The history of "the Great Writ[1]" can be dated to around 1305 CE, with its first codification in the Habeas Corpus Act of 1679 (HCA). The HCA remains a major source of interpretation for habeas rights in the United States, and was codified there in the Judiciary Act of 1789 (JA). Unfortunately, the writ's power has withered in the centuries since the JA. It has been suspended and diminished by both the executive and the legislative branches, and it creates gaps between itself and the remedial scheme of § 1983.

The "Great Writ" has been rendered "less great" numerous times, beginning with President Lincoln[2]. Between the 19th and 20th centuries, CE, the three branches of government volleyed to diminish or preserve the writ[3], culminating in The Antiterrorism and Effective Death Penalty Act of 1996 and its new "clearly established" standard[4]. This standard raised the bar for the writ significantly, especially when compared to § 1983: the writ's competing vehicle for enforcing constitutional rights. § 1983 allowed for regional circuit courts of appeal or a significant consensus of regional appeals courts to provide a clearly established standard. Lastly, there are the 21st century, CE, post 9/11 legislation. The most important of this era's legislation is the Habeas Corpus Restoration Act of 2007 (HCRA) and an executive order (2009), which

---

[1] In the 17th century courts of England, prisoners used the writ, issued from a superior court and to an official (sheriff, jailer, etc...), to challenge his confinement or its duration.

[2] The power to suspend the writ is contained within Article I, § 9, clause 2, requiring said suspension to be in times of "rebellion or invasion [such that] the public safety may require it." Initially suspended by the executive branch in 1861 by President Lincoln, seeking to imprison his political opposition on the cusp of civil a war, the legislative branch passed the Habeas Corpus Suspension Act (HCSA) in 1863, giving the power to the executive branch to suspend the writ for cases involving a broad category of enemy combatants and traitors.

[3] The HCSA was itself diminished by *Ex Parte Milligan*'s requirement that civil courts be inaccessible in order to try civilians. The writ was, once again, suspended by the executive branch in 1871,. It was Suspended three more times; once to quell unrest in South Carolina, once in response to rampant criminality and lawlessness in the Philippines, and once more during World War II in the aftermath of the Pearl harbor attacks (*Duncan v. Kahanmoku*). The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) reduced the power of the great writ significantly.

[4] In response to the Oklahoma City Bombings, the legislature reduced the writ to cases which were unreasonable applications of clearly established law "as determined by the Supreme Court of the United States."

restored the ability of Guantanamo detainees to use the writ. The rebuttal to this onslaught of diminishing legislation must be the recognition of a right to habeas corpus.

The "Great Writ" is currently not interpreted as a right, but as a proscription against denying the writ. But this interpretation makes little sense, as pointed out by Sen. Arlen Specter. How can it be possible to prohibit a specific form of legal recourse from being taken away without it first being granted as a right? Its interpretation as a right would curtail the onslaught of post-9/11 era legislation aimed at diminishing the writ. Alternatively, the HCRA might be strong enough on its own: or, at least, is strong enough until the next major terror attack or war. But a judicial gap still exists between the writ and § 1983.

A unique set of facts can render both habeas and § 1983 inapplicable. Consider Justice Souter's hypothetical of a man who discovers he was framed after he has served his sentence[5]. In such a circumstance, § 1983 would not be available because it would necessarily invalidate (or at least shorten) his conviction , and the writ is unavailable because he is not in custody. The only recourse available to him would be exclusive to the state's judicial and executive branches. This is an unacceptable gap which defeats the remedial scheme of § 1983 by using the *Heck Bar*'s favorable termination requirement. But the writ of coram nobis[6] has no such favorable termination requirement. Unfortunately, the writ of coram nobis is highly jurisdictional, varying by region. Appropriate legislation would be needed to recognize a uniform right to the writ of coram nobis.

---

[5] Heck v. Humphrey

[6] The writ of coram nobis is used to challenge, post-conviction, a violation of a constitutional right.