of interesting does not have to include complex and absurd. It can be interesting to state the obvious, let us hope the Courts will.

Endnotes

1 Robert F Kennedy, Cape Town, South Africa, 7 June 1966.
2 Cf F G Brennan, 'The purpose and scope of judicial review' in M Taggart (ed) *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (1986), 18-19.
3 Gleeson, 'Courts and the Rule of Law' (The Rule of Law Lecture Series), Melbourne University (7 November 2001), <http://www.highcourt.gov.au/speeches/cj/cj_ruleodlaw.htm>
4 *Australia Communist Party v Commonwealth* (1951) 83 CLR 1.
5 Note 4, 193.
6 Note 3.
7 A pre-eminent Australian administrative law academic.
8 Mark Aronson, Bruce Dyer, Matthew Groves, *Judicial Review of Administrative Action* (3rd edn, 2004), 15.
9 See for example former Chief Justice Owen Dixon, 'Marshall and the Australian Constitution' (1957), in Dixon, *Jesting Pilate* (1965), 166.
10 The seminal early work on the Australian Constitution was written by John Quick and Robert Garran. In explaining separation of powers in the context of Chapter III, they give this quote. John Quick & Robert Garran, *The Annotated Constitution of the Australian* Commonwealth (1901, reprinted 1979), 719; citing Marshall CJ in *Wayman v Southard*, 10 Wheat. 46.
11 See Richard Fallon, 'The Rule of Law' as a Concept in Constitutional Discourse', 97 *Columbia Law Review* 1. Fallon breaks rule-of-law discourse down into four categories, and provides examples of each category from the jurisprudence of various Supreme Court Justices.
12 Note 11, 39.
13
14 Evans S, 'The Rule of Law, Constitutionalism and the MV Tampa', (2002) June, 13 *Public Law Review*, 94-101 at 95 quoting Judith Shklar.
15 Lord Woolf 'Droit Public', *Public Law* 1995, SPR, 57-71.
16 O'Donnell B, 'Jurisdictional error, invalidity and the role of injunction in s 75(v) of the Austalian Constitution', (2007) 26 *Australian Bar Review*, 291-335 at 292.
17 Note 17.
18 (1982) 154 CLR 25.
19 Note 18, 70.
20 *Abbott Laboratories v Gardner*, 387 US 136 (1967).
21 See for example *Johnson v Robison*, 415 US 361 (1974); *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, and subsequent cases adopting the principle there set down by Dixon J.
22 United States Constitution art 1, § 9, cl 2.
23 It has been largely neglected in efforts to modernise the prerogative writs by allowing for 'orders in the nature of prohibition' etc.
24 For example, *Rasul v Bush* 542 U.S. 466 (2004).
25 5 U.S.C.A. §§ 551-706.
26 5 US (1 Cranch) 137 (1803).
27 A R Blackshield, 'The Courts and Judicial Review', in S Encel, D Horne and E Thompson (eds), *Change the Rules! Towards a Democratic Constitution* (1977), 118.
28 *Marbury v Madison*, above n 26, 173.
29 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1879 (Isaacs).
30 Note 29, 1877 (Kingston).
31 Note 29, 1879 (Quick).
32 Cane P, 'The making of Austalian administaruve law' (2003) 24 *Australian Bar Review*, 1-20 at 6.
33 *Plaintiff S157 v Commonwealth of Australia* (2003) 211 CLR 476 *(Plaintiff S157)*.
34 Note 16 at 293 provides succinct explanation of developments.
35 Note 16 at 293.
36 Solicitor General David Bennett in the Federal Court. Quote taken from Marr D and Wilkinson M, *Dark Victory*, Allen & Unwin, Sydney, 2003 p145.

