
ARTICLE
THE FORGOTTEN CORE MEANING
OF THE SUSPENSION CLAUSE

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THE FORGOTTEN CORE MEANING OF THE SUSPENSION CLAUSE

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Modern debates about the limits imposed by the Suspension Clause on the Executive's power to detain citizens without criminal charges during wartime have largely taken place without historical reference to what the Founding generation understood the "Privilege of the Writ of Habeas Corpus" to mean. These debates likewise have largely failed to account for how the Founding generation viewed the relationship between the privilege and the provision for its suspension included in the Suspension Clause. Meanwhile, the Supreme Court has emphasized that the Suspension Clause analysis should be guided at a minimum by an understanding of the legal status of the privilege at the time of ratification. This Article seeks to fill this void by exploring the historical record to provide an account of what the Founding generation understood the constitutional "Privilege of the Writ of Habeas Corpus" to be. The evidence explored herein reveals that by the Founding period, the privilege had come to encompass a general right of persons owing allegiance and thereby enjoying the protection of domestic law — most especially citizens — not to be detained without charges for criminal or national security purposes in the absence of a valid suspension. This conclusion follows from the strong connection forged in the period leading up to ratification between the privilege and a host of individual rights — including the rights to presentment or indictment, reasonable bail, and speedy trial — many of which were promised by the Habeas Corpus Act of 1679. As this Article also explores, throughout the Founding period and well through Reconstruction, it was virtually taken for granted that where a valid suspension was not in place — even during wartime — citizens owing allegiance who were suspected of supporting the enemy could only be detained on American soil pursuant to substantiated criminal charges. Consistent with this principle, the history reveals that the entire point of suspending the privilege was to endow the Executive with the power to arrest and detain such persons without criminal charges in times of war. The Article concludes by discussing how this history calls into question the constitutionality of the internment of Japanese Americans during World War II and the detention of American citizens as so-called "enemy combatants" in the wake of the attacks of September 11, 2001.

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INTRODUCTION

With regard to the writ of Habeas Corpus, they wished that its privileges should be more accurately defined and more liberally granted, so that citizens should not be subject to confinement on mere suspicion.

— John Stetson Barry¹

The Suspension Clause remains a puzzle. Just what the Founding generation had in mind when they included it in the Constitution remains the subject of great debate, as does the role that it should play today in regulating government action taken in the name of national security. In the wake of the attacks of September 11, 2001 — events that have now made war and the fear of terrorism a part of our ongoing national experience — clarifying the meaning of the Suspension Clause has taken on important and all-too-real-world significance.

In prior work, I explored the historic office of suspension as a font of emergency power during times of national crisis.² More specifically, that work concluded that where Congress takes the “grave action”³ of suspending the privilege of the writ of habeas corpus, it may “by that act . . . lawfully . . . authorize the Executive to engage in some measure of preventive detention.”⁴ This conclusion followed in large part from the historical conception of the suspension authority, which has long viewed an act of suspension as the appropriate means by which the Executive could arrest on suspicion alone, without the test of a criminal trial and free of many of the legal constraints that normally govern the ability to arrest and detain in the name of preserving the peace.⁵

But there are two sides to the Suspension Clause. Article I, Section 9 provides: “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.”⁶ The clause both contemplates a dramatic emergency power (by permitting suspension of the privilege) and operates as a significant constraint on what government may do in the absence of a valid suspension (by implicitly recognizing the availability of

¹ 3 JOHN STETSON BARRY, *THE HISTORY OF MASSACHUSETTS: THE COMMONWEALTH PERIOD 178* (Boston, Henry Barry 1857) (discussing the comments of the Boston delegates with respect to the draft habeas clause in the Massachusetts Constitution of 1780). Barry paraphrases Alden Bradford’s earlier account of the relevant events. *See* 2 ALDEN BRADFORD, *HISTORY OF MASSACHUSETTS 186* (Boston, Wells & Lilly 1825) (“They wished the provision respecting the privilege of habeas corpus to be more accurately defined, and more liberally granted, so that the citizens should not be subject to confinement on suspicion.”).

² *See generally* Amanda L. Tyler, *Suspension as an Emergency Power*, 118 *YALE L.J.* 600 (2009).

³ *Hamdi v. Rumsfeld*, 542 U.S. 507, 575 (2004) (Scalia, J., dissenting).

⁴ Tyler, *supra* note 2, at 606.

⁵ *See generally id.* at 613–64.

⁶ U.S. CONST. art. I, § 9, cl. 2.

the privilege at all other times).⁷ It is in this latter capacity that the Suspension Clause serves as arguably the single most important source of protection of individual liberty in the Constitution.

Much of the contemporary analysis of how the Suspension Clause functions when the privilege of the writ of habeas corpus remains intact, however, has proceeded in something of a vacuum. Modern debates have largely ignored what exactly the Founding generation believed that the “Privilege of the Writ of Habeas Corpus” encompassed. Likewise, these debates have all but disregarded how the Founding conception of the privilege related to the Constitution’s recognition of a power to suspend the same. This is unfortunate. In adopting the Suspension Clause, the Founding generation imported the privilege and the power to suspend it from English tradition. It is no wonder, then, that Chief Justice John Marshall once said of “this great writ”: “The term is used in the [C]onstitution, as *one which was well understood*.”⁸ Recent Supreme Court jurisprudence, moreover, posits that “‘at the absolute minimum,’ the [Suspension] Clause protects the writ as it existed when the Constitution was drafted and ratified.”⁹ It follows that ascertaining the Founding conceptions of the privilege and suspension must inform any attempt to make sense of the Suspension Clause today.¹⁰

Nonetheless, modern jurisprudence seems to have developed entirely removed from the historical origins of the Suspension Clause. The record during and since World War II, for example, suggests that preventive national security detentions of citizens without the imprimatur of a suspension have become an accepted practice in this country during times of war. Consider the forced detention of thousands of citizens of Japanese ancestry during World War II on the purported basis

⁷ The Supreme Court recently opined in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), that the Suspension Clause “ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the ‘delicate balance of governance’ that is itself the surest safeguard of liberty.” *Id.* at 2247 (quoting *Hamdi*, 542 U.S. at 536 (plurality opinion)); see also Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantánamo: The Boumediene Decision*, 2008 SUP. CT. REV. 1, 1 (observing that in *Boumediene*, the Supreme Court, “for the first time, clearly held . . . that the Constitution’s Suspension Clause . . . affirmatively guarantees access to the courts to seek the writ of habeas corpus (or an adequate substitute) in order to test the legality of executive detention”). Accordingly, this Article assumes that the Suspension Clause not only limits when the privilege may be suspended, but also implicitly obligates Congress to ensure some measure of jurisdiction in the courts to award the core habeas remedy. See Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 340–42 (2006) (explaining and defending this position); Tyler, *supra* note 2, at 608 n.31.

⁸ *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830) (emphasis added).

⁹ *Boumediene*, 128 S. Ct. at 2248 (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)).

¹⁰ As is recorded in countless habeas corpus treatises, the writ has served a range of functions over time in a number of contexts. To be clear, this Article is concerned with ascertaining the core “Privilege of the Writ of Habeas Corpus” that the Founding generation sought to protect in the Suspension Clause.

that they *might* spy on behalf of the Japanese Empire. Or consider the McCarthy-era adoption of the Emergency Detention Act of 1950,¹¹ in which Congress expressly provided that it was not suspending habeas corpus¹² when it authorized the President to declare an “Internal Security Emergency”¹³ and detain individuals, including citizens, based on the belief that they were likely to engage in spying or sabotage on behalf of the United States’s enemies.¹⁴ More recently, the government detained dozens of persons without charges, including American citizens, as material witnesses in the immediate wake of the attacks of September 11, 2001.¹⁵ As part of the war on terrorism that followed those attacks, moreover, the government has taken a host of prisoners and labeled them “enemy combatants” — that is, enemies of the state. This group has included at least two citizens.¹⁶ Congress recently enacted legislation encompassing portions of bills introduced by Senator John McCain and others that revives aspects of the Emergency Detention Act¹⁷ insofar as the legislation approves the detention without trial of so-called “unprivileged enemy belligerents,”¹⁸ a category expressly inclusive of citizens.

The Supreme Court’s holding in *Hamdi v. Rumsfeld*,¹⁹ a case arising out of the detention of an American citizen in the war on terrorism, is in keeping with this trend.²⁰ The case produced an important Supreme Court decision on the application of the Suspension Clause to the preventive detention of citizens during wartime, a matter of first impression. In *Hamdi*, a fractured Court rejected the government’s assertion that the Executive could detain a citizen indefinitely without some opportunity to challenge his classification as an enemy combatant.²¹ At the same time, however, the Court held that the Suspension Clause does not preclude the detention of a citizen as the equivalent of a prisoner of war, even in the absence of a congressionally declared

¹¹ Pub. L. No. 81-831, tit. II, 64 Stat. 1019 (repealed 1971).

¹² *Id.* § 116, 64 Stat. at 1030.

¹³ *Id.* §§ 102–103, 64 Stat. at 1021 (internal quotation marks omitted).

¹⁴ *Id.* § 103, 64 Stat. at 1021.

¹⁵ See HUMAN RIGHTS WATCH & ACLU, WITNESS TO ABUSE: HUMAN RIGHTS ABUSES UNDER THE MATERIAL WITNESS LAW SINCE SEPTEMBER 11, at 1 (2005), available at <http://www.aclu.org/FilesPDFs/materialwitnessreport.pdf> (noting that after the attacks of September 11, 2001, “at least seventy men living in the United States — all Muslim but one — have been [subjected to] indefinite detention without charges”).

¹⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507, 577 (2004) (Scalia, J., dissenting).

¹⁷ National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1021 (2011) (enacted); see also Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010, S. 3081, 111th Cong. § 5 (2010); Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010, H.R. 4892, 111th Cong. § 5 (2010).

¹⁸ S. 3081 § 5; see also H.R. 4892 § 5.

¹⁹ 542 U.S. 507.

²⁰ See *id.* at 510 (plurality opinion).

²¹ *Id.* at 533.

suspension.²² On this point, Justice Scalia, joined by Justice Stevens, dissented and contended that the entire purpose of the Suspension Clause was to protect citizens from this very end.²³

In the wake of *Hamdi*, prominent legal scholars have applauded the plurality opinion's pragmatic approach, which considered both the individual liberty interests at stake in the case as well as the needs of national security.²⁴ Like the plurality opinion in *Hamdi*, however, scholars have not engaged with the extensive historical record informing the important questions of constitutional law posed by the case. This failure to engage with history has persisted, moreover, during a time when the Supreme Court has emphasized the significance of original meaning in other Suspension Clause decisions.²⁵

This Article seeks to unearth the historical evidence that informed the adoption of the Suspension Clause and to discover specifically whether the Founding generation's understanding of that clause permitted the government to detain without formal charges persons enjoying the full protection of domestic law²⁶ for criminal or national security purposes in the absence of a valid suspension.²⁷ Undertaking this task reveals that the outcome in *Hamdi* stands entirely at odds with what the Founding generation believed it was prohibiting when it adopted the Suspension Clause. In short, though in the minority in *Hamdi*, Justices Scalia and Stevens have volumes of history on their side.

This Article proceeds as follows. Part I first discusses in greater detail the twentieth- and twenty-first-century episodes that reflect a growing modern acceptance of detaining citizens during wartime without criminal charges and in the absence of a suspension. This Part then discusses the relevance of history in the interpretation of the Suspension Clause.

²² *Id.* at 519.

²³ *Id.* at 554 (Scalia, J., dissenting).

²⁴ See, e.g., DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW 137 (2009); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2091 (2007); Trevor W. Morrison, *Hamdi's Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411, 416 (2006).

²⁵ See *supra* p. 904.

²⁶ The Article will use the phrases "persons within protection," "persons owing allegiance," and "persons subject to the law of treason" to communicate this same idea. Ascertaining the lines of protection implicates a host of difficult questions. To avoid wading into them, this Article will focus on detention practices as applied to citizens, a category of persons who have traditionally enjoyed the strongest claim to the full protection of domestic law. It bears noting, though, that the concept of protection has traditionally encompassed at least some aliens. See *infra* notes 221, 346.

²⁷ Along these lines, where this Article refers to detention on suspicion alone, it means to invoke the expression as shorthand for preventive detention without criminal charges.

Part II turns to the historical evidence to unearth the English origins of the privilege and the suspension power. That evidence reveals that the privilege evolved to become the principal safeguard against the preventive detention of persons within protection for criminal and national security purposes insofar as it came to embody not just a generic right to judicial review, but also a particular demand that one be charged criminally and tried in due course or discharged. The history also shows that the writ of habeas corpus and the crime of treason forged a special link in the celebrated Habeas Corpus Act of 1679,²⁸ which granted those persons subject to the law of treason and arrested for criminal or national security purposes the right to petition for their freedom if not timely tried for treason or another crime. Finally, the English history demonstrates that Parliament adopted the practice of suspending the protections of the Habeas Corpus Act in order to bring within the law the detention without charges of persons subject to the law of treason for criminal or national security purposes. This explains why Parliament commonly suspended the Act in times of war, including during the Revolutionary War, when Parliament sought to legalize the detention without charges of captured American soldiers on English soil (where the Habeas Corpus Act was in effect and, as Lord Mansfield advised Lord North's Administration, the writ would therefore be available to them to win their freedom so long as they claimed subjecthood²⁹). As is also brought to light in this Part, once Parliament came to accept that the colonists had broken their allegiance from the Crown, it permitted its suspension legislation to lapse and recognized the colonists remaining in custody as "prisoners of war" whose rights would no longer be governed by domestic law but instead by the "law of nations."³⁰

The Article turns in Part III to an exploration of the Founding-era evidence revealing the contemporary understanding of the privilege and suspension. This Part begins by studying the effects of the declaration of new lines of allegiance in the United States as well as the treatment of disaffected persons by the states during and immediately after the Revolutionary War. Massachusetts receives special focus because it was the first state to constitutionalize habeas protections and to enact a suspension of the privilege within a constitutional framework. Part III next explores the terms on which the Founding generation debated the Suspension Clause, along with the evidence of how that Clause was understood to constrain the government's powers of detention in the early days of the Republic. Throughout, the Part

²⁸ 31 Car. 2, c. 2 (Eng.).

²⁹ See *infra* pp. 947–48.

³⁰ See *infra* pp. 950–51 (detailing these events).

presents consistent evidence suggesting that the Founding generation embraced the very same understanding of the privilege and suspension known to English law in the period leading up to ratification. As is also explored in this Part, this period provides extensive evidence underscoring the continuing influence of the English Habeas Corpus Act on the development of American law.

In Part IV, the Article reviews the only two domestic episodes of suspension on American soil — namely, those that occurred during the Civil War and Reconstruction. In so doing, the Article finds both to be largely consistent with the earlier history of the privilege and its suspension.

Finally, Part V returns to an exploration of the modern departures from what had otherwise been a consistent view of the constraints built into the Suspension Clause. Here, the Article concludes that the mass detention during World War II of Japanese Americans in camps and the military detentions of citizen–enemy combatants on American soil during the war on terrorism stand entirely at odds with the original understanding of the Suspension Clause, insofar as both took place in the absence of a valid suspension.³¹ To be sure, as this Part discusses, *Hamdi*'s case presents complex questions in light of his overseas battlefield capture. Nonetheless, this Part concludes that once the government transported him to American soil for military detention, his case became no different from those of the treasonous colonists brought upon English soil for detention during the Revolutionary War. In closing, this Part rejects more generally the idea suggested by the plurality opinion in *Hamdi* that the guarantees built into the Suspension Clause should be subject to contextual balancing by the courts. To the contrary, all evidence suggests that in recognizing the power to suspend in Article I, Section 9, those who ratified the Constitution provided a specific lever by which the document would become both sensitive and responsive to the needs of national security in times of emergency.

In the end, the historical evidence set forth in this Article — much of which is introduced here for the first time to the debates over the meaning of the Suspension Clause — demonstrates two important lessons. First, many of the questions raised today respecting the government's power to hold prisoners during wartime are not new. Second, fully anticipating that there would be forceful arguments favoring the recognition of expanded government power to infringe on the liberty of persons within protection in times of national crisis, the Founding gen-

³¹ As is explored below, the Suspension Clause therefore provides a basis for viewing the detention of Japanese Americans during World War II as unconstitutional separate and apart from the conventional focus on the discriminatory aspects of the military detention orders. For more discussion, see *infra* note 641 and accompanying text.

eration imported the English suspension model into the Constitution as the exclusive means by which the detention of persons within protection outside the criminal process for criminal or national security purposes could be brought within the law.³²

I. FROM WORLD WAR II TO THE WAR ON TERRORISM: PREVENTIVE DETENTION OF CITIZENS FOR NATIONAL SECURITY PURPOSES

The twentieth and twenty-first centuries have witnessed several wartime episodes in which the government has detained American citizens in a preventive posture without the imprimatur of suspension legislation. These examples, culminating in the Supreme Court's 2004 *Hamdi v. Rumsfeld* decision, collectively suggest a modern political and legal acceptance of the idea that wartime conditions alone may justify the detention of citizens for national security purposes outside the criminal process.³³ The roots of this trend date back to World War II and the Cold War.

A. World War II and the Cold War

There was a suspension of habeas corpus during World War II, but it was limited to the Hawaiian Territory and followed under special procedures set forth in the Hawaiian Organic Act of 1900.³⁴ Accordingly, the confinement of over 70,000 American citizens of Japanese ancestry on the West Coast in detention camps during this period followed under military orders, not under legislation purporting to be a suspension. As the Supreme Court noted in *Ex parte Endo*³⁵:

On May 19, 1942, General De Witt promulgated Civilian Restrictive Order No. 1 and on June 27, 1942, Public Proclamation No. 8. These prohibited evacuees from leaving Assembly Centers or Relocation Centers except pursuant to an authorization from General De Witt's headquarters. Public Proclamation No. 8 recited that "the present situation within these military areas requires as a matter of military necessity" that the evacuees be removed to "Relocation Centers for their relocation, maintenance and supervision," that those Relocation Centers be designated as War Reloca-

³² And having learned from the English example that this extraordinary power could be abused, the Founders strictly limited its invocation to times of "Rebellion or Invasion."

³³ To be sure, as detailed below, acceptance of the idea has not been universal.

³⁴ Ch. 339, 31 Stat. 141 (authorizing territorial governor to suspend "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it," *id.* § 67, 31 Stat. at 153). Immediately following the bombing of Pearl Harbor in 1941, the territorial governor suspended the writ of habeas corpus and declared martial law on the islands; President Roosevelt quickly approved the governor's actions. See *Duncan v. Kahanamoku*, 327 U.S. 304, 307-08 (1946); see also *infra* note 556. See generally Garner Anthony, *Martial Law, Military Government and the Writ of Habeas Corpus in Hawaii*, 31 CALIF. L. REV. 477 (1943).

³⁵ 323 U.S. 283 (1944).

tion Project Areas, and that restrictions on the rights of the evacuees to enter, remain in, or leave such areas be promulgated.³⁶

The government's asserted justification for the detentions was a generalized belief that such persons posed a threat to the war effort and might spy on behalf of the enemy Japanese Empire.³⁷ No criminal charges substantiated the mass detentions. Indeed, in most if not all cases, no individualized suspicion existed at all with respect to persons who were sent to the camps.³⁸ Much of the litigation challenging the detention orders and related curfews put into effect during this period focused on the fact that they were drawn along racial and ethnic lines.³⁹ Surprisingly little attention was paid to the fact that there might be a Suspension Clause problem with detaining citizens in this manner.⁴⁰

Only a few years later, Congress authorized similar detentions outright, this time in response to the onset of the Cold War. The Emergency Detention Act of 1950⁴¹ empowered the President to declare uni-

³⁶ *Id.* at 289 (citations omitted). Earlier in the war, Congress had ratified portions of President Roosevelt's Executive Order 9066, 3 C.F.R. 1092 (1942) (repealed 1976), thereby 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).

³⁷ *See Endo*, 323 U.S. at 285-93, 295 (detailing the evacuation and internment policies governing persons of Japanese ancestry, both citizens and aliens, in the western United States during World War II).

³⁸ *See generally* Eugene V. Rostow, *The Japanese American Cases — A Disaster*, 54 YALE L.J. 489 (1945) (detailing government treatment of Japanese Americans during the war).

³⁹ *See Endo*, 323 U.S. at 297 (declining to reach the constitutionality of the detention of citizens of Japanese ancestry by deciding the case on narrower grounds — namely, that governing regulations required release of loyal citizens); *Korematsu v. United States*, 323 U.S. 214, 215-18 (1944) (upholding criminal conviction of Japanese American for refusing to relocate from the West Coast under exclusion order); *Hirabayashi v. United States*, 320 U.S. 81, 104-05 (1943) (upholding criminal conviction of Japanese American for refusing to obey curfew order). *See generally* Patrick O. Gudridge, Essay, *Remember Endo?*, 116 HARV. L. REV. 1933, 1953-64 (2003) (detailing the Justices' deliberations in *Endo*).

⁴⁰ This is not to say that the litigants whose cases reached the Supreme Court ignored the issue. *Hirabayashi's* lawyers, for example, contended:

[T]he framers of the Constitution, who had themselves just been through a great war, recognized that circumstances might arise in which the ordinary safeguards of the law might, temporarily at least, be suspended. In time of invasion or rebellion the Constitution authorizes the suspension of the writ of habeas corpus. The power of the Executive to order the detention of persons on suspicion without possibility of judicial review thus exists. But it must be confined to the circumstances described in the Constitution and be exercised in the manner there provided.

Brief for Appellant at 19-20, *Hirabayashi*, 320 U.S. 81 (No. 870); *see also* Opening Brief for Appellant at 16-17, *Endo*, 323 U.S. 283 (No. 70) (relying on *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), to argue that the President has no power to hold a citizen without charges); Brief for Appellant at 39-40, *Korematsu*, 323 U.S. 214 (No. 22) (arguing generally that the Executive has no power to effect "an outright suspension of the Constitution," *id.* at 39).

⁴¹ The provisions of the Emergency Detention Act came within legislation popularly known as the Internal Security Act of 1950, Pub. L. No. 81-831, 64 Stat. 987.

laterally an “Internal Security Emergency.”⁴² Upon the President’s declaring such an emergency, the legislation authorized him to take individuals, including citizens, into custody based solely on suspicion of a likelihood of future engagement in spying or sabotage on behalf of our enemies.⁴³ In the Act, Congress expressly provided that it was not suspending habeas corpus, apparently thinking such a step unnecessary.⁴⁴ Although the law provoked substantial academic criticism,⁴⁵ members of Congress overwhelmingly supported its passage⁴⁶ along with appropriations for the building of detention centers.⁴⁷ Congress repealed the Act in 1971, with its emergency provisions having never been invoked and therefore never challenged in court.⁴⁸ In its place, Congress adopted the Non-Detention Act,⁴⁹ providing therein that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”⁵⁰

It would take the attacks of September 11, 2001, for this issue to return to the public discourse.

*B. The War on Terrorism and the Supreme Court’s Decision
in Hamdi v. Rumsfeld*

In the immediate wake of the attacks, the government detained dozens of persons, some of whom were citizens, as material witnesses to the ongoing investigation of the events of September 11, 2001.⁵¹ Meanwhile, Congress enacted the Authorization for Use of Military Force⁵² (AUMF). 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

⁴² Pub. L. No. 81-831, tit. II, § 102, 64 Stat. 1019, 1021 (repealed 1971) (internal quotation marks omitted).

⁴³ *Id.* § 103, 64 Stat. at 1021.

⁴⁴ *See id.* § 116, 64 Stat. at 1030.

⁴⁵ *See, e.g.,* Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143, 160 (1952).

⁴⁶ *See* 96 CONG. REC. 15,726 (1950) (reporting Senate vote); 96 CONG. REC. 15,632–33 (1950) (reporting House vote).

⁴⁷ *See* David Cole, Essay, *The Priority of Morality: The Emergency Constitution’s Blind Spot*, 113 YALE L.J. 1753, 1770 (2004) (discussing the Act).

⁴⁸ *See id.* at 1769–70 (reporting the 1971 repeal and that “the emergency detention statute was never invoked because no emergency was declared,” *id.* at 1770).

⁴⁹ Pub. L. No. 92-128, 85 Stat. 347 (1971) (codified in scattered sections of the U.S. Code); *see also* 18 U.S.C. § 4001(a) (2006).

⁵⁰ 18 U.S.C. § 4001(a).

⁵¹ *See* al-Kidd v. Ashcroft, 580 F.3d 949, 970 (9th Cir. 2009) (reporting al-Kidd’s allegations that the government invoked the material witness statute as a mere pretext to arrest and detain terrorism suspects, including citizens, for whom there was insufficient support for criminal charges), *rev’d*, 131 S. Ct. 2074 (2011). *See generally* HUMAN RIGHTS WATCH & ACLU, *supra* note 15.

⁵² Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

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.”⁵³

As part of the war on terrorism that followed shortly thereafter and continues, the United States military has taken hundreds of suspected terrorists and others believed to possess ties to al Qaeda into custody, including some American citizens. In some cases, the government initiated timely criminal charges against those individuals captured;⁵⁴ others, however, were labeled “enemy combatants” and held without charges in military confinement. Two prominent citizen cases falling into this category are those of José Padilla and Yaser Hamdi.

1. *Padilla*. — The government arrested Padilla in 2002 upon his arrival at Chicago’s O’Hare International Airport en route from Pakistan pursuant to a material witness warrant stemming from the ongoing 9/11 grand jury investigation in New York.⁵⁵ Approximately one month later, the President issued an order in which he declared that Padilla was an “enemy combatant” who should be taken into military custody.⁵⁶ The government then withdrew its subpoena and transferred Padilla to the custody of the Department of Defense.⁵⁷

In his order, the President wrote that he had “DETERMINE[D]” that Padilla “[was] closely associated with al Qaeda, an international terrorist organization with which the United States is at war”; had carried out “war-like acts, including conduct in preparation for acts of international terrorism” against the United States; “possesse[d] intelligence” that might assist the government in its counterterrorism efforts; and “represent[ed] a continuing, present and grave danger to the national security of the United States” such that his immediate detention “[was] necessary to prevent him from aiding al Qaeda in its efforts to attack the United States.”⁵⁸

Extensive habeas litigation followed over the lawfulness of Padilla’s detention as an enemy combatant, but when the case reached the Supreme Court, a majority declined to reach the merits of Padilla’s

⁵³ *Id.* § 2, 115 Stat. at 224.

⁵⁴ One example falling into this category is that of John Walker Lindh, a U.S. citizen captured while fighting with the Taliban in Afghanistan against American forces. The government charged Lindh with various crimes (though not treason), and he eventually pleaded guilty to two charges. See Katharine Q. Seelye, *Regretful Lindh Gets 20 Years in Taliban Case*, N.Y. TIMES, Oct. 5, 2002, at A1.

⁵⁵ *Rumsfeld v. Padilla*, 542 U.S. 426, 430–31 (2004).

⁵⁶ *Id.* at 431.

⁵⁷ *Id.* at 431–32, 432 n.3.

⁵⁸ *Padilla v. Hanft*, 423 F.3d 386, 389 (4th Cir. 2005) (quoting Memorandum from President George W. Bush to Sec’y of Def. Donald Rumsfeld (June 9, 2002)).

claims on jurisdictional grounds.⁵⁹ In subsequent proceedings, the district court ruled that Padilla was entitled to discharge for being held without criminal charges.⁶⁰ The Fourth Circuit disagreed and reversed the order.⁶¹ At this point, the government indicted Padilla on various criminal charges and transferred him to the control of civilian authorities, thereby rendering a then-pending certiorari petition, if not technically moot, no longer of interest to the Court.⁶² In the meantime, the government had held Padilla in military custody without any pending criminal charges for over three years.⁶³

2. *Hamdi*. — Yaser Hamdi's case involved similar, though not identical, circumstances. Hamdi was an American-born man who had been captured by the Northern Alliance in Afghanistan in 2001 and turned over to the American military.⁶⁴ The military initially transported Hamdi to its base at Guantánamo Bay, Cuba.⁶⁵ Upon learning that Hamdi was a United States citizen, it then transferred him for detention to a naval brig in Virginia and, subsequently, to South Carolina, where he was labeled an "enemy combatant."⁶⁶ Hamdi's father filed a habeas petition challenging the legality of his son's detention,⁶⁷ and the case eventually made its way to the Supreme Court.

Before the Court, the government took the position that through the enactment of the AUMF, Congress had authorized Hamdi's detention.⁶⁸ The government also argued that Hamdi was not entitled to independent review of the propriety of either his classification as an enemy combatant or his detention on that basis.⁶⁹ In *Hamdi v. Rumsfeld*, writing for the plurality, Justice O'Connor agreed with the former proposition but rejected the latter.⁷⁰ Specifically, Justice O'Connor,

⁵⁹ See *Padilla*, 542 U.S. at 430, 451 (dismissing Padilla's habeas petition for being filed in the wrong jurisdiction). For more details on Padilla's case, see generally Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1032-41 (2008).

⁶⁰ See *Padilla v. Hanft*, 389 F. Supp. 2d 678, 692 (D.S.C. 2005); see also *id.* at 691 ("[T]his is a law enforcement matter, not a military matter."); *id.* (listing several criminal statutes pursuant to which Padilla could be charged if the President's allegations had evidentiary support).

⁶¹ See *Padilla*, 423 F.3d at 397.

⁶² See *Padilla v. Hanft*, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring in denial of certiorari).

⁶³ *Id.* With respect to this period, the government later contended successfully that Padilla enjoyed no speedy trial rights. See Government's Opposition to Defendant Padilla's Motions to Dismiss for Lack of Speedy Trial and for Pre-indictment Delay at 6, *United States v. Padilla*, No. 04-60001-CR (S.D. Fla. Apr. 9, 2007) (arguing that speedy trial rights do not apply "to those not yet accused" of a crime (quoting *United States v. Marion*, 404 U.S. 307, 313 (1971))).

