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# Habeas Corpus in the Anglo-American Legal Tradition

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## Abstract

*The habeas corpus provision in the United States Constitution, known as the Suspension Clause, has long confounded courts and scholars as to its intended purpose. The wording of the Clause seems to promise the availability of "[t]he Privilege of the Writ of Habeas Corpus" – or, at least preclude the United States Congress from undermining that privilege where it is otherwise available unless Congress takes the dramatic step of enacting suspension legislation. The very same Clause, recognizing the extraordinary nature of suspension, precludes the legislature from adopting such a state of affairs except in the face of rare and dire circumstances – namely, "Cases of Rebellion or Invasion." But beyond these apparent truths, numerous questions going to the nature and purpose of the habeas clause remain. To tackle the range of questions going to the role and meaning of the Suspension Clause in the United States constitutional framework requires careful study of the backdrop against which the Clause was adopted in order to make sense of what those who drafted and ratified the Constitution hoped to achieve by its inclusion. Although many argue over whether history should be the determinative factor in resolving constitutional questions as they arise today, no one seriously questions that history is deeply relevant to debates over the Suspension Clause. Indeed, Chief Justice John Marshall declared long ago that understanding the role of habeas corpus in the American Constitution requires looking to the privilege's origins in English law. As he phrased things in discussing "this great writ …, [t]he term is used in the Constitution, as one which was well understood." Further, modern Supreme Court jurisprudence still trains our attention on the Founding period, positing that "'at the absolute minimum,' the [Suspension] Clause protects the writ as it existed when the Constitution was drafted and ratified." Accordingly, this article explores the relevant historical backdrop to the Founding period before carrying the story forward to chronicle how the Suspension Clause has been interpreted during important periods in American history, sometimes correctly and – as will be seen – sometimes incorrectly.*

KEY WORDS: Habeas Corpus, Suspension, war, Lincoln, American Revolution, terrorism

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## Introduction

> "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."[1)]

The habeas corpus provision in the United States Constitution, known as the Suspension Clause, has long confounded courts and scholars as to its intended purpose. The wording of the Clause seems to promise the availability of "[t]he Privilege of the Writ of Habeas Corpus" – or, at least preclude Congress from undermining that privilege where it is otherwise available unless Congress takes the dramatic step of enacting suspension legislation. The very same clause, recognizing the extraordinary nature of suspension, precludes the legislature from adopting such a state of affairs except in the face of rare and dire circumstances – namely, "Cases of Rebellion or Invasion." But beyond these apparent truths, numerous questions going to the nature and purpose of the habeas clause remain.

There are questions, for example, going to what precisely the "privilege of the writ of habeas corpus" set forth in the habeas clause actually encompasses. Does the privilege equate with a general right to process and judicial review akin to that promised by the Due Process Clauses of the United States Constitution?[2)] Or does it embody a greater range of protections against government deprivations of liberty? And who may invoke those protections? Need one be a citizen to do so, or can any prisoner detained by the United States government do so? Additionally, are there geographic restrictions on the sweep and application of the Suspension Clause? Finally, which branch of government may suspend the privilege? And how? These and other questions going to the meaning of the Suspension Clause have entered the political and legal discourse during many flashpoints in American history, often provoking intense debate over how best to answer them.

To tackle the range of questions going to the role and meaning of the

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1) U.S. Const. art. I, § 9, cl. 2.

2) *See* U.S. Const. amends. art. V, XIV.

Suspension Clause in our constitutional framework requires careful study of the backdrop against which the Clause was adopted in order to make sense of what those who drafted and ratified the Constitution hoped to achieve by its inclusion. After all, habeas corpus was an institution born of English legal origins and it is imperative to understand those origins if one is to tell a story of how they informed the early development of American law and ultimately the United States Constitution. Thus, although many argue over whether history should be the determinative factor in resolving constitutional questions as they arise today, no one seriously questions that history is deeply relevant to debates over the Suspension Clause. Indeed, Chief Justice John Marshall declared long ago that understanding the role of habeas corpus in the American Constitution requires looking to the privilege's origins in English law. As he phrased things in discussing "this great writ . . . [t]he term is used in the Constitution, as one which was well understood."[3] Further, modern Supreme Court jurisprudence still trains our attention on the Founding period, positing that "'at the absolute minimum,' the [Suspension] Clause protects the writ as it existed when the Constitution was drafted and ratified."[4] Accordingly, this article explores the relevant historical backdrop to the Founding period before carrying the story forward to chronicle how the Suspension Clause has been interpreted during important periods in American history, sometimes correctly and – as will be seen – sometimes incorrectly.

## I. The English Origins of Habeas Corpus and Suspension

"The Privilege of the Writ of Habeas Corpus" and the concept of suspension both trace their origins to English judicial and parliamentary practice. Studying this English backdrop and how it influenced the development of early American law is therefore enormously important to understanding the backdrop against which the Founding generation wrote the United States Constitution.

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3) *See* Ex parte Watkins, 3 Pet. (28 U.S.) 193, 201 (1830).

4) *Boumediene v. Bush*, 553 U.S. 723, 746 (2008) (quoting INS v. St. Cyr, 533 U.S. 289, 301 (2001)).

The story begins with the common law writ of habeas corpus *ad subjiciendum*, a judicial creation that demanded cause for a prisoner's detention from his jailer.[5] The common law writ came into regular use in the seventeenth century as a "prerogative writ" – namely, as the embodiment of royal power invoked by the Court of King's Bench in aid of the king's obligation to look after his subjects.[6] Over time, English judges came to employ the writ as a tool for inquiring into both the cause of initial arrest and the cause of continued detention of those who could claim to fall within the protection of domestic law.[7] Nonetheless, in the early seventeenth century, royal courts regularly countenanced returns, citing the king's command to imprison as sufficient justification to detain (or at least sufficient to preclude judicial inquiry into detention) based on the contemporary understanding that the crown's directives themselves constituted the "law of the land."[8]

Over the course of the seventeenth century, judicial and legislative developments moved toward rejecting the idea that the royal command alone might constitute legitimate cause to arrest and detain. An important moment in the story by which the English law of habeas corpus did so came with the passage of the English Habeas Corpus Act of 1679. The English Parliament's adoption of the Habeas Corpus Act coincided with the rise of parliamentary supremacy and a broader parliamentary effort to wrestle control over matters of detention from the monarch and its courts. With the act, the Parliament now controlled and defined what constituted legal cause to detain. In so doing, royal fiat ceased to suffice. In short order, moreover, the Parliament created a counterpart to the act's protections – namely, suspension – which it designed as a tool that could be invoked

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5) This writ, also called "*ad subjiciendum et recipiendum*," translates as "to undergo and receive" the "corpus," or body, of the prisoner. The writ was directed to the relevant custodian, or jailor, who had custody of the prisoner.

6) Paul D. Halliday, Habeas Corpus: From England to Empire 9 (2010). As Halliday recounts, in 1619, Chief Justice Sir Henry Montagu described "habeas corpus as a 'writ of the prerogative by which the king demands account for his subject who is restrained of his liberty.'" *Id.* at 65 (quoting (1619) Palmer 54, 81 Eng. Rep. 975 (K.B.)).

7) Halliday, *supra* note 6, at 48-53.

8) *See, e.g.*, Darnel's Case, (1627) 3 Cobbett's Complete Collection of State Trials 1, 59 (K.B.) (Eng.) (often called the "Case of the Five Knights").

during wartime to legalize arrests made outside the criminal process. As English law had come to establish by this point, without suspension, courts would otherwise discharge prisoners detained in this posture under the terms of the Habeas Corpus Act.

This development set the stage for – and profoundly influenced – the development of habeas corpus law in the United States. Much of the act's influence was derived in large measure from the major role that the act played in political and popular discourse during the decades leading up to the drafting and ratification of the United States Constitution as well as from the important developments involving the act's suspension for American "Rebels" during the American Revolutionary War. But before turning to that story, it is important to understand more about the English act and its relationship to the concept of suspension.