37 A [2003] HCA 30 (17 June 2003)
38 An apt metaphor – the crisis, like a largo cargo ship, ploughing through the waters of Australian law.
39 Commonwealth Hansard; Hof R 29 August 2001 p30569.
40 *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth), introducing the new s 474, *Migration Act 1958* (Cth), entitled: 'Decisions under Act are final'.
41 Section 474(1)(b)-(c) & (2), *Migration Act 1958*.
42 Note 33, 492.
43 Note 33, 492-3.
44 Note 33, 514.
45 Ibid, 505, citing *R v Coldham; Ex parte Australian Workers Union* (1983) 153 CLR 415.
46 *Plaintiff S157*, above n 26, 504, citing *Hickman*.
47 Basten J QC, 'Constitutional elements of judicial review' (2004) 15 *Public Law Review* 187, 187- 201.
48 (1945) 70 CLR 598 at 615.
49 Duncan Kerr & George Williams 'Review of executive action and the rule of law under the Australian Constitution' (2003) 14 *Public Law Review* 219, 233.
50 See 8 USC 1252. See Gerald L Neuman, 'Jurisdiction and the rule of law after the 1996 Immigration Act' (2000) 113 *Harvard Law Review* 1963, 1989-1998.
51 533 US 348 (2001).
52 533 US 289 (2001).
53 5 U.S.C.A. §§ 551-706. Neuman, above n 36, 1968, and Scalia J in *St Cyr*, above n 38, 329.
54 *St Cyr*, note 52, Scalia, 329.
55 110 Stat 1214 (1996).
56 (Stevens, Kennedy, Souter, Ginsbourg and Breyer JJ)
57 *Calcano-Martinez*, above n 37, 351.
58 *Calcano-Martinez*, above n 37, 351-2.
59 Note 52, 299.
60 Note 52, 299-300, citing *Crowell v Benson* 285 US 22 (1932), 62.
61 345 US 229 (1953).
62 Note 52, 311; cf Scalia J in dissent at 331.
63 Note 52, 329.
64 Emphasis added, Note 52, 336.
65 *Marbury v Madison*, above n 26, 177
66 Kirk J, 'The entrenched minimum provision of judicial review' (2004) 12 Australian Journal of Administrative Law, 64-72 at 65.
67 Note 14, 97.
68 The word refugee is used intentionally. A person is a refugee before a particular government determines them to be so. A message was sent to the Australian Government via the Norwegian ambassador from 'Afghan Refugees'.
69 *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452.
70 For example, *Hamdi v Rumsfeld* 124 S.Ct. 2633 (2004) at 2635.
71 115 Stat 224.
72 Note 36, 151.
73 *Ruddock & Ors v Vadarlis & Ors* (2001) 110 FCR 491.
74 *Convention relating to the Status of Refugees*, 1951.
75 Extratct from the Brief for the Respondents in Opposition filed in the Supreme Court in *Rasul v Bush* No 03-334 at p2.
76 66 Fed.Reg. 57833 (2001).
77 Note 76, 57834.
78 In 1981, President Reagan issued Executive Order 12324, entitled 'Interdiction of Illegal Immigrants'. It authorised the Secretary of State to enter into cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea. It authorised the Secretary of the Department responsible for the Coast Guard to issue appropriate orders to the Coast Guard to enforce the suspension of entry of undocumented aliens and the interdiction of any vessel carrying such aliens.
79 See *Rasul v Bush* 542 US 466 (2004), 471.
80 Human Rights First website, <http://www.humanrightsfirst.org/us_law/inthecourts/supreme_court_gitmo1.htm>.
81 Weekly Compilation of Presidential Documents, July 7, 2003, Volume 39, No. 27, at 877, see <http://origin.www.gpoaccess.gov/wcomp/v39no27.html>.
82 See <http://thomas.loc.gov/home/histdox/fedpapers.html>.
83 http://thomas.loc.gov/home/histdox/fed_08.html.
84 [2001] FCA 1329
Note 84, 543.
86 Note 84, 545.
87 Note 84, 501.
88 Note 84, 500.

89 542 U.S. 466 (2004)
90 See for example http://www.ccr-ny.org/v2/rasul_v_bush/home.asp.
91 Note 90.
92 *Johnson v Eisentranger* 339 U.S. 763 (1950)
93 Note 89, 466.
94 Note 89, 483.
95 Note 89, 474, citing *St Cyr*, 301.
96 For example, BBC News, 'Timeline: Guantanamo Bay Britons', published 27 January 2005, available for download at http://news.bbc.co.uk/2/hi/uk_news/3545709.stm.
97 Note 89.
98 Note 80.
99 *Hamdi v Rumsfeld (Hamdi)* 542 US 507 (2004).
100 Note 99, 510.
101 Note 99, 511.
102 424 US 319 (1976).
103 Note 99, 516-7.
104 Note 99, 527.
105 Note 99, 535.
106 Note 99, 536.
107 Note 99, 531.
108 Note 99, 576.
109 Note 99, 579.
110 126 S.Ct. 2749 (2006).
111 A simple Google search reveals numerous reports from all major national new services; See <http://en.wikipedia.org/wiki/Salim_Ahmed_Hamdan>.
112 See charge sheet available at < http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf>.
113 *Hamdan v Rumsfeld*, 344 F.Supp.2d 152 (D.D.C. 2004), 155.
114 119 Stat 2739 (2005).
115 Note 113, 2763-4.
116 Note 113, 2764.
117 Note 113, 2763.
118 Note 113, 2810.
119 Note 113, 2810-11
120 Note 113, 2823-4.
121 120 Stat 2600 (2006).
122 476 F.3d 981 (2007).
123 S. 3930 § 948d. Jurisdiction of military commissions.

124 476 F. 3d 981 (2007).
125 Note 124.
126 Pub. L. No. 109-366, 120 Stat. 2600 (*id.* 87a-88a).
127 Note 124, 994.
128 Docket 06-1195, http://www.supremecourtus.gov/docket/06-1195.htm
129 549 U. S. ____ (2007) (yet to be published in printed court reports) available at <http://www.supremecourtus.gov/opinions/06pdf/06-1195Breyer.pdf>.
130 Note 129.
131 Michael Ratner President of the Centre for Constitutional Rights see Note 90.
132 [2007] FCA 299 (8 March 2007, unreported).
133 Note 132, for example para 3.
134 Note132 para 9.
135 Note 132.
136 For example, Note 132, para 62.
137 Note 132, para 60.
138 [2002] EWCA Civ 1598.
139 [1985] AC 374.
140 (1987) 75 ALR 218.
141 Note 140, 249.
142 (2000) 204 CLR 82.
143 Note 142, 93.
144 Note 142 (emphasis added).
145 Note 142, 101.
146 (1988) 19 FCR 347.
147 *Hicks v Ruddock*, para 20.
148 Note 99, 2296.
149 *Lingua Franca,* ABC Radio National, 3 March 2007. Transcript available at http://www.abc.net.au/rn/linguafranca/stories/2007/1859567.htm. Paragraph 92 is based upon the information in his piece.

150 Note 124, 986.
151 Note 4.
152 Note 515, 262-3.
153 To paraphrase Holmes J in dissent in *Norther Securities Co V U.S.* 197 (1904), 363.
154 Note 47, 194.
155 Adam Tomkins, *Public Law* (2003), 78.
156 Note 8, 142.
157 Note 8.
158 Note 8.
159 Note 8, 143.
160 Note 33, 514.
161 Note 70, 536.
162 Note 16, 333.