⁶⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004) (plurality opinion).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 511.

⁶⁸ *Id.* at 517.

⁶⁹ *Id.* at 527.

⁷⁰ *Id.* at 509.

joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, first concluded that the AUMF had authorized the detention of persons captured as part of the war on terrorism, whether they be American citizens or not.⁷¹ In so holding, Justice O'Connor rejected the argument that the Non-Detention Act barred Hamdi's detention as a statutory matter.⁷²

Next, and now with the support of Justices Souter and Ginsburg, Justice O'Connor recognized that "detention without trial 'is the carefully limited exception'"⁷³ in our constitutional tradition and cautioned that the Court should "not give short shrift to the values that this country holds dear or to the privilege that is American citizenship."⁷⁴ Nonetheless, Justice O'Connor's opinion concluded that a citizen detained under the AUMF need only be given "a meaningful opportunity to contest the factual basis" for his classification as an enemy combatant "before a neutral decisionmaker."⁷⁵

Justice O'Connor's opinion then posited that the appropriate framework for such hearings would "balanc[e] [the] serious competing interests" at stake.⁷⁶ Toward that end, Justice O'Connor wrote, the Court's due process decision in *Mathews v. Eldridge*⁷⁷ was instructive⁷⁸:

Mathews dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the Government's asserted interest, "including the function involved" and the burdens the Government would face in providing greater process. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the

⁷¹ *See id.* at 517.

⁷² Specifically, Justice O'Connor concluded that the AUMF provided the authorization required under the Non-Detention Act. *See id.* On this point, Justices Stevens, Scalia, Souter, and Ginsburg disagreed. *See id.* at 553 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 554 (Scalia, J., joined by Stevens, J., dissenting). Justice Thomas believed that the President may possess the inherent authority to detain enemy combatants but concluded that the President was at least acting pursuant to congressional authorization. *See id.* at 587 (Thomas, J., dissenting).

⁷³ *See id.* at 529 (plurality opinion) (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987) (upholding pretrial detention pursuant to the Bail Reform Act against due process challenge)).

⁷⁴ *Id.* at 532.

⁷⁵ *Id.* at 509. Justices Souter and Ginsburg joined this part of Justice O'Connor's opinion for the purpose of producing a judgment. *See id.* at 553 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment).

⁷⁶ *Id.* at 529 (plurality opinion).

⁷⁷ 424 U.S. 319 (1976). Justice O'Connor also relied upon a host of cases setting out the proper procedures for civil commitment of the mentally ill and for pretrial detention. *See Hamdi*, 542 U.S. at 529 (plurality opinion) (citing *Heller v. Doe*, 509 U.S. 312, 330-31 (1993); *Zinerman v. Burch*, 494 U.S. 113, 127-28 (1990); *Salerno*, 481 U.S. at 746; *Schall v. Martin*, 467 U.S. 253, 274-75 (1984); *Addington v. Texas*, 441 U.S. 418, 425 (1979)).

⁷⁸ *Hamdi*, 542 U.S. at 528-29 (plurality opinion).

“probable value, if any, of additional or substitute procedural safeguards.”⁷⁹

In the present circumstances, Justice O’Connor wrote, the calculus must account for the fact that the government interest in preventing persons captured in battle from returning to the battlefield is significant.⁸⁰ Further, in discussing which measures could satisfy due process considerations, she declined to rule out that the government could rely upon hearsay evidence or that the relevant hearing could be provided in a military tribunal.⁸¹

In holding that Hamdi had a right to review of his detention, the Court rejected the government’s expansive position that the Executive’s detention policies were virtually immune from oversight.⁸² (In support of that argument, the government won only the vote of Justice Thomas.⁸³) But at the same time, the Court’s holding accepted another key government argument in the case, namely that “[t]here is no bar to this Nation’s holding one of its own citizens as an enemy combatant.”⁸⁴ On this point, Justice O’Connor’s opinion emphasized the “context” of Hamdi’s arrest, which involved “a United States citizen captured in a *foreign* combat zone.”⁸⁵ She also relied heavily on *Ex parte Quirin*,⁸⁶ a World War II–era decision that upheld on expedited review the domestic military trial of an individual claiming United States citizenship for violations of the laws of war.⁸⁷ *Quirin*, she noted, had bolstered its holding by observing that “[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war.”⁸⁸ In her view, the power to try and sentence a citizen during

⁷⁹ *Id.* at 529 (citations omitted) (quoting *Mathews*, 424 U.S. at 335).

⁸⁰ *Id.* at 531.

⁸¹ *See id.* at 533–34 (“Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding.”); *id.* at 538 (“There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal.”).

⁸² *See id.* at 538.

⁸³ *See id.* at 579 (Thomas, J., dissenting).

⁸⁴ *Id.* at 519 (plurality opinion). The cursory explanation offered by Justices Souter and Ginsburg stating why they joined Justice O’Connor’s opinion obscures whether they agreed with this and other points in her opinion. *See id.* at 553–54 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment).

⁸⁵ *Id.* at 523 (plurality opinion). The plurality chastised Justice Scalia for ignoring these circumstances, and it criticized his reliance upon the World War II decision *In re Territo*, 156 F.2d 142, 148 (9th Cir. 1946), as additional support. *See Hamdi*, 542 U.S. at 523–24 (plurality opinion).

⁸⁶ 317 U.S. 1 (1942).

⁸⁷ *Id.* at 48. The soldier had entered the United States in German uniform along with other German soldiers in order to engage in various hostile acts. *See id.* at 21.

⁸⁸ *Hamdi*, 542 U.S. at 519 (plurality opinion) (alteration in original) (quoting *Quirin*, 317 U.S. at 37–38) (internal quotation marks omitted).

wartime under the laws of war led inexorably to the conclusion that citizens also may be held as prisoners of war for the duration of hostilities.

From this holding, Justice Scalia, joined by Justice Stevens, dissented.⁸⁹ In their view, because Hamdi was a citizen held within the United States, his detention as an enemy combatant could follow only pursuant to a valid suspension of the privilege, which all agreed had not occurred.⁹⁰ Stated another way, the dissent argued that without a suspension the Constitution bars the government from detaining a United States citizen as the equivalent of a prisoner of war. In the dissent's view:

Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art. I, § 9, cl. 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge.⁹¹

The Suspension Clause, Justice Scalia wrote, married two ideals central to the inherited English tradition, namely "due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally imprisoned."⁹² As he explained:

The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property. When a citizen was deprived of liberty because of alleged criminal conduct, those procedures typically required committal by a magistrate followed by indictment and trial.⁹³

The dissenters conceded the existence of exceptions to this proposition, including commitment of the mentally ill and quarantine of the infectious.⁹⁴ Such limited and "well-recognized exceptions" were entirely inapplicable, however, to the case at bar.⁹⁵ To the contrary, they wrote, the English legal tradition that informed the Suspension Clause

⁸⁹ Justice Scalia's opinion first disagreed that Hamdi's detention was authorized by the AUMF. *See id.* at 561-63, 573-76 (Scalia, J., dissenting). Given that Congress had passed the Non-Detention Act hand-in-hand with its repeal of the Emergency Detention Act, *see supra* pp. 910-11, this position has considerable force.

⁹⁰ *See Hamdi*, 542 U.S. at 554 (Scalia, J., dissenting).

⁹¹ *Id.*

⁹² *Id.* at 555-56.

⁹³ *Id.* at 556.

⁹⁴ *Id.*

⁹⁵ *Id.*

required that “[c]itizens aiding the enemy [be] treated as traitors subject to the criminal process.”⁹⁶

Justice Scalia’s opinion recited a range of historical evidence supporting this conclusion, including the 1679 English Habeas Corpus Act,⁹⁷ the writings of Thomas Jefferson,⁹⁸ the understanding of the role of suspension that held sway during Burr’s conspiracy (when a suspension passed the Senate but failed in the House),⁹⁹ and how the government treated prisoners during the War of 1812.¹⁰⁰ Justice Scalia also relied on *Ex parte Milligan*,¹⁰¹ handed down in the immediate wake of the Civil War, in which the Supreme Court declared that a citizen could not be tried by a military tribunal for violations of the laws of war “where the courts are open and their process unobstructed.”¹⁰² Although it acknowledged that *Quirin* postdated *Milligan*, the dissent referred to *Quirin* as “not this Court’s finest hour”¹⁰³ and contended that *Milligan* remains a better “indicator of original meaning.”¹⁰⁴ In the dissent’s view, then, the government had two, and only two, avenues for detaining Hamdi: either initiate criminal proceedings against him or suspend the privilege of the writ of habeas corpus.¹⁰⁵ In the absence of either course, Hamdi was entitled to release:

If the Suspension Clause does not guarantee the citizen that he will either be tried or released [in the absence of a suspension] . . . ; if it merely guarantees the citizen that he will not be detained unless Congress by ordinary legislation says he can be detained; it guarantees him very little indeed.¹⁰⁶

It followed, in the dissent’s view, that the majority’s adoption of a judicial balancing test in this context was especially problematic. In adopting the specific procedures for suspending the privilege, the dissent wrote, the Founders “equipped us with a Constitution designed to

⁹⁶ *Id.* at 559.

⁹⁷ *See id.* at 557–58.

⁹⁸ *See id.* at 564–65 (citing Letter from Thomas Jefferson to James Madison (July 31, 1788), in 13 THE PAPERS OF THOMAS JEFFERSON 440, 442 (Julian P. Boyd ed., 1956)).

⁹⁹ *See id.* at 565 (citing 16 ANNALS OF CONG. 405 (1807)); *see also infra* pp. 979–86.

¹⁰⁰ *Hamdi*, 542 U.S. at 565–66 (Scalia, J., dissenting) (citing *Smith v. Shaw*, 12 Johns. 257 (N.Y. Sup. Ct. 1815); *M’Connell v. Hampton*, 12 Johns. 234 (N.Y. Sup. Ct. 1815); *In re Stacy*, 10 Johns. 328 (N.Y. Sup. Ct. 1813)).

¹⁰¹ 71 U.S. (4 Wall.) 2 (1866).

¹⁰² *Hamdi*, 542 U.S. at 567 (Scalia, J., dissenting) (quoting *Milligan*, 71 U.S. (4 Wall.) at 121) (internal quotation mark omitted).

¹⁰³ *Id.* at 569.

¹⁰⁴ *Id.* at 567 n.1.

¹⁰⁵ *Id.* at 554.

¹⁰⁶ *Id.* at 575. The dissent noted that the detention of noncitizens might present a different case, as would a situation in which a citizen is captured *and held* outside the United States. *See id.* at 574 n.5, 577.

deal with” the inevitable tension between individual liberty and national security.¹⁰⁷

C. The Suspension Clause and Original Meaning

Animating the plurality opinion in *Hamdi* is the idea that the Constitution — and the Suspension Clause in particular — operates contextually to account for the surrounding political circumstances. The plurality unquestionably embraced a pragmatic approach — one that encompasses the idea that government assertions predicated upon the needs of national security can and should be balanced against individual liberty interests when ascertaining the lawfulness of government detention practices, even with respect to citizens. One could view the result in *Hamdi* as following from the same idea expressed by the Supreme Court long ago in *McCulloch v. Maryland*¹⁰⁸: the Constitution was “intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.”¹⁰⁹

In stark contrast to that view is the view set forth in the *Hamdi* dissent. This position is fairly described as both formalistic and unyielding, for it cares not what arguments the government advances in the name of national security to justify its detention practices (at least with respect to citizens¹¹⁰) but instead posits that where the suspension authority has not been invoked, these arguments are essentially irrelevant. For this, Justice Scalia’s opinion has been criticized as uncompromising¹¹¹ and potentially more threatening to civil liberties than the position embraced by the plurality.¹¹² In turn, many leading commentators have lauded the plurality opinion for its flexibility.¹¹³

¹⁰⁷ *Id.* at 579.

¹⁰⁸ 17 U.S. (4 Wheat.) 316 (1819).

¹⁰⁹ *Id.* at 415 (first emphasis added).

¹¹⁰ See *supra* note 106.

¹¹¹ See, e.g., Fallon & Meltzer, *supra* note 24, at 2091 (labeling Justice Scalia’s view “too cramped”).

¹¹² See, e.g., FARBER & SHERRY, *supra* note 24, at 137 (arguing that Justice Scalia’s view puts the government in a “straightjacket,” unable to account for “changing conditions,” and observing that “if invoked [a suspension] might be far more destructive of civil liberties than a judicially defined solution”); Morrison, *supra* note 24, at 416 (arguing that Justice Scalia’s position “could . . . pose a serious threat to the safeguards of liberty built into the law of habeas corpus and the Constitution itself”).

¹¹³ See, e.g., FARBER & SHERRY, *supra* note 24, at 137 (arguing that Justice O’Connor’s “effort to find a solution” respecting “the need for some flexibility in protecting national security” was “admirable”); Morrison, *supra* note 24, at 416 (agreeing with Justice O’Connor’s “grant[ing] Congress fairly broad latitude to authorize extraordinary measures in times of national crisis, including the detention of alleged enemy combatants in the ‘war on terror’”). Consistent with *Hamdi*, Professor Trevor Morrison has written that Congress enjoys “some leeway to authorize extraordinary executive detention *without* suspending the writ.” Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1539 (2007) (emphasis added). In so arguing, Morrison’s work relies in part on the work of Professors Samuel Issacharoff and Richard

The disagreement between Justice O'Connor and Justice Scalia in *Hamdi* is partly explained by their often divergent approaches to constitutional interpretation.¹¹⁴ But there is another explanation as well. Notably absent from the plurality opinion is any account of — or reckoning with — the historical conception of the “Privilege of the Writ of Habeas Corpus” and its counterpart, the suspension power. The dissent, by contrast, relied heavily upon the historical development of these concepts. This Article seeks to provide a fuller account of that history in an effort to uncover what the Founding generation understood the privilege to embody and how it related to the concept of suspension.

Turning to history to ascertain the meaning of the Suspension Clause is hardly novel, and is all but unavoidable. Indeed, in discussing the constitutional privilege, Chief Justice John Marshall once said: “The term is used in the constitution, as one which was well understood.”¹¹⁵ The concepts of habeas corpus and suspension were terms of art with deep roots in the English and early American traditions.¹¹⁶ They needed no definition in the Constitution precisely because they were so “well understood” by the Founders. As Justice Story once put it:

What is the writ of habeas corpus? What is the privilege which it grants? The common law, and that alone, furnishes the true answer. The existence . . . of the common law is not only supposed by the constitution, but is appealed to for the construction and interpretation of its powers.¹¹⁷

The Supreme Court’s modern Suspension Clause jurisprudence is very much in keeping with this idea. Recently, the Court reiterated that “‘at the absolute minimum’ the [Suspension] Clause protects the

Pildes, which posits that during wartime, courts should focus on preserving institutional structures and processes by respecting congressional endorsement of emergency measures. See generally Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1 (2004).

¹¹⁴ For example, Justice O'Connor often embraced balancing tests in constitutional cases, while Justice Scalia has eschewed the same. Compare, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986) (O'Connor, J.) (applying a balancing test to whether Congress may depart from Article III's structural requirements), with *Burnham v. Superior Court*, 495 U.S. 604, 622–27 (1990) (Scalia, J.) (rejecting a balancing test in favor of a bright-line rule for the personal jurisdiction–due process inquiry in cases of physical presence within the jurisdiction).

¹¹⁵ *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830); see also *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807) (observing that “resort may unquestionably be had to the common law” to ascertain the meaning of the privilege).

¹¹⁶ See Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 583 (2008) (observing that the “Privilege of the Writ of Habeas Corpus” was taken by the framers and their contemporaries to be self-evident” and that suspension practices “were well-entrenched between 1689 and 1777”).

¹¹⁷ *United States v. Coolidge*, 25 F. Cas. 619, 619 (C.C.D. Mass. 1813) (No. 14,857), *rev'd on other grounds*, 14 U.S. (1 Wheat.) 415, 416–17 (1816).

writ as it existed when the Constitution was drafted and ratified.”¹¹⁸ In response, one legal scholar has read the Court’s jurisprudence in this area to stand for the proposition that “the eighteenth-century writ [is] a floor (but not necessarily a ceiling) for the content of the Suspension Clause.”¹¹⁹ Even putting to the side the doctrinal importance of the original meaning of the clause, the historical evidence brought to light in this Article should be of interest to anyone who cares about text, structure, and history in constitutional interpretation.¹²⁰ There are, moreover, compelling reasons to care about the Founding conceptions of the privilege and suspension when interpreting the Suspension Clause in particular.

The Constitution was of course drafted at many different levels of generality. Many of its clauses lay down abstract principles or norms.¹²¹ At the other extreme, some portions of the Constitution speak their commands with unmistakable clarity. Take Article II’s requirement that the President have attained the age of thirty-five.¹²² Other provisions of the Constitution are narrowly drawn to approach this level of specificity in different ways. Certain provisions, for example, enshrine terms of art that had well-settled meaning in English law at the time of the Founding or by their very terms explicitly refer the reader to the English common law backdrop of that time. The Seventh Amendment, for example, expressly “preserve[s]” the civil jury-

¹¹⁸ *Boumediene v. Bush*, 128 S. Ct. 2229, 2248 (2008) (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)); see also *St. Cyr*, 533 U.S. at 301 (stating that the Suspension Clause inquiry should be guided “at the absolute minimum” by an understanding of the legal status of the writ “as it existed in 1789” (quoting *Felker v. Turpin*, 518 U.S. 651, 664 (1996)) (internal quotation marks omitted)).

¹¹⁹ Gerald L. Neuman, Essay, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 537, 543 (2010).

¹²⁰ Today, “[v]irtually everyone agrees” that text and original meaning matter in constitutional interpretation. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 881 (1996); see also Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1086 (1989) (“Almost no one believes that the original understanding is wholly irrelevant to modern-day constitutional interpretation.”). Modern debate centers instead on how much original meaning matters. See, e.g., Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 781–96 (2010) (discussing the debates and collecting sources).

¹²¹ A host of commentators from a range of interpretive camps have made this observation. See, e.g., RONALD DWORKIN, *FREEDOM’S LAW* 7 (1996) (observing that “[m]any of these clauses are drafted in exceedingly abstract moral language” intended to “refer to abstract moral principles”); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 433 (2007) (referring to the “abstract or vague phrases of the Constitution: ‘due process,’ ‘equal protection,’ ‘cruel and unusual punishments,’ and ‘freedom of speech’”); Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 240 (2004) (book review) (positing that the original public meaning of certain clauses is very general, thereby granting jurists “considerable discretion in developing legal doctrines”).

¹²² U.S. CONST. art. II, § 1, cl. 5; cf. DWORKIN, *supra* note 121, at 8 (recognizing that the Constitution also includes “a great many clauses that are neither particularly abstract nor drafted in the language of moral principle”).

trial right as it was known “at common law.”¹²³ Other provisions embody specific compromises over how to balance the need for a strong centralized government against the rights of the individual.¹²⁴ A classic example in this vein is the Just Compensation Clause, which embodies the tradeoff that the government may take private property for public use, but only where it provides appropriate compensation.¹²⁵ The Suspension Clause presents an example of a provision that achieves specificity both by enshrining terms of art and by embodying a compromise between national and individual interests.

As is explored below, the Founding generation knew a thing or two about war and ongoing threats to national security, for they wrote the Constitution in the wake of a bloody struggle for independence (during which England had suspended the writ of habeas corpus with respect to the colonists) and at a time when the new country stood on precarious footing with enemies all around. Indeed, it is fair to say that “[t]he American Constitution . . . was born in crisis and tested in crisis.”¹²⁶ As is also revealed below, the Founders had a very specific conception of what the “Privilege of the Writ of Habeas Corpus” and “suspension” comprised when they enshrined those terms of art in the Constitution.¹²⁷

By the time of the Founding, the privilege had evolved to encompass not just a generic right to due process, but also a particular demand (derived in large measure from the English Habeas Corpus Act of 1679) that persons within protection detained for criminal or national security purposes be charged criminally and tried in due course or discharged. In keeping with this understanding, the Suspension Clause, by design, rejected the idea that national security interests should be balanced against the right to individual liberty enjoyed by persons within protection, save one exception: in the event of a “Rebellion or Invasion”¹²⁸ where the political branches have taken the dramatic step of suspending the privilege. Indeed, the history leading up

¹²³ U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .”).

¹²⁴ As Professor Max Farrand once said, the Constitution represents a “bundle of compromises.” MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 201 (1913) (internal quotation marks omitted).

¹²⁵ See U.S. CONST. amend. V. For a discussion of the applicability of the Just Compensation Clause during wartime, see *infra* note 698.

¹²⁶ Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 709 (2009).

¹²⁷ See *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830) (Marshall, C.J.); cf. Balkin, *supra* note 121, at 495 (noting the importance of placing the Constitution’s references to “terms of art” in historical context); Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 428–31 (2009) (discussing generally the interpretation of “terms of art,” *id.* at 428, included in the Constitution).

¹²⁸ U.S. CONST. art I, § 9, cl. 2.

to and surrounding the Founding period shows that the very purpose animating the Suspension Clause was to bestow on the new government a particular lever, drawn from English and colonial practice, by which it could — in a formal, transparent, and dramatic way — balance the needs of national security against the individual rights enshrined in the Constitution.¹²⁹

Where, as here, the Founders both anticipated a problem — the propensity to favor national security interests over civil liberties in times of emergency — and, in order to address the problem, made an unambiguous decision to adopt a specific and well-entrenched framework, which struck the balance categorically in favor of civil liberties unless and until the political branches made the decision to suspend them, there is an especially powerful case for continuing to honor that choice. Indeed, the review of the historical record that follows demonstrates overwhelmingly that the Founding generation ascribed to the Suspension Clause the same meaning as did the dissent in *Hamdi*.

This is not to say that historical inquiry can resolve all questions of constitutional interpretation. It is no doubt true that “much of the Constitution . . . speak[s] in majestic generalities, thereby leaving interpreters with greater flexibility in the document’s implementation over time.”¹³⁰ By the same token, the Constitution today must often confront problems that the Founding generation never anticipated.¹³¹ But in the case of the Suspension Clause, where the extensive historical record reveals that the Founding generation anticipated the problem of recurring emergencies and worked out a specific framework for addressing them that assigned to the political branches — not the courts — the role of weighing the needs of national security against civil liberties during such times, departing from that framework does a disservice to the very concept of a binding constitution¹³² and to the

¹²⁹ On the intersection of purposivism and original meaning, see generally Henry Paul Monaghan, *Doing Originalism*, 104 COLUM. L. REV. 32 (2004).

¹³⁰ John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2040 (2009); see also John F. Manning, Essay, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 339, 431–32 (2010) (“[T]he relevant constitutionmakers, like any other lawmakers, evidently made *choices* about when to articulate their policies in open-ended terms that leave room for flexible, purposive interpretation and when to opt for greater certainty but less adaptability.”). An example in this vein is the Fourteenth Amendment’s guaranteeing to “person[s] . . . the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

¹³¹ This argument represents a common rationale for eschewing exclusive reliance on original meaning. See, e.g., Farber, *supra* note 120, at 1093–95; H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 664–65 (1987) (“[T]he vast majority of contemporary constitutional disputes involve facts, practices, and problems that were not considered or even dreamt of by the founders.”).

¹³² Cf. Balkin, *supra* note 121, at 429 (“Why is it important to preserve meaning over time? It follows from the assumption that law continues in force over time until it is amended or repealed.”); Joseph Raz, *Intention in Interpretation*, in THE AUTONOMY OF LAW 249, 258 (Robert

compromises underlying the document.¹³³ In the words of Chief Justice Marshall: “The principles . . . established” in the Constitution were “designed to be permanent.”¹³⁴

II. THE ENGLISH CONCEPTION OF THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS AND SUSPENSION PRIOR TO RATIFICATION

In prior work, I sought to demonstrate that although “[h]istorically speaking, the suspension power [has been] rarely invoked,” it has long “been both appreciated and wielded as an emergency power of tremendous consequence for addressing the breakdown of law and order and steering our constitutional ship back on course when it falters.”¹³⁵ That analysis pertained to how the suspension power operates when invoked in the midst of a “Rebellion or Invasion,” the two circumstances thought by the Founders to warrant such a dramatic measure. My primary concern here, by contrast, is how the Suspension Clause operates as a constraint on the government when a lawful suspension has *not* been declared. At first blush, this question appears to stand separate and apart from any inquiry into what the Suspension Clause contemplates in terms of an emergency power. The history demonstrates, however, that the two inquiries have long been inextricably intertwined, in effect “two sides of the same coin.”¹³⁶

This Part begins by exploring the historical understanding of the privilege and the suspension power. Doing so requires looking first to England, where these concepts originated and where the Suspension Clause’s roots may be found.

A. *The Origins of the Privilege and the Protection of Individual Liberty in English Law*

The Framers wrote the Constitution mindful of the long and celebrated role of the writ of *habeas corpus ad subjiciendum* in English law. By design, this writ tested the legality of a petitioner’s detention. The Founding generation was also well educated concerning the bene-

P. George ed., 1996) (“It makes no sense to give any person or body law-making power unless it is assumed that the law they make is the law they intended to make.”).

¹³³ See *supra* note 124; see also Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421, 1421 (2008) (arguing that “courts pursuing interpretive fidelity should strive to uphold the specific compromises incorporated into enacted legal texts [where they are clear], especially the Constitution”); cf. David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 74 (2006) (observing that “the [habeas] guarantee would be stripped of virtually all meaning if it did not include what might fairly be viewed as the essence of the writ at the time of ratification”).

¹³⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

¹³⁵ Tyler, *supra* note 2, at 602.

¹³⁶ I borrow the analogy from Professor David Shapiro. See Shapiro, *supra* note 133, at 87.

fits provided by the English Habeas Corpus Act of 1679 and well aware of Parliament's proclivity to suspend the operation of the Act, given that Parliament had denied the colonists the benefits of the Act in the colonies and exposed them to an act of suspension on English soil during the Revolutionary War. The English historical backdrop accordingly provides important clues concerning what the Founding generation hoped to achieve in adopting the Suspension Clause.

Parsing this history reveals much. First, in England, the writ of habeas corpus enjoyed special status as, to borrow from Blackstone, a "bulwark of our liberties" and the embodiment of the "natural inherent right" of the "personal liberty of the subject."¹³⁷ Second, the privilege enjoyed a long and celebrated link with English conceptions of due process rooted in Magna Carta or the "Great Charter."¹³⁸ Third, the content of due process that English law connected with the privilege as it had evolved by the time of ratification was a specific right (subject to narrow and well-established exceptions not applicable here¹³⁹) not to be jailed on mere suspicion of criminal activity or of posing a danger to the state, but instead only upon formal criminal charges and timely trials commensurate with well-established procedural safeguards. Further, it was well settled in English law that persons within the protection of English law — most indisputably, the Crown's subjects — were to be dealt with as traitors under domestic criminal law and not as enemies when they sided with the Crown's adversaries.¹⁴⁰

¹³⁷ 1 WILLIAM BLACKSTONE, COMMENTARIES *133, *126, *131.

¹³⁸ See *id.* at *133 (likening the Habeas Corpus Act of 1679 to a "second magna carta").

¹³⁹ As Justice Scalia noted in his *Hamdi* dissent, see *supra* p. 916, there were other justifications in English law for lawfully restraining persons preventively, but these categories were both narrow and entirely inapplicable to the detention of persons within protection who were suspected of criminal activity or of posing a threat to national security. For instance, exceptions to the rule against preventive detention included the lawful restraint of material witnesses and of other categories of persons not suspected of criminal activity or of posing a threat to national security. See Opinion on the Writ of Habeas Corpus, (1758) 97 Eng. Rep. 29 (H.L.) 37 (observing that "[t]here are many other lawful restraints," including of "persons who are in custody upon civil process . . . , paupers in hospitals or workhouses, madmen under commissions of lunacy," and those under "quarantine"); *infra* p. 1015 (discussing the concept of a material witness). Many of these same narrow and well-defined exceptions exist today, though of course *capias ad respondendum* (the arrest of civil defendants pending trial) has been discarded. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Bail is sometimes referred to as another exception to the rule against preventive detention. As is shown below, bail was historically bound up with both the privilege and its suspension when connected to pending criminal charges. See *infra* pp. 932–33. As for the exception for the criminally insane, it makes sense when one considers that criminal prosecution of those who are unable to assist in their defense is not an option in our legal tradition.

¹⁴⁰ The historical record suggests that English law distinguished between those owing allegiance to the Crown and those who did not when determining whether the rights and protections of English law would be recognized. See Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1844–45 (2009); see also Carlton F.W. Larson, *The Forgotten Constitutional Law of*

Acts of suspension nonetheless displaced this rule while concomitantly empowering the Crown to arrest and detain persons within protection in the absence of formal criminal charges.

As explored below, English pre-ratification suspensions all came during wartime and were uniformly directed at those actually engaged in or suspected of treasonous practices.¹⁴¹ It did not matter whether the arrests were made with the goal of eventual prosecution, as a means of detention to prevent return to the battlefield, or as a tool to help uncover broader plots targeting the Crown. Whatever the aim of such detentions, when not connected to criminal charges, the only way that they could be brought within the law was through a suspension of habeas corpus. In the absence of suspension, accordingly, the writ stepped in to serve as the means by which individuals could secure release from detentions predicated on suspicion that would not sustain criminal charges in the ordinary course.