## *1. The English Habeas Corpus Act of 1679*

The English Habeas Corpus Act of 1679 proved the culmination of a lengthy effort during the seventeenth century, spearheaded at its origins by John Selden and Sir Edward Coke, to secure strict limitations on what would constitute legitimate "cause" for detention of individuals by the crown.[9] The act, entitled "An Act for the better securing the Liberty of the Subject and for Prevention of Imprisonments beyond the Seas," declared that it was intended to address "great Delays" by jailers "in making Returns of Writs of Habeas Corpus to them directed" as well as other abuses undertaken "to avoid their yielding Obedience to such Writs."[10] Toward that end, the act declared that it was "[f]or the prevention whereof and the more speedy Relief of all persons imprisoned for any such criminal

9) For an explication of the period leading up to enactment of the English Habeas Corpus Act, consult Amanda L. Tyler, *A "Second Magna Carta": The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege*, 91 Notre Dame L. Rev. 1949 (2016); see also Amanda L. Tyler, Habeas Corpus Goes to War: Tracing the Story of the United States Constitution's Habeas Privilege from the Tower of London to Guantánamo Bay (forthcoming 2017).

10) 1679, 31 Car. 2, c. 2, § 1 (Eng.), *reprinted in* 3 The Founder's Constitution 310 (Philip B. Kurland & Ralph Lerner eds. 1987). By its terms, the act sought to remedy the fact that "many of the King's subjects have been and hereafter may be long detained in Prison in such Cases where by Law they are baylable." *Id.*

or supposed criminal Matters." Accordingly, the Habeas Corpus Act's focus – cases involving persons imprisoned "for any criminal or supposed criminal Matters" – serves to underscore its close connection to the criminal process. In short order, the act came to be understood as embracing not just the cases of ordinary criminals, but domestic enemies of the state as well.

Many of the act's provisions codified preexisting, though not necessarily uniformly followed, judicial practices tied to the common law writ. It is, accordingly, important to understand that in practice the act served to complement the common law writ, using the preexisting writ as a vehicle for enforcing its terms. (The common law writ, as Blackstone noted, also continued to serve as the vehicle for redress available in "all . . . cases of unjust imprisonment" that were not covered by the act.[11]) This being said, where the act applied, the Parliament took control over a good deal of habeas jurisprudence from the courts, and it did so with a statute that by its terms required courts to follow its mandates under threat of penalty. Two sections of the act bear mention here. First, the third section of the act established the procedures for obtaining writs during court vacation periods and later sections provided that the act would reach so-called "privileged places" and other areas previously beyond the range of habeas courts. Second, the seventh section of the act made clear the connection between the writ of habeas corpus and the criminal process. This section covered "any person or persons . . . committed for High Treason or Felony" and provided that where a prisoner committed on this basis was not indicted within two court terms (a period typically spanning only three to six months), the judges of King's Bench and other criminal courts were "*required* . . . to set at Liberty the Prisoner upon Bail."[12] Further, the section declared that "if any person or persons committed as aforesaid . . . shall not be indicted and tried the second Term . . . or upon his Trial shall be acquitted, he shall be discharged from his Imprisonment."[13]

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11) 3 Blackstone's Commentaries *137 (observing that "all other cases of unjust imprisonment" not covered by the Act were "left to the *habeas corpus* at common law").

12) 31 Car. 2, c. 2, §§ 3, 7 (emphasis added). The judicial mandates came under threat of financial penalty as set forth in Section 10. *See id.* § 10. Note that over time the relevant language from section 7 moved to section 6 of the Act.

13) *Id.* Judges initially often evaded the act's protections by setting excessive bail; for that reason, the Declaration of Rights in 1689 declared that courts should not require excessive

Thus, in its seventh section, the English Habeas Corpus Act promised release of those held for criminal or "supposed" criminal matters, including the most dangerous of suspects – those detained on accusations of treason – where they were not timely tried.[14] Those held for suspected treason during the Jacobite Wars of the late seventeenth and eighteenth centuries and later during the American Revolution routinely invoked the act's protections to their benefit, either to force timely trial on criminal charges or secure their discharge.[15] There was no such thing as detention for military purposes of those who could claim the protections of domestic law. Instead, the act promised such persons that they must be afforded the protections of the criminal process in a timely fashion or else win their discharge. The act did not include any exceptions for times of war. It is for this very reason that the parliament invented the concept of suspension as a tool for displacing the protections associated with the Habeas Corpus Act during such periods in which the state itself was under attack.

## *2. Suspension*

It took the English Parliament only ten years to create a tool for setting aside the robust protections of the English Habeas Corpus Act – suspension. Studying the historical episodes of suspension during the late seventeenth and eighteenth centuries demonstrates that the purpose consistently animating those suspensions was to empower the executive to arrest suspected traitors outside the formal criminal process. To take one of many examples, the very first suspension, which came ten years after the act's passage and in the immediate wake of the Glorious Revolution, proved to expand the authority of the crown dramatically in the face of threats to the throne. William, having just been crowned in place of the dethroned James Stuart, asked the parliament in 1689 to suspend the

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bail. *See* Declaration of Rights, 1688, 1 W. & M., sess. 2, c. 2, § 1 (Eng.).

14) Chief Justice John Holt wrote shortly after passage of the English Act that its "design . . . was to prevent a man's lying under an accusation for treason, &c. above two terms." Crosby's Case, (1694) 88 Eng. Rep. 1167 (K.B.) 1168 (Holt, C.J.).

15) For details on many such cases, consult generally Tyler, *supra* note 9; and Amanda L. Tyler, *Habeas Corpus and the American Revolution*, 103 Cal. L. Rev. 635 (2015).

Habeas Corpus Act in order to arrest – solely on suspicion – Jacobite supporters who sought to return the Stuart line to power. As his emissary conveyed the request to the parliament, the king sought the power to confine persons "committed on suspicion of Treason only," lest they be "deliver[ed]" by habeas corpus.[16] The Parliament obliged and the first suspension followed.

Numerous attempts by the Jacobites to regain the British throne, combined with constant fighting with France, triggered several suspensions in the decades that followed, with the last of these suspensions coming in response to the Jacobite Rebellion in Scotland in 1745. In each of these suspensions, the Parliament empowered the crown to arrest those believed to pose a danger to the state on suspicion alone and detain them for the duration of the suspension without obligation to try them on criminal charges. Notably, in every one of these episodes, suspension was understood to set aside the protections set forth in the seventh section of the act as well as any complementary common law habeas role for the courts. Accordingly, as it came to be established in English law during the period leading up to the Revolutionary War, the suspension model contemplated that it was only by suspending Section 7 of the Habeas Corpus Act that detention outside the criminal process of persons who could claim the protection of domestic law could be made lawful – *even in wartime*.[17]

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16) 9 Debates of the House of Commons, from the Year 1667 to the Year 1694, at 129-130 (Anchitell Grey ed., London, n. pub. 1763) (remarks of Richard Hampden). For discussion of this suspension and its extensions, along with subsequent suspensions during the decades that followed, consult Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 Harv. L. Rev. 901, 934-944 (2012).

17) This being said, during this same period, Parliament also often invoked its power of attainder as a means to circumvent the protections of the Habeas Corpus Act. For more details, consult Tyler, *supra* note 9. Notably, suspension was not understood as necessary to detain those properly classified as prisoners of war for preventive purposes. *See* 1 Matthew Hale, Historia Placitorum Coronae.: The History of the Pleas of the Crown 159 (Sollom Emlyn ed., Philadelphia, Robert H. Small 1847) ("[T]hose that raise war against the king may be of two kinds, subjects or foreigners: the former are not properly enemies but rebels or traitors . . . ."); *see also* Halliday, *supra* note 6, at 170-173.

