

Molecules of Therapy
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1. Why we are in Guantánamo: *outrunning the Writ.*

Article IV of the Impeachment of the Earl of Clarendon in 1667:

That he hath advised and procured divers of his Majesty's subjects to be imprisoned against law in remote islands, garrisons and other places thereby to prevent them from the benefit of the law, and to introduce precedents for imprisoning any other of his Majesty's subjects in like manner.

2. The purpose of avoiding the Writ was to facilitate torture as described by the Solicitor General to the Supreme Court in *Rasul*:

The intelligence-gathering operations at Guantánamo are an integral component of the military's efforts to repel and defeat the enemy (*Quirin*, 317 U.S. at 28) in the ongoing military campaign being waged not only in Afghanistan but around the globe. Any judicial review of the military's operations at Guantánamo would directly intrude on those important intelligence-gathering operations. Moreover, *any judicial demand that the Guantánamo detainees be granted access to counsel to maintain a habeas action would in all likelihood put an end to those operations a result that not only would be very damaging to the military's ability to win the war, but no doubt be highly comforting to enemies of the United States. Eisentrager, 339 U.S. at 779* , Brief in Opposition at 54, emphasis supplied.

All that would be ended by the presence of *habeas* counsel was, however, torture and abuse, not lawful interrogation

These are the considerations that led me to act for prisoners at Guantánamo. And as Daniel Webster wrote a colleague "It is a great case, I hope to get in on one side or the other."

Origins of the Litigation

3. How it began.

In 2004 I was in Kuwait where I represent a trading company then involved in arbitration against an American contractor with the Kuwait National Petroleum Company. My hosts/client introduced me to the former head of KNPC's legal affairs department who had started his own firm, Mr. Al Haroun (Arabic for Aaron, the brother of Moses.) He had been instrumental

in securing the services of a US law firm, Shearman & Sterling, to act for the son of a close friend as well as other Kuwaiti nationals in seeking *habeas*. He explained to me the extraordinary travail of securing such legal help from a U.S. firm. But he succeeded after much difficulty. *Rasul* followed.

Aroused from my dogmatic slumbers by the brute executive trampling of domestic and international law and the Supreme Court decision in *Rasul*, I called a friend at Wilmer, Dan Squire, and asked if he was involved. He said no, but that I should call his partner in Boston, Rob Kirsch, so I did. Thus I began. For once, I was really glad I was a lawyer: I could take direct action against a specific defendant. This I knew how to do even though I knew nothing about *habeas*. I figured there were perhaps twenty cases I would need to learn, a manageable prospect. Plus the cases were fascinating with bundles of issues rarely faced in private practice. Indeed issues that I had not dealt with since the late 60s when I worked for the predecessor section of DOJ that was defending the cases.

Mechanics

4. Meeting the clients

I have been to the base fifteen times without a refusal so far. The early meetings involved getting acquainted, showing up the next time, and conveying that we were in the case for the long haul, or at least as long as they wished to pursue it. This latter point was crucial. Where the prisoner controls nothing about his life he must see that he controls his lawyer. Eventually they came to see that we were not government spies, agents of a malevolent power, but rather there to do something for them, with no guarantee that our effort would do any good. And, apart from restricting some of the grosser practices at the base (torture) not much has changed for them as a result of the lawyers. But the clients, even if they have no faith in the US legal system (they found it ludicrous to suggest a judge could order the President to do anything); nevertheless, they appreciate the effort. Some of course do not, but that seems inevitable to me.

Another reason for the visits is simply to offer hope, to visit the abominated and to try to make their lot more bearable. I think this has helped, but cannot be certain.

The Bottom Line

5. Torture: Dec. 8 2005 House of Lords Decision

On 23 August 1628 George Villiers, Duke of Buckingham and Lord High Admiral of England, was stabbed to death by John Felton, a naval officer, in a house in Portsmouth. The 35-year-old Duke had been the

favourite of King James I and was the intimate friend of the new King Charles I, who asked the judges whether Felton could be put to the rack to discover his accomplices. All the judges met in SerjeantsInn.

Many years later Blackstone recorded their historic decision:

The judges, being consulted, declared unanimously, to their own honour and the honour of the English law, that no such proceeding was allowable by the laws of England.

At bottom the effort of *habeas* counsel in Guantánamo is an attempt to restore the honor of the United States taken by a president who thought that the title Commander-in-Chief of the Army and Navy made him also "Commander in Chief of the country, its industries and its inhabitants" (*Youngstown*, 343 US 644) in complete derogation of other constitutional provisions and statutes duly enacted.

I am glad to have been part of this restoration.