As one legal scholar has written, the “Great Writ achieved its celebrity in the constitutional struggles of the seventeenth century as a remedy against political arrests by the King’s council and ministers.”¹⁴² During this time, the writ evolved into what Blackstone would call a “bulwark” of “personal liberty” largely due to the Privy Council’s penchant for “frequently commit[ting] persons without indictment, trial or any other semblance of due process.”¹⁴³ Thus, at its traditional core, “the writ afforded a powerful guarantee that individuals would not be detained on executive fiat instead of legally recognized grounds.”¹⁴⁴

It was, of course, not always so. The return in *Darnel’s Case*¹⁴⁵ in 1627, for example, stated nothing more than that the prisoners were held *per speciale mandatum Domini Regis* — in other words, by the special command of the King.¹⁴⁶ In arguing for the position that the command of the King did not constitute *per legem terrae* (“the law of the land,” as referenced in the Great Charter), counsel for the prisoners posited that “[n]o freeman shall be imprisoned without due process of

Treason and the Enemy Combatant Problem, 154 U. PA. L. REV. 863, 867 (2006); *infra* pp. 931, 1015–16 and note 221 (discussing possible implications of this distinction).

¹⁴¹ See *infra* pp. 929–30.

¹⁴² Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555, 563 (2002). As historian Paul Halliday has demonstrated, however, the English origins of the writ are not necessarily steeped in the protection of individual liberty, but instead in preserving the Crown’s prerogative to have an account of its subjects. See generally PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* (2010).

¹⁴³ ROBERT S. WALKER, *THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY* 58 (1960).

¹⁴⁴ Neuman, *supra* note 142, at 563.

¹⁴⁵ (1627) 3 Cobbett’s St. Tr. 1 (K.B.) (Eng.).

¹⁴⁶ DANIEL JOHN MEADOR, *HABEAS CORPUS AND MAGNA CARTA* 13 (1966). *Darnel’s Case* arose out of King Charles I’s decision to imprison the petitioners for failing to lend him money to pursue his foreign policy objectives independent of parliamentary cooperation. *Id.*

the law” — namely, “either by presentment or by indictment.”¹⁴⁷ The argument would not succeed on this occasion, but “[i]ts most immediate consequence was to set the stage for parliamentary debates the next year which led to the Petition of Right.”¹⁴⁸

In the Petition of Right, Parliament essentially repudiated the holding in *Darnel's Case* and embraced counsel's argument. Specifically, after quoting chapter 39 of Magna Carta — which established the principle that one could not be deprived of liberty without due process of law¹⁴⁹ — the Petition set forth the following grievance and demand:

[Y]our Subjects have of late been imprisoned without any cause shewed: And when for their deliverance they were brought before your Justices by your Majesties Writts of Habeas corpus . . . , no cause was certified, but that they were detained by your Majesties speciall comaund . . . without being charged with any thing to which they might make aunswere according to the Lawe. . . . They . . . pray . . . that no freeman in any such manner as is before mentioned be imprisoned or detained.¹⁵⁰

The King eventually signed the Petition,¹⁵¹ and although it was considered by many at the time to be merely a declaratory statute, by the latter half of the seventeenth century it came to be viewed as establishing an important limitation on the power of the Executive to arrest and detain.¹⁵² As Canadian legal scholar R.J. Sharpe has described it, the Petition came to embody the denial to the King and his Council “of the power to lock up, *without laying a criminal charge*,

¹⁴⁷ *Darnel's Case*, 3 Cobbett's St. Tr. at 18 (argument of Selden before King's Bench).

¹⁴⁸ MEADOR, *supra* note 146, at 18; *see also* Petition of Right, 1627, 3 Car., c. 1, §§ 3, 5 (Eng.). Discussing *Darnel's Case*, Professor Daniel Meador notes with insight equally applicable today: “The case is also noteworthy because it shows how the writ of habeas corpus is no greater protector of liberty than the judges' view as to what constitutes lawful custody.” MEADOR, *supra* note 146, at 18; *see also infra* p. 999.

¹⁴⁹ GREAT CHARTER OF LIBERTIES, ch. 39 (1215), *reprinted in* SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 42, 47 (George Burton Adams & H. Morse Stephens eds., 1904) (“No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.”). Coke's highly influential *Institutes* later connected chapter 39 with habeas corpus. *See* SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 54 (London, E & R Brooke 1797) (1628).

¹⁵⁰ Petition of Right, 1627, 3 Car., c. 1, §§ 5, 8. The Petition's roots date back even further. Under King Edward III's reign, in conjunction with adoption of the treason statute that governed for many centuries, *see infra* note 174, Parliament had declared:

Whereas it is contained in the Great Charter . . . that none shall be imprisoned nor put out of his Freehold, nor of his Franchises nor free Custom, unless it be by the Law of the Land; It is accorded assented, and stablished, That from henceforth none shall be taken by Petition or Suggestion made to our Lord the King, or to his Council, unless it be by Indictment or Presentment of good and lawful People of the same neighbourhood where such Deeds be done, in due Manner, or by Process made by Writ original at the Common Law . . . and forejudged of the same by the Course of the Law . . .

25 Edw. 3, stat. 5, c. 4 (1351) (Eng.).

¹⁵¹ 3 H.L. JOUR. (1628) 844 (Eng.).

¹⁵² *See* R.J. SHARPE, THE LAW OF HABEAS CORPUS 13 (1976).

those who were considered to be dangerous to the security of the State”¹⁵³ when no “emergency legislation conferr[ed] such power.”¹⁵⁴ Thus, English historian Henry Hallam counseled that the animating principle of English law, some fifty years before the Habeas Corpus Act of 1679,¹⁵⁵ was that “no freeman could be detained in prison, except upon a criminal charge or conviction, or for a civil debt.”¹⁵⁶

For this reason, many commentators have cautioned against over-emphasizing the role of the Habeas Corpus Act of 1679 in the story of the privilege. Hallam, for one, wrote that the Act “introduced no new principle, nor conferred any right upon the subject.”¹⁵⁷ The Act complemented, but did not displace, the common law writ of habeas corpus,¹⁵⁸ which continued to serve as the vehicle for redress available in “all . . . cases of unjust imprisonment” that were not covered by the Act.¹⁵⁹

Nonetheless, it was with the Habeas Corpus Act of 1679 that the writ achieved its celebrated status in Blackstone’s *Commentaries*, which at this point — building on Coke’s *Institutes* — linked the privilege with the Great Charter’s guarantee that one may be detained only in accordance with due process.¹⁶⁰ As is well known, the writings

¹⁵³ *Id.* at 91 (emphasis added).

¹⁵⁴ *Id.* at 13.

¹⁵⁵ In the interim period, Parliament dissolved the Star Chamber and enacted earlier habeas corpus legislation. *See, e.g.*, 16 Car., c. 10, § 1 (1640) (Eng.).

¹⁵⁶ HENRY HALLAM, *THE CONSTITUTIONAL HISTORY OF ENGLAND, FROM THE ACCESSION OF HENRY VII TO THE DEATH OF GEORGE II* 475 (William Smith ed., New York, Harper & Brothers 1883). Along similar lines, Blackstone wrote that “the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful.” 3 BLACKSTONE, *supra* note 137, at *133.

¹⁵⁷ HALLAM, *supra* note 156, at 475; *see also* HALLIDAY, *supra* note 142, at 55–56 (positing that the familiar story that the Act was needed to permit vacation writs is error); Halliday & White, *supra* note 116, at 611 (“[T]he celebrated Habeas Corpus Act merely codified practices generated by King’s Bench justices.”). *But see* HALLAM, *supra* note 156, at 475–76 (observing that the Act “cut off the abuses by which the government’s lust of power . . . had impaired so fundamental a privilege”); Maxwell Cohen, *Habeas Corpus Cum Causa — The Emergence of the Modern Writ — II*, 18 CANADIAN B. REV. 172, 195 (1940) (arguing that the Act nonetheless improved habeas law).

¹⁵⁸ *See* SHARPE, *supra* note 152, at 18 (observing that “[t]he Act is largely a piecemeal repairing of the common law”).

¹⁵⁹ 3 BLACKSTONE, *supra* note 137, at *137 (observing that “all other cases of unjust imprisonment” not covered by the Act were “left to the *habeas corpus* at common law”); *see also* WILLIAM S. CHURCH, *A TREATISE ON THE WRIT OF HABEAS CORPUS* § 34, at 31 (2d ed., San Francisco, Bancroft-Whitney Co. 1893) (noting that in “cases of imprisonment without warrant . . . the party detained had to sue out his remedy at common law”). For an extensive discussion of the importance of the common law writ, *see* Halliday & White, *supra* note 116, at 608–09.

¹⁶⁰ *See* 3 BLACKSTONE, *supra* note 137, at *132–35; 4 BLACKSTONE, *supra* note 137, at *432 (“*Magna carta* . . . declared, that no man shall be imprisoned contrary to law: the *habeas corpus* act points him out effectual means . . . to release himself . . .”); COKE, *supra* note 149, at 54 (asking “Now it may be demanded, if a man be taken, or committed to prison *contra legem terrae*,

of Coke and Blackstone represented the most influential sources on English law to which the Founding generation turned in shaping American law.¹⁶¹ And, as the Article explores below, the protections embodied in the Habeas Corpus Act powerfully influenced the Founding generation's understanding of the privilege and the role of suspension, both of which they later would import into the Constitution.

The Habeas Corpus Act came on the heels of several important developments, not the least of which was the Lord Chief Justice's refusal to issue habeas corpus in 1667 to a prisoner on the sole basis that he was "a dangerous person."¹⁶² This and other cases triggered the introduction of habeas corpus legislation in 1668,¹⁶³ which was voted down and reintroduced in amended form several times before circumstances finally supported enactment of legislation in 1679.¹⁶⁴

The thrust of the Act was to enforce prisoners' rights to bail and speedy trial on criminal charges. (To be sure, 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 bail.¹⁶⁵) Specifically, the Habeas Corpus Act declared that it was "[f]or the prevention whereof and the more speedy Releife of all persons imprisoned for any such criminall or supposed criminall Matters."¹⁶⁶ Toward that end, it promised a speedy trial while man-

against the law of the land, what remedy hath the party grieved?" and answering "He may have an *habeas corpus*"; see also *Boumediene v. Bush*, 128 S. Ct. 2229, 2244 (2008) (citing 9 SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 112 (1926)); 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 30 (New York, O. Halsted 1827) (writing of the Act that "[i]ts excellence consists in the easy, prompt, and efficient remedy afforded for all unlawful imprisonment, and personal liberty is not left to rest for its security upon general and abstract declarations of right"). Meador described the link this way: "[D]ue process was concerned with how and why a man was imprisoned; the writ was a procedural avenue by which a prisoner could get those questions before a court." MEADOR, *supra* note 146, at 19.

¹⁶¹ For example, Coke's *Institutes* "were read in the colonies by virtually everyone who undertook the study of law," and Blackstone's *Commentaries* "turned out to be even more influential on American law and lawyers in the formative decades than Coke's *Institutes*." MEADOR, *supra* note 146, at 23, 28; see also Tyler, *supra* note 2, at 614–22 (surveying sources on this point).

¹⁶² Helen A. Nutting, *The Most Wholesome Law — The Habeas Corpus Act of 1679*, 65 AM. HIST. REV. 527, 531 (1960) (detailing the case of William Farmer and citing sources).

¹⁶³ Laying the groundwork for the 1679 Act, the 1668 bill required bailing a prisoner "if legal proceedings were not instituted within six months of his commitment." *Id.* at 532.

¹⁶⁴ See *id.* at 532–42 (detailing course of events). Macaulay's *History of England* reports that King Charles II "would gladly have refused his consent [to the bill] . . . but he was about to appeal from his parliament to his people on the question of the succession; and he could not venture, at so critical a moment, to reject a bill which was in the highest degree popular." 1 THOMAS BABBINGTON MACAULAY, *THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II* 193 (Philadelphia, J.B. Lippincott & Co. 1871).

¹⁶⁵ See Declaration of Rights, 1688, 1 W. & M., sess. 2, c. 2, § 1 (Eng.).

¹⁶⁶ Habeas Corpus Act of 1679, 31 Car. 2, c. 2, § 1 (Eng.).

dating the remedy of discharge where that promise was not kept.¹⁶⁷ For this reason, English legal historian William Holdsworth wrote that the Act made the writ “the most effective weapon yet devised for the protection of the liberty of the subject, by providing both for a speedy judicial inquiry into the justice of any imprisonment on a criminal charge, and for a speedy trial of prisoners remanded to await trial.”¹⁶⁸ And another English commentator, Thomas Erskine May, more generally called the writ “unquestionably the first security of civil liberty” that “protects the subject from unfounded suspicions, from the aggressions of power, and from abuses in the administration of justice.”¹⁶⁹

In its seventh section, the Habeas Corpus Act specifically addressed and limited the means by which the Crown lawfully could detain the most serious criminals, including those persons believed to pose a danger to the state. Specifically, section 7 covered those “committed for High Treason or Felony.”¹⁷⁰ Where a prisoner committed on this basis was not indicted and tried by the second succeeding court term (that is, within three to six months¹⁷¹), the Act commanded that the prisoner “shall be discharged from his Imprisonment.”¹⁷² Referring to this section, Lord Chief Justice Holt wrote shortly after its passage that “the design of the Act was to prevent a man’s lying under accusation of treason, &c. above two terms.”¹⁷³

By this time, high treason had long been settled to include, among other things, “forming and displaying by an overt act an intention to kill the king,” “levying war against the king,” and “adhering to the king’s enemies.”¹⁷⁴ These acts plainly “involved offenses of a military nature”¹⁷⁵ such that they were most likely to arise in those periods in which national security was under threat or the Crown was at war. Inclusion in the Habeas Corpus Act of such detailed protections for those accused of high treason would have been largely superfluous if the Crown could simply ignore them in the ordinary course by detain-

¹⁶⁷ The Act’s effectiveness turned in many respects on its provision for penalties in those cases in which its guarantees were violated. *See id.* §§ 5–6.

¹⁶⁸ 9 HOLDSWORTH, *supra* note 160, at 118.

¹⁶⁹ 2 THOMAS ERSKINE MAY, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 252 (Boston, Crosby & Nichols 1863).

¹⁷⁰ 31 Car. 2, c. 2, § 7.

¹⁷¹ *See Hamdi v. Rumsfeld*, 542 U.S. 507, 558 (2004) (Scalia, J., dissenting).

¹⁷² 31 Car. 2, c. 2, § 7.

¹⁷³ Crosby’s Case, (1694) 88 Eng. Rep. 1167 (K.B.) 1168.

¹⁷⁴ Clarence C. Crawford, *The Writ of Habeas Corpus*, 42 AM. L. REV. 481, 490 n.30 (1908) (internal quotation marks omitted); *see also* 25 Edw. 3, stat. 5, c. 2 (1351) (Eng.) (establishing the law of high treason that remained largely in effect for five hundred years). “[A]ttempt[s] w[ere] made to fill in the more important gaps by additional legislation and by judicial interpretation,” both of which “led to much abuse.” Crawford, *supra*, at 490 n.30. In such cases, Parliament often redefined the crime of high treason itself.

¹⁷⁵ *Hamdi*, 542 U.S. at 564 (Scalia, J., dissenting).

ing persons thought to pose a danger to the state without charges in the first instance.

It bears highlighting that the Habeas Corpus Act did “not contain any exception for wartime.”¹⁷⁶ That omission is telling, given the controlling understanding of treason during this time period. As noted above and as Blackstone elaborated in his influential *Commentaries*, treason encompassed a whole range of acts that today we would view as taking up arms against the government or the equivalent of terrorism. Thus, Blackstone instructed:

If a man be adherent to the king’s enemies in his realm, giving to them aid and comfort in the realm, or elsewhere, he is . . . guilty of high treason. This must . . . be proved by some overt act, as by giving them intelligence, by sending them provisions, by selling them arms, by treacherously surrendering a fortress, or the like.¹⁷⁷

High treason not only encompassed aiding “foreign powers with whom we are at open war”: according to Blackstone, it also covered the provision of assistance to “foreign pirates or robbers, who may happen to invade our coasts, without any open hostilities between their nation and our own”¹⁷⁸ — that is, to non-state actors who were hostile to the Crown. Finally, Blackstone instructed that high treason “most indisputably” included adhering to or aiding “fellow-subjects in actual rebellion at home.”¹⁷⁹

During this period, moreover, English law drew a distinction between those subject to the law of treason and others who took up arms against the Crown. As the English jurist Sir Matthew Hale, one of the most influential writers on the English law of treason,¹⁸⁰ wrote during this period: “[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”¹⁸¹ This understanding pervades the main English treatises of the period, all of which emphasize the concept of alle-

¹⁷⁶ *Id.* (making this point).

¹⁷⁷ 4 BLACKSTONE, *supra* note 137, at *82.

¹⁷⁸ *Id.* at *83.

¹⁷⁹ *Id.* Misprision of treason was also a serious crime during this period. It encompassed, among other things, concealing knowledge of treasonous plots (something thought to constitute aiding and abetting). *See id.* at *120. For more on the crime of high treason during the pre-ratification period, see SIR MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION OF OYER AND TERMINER AND GOAL DELIVERY FOR THE TRIAL OF THE REBELS IN THE YEAR 1746 IN THE COUNTY OF SURRY AND OF OTHER CROWN CASES 183–251 (Oxford, Clarendon Press 1762).

¹⁸⁰ As evidence of his influence, discussion of Hale pervades Chief Justice Marshall’s opinion in the treason trial of Aaron Burr. *See United States v. Burr*, 25 F. Cas. 55 (C.C.D. Va. 1807) (No. 14,693).

¹⁸¹ 1 SIR MATTHEW HALE, HISTORIA PLACITORUM CORONAE [THE HISTORY OF THE PLEAS OF THE CROWN] 159 (Sollom Emlyn ed., London, n. pub. 1736) (published posthumously).

giance and conclude — as Coke did in his *Institutes* — that those owing allegiance who take up arms against the King “*shall be punished as Traytors*” — not treated and detained as wartime enemies.¹⁸² Importantly, as traitors, they were not only punishable under the law of treason but also protected by the attendant right to a speedy trial or discharge promised by the Habeas Corpus Act.¹⁸³ Indeed, for this reason, Charles II’s successor, his brother James II, viewed the Act as “a great misfortune,” lamenting that “it obliged the Crown to keep a greater force on foot than it needed otherwise to preserve the government” and deal with the “disaffected, turbulent, and unquiet spirits” and “their wicked designs.”¹⁸⁴ Enemy aliens, by contrast, generally did not enjoy the rights and protection of domestic law,¹⁸⁵ but instead had to rely on the law of nations for protection.¹⁸⁶

Notably, the Trial of Treasons Act of 1696,¹⁸⁷ which followed shortly after the Habeas Corpus Act, instituted additional protections for those charged with the crime of high treason.¹⁸⁸ These included the requirement of two witnesses to an overt act, a requirement that was later imported into the United States Constitution’s Treason Clause,¹⁸⁹ and other protections that had not been previously granted to those accused of common law crimes, including the rights to counsel and to compel witnesses for one’s defense.¹⁹⁰ Viewing these developments together, it was no stretch for a popular treatise on English law published and widely read in the colonies in the pre-ratification period to

¹⁸² SIR EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 5 (5th ed., London, n. pub. 1671) (emphasis added); see also HENRY CARE, *ENGLISH LIBERTIES, OR THE FREE-BORN SUBJECT’S INHERITANCE* 65 (W.N. ed., 5th ed., Boston, J. Franklin 1721); FOSTER, *supra* note 179, at 183–90, 193–98, 200–01 (observing that “High Treason” is “an Offence committed against the Duty of Allegiance,” *id.* at 183, and that “Protection [of the laws] and Allegiance are reciprocal Obligations,” *id.* at 188). Blackstone’s *Commentaries* echoed this view, observing that treason “imports a betraying, treachery, or breach of faith” that happens “only between allies” and is committed by “member[s] of the community.” 4 BLACKSTONE, *supra* note 137, at *75.

¹⁸³ This explains in part why, by the early seventeenth century, English law considered “the bond of allegiance . . . not a bond of servitude but of freedom.” Halliday & White, *supra* note 116, at 603 (quoting Calvin’s Case, (1608) 77 Eng. Rep. 377 (K.B.)) (internal quotation mark omitted).

¹⁸⁴ ANDREW AMOS, *THE ENGLISH CONSTITUTION IN THE REIGN OF KING CHARLES THE SECOND* 203 (London, V&R Stevens & G.S. Norton 1857) (quoting James II, *For My Son, the Prince of Wales* (1692)).

¹⁸⁵ 1 BLACKSTONE, *supra* note 137, at *361 (observing that “alien-enemies have no rights, no privileges, unless by the king’s special favour, during the time of war”).

¹⁸⁶ On this point, see, for example, *infra* pp. 950–51.

¹⁸⁷ An Act for Regulateing of Tryals in Cases of Treason and Misprision of Treason, 1696, 7 & 8 Will. 3, c. 3 (Eng.) [Trial of Treasons Act].

¹⁸⁸ *Id.*

¹⁸⁹ See U.S. CONST. art. III, § 3, cl. 1.

¹⁹⁰ See 7 & 8 Will. 3, c. 3; see also JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 67–105 (2003) (detailing background of the Trial of Treasons Act and observing that it triggered a revolution in criminal procedure).

point to Magna Carta, the Habeas Corpus Act, and the 1696 treason statute as the great protectors of English liberties.¹⁹¹

It was because the crime of high treason was so serious, moreover — it was generally a capital offense with no opportunity for bail¹⁹² — that Blackstone counseled that its sanctions must be safeguarded from abuse at the hand of government. Thus, Blackstone opined that high treason must be “the most precisely ascertained” of crimes,¹⁹³ for if it “be indeterminate, this alone . . . is sufficient to make any government degenerate into arbitrary power.”¹⁹⁴ Along these same lines, he cautioned that the “opportunity to create abundance of constructive treasons” was equally dangerous to liberty.¹⁹⁵ Likewise, Hale warned:

How dangerous it is by construction and analogy to make treasons, where the letter of the law has not done it: for such a method admits of no limits or bounds, but runs as far as the wit and invention of accusers, and the odiousness and detestation of persons accused will carry men.¹⁹⁶

In this passage, Hale recognized the urge in times of danger to proceed outside “the letter of the law” — that is, outside defined crimes — against those believed to be disloyal, and he rejected that course. Here again, we see that if the Crown could simply detain on suspicion of disaffection alone, the provision of the many protections tied to charges of high treason would have been pointless except as a means to secure the penalty of execution.

Factoring together these developments in English law — the evolution of the common law writ, the Petition of Right, the Habeas Corpus Act, the Declaration of Rights, and the Trial of Treasons Act — it is easy to see how by the time of ratification it was well understood that “[t]he right to be either tried according to law or released is really the right that habeas corpus is supposed to secure.”¹⁹⁷ In his influential *Commentaries* published shortly before the Revolutionary War, Blackstone summarized English law as providing that “no man is to be arrested, unless charged with such a crime, as will at least justify holding him to bail, when taken.”¹⁹⁸ Likewise, his *Commentaries* declared that

¹⁹¹ See CARE, *supra* note 182, at 62.

¹⁹² See 4 BLACKSTONE, *supra* note 137, at *92.

¹⁹³ *Id.* at *75.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*; see also 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1791, at 667–68 (Boston, Hilliard, Gray & Co. 1833) (discussing the dangers of multiplying types of treason).

¹⁹⁶ 1 HALE, *supra* note 181, at 86–87.

¹⁹⁷ SHARPE, *supra* note 152, at 135. To entrench and bolster the protections of the Habeas Corpus Act, the Declaration of Rights in 1689 declared that the Crown could no longer suspend the laws and prohibited the setting of excessive bail. See Declaration of Rights, 1688, 1 W. & M., sess. 2, c. 2, § 2 (Eng.).

¹⁹⁸ 4 BLACKSTONE, *supra* note 137, at *286.

“it is unreasonable to send a prisoner [to jail], and not to signify withal the crimes alleged against him.”¹⁹⁹ Blackstone also rejected the concept of general warrants “to apprehend all persons suspected, without naming or particularly describing any person in special” as “illegal and void.”²⁰⁰ Finally, Blackstone held out the Habeas Corpus Act as making “the remedy . . . now complete for *removing* the injury of unjust and illegal confinement.”²⁰¹ Being “apprehended upon suspicion,” that is, without charges, Blackstone counseled, was legal only when the writ was unavailable — circumstances that came to pass in England only during periods of suspension.²⁰²

Writing a few decades after Blackstone, Chief Justice Marshall confirmed both the Founding understanding of English law as encompassing these principles and the influence of the Habeas Corpus Act on the Founding generation. As he described the origins of the privilege:

The English judges, being originally under the influence of the crown, neglected to issue this writ where the government entertained *suspicious which could not be sustained by evidence*; and the writ when issued was sometimes disregarded or evaded, and great individual oppression was suffered in consequence of delays in bringing prisoners to trial. To remedy this evil the celebrated *habeas corpus* act of the 31st of Charles II. was

¹⁹⁹ 1 BLACKSTONE, *supra* note 137, at *133. Here, Blackstone was paraphrasing Acts 25:27, in which a Roman magistrate explained to St. Paul: “[I]t seemeth to me unreasonable to send a prisoner, and not withal to signify the crimes laid against him.” Acts 25:27 (King James). (As Halliday notes, Coke also drew on this passage in his writings. See HALLIDAY, *supra* note 142, at 1.) To be sure, here Blackstone glossed over the parliamentary practice of summarily declaring persons guilty of crimes in bills of attainder, something for which he would later be criticized by Justice Story. Justice Story wrote: “[L]et it be remembered, that the right to pass bills of attainder in the British parliament still enables that body to exercise the summary and awful power of taking a man’s life, and confiscating his estate, without accusation or trial.” 3 STORY, *supra* note 195, § 1334, at 207. Justice Story chastised Blackstone, “[t]he learned commentator,” for having “slid over this subject with surprising delicacy.” *Id.* The considerable influence of Blackstone’s *Commentaries* on the Founding generation, see *supra* note 161, nonetheless underscores the significance of his writings on these and other issues. In response to the English practice, moreover, the Constitution expressly prohibits Congress from issuing bills of attainder. See U.S. CONST. art. I, § 9, cl. 3; see also 3 STORY, *supra* note 195, § 1338, at 209–11; 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 292–93 (Philadelphia, William Young Birch & Abraham Small 1803). For more discussion, see *infra* note 253.

²⁰⁰ 4 BLACKSTONE, *supra* note 137, at *288; see also SIR EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 176 (London, n. pub. 1797) (stating that justices of the peace could not issue warrants to arrest on suspicion alone); 2 MAY, *supra* note 169, at 252 (writing that “[t]he illegality of general warrants” was settled by this time).

²⁰¹ 3 BLACKSTONE, *supra* note 137, at *137.

²⁰² *Id.* at *138.

enacted, for the purpose of securing the benefits for which the writ was given.²⁰³

B. Parliamentary Suspensions of the Habeas Corpus Act

A review of the suspensions that followed passage of the Habeas Corpus Act prior to ratification further supports the conclusion that English law viewed suspension as a necessary prerequisite to make lawful the detention without charges of persons within protection for national security purposes. The singular objective of the English suspensions in the seventeenth and eighteenth centuries was to “impower” the Executive during wartime to detain persons suspected of high treason and treasonable practices while freeing the Executive of the many legal constraints, including the obligation to sustain criminal charges against such persons, that would otherwise be enforceable through the writ of habeas corpus.²⁰⁴

The first suspension of the Habeas Corpus Act came just ten years in its wake. This suspension was important for establishing a precedent to which future legislatures would look when contemplating such dramatic legislation. It came in response to the events of the Glorious Revolution of 1688, which spurred James II to flight and installed William and Mary on the throne. “The first years after the Revolution were full of danger”²⁰⁵ or, at least, great instability. James had been received at the French Court and, “aided by foreign enemies and a powerful body of English adherents, was threatening . . . the crown with war and treason.”²⁰⁶ In the meantime, Ireland (preferring a Catholic to a Protestant leader) was in revolt and Scotland was likewise on the verge of revolting.

A dramatic series of events followed. On March 1, 1689, William delivered a message to the House of Commons through an emissary, Richard Hampden, a member of the Privy Council.²⁰⁷ The King intended by his message to inform the Commons of the severity of the threat posed by James and the Crown’s need for expanded powers to address the situation. Hampden reported that William had reason to believe that supporters of James were meeting in and around London. Hampden also relayed that by the Crown’s orders, persons had al-

²⁰³ *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (emphasis added); *see also id.* (“This statute . . . enforces the common law [and] excepts from those who are entitled to its benefit, persons committed for felony or treason plainly expressed in the warrant, as well as persons convicted or in execution.”).

²⁰⁴ *See HALLIDAY, supra* note 142, at 248–49; Tyler, *supra* note 2, at 617–21.

²⁰⁵ 2 MAY, *supra* note 169, at 253.

²⁰⁶ *Id.*

²⁰⁷ Halliday notes that “[i]t was a sign of how much political circumstances had changed” that Hampden delivered the King’s message, for he had been “an active supporter” of the Habeas Corpus Act. HALLIDAY, *supra* note 142, at 247.

ready been arrested on suspicion of treasonous activities, and William expected that there might be reason to arrest more.²⁰⁸ Speaking of those already imprisoned, he continued:

If these should be set at liberty, 'tis apprehended we shall be wanting to our own safety, the Government, and People. The King is not willing to do any thing but what he may be warranted by Law; therefore, if these persons deliver themselves by *Habeas Corpus*, there may arise a difficulty. Excessive Bail you have complained of. If men hope to carry their great design on, they will not be unwilling to forfeit their Bail. The King asks your Advice, and hopes you will give it, as likewise the Lords. I forgot to tell you, some are committed on suspicion of Treason only.²⁰⁹

Thus, Hampden communicated that the Crown wished not to violate the law and that it (rightly) feared that persons detained without formal charges would be “deliver[ed]” by habeas corpus.