## II. Crossing the Atlantic

Although the suspension model was well settled by the middle of the eighteenth century, the American Revolutionary War placed tremendous pressure on its framework. Further, the movement for independence that drove the war proved an opportunity for the Americans to build their own legal frameworks. As will be shown, the American Founding generation knew a great deal concerning the benefits provided by the act – indeed, denial of the act's protections to the colonists constituted a major complaint about British rule and contributed to the movement for independence. Well steeped in their Blackstone, the colonists read about how the act was a "bulwark" of "personal liberty" and a "second *magna carta*."[18] Unsurprisingly, they wanted to enjoy this second *Magna Carta* too.

As noted, an important component of this story is the fact that the colonists resented being consistently denied the protections of the Habeas Corpus Act in America. Thus, to take one of many examples, in 1774, the Continental Congress decried the fact that colonists were "the subjects of an arbitrary government, deprived of trial by jury, and when imprisoned cannot claim the benefit of the habeas corpus Act, that great bulwark and palladium of English liberty."[19] Such complaints followed on the heels of several failed efforts by various colonies to adopt the act for themselves.

As things unfolded, this patchwork legal framework – the act applying in some areas, but not in others – came to play a major role in how the British treated American prisoners, so-called "Rebels," when captured during the war. Studying the way in which the British treated American prisoners during this period underscores the important role that the act, its geographic sweep, and its suspension played in the governing legal calculus during the war.

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18) 1 Blackstone's Commentaries *126, *131, *133. Blackstone's *Commentaries* grew out of Blackstone's lectures and were published between 1765 and 1769. The timing and circulation of his *Commentaries* meant that they wielded profound influence on the development of early American law.

19) [1774] 1 Journals of the Continental Congress 1774-1789, at 88 (Worthington Chauncey Ford ed., 1904); *see also id.* at 107-108 (reiterating same complaints) (replicating Lettre Adressée aux Habitans de la Province de Quebec (Oct. 26, 1774)).

### *1. Ethan Allen and His Green Mountain Boys*

In September of 1775, after having seized the important strategic post of Fort Ticonderoga in New York from the British, Captain Ethan Allen and his Green Mountain Boys headed north to Canada with the goal of capturing the city of Montreal. The poorly-planned endeavor ended quickly with their capture. Once in the custody of British General Richard Prescott, Allen reported that he was treated badly and threatened with a traitor's execution.[20] In short order, British Lieutenant Governor Cramahé ordered Allen along with his cohort of "Rebel Prisoners" to be dispatched to England, in Cramahé's words because he had "no proper Place to confine them in, or Troops to guard Them" in Canada.[21] After a long journey across the Atlantic Ocean, the prisoners landed in Falmouth, England days before Christmas in December 1775.

Upon their arrival, the British imprisoned Allen and his Boys at Pendennis Castle in Cornwall. If Allen's personal narrative (first published in 1779 and widely read in America[22]) is to be believed, people "came in great numbers out of curiosity, to see [him]."[23] But within days of Allen's arrival, the British legal elite met and decided to send Allen and his fellow Rebels back to America as soon as possible. As Lord George Germain, secretary of state for the Americas, wrote to the Lords of the Admiralty immediately after the meeting, it was "The King's Pleasure" that Allen and the other prisoners be removed to his Majesty's ship *Solebay*, which should "put to Sea with the first fair wind" and set course for Boston, where the prisoners were to be turned over to British General Howe.[24] After less than

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20) *See* Ethan Allen, A Narrative of Colonel Ethan Allen's Captivity, Written by Himself 36 (Burlington, Vermont, H. Johnson & Co. 3d ed. 1838) [hereinafter Allen Narrative] (reporting Prescott's statement).

21) Extract of Letter from Lieutenant Governor Cramahé to the Earl of Dartmouth (Nov. 9, 1775), The National Archives (Great Britain) [hereinafter TNA] SP 44/91/443.

22) Initially, the book was published in installments in, among other places, the *Pennsylvania Packet*. *See, e.g.*, Pa. Packet or Gen. Advertiser (Nov. 11, 1779) (publishing the portion of Allen's Narrative discussing his return to America).

23) *See* Allen Narrative, *supra* note 20, at 50; *see also id.* at 55-56.

24) Letter from Lord George Germain to the Lords Commanders of the Admiralty (Dec.

two weeks in England, Allen found himself headed back to America. *Why?*

The answer to this question teaches a great deal about the status of Anglo-American habeas law during this important period. In addition to political calculations stemming from apparent uncertainty on the part of the British Government as to whether it thought it could successfully prosecute the Rebels as traitors, there is extensive contemporary evidence to suggest that efforts were underway to invoke the protections of the English Habeas Corpus Act on behalf of Allen and his fellow Rebels in the British courts. For example, *The Annual Register* for 1775 reported of the prisoners: "whilst their friends in London were preparing to bring them up by *habeas corpus*, to have the legality of their confinement discussed, they were sent back to North-America to be exchanged."[25] Similar stories ran in multiple other British papers during this time, including several which named prominent habeas counsel with ties to the American cause as having taken on the case. Further, one London newspaper specifically identified (and criticized) the administration's desire "to elude the Habeas Corpus Act" as the reason for sending Allen back to America.[26]

The internal documents of British officials confronting the question of what to do with Allen and the other Rebels also reveal a great desire to make the problems posed by Allen's detention in England go away – and fast. As one admiralty lord wrote just days after Allen's arrival in England, the administration's "principal object" must be "to get the prisoners out of reach as soon as possible."[27] Out of reach of what? The answer, most likely, was the English courts, where a subject like Allen held on English soil had the right to invoke the protections of the Habeas Corpus Act and thereby force his trial or else secure his freedom.

As noted, however, across the Atlantic, the Habeas Corpus Act did not

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27, 1775), TNA CO 5/122/398.

25) 18 The Annual Register, or a View of the History, Politics, and Literature, for the Year 1775, at 187 (London, J. Dodsley 1780).

26) *To the Printer of the Public Advertiser*, Pub. Advertiser, Issue 14474 (Feb. 22, 1776) (referring to Allen's arrival in Corke as resulting from "a Violation of Law" and "criminal too, as it was notoriously done to elude the Habeas Corpus Act").

27) Letter from Lord Hugh Palliser to the Earl of Sandwich (Dec. 29 1775), *in* 1 The Private Papers of John, Earl of Sandwich, First Lord of the Admiralty 1771-1782, at 87 (G.R. Barnes & J.H. Owen eds., 1932).

apply, or at least that was the position to which the crown had subscribed for some time by now. It followed that by sending Allen back across the Atlantic, the administration could avoid having to confront the Habeas Corpus Act's mandate that he be timely tried on criminal charges or else discharged. Also, in America, prisoner exchanges were up and running. It is important to note, however, that such exchanges did not follow under the King's formal sanction, but instead by reason of "personal agreements" between Continental Army General George Washington and his British counterparts, first General Howe and then General Clinton. Indeed, Lord Germain took pains to remind General Howe that he was to effect exchanges "without the King's Dignity & Honor being committed, or His Majesty's Name used in any Negotiation for that purpose."[28] After all, entering a formal exchange with the Americans would have been tantamount to recognizing their American prisoners as being in the service of a foreign sovereign, rather than traitors and rebels who needed to return to their proper allegiance.

### 2. *The American Rebels Learn about Suspension*

As the war continued, British ships began arriving in constant stream through 1776 to deposit American prisoners on British shores. Parliament now had to address the legal status of American rebels held on English soil where the Habeas Corpus Act was in full effect.

In early 1777, Lord North responded to these developments by invoking the same tool that earlier administrations had wielded during similar periods of unrest – he proposed a suspension. In introducing the measure to the parliament, Lord North explained:

> [I]t had been customary upon similar occasions of rebellion, or danger of invasion, to enable the king to seize suspected persons. . . .