Debate in the House of Commons followed. It opened with Charles Boscawen’s noting that disaffection had invaded the military ranks such that armed soldiers might potentially join the enemy in Scotland. He then remarked:

[T]he King has sent for your Advice, and he knows well enough how the Law stands, which ought to be inviolable, and I am always for keeping it. Therefore I would make immediate application to the King, to take up such persons as he shall suspect to be obnoxious; likewise I would have a short Bill, for two or three months, to enable the King to commit such persons as he shall have cause to suspect, without the benefit of *Habeas Corpus*.²¹⁰

The suggestion naturally encountered a range of opposition. Some reacted with alarm to the idea of repealing the protections of the Habeas Corpus Act, as Sir Thomas Clarges called it, “a thing so sacred!”²¹¹ Clarges, who had played a key part in securing passage of the Act, questioned whether setting excessive bail was not instead the answer; in all events, he opined that “the Law is sufficient already.”²¹² To this argument, many responded that only two weeks earlier the Declaration of Rights repudiated the setting of excessive bail and that the writ would now enforce that protection as well.²¹³ Another speak-

²⁰⁸ 9 DEBATES OF THE HOUSE OF COMMONS, FROM THE YEAR 1667 TO THE YEAR 1694, at 129–30 (Anchitell Grey ed., London, n. pub. 1769) [hereinafter GREY’S DEBATES]. *Grey’s Debates* was derived from the notes of Anchitell Grey, who served in the Commons during this period. Although Grey’s notes are not a perfect transcript, they are the best account available of the relevant debates.

²⁰⁹ *Id.* at 130.

²¹⁰ *Id.* at 131.

²¹¹ *Id.*

²¹² *Id.* (equating the suspension proposal with “Martial Law”). In later debates, Clarges would exclaim: “We have had a struggle for [the Habeas Corpus Act] . . . and now, upon suggested Necessities, to dispense with this Law!” *Id.* at 268.

²¹³ See Declaration of Rights, 1688, 1 W. & M., sess. 2, c. 2, § 2 (Eng.).

er questioned whether the failure yet to install judges in the wake of the Revolution meant that no practical avenue for securing the writ existed.²¹⁴ To all of these arguments, Hampden responded that the King held the belief that the writ ran to the Tower, where some of the prisoners were being held, and for them to remain committed, the House needed “to have a Vote for a Bill for the King to commit, without benefit of *Habeas Corpus*, [for] [th]ree months.”²¹⁵

The House of Commons then read a draft bill twice and committed it.²¹⁶ Meanwhile the same day, through another emissary, William informed the House of Lords that:

He had secured some Persons, as dangerous to the Government; and thought it might be convenient to secure more: But, being extreme tender of doing any Thing that the Law doth not fully warrant, had given Order that this House might be acquainted with what He had thought Himself obliged to do, for the Public Peace and Security of the Government.²¹⁷

In response, the Lords communicated to the Commons that they wished to authorize the King to “secure[] all such suspected Persons, as may effectually prevent any Disturbance of the Public Peace; and that such Persons as are, or shall be, so committed may be detained until the First Day of the next [court] Term.”²¹⁸

Within days (and after inserting a privilege for Parliament excepting it from the bill’s coverage²¹⁹), both houses passed the first suspension of the Habeas Corpus Act. They titled it: “An Act for Impowering His Majestie to Apprehend and Detaine such Persons as He shall finde just Cause to Suspect are Conspireing against the Government.”²²⁰ The legislation provided:

²¹⁴ See 9 GREY’S DEBATES, *supra* note 208, at 133 (remarks of Heneage Finch). For more on this issue, see Clarence C. Crawford, *The Suspension of the Habeas Corpus Act and the Revolution of 1689*, 30 ENG. HIST. REV. 613, 616–18 (1915).

²¹⁵ 9 GREY’S DEBATES, *supra* note 208, at 132.

²¹⁶ *Id.* at 136.

²¹⁷ 14 H.L. JOUR. (1689) 135 (Eng.) (internal quotation mark omitted).

²¹⁸ *Id.*

²¹⁹ See 9 GREY’S DEBATES, *supra* note 208, at 136–37 (debates of March 4, 1689). During the parliamentary privilege debates, Sir Edward Seymour stated: “I would have no Members taken upon suspicion of practicing against the Government; but when they shall be first adjudged criminal here.” *Id.* at 136. As with all other speakers during this period, his comments suggest an equating of suspension with the power to arrest without charges, along with a view that in the absence of a suspension such a power did not lie. For more on the historical context of this suspension, consult HALLIDAY, *supra* note 142, at 247–48.

²²⁰ 1688, 1 W. & M., c. 2 (Eng.); see also 2 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS 284–85 (London, n. pub. 1742) [hereinafter HISTORY AND PROCEEDINGS] (noting royal assent granted March 16, 1689). Historian Clarence Crawford’s work highlights that at this point no member of Parliament voiced concerns that the Crown would abuse its new authority. See CLARENCE CORY CRAWFORD, THE SUSPENSION OF THE HABEAS CORPUS ACT IN ENGLAND 28–29 (1906).

For the securing the Peace of the Kingdome in this Time of Imminent Danger against the Attempts and Trayterous Conspiracies of evill disposed Persons

Bee it Enacted . . . That every Person or Persons²²¹ that shall be committed by Warrant of Their said Majestyes most Honourable Privy Council Signed by Six of the said Privy Council at least for Suspition of High Treason may be detayned in safe Custodie till [April 17, 1689], without Baile or Mainprize and that noe Judge or other Person shall Baile or Try any such Person or Persons soe Committed without Order from Their said Majestyes Privy Council Signed by Six of the said Privy Council . . . any Law or Statute to the contrary notwithstanding.²²²

Provided alwayes That from and after the said [April 17] the said Persons soe Committed shall have the Benefitt and Advantage of [the Habeas Corpus Act of 1679²²³] and alsoe of all other Laws and Statutes any way relatinge to or providinge for the Liberty of the Subjects of this Realme.²²⁴

In short, the suspension displaced for a time the protections inherent in the Habeas Corpus Act in order to empower the Crown to arrest and detain on suspicion — that is, on evidence not given under oath — while being freed from having to proceed to prosecution.²²⁵

Additional arrests on suspicion followed after passage of the bill.²²⁶ In the meantime, the state of national security grew more precarious. James, enjoying the support of France, had landed in Ireland, where the Irish Parliament declared that he remained king and where he was preparing to invade Scotland.²²⁷ Scores of Protestants fled Ireland for England and its Protestant ruler, and “it was believed that many Irish [C]atholics were accompanying them in disguise to stir up sedition.”²²⁸ At home, “disaffection was rife in the army,” and there was a mutiny at Ipswich.²²⁹ Meanwhile, the first act of suspension lapsed at the

²²¹ Note that here, as in later English suspensions, the Act references “persons,” not just “subjects,” thereby supporting the conclusion that the lines of protection encompassed at least some aliens. Congress used similar terminology in the suspension legislation proposed during the Jefferson Administration. See *infra* pp. 982–83.

²²² Here the Act includes what would become a common feature in English and colonial suspension acts: a *non obstante* clause that displaced all legal protections, including any remaining claim to the common law writ. See 1 W. & M., c. 2 (containing the language “any Law or Statute to the contrary notwithstanding”).

²²³ Here the suspension gave the full title and date of the 1679 Act. *Id.*

²²⁴ *Id.* The Statutes at Large do not contain the body of the Act. It may be found in the Statutes of the Realm. See 6 THE STATUTES OF THE REALM 24 (John Raithby ed., London, n. pub. 1819). Needless to say, the original spelling was retained above.

²²⁵ Cf. SHARPE, *supra* note 152, at 91–92; Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 976 (1998) (discussing these suspensions and calling them “limited” insofar as they were directed exclusively at arrests of those suspected of treasonous practices).

²²⁶ For details, see Crawford, *supra* note 214, at 621.

²²⁷ *Id.* at 621–22.

²²⁸ *Id.* at 622.

²²⁹ *Id.*

start of the new court term, and several prisoners quickly sought relief in the courts, requesting that they be bailed or tried as promised by the Habeas Corpus Act.²³⁰

Before the courts could act, Parliament took up a bill to extend the term of the suspension and expand its scope.²³¹ Both houses passed the extension, and the King signed it the same day.²³² In most respects, this suspension was the same as the prior one, with one important difference — it now empowered the Executive to arrest and commit not only on suspicion of high treason but also more generally on suspicion of “Treasonable Practices.”²³³ The Crown issued new warrants for prisoners held in the Tower, including at least one who had a habeas petition pending in the courts, a fact that appears to have influenced passage of this suspension.²³⁴ The Crown also issued warrants to take in additional prisoners. Several of these warrants expressly stated that they were based on suspicion alone (instead of being based on evidence that could substantiate criminal charges); the Crown also issued general warrants that expressly provided for the arrest of so-called “suspicious persons.”²³⁵ Meanwhile, William declared war against France, and James’s plot to retake the English throne had picked up considerable momentum.²³⁶ These developments triggered a debate in Parliament over a proposal to extend the suspension a third time.²³⁷

Hampden introduced the measure in the Commons. His remarks are illuminating as to the animating purpose of the suspension:

Dangers usually come not in a day; growing dangers, and the consequences, are in the dark, when it is too late to prevent. What is the meaning of all the intelligence that comes out of the Country, of ill-affections to the Government? And have we not a body here that are mutinying against the Government? In *Lancashire*, since the *Irish* were disbanded, they meet in parties, and you have no way to obviate this danger but by this Bill. You are willing to go home; what will the King do? Dangerous

²³⁰ *Id.*

²³¹ See An Act for Impowering His Majesty to Apprehend and Detaine Such Persons as He Shall Finde Just Cause to Suspect Are Conspireing Against the Government, 1688, 1 W. & M., c. 7 (Eng.); 2 HISTORY AND PROCEEDINGS, *supra* note 220, at 304–05 (noting royal assent granted April 24, 1689). This Act ran to May 25, 1689. 1 W. & M., c. 7.

²³² 14 H.L. JOUR. (1689) 190–91 (Eng.).

²³³ 1 W. & M., c. 7. The suspension also expanded the scope of those who were given the power to commit upon suspicion to include either one of the two secretaries of state. *Id.*

²³⁴ See Crawford, *supra* note 214, at 623. Thus, the Act specifically made itself applicable to “every Person or Persons that Shall be in Prison at or upon the [25th of April, 1689] or after.” 1 W. & M., c. 7.

²³⁵ Crawford, *supra* note 214, at 623 (citing the relevant portions of the warrant-book of the home department).

²³⁶ *Id.* at 624.

²³⁷ 9 GREY’S DEBATES, *supra* note 208, at 262–63.

persons will be delivered out of prison of course, if this Bill prevent it not; and they may act to the Subversion of the Government. . . . And if people conspire, the King cannot keep them in prison; since they must come out by *Habeas Corpus*, if you prevent it not by this Bill. We are in War, and if we make only use of that remedy as if we were in full Peace, you may be destroyed without remedy. This Bill is for present occasion, and for a short time only I move it.²³⁸

Unlike the prior two bills, this proposal provoked extensive debate in the Commons. Whether for or against the measure, speakers uniformly equated suspension with empowering the Crown to arrest outside the criminal process those persons thought to be working with the enemy.²³⁹ Likewise, all appear to have assumed that the criminal laws governed in the ordinary course in the absence of a suspension.²⁴⁰ Thus, Sir John Hawles defended the bill as necessary to confine the disaffected and thereby prevent them “from doing mischief.”²⁴¹ Colonel John Birch cautioned that “[w]e are in a state of War . . . [with] disaffected persons in every corner” and urged that the bill was necessary to address the fact that many prisoners “that disturb the Government have been picked up, but not tried, in two or three months.”²⁴² Implicit in his comment was the idea that where not timely tried, such persons could no longer be lawfully committed if the suspension were permitted to lapse.

For this reason, Sir Christopher Musgrave opposed the extension. In his view, the bill “suspends not only the *Habeas Corpus*, but the Law that was before it.”²⁴³ He believed that the law — in particular, the criminal law — was sufficient to address the crisis at hand. As he put it: “We hear of several clapped up, and no prosecution against them We are told of some going to King *James*; if that be so, you have a Law to punish them; and if any break in upon your Army, ‘tis Rebellion, and you may punish them.”²⁴⁴ Along the same lines, Clarges said that “[t]is so much against the privilege of the subject that any man may be imprisoned upon a bare suggestion, and not have

²³⁸ *Id.*

²³⁹ *Id.* at 262–76.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 267 (“I think it fit that such a Bill be brought in, in time of danger from abroad, and within the realm; and ‘tis only to confine them from doing mischief.”). Circumstances must have been dire for Hawles to support the measure, given that during this same period his writings championed an expansive view of the role of the jury in criminal cases. See THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE 252–53, 255–60 (1985).

²⁴² 9 GREY’S DEBATES, *supra* note 208, at 265.

²⁴³ *Id.* at 267.

²⁴⁴ *Id.*; see also *id.* at 265 (remarks of Sir Robert Sawyer) (lamenting that the “Bill does not take care for Proof of a Charge against a man” but instead permits commitment “[u]pon a bare Suspicion”).

benefit of *Habeas Corpus*.²⁴⁵ To the contrary, he said that he “would not have any man committed, by this Bill, but by Oath, and that the accuser do give security to *prosecute*.”²⁴⁶

Sir Robert Cotton then detailed the connection between the writ and the protections inherent in criminal procedure:

Laws are made that a man may be safe, that a man may know his crime before he be committed to prison, and may recover his Liberty in a legal manner, as the Law appoints. If this was for . . . any ground of reasonable suspicion; but when the suspicion has no ground, but upon private resentments, and that not so open, and not know why suspected, this alters the very reason of the Law of *Habeas Corpus*.²⁴⁷

The “Law” to which Cotton referred here was the accepted rules of criminal procedure. Thus, Cotton equated the function of the writ with ensuring that “a man may know his crime before he be committed to prison” and test the sufficiency of the grounds of the charges against him in that process.

Whether for or against the bill, all seemed to appreciate that they were creating a precedent for the future. In one particularly colorful statement, Sir Robert Napier observed: “This Mistress of ours, the *Habeas Corpus* Act, if we part with it twice, it will become quite a common Whore.”²⁴⁸ Ultimately, despite substantial opposition,²⁴⁹ the bill passed in both houses, received the royal assent, and extended the suspension for five additional months.²⁵⁰ Like the first extension, it permitted commitment on suspicion of high treason as well as suspicion of “Treasonable Practices.”²⁵¹ When this extension finally lapsed, several prisoners being held without sufficient evidence to support criminal charges successfully petitioned for writs of habeas corpus.²⁵² In fact, during this period, King’s Bench bailed or discharged some eighty per-

²⁴⁵ *Id.* at 271.

²⁴⁶ *Id.* (emphasis added).

²⁴⁷ *Id.* at 274.

²⁴⁸ *Id.* at 263.

²⁴⁹ Those for and against the measure divided strictly along party lines. See CRAWFORD, *supra* note 220, at 34. Probably due to this fact, these debates include the first suggestions that the suspension power could be abused and wielded against political enemies. See 9 GREY’S DEBATES, *supra* note 208, at 264–67 (remarks of Sir Robert Sawyer, Sir Joseph Tredenham, and Sir Robert Cotton).

²⁵⁰ An Act for Impowering Their Majestyes to Committ Without Baille Such Persons as They Shall Finde Just Cause to Suspect Are Conspireing Against the Government, 1688, 1 W. & M., c. 19 (Eng.); 2 HISTORY AND PROCEEDINGS, *supra* note 220, at 321 (noting royal assent granted May 28, 1689). The Act ran until October 23, 1689. See 1 W. & M., c. 19.

²⁵¹ 1 W. & M., c. 19.

²⁵² See CRAWFORD, *supra* note 220, at 46 (“Immediately after the expiration of the Suspension Act, we find numerous mentions of writs of Habeas Corpus being granted . . .”) (citing 12 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 598, 613–14 (London, T.C. Hansard 1816)); see also Crawford, *supra* note 214, at 626–27.

cent of those who sought writs of habeas corpus; meanwhile, those remaining in detention generally proceeded toward trial on criminal charges.²⁵³ An attempt to renew the suspension in the spring of 1690 failed,²⁵⁴ and shortly thereafter William personally commanded the English army in Ireland in its defeat of James at the Battle of the Boyne, spurring James to flee back to France.²⁵⁵

This important first experiment with suspension says much about the prevailing understanding of the privilege and its suspension. The entire point of a suspension was to empower the Crown — in a time of great national crisis — to arrest preventively and without criminal charges persons within protection who were feared to be working with the enemy. And in the absence of a suspension, the law demanded that such persons be dealt with according to the criminal process. Where these principles were violated, the courts could not “refuse a writ of Habeas Corpus or release on bail, if demanded, providing nothing more substantial than suspicion could be shown.”²⁵⁶

In the years that followed, William’s reign continued on uncertain footing, and England remained at an almost constant state of war with France. During this time, the war was going badly: William’s popularity at home was suffering; James, again with the support of France, had assembled troops to prepare for an invasion; and James’s supporters at home were amassing their own troops to prepare for a general uprising.²⁵⁷ In February 1696, William learned of an assassination plot the night before it was to be implemented.²⁵⁸ He reacted immediately — first, by arresting several conspirators, and second, by sum-

²⁵³ See HALLIDAY, *supra* note 142, at 32; Halliday & White, *supra* note 116, at 626–27, 626 n.145. Even though it declined to extend the suspension at this point, “Parliament . . . was determined to hinder the escape of the more conspicuous offenders.” Crawford, *supra* note 214, at 627. Thus, when the suspension lapsed, Parliament apparently itself ordered the commitment of certain persons to the Tower. *Id.* The parliamentary practice of circumventing the criminal process and committing persons by “legislative declaration of the guilt of the party, without trial” served as the impetus for the Bill of Attainder Clause in the Constitution. 1 TUCKER, *supra* note 199, app. at 293. That clause immediately follows the Suspension Clause and prohibits Congress from engaging in the same practice. U.S. CONST. art. I, § 9, cl. 3; see also 3 STORY, *supra* note 195, § 1338, at 211 (observing that “[b]ills of this sort have been most usually passed in England in times of rebellion, or of gross subrviency to the crown, or of violent political excitements; periods, in which all nations are most liable . . . to forget their duties, and to trample upon the rights and liberties of others”); 1 TUCKER, *supra* note 199, app. at 292–93. St. George Tucker noted in his American version of *Blackstone’s Commentaries* that the practice had largely died out in England well before the time of ratification. *Id.* app. at 293.

²⁵⁴ See 10 GREY’S DEBATES, *supra* note 208, at 126–50. In these debates, one member of Parliament observed: “If an Angel came from Heaven that was a Privy-Counsellor, I would not trust my Liberty with him one moment.” *Id.* at 141 (remarks of Sir William Whitlock).

²⁵⁵ See JOCK HASWELL, JAMES II 302–03 (1972).

²⁵⁶ CRAWFORD, *supra* note 220, at 43.

²⁵⁷ See 4 MACAULAY, *supra* note 164, at 220–48 (London, Longman, Brown, Green & Longmans 1855).

²⁵⁸ See CRAWFORD, *supra* note 220, at 51–52, 58.

moning the Commons to the House of Lords and requesting the houses “to do every thing which you shall judge proper for our common Safety.”²⁵⁹ In a joint resolution, the houses responded immediately that they “desire[d] his Majesty to give speedy Order for securing such Persons, with their Horses and Arms, as he shall have just Reason to suspect are Enemies to his Person and Government.”²⁶⁰ Then, within a matter of days, both houses passed and the King signed new suspension legislation modeled on the second and third suspension acts of 1689.²⁶¹ Presumably, this formal act of suspension would have been superfluous had Parliament viewed its joint resolution as having freed the Crown of the obligations imposed on it by the Habeas Corpus Act.

This suspension, which ran for six months, once again empowered the Crown to arrest and detain on suspicion of treason and treasonous practices outside the criminal process. The Act’s preamble cited the “time of imminent Danger” and stated that it was intended to reach “Traiterous Conspiracies of Evil disposed Persons.”²⁶² The bill does not appear to have met with any opposition,²⁶³ and unsurprisingly, a number of arrests followed its passage.²⁶⁴ In the year after the suspension lapsed, King’s Bench released all twenty-three prisoners who sought petitions before it who had been imprisoned by Crown warrants.²⁶⁵ Others were prosecuted and convicted for their acts, save one — Sir John Fenwick, who had been implicated in the assassination plot.²⁶⁶ His prosecution for high treason failed because one of the witnesses against him had escaped and fled.²⁶⁷ When Parliament sought to keep Fenwick committed by passing a bill of attainder against him,²⁶⁸ “[t]his measure was generally condemned.”²⁶⁹

In response to the continued efforts of the Jacobites to reinstate the Stuart line, similar acts of suspension followed in 1708,²⁷⁰

²⁵⁹ 15 H.L. JOUR. (1696) 679 (Eng.); 11 H.C. JOUR. (1696) 465 (Eng.).

²⁶⁰ 11 H.C. JOUR. (1696) 465.

²⁶¹ See An Act for Impowering His Majestie to Apprehend and Detain Such Psons as Hee Shall Find Cause to Suspect Are Conspiring Against His Royal Person or Government, 1696, 7 & 8 Will. 3, c. 11 (Eng.); 11 H.C. JOUR. (1696) 497 (Eng.) (noting royal assent given March 7, 1696).

²⁶² 7 & 8 Will. 3, c. 11.

²⁶³ CRAWFORD, *supra* note 220, at 56.

²⁶⁴ See *id.* at 59.

²⁶⁵ See HALLIDAY, *supra* note 142, at 250.

²⁶⁶ See CRAWFORD, *supra* note 220, at 59.

²⁶⁷ *Id.*

²⁶⁸ 8 & 9 Will. 3, c. 4 (1696) (Eng.).

²⁶⁹ CRAWFORD, *supra* note 220, at 59–60 (citing, among others, 13 HOWELL, *supra* note 252, at 538–758). For more discussion of bills of attainder, see *supra* notes 199, 253.

²⁷⁰ See An Act to Impower Her Majesty to Secure and Detain Such Persons as Her Majesty Shall Suspect Are Conspiring Against Her Person or Government, 1707, 6 Ann., c. 67 (Gr. Brit.);

1715,²⁷¹ 1722,²⁷² and 1744.²⁷³ In the 1744 legislation, Parliament addressed yet another “threatened . . . Invasion by a *French* power, in concert with disaffected Persons at Home” — particularly in Scotland, where Parliament feared the seeds of a major uprising had been sown.²⁷⁴ The legislation came immediately after reports that the French fleet had assembled and was preparing to sail.²⁷⁵ To defend against the impending attack and secure “the Laws and Liberties of th[e] Kingdom,” Parliament provided that “[p]ersons in Prison may be detained for Treason, or Suspicion” notwithstanding the Scottish equivalent of the Habeas Corpus Act, which was temporarily “suspended.”²⁷⁶

It was not long before Parliament acted again. In the wake of its failed invasion of 1744, France declared war on Britain.²⁷⁷ After France won several battles on the continent, the Crown feared that France would try again to invade.²⁷⁸ Meanwhile, by 1745, a full-fledged “wicked and unnatural Rebellion” was under way in Scotland in which certain “Subjects, encouraged by His [Majesty’s] Enemies Abroad,” were attempting once again to reinstate the Stuart line.²⁷⁹ Led by James II’s grandson Charles, a Jacobite force composed largely of highlanders had taken Edinburgh and was marching south under Charles’s direction for London. Charles viewed Scotland as the only place where he could trigger an uprising without French help; once it

18 H.L. JOUR. (1708) 506 (Gr. Brit.) (noting royal assent given March 11, 1708). This suspension came in response to a planned invasion by James with French support.

²⁷¹ See An Act to Impower His Majesty to Secure and Detain Such Persons as His Majesty Shall Suspect Are Conspiring Against His Person and Government, 1714, 1 Geo., stat. 2, c. 8 (Gr. Brit.); 20 H.L. JOUR. (1715) 128 (Gr. Brit.) (noting royal assent given July 23, 1715). Parliament renewed this suspension the following year. See 1 Geo., stat. 2, c. 30 (1715) (Gr. Brit.); 20 H.L. JOUR. (1716) 269–70 (Gr. Brit.) (noting royal assent given January 21, 1716). In the same session, Parliament enacted a statute “for the more easy and speedy Trial of such Persons as have levied or shall levy War against his Majesty.” 1 Geo., stat. 2, c. 33.

²⁷² See An Act to Impower His Majesty to Secure and Detain Such Persons, as His Majesty Shall Suspect Are Conspiring Against His Person and Government, 1722, 9 Geo., c. 1 (Gr. Brit.); 22 H.L. JOUR. (1722) 21–22 (Gr. Brit.) (noting royal assent given October 17, 1722).

²⁷³ See An Act to Impower His Majesty to Secure and Detain Such Persons as His Majesty Shall Suspect Are Conspiring Against His Person and Government, 1744, 17 Geo. 2, c. 6 (Gr. Brit.); 26 H.L. JOUR. (1744) 332, 334–35 (Gr. Brit.) (noting royal assent given March 2, 1744).

²⁷⁴ 17 Geo. 2, c. 6.

²⁷⁵ See JOHN L. ROBERTS, *THE JACOBITE WARS* 70 (2002). As the law’s terms reflect, Parliament was deeply concerned over Jacobite support in Scotland.

²⁷⁶ 17 Geo. 2, c. 6. This Act ran only for a very brief period, until April 29, 1744. See *id.*

²⁷⁷ See ROBERTS, *supra* note 275, at 70.

²⁷⁸ See *id.* at 71.

²⁷⁹ An Act to Impower His Majesty to Secure and Detain Such Persons as His Majesty Shall Suspect Are Conspiring Against His Person and Government, 1745, 19 Geo. 2, c. 1 (Gr. Brit.); 26 H.L. JOUR. (1745) 511 (Gr. Brit.) (noting royal assent given October 21, 1745).

was underway, he believed that the French would “have every incentive to supply men and arms to restore the Stuart dynasty.”²⁸⁰

In response and for the preservation of “his Majesty’s Sacred Person, and the securing the Peace of this Kingdom in a Time of so much Danger, against all traiterous Attempts and Conspiracies whatsoever,” Parliament provided that “[p]ersons imprison’d for Suspicion of High Treason may be detained without Bail” until the following year.²⁸¹ The legislation again “suspended” the Scottish “act for preventing wrongous Imprisonment.”²⁸² This suspension again targeted those suspected of or known to be aiding or fighting alongside the enemy and authorized their detention without charges until order could be restored. Such order eventually returned in the wake of the Jacobite army’s major defeat at the Battle of Culloden in 1746.²⁸³

One English suspension deserves special attention, for it heavily influenced the thinking of the Founding generation. Nonetheless, it has largely escaped attention from American legal scholars. In 1777, Parliament responded to the outbreak of rebellion in the colonies by enacting new suspension legislation. It provided:

Whereas a Rebellion and War have been openly and traiterously levied and carried on in certain of His Majesty’s Colonies and Plantations in *America*, and Acts of Treason and Piracy have been committed on the High Seas, and upon the Ships and Goods of his Majesty’s Subjects, and many Persons have been seised and taken, who are expressly charged or strongly suspected of such Treasons and Felonies, and many more such Persons may be hereafter so seised and taken: And whereas such Persons have been, or may be brought into this Kingdom, and into other Parts of his Majesty’s Dominions, and 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; be it therefore enacted . . . That all and every Person or Persons who have been, or shall hereafter be seised or taken in the Act of High Treason . . . or in the Act of Piracy, or who are or shall be charged with or suspected of the Crime of High Treason . . . and who have been, or shall be committed, in any Part of his Majesty’s Dominions, for such Crimes . . . or for Suspicion of such

²⁸⁰ ROBERTS, *supra* note 275, at 76.

²⁸¹ 19 Geo. 2, c. 1. This Act ran until April 19, 1746.

²⁸² *Id.* Parliament extended this suspension in April 1746. See An Act for Continuing an Act of This Present Session of Parliament, Intituled, *An Act to Impower His Majesty to Secure and Detain Such Persons as His Majesty Shall Suspect Are Conspiring Against His Person and Government*, 1746, 19 Geo. 2, c. 17 (Gr. Brit.); 26 H.L. JOUR. (1746) 565–66 (Gr. Brit.) (noting royal assent given April 19, 1746). Parliament extended the suspension in November 1746. See An Act for the Further Continuing an Act Made in the Last Session of Parliament, Intituled, *An Act to Impower His Majesty to Secure and Detain Such Persons as His Majesty Shall Suspect Are Conspiring Against His Person and Government*, 1746, 20 Geo. 2, c. 1 (Gr. Brit.) (extending the suspension to February 20, 1747); 27 H.L. JOUR. (1746) 9 (Gr. Brit.) (noting royal assent given November 26, 1746).

²⁸³ See ROBERTS, *supra* note 275, at 175–88.

Crimes . . . shall and may be thereupon secured and detained in safe Custody, without Bail or Mainprize . . . any Law, Statute, or Usage, to the contrary in anywise notwithstanding.²⁸⁴

The Act applied only to those acts “committed in any of his Majesty’s Colonies or Plantations in *America*, or on the High Seas.”²⁸⁵ It also governed those engaged in piracy — a category that encompassed, in the view of Parliament, the acts of American privateers. (Parliament, of course, would never acknowledge such persons as sailing under letters of marquee issued by a foreign government; thus, it labeled them “pirates.”)

Like the suspensions that preceded it, this one granted temporary allowance for detention without trial and conviction of “[p]ersons” who were either charged with high treason or more generally “suspected” of the same.²⁸⁶ As its terms made clear, the entire purpose of the suspension was to permit the detention of prisoners during the war outside the normal criminal process.²⁸⁷ Parliament explained that it adopted the Act because “it may be inconvenient in many such Cases to proceed forthwith to the Trial of such Criminals” — the rebellious colonists — “and at the same Time of evil Example to suffer them to go at large.”²⁸⁸ The solution adopted here was the same as that chosen in 1689 and in subsequent wartime episodes: a suspension of the protections normally embodied in the privilege. Parliament renewed this suspension on a year-by-year basis throughout the war, only permitting it to lapse in 1783.²⁸⁹

Thus, one need not look beyond the text of the 1777 Act to see that its very purpose was to set aside, for a time, the ordinary protections inherent in the criminal process. All the same, further support may be found in the parliamentary debates preceding its adoption. Throughout those debates, the legislation was conceived of as a natural outgrowth of the earlier suspension acts and, for that reason, it encountered considerable resistance. Many in Parliament were deeply concerned that a generous interpretation of the Act could lead to its

²⁸⁴ 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, 1777, 17 Geo. 3, c. 9 (Gr. Brit.); 35 H.L. JOUR. (1777) 78, 82–83 (Gr. Brit.) (noting royal assent given March 3, 1777).

²⁸⁵ 17 Geo. 3, c. 9.

²⁸⁶ *Id.*

²⁸⁷ *See id.*

²⁸⁸ *Id.*

²⁸⁹ Parliament renewed the original one-year suspension five times. *See* 22 Geo. 3, c. 1 (1782) (Gr. Brit.); 21 Geo. 3, c. 2 (1781) (Gr. Brit.); 20 Geo. 3, c. 5 (1780) (Gr. Brit.); 19 Geo. 3, c. 1 (1779) (Gr. Brit.); 18 Geo. 3, c. 1 (1778) (Gr. Brit.).

application to persons in England,²⁹⁰ as opposed to only persons captured in the colonies and on the high seas.

In introducing the measure, Lord Frederick North, who served as the leader of the House of Commons and as Prime Minister during this period, emphasized (as the text of the Act later reflected) that the entire purpose of the Act was to permit the Crown to hold rebellious colonists on English soil outside the normal criminal process. As North reportedly observed:

[T]here had been, during the present war in America, many prisoners made, who were in actual commission of the crime of high treason; and, there were persons, at present, guilty of that crime, who might be taken, but perhaps *for want of evidence could not be kept in gaol*. That it had been customary upon similar occasions of rebellion, or danger of invasion, to enable the king to seize suspected persons 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.*²⁹¹

As this account makes clear, Lord North viewed the bill as necessary to treat the disaffected colonists “like other prisoners of war,” particularly given the “want of evidence” that existed to sustain charges in many cases.²⁹² In keeping with this idea, John Dunning lamented that under the bill, “[n]o man is exempt from punishment, because innocence is no longer a protection.”²⁹³

Digging still further to examine the circumstances that drove adoption of this legislation reveals an important lesson in the story of habeas corpus and the American Constitution. In the period between adoption of the Habeas Corpus Act and the Revolutionary War, the Crown had consistently denied the colonists the “privilege” of enjoying the benefit of the protections of the Habeas Corpus Act. Thus, within a month of taking the throne, King James II vetoed New York’s Char-

²⁹⁰ See, e.g., 19 THE PARLIAMENTARY HISTORY OF ENGLAND 18–19 (London, T.C. Hansard 1814) [hereinafter COBBETT’S PARLIAMENTARY HISTORY] (remarks of John Morton); *id.* at 21 (remarks of Mr. Luttrell). See generally *id.* at 3–53 (detailing debates in February 1777). (*Cobbett’s* is an account drawn from various sources, including newspapers, pamphlets, memoirs, and diaries. It is relied upon here as one of the best accounts of the relevant debates.) In response to its members’ concerns about the potential scope of the Act, Parliament limited the reach of the Act. See *supra* p. 945.

²⁹¹ 19 COBBETT’S PARLIAMENTARY HISTORY, *supra* note 290, at 4 (emphases added). The Act was commonly known as “North’s Act.” See Catherine M. Prelinger, *Benjamin Franklin and the American Prisoners of War in England During the American Revolution*, 32 WM. & MARY Q. 261, 264 (1975) (internal quotation marks omitted).

²⁹² 19 COBBETT’S PARLIAMENTARY HISTORY, *supra* note 290, at 4. Thus, as one speaker put it, if “attack[ing] . . . the palladium of English liberty” is how they should “expect to recover our colonies,” it will be “at the expence of Magna Charta.” *Id.* at 40 (remarks of James Luttrell) (Feb. 17, 1777). For more on these debates and reaction to this suspension, consult Halliday & White, *supra* note 116, at 644–51.

²⁹³ 19 COBBETT’S PARLIAMENTARY HISTORY, *supra* note 290, at 9.

ter of Liberties and Privileges (which he had earlier approved as Duke of York²⁹⁴) by responding to the colonists' claim to "be governed by and according to the Laws of England" that "[t]his Priviledge is not granted to any of His Ma^{ty}s Plantations where the Act of Habeas Corpus and all such other Bills do not take Place."²⁹⁵ Similarly, the Privy Council disallowed an attempt by Massachusetts in 1692 to pass a Habeas Corpus Act that essentially copied the 1679 English Act. As the Council responded in 1695:

[W]hereas . . . the writt of Habeas Corpus is required to be granted in like manner as is appointed by the Statute 31 Car. II. in England, which privilege has not as yet been granted in any of His Maj^{ty}s Plantations, It was not thought fitt in His Maj^{ty}s absence that the said Act should be continued in force and therefore the same hath been repealed.²⁹⁶

To the extent that any doubt remained on this score, Massachusetts's colonial governor declared in 1699 that the "Habeas corpus act [is] not to be in force in the colonies."²⁹⁷ It followed that "[i]n the majority of the colonies formal habeas corpus acts were not passed until after the American Revolution, when they were free from any hindrance on the part of England."²⁹⁸

The denial of the protections of the Habeas Corpus Act to the colonists proved to be one of their most significant complaints about British rule. In 1774, for example, the Continental Congress documented its complaints about British rule in a letter to the people of Great Britain. There, the 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."²⁹⁹

There existed little doubt, however, that so long as the colonists claimed the benefits of subjecthood or the Crown continued to demand

²⁹⁴ See David S. Lovejoy, *Equality and Empire: The New York Charter of Liberties, 1683*, 21 WM. & MARY Q. 493, 510–14 (1964) (detailing story).

²⁹⁵ Observations upon the Charter of the Province of New-York (1684), in 3 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW-YORK 357, 357 (John Romeyn Brodhead ed., Albany, Weed, Parsons & Co. 1853).

²⁹⁶ Act for the Better Securing the Liberty of the Subject, and for Prevention of Illegal Imprisonment, ch. 42, 1692–1714 Mass. Acts 95, 99 (quoting Letter from the Privy Council) (internal quotation mark omitted).

²⁹⁷ PAUL M. HAMLIN & CHARLES E. BAKER, SUPREME COURT OF JUDICATURE OF THE PROVINCE OF NEW YORK, 1691–1704: INTRODUCTION 389 (1959) (alteration in original) (internal quotation marks omitted).

²⁹⁸ A.H. Carpenter, *Habeas Corpus in the Colonies*, 8 AM. HIST. REV. 18, 26–27 (1902); see also Dallin H. Oaks, *Habeas Corpus in the States — 1776–1865*, 32 U. CHI. L. REV. 243, 251 (1965) (same).

²⁹⁹ 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 88 (Worthington Chauncey Ford ed., 1904) [hereinafter JOURNALS OF THE CONTINENTAL CONGRESS]; see also *id.* at 107–08 (replicating same complaint).

their allegiance while denying their independence, captured colonists could claim the benefit of the Act once brought upon proper English soil. This fact proved to be of great concern to Lord North's Administration. In August 1776, North's Secretary of State for America, Lord George Germain, wrote to the Chief Justice of King's Bench, Lord Mansfield, for advice concerning how to treat four American officers who had been captured on the seas trying to intercept British ships and were now at the port of London.³⁰⁰ Lord Mansfield responded: "Their crime abstractedly and upon the face of it is piracy, and it is better so to treat it, though under all the collateral circumstances I take them to be guilty of high treason in levying war."³⁰¹ Assuming it unlikely that the prisoners would be sent back to America (where the Act did not govern) as another prominent American prisoner had been the year before,³⁰² Lord Mansfield contrasted them with "prisoners of war," whom, he opined, "the King might keep . . . where he pleased."³⁰³ But, Lord Mansfield cautioned:

If these 4 are so wickedly advised as to claim to be considered as subjects and apply for a *habeas corpus*, it is their own doing; they force a regular commitment for their crime. Upon the return to the writ, if they are not committed before, opposition should be made to their discharge on the part of the Attorney-General upon information of their crime properly sworn, as a ground for their commitment.³⁰⁴

Thus, Lord Mansfield — one of the most influential English jurists of all time — warned North's Administration that to the extent that the colonists remained royal subjects, their commitment on English soil could be defended against a petition for a writ of *habeas corpus* only by sworn criminal charges presented against them. Notably, Lord Mansfield also mentioned here that "[d]uring the last rebellion and after . . . , many French officers were in gaol as rebels, being either born in the King's dominions or if born abroad the sons of British subjects; they were tried and condemned."³⁰⁵ On this basis, Lord Mansfield advised Germain to "direct the 4 to be kept aboard [a guardship] till further order, always being prepared in case of a *habeas corpus*."³⁰⁶ (No

³⁰⁰ Letter from Lord George Germain to Lord Mansfield (Aug. 6, 1776), in 12 DOCUMENTS OF THE AMERICAN REVOLUTION, 1770-1783, at 176, 176-77 (K.G. Davies ed., 1976) [hereinafter DOCUMENTS OF THE AMERICAN REVOLUTION].

³⁰¹ Letter from Lord Mansfield to Lord George Germain (Aug. 8, 1776), in 12 DOCUMENTS OF THE AMERICAN REVOLUTION, *supra* note 300, at 179, 179.

³⁰² *See id.* at 179-80.

³⁰³ *Id.* at 180.

³⁰⁴ *Id.*

³⁰⁵ *Id.* (noting that none were executed and all were "sent back"). This suggests that wearing the uniform of the enemy was irrelevant to the application of these governing legal principles. *See infra* pp. 1007-11.

³⁰⁶ Letter from Lord Mansfield to Lord George Germain, *supra* note 301, at 180.

doubt relying on Lord Mansfield's advice, Germain later instructed his officials in America that American prisoners, "not being on the foot of a foreign enemy . . . are not deemed prisoners of war in England but are committed for high treason."³⁰⁷

With the passage of another year, however, it was no longer feasible to detain all captured American sailors aboard English ships "to obstruct their access to courts and judges."³⁰⁸ Instead, space constraints meant that numerous prisoners would have to be transferred to British soil for detention.³⁰⁹ It was at this point that Parliament, rather than labeling the captured Americans "prisoners of war," which would have been tantamount to recognizing American independence, instead enacted the 1777 suspension legislation to set aside any entitlement enjoyed by the prisoners to the benefits of the Habeas Corpus Act.³¹⁰

Unlike prior legislation, this suspension did not, in so many words, actually "suspend" the privilege. This omission likely followed in part from the fact, already noted, that the Crown had consistently denied the colonists — at whom the legislation was directed³¹¹ — the protections of the Habeas Corpus Act. Regardless, those debating the legislation in Parliament conceived of it and referred to it repeatedly as a suspension akin to earlier suspensions that had been passed during times of war, and the legislation was modeled on those prior acts.³¹² The colonists, moreover, plainly viewed this legislation as akin to a formal suspension. One need look no further than George Washington's widely published 1777 "manifesto," which complained just a few

³⁰⁷ FRANCIS D. COGLIANO, *AMERICAN MARITIME PRISONERS IN THE REVOLUTIONARY WAR* 47 (2001).

³⁰⁸ HALLIDAY, *supra* note 142, at 251.

³⁰⁹ *See id.* (citing SHELDON S. COHEN, *YANKEE SAILORS IN BRITISH GAOLS* 26–29 (1995)).

³¹⁰ *See id.* at 251–52. Because the Crown had long claimed the right to deny the protections of the Habeas Corpus Act to the American colonies, *see supra* pp. 946–47, it followed that the Crown did not consider the Act to limit its detention authority with respect to colonists on American soil. *See infra* p. 954. Thus, whether for this reason or other political or "practical purposes," the British military often treated the rebels more like enemy belligerents when captured on American soil during the war, and it often exchanged them for British prisoners. Prelinger, *supra* note 291, at 272.

³¹¹ *See, e.g.*, 19 COBBETT'S PARLIAMENTARY HISTORY, *supra* note 290, at 17 (remarks of Lord North) (observing that "the inhabitants of Great Britain . . . were not within the Act").

³¹² *See, e.g., id.* at 9 (remarks of John Dunning) ("[W]hatever the title of the Bill may be, it is not an American, so much as it is a British suspension of the Habeas Corpus Act."); *id.* at 10–13 (remarks of Charles James Fox) (same); *id.* at 17–18 (remarks of Abel Moysey) (same); *id.* at 30 (remarks of John Wilkes) (observing that "[the] Bill . . . is to suspend the Habeas Corpus Act"); *id.* at 37–38 (remarks of the Attorney General) (connecting the proposed legislation to prior acts of suspension). Indeed, in debating an extension of the original bill, many members of Parliament, including Edmund Burke, continued to refer to it as a suspension. *See id.* at 465–66 (remarks of Edmund Burke) (referring to "suspending the Habeas Corpus," *id.* at 465, and warning that "this suspension may become a standing suspension, and consequently, the eternal suspension and destruction of the Habeas Corpus," *id.* at 466); *see also id.* at 464 (remarks of William Baker) (referring to "the late bill for the suspension of the Habeas Corpus Act").

months after passage of the Act that “arbitrary imprisonment has received the sanction of British laws by the suspension of the Habeas Corpus Act.”³¹³

Lest one forget the context in which this much-extended suspension took place, it was during a war within which the American colonists were unquestionably viewed as traitors. (Indeed, the 1777 Act labeled them as such.) In the view of the English, the colonists could not break away from their allegiance owed to the Crown. This legislation would have been unnecessary had Parliament or the Crown otherwise enjoyed a general power to treat the colonists — most especially those detained in England, where the Habeas Corpus Act applied to royal subjects — as prisoners of war. By this time, however, it was well settled under English law that Parliament was constrained by the Habeas Corpus Act, which required that the detention of subjects owing allegiance be sustained by formal criminal charges.³¹⁴ Any other conclusion cannot be reconciled with the expressly stated purpose of this legislation and invites the question why Parliament felt at all compelled to enact it in the first instance.

An important but much-ignored culmination of the story of the Revolutionary War suspensions enacted by Parliament reinforces this conclusion. In the wake of the important American victory at Yorktown and the collapse of Lord North’s Administration, peace negotiations commenced and resulted in a preliminary accord in November 1782 that recognized American independence.³¹⁵ Meanwhile, Parliament had declined to extend the final suspension, which was set to expire on January 1, 1783. Parliament did, however, address the legality of the continuing detention of the “*American Prisoners brought into Great Britain*” during the “present Hostilities.”³¹⁶ Rather than renew the suspension, Parliament chose a course commensurate with the direction of peace negotiations — namely, one that suggested that it no

³¹³ 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 457 (Sylvanus Urban ed., London, n. pub. 1777), reprinted in CONTINENTAL J. & WKLY. ADVERTISER (Boston), Mar. 5, 1778, at 3.

³¹⁴ According to historian Olive Anderson, “[c]aptured Americans created exceptionally awkward problems, since neither wholesale release nor wholesale trial for treason or piracy was practicable, and Habeas Corpus made indefinite imprisonment illegal.” Olive Anderson, *The Treatment of Prisoners of War in Britain During the American War of Independence*, 28 BULL. INST. HIST. RES. 63, 66 (1955); see also *id.* at 82 (“Americans taken in arms were not prisoners of war but traitors or pirates . . .”); Prelinger, *supra* note 291, at 264 (“Americans who were seized in combat were not considered prisoners of war, but traitors.”).

³¹⁵ See JOSEPH C. MORTON, *THE AMERICAN REVOLUTION* 95–96 (2003).

³¹⁶ 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) 425–26 (Gr. Brit.) (noting royal assent given March 25, 1782).

longer viewed the colonists as owing allegiance but instead viewed them as members of a newly formed and wholly separate nation.

Specifically, Parliament passed “An Act for the better detaining, and more easy Exchange, of *American* Prisoners brought into *Great Britain*.”³¹⁷ The statute authorized the King “to hold and detain . . . as *Prisoners of War*, all Natives or other Inhabitants of the Thirteen *revolted* Colonies not at His Majesty’s Peace.”³¹⁸ Further, the Act contemplated the exchange of such prisoners “according to the Custom and Usage of War, and the Law of Nations” — that is, the treatment of the prisoners would now be governed by the law of nations, *not* domestic English law.³¹⁹ In short, Parliament no longer believed that a suspension was necessary to hold the American prisoners without charges on English soil, where the privilege would otherwise be available to subjects, because the Americans had been converted into prisoners of war — a concept that, for the times, was entirely at odds with the notion of falling within the protection of domestic English law.³²⁰ Indeed, for this very reason, Benjamin Franklin pointed to this legislation as “a renunciation of the British Pretensions to try our People as Subjects guilty of High Treason” and a “tacit acknowledgment of our Independency.”³²¹ Put another way, once the Crown recognized the inevitable conclusion that the lines of allegiance had been severed,³²² the wartime acts of the colonists were no longer treasonous but represented acts of the enemy soldiers of a foreign state.

The manner in which Parliament viewed American prisoners taken during the Revolutionary War reveals much about the then-prevailing English understanding of the privilege and suspension. Unless and until the lines of allegiance were severed, English law did not countenance the detention of one owing allegiance as a so-called “prisoner of war” and without criminal charges where the Habeas Corpus Act unquestionably applied.

³¹⁷ 22 Geo. 3, c. 10.

³¹⁸ *Id.* (emphases added). The Act authorized the Crown “to discharge any Person or Persons so taken and detained as Prisoner or Prisoners of War, either absolutely, or upon such Conditions, and with such Limitations, or for such a Time, as His Majesty shall deem proper.” *Id.*

³¹⁹ *Id.*

³²⁰ See Prelinger, *supra* note 291, at 290 (“[I]n 1782, the official British posture respecting prisoners, as well as its attitude toward the war in general, changed fundamentally. Parliament enacted legislation that recognized captured Americans as prisoners of war rather than rebels.”).

³²¹ Letter from Benjamin Franklin to John Adams (Apr. 21, 1782), in 8 THE WRITINGS OF BENJAMIN FRANKLIN 430, 431 (Albert Henry Smyth ed., 1906); see also *id.* (“Having taken this step, it will be less difficult for them to acknowledge it expressly.”). See generally Prelinger, *supra* note 291 (detailing Franklin’s role in trying to secure the exchange of American prisoners held in Britain during the war).

³²² The Treaty of Paris, formalizing Britain’s recognition of American independence, was signed a little more than a year later and provided for the release of all prisoners of war. See Definitive Treaty of Peace, U.S.-Gr. Brit., art. VII, Sept. 3, 1783, 8 Stat. 80.

*C. The Privilege, Suspension, and Individual Liberty
Under English Law*

Accordingly, the framework established in English law governing the relationship between the privilege and suspension was well settled by the time of ratification. It was also widely chronicled. As early as 1722, pamphleteers stressed the limited nature of a suspension and the constraints on the Crown's power to detain that governed in its absence: "[T]ho' his Majesty has a power to imprison whom he shall have Reason to suspect to be dangerous Persons, and Enemies to the Government, the time of keeping them under Confinement is limited by Parliament, and . . . the Occasion for which [the power] was granted him [by the suspension]."³²³

Several influential treatises written before and in the immediate wake of ratification tell the same story. In a particularly influential portion of his *Commentaries*, for example, Blackstone described suspensions as permitting the Executive "to imprison suspected persons without giving any reason for so doing," while cautioning that suspension acts were appropriate only "when the danger of the state is so great, as to render this measure expedient."³²⁴ He likewise cautioned: "[T]his experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with its liberty for a while, in order to preserve it for ever."³²⁵ Blackstone contrasted a suspension with times when the writ remains available to ensure "the preservation of . . . personal liberty" and protect against arrest outside the criminal process.³²⁶ In the similarly influential *American's Blackstone*, St. George Tucker linked this passage with the Suspension Clause in the American Constitution.³²⁷

In one of the most extensive treatments of the relationship between the privilege and suspension, Thomas Erskine May described acts of suspension as "suspend[ing], for a time, the rights of individuals, in the interests of the state" and displacing "the civil liberties of English-

³²³ CORKE, UNDENIABLE REASONS FOR SUSPENDING THE HABEAS CORPUS ACT, AND SECURING TRAYTORS 2 (n.p., George Bennett 1722).

³²⁴ 1 BLACKSTONE, *supra* note 137, at *132. Hamilton referenced Blackstone for related propositions in the *Federalist Papers*. See THE FEDERALIST NO. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

³²⁵ 1 BLACKSTONE, *supra* note 137, at *132.

³²⁶ *Id.* at *131.

³²⁷ 1 TUCKER, *supra* note 199, app. at 292 (observing in his annotation that the privilege "can be suspended, only, by the authority of congress; but not whenever congress may think proper; for it cannot be suspended, unless in cases of actual rebellion, or invasion"). Tucker's Americanized version of Blackstone's *Commentaries* was "the first major legal treatise on American law" and "one of the most influential legal works of the early nineteenth century." Davison M. Douglas, *Foreword: The Legacy of St. George Tucker*, 47 WM. & MARY L. REV. 1111, 1114 (2006).

men.”³²⁸ “Ringleaders must be seized, outrages anticipated, plots disconcerted, and the dark haunts of conspiracy filled with distrust and terror.”³²⁹ Continuing, May expounded on what those civil liberties entailed. Thus, he contrasted the power “to arrest, on suspicion” with “charg[ing] with treason” and bringing persons “to justice.”³³⁰ In a particularly illuminating passage, he summarized the relationship between suspension and the civil liberties of those within the protection of the laws as it was understood in the late eighteenth century:

Though termed a suspension of the Habeas Corpus Act, it was, in truth, a suspension of Magna Charta, and of the cardinal principles of the common law. Every man had hitherto been free from imprisonment until charged with crime by information upon oath; and entitled to a speedy trial, and the judgment of his peers. But any subject could now be arrested on suspicion of treasonable practices, without specific charge or proof of guilt: his accusers were unknown; and in vain might he demand public accusation and trial.³³¹

Here again, we find confirmation that the power to arrest outside the criminal process persons suspected of treasonous activities was linked entirely to invocation of the suspension authority. More generally, consistent with the evolution of the privilege in English law, this passage reveals that the writ of habeas corpus was much more than merely a judicial remedy — it embodied and made real a host of important rights that protected individual liberty.

To be sure, one must be careful in structuring arguments by analogy to pre-ratification English practices. In this country, the Founders both adopted a supreme and binding Constitution and deliberately rejected the structural norms of the English model that blended, rather than separated, the powers of government.³³² Nonetheless, it is simply impossible to make sense of the United States Constitution’s references to “Habeas Corpus” and suspension without resort to the English and colonial experiences that informed the Founders’ understanding of these terms. By the time of the Founding, students of English law understood that legislation framed or understood as a suspension of the privilege was the exclusive means by which the legislature could em-

³²⁸ 2 MAY, *supra* note 169, at 253.

³²⁹ *Id.* at 255.

³³⁰ *Id.* at 254.

³³¹ *Id.* at 255 (footnote omitted); *see also* CRAWFORD, *supra* note 220, at 17 (arguing that “in times of great public danger, personal liberty must sacrifice something in behalf of state liberty; that the executive must have the power to make summary arrests on suspicion of treason without benefit of bail or trial”); WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 141–42 (1980) (“The enactment was not so much a suspension of the writ itself as a suspension of the rights secured by the act, namely, discharge, bail, or speedy trial.” *Id.* at 142.).

³³² *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 27–29, 36–56 (2001).

power the Executive lawfully to detain persons within protection without criminal charges for criminal or national security purposes.³³³ As we will soon see, this marriage of rights and remedy, and the provision for limited suspension thereof in times of true emergency, is that which the Founding generation embraced and incorporated in the Constitution's Suspension Clause.

III. THE FOUNDING-ERA CONCEPTION OF THE PROTECTIONS INHERENT IN THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS AND HOW THEY RELATED TO ACTS OF SUSPENSION

Studying how the established norms embodied in the privilege came to be enshrined in the Suspension Clause likewise requires surveying the American landscape well before the Constitutional Convention. From the beginning, the colonists claimed to possess "all the rights, liberties and immunities of free and natural-born subjects, within the realm of England."³³⁴ But this claim rarely equated with the reality on the ground. As already noted, the Crown steadfastly denied the colonists the protections of the Habeas Corpus Act as well as trial by jury.³³⁵ King James II had vetoed New York's Charter of Liberties and Privileges on the basis that the "Priviledge" of "be[ing] governed by and according to the Laws of England . . . is not granted to any of His Ma^{ty} Plantations where the Act of Habeas Corpus and all such other Bills do not take Place."³³⁶ Accordingly, it was not uncommon for colonial governors to claim expansive detention powers. In one case, New York Governor Lord Bellomont advised his lieutenant governor with respect to two prisoners who had been taken into custody, "commit 'em to gaol without baile or mainprize, which I am positive you can legally justifie, and there's no removing them by *Habeas corpus*, for there is no such law in force in any of the Plantations."³³⁷ And in another case, English judge Joseph Dudley denied habeas relief to

³³³ Notably, Parliament was effectively all-powerful during this period, and theoretically, it would have required only an ordinary act of legislation, rather than legislation viewed as a suspension, to override the established norms embodied in the privilege. (To be sure, this suggestion gives too little credit to the entrenched, though unwritten, principles of the English constitution. For a helpful summary of Blackstone's views on how the English constitution functioned as "a precondition of law," consult John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 556–58 (2005).) This makes Parliament's establishment of the suspension model that much more significant as the limited and ultimately exclusive means of suspending the protections embodied in the privilege.

³³⁴ 1 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 299, at 68 (replicating 1774 Statement of Violation of Rights).

³³⁵ See *supra* pp. 946–47.

³³⁶ Observations upon the Charter of the Province of New-York, *supra* note 295, at 357.

³³⁷ Letter from Lord Bellomont to Lieutenant Governor of New York (July 23, 1699), in 18 CALENDAR OF STATE PAPERS, COLONIAL SERIES, AMERICA AND WEST INDIES, 1700, at 699, 700 (Cecil Headlam ed., 1910).

prisoners in New England who had long been held without charges on the basis that the Habeas Corpus Act “is particularly limited to the Kingdom of *England*.”³³⁸

The different treatment that the colonists experienced at the hands of the Crown formed the basis of grievances on more than one occasion.³³⁹ The Continental Congress, for example, wrote to the British populace in 1774 decrying the denial to the colonists of “trial by jury” and “the benefit of the habeas corpus Act, that great bulwark and palladium of English liberty.”³⁴⁰ That same year, while soliciting Canadian support for the cause of independence, the Continental Congress declared among the most fundamental rights the right to be governed by representatives of the people’s choosing, the right to trial by jury, and the privilege of habeas corpus.³⁴¹ In its words, “[t]hese are the rights, without which a people cannot be free and happy.”³⁴² Among them, habeas corpus was essential:

If a subject is seized and imprisoned, tho’ by order of Government, he may, by virtue of this right, immediately obtain a writ, termed a Habeas Corpus, from a Judge, whose sworn duty it is to grant it, and thereupon procure any illegal restraint to be quickly enquired into and redressed.³⁴³

In breaking away from England, the colonists would claim the privilege as their own and in time incorporate it into a new constitutional framework that entrenched its protections from suspension far more than English law had.

A. Declaring Independence and Forming a New Allegiance

This story begins just months before the formal declaration of independence by the colonies. In January 1776, the Continental Congress resolved that “those who refuse to defend their country should be

³³⁸ HAMLIN & BAKER, *supra* note 297, at 402–03 (internal quotation mark omitted) (citing sources).

³³⁹ See, e.g., *supra* pp. 947, 949; see also ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS 97, 98, 104 (Frank H. Hurd ed., 2d ed., Albany, W. C. Little & Co. 1876) (1858).

³⁴⁰ 1 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 299, at 88. Years earlier, prominent New England puritan minister Cotton Mather wrote: “Wee are Slaves, without the Habeas Corpus-Act.” HAMLIN & BAKER, *supra* note 297, at 401 (quoting Letter from Cotton Mather to John Cotton (Nov. 1678), in 4 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 383, 390 (1868)) (internal quotation marks omitted).

³⁴¹ 1 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 299, at 107–08 (replicating Lettre Adressée aux Habitans de la Province de Quebec (Oct. 26, 1774)).

³⁴² *Id.* at 108; see also *id.* (mentioning also “holding lands by the tenure of easy rents” and “freedom of the press”); *id.* (“These are the rights . . . which we are, with one mind, resolved never to resign but with our lives.”).