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28) Letter from Lord George Germain to The Honorable Major General Howe (Feb. 1, 1776), TNA CO 5/93/16. In his own words, General Clinton refused to enter any formal cartel lest it "acknowledg[e] . . . independency," and, like his predecessor, declared that personal agreements between Washington and him would govern prisoner exchanges in America. Massachusetts Historical Society, Report of Exchanges of Prisoners During the American Revolutionary War 20 (Boston, 1861) (quoting Clinton).

> But as the law stood . . . it was not possible at present officially to apprehend the most suspected person. . . . It was necessary for the crown to have a power of confining them like other prisoners of war.[29)]

In other words, the administration sought in the proposed legislation to legalize the detention of American Rebels during the war without having to bring them to trial on criminal charges.

The bill, like the war that occasioned it, was controversial from the start. Nonetheless, despite the misgivings raised by several members who spoke during the debates, the Parliament ultimately passed Lord North's measure by a substantial margin. As enacted, the suspension legislation applied only to persons suspected of the crimes of high treason or piracy committed in America or on the high seas, and authorized their detention without bail or mainprize. Thus, the Parliament was careful to target only Americans, and it did so for the purpose of addressing "a Rebellion and War [that] ha[s] been openly and traitorously levied and carried on in certain of his Majesty's Colonies and Plantations in *America*, and Acts of Treason and Piracy [that] have been committed on the High Seas." Acknowledging that many American prisoners "have been, or may be brought into this Kingdom, and into other Parts of his Majesty's Dominions," the Parliament explained the need for legislation modeled upon earlier suspension acts because "it may be inconvenient in many such Cases to proceed forthwith to the Trial of such Criminals, and at the same Time of evil Example to suffer them to go at large."[30)]

The Parliament subsequently extended the legislation several times to last through much of the war. Once enacted, the legislation, popularly known as North's Act, quickly earned the ire of Americans, with George Washington complaining in his *Manifesto* that the Parliament had now

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29) 19 The Parliamentary History of England, from the Earliest Period to the Year 1803, at 4 (London, T.C. Hansard 1814) (remarks of Lord Frederick North given to the House of Commons Feb. 6, 1777).

30) An Act to Impower his Majesty to Secure and Detain Persons Charged with, or Suspected of, the Crime of High Treason, Committed in any of his Majesty's Colonies or Plantations in *America*, or on the High Seas, or the Crime of Piracy, 17 Geo. 3, c. 9 (1777) (Gr. Brit.); *see* 35 H.L. Jour. (1777) 78, 82-83 (Gr. Brit.) (noting royal assent given March 3, 1777).

sanctioned "arbitrary imprisonment" by reason of the "suspension of the Habeas Corpus Act."[31] On the ground, the act rendered lawful the indefinite detention without trial of almost three thousand captured Americans brought to England during the war.

It was only once independence became a foregone conclusion that the Parliament finally permitted the suspension to lapse, recognizing the law as no longer necessary to hold the remaining American prisoners on English soil without trial. This followed from the fact that as peace negotiations got underway, the Parliament declared that the British Government's relationship with the American prisoners – now viewed as in the service of a newly-acknowledged (if not yet formally recognized) independent country – was no longer governed by domestic law but instead the Law of Nations, which permitted the detention of prisoners of war without criminal trial for the purpose of preventing their return to the battlefield.[32]

## III. Suspension and the Habeas Corpus Act in Revolutionary America

Meanwhile, on the other side of the Atlantic, the newly-declared independent states were embracing the English Habeas Corpus Act as their own, and in some cases, the concept of suspension as well. In studying the legal frameworks of the original states, one finds extensive evidence that

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31) George Washington, *Manifesto of General Washington, Commander in Chief of the Forces of the United States of America, in Answer to General Burgoyne's Proclamation* (July 19, 1777), *in* 47 The Gentleman's Magazine, And Historical Chronicle for the Year 1777, at 456-457 (Sylvanus Urban ed., London, D. Henry Sept. 1777), *reprinted in* Continental J. & Wkly. Advertiser (Boston) (Mar. 5, 1778), at 3.

32) *See* An Act for the Better Detaining, and More Easy Exchange, of *American* Prisoners Brought into *Great Britain*, 1782, 22 Geo. 3, c. 10 (Gr. Brit.); *see also* 36 H.L. Jour. (1782) 425-426 (Gr. Brit.) (noting royal assent given March 25, 1782). The statute declared that, "it may and shall be lawful for his Majesty, during the Continuance of the present Hostilities, to hold and detain . . . as *Prisoners of War*, all Natives or other Inhabitants of the Thirteen revolted Colonies not at His Majesty's Peace." The Act likewise authorized the discharge or exchange of such prisoners "according to the Custom and Usage of War, and the Law of Nations . . . any Warrant of Commitment, or Cause therein expressed, or any Law, Custom, or Usage, to the contrary notwithstanding." *Id.*

the idea of the habeas privilege was linked inextricably to the English Act, and a number of states quickly moved to adopt formally the act's terms as part of their new constitutions and codes. Other states, meanwhile, introduced the protections of the act through common law judicial processes that were later codified in statutory law.

The prominence of the act in early American legal discourse is demonstrated in many quarters, including South Carolina's newly-declared independent General Assembly taking up as one of its very first matters the confirmation of the act's operation in March of 1776.[33] Another prominent example may be found in Georgia's inclusion in its Constitution of 1777 express provision that "the principles of the Habeas Corpus Act, shall be part of this Constitution."[34] As though to drive home the point, Georgia annexed verbatim copies of the English Habeas Corpus Act to its original distribution.[35]

During the Revolutionary War, moreover, at least six of the newly declared independent states enacted their own suspension acts modeled on the English precedents from the late seventeenth and eighteenth centuries. They did so in order to legalize the detention of the disaffected outside the criminal process. These states included Massachusetts, Pennsylvania, Maryland, South Carolina, Virginia, and New Jersey.[36] Notably, some of those suspensions expressly set aside the Habeas Corpus Act, as in Pennsylvania, where its suspension legislation declared its intent "to restrain for some limited Time the Operation of the Habeas Corpus Act."[37]

In the years following the war, a wave of additional states statutorily adopted (or, in some cases, reaffirmed), the core terms of the English Act, including particularly its seventh section, as part of their statutory law.[38]

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33) Journal of the General Assembly of South Carolina, March 26, 1776-April 11, 1776, at 21, 24, 26 (A.S. Salley, Jr. ed., 1906).

34) Ga. Const. of 1777, art. LX.

35) Charles Francis Jenkins, Button Gwinnett: Signer of the Declaration of Independence 109 (1926).

36) For details of these suspensions, consult Tyler, *supra* note 16, at 958-968.

37) Journal and Proceedings of the General Assembly of the Common-wealth of Pennsylvania 88 (John Dunlap, ed. 1777).

38) For extensive details on this period, consult Tyler, *supra* note 9.

Other states had constitutionalized its terms, either explicitly, as in the case of Georgia, or by connecting the habeas privilege to the concept of suspension and embracing the understanding that without a suspension, one held on suspicion of criminal activity must be tried in due course, as Massachusetts's Constitution of 1780 did.[39] Further, just three months before the Constitutional Convention convened in Philadelphia in 1787, New York passed a statute almost identical to the 1679 Act. The legislation, tracking the seventh section of its English predecessor, made express the requirement that any person "committed for treason or felony" who is not "indicted and tried [by] the second term [of the] sessions" of the relevant court "after his commitment shall be discharged from his imprisonment."[40] Highlighting the pervasive influence of the English Habeas Corpus Act on the development of early American law, the great New York jurist and legal commentator Chancellor James Kent observed in 1827 that "the statute of 31 Charles II. c. 2 is the basis of all the American statutes on the subject."[41]

## IV. Constitutionalizing the Privilege – A "Good Start" to a Bill of Rights

Such was the backdrop against which the Founding generation drafted and ratified the Suspension Clause. It should therefore come as no surprise that the continuing influence of the suspension framework tethered to the English Habeas Corpus Act on American habeas jurisprudence – and particularly the Suspension Clause – was profound and extensive.