³⁴³ *Id.* at 107.

excluded from its protection.”³⁴⁴ Then, on June 24, 1776, the Congress declared that “all persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws.”³⁴⁵ This new allegiance, moreover, came with not only “the protection from the laws” but also the same expectation of loyalty as it had under English law.³⁴⁶ Thus, the Congress declared:

That all persons . . . owing allegiance to any of the United Colonies . . . who shall levy war against any of the said colonies within the same, or be adherent to the king of Great Britain, or others the enemies of the said colonies, or any of them . . . giving to him or them aid and comfort, are guilty of treason against such colony³⁴⁷

This resolution effectively embodied a renouncement of English citizenship and the creation of a new union just as much as did the Declaration of Independence, which followed only days later and reiterated: “The good People of these Colonies . . . are Absolved from all Allegiance to the British Crown.”³⁴⁸

In its June 24 resolution, the Continental Congress also “recommended to the legislatures of the several United Colonies” that they “pass laws for punishing . . . any of the treasons before described.”³⁴⁹ Most, if not all, of the colonies soon did, and many of the new laws relied heavily upon English conceptions of treason.³⁵⁰ There was, of course, a compelling need to address the problems of treason and disaffection during this period. Persons with Crown sympathies were ubiquitous in the colonies and hard to differentiate from those loyal to the new government. Further, colonists often traded with the enemy, “shared intelligence, harbored clandestine intruders, and joined in acts of sabotage, looting, and violence of the sort that today might be called ‘terrorism.’”³⁵¹ The dominant understanding embodied in the formal

³⁴⁴ 4 AMERICAN ARCHIVES 1631 (Peter Force ed., 4th ser., Washington, M. St. Clair Clarke & Peter Force 1843) (replicating Resolution of January 3, 1776).

³⁴⁵ 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 299, at 475 (Worthington Chauncey Ford ed., 1906) (replicating Resolution of June 24, 1776).

³⁴⁶ It bears noting here that “Anglo-American law has never held that allegiance is simply a question of citizenship.” Larson, *supra* note 140, at 867; *see also* COKE, *supra* note 182, at 4–5 (“[A]ll Aliens that are within the Realm of England, and whose Soveraignes are in amity with the King of England, are within the protection of the King, and do owe a locall obedience to the King . . . and if they commit High Treason against the King, they shall be punished as Traytors”); Hamburger, *supra* note 140, at 1851 (observing that during the Founding period, “not only citizens, but also lawfully visiting aliens who joined an enemy would have had the protection of the law, and they would therefore have gone free, unless tried . . . and convicted of treason or another offense”). *See generally* HALLIDAY, *supra* note 142, at 201–08 (discussing how English law viewed aliens and alien enemies).

³⁴⁷ 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 299, at 475.

³⁴⁸ THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

³⁴⁹ 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 299, at 475.

³⁵⁰ *See* BRIAN F. CARSO, JR., “WHOM CAN WE TRUST NOW?” 62–63 (2006).

³⁵¹ Hamburger, *supra* note 140, at 1855.

law of the time, however, remained that in the absence of a suspension of the privilege, those persons owing allegiance could be detained only on formal, substantiated criminal charges. Even when the Continental Congress empowered General George Washington “to arrest and confine persons who . . . are otherwise disaffected to the American cause,” it ordered him to “return to the states of which they are citizens, their names, and the nature of their offences, together with the witnesses to prove them”³⁵² — presumably so that such persons could be tried on criminal charges in the ordinary course. Supporting this interpretation is a subsequent resolution by the Congress declaring that those persons deemed to owe allegiance to the American cause who were captured fighting with the British should be sent to their home states “to be dealt with [under] the laws thereof.”³⁵³

Meanwhile, the Congress had already adopted the following resolution:

That all persons, *not members of, nor owing allegiance to*, any of the United States of America, as described in a resolution of Congress of the 24th of June last,³⁵⁴ who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States, or of any of them, shall suffer death, according to the law and usage of nations, by sentence of a court martial, or such other punishment as such court martial shall direct.³⁵⁵

In these resolutions, early American law distinguished, just as English law did, between those persons owing allegiance and those who fell outside the protection of domestic law, who instead were left to rely upon the “law and usage of nations” for their protection.

State laws generally drew the same distinction. Thus, following the Continental Congress’s treason resolution, many states enacted laws defining and criminalizing treasonous activity. In so doing, the states adopted most if not all of the procedural guarantees that had come to be associated with the crime of treason under English law.³⁵⁶ Consistent with the English distinction between traitors and enemies,³⁵⁷ moreover, many of the treason statutes differentiated between persons from whom allegiance was expected and those who fell outside protec-

³⁵² 6 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 299, at 1045–46 (Worthington Chauncey Ford ed., 1906) (replicating Resolution of December 27, 1776).

³⁵³ 9 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 299, at 1069 (Worthington Chauncey Ford ed., 1907) (replicating Resolution of December 30, 1777).

³⁵⁴ Here the Congress was referring to its earlier resolution with respect to allegiance and treason. *See supra* pp. 955–56.

³⁵⁵ 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 299, at 693 (emphasis added) (replicating Resolution of August 21, 1776).

³⁵⁶ *See* CARSO, *supra* note 350, at 62; *see also supra* p. 931 (discussing the Trial of Treasons Act, 1696, 7 & 8 Will. 3, c. 3 (Eng.)).

³⁵⁷ *See supra* pp. 930–31; *see also* 1 HALE, *supra* note 181, at 159; sources cited *supra* notes 182–185 (citing other authorities).

tion and therefore could not be charged with treason but who could be held as prisoners of war. Pennsylvania's 1777 treason statute provides one example: the legislation by its terms applied to persons falling "under the protection of [the state's] laws"³⁵⁸ but expressly did *not* apply to "prisoners of war."³⁵⁹ North Carolina's 1777 treason statute drew the same distinction.³⁶⁰

As the war unfolded, the Continental Congress urged state executives "to apprehend and secure all persons . . . who have, in their general conduct and conversation, evidenced a disposition inimical to the cause of America."³⁶¹ But of course, not all of the disaffected who were deemed to owe allegiance could be brought to trial on formal charges. Thus, a number of states responded just as English tradition had instructed them to — they enacted suspension legislation. In so doing, these states laid the groundwork for the suspension model that would be adopted by the Convention of 1787, while also confirming the growing recognition in the states of a robust habeas privilege, whether derived from common law³⁶² or legislation predicated upon the English Habeas Corpus Act, which was quite common.³⁶³ As evi-

³⁵⁸ An Act Declaring What Shall Be Treason, and What Other Crimes and Practices Against the State Shall Be Misprision of Treason, § 3, in *THE ACTS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA* 18, 18 (Thomas M'Kean ed., Philadelphia, Francis Bailey 1782).

³⁵⁹ *Id.* § 2.

³⁶⁰ See An Act Declaring What Crimes and Practices Against the State Shall Be Treason, and What Shall be Misprision of Treason, and Providing Punishments Adequate to Crimes of Both Classes, and for Preventing the Dangers Which May Arise from the Persons Disaffected to the State, in 24 *THE STATE RECORDS OF NORTH CAROLINA* 9, 9 (Walter Clark ed., 1905) (1777) (providing that "all and every Person and Persons (Prisoners of War excepted) now inhabiting or residing within the limits of the State of North-Carolina, or who shall voluntarily come into the same hereafter to inhabit or reside, do owe, and shall pay Allegiance to the State of North Carolina," *id.* § 1, and defining treasonous activities).

³⁶¹ 8 *JOURNALS OF THE CONTINENTAL CONGRESS*, *supra* note 299, at 695 (Worthington Chauncey Ford ed., 1907) (replicating Resolution of August 28, 1777).

³⁶² Indeed, examples may be found from the colonial period of the common law writ proving as effective as the Habeas Corpus Act, *see, e.g.*, *HAMLIN & BAKER*, *supra* note 297, at 390–400 (listing examples), while some states had long incorporated the English Act into their common law frameworks, *see, e.g.*, *JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION* 62 (1993) (noting that "[t]he absence of a specific reference [to habeas in the original North Carolina Constitution] was of no practical import since England's Habeas Corpus Act (1679) was accepted as part of the state's common law").

³⁶³ One author suggests that only South Carolina had a habeas statute at the time of the Declaration of Independence, *see Oaks, supra* note 298, at 251, although it is unclear if the Crown even knew about its existence, having never reviewed the same, *see Carpenter, supra* note 298, at 23. As is discussed below, Maryland's suspension during the war expressly displaced "the habeas corpus act," the protections of which Maryland claimed at the time as well. *See infra* p. 960. In the wake of the war, many states formally adopted statutes modeled on the 1679 Act. For example, Virginia adopted a statute in 1784, Pennsylvania in 1785, and New York in 1787. *See HURD, supra* note 339, at 120–28; *see also Oaks, supra* note 298, at 253–54 (noting that only Connecticut out of the original thirteen states failed to pass a statute modeled on the Habeas Corpus Act of 1679).

dence of the continuing and profound influence that the English Act wielded on early American law, consider the Georgia Constitution of 1777, which expressly provided that “[t]he principles of the Habeas Corpus Act, shall be part of this Constitution”³⁶⁴ and annexed the English Act to its original distribution.³⁶⁵

By their common terms, the Revolutionary War suspensions in America bestowed authority on state executives to arrest and hold persons preventively based on suspicion of supporting the Crown. Early in the war, for example, Pennsylvania’s General Assembly enacted a suspension for the “preservation of th[e] state” and, more specifically, to address the fact that “there are . . . persons among us, who cannot at this juncture be safely trusted with their freedom.”³⁶⁶ Thus, the act provided that “it shall and may be lawful” for the Executive:

[T]o arrest any person or persons within this commonwealth who shall be suspected from any of his or her acts, writings, speeches, conversations, travels or other behavior, to be disaffected to the community of this or all or any of the United States of America, or to be a harbinger of the common enemy who is at our gates, or to give mediate or immediate intelligence and warning to their commanders . . . or by discouraging people from taking up arms for the defense of their country.³⁶⁷

The Pennsylvania law expressly empowered the Executive “to confine” such persons, to banish them, or to demand that they subscribe an “oath or affirmation of allegiance and fidelity to [the] state.”³⁶⁸ Here, as elsewhere, the law tied suspension to the lines of allegiance. Finally, in conjunction with bestowing such broad powers on the Executive, the act prohibited judges from “issu[ing] or allow[ing] any writ of ha-

New York passed a statute almost identical to the 1679 Act just three months before the Constitutional Convention. See *An Act for the Better Securing the Liberty of the Citizens of this State, and for Prevention of Imprisonments*, in 1 *LAWS OF THE STATE OF NEW YORK* 369, 369 (New York, Thomas Greenleaf 1792). In 1833, Justice Story observed that the English statute “has been, in substance, incorporated into the jurisprudence of every state in the Union.” 3 *STORY*, *supra* note 195, § 1335, at 208.

³⁶⁴ GA. CONST. of 1777, art. LX.

³⁶⁵ CHARLES FRANCIS JENKINS, BUTTON GWINNETT: SIGNER OF THE DECLARATION OF INDEPENDENCE 109 (1926) (“[T]he House . . . ordered, that 500 copies be immediately struck off, with the Act of Distribution, made in the reign of Charles the Second, and the habeas corpus act annexed . . .”).

³⁶⁶ *An Act to Empower the Supreme Executive Council of this Commonwealth to Provide for the Security Thereof in Special Cases Where No Provision Is Already Made by Law*, ch. 762, pmb. (1777), in 9 *THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801*, at 138, 138–39 (James T. Mitchell & Henry Flanders eds., 1903) [hereinafter *STATUTES AT LARGE OF PENNSYLVANIA*]. The Act was in force only for a limited period. See *id.* § 3, in 9 *STATUTES AT LARGE OF PENNSYLVANIA*, *supra*, at 140 (providing that the Act “shall be in force to the end of the first sitting of the next general assembly of the commonwealth and no longer”).

³⁶⁷ *Id.* § 1, in 9 *STATUTES AT LARGE OF PENNSYLVANIA*, *supra* note 366, at 139.

³⁶⁸ *Id.*

beas corpus . . . to obstruct the proceedings of the said executive council.”³⁶⁹

As Professor Philip Hamburger has detailed, this suspension stemmed from fear that the Quakers were aiding the British, who had landed in the Chesapeake and were preparing to attack Philadelphia.³⁷⁰ As he notes,³⁷¹ the Continental Congress had raised concerns about the Quakers, worrying that they were “disaffected to the American cause.”³⁷² Pennsylvania’s executive initially responded by taking the position that the Quakers should be understood as having “re-nounce[d] all the privileges of citizenship.”³⁷³ When a habeas court suggested that the Quakers’ rights as citizens remained fully intact,³⁷⁴ the legislature responded by enacting the suspension, which prohibited judges from issuing writs of habeas corpus in such cases.

The actions of several other states are in keeping with this example. In Maryland, the legislature responded to the British landing in the Chesapeake and the threat of invasion that came with it by enacting suspension legislation. The legislation posited that in the event of an invasion by the British, the Governor “shall have full Power and Authority to arrest . . . all Persons whose going at Large the Governor . . . shall have good Grounds to believe may be dangerous to the Safety of this State, and the same Persons to confine.”³⁷⁵ The statute further clarified that “the *Habeas Corpus* Act shall be suspended, as to all such Persons.”³⁷⁶ Just as in many English suspensions, here, the connection forged between suspension and those protections derived from “the *Habeas Corpus* Act” was made explicit.

In 1778, with the British threatening to invade, South Carolina’s legislature responded to “this time of public danger, when this State is threatened with an invasion by the enemy,” by suspending the writ for the express reason that “the hands of the executive should be strengthened.”³⁷⁷ Toward that end, South Carolina’s suspension declared it

³⁶⁹ *Id.* § 2, in 9 STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 366, at 140.

³⁷⁰ See Hamburger, *supra* note 140, at 1911–17.

³⁷¹ See *id.* at 1912.

³⁷² 8 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 299, at 694 (replicating Resolution of August 28, 1777).

³⁷³ EXILES IN VIRGINIA 112 (Thomas Gilpin ed., Philadelphia, C. Sherman 1848) (replicating Resolution of September 9, 1777).

³⁷⁴ See Hamburger, *supra* note 140, at 1914.

³⁷⁵ An Act to Punish Certain Crimes and Misdemeanors, and to Prevent the Growth of Toryism, § 12, 1777 Md. Laws ch. 20.

³⁷⁶ *Id.*

³⁷⁷ An Ordinance to Empower the President or Commander-in-Chief for the Time Being, with the Advice of the Privy Council, to Take Up and Confine All Persons Whose Going at Large May Endanger the Safety of this State, pmb., in 4 THE STATUTES AT LARGE OF SOUTH CAROLINA 458, 458 (Thomas Cooper ed., Columbia, A.S. Johnston 1838) [hereinafter STATUTES AT LARGE OF SOUTH CAROLINA].

“lawful” for the Executive “by warrant under his hand and seal, to arrest, secure and commit to safe custody all such persons as now are in, or hereafter shall come into this State, and whose going at large may, in [the Executive’s] opinion . . . , endanger the safety of this State.”³⁷⁸ Similarly, the law provided that neither the courts nor any judge “shall bail or try any person so as aforesaid to be committed” until the lapsing of the suspension.³⁷⁹

That same year, New York created a Board of Commissioners (on which John Jay, among others, served) and empowered it with the authority:

[T]o send for persons and papers and administer oaths and to apprehend and confine or cause to be apprehended and confined in such manner and under such restrictions and limitations as to them shall appear necessary for the public safety all persons whose going at large shall in the judgment of the said commissioners or any three of them appear dangerous to the safety of this State.³⁸⁰

The Act specifically prohibited the granting of bail by judges or magistrates to those individuals confined by the commissioners.³⁸¹

Two years later, the New Jersey legislature suspended the privilege, specifically targeting those persons who were apprehended for trading with the enemy or going across enemy lines.³⁸² For such persons, “the Privilege of the Writ of *Habeas Corpus*” was “suspended and made void.”³⁸³

And in May 1781, suspension came to Virginia.³⁸⁴ It followed closely on the heels of the British, who had turned their sights just months earlier toward the Commonwealth, in part (or so the story

³⁷⁸ *Id.* § 1, in 4 STATUTES AT LARGE OF SOUTH CAROLINA, *supra* note 377, at 458.

³⁷⁹ *Id.* § 2, in 4 STATUTES AT LARGE OF SOUTH CAROLINA, *supra* note 377, at 458. Following the example set by Parliament in 1689, the legislators exempted themselves in large measure from the suspension. See *id.*, in 4 STATUTES AT LARGE OF SOUTH CAROLINA, *supra* note 377, at 459.

³⁸⁰ An Act Appointing Commissioners for Detecting and Defeating Conspiracies and Declaring Their Powers, ch. 3 (1778), in 1 LAWS OF THE STATE OF NEW YORK 8, 9 (Albany, Weed, Parsons & Co. 1886); see also THOMAS B. ALLEN, TORIES: FIGHTING FOR THE KING IN AMERICA’S FIRST CIVIL WAR 196 (2010) (discussing the New York State Committee and Commission for Detecting and Defeating Conspiracies).

³⁸¹ See An Act Appointing Commissioners for Detecting and Defeating Conspiracies and Declaring Their Powers, ch. 3, in 1 LAWS OF THE STATE OF NEW YORK, *supra* note 380, at 9.

³⁸² See An Act More Effectually to Prevent the Inhabitants of this State from Trading with the Enemy, or Going Within Their Lines, and for Other Purposes Therein Mentioned § 9 (1780), in ACTS OF THE FIFTH GENERAL ASSEMBLY OF THE STATE OF NEW-JERSEY 11, 15 (Trenton, Isaac Collins 1781).

³⁸³ *Id.*

³⁸⁴ See An Act for Giving Certain Powers to the Governour and Council, and for Punishing Those Who Shall Oppose the Execution of the Laws, ch. 7 (1781), in 10 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 413, 413–14 (William Waller Hening ed., Richmond, George Cochran 1822) [hereinafter STATUTES AT LARGE OF VIRGINIA].

goes) because Cornwallis believed that his army would be a welcome sight to many Virginians.³⁸⁵ The legislature responded swiftly in the “time of public danger” with a suspension.³⁸⁶ The Virginia law declared a need to “invest the executive with the most ample powers, both for the purpose of strenuous opposition to the enemy, and also to provide for the punctual execution of laws.”³⁸⁷ The statute provided:

The governor, with advice of the council, is . . . hereby empowered to apprehend . . . and commit[] to close confinement, any person or persons whatsoever, whom they may have just cause to suspect of disaffection to the independence of the United States or of attachment to their enemies, and such person or persons shall not be set at liberty by bail, mainprize or *habeas corpus*.³⁸⁸

Like Pennsylvania’s legislation, Virginia’s law also “empowered” the Governor and his council “to send within the enemy’s lines” persons “who hath or have heretofore refused to take the oaths of allegiance” and “whom they shall have good cause to suspect . . . [are] inimical to the independence of the United States.”³⁸⁹ Just weeks later, the British attempted to capture Virginia’s then-Governor Thomas Jefferson in a raid on Charlottesville. (He escaped, but some members of the legislature were not so fortunate.³⁹⁰) As with the other suspensions of the period, underlying Virginia’s legislation was the understanding that even in the midst of the most serious of wartime threats, where habeas was otherwise available, suspension was a necessary step to bring within the law the preventive detention of persons owing allegiance who were suspected of supporting the British.

The suspensions that took place in Massachusetts during this period tell the same story. First, in 1777, the Massachusetts legislature broadly empowered the Governor and his council to issue warrants for the apprehension and commitment of “any person whom the council shall deem the safety of the Commonwealth requires should be restrained of his personal liberty, or whose enlargement within this state is dangerous thereto.”³⁹¹ Those persons captured were subject to being “continued in imprisonment, without bail or mainpri[s]||z[e],” until dis-

³⁸⁵ See HENRY P. JOHNSTON, *THE YORKTOWN CAMPAIGN AND THE SURRENDER OF CORNWALLIS*, 1781, at 29 (New York, Harper & Brothers 1881).

³⁸⁶ An Act for Giving Certain Powers to the Governour and Council, and for Punishing Those Who Shall Oppose the Execution of the Laws, ch. 7, in 10 *STATUTES AT LARGE OF VIRGINIA*, *supra* note 384, at 413.

³⁸⁷ *Id.*

³⁸⁸ *Id.*, in 10 *STATUTES AT LARGE OF VIRGINIA*, *supra* note 384, at 414.

³⁸⁹ *Id.*

³⁹⁰ See R.B. BERNSTEIN, *THOMAS JEFFERSON* 45 (2003).

³⁹¹ See An Act for Taking Up and Restraining Persons Dangerous to this State, ch. 45, § 1 (1777), in 5 *THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY* 401, 401 (Boston, Wright & Potter Printing Co. 1886) [hereinafter *ACTS AND RESOLVES OF THE MASSACHUSETTS BAY*].

charged by the Executive or the legislature.³⁹² This Act came in response to a “time when the public[k] enemy have actually invaded some of our neighbouring states, and threaten an invasion of this state.”³⁹³ Like the other suspensions already discussed, the plain object of the statute was to grant expanded powers to the Executive to ferret out potential traitors and detain them as needed to advance the war effort.³⁹⁴

Three years later, in 1780, the people of Massachusetts adopted their constitution.³⁹⁵ In it, they included express recognition of the privilege of habeas corpus.³⁹⁶ Reviewing the history leading up to this point reveals how people viewed the relationship between the privilege and suspension during the Founding period.³⁹⁷ Unfortunately, these materials have been all but ignored by scholars. When the initial draft constitution was circulated to the towns, the Boston delegates generally supported its adoption, but they expressed specific concerns about the habeas clause. As Boston’s Return stated:

[T]he Suspension of this security of personal Liberty or freedom from Imprisonments [should be limited] to times of War, invasion and rebellion It was not conceived that any cause could possibly exist in time of peace, that could justify imprisonments *without allegation or charge*; and the granting a Power in a season of tranquility liable to such gross abuse, and which might be attend with consequences destructive of the dearest priviledges and best interest of the Subject was deemed incompatible with every Principle of Liberty.³⁹⁸

Lest there be any doubt concerning the contemporary linking of the privilege with the right of citizens not to be detained outside the criminal process and, more specifically, with the protections derived from

³⁹² *Id.* § 3, in 5 ACTS AND RESOLVES OF THE MASSACHUSETTS BAY, *supra* note 391, at 401 (alterations in original). This Act had a one-year sunset provision. *Id.* § 4, in 5 ACTS AND RESOLVES OF THE MASSACHUSETTS BAY, *supra* note 391, at 401.

³⁹³ *Id.* pmbl., in 5 ACTS AND RESOLVES OF THE MASSACHUSETTS BAY, *supra* note 391, at 401 (alterations in original).

³⁹⁴ It is also possible that the General Court enacted this suspension to bring within the law the extrajudicial seizure and continuing commitment of certain colonists suspected of providing aid to the British, which apparently had already taken place. *See* 2 BRADFORD, *supra* note 1, at 89 (describing one such commitment: “One Dr. G—— was confined at Cambridge, by order of the general assembly, for assisting the enemy in this manner.”).

³⁹⁵ *See* MASS. CONST. of 1780.

³⁹⁶ *See id.* pt. 2, ch. VI, art. VII.

³⁹⁷ The adoption of Massachusetts’s Constitution is particularly illuminating concerning commonly held views about such concepts because it involved far greater participation by the citizenry than did the constitutionmaking processes in other states. *See* THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780, at 52 (Oscar Handlin & Mary Handlin eds., 1966) [hereinafter POPULAR SOURCES].

³⁹⁸ *Id.* at 763 (emphasis added); *see also* 3 BARRY, *supra* note 1, at 177–78 (describing Boston’s Return as seeking a stronger habeas clause to ensure “that citizens should not be subject to confinement on mere suspicion,” *id.* at 178).

the Habeas Corpus Act, the returns of several other towns drove home the point. For example, Milton's Return posited that a suspension should occur only "in times of war, or threatned Invasion, and then for a time not exceeding six months. . . . [S]ix months is fully sufficient for any Legislature to ascertain the precise crime, and to procure the evidence against any Individual, in order to bring him for Trial."³⁹⁹ The town of Waltham proposed that the draft habeas clause be amended to clarify that "the Habeas Corpus Act be not suspended for a Longer Time than six months as in that Time they think any Person may be brought to his Tryal or admitted to Bail."⁴⁰⁰ Lexington's Return also connected the privilege with the Habeas Corpus Act.⁴⁰¹ Finally, Groton's Return proposed a time limit on any potential suspension that derived from the very protections embodied in the 1679 Act. Specifically, Groton argued that whether a prisoner is charged with a crime or not, no suspension may "opperate against any one Subject after the Superiour Court hath Set Two Terms" in the relevant county, positing that "in Either Case he shall be delivered before the Second Term is over."⁴⁰²

These returns are compelling evidence of a contemporary understanding that equated the availability of the privilege of the writ with the right of citizens not to be detained in the absence of formal "allegation or charge." The final version of the Massachusetts habeas clause nonetheless expressly recognized that this right could be "suspended" in emergencies.⁴⁰³ As explored below, the two suspensions that followed on the heels of the adoption of the Massachusetts Constitution demonstrate that the people of the Commonwealth viewed suspension as the exclusive means by which to make lawful the detention of persons within protection without charges.

The Massachusetts example is particularly telling with respect to Founding-era understandings about habeas and suspension.⁴⁰⁴ First, the habeas clause in the Massachusetts Constitution is believed to have

³⁹⁹ POPULAR SOURCES, *supra* note 397, at 790.

⁴⁰⁰ *Id.* at 680.

⁴⁰¹ *See id.* at 661 (observing that a twelve-month suspension would be "longer than is necessary; and that a suspension of the Benefit of the act referred to in the Article, for so long a Term, might be of dangerous Consequence to the Liberties of the Subject").

⁴⁰² *Id.* at 649.

⁴⁰³ 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."). No changes were made to the habeas clause in response to the returns of the towns, even though numerous returns sought to limit the suspension power to times of war, invasion, or rebellion. *See generally* POPULAR SOURCES, *supra* note 397.

⁴⁰⁴ *See* Tyler, *supra* note 2, at 623–27 (discussing this period).

served as a prototype for the Suspension Clause.⁴⁰⁵ Second, the two Massachusetts suspensions during this period were the first to take place within a constitutional framework that expressly provided for the privilege.⁴⁰⁶ Finally, the Massachusetts suspension enacted in response to Shays's Rebellion was well known to the Framers, for the events surrounding that rebellion proved to be a major "catalyst in the movement for the Constitution."⁴⁰⁷

But before Daniel Shays, there was Samuel Ely. In the early 1780s, Ely led a small band of armed malcontents in western Massachusetts who had sworn to oppose the government.⁴⁰⁸ Their complaints were similar to those later advanced by Shays and his band: taxes were too high, the government was spending too much, currency was next to worthless, and debtors were being run over in court.⁴⁰⁹ Ely and his followers rioted, seized government property taken in execution of debts, and attempted to keep the courts from sitting.⁴¹⁰ Notwithstanding its relatively small size, Ely's movement was the subject of great concern in Boston. This concern followed in part from the widespread — though probably inaccurate — perception that Ely was allied with the British, who were still in the Maine territory on Massachusetts's northern border and viewed as a continuing threat by state leaders in Boston.⁴¹¹

Accordingly, in 1782, the Massachusetts General Court enacted its first suspension against the backdrop of the new constitution. By its terms, the legislation expressly "suspend[ed] the privilege of the writ of habeas corpus" and "authorised and empowered" the Governor and his council "to apprehend and secure . . . without Bail or Mainprize, any Person or Persons whose being at large may be judged" by the Executive "to be Dangerous to the Peace and Well-being of this or any of the United States."⁴¹² After six months, the "Disturbances" and "Opposition to the legal Authority" of the State continued such that the Gener-

⁴⁰⁵ See Neuman, *supra* note 142, at 564.

⁴⁰⁶ See Tyler, *supra* note 2, at 623.

⁴⁰⁷ Richard D. Brown, *Shays's Rebellion and the Ratification of the Federal Constitution in Massachusetts*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 113, 113 (Richard Beeman et al. eds., 1987).

⁴⁰⁸ See DAVID P. SZATMARY, SHAYS' REBELLION 43 (1980).

⁴⁰⁹ See, e.g., CHARLES MARTYN, THE LIFE OF ARTEMAS WARD 263 (1921).

⁴¹⁰ See ROBERT J. TAYLOR, WESTERN MASSACHUSETTS IN THE REVOLUTION 103–22 (1954).

⁴¹¹ See MARTYN, *supra* note 409, at 263–64, 267 n.30. Many members of the General Court feared that the insurgents were infected with Toryism. See, e.g., TAYLOR, *supra* note 410, at 118 (citing Letter from Joseph Hawley to Caleb Strong (June 24, 1782), expressing this view); *id.* at 119 (noting that contemporary newspapers published similar sentiments).

⁴¹² An Act to Suspend the Privilege of the Writ of Habeas Corpus for Six Months, ch. 2, 1782–1783 Mass. Acts 6 (1782). The legislation also included a *non obstante* clause. See *id.* ch. 2, 1782–1783 Mass. Acts at 7 (including the clause "any Law, Usage or Custom to the contrary notwithstanding").

al Court extended the suspension for an additional four months.⁴¹³ The renewal legislation made that much clearer what the effect of the suspension would be upon individual rights (“the *Benefit* derived to the Citizens from the issuing of Writs of Habeas Corpus should be suspended for a limited Time in certain Cases”⁴¹⁴) as well as upon executive authority (“the Governor . . . is authorised and empowered by Warrant . . . , by him subscribed, to apprehend and secure” anyone he believes poses a danger to the state⁴¹⁵). Together, these acts stripped the citizens of the “*Benefit[s]*” secured by the writ of habeas corpus and granted the Executive expansive authority to arrest and detain individuals based solely on state warrants.⁴¹⁶

Soon thereafter, a larger and more alarming movement developed in the western part of the state. Unlike Ely’s insurgents, “the Shaysites were short on political theory and long on military organization.”⁴¹⁷ They quickly moved from peaceful petitioning to armed confrontations with state militia. Under the leadership of Daniel Shays, Luke Day, and others, the Shaysites prevented several Commonwealth courts from sitting and later attempted to take a federal arsenal.⁴¹⁸ With each passing day, the movement took on “more and more tokens of real insubordination and anarchy.”⁴¹⁹ Once again, those in power feared (without substantiation) that the British were behind the uprising.⁴²⁰

This concern led the General Court to convene a special session in September 1786.⁴²¹ At that time, Governor James Bowdoin (who earlier had presided over the drafting of the Massachusetts Constitution⁴²²) urged the chambers to give him expanded powers to put down the uprising. The Senate responded by, among other things, passing suspension legislation, but the House initially demurred.⁴²³ The House’s reluctance to suspend reportedly “occasioned very great

⁴¹³ An Act to Suspend the Privilege of the Writ of Habeas Corpus for Four Months, ch. 34, 1782–1783 Mass. Acts 105 (1783). The extension also followed reports that interrogations of Ely rioters had revealed their “formal agreement to oppose the government.” TAYLOR, *supra* note 410, at 120.

⁴¹⁴ Ch. 34, 1782–1783 Mass. Acts at 105 (emphasis added).

⁴¹⁵ *Id.*

⁴¹⁶ *Id.* (emphasis added).

⁴¹⁷ TAYLOR, *supra* note 410, at 148.

⁴¹⁸ See 3 BARRY, *supra* note 1, at 232–46.

⁴¹⁹ EDWARD EVERETT HALE, *THE STORY OF MASSACHUSETTS* 306 (Boston, D. Lothrop Co. 1891) (“‘Burning barns and blazing haystacks’ were the tokens of the punishment by which lawless men showed their resentment against friends of the Government”).

⁴²⁰ See, e.g., TAYLOR, *supra* note 410, at 149–50 (detailing communications to Governor Bowdoin conveying these fears while noting that the insurgents denied British involvement).

⁴²¹ See 3 BARRY, *supra* note 1, at 232.

⁴²² See *id.* at 176.

⁴²³ An offer of pardon had been held out in the interim as well, but met with no success. *Id.* at 238.

alarm['] among those who supported more stringent measures “to prevent [more insurrections] in [the] future.”⁴²⁴ Indeed, there existed a prevailing fear that the situation could lead to civil war.⁴²⁵ Once it became clear that existing measures were ineffective to stem the tide of the growing insurgency, the House finally passed the suspension bill.⁴²⁶ By its terms, the law responded to the ongoing “violent and outrageous opposition, which hath lately been made by armed bodies of men . . . to the Constitutional Authority” of the state.⁴²⁷ Again, the General Court declared that the “benefit derived to the Citizens from the issuing of Writs of Habeas Corpus, should be suspended for a limited time.”⁴²⁸ Likewise, the legislature “authorised and empowered” the Governor and his council, by issuance of their own state warrants, to arrest and detain “any person or persons whatsoever, whom the Governor and Council, shall deem the safety of the Commonwealth requires should be restrained of their personal liberty, or whose enlargement is dangerous thereto; any Law, Usage or Custom to the contrary notwithstanding.”⁴²⁹ The Act also made clear that “any Person who shall be apprehended and imprisoned” under its terms “shall be continued in imprisonment, without Bail or Mainprize, until he shall be discharged therefrom by order of the Governor, or of the General Court.”⁴³⁰

Governor Bowdoin had his expanded powers. He and his council could now issue state warrants and arrest and hold without charges those believed to be tied to the insurgency, along with anyone taken in armed conflict with the militia. Period commentators highlighted the dramatic nature of the suspension in this regard. Writing only two years later, for example, George Richards Minot reported that the General Court believed circumstances justified placing “every man’s

⁴²⁴ GEORGE RICHARDS MINOT, THE HISTORY OF THE INSURRECTIONS, IN MASSACHUSETTS, IN THE YEAR MDCCLXXXVI, AND THE REBELLION CONSEQUENT THEREON 62 (Worcester, Isaiah Thomas 1788).

⁴²⁵ See 2 BRADFORD, *supra* note 1, app. at 366 (replicating the February 3, 1787, speech given by Governor Bowdoin to the General Court expressing fear that civil war might ensue absent sustained government measures); see also MINOT, *supra* note 424, at 80, 96–97.

⁴²⁶ See MINOT, *supra* note 424, at 52–66 (detailing legislative delays); *id.* at 65 (“[T]he extreme danger to which the government was reduced, by [the] . . . insurgents, outweighed every consideration that had hitherto supported an opposition to the spirit of the [bill]”); see also 3 BARRY, *supra* note 1, at 234–35; TAYLOR, *supra* note 410, at 150–51.

⁴²⁷ An Act for Suspending the Privilege of the Writ of Habeas Corpus, ch. 41, 1786–1787 Mass. Acts 102 (1786). A few months later, the General Court escalated this rhetoric, declaring that “a horrid and unnatural REBELLION and WAR has been openly and traitorously raised and levied against this Commonwealth . . . with [the] design to subvert and overthrow the constitution and form of government thereof.” 2 BRADFORD, *supra* note 1, app. at 373 (emphasis omitted) (quoting Declaration of Rebellion (Feb. 4, 1787)).

⁴²⁸ Ch. 41, 1786–1787 Mass. Acts at 102 (emphasis added).

⁴²⁹ *Id.* (bestowing authority for period of eight months).

⁴³⁰ *Id.* at 103.

liberty” in “the discretion of the Supreme Executive, without legal remedy.”⁴³¹ In the months following the law’s enactment, the Governor and his council issued state warrants for a number of suspected insurgents.⁴³² Meanwhile, the government warned Shays’s followers that unless they laid down their arms, they “would be dealt with in a summary manner.”⁴³³ As events unfolded, the state militia secured key victories, which ultimately led the rebels to disband and flee.

At this point, Minot reports, “the General Court found it a suitable time for providing for the trials of such as were in custody,”⁴³⁴ and trials of key figures in the insurgency followed.⁴³⁵ It appears it was simply taken for granted that with the lapsing of the suspension and the restoration of order, the continuing detention of those in custody required their referral to the criminal process. This fact explains why one contemporary writer observed that without the suspension, the “ringleaders” of the rebellion who were held based solely on the Governor’s orders would have been able to secure their freedom through habeas corpus.⁴³⁶

Just a few months later, this conception of the privilege and the provision for its suspension on extraordinary occasions would be included in the new Constitution forged in Philadelphia.

⁴³¹ MINOT, *supra* note 424, at 65; *see also* Thomas B. Wait, Editorial, CUMBERLAND GAZETTE, Dec. 15, 1786 (positing that “the design” of the legislation was to “authorize the Governor, with advice of Council, to apprehend and secure” anyone “judged by them to be dangerous to the peace of the State”).

⁴³² *See, e.g.*, 2 BRADFORD, *supra* note 1, app. at 363, 365 (replicating Governor Bowdoin’s February 3, 1787, speech to the General Court discussing arrests ordered pursuant to state warrants); MINOT, *supra* note 424, at 77–79 (mentioning one round of arrests by state warrants); TAYLOR, *supra* note 410, at 162 (reporting on another round of arrests on state warrants); *see also* LEONARD L. RICHARDS, SHAYS’S REBELLION: THE AMERICAN REVOLUTION’S FINAL BATTLE 19–21 (2002) (providing another account). The Governor had instructed General Benjamin Lincoln:

You will take command of the militia The great objects to be effected are, to protect the Judicial Courts . . . to assist the civil magistrates in executing the laws; and in repelling or apprehending all and every such person [who shall] . . . attempt or enterprise the destruction, detriment or annoyance of this Commonwealth; and also to aid . . . in apprehending . . . all such persons, as may have been named in the state warrants

MINOT, *supra* note 424, at 99–100. Efforts to enforce state warrants upon the insurgency’s rank and file met with frustration, as many had gone into hiding. *See id.* at 79. But Minot reports that one early expedition to enforce state warrants against principals was “a very important event,” the effect of which was to make “precarious” their “personal safety.” *Id.*

⁴³³ 3 BARRY, *supra* note 1, at 243.

⁴³⁴ MINOT, *supra* note 424, at 161; *see also* 3 BARRY, *supra* note 1, at 254 (“As disturbances had now in a great measure subsided, the legislature turned its attention to the trial of those who had been seized and imprisoned.”).

⁴³⁵ *See* MINOT, *supra* note 424, at 162–63 (noting as well the adoption of a severe disqualification law stripping participants in the insurgency of various rights); *see also* 3 BARRY, *supra* note 1, at 255 (discussing trials); 2 BRADFORD, *supra* note 1, at 307–08 (same). Eventually, most were pardoned. *See, e.g.*, 3 BARRY, *supra* note 1, at 258.

⁴³⁶ *See* Wait, *supra* note 431.

*B. The Constitutional Convention and Ratification:
The “Privilege . . . Is Essential to Freedom”*

There was only limited discussion of the Suspension Clause at the Constitutional Convention. Four days after the Convention came to order in May 1787, Charles Pinckney suggested a habeas clause for inclusion in the new Constitution. Madison’s notes report that the proposal read: “The legislature of the United States shall pass no law on the subject of religion, nor touching or abridging the liberty of the press; nor shall the privilege of the writ of *habeas corpus* ever be suspended, except in case of rebellion or invasion.”⁴³⁷

It was not until August 20 that Pinckney renewed his proposal in more specific terms. *Farrand’s Records* 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.⁴³⁸

Because this proposal bore many similarities to the provision in the Massachusetts Constitution,⁴³⁹ commentators have suggested that Massachusetts’s clause provided the model for Pinckney’s language.⁴⁴⁰

The timing of Pinckney’s second attempt to provide for habeas corpus and suspension is potentially relevant. On August 20, the delegates also debated in great detail the contours of the Treason Clause,

⁴³⁷ 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]. This proposal’s limitation of suspension to cases of rebellion or invasion would survive in the final draft. It may have derived from a number of sources, including possibly the Irish adoption of the 1679 Habeas Corpus Act (“An Act for Better Securing the Liberty of the Subject”) in 1781, which imported the language of the 1679 Habeas Corpus Act verbatim, with one notable addition: a provision allowing the Irish Council to suspend the act “during such time only as there shall be an actual invasion or rebellion in this kingdom or Great Britain.” An Act for Better Securing the Liberty of the Subject, 1781, 21 & 22 Geo. 3, c. 11, § XVI (Ir.).

⁴³⁸ 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] (omission in original) (internal quotation marks omitted). When discussion of the proposal began eight days later, Madison’s notes described it as “urging the propriety of securing the benefit of the Habeas corpus in the most ample manner” while suggesting that “it should not be suspended but on the most urgent occasions, [and] then only for a limited time not exceeding twelve months.” *Id.* at 438 (internal quotation mark omitted) (remarks of Charles Pinckney).

⁴³⁹ See, e.g., MASS. CONST. of 1780, pt. 2, ch. VI, art. VII; see also N.H. CONST. of 1784, pt. 2, art. XCI (“The privilege and benefit of the habeas corpus, shall be enjoyed in this state, 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 time not exceeding three months.”). In addition to New Hampshire, at least two other states had habeas clauses at the time of the Convention. See GA. CONST. of 1777, art. LX; N.C. CONST. of 1776, art. XIII.

⁴⁴⁰ See, e.g., JAMES F. JOHNSTON, THE SUSPENDING POWER AND THE WRIT OF HABEAS CORPUS 22 (Philadelphia, John Campbell 1862); Neuman, *supra* note 142, at 564.

settling on its final form,⁴⁴¹ which derived its core terms directly from English law.⁴⁴² This timing suggests that, just as English law had, the delegates viewed the careful delineation of the crime of treason as connected to the provision for the privilege of the writ of habeas corpus along with its suspension.

When debate ensued eight days later over Pinckney's proposal, speakers tended toward questioning whether the new Constitution should recognize any suspension power in the federal government. Thus, Madison's notes report that John Rutledge "was for declaring the Habeas Corpus inviolable — He did [not] conceive that a suspension could ever be necessary at the same time through all the States."⁴⁴³ Perhaps Rutledge thought that the states were sufficiently equipped to address any future crises. James Wilson, in turn, "doubted whether in any case [a suspension] could be necessary, as the discretion now exists with Judges, in most important cases to keep in Gaol or admit to Bail."⁴⁴⁴

Wilson's comments bear attention. Like several of the speakers in Parliament during the debates over the very first act of English suspension,⁴⁴⁵ Wilson suggested that the criminal justice system could address any crisis, given that judges enjoyed some measure of discretion to grant or refuse bail with respect to persons under criminal indictment. The assumption animating this statement, of course, is that jailing persons within protection who threaten national security must be accomplished through criminal prosecution.

There is good reason to think that Wilson had the crime of treason in mind when he made this statement. Wilson was a native of Scotland who had grown up in the wake of the suspension imposed there in 1745.⁴⁴⁶ He was also one of the most prominent lawyers of his time and respected for his expertise on treason law.⁴⁴⁷ Wilson had contributed to the drafting of the June 24, 1776, resolution of the Continental Congress that called for allegiance to the new Republic and de-

⁴⁴¹ See CARSO, *supra* note 350, at 69–74.

⁴⁴² The Treason Clause provides: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." U.S. CONST. art. III, § 3, cl. 1. James Wilson served as a principal drafter of the Treason Clause. Shortly after ratification, Wilson's famous lecture on treason observed that the clause was "transcribed from a part of the statute of Edward the third." 2 JAMES WILSON, *Of Crimes, Immediately Against the Community*, in THE WORKS OF JAMES WILSON 663, 665 (Robert Green McCloskey ed., 1967); see also 3 STORY, *supra* note 195, § 1793, at 669.

⁴⁴³ James Madison, Notes on the Constitutional Convention (Aug. 28, 1787), in 2 FARRAND'S RECORDS, *supra* note 438, at 437, 438 (alteration in original).

⁴⁴⁴ *Id.* (alteration in original).

⁴⁴⁵ See, e.g., *supra* p. 935.

⁴⁴⁶ See CARSO, *supra* note 350, at 66.

⁴⁴⁷ *Id.*

clared that adherence to the Crown constituted treason.⁴⁴⁸ He had also served as defense counsel in several treason prosecutions during the Revolutionary War.⁴⁴⁹ Finally, Wilson had served as a principal drafter of the Constitution's Treason Clause, which was based heavily on English law.⁴⁵⁰

Ultimately, the drafters embraced language suggested 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.⁴⁵¹

In so doing, the delegates left a trail of evidence strongly suggesting that they recognized an important connection between habeas corpus, suspension, and criminal prosecution. For example, the delegates initially placed this clause in the judiciary article (then-Article XI) alongside the guarantee that "[t]he trial of all crimes (except in cases of impeachment) shall be by jury."⁴⁵² It was only when the Committee of Style reorganized the articles that it separated the two clauses, moving the habeas clause to Article I and leaving the guarantee of a jury trial in criminal cases in the judiciary article, which became Article III.⁴⁵³ (The Committee of Style also changed the word "where" to "when" in the Suspension Clause.⁴⁵⁴) The jury-trial right had also been the subject of discussion just before the drafters took up discussion of the habeas clause.⁴⁵⁵ Additional evidence of a contemporary link between the two protections includes Alexander Hamilton's essays in the *Federalist Papers*, which specifically married the protection of habeas corpus in the draft Constitution with the guarantee of "trial by jury in criminal cases."⁴⁵⁶

This connection makes sense when one considers how the Founding generation viewed the jury right in criminal cases. Just like the

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ See *id.* at 61, 66; *supra* note 442; see also 3 STORY, *supra* note 195, § 1791, at 667–68 (criticizing constructive treasons); 2 WILSON, *supra* note 442, at 663–69 (echoing Blackstone and others in arguing that "the law of treason should . . . be determinate [and] . . . stable," *id.* at 663). Later, Wilson taught law and served as one of the first Justices on the Supreme Court. See CARSO, *supra* note 350, at 66.

⁴⁵¹ Madison, *supra* note 443, at 438 (internal quotation marks omitted).

⁴⁵² *Id.* (internal quotation mark omitted). At this point, the draft put the jury-trial guarantee in Article XI, Section 4, and the habeas clause in Article XI, Section 5. *Id.*

⁴⁵³ See Report of Committee of Style (Sept. 12, 1787), in 2 FARRAND'S RECORDS, *supra* note 438, at 590, 596, 601; see also U.S. CONST. art. III, § 2, cl. 3 (Jury Clause).

⁴⁵⁴ Report of Committee of Style, *supra* note 453, at 596.

⁴⁵⁵ Madison, *supra* note 443, at 438.

⁴⁵⁶ See, e.g., THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 324, at 499. Additional reinforcement of the protections embodied in the privilege came in the prohibition on bills of attainder. See U.S. CONST. art. I, § 9, cl. 3; see also *supra* notes 199, 253 (discussing the English background, in particular Parliament's practice of circumventing a lapse in suspension by resorting to legislative declarations of guilt).

privilege of habeas corpus, the “great object” of trial by jury, Justice Story wrote, was “to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people.”⁴⁵⁷ As with the privilege, the right to trial by jury had long served to keep the government in check.⁴⁵⁸ Both traced their roots to Magna Carta and both were understood during this period as “bulwark[s] of . . . civil and political liberties” to be guarded “with an unceasing jealousy.”⁴⁵⁹ As the Continental Congress had phrased it in 1774, the privilege and the right to trial by jury were among the most important rights in a free society “without which a people cannot be free and happy.”

Turning to the ratification debates, one finds additional evidence supporting this understanding of the relationship between criminal prosecution, habeas corpus, and suspension. In the *Federalist Papers*, Alexander Hamilton celebrated “the establishment of the writ of *habeas corpus*” as being secured “in the most ample and precise manner in the plan of the convention.”⁴⁶⁰ He also reported that “trial by jury in criminal cases, *aided by the habeas corpus act* . . . [is] provided for in the most ample manner.”⁴⁶¹ Significantly, Hamilton not only connected the jury-trial right with the Suspension Clause but also specifically referenced the protections embodied in “the *habeas corpus act*” as having been provided for in the plan of the Convention.

This and other contemporary evidence reveal the continuing influence of the 1679 Act on American law. Indeed, just three months prior to the Convention, the Act’s terms had been adopted almost verbatim by New York’s legislature,⁴⁶² and an installment of Luther Martin’s widely circulated *Genuine Information* opposing the plan of the Convention criticized the Suspension Clause for bestowing the power on

⁴⁵⁷ 3 STORY, *supra* note 195, § 1774, at 653; *see also id.* (“So long, indeed, as this palladium remains sacred and inviolable, the liberties of a free government cannot wholly fall.”).

⁴⁵⁸ Thus, one of the most controversial aspects of the draft Constitution was its failure to provide for a jury right in civil cases. *See* THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 324, at 494 (“The objection to the plan of the convention, which has met with most success in this State, and perhaps in several of the other States, is *that relative to the want of a constitutional provision for the trial by jury in civil cases.*”). As one Antifederalist argued, without the right, federal courts sitting without juries might be “ready to protect the officers of government against the weak and helpless citizen.” *Essay of a Democratic Federalist* (1787), *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 58, ¶ 3.5.9, at 61 (Herbert J. Storing ed., 1981).

⁴⁵⁹ 3 STORY, *supra* note 195, § 1773, at 652 (discussing jury right); *see also* 1 BLACKSTONE, *supra* note 137, at *133 (calling the habeas privilege a “bulwark” of liberty).

⁴⁶⁰ THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 324, at 511, 514.

⁴⁶¹ THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 324, at 499 (emphasis added).

⁴⁶² *See* An Act for the Better Securing the Liberty of the Citizens of this State, and for Prevention of Imprisonments, ch. 39, *supra* note 363, at 369. Further, a few years earlier, the Province of Quebec finally succeeded in winning legislation modeled on the 1679 Act. *See* Ordonnance Pour la Sûreté de la Liberté du Sujet dans la Province de Québec, et pour Empêcher les Emprisonnemens hors de Cette Province, 1784, 24 Geo. 3, c. 1 (Que.).

the federal government to “suspend[] the habeas corpus act.”⁴⁶³ By the time that Justice Story wrote his *Commentaries* in 1833, he would call the Act “another magna charta” and equate it with “the true standard of law and liberty.”⁴⁶⁴ He also observed that the English statute “has been, in substance, incorporated into the jurisprudence of every state in the Union; and the right to it has been secured in most, if not in all, of the state constitutions by a provision, similar to that existing in the constitution of the United States.”⁴⁶⁵

The provision for the many protections associated with the Habeas Corpus Act in the original body of the Constitution proved an important aspect of Hamilton’s argument that there was no need to include express recognition in the Constitution of the protections later encompassed within the Bill of Rights.⁴⁶⁶ With the benefit of knowing what the Founding generation understood the habeas privilege to embody, it is easy to understand how Hamilton could have taken this position. At the time he was writing, the privilege was linked to the right to presentment or indictment, the right to a speedy trial, protection from excessive bail, and a general right not to be detained except in conformity with due process. Indeed, even the Antifederalist *Federal Farmer* pointed to the Suspension Clause and its neighboring provisions as “a partial bill of rights.”⁴⁶⁷

Hamilton also argued that the draft Constitution provided for the writ of habeas corpus and the right to a jury in order to protect individual liberty from “[a]rbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions.”⁴⁶⁸ Put another way, Hamilton viewed the writ of habeas corpus as a means of protection against common abuses of the criminal process. There is no suggestion that he contemplated that

⁴⁶³ Luther Martin, *The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia* (1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 458, at 19, ¶ 2.4.72, at 62 (emphases omitted); see also *id.* (equating the power to suspend with the power to “imprison . . . during its pleasure”).

⁴⁶⁴ 3 STORY, *supra* note 195, § 1335, at 207, 208.

⁴⁶⁵ *Id.* § 1335, at 208.

⁴⁶⁶ See THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 324, at 510–13.

⁴⁶⁷ 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 458, at 214, ¶ 2.8.51, at 248; see also *id.* ¶¶ 2.8.51–52, at 248–49 (positing that “the 9th and 10th Sections in Art. I. in the proposed constitution, are no more nor less, than a partial bill of rights; they establish certain principles as part of the compact upon which the federal legislators and officers can never infringe” while arguing that “this bill of rights ought to be carried farther”).

⁴⁶⁸ THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 324, at 498.

persons within protection could be detained outside that process for criminal or national security purposes.

Thomas Jefferson's letters from this period further support this conclusion. Notably, Jefferson questioned whether any recognition of a suspension power was wise.⁴⁶⁹ This doubt followed from Jefferson's view that the criminal process could address any crisis. In his correspondence with James Madison, Jefferson wrote:

Why suspend the Hab. corp. in insurrections and rebellions? The parties who may be arrested may be charged instantly with a well defined crime. Of course the judge will remand them. If the publick safety requires that the government should have a man imprisoned on less probable testimony in those than in other emergencies; let him be taken and tried, retaken and retried, while the necessity continues, only giving him redress against the government for damages.⁴⁷⁰

Jefferson's comments echo those made at the convention by James Wilson, with whom Jefferson had worked in drafting the Continental Congress's resolution on allegiance and treason. The idea was simply this: the criminal process could address any situation involving threats to national security by persons owing allegiance and, to the extent that the government abused that process, those harmed would have a remedy at law for damages.

Importantly, Jefferson also expressly pointed out, in the very next section of his letter to Madison, that prosecution for treason was the proper means of proceeding against those who participate in insurrections and rebellions. Lawyers and historians have overlooked this part of his letter, but it speaks volumes about how all of these concepts, now imported into the constitutional framework, related to one another:

Examine the history of England: see how few of the cases of the suspension of the Habeas corpus law have been worthy of that suspension. They have been either real treasons wherein the parties might as well have been charged at once, or sham-plots where it was shameful they should ever have been suspected. Yet for the few cases wherein the suspension of the hab. corp. has done real good, that operation is now become habitual, and the minds of the nation almost prepared to live under it's [sic] constant suspension.⁴⁷¹

Here, Jefferson equated the role of suspension with freeing the government of the constraints of the criminal process, and he observed that even if there were some situations in which "the suspension of the

⁴⁶⁹ See, e.g., Letter from Thomas Jefferson to Alexander Donald (Feb. 7, 1788), as reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 353, 354 (John P. Kaminski & Gaspare J. Saladino eds., 1988) [hereinafter DOCUMENTARY HISTORY] (expressing a hope that the Constitution would be amended with "a declaration of rights . . . which shall stipulate . . . no suspensions of the habeas corpus").

⁴⁷⁰ Letter from Thomas Jefferson to James Madison, *supra* note 98, at 442.

⁴⁷¹ *Id.*

hab. corp. has done real good,” the better course was simply to leave the matter to the criminal process altogether. Jefferson’s writings powerfully “illustrate[] the constraints under which the Founders understood themselves to operate”⁴⁷² and suggest that it was inconceivable to Jefferson that the federal government could detain disaffected persons within protection for criminal or national security purposes outside the criminal process in the absence of a suspension. As explored below, Jefferson’s writings and actions in response to the Burr Conspiracy further demonstrate that he held this view.⁴⁷³

Other comments and writings during the ratification debates likewise support this conclusion. In the Virginia debates, for example, Wilson Nicholas conceded the need for a suspension power but was emphatic that “[i]n no other case can [Congress] suspend our laws; and this is a most estimable security.”⁴⁷⁴ Striking a similar note, James McHenry observed in the Maryland House of Delegates that “[p]ublic Safety may require a suspension of the Ha: Corpus in cases of necessity: when those cases do *not* exist, the virtuous Citizen will ever be protected in his opposition to power.”⁴⁷⁵ And at the Massachusetts Ratifying Convention, Judge Sumner proclaimed in no uncertain terms that the “privilege . . . is essential to freedom.”⁴⁷⁶ He nonetheless opined that a suspension power would be needed when “the worst enemy may lay plans to destroy us, and so artfully as to prevent any evidence against him, and might ruin the country.”⁴⁷⁷ Parsing his comments reveals that he viewed suspension as necessary where the “enemy” who “might ruin the country” would be able to “prevent any evidence against him.” In other words, suspension was needed for times when criminal prosecution was not an effective option for sustaining detention. This same understanding of the Suspension Clause controlled in the early days of the Republic.

C. *The Suspension Clause in Its Infancy*

The period following ratification is possibly most significant for the fact that it did not witness any suspensions at the federal level, notwithstanding several violent episodes challenging the authority of the

⁴⁷² Hamdi v. Rumsfeld, 542 U.S. 507, 565 (2004) (Scalia, J., dissenting).

⁴⁷³ See *infra* pp. 979–81.

⁴⁷⁴ The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 16, 1788), in 3 ELLIOT’S DEBATES, *supra* note 437, at 1, 102 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott & Co. 1891) (remarks of Wilson Nicholas).

⁴⁷⁵ Remarks of James McHenry Before the Maryland House of Delegates (Nov. 29, 1787), in 3 FARRAND’S RECORDS, *supra* note 438, app. A at 144, 149 (emphasis added).

⁴⁷⁶ Debates in the Convention of the Commonwealth of Massachusetts, on the Adoption of the Federal Constitution (Jan. 26, 1788), in 2 ELLIOT’S DEBATES, *supra* note 437, at 1, 109 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott & Co. 1891).

⁴⁷⁷ *Id.*

government and at least one major war of international character on American soil. In addition to giving rise to negative implications from the absence of suspension, this period sheds considerable light on the understanding at the time of the Founding of the role of the Suspension Clause within the new constitutional scheme.

Shortly after ratification, the first Congress enacted a statute providing for the “Punishment of certain Crimes against the United States.”⁴⁷⁸ This statute made criminal both treason and misprision of treason⁴⁷⁹ and relied heavily on the same important concept that had informed the application of the law of treason in England and the early Republic — namely, the obligation of allegiance. By the statute, “any person . . . owing allegiance to the United States of America [who] shall levy war against them, or shall adhere to their enemies” and be convicted of the same was guilty of treason.⁴⁸⁰ In his famous law lectures given shortly thereafter, James Wilson pointed to English law as the source of the related concepts of allegiance (what he called “obedience”) and protection that lay at the foundations of the law of treason.⁴⁸¹ Thus, “[o]f obedience,” Wilson said, “the antipode is treason.”⁴⁸² According to Wilson, citizens unquestionably owed obedience to the United States.⁴⁸³ Wilson then explicated his understanding of “levying war” against the United States and giving aid to the enemy. Among other things, treason included “join[ing] with rebels in a rebellion, or with enemies in acts of hostility,” and aiding the enemy encompassed “giv[ing] intelligence to enemies,” sending them “provisions,” and “sell[ing] arms to them.”⁴⁸⁴

This understanding of treason was important because during the early years of the Republic, charging individuals with the crime of treason — not suspending habeas corpus — was the standard way of proceeding against rebels and other persons who took up arms against the state or were suspected of working with its enemies. There is no evidence, for example, that President Washington considered calling for a suspension to aid his efforts in putting down the Whiskey Rebellion, though he assembled a substantial militia to address the insurrec-

⁴⁷⁸ Act of April 30, 1790, ch. 9, 1 Stat. 112.

⁴⁷⁹ *Id.* §§ 1–2, 1 Stat. at 112.

⁴⁸⁰ *Id.* § 1, 1 Stat. at 112.

⁴⁸¹ See 2 WILSON, *supra* note 442, at 666 (“In the monarchy of Great Britain, protection and allegiance are universally acknowledged to be rights and duties reciprocal.”). William Rawle’s famous constitutional law treatise echoes this point. See WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 93 (2d ed., Philadelphia, Philip H. Nicklin 1829) (noting “the reciprocal compact of protection and allegiance”). See generally Hamburger, *supra* note 140.

⁴⁸² 2 WILSON, *supra* note 442, at 666.

⁴⁸³ See *id.* at 666–67.