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39) Mass. Const. of 1780, pt. 2, ch. VI, art. VII ("The privilege and benefit of the writ of Habeas Corpus shall be enjoyed in this Commonwealth in the most free, easy, cheap, expeditious and ample manner; and shall not be suspended by the Legislature, except upon the most urgent and pressing occasions, and for a limited time not exceeding twelve months."). The debates leading up to adoption of this provision, which demonstrate its linking with the protections of the English Habeas Corpus Act, are discussed in Tyler, *supra* note 16, at 963-964.

40) An Act for the Better Securing the Liberty of the Citizens of this State, and for Prevention of Imprisonments (Feb. 21, 1787), *in* 1 Laws of the State of New York 369, 369 (New York, Thomas Greenleaf 1792).

41) II James Kent, Commentaries on American Law 24 (New York O. Halsted 1827).

When the delegates to the Constitutional Convention met in Philadelphia in 1787, they set to work on a new federal structure that would replace the Articles of Confederation. As an initial matter, the delegates resolved that the new federal government would be empowered to act directly upon the people, rather than exclusively through member states, as had been the case under the short-lived Articles of Confederation.[42] Next, the delegates embraced a formal separation of powers for the design of the federal government – a marked departure from the British model – as well as the creation of a Supreme Court and authorization for the creation of inferior national courts that would operate independently of the political branches. It was within the larger conversation about the judicial branch that the delegates turned to two protections that British rule had denied the colonists: namely those protections associated with the English Habeas Corpus Act and the right to jury trial.

As things unfolded, there was only very limited discussion at the convention of what ultimately became the Suspension Clause in the United States Constitution. Four days after the convention came to order, Charles Pinckney introduced a draft plan to the convention that received no reported discussion. One of his proposals, however, laid the groundwork for the Suspension Clause and introduced a concept that would survive in the clause's final form – namely, the restriction on suspensions "except in case of rebellion or invasion."[43] Pinckney may have been influenced by the recent adoption in Ireland of the English Habeas Corpus Act, which copied much of the language of the 1679 Act verbatim, with the notable addition of language constraining the Irish Council from suspending the act except "during such time only as there shall be an actual invasion or rebellion in this kingdom or Great Britain."[44]

Months later, Pinckney moved again for recognition of the habeas

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42) Jack Rakove, Revolutionaries: A New History of the Invention of America 55 (2010).

43) 1 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution 148 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott & Co. 1881) [hereinafter Elliot's Debates] (replicating Charles Pinckney's draft plan, Article VI).

44) An Act for Better Securing the Liberty of the Subject, 1781, 21 & 22 Geo. 3, c. 11, § XVI (Ir.).

privilege hand-in-hand with constraints on when it could be suspended. *Farrand's Records of the Federal Convention of 1787* reports that the proposal read:

> The privileges and benefit of the Writ of Habeas corpus shall be enjoyed in this Government in the most expeditious and ample manner; and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a time period not exceeding [— —] months.[45]

As limited debate unfolded days later, the delegates instead came to embrace the language proposed by Gouverneur Morris that read: "The privilege of the writ of Habeas Corpus shall not be suspended, unless where in cases of Rebellion or invasion the public safety may require it."[46]

At this point, Madison's notes recount that the delegates took a vote on Morris's proposal. All agreed on the first part that standing alone prohibited suspension under any circumstances: "The privilege of the writ of Habeas Corpus shall not be suspended . . . ." It was the second part of the proposed clause, which recognized a power to suspend "in cases of Rebellion or invasion [where] the public safety may require it," that elicited dissent in the ranks. Specifically, North Carolina, South Carolina, and Georgia voted against including such language in the draft clause.[47]

Notably, the evidence suggests that the delegates clearly recognized an important connection between habeas corpus, suspension, and requiring criminal prosecution of those taken into custody who could claim the protection of domestic law. For example, the delegates initially placed the Suspension Clause in the judiciary article (then-Article XI) right alongside the guarantee that "[t]he trial of all crimes (except in cases of impeachment)

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45) James Madison, Notes on the Constitutional Convention (Aug. 20, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 340, 341 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS].

46) *Id.* at 438 (internal quotation marks omitted). The Committee on Style later changed the wording of the Clause by substituting "when" for "where." *See* Report of Committee of Style (Sept. 12, 1787), *in* 2 *id.* at 596.

47) *See* Madison, *in* 2 *id.* at 438; *see also* I ELLIOT'S DEBATES, *supra* note 43, at 270 (reporting the approval of Morris's proposed wording).

shall be by jury."[48] Further, the jury-trial right had also been the subject of discussion just before the drafters took up discussion of the habeas clause.[49] And, in promoting the draft Constitution in the *Federalist Papers*, Alexander Hamilton lauded the fact that the Constitution provided for "trial by jury in criminal cases, aided by the *habeas corpus act*."[50] As Hamilton's above language exemplifies, moreover, there was widespread association of the proposed Suspension Clause's protection of the privilege with the English Habeas Corpus Act. Indeed, participants throughout the ratification debates connected the two directly; others simply took for granted the fact that the clause's limitations on suspension were intended to safeguard the very protections that the Parliament had invented suspension to set aside – namely, those associated with the seventh section of the English Habeas Corpus Act.[51]

This backdrop helps put in context many of the comments made during the Constitutional Convention and Ratification debates about the Suspension Clause. In particular, it helps explain why Alexander Hamilton believed that constitutionalizing the privilege and with it many of the protections long associated with the English Act – such as the right to presentment or indictment, speedy trial, and protection from excessive bail – rendered additional express protection of these rights arguably unnecessary. Indeed, even the Antifederalist *Federal Farmer* pointed to the Suspension Clause and its neighboring provisions as "a partial bill of rights."[52] Later, highlighting the profound influence of the English Act on

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48) Madison, *in* 2 Farrand's Records, *supra* note 45, at 438 (internal quotation mark omitted). At this point, the draft put the two provisions in Article XI, Sections 4 and 5. *See id.* Later, the Committee of Style reorganized the articles and separated the two clauses. *See* Report of Committee of Style (Sept. 12, 1787), *in* 2 *id.* at 590, 596, 601; *see also* U.S. Const. art. III, § 2, cl. 3 (Jury Clause).

49) *See* Madison, *in* 2 Farrand's Records, *supra* note 45, at 438.

50) The Federalist No. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (emphasis added).

51) For greater discussion of this point, consult Tyler, *supra* note 9; and Tyler, *supra* note 16, at 969-975.

52) Letter IV from the Federal Farmer to the Republican (Oct. 12, 1787), *in Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention; and to Several Essential and Necessary Alterations to It* (1787), *reprinted in* 2 The Complete Anti-Federalist, *supra* note 51, at 214, ¶ 2.8.51, at 248; *see also id.* ¶¶ 2.8.51-.52, at 248-249.

the Suspension Clause, Chief Justice Marshall would write that when interpreting the Suspension Clause, we must look to "that law which is in a considerable degree incorporated into our own," specifically, "the celebrated *habeas corpus* act" of 1679.[53]

## V. Civil War and Suspension

It was not until the Confederate attack on Fort Sumter on April 12, 1861, and the Civil War that followed that the United States witnessed its first suspension at the federal level. President Lincoln viewed the secession of the Confederate States as illegal, and considered those who supported the Confederacy to be traitors who needed to return to their proper allegiance.[54] In this regard, the Union view of the secessionists mirrored that held by the British with respect to the American Rebels years earlier. This view of allegiance would also shape how the Union treated Confederates when held as prisoners.

Within days of the attack on Fort Sumter, Lincoln authorized Union military leaders to suspend habeas wherever they believed it necessary to protect key geographic areas.[55] Lincoln did so famously on his own and without congressional approval. To be sure, initially Congress was unable to meet to grant him this authority, but well after the body reconvened and for the next two years until Congress finally enacted suspension legislation, Lincoln kept on authorizing suspensions throughout the country.[56]

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53) *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 201-202 (1830) (Marshall, C.J.).

54) Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* Abraham Lincoln: Speeches and Writings, 1859-1865, at 215, 218 (Don E. Fehrenbacher ed., 1989) (arguing that secession was illegal and that "the Union [was] unbroken").

55) *See, e.g.*, Letter from Abraham Lincoln to Winfield Scott (Apr. 25, 1861), *in* 4 The Collected Works of Abraham Lincoln 344, 344 (Roy P. Basler et al. eds., 1953) [hereinafter Collected Works] (authorizing suspension of the privilege in Maryland in situations of the "extremest necessity").

56) For a collection of citations, consult Tyler, *supra* note 9.

## *1. "The Great Suspender" and the Case of John Merryman*

Lincoln's unilateral assumption of what had always been a legislative power – suspension, after all, owes its very creation to the Parliament – came under criticism almost immediately and soon sparked a widespread public debate.[57] From the outset of the war, Lincoln recognized Maryland as situated in a critically important location. Union troops needed to pass through the state to reach Washington, DC, and just seven days after the Confederate assault on Fort Sumter, mobs had attacked a Massachusetts regiment traveling through Baltimore heading south, killing four members. And although the Maryland legislature had voted against secession, it also took numerous steps to frustrate Union efforts, such as refusing to reopen rail lines to the north and pushing for the withdrawal of federal troops from the state. Matters escalated to the point that the governor deployed the state militia and purportedly approved of local orders that several key bridges be destroyed in order to thwart Union troop movements through the state. One of those believed to play a role in destroying several bridges was a Maryland farmer by the name of John Merryman.

Union troops arrested Merryman at his home in Baltimore on a Saturday. Labeling him a traitor, the military imprisoned him at Fort McHenry. President Lincoln had given his military commanders in Maryland full discretion to suspend habeas corpus as needed to protect key military areas, and having exercised that authority Cadwalader held the view that it was therefore legal for him to detain persons suspected of treason without charges. Yet the very same day of Merryman's arrest, counsel prepared a habeas petition on his behalf, arranging for its presentation in Washington to the Chief Justice of the Supreme Court of the United States, Roger B. Taney. On Sunday, Taney ordered General Cadwalader to appear and produce the body of John Merryman and

57) Numerous pamphlets on this subject were published during this period. For a list of citations, consult William F. Duker, A Constitutional History of Habeas Corpus 178 n.189 (1980); and Sydney G. Fisher, *The Suspension of Habeas Corpus During the War of the Rebellion*, 3 Pol. Sci. Q. 454, 485-488 (1888). I borrow the phrase "the Great Suspender" from Saikrishna Bangalore Prakash, *The Great Suspender's Unconstitutional Suspension of the Great Writ*, 3 Alb. Gov't L. Rev. 575 (2010).

demonstrate legal justification for his detention at hearing the next day. But Cadwalader declined to appear, instead sending a deputy to explain the General's position that a suspension legalized Merryman's detention and rendered any judicial inquiry improper.

Taney made quick work of Cadwalader's arguments, writing in his opinion on the matter:

> I understand that the president not only claims the right to suspend the writ of habeas corpus himself, at his discretion, but to delegate that discretionary power to a military officer. . . . I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands, that the privilege of the writ could not be suspended, except by act of congress.[58)]

Taney then discussed the developments leading up to adoption of what he called "the great habeas corpus act" during the reign of Charles II. Taney emphasized that "[t]he great and inestimable value of the habeas corpus act of the 31 Car. II. is, that it contains provisions which compel courts and judges, and all parties concerned, to perform their duties promptly, in the manner specified in the statute." That "manner," or tradition, Taney explained, in turn formed the basis of American habeas law and specifically established two important benchmarks of constitutional law. The first such principle, Taney wrote, was that only the legislative body possessed the power to suspend habeas. Second, Taney observed that the entire history of the English Act and its incorporation into American law required that one be charged and tried in due course in the absence of a valid suspension, or else be discharged.

Taney concluded his opinion by noting that he had arranged for his opinion to be delivered to President Lincoln who, Taney wrote, would then be left "to determine what measures he will take to cause the civil process of the United States to be respected and enforced." The government

58) Ex parte *Merryman*, 17 F. Cas. 148 (C.C.D. Md. 1861) (No. 9487).

responded by eventually indicting Merryman on various charges, including treason, although for various reasons he was never tried. Notwithstanding the change of course in Merryman's particular case, however, Lincoln openly rejected Taney's opinion as wrong, proclaiming numerous additional suspensions ahead of Congress ever acting and famously defending the President's unilateral power to suspend before Congress, asserting that "[i]t was not believed that any law was violated."[59)]

Chief Justice Taney's tenure on the Supreme Court is hardly the subject of much celebration, but he was most assuredly right in *Merryman* as to the question which branch possesses the authority to suspend habeas. It bears noting, moreover, that his conclusion was the same as that reached by Chief Justice Marshall in *dicta* years earlier.[60)] As Taney observed, the drafters of the Constitution placed the Suspension Clause in Article I – the legislative article – and suspension was, at its origins, a legislative creation born out of a movement to take control over matters of detention from the executive. The idea that the executive could suspend habeas without legislative involvement, at least when the legislature is able to meet and take up the matter, is entirely at odds both with this history and the Founding generation's deep suspicion of concentrated executive authority.[61)]

### *2. The Sweep of Suspension*

Lincoln may have been mistaken about which branch possessed the authority to suspend, but he certainly appreciated the dramatic nature of suspension and understood its necessity as a means of legalizing arrests that otherwise would be unconstitutional in the ordinary course. Referring to the Suspension Clause, Lincoln wrote that the "provision plainly attests to the understanding of those who made the constitution that . . . the purpose" of suspension was so that "men may be held in custody whom

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59) *See* Abraham Lincoln, Message to Congress (July 4, 1861), *in* 4 Collected Works, *supra* note 55, at 430.

60) *See* Ex parte *Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (Marshall, C.J.) ("If at any time the public safety should require the suspension of the powers vested by [Judiciary Act] in the courts of the United States, it is for the legislature to say so.").

61) For an outstanding explication of the position that suspension is a congressional power, see Prakash, supra note 57, at 591-613.

the courts acting on ordinary rules, would discharge."[62] Thus, as Lincoln explained the operation of the clause: "Habeas Corpus, does not discharge men who are proved to be guilty of defined crime; and its suspension is allowed by the constitution on purpose that, men may be arrested and held, who can not be proved to be guilty of defined crime, 'when in cases of Rebellion or Invasion the public Safety may require it.'"[63]

As noted, President Lincoln firmly believed that the Confederate states could not legally secede from the Union, and it followed that he held the view that Confederates retained their duty of allegiance to the Union. As such, Lincoln also believed that any detention of Confederate soldiers and civilian supporters outside the criminal process required a suspension. Accordingly, he issued sweeping suspensions to reach virtually every prisoner who might be captured in the war.[64] Then, after actively debating suspension for two years, Congress finally passed legislation in 1863, entitling the measure "An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases." The first section of the Act provided:

> That, during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof.[65]

Congress intended its chosen wording (stating that the President "is authorized" rather than "is hereby authorized") to be ambiguous on the question whether the bill was an investiture of the power in the president

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62) Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863), *in* 6 The Collected Works of Abraham Lincoln 260, 264 (Roy P. Basler et al. eds., 1953) (internal citation omitted).

63) *Id.* It followed, in Lincoln's view, that suspension allows even for "instances of arresting innocent persons," something "always likely to occur in such cases." *Id.* at 263.

64) For more details, see Tyler, *supra* note 9.

65) Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755, 755. For more on the details of this legislation, consult Amanda L. Tyler, *Suspension as an Emergency Power*, 118 Yale L.J. 600, 637-655 (2009).

or a validation of the president's prior acts.[66]

Now unquestionably armed with the authority to address the "clear, flagrant, and gigantic case of Rebellion"[67] tearing apart the Union, Lincoln issued another sweeping suspension in September of 1863. (Notably, moreover, Lincoln cited the 1863 Act as the basis of his authority, almost conceding the questionable constitutionality of his earlier proclamations.) It provided:

> [I]n the judgment of the President, the public safety does require that the privilege of the said writ shall now be suspended throughout the United States in the cases where, by the authority of the President of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy . . . .[68]

Lincoln's proclamation specifically encompassed persons held in military custody as "prisoners of war" – the category surely intended to encompass Confederate soldiers captured on the battlefield. This is noteworthy insofar as even Lincoln did not believe that the President had inherent authority to detain such persons in the absence of a suspension. In the wake of this proclaimed suspension, Union military officials detained thousands of individuals across the country, including scores captured in battle. Only a portion of those detained during the war were ever tried for criminal conduct and, in most cases, those trials occurred before military tribunals, a practice that implicates a host of additional constitutional issues.

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66) *See*, *e.g.*, Cong. Globe, 37th Cong., 3d Sess. 1094 (1863) (statement of Sen. Bayard) (referring to the measure as "intentionally ambiguous . . . [and] intended to be so framed that it may be read two ways").

67) Letter from Abraham Lincoln to Erastus Corning and Others, *supra* note 62, at 264.

68) Proclamation No. 7, 13 Stat. 734, 734 (1863). Lincoln's proclamation also encompassed those in the United States Military, military deserters, and draft dodgers. *See id.*

### *3. Military Trials and Habeas Corpus*

As noted, the use of military tribunals during the war proved another controversial aspect of Lincoln's agenda and earned the post-war rebuke of the Supreme Court in its 1866 decision in Ex parte *Milligan*. In areas in which the regular civilian courts were "open and their process unobstructed," five members of the court held, civilians must be tried by civilian courts and given the full panoply of constitutional rights relating to criminal procedure, including the jury trial and a life-tenured judge – even in the face of ongoing civil war.

Lamdin Milligan had been tried by a military tribunal in Indiana for various charges relating to supporting the Confederacy and was convicted. Afterward, the tribunal sentenced him to death. When Milligan sought habeas corpus relief challenging the legitimacy of his conviction, the Supreme Court sided with him based in part on its view that "in Indiana[,] the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances." It was of no moment to the majority that Milligan had been charged with violations of the laws of war. Such laws, the court concluded, "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."[69] (The Supreme Court later called this aspect of the *Milligan* opinion into question in the hastily-decided World War II case of Ex parte *Quirin*.[70])

Notably, the *Milligan* Court also rejected the argument that the existence of a nationwide suspension sanctioned Milligan's trial before a military commission. Suspension, the court held, only permits *detention* during its duration; it says nothing about the propriety of military versus civilian courts, nor does it legitimate the denial of standard constitutional protections. Put another way, as Justice Davis phrased it, "[t]he Constitution goes no further. It does not say after a writ of *habeas corpus* is denied a citizen, that he shall be tried otherwise than by the course of the common law. . . [The Founding generation] limited the suspension to one great right,

69) Ex parte *Milligan*, 71 U.S. (4 Wall.) 2, 6, 121 (1866).

70) 317 U.S. 1 (1942).

and left the rest to remain forever inviolable."[71]

## VI. World War II and the "Forgotten" Suspension Clause

With the exception of suspension legislation enacted during the reconstruction period that followed the Civil War,[72] the concept of suspension did not enter the political and legal discourse again in the United States until World War II. But in the immediate wake of the Japanese attack on Pearl Harbor that ushered the United States into World War II, suspension returned. That very afternoon, the Territorial Governor of the Hawaiian Territory proclaimed a suspension on the islands, acting pursuant to special procedures set forth in the Hawaiian Organic Act of 1900.[73] With respect to the mainland United States, however, Congress never debated, much less passed, any suspension legislation.

Instead, President Franklin Delano Roosevelt's Executive Order 9066, issued in February of 1942, established the foundation for all that followed. The President's Order gave the secretary of war the authority to designate military zones "from which any or all persons may be excluded" and provide for the regulation of the terms on which persons could enter, remain in, or be forced to leave such areas.[74] Under the auspices of 9066, the military imposed curfews, designated large swaths of the western United States as military areas of exclusion, and ultimately created "relocation centers" across the western United States – all aimed at controlling the movements of, and ultimately detaining against their will, persons of Japanese ancestry during the war.[75]

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71) Milligan, 71 U.S. (4 Wall.) at 126.

72) During Reconstruction, Congress again provided the President with authority to suspend the privilege – this time to combat the Ku Klux Klan in the South. For details, consult Tyler, *supra* note 65, at 655-662.

73) Ch. 339, 31 Stat. 141; *id.* § 67, 31 Stat. at 153 (authorizing territorial governor to suspend "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it"). For additional details, see Duncan v. Kahanamoku, 327 U.S. 304, 307-308 (1946).

74) 3 C.F.R. 1092 (1942) (repealed 1976).

75) *See*, *e.g.*, Public Proclamation No. 8, 7 Fed. Reg. 8346 (June 27, 1942) (compelling "persons of Japanese ancestry" evacuated from Military Areas to report to "Relocation

As things unfolded, over 110,000 Japanese Americans – including over 70,000 United States citizens – were forced from their homes and, ultimately, detained in camps scattered across the west. Well before these policies were put into place, many prominent government officials expressed great skepticism over the need for such measures. The skeptics included the Director of the Federal Bureau of Investigation, J. Edgar Hoover, who reportedly told Attorney General Francis Biddle that the push for such policies was "based primarily upon public and political pressure rather than on factual data."[76] There were also enormous constitutional problems with the policies. Beyond the fact that they were born of insidious racial and ethnic discrimination, the internment stands as the single largest violation of the Suspension Clause in history.

In four cases, Japanese American citizens challenged the constitutionality of the military's policies all the way to the Supreme Court. Gordon Hirabayashi's was the first. Hirabayashi had been convicted of violating a curfew order and refusing to register with military authorities as part of a process that was likely to result in his relocation to a camp. When Hirabayashi challenged his convictions on appeal, the Supreme Court rejected his arguments that the orders violated the non-delegation doctrine and the Fifth Amendment to the United States Constitution, reasoning:

> The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances

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Centers for their relocation, maintenance and supervision"); Civilian Restrictive Order 1, 8 Fed. Reg. 982 (May 19, 1942) (prohibiting "all persons of Japanese ancestry, both alien and non-alien," within "Assembly Centers, Reception Centers or Relocation Centers pursuant to exclusion orders" from leaving such areas without prior written authorization). For additional discussion, *see* Ex parte *Endo*, 323 U.S. 283, 289 (1944). Earlier in the war, Congress ratified portions of President Roosevelt's Executive Order 9066, 3 C.F.R. 1092 (1942) (repealed 1976), making it a criminal offense to remain in designated military zones. *See* Act of Mar. 21, 1942, Pub. L. No. 77-503, 56 Stat. 173 (repealed 1976).

76) Francis Biddle, In Brief Authority 224 (1962) (quoting from a memo sent by Hoover to Attorney General Biddle) (internal quotation marks omitted).

racial distinctions are irrelevant.[77]

In Fred Korematsu's case the following year, the court again rejected a challenge to the criminalization of the military orders targeting Japanese Americans. (Korematsu had remained in a designated military zone, violating exclusionary restrictions.) Once again, the court declined to "reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained."[78]

But one Japanese American litigant did prevail in the court. On the same day that the Court decided *Korematsu*, it decided a habeas case brought by native Californian Mitsuye Endo. Endo had been fired from her job working for the State of California based on her Japanese ancestry. She had next been forced to evacuate the military area encompassing where she lived in Sacramento, California, report to an assembly center, and finally report for detention with her family at one of the government's "relocation centers," Tule Lake Camp. Meanwhile, Endo's brother served in the United States Army. Endo's case posed the only direct challenge to the constitutionality of the wartime internment of Japanese Americans, and she correctly argued that *Milligan* and a host of additional historical precedents taught that the government had no general authority to detain citizens without criminal charges. In an attempt to moot her case as it made its way through the courts, the government offered her release on the condition that she relocate outside the evacuation zones. Endo refused and remained in the camps.

In time, the Supreme Court decided her case in her favor, albeit on exceedingly narrow grounds – namely, by concluding that the governing military regulations required the release of concededly loyal citizens, like Endo, from relocation centers. The court never reached the important Suspension Clause and other constitutional issues weighing in the balance.[79] Internal court documents suggest that Chief Justice Harlan Fiske

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77) *Hirabayashi v. United States*, 320 U.S. 81, 101 (1943). A companion case to Hirabayashi was *Yasui v. United States*, 320 U.S. 115 (1943).

78) *Korematsu v. United States*, 323 U.S. 214, 218 (1944).

79) *See* Ex parte *Endo*, 323 U.S. 283 (1944).

Stone, knowing that the court would decide the case in Endo's favor, held up the decision to give President Roosevelt time to act ahead of the court and suspend 9066. Once the military announced that it would begin lifting the evacuation orders and closing the camps, the court handed down Ex parte *Endo* the very next day. Camp closures began within weeks of the decision.

Most who evaluate these important decisions along with the treatment of Japanese Americans during World War II more generally have focused on the discriminatory components of the government's actions. It is easy to see why. After all, as countless scholars have documented, discrimination was front and center to the debates leading up to the adoption of the policies put in place in by the military, a fact that implicates a host of enormously troubling constitutional considerations under equal protection jurisprudence.

It is also the case, however, that the entire internment scheme ran categorically afoul of the Suspension Clause. Indeed, history had long dictated that the core purpose of the Suspension Clause was to prohibit the detention of citizens outside the criminal process in the absence of a valid suspension, *even in wartime*. This is precisely what earlier episodes, including the American Revolutionary War and the Civil War, teach us. Specifically, where those suspected of disloyalty enjoyed the habeas privilege either under the Habeas Corpus Act or the Suspension Clause, Anglo-American habeas jurisprudence had always required a valid suspension to authorize detention for national security purposes outside the criminal process. The regrettable legacy of the World War II internment of Japanese Americans is the creation of a precedent that gave constitutional sanction to "a policy of mass incarceration under military auspices."[80)]

80) Morton Grodzins, Americans Betrayed: Politics and the Japanese Evacuation 374 (1949).

## VII. Habeas Corpus Today: Confronting the Age of Terrorism

The terrorist attacks that occurred on September 11, 2001, and the habeas cases that followed, brought the Suspension Clause back into the legal and political discourse in the United States. Following the attacks, Congress enacted the Authorization for Use of Military Force (AUMF).[81] The AUMF empowered the executive to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons."[82]

In carrying out the mandate of the AUMF, the United States Government has pursued a lengthy and constantly evolving war on terrorism. In prosecuting the war, the United States military has taken numerous suspected terrorists and others believed to possess ties to Al Qaeda and other terrorist organizations into custody, including a small number of American citizens. On occasion, the government has initiated criminal charges against individuals captured. A more common approach has been to label all detainees in the war on terrorism "enemy combatants" and hold them without criminal charges in military confinement, usually at the United States Naval Base at Guantánamo Bay, Cuba. The government has also held two citizen-enemy combatants in military custody on United States soil: José Padilla and Yaser Hamdi.

Both Padilla and Hamdi litigated challenges to their confinement as enemy combatants all the way to the Supreme Court, with only Hamdi's case resulting in an opinion on the merits. Afghan Northern Alliance fighters captured Hamdi – who had been born in the United States but grew up in Saudi Arabia – in Afghanistan in 2001. The Alliance next turned him over to the United States military, reporting that Hamdi had been fighting with the enemy Taliban. In time, the military transferred Hamdi to

81) Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

82) *Id.* § 2, 115 Stat. at 224.

a naval brig in South Carolina where he was labeled an "enemy combatant" and claimed the power to detain him indefinitely for the duration of the war on terrorism.

In *Hamdi v. Rumsfeld*, a fractured court rejected the government's assertion that the executive could detain a citizen indefinitely without providing him some opportunity to challenge his classification as an enemy combatant.[83] At the same time, however, the court held that the Suspension Clause does not preclude the detention of a citizen in a posture akin to a prisoner of war, even in the absence of a suspension. In Justice O'Connor's words: "There is no bar to this Nation's holding one of its own citizens as an enemy combatant."[84]

Thus, Justice O'Connor's opinion in *Hamdi* sanctioned the idea of citizens being detained in military custody without charges, and in the absence of a suspension. The concept of a citizen-enemy combatant as recognized in *Hamdi*, however, is simply impossible to square with the understanding of the suspension model that controlled during the American Revolution, Founding era, and Civil War periods. Indeed, as already noted above in the discussion of the Japanese American internment, history suggests that the entire purpose of the Suspension Clause was to present the government with a decision either to prosecute those suspected of disaffection or else suspend the privilege in order to legalize detention outside the criminal process.[85]

More difficult cases wait in the wings. They include questions going to the application of the Suspension Clause to United States military installations in Guantánamo Bay, Cuba, and elsewhere, as well as questions about who may claim the clause's protections along with how domestic constitutional law interacts with the international laws of war. The Supreme Court took up some of these questions in the 2008 case of *Boumediene v. Bush*, holding that non-citizen detainees imprisoned at Guantánamo Bay, Cuba, could invoke the Suspension Clause to force

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83) *Hamdi v. Rumsfeld*, 542 U.S. 507, 510, 533 (2004) (plurality opinion).

84) *Id.* at 519 (plurality opinion).

85) For their part, the dissenting Justices Scalia and Stevens both embraced and followed the historical narrative that has defined the constitutional habeas privilege and Suspension Clause. *See id.* at 554-579 (Scalia, J., dissenting).

judicial review in the federal courts of their classification as enemy combatants.[86] In this respect, *Boumediene* built on *Hamdi* and extended *Hamdi*'s reasoning that the Suspension Clause promises some review of a detainee's classification as an enemy combatant to a new category of individuals beyond United States citizens. But as in *Hamdi*, in *Boumediene*, the court did not understand the Suspension Clause to preclude detention without charges, which was the original purpose of the protections inherent in section seven of the English Habeas Corpus Act. Thus, under the court's modern jurisprudence, the Suspension Clause has evolved to where it is now understood to promise certain procedural rights as opposed to barring certain kinds of detention outright.

## Conclusion

As the stories told here convey, the Founding generation who ratified the United States Constitution embraced in the Suspension Clause a conception of the "Privilege of the Writ of Habeas Corpus" derived from the seventh section of the English Habeas Corpus Act, along with the suspension model invented by the British Parliament to set aside the protections associated with the Act. In so doing, the Founding generation constitutionalized a well-entrenched framework for addressing the inevitable emergencies that would arise in the future – namely, a suspension model derived from the English practice that leaves it to the political branches to balance the needs of national security against individual liberty in times of crisis, but only permitting such balancing in truly extraordinary times – namely, in "Cases of Rebellion or Invasion [when] the public Safety may require it." As explored here, over the course of American history, examples may be found that are both consistent with this Founding model and dramatically at odds with it, as with the case of the mass detention of Japanese American citizens during World War II.

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86) 553 U.S. 723 (2008). Whether the holding in *Boumediene* should be extended beyond Guantánamo Bay has been the subject of considerable debate and litigation. *See, e.g.*, Al Maqaleh v. Gates, 605 F.3d 84, 92-99 (D.C. Cir. 2010) (concluding that *Boumediene* does not extend to the American military base in Bagram, Afghanistan).