⁴⁸⁴ *Id.* at 668. Notably, Wilson recognized that in close cases a “very fine” line distinguishes treason from a lesser crime that might be charged. *Id.*

tion.⁴⁸⁵ President John Adams adopted the same course in response to Fries's Rebellion; like his predecessor, President Adams relied upon the militia and a great show of force to put down the uprising.⁴⁸⁶ In both cases, when the military sought to accomplish the committal of insurgents, it turned suspects over to civilian authorities for criminal prosecution. There is no evidence that anyone was ever held as an "enemy of the state" or "prisoner of war," even though both episodes witnessed citizens in armed conflict with government troops.

For example, during the Whiskey Rebellion, President Washington gave specific orders to his general, Henry Lee, that the leaders of the rebellion were "to be delivered to the civil magistrates" in order that they be prosecuted for their acts.⁴⁸⁷ And in speaking with those who would oversee the mission to put down the insurrection, "Washington . . . sought constantly to get [them] to impress on their troops the necessity for proper conduct and strict observance of their roles as assistants to the civil authority."⁴⁸⁸ "He assured us," said one chronicler of the episode, "that the army should not consider themselves as judges or executioners of the laws, but as employed to support the proper authorities in the execution of them."⁴⁸⁹

⁴⁸⁵ Pennsylvania did not suspend the privilege either. Instead, the legislature authorized the Governor "to engage . . . the militia" to "restor[e] peace and order." An Act to Provide for Suppressing an Insurrection in the Western Counties of this Commonwealth, ch. 1779, § 1 (1794), in 15 STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 366, at 195, 195–96 (James T. Mitchell & Henry Flanders eds., 1911).

⁴⁸⁶ See CARSO, *supra* note 350, at 94.

⁴⁸⁷ ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789–1878, at 55 (1988); see also WILLIAM HOGELAND, THE WHISKEY REBELLION 215 (2006). President Washington specifically laid out the objectives of General Lee's mission, which were "to be effected in two ways — 1. By military force[, and] 2. By judiciary process, and other civil proceedings." Letter from Alexander Hamilton to Henry Lee (Oct. 20, 1794), in 1 AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES 112, 112 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales & Seaton 1834).

⁴⁸⁸ COAKLEY, *supra* note 487, at 50; see also *id.* at 52 (recounting how Washington rejected the idea that the army would "bring offenders to a military Tribunal" but instead promised that they would "merely aid the civil magistrates" (quoting 4 THE DIARIES OF GEORGE WASHINGTON, 1748–1799, at 216 (John C. Fitzpatrick ed., 1925)) (internal quotation mark omitted)). Ultimately, the military arrested only a handful of insurgents, thirty-five of whom were charged with "levying war against the United States." See CARSO, *supra* note 350, at 92 (internal quotation marks omitted). Eventually, only two were convicted of treason. *Id.* President Washington later pardoned them. COAKLEY, *supra* note 487, at 63. John Fries and his lieutenants were prosecuted and found guilty of treason. See CARSO, *supra* note 350, at 94.

⁴⁸⁹ WILLIAM FINDLEY, HISTORY OF THE INSURRECTION, IN THE FOUR WESTERN COUNTIES OF PENNSYLVANIA: IN THE YEAR M.DCC.XCIV 179 (Philadelphia, Samuel Harrison Smith 1796). The reality on the ground was not entirely in keeping with President Washington's commands. See, e.g., HOGELAND, *supra* note 487, at 223 (observing that the judge reviewing insurgent arrests "held a number of men for removal to Philadelphia despite what he viewed as lack of evidence against them" in light of "pumped-up officers cursing him furiously whenever he turned anyone loose").

Accordingly, for the time, suspension remained a lever of extraordinary authority that government leaders eschewed. Even the return of the British to American soil and the dramatic battles of the War of 1812 did not trigger a suspension.⁴⁹⁰ Instead, the Madison Administration and the courts during this period took the position that citizens suspected of aiding the British could not be held in the absence of criminal charges and that they could not be tried by military tribunals.

In one case in which the United States military held a citizen prisoner on suspicion of passing information about troop movements to the enemy on the Great Lakes front of the war during a “critical” time,⁴⁹¹ Chief Judge Kent of New York’s Supreme Court of Judicature found it deeply troubling that the military was “assuming criminal jurisdiction over a private citizen.”⁴⁹² He wrote:

The pretended charge of treason, (for upon the facts before us we must consider it as a pretext,) without being founded upon oath, and without any specification of the matters of which it might consist, and without any colour of authority in any military tribunal to try a citizen for that crime, is only aggravation of the oppression of the confinement.⁴⁹³

Chief Judge Kent issued an attachment to enforce an order requiring either the discharge of the prisoner or that he be brought before a commissioner.⁴⁹⁴

In another prominent case, the military tried and convicted a citizen by court martial for spying based on allegations that he had passed information to the British. In response, President Madison “direct[ed]” that the prisoner, “being considered a citizen of the U.S. & not liable to be tried by a court martial as a spy, . . . unless he should be arraigned by the civil court for treason or a minor crime under the laws of the state of New York, . . . must be discharged.”⁴⁹⁵

⁴⁹⁰ To be sure, Andrew Jackson — then-major general of the Tennessee militia — declared martial law in New Orleans in the final months of the War of 1812. He also effectively suspended the privilege, given that he not only ignored a writ of habeas corpus ordering the release of a prisoner, but also ordered the jailing of the judge who had issued the writ. See MATTHEW WARSHAUER, *ANDREW JACKSON AND THE POLITICS OF MARTIAL LAW* 35–39 (2006) (detailing these events).

⁴⁹¹ Letter from Secretary of the Navy Jones to Commodore Isaac Chauncey (July 14, 1813), reprinted in 2 *THE NAVAL WAR OF 1812: A DOCUMENTARY HISTORY* 500, 501 (William S. Dudley ed., 1992) (observing that “[t]he moment is critical” in the war).

⁴⁹² *In re Stacy*, 10 Johns. 328, 334 (N.Y. Sup. Ct. 1813). For more on this and other cases from this period, see generally Ingrid Brunk Wuerth, *The President’s Power to Detain “Enemy Combatants”*: Modern Lessons from Mr. Madison’s Forgotten War, 98 NW. U. L. REV. 1567 (2004).

⁴⁹³ *Stacy*, 10 Johns. at 333.

⁴⁹⁴ See *id.* at 334.

⁴⁹⁵ Opinion of the President (Oct. 20, 1812), in *Case of Clark the Spy* (1812), reprinted in *MIL. MONITOR & AM. REG.* (N.Y.), Feb. 1, 1813, at 121. During this period, the use of military tribunals was reserved for those in military service and persons *not* owing allegiance. Thus, just as the resolution of the Continental Congress had in 1776, the American Articles of War, enacted in 1806, provided:

The early days of the Republic did witness one occasion on which Congress came very close to suspending the privilege. The events leading up to this point are well known, but the story of the role that a proposed suspension played in them is not. Aaron Burr had served as Vice President during President Jefferson's first term, but — as someone for whom President Jefferson never held much regard — he was dropped from the ticket for President Jefferson's second term in 1805. Not long after, Burr departed to explore the western territories.⁴⁹⁶ What he did — or did not — seek to accomplish in these explorations remains the subject of debate. What is not debated is that President Jefferson firmly believed, based on information received from General James Wilkinson (whose own loyalties were highly questionable), that Burr was spearheading “an illegal combination of private individuals against the peace and safety of the Union, and a military expedition planned by them against the territories of a Power in amity with the United States.”⁴⁹⁷ Burr's co-conspirators were believed to include, among others, Erick Bollman, Samuel Swartwout, and Peter Ogden.⁴⁹⁸ In New Orleans, General Wilkinson ordered the arrests of all three (and others) and their detention in military custody.⁴⁹⁹ He then ordered Bollman and Swartwout transported by warship to the East Coast, and upon their ultimate arrival in Washington, they were held by the military, still without a warrant.⁵⁰⁰ Meanwhile, a judge dis-

That in time of war, all persons *not citizens of, or owing allegiance to* the United States of America, who shall be found lurking as spies, in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by sentence of a general court martial.

Articles of War of 1806, ch. 20, § 2, 2 Stat. 359, 371 (emphasis added).

⁴⁹⁶ For more on the life of Aaron Burr, see generally HERBERT S. PARMET & MARIE B. HECHT, *AARON BURR* (1967).

⁴⁹⁷ 16 ANNALS OF CONG. 39 (1807) (message from President Thomas Jefferson to the Senate and House of Representatives of the United States dated January 22, 1807); see also CARSO, *supra* note 350, at 96–100 (describing background of Burr's Conspiracy). President Jefferson also stated that Burr's objects included “the severance of the Union of these States by the Alleghany mountains” and “an attack on Mexico.” 16 ANNALS OF CONG. 41 (1807). Just weeks earlier, he had described Burr as heading up “an armed body,” the object of which was “to seize New Orleans, from thence attack Mexico,” and “add Louisiana to his empire, and the Western States from Alleghany if he can.” Letter from Thomas Jefferson to John Langdon (Dec. 22, 1806), in 19 THE WRITINGS OF THOMAS JEFFERSON 157, 157 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903).

⁴⁹⁸ See CARSO, *supra* note 350, at 98, 103.

⁴⁹⁹ See 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 332–33 (1919); CARSO, *supra* note 350, at 103 (observing that “Wilkinson had created a reign of military tyranny”).

⁵⁰⁰ See *United States v. Bollman*, 24 F. Cas. 1189, 1190 (C.C.D.C. 1807) (No. 14,622) (reporting that the petition for habeas corpus filed in the D.C. Circuit alleged that Bollman and Swartwout were “confined in the city of Washington, at the marine barracks, under a military guard”); see also WILLIAM PLUMER'S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, 1803–1807, at 596 (Everett Somerville Brown ed., 1923) [hereinafter WILLIAM PLUMER'S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE] (reporting that the prisoners were “guarded, night & day, by an officer & 15 soldiers of the Marine Corps”).

charged Ogden.⁵⁰¹ Never one to be second-guessed, General Wilkinson ordered him arrested anew, along with the lawyer (James Alexander) who had sought the writ on Ogden's behalf.⁵⁰² The military then sent Alexander to Baltimore, where he was discharged by a writ of habeas corpus,⁵⁰³ as was another prisoner, Adair, "there being no evidence against either of them."⁵⁰⁴

For his part, Jefferson recognized that all of these military arrests were unlawful. "On great occasions," he wrote at the time, "every good officer must be ready to risk himself in going beyond the strict line of law, when the public preservation requires it."⁵⁰⁵ Suggesting that arrests "going beyond the strict line of law" would be indulged only in a handful of prominent cases, Jefferson instructed Wilkinson to keep in New Orleans those prisoners who were not central figures in the conspiracy and "against whom there is only suspicion, or shades of offence not strongly marked. In that case," Jefferson wrote, "I fear the public sentiment would desert you; because, seeing no danger here, violations of law are felt with strength."⁵⁰⁶ Jefferson specifically acknowledged that with respect to Alexander and Ogden, "the evidence yet received will not be sufficient to commit them."⁵⁰⁷

⁵⁰¹ 3 BEVERIDGE, *supra* note 499, at 333.

⁵⁰² *See id.* at 334-35.

⁵⁰³ *See id.* at 343.

⁵⁰⁴ WILLIAM PLUMER'S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, *supra* note 500, at 616 (internal quotation marks omitted) (entry of February 20, 1807).

⁵⁰⁵ Letter from President Thomas Jefferson to Governor W.C.C. Claiborne (Feb. 3, 1807), in 11 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 497, at 150, 151 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905). Jefferson continued:

The Feds, and the little band of Quids, in opposition, will try to make something of the infringement of liberty by the military arrest and deportation of citizens, but if it does not go beyond such offenders as Swartwout, Bollman, Burr, [and two others], etc., they will be supported by the public approbation.

Id.

⁵⁰⁶ Letter from President Thomas Jefferson to General James Wilkinson (Feb. 3, 1807), in 11 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 497, at 147, 149. Wilkinson also apparently recognized the dubious legality of his actions, for in a December 14, 1806, letter to the President, he stated that he would "look to our country for protection" if he was later sued by Bollman and Swartwout for damages for false imprisonment. 3 BEVERIDGE, *supra* note 499, at 334 (quoting Letter from General James Wilkinson to President Thomas Jefferson (Dec. 14, 1806), in NAT'L INTELLIGENCER (D.C.), Jan. 23, 1807) (internal quotation marks omitted). Presumably, Wilkinson meant that he would seek indemnification from the government for any damages levied against him, a common practice during this period. *See, e.g.*, James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1866 (2010).

⁵⁰⁷ Letter from President Thomas Jefferson to General James Wilkinson, *supra* note 506, at 149. A month earlier, Senator William Plumer wrote that "[t]he president of the United States, a day or two since, informed me that he knew of no evidence sufficient to convict [Burr] of either high crimes or misdemeanors." 3 BEVERIDGE, *supra* note 499, at 338 n.2 (quoting Letter from William Plumer to Jeremiah Mason (Jan. 4, 1807)) (internal quotation mark omitted) (citing addi-

Only days before writing these letters, on January 22, 1807, Jefferson had sent a message to Congress lamenting the fact that one of the “principal emissaries of Mr. Burr, whom the General [Wilkinson] had caused to be apprehended . . . had been liberated by *habeas corpus*.”⁵⁰⁸ Jefferson’s statement also expressed concerns over whether there existed sufficient evidence to sustain arrest warrants for the main conspirators upon their delivery to civil authorities for prosecution,⁵⁰⁹ a fact that — as suggested by his earlier writings — Jefferson understood made such arrests questionable in the absence of a suspension.⁵¹⁰ The next day, after Senator William Branch Giles of Virginia introduced a bill to suspend the writ of habeas corpus, the Senate suspended its normal rules and quickly passed the bill.⁵¹¹ Several scholars have implied that Jefferson asked Giles to introduce the bill.⁵¹² Although my own research has failed to uncover direct evidence supporting this claim, the timing and import of Jefferson’s January 22 message to Congress (complaining about the “liberat[ion]” of one of Burr’s “principal emissaries” by “*habeas corpus*”), the fact that Giles was known as the Administration’s leader in the Senate,⁵¹³ and the Senate’s passage of a suspension on the very next day support the inference.

Such was the backdrop against which the first extensive debate followed in Congress over whether to suspend the privilege under the new Constitution. I have discussed the debates in prior work.⁵¹⁴ For immediate purposes, they are equally illuminating. The Senate took up the matter first and, after a closed-door session,⁵¹⁵ hurriedly and overwhelmingly enacted a suspension bill.⁵¹⁶ The debate was not re-

tional Plumer letters). On January 22, however, Jefferson told Congress that Burr’s “guilt is placed beyond question.” 16 ANNALS OF CONG. 40 (1807).

⁵⁰⁸ 16 ANNALS OF CONG. 43 (1807).

⁵⁰⁹ See *id.* at 39–40 (observing that “little has been given under the sanction of an oath, so as to constitute formal and legal evidence. It is chiefly in the form of letters, often containing such a mixture of rumors, conjectures, and suspicions”). But see *id.* at 43 (stating that the conspirators will be turned over for the “course of trial”).

⁵¹⁰ See *supra* p. 974 (illustrating Jefferson’s view that the state could not detain individuals outside the criminal process in the absence of suspension).

⁵¹¹ See S. JOURNAL, 9th Cong., 2d Sess. 130–31 (1807); 1 MEMOIRS OF JOHN QUINCY ADAMS 445–46 (Charles Francis Adams ed., Philadelphia, J.B. Lippincott & Co. 1874); WILLIAM PLUMER’S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, *supra* note 500, at 585.

⁵¹² See, e.g., 3 BEVERIDGE, *supra* note 499, at 346–47; DUKER, *supra* note 331, at 135; 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 302 (1922). One account suggests that the first request for a suspension during this episode came from Navy Secretary Smith two months earlier, who asked for it “in a panic.” IRVING BRANT, JAMES MADISON: SECRETARY OF STATE, 1800–1809, at 349 (1953).

⁵¹³ See LEONARD W. LEVY, JEFFERSON & CIVIL LIBERTIES: THE DARKER SIDE 74 (1963).

⁵¹⁴ See Tyler, *supra* note 2, at 630–36.

⁵¹⁵ WILLIAM PLUMER’S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, *supra* note 500, at 585.

⁵¹⁶ LEVY, *supra* note 513, at 85–86.

corded and provides only hints about what some senators thought about the privilege, suspension, and the propriety of the military arrests that the Executive had undertaken.⁵¹⁷ Senator James Bayard of Delaware opposed the measure, observing that its “principal object seems to be to hold Bollman & Swartout [sic] in custody . . . that they may bear witness against Mr. Burr.”⁵¹⁸ He expressed a concern, repeated numerous times in the subsequent House debates,⁵¹⁹ that a suspension on this occasion would form a dangerous precedent for the future.⁵²⁰ Samuel Smith of Maryland, arguing in support of the bill, viewed it as “a preventive measure.”⁵²¹ John Quincy Adams apparently was “*passionately zealous* for its passage.”⁵²² Adams recognized, however, that something extraordinary was at stake — namely, the temporary suspension of “the great palladium of our rights.”⁵²³ William Plumer of New Hampshire also supported the measure,⁵²⁴ and his notes suggest a recognition that without the imprimatur of a suspension, the military arrests would ultimately be condemned as unlawful in actions for false imprisonment.⁵²⁵

The bill that the Senate passed provided:

That in all cases, where any person or persons, charged on oath with treason, misprision of treason, or other high crime or misdemeanor, endangering the peace, safety, or neutrality of the United States, have been or shall be arrested or imprisoned, by virtue of any warrant or authority of the President of the United States, or from the Chief Executive Magistrate of any State or Territorial Government, or from any person acting under the direction or authority of the President of the United States, the privilege of the writ of *habeas corpus* shall be, and the same hereby is suspended, for and during the term of three months⁵²⁶

⁵¹⁷ The main sources describing the debates are John Quincy Adams’s diaries and Plumer’s summaries of the proceedings. See 1 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 511, at 445–46; WILLIAM PLUMER’S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, *supra* note 500, at 585–89.

⁵¹⁸ WILLIAM PLUMER’S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, *supra* note 500, at 586.

⁵¹⁹ See 16 ANNALS OF CONG. 402–25 (1807).

⁵²⁰ See WILLIAM PLUMER’S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, *supra* note 500, at 588.

⁵²¹ *Id.* at 587.

⁵²² *Id.* at 589.

⁵²³ *Id.* at 587. Adams was reported to have said: “[Y]et on extraordinary occasions I believe [sic] its temporary suspension is equally as essential to the preservation of our government [and] the priveledges of the people.” *Id.*

⁵²⁴ As he wrote, although the writ “is designed to secure our rights . . . its temporary suspension in such a state of things will most effectually secure its object — *public security*.” *Id.* at 592.

⁵²⁵ Plumer lamented that the House’s subsequent failure to pass the bill meant that General Wilkinson would “probably fall a victim” and be “harrassed [sic] by suits” brought “by those whom he has arrested.” *Id.*

⁵²⁶ See 16 ANNALS OF CONG. 402 (1807) (replicating bill). For more on the congressional debates, see DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS,

By its terms, the bill legalized the continued detention of those persons, like Bollman and Swartwout, already in military custody. More generally, the purpose of the bill — just like the earlier English suspensions — was to empower the Executive to arrest and detain suspected traitors, for a time, outside the criminal process.

Only days later, the House took up the matter. These debates, unlike those in the Senate, were reported in the *Annals*, and they offer a rich glimpse into the Founding-era understanding of the privilege and its suspension.⁵²⁷ Upon its first reading, the House overwhelmingly defeated the measure.⁵²⁸ This defeat followed in large part from a recognition by many in the House that the suspension would free the Executive of normal legal constraints governing its power to arrest and from a general skepticism that existing circumstances warranted such an extraordinary course.⁵²⁹

After John Eppes moved to reject the bill without sending it to committee, his fellow Virginian William Burwell noted that Jefferson had promised to turn over the prisoners to “the civil authority” for prosecution.⁵³⁰ This promise, Burwell argued, obviated the need for a suspension empowering the government to continue holding them without charges.⁵³¹ Toward that end, he observed:

With regard to those persons who may be implicated in the conspiracy, if the writ of habeas corpus be not suspended, what will be the consequence? When apprehended, they will be brought before a court of justice, who will decide whether there is any evidence that will justify their commitment for farther prosecution.⁵³²

Thus, Burwell both equated suspension with the power to detain outside the normal criminal process and recognized that without a suspension, continued detention of the conspirators turned on whether sufficient evidence existed to sustain criminal charges against them. This understanding explains his observation that a suspension would give the Executive “the power of seizing and confining a citizen, upon

1801–1829, at 131–33 (2001). John Quincy Adams wrote that only Senator James Bayard voted against the bill. *See id.* at 131 (citing 1 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 511, at 445–46). Plumer reported that “3 or 4” senators voted against it. WILLIAM PLUMER’S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, *supra* note 500, at 590.

⁵²⁷ *See* 16 ANNALS OF CONG. 402–25 (1807). The *Annals* were not a verbatim transcript but were derived from newspaper reports. I will quote and rely upon them here (as I have in the past) as the best account that we have of this important debate.

⁵²⁸ The vote was 113 in favor of rejecting the bill, with only nineteen opposed. *Id.* at 424.

⁵²⁹ *See* Tyler, *supra* note 2, at 632–36 (summarizing the debates).

⁵³⁰ *See* 16 ANNALS OF CONG. 404 (1807) (statement of Rep. William Burwell).

⁵³¹ *See id.*

⁵³² *Id.* at 405 (emphasis added). Burwell read Jefferson’s statement to suggest that “there was sufficient evidence to authorize their commitment” in part because “[s]everal months would elapse before their final trial, which would give time to collect evidence.” *Id.*

bare suspicion.”⁵³³ In light of the fact that the conspiracy appeared to have run its course by this time, Burwell believed that “there was . . . no good reason to take” what he deemed “this *precautionary* step.”⁵³⁴

James Elliot of Vermont likewise doubted that circumstances warranted “suspend[ing], for a limited time, the privileges attached to the writ of habeas corpus.”⁵³⁵ In his view, these privileges were extensive, for he equated suspension of the privilege with “a temporary prostration of the Constitution itself.”⁵³⁶ Paraphrasing Blackstone, he called habeas corpus “a writ of liberty” and cautioned that its suspension “ought never to be resorted to but in cases of extreme emergency.”⁵³⁷ In his view, suspension was appropriate only when “the existing invasion or rebellion, in our sober judgment, threatens the first principles of the national compact, and the Constitution itself.”⁵³⁸

Joseph Varnum of Massachusetts, by contrast, supported the measure and repeatedly questioned whether without it the government would be able “to trace the conspiracy to its source.”⁵³⁹ Toward that end, he urged adoption of the measure to “lead to a full discovery of those concerned” in the conspiracy.⁵⁴⁰ Varnum also openly feared that without a suspension, “the head of [the] conspiracy” could “be set at liberty by the tribunals of justice” if there existed “*no evidence . . . of the crime charged to him.*”⁵⁴¹ Again underlying Varnum’s statements was the understanding that without a suspension, the legality of the conspirators’ continued detention turned on whether criminal charges could be sustained against them.

The same assumption underlay many other statements made in the debates, and none may be found contradicting it. Roger Nelson of Maryland equated a suspension with permitting “confining a man in

⁵³³ *Id.*

⁵³⁴ *Id.* (emphasis added); see also 3 STORY, *supra* note 195, § 1336, at 208 (equating suspension with permitting “apprehen[sion] upon suspicion”).

⁵³⁵ 16 ANNALS OF CONG. 406 (1807) (statement of Rep. James Elliot).

⁵³⁶ *Id.* at 407. Similar comments pervade the debates and are catalogued in Tyler, *supra* note 2, at 632–36. They include Eppes’s statement: “I cannot . . . bring myself to believe that this country is placed in such a dreadful situation as to authorize me to suspend the personal rights of the citizen, and to give him, in lieu of a free Constitution, the Executive will for his charter.” 16 ANNALS OF CONG. 411 (1807) (statement of Rep. John Eppes).

⁵³⁷ 16 ANNALS OF CONG. 408 (1807) (statement of Rep. James Elliot); see also 1 BLACKSTONE, *supra* note 137, at *132 (“In like manner this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with its liberty for a while, in order to preserve it for ever.”).

⁵³⁸ 16 ANNALS OF CONG. 406 (1807) (statement of Rep. James Elliot) (“In other words, we can only act, in this case, with a view to national self-preservation.”).

⁵³⁹ *Id.* at 411 (statement of Rep. Joseph Varnum); see also *id.* at 412.

⁵⁴⁰ *Id.* at 412.

⁵⁴¹ *Id.* (emphasis added).

prison without a cause” or “on vague suspicion.”⁵⁴² Where the privilege remained intact, by contrast, the power to commit was far more limited. As he described it: “[F]rom the evidence, [if] there [are] sufficient grounds to suspect that [the prisoner] is guilty of offence, he will not be discharged.”⁵⁴³ In this same vein, other speakers criticized what had already occurred as violating these fundamental principles. As John Randolph of Virginia saw things: “[T]he military has . . . usurped the civil authority” and the bill under debate was “calculated to give a softening and smoothing over to this usurpation.”⁵⁴⁴ Ultimately, without ever being committed, the bill died in the House.⁵⁴⁵

In the immediate wake of the Senate’s passage of the suspension bill and just before the House debates, an attorney for Bollman and Swartwout had filed a petition for a writ of habeas corpus in the Circuit Court for the District of Columbia.⁵⁴⁶ As reported by Chief Judge Cranch, the petition argued that the attorney:

[H]ad called on Colonel Wharton, the commandant of the marine corps, and requested a copy of the warrant or cause of commitment, who replied that he had no warrant of commitment, but that the prisoners were delivered in the usual military mode, and that they were merely under his care for safe keeping.⁵⁴⁷

In response to the petition, the federal prosecutor, at the Administration’s behest, requested that the court issue an arrest warrant to hold Bollman and Swartwout on charges of treason.⁵⁴⁸ A divided court, with Chief Judge Cranch dissenting, granted the government’s request just one day after the House voted down the suspension.⁵⁴⁹ The matter next went to the Supreme Court and, in an important opinion written by Chief Justice Marshall, a majority determined that the evidence

⁵⁴² *Id.* at 413, 414 (statement of Rep. Roger Nelson).

⁵⁴³ *Id.* at 413.

⁵⁴⁴ *Id.* at 419 (statement of Rep. John Randolph). “[O]n this ground,” Randolph stated, “I cannot assent to it.” *Id.*

⁵⁴⁵ *Id.* at 424.

⁵⁴⁶ See *United States v. Bollman*, 24 F. Cas. 1189, 1190 (C.C.D.C. 1807) (No. 14,622) (noting that the original petition was filed on January 24); see also *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 75 (1807) (noting that separate counsel later renewed the motion on behalf of Bollman).

⁵⁴⁷ See *Bollman*, 24 F. Cas. at 1190.

⁵⁴⁸ See *id.* at 1189. For more details, see ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 21, 161 n.7 (2001).

⁵⁴⁹ See *Bollman*, 24 F. Cas. at 1190. The order for Bollman and Swartwout’s commitment is replicated in the Supreme Court’s opinion. See *Bollman*, 8 U.S. (4 Cranch) at 75–76. In a letter to his father, Chief Judge Cranch wrote of his dissent:

I had no doubt whatever that the Constitution did not justify a commitment upon such evidence; and although I felt that the public interest might be benefitted by committing those gentlemen for trial, yet I could not consent to sacrifice the most important constitutional provision in favor of individual liberty, to reasons of State.

1 WARREN, *supra* note 512, at 304.

was insufficient to support the charges and directed that the prisoners be discharged.⁵⁵⁰ (The Court declined to rule out that “fresh proceedings” could be initiated upon stronger evidence.⁵⁵¹)

Together, the historical evidence from this period suggests that all understood that without the suspension, the detention of the citizen-conspirators suspected of plotting war on the United States turned entirely on the question whether sufficient evidence existed to sustain criminal charges against them.⁵⁵² As Chief Judge Cranch wrote at the time:

Never before has this country, since the Revolution, witnessed so gross a violation of personal liberty, as to seize a man without any warrant or lawful authority whatever, and send him two thousand miles by water for his trial out of the district or State in which the crime was committed — and then for the first time to apply for a warrant to arrest him⁵⁵³

In sum, this historical episode strongly supports the conclusion that “[i]f the Suspension Clause does not guarantee the citizen that he will either be tried or released [in the absence of a suspension] . . . ; it guarantees him very little indeed.”⁵⁵⁴

IV. THE CIVIL WAR AND RECONSTRUCTION: THE CONSTITUTION’S FIRST EXPERIMENT WITH “A MOST EXTRAORDINARY POWER”⁵⁵⁵

It was not until the Civil War that Congress invoked the suspension authority for the first time. Congress again authorized the President to suspend the privilege during Reconstruction. This second suspension came in response to the rise of the Ku Klux Klan in the South

⁵⁵⁰ See *Bollman*, 8 U.S. (4 Cranch) at 135.

⁵⁵¹ *Id.* at 137. The government later captured Burr and prosecuted him for treason in a trial over which Chief Justice Marshall presided. See 1 WARREN, *supra* note 512, at 308. The jury in the case “returned with a verdict of ‘Not guilty.’” *United States v. Burr*, 25 F. Cas. 55, 201 (C.C.D. Va. 1807) (No. 14,693). For details of the Burr trial, see 1 WARREN, *supra* note 512, at 308–15.

⁵⁵² A review of the House debate that followed some weeks later on a bill that would have provided for penalties where the writ was not honored suggests that all in the House simply took for granted that the military arrests during this period were illegal. See, e.g., 16 ANNALS OF CONG. 506, 520 (1807) (statement of Rep. James Broom); *id.* at 510 (statement of Rep. William Burwell); *id.* at 513 (statement of Rep. John Eppes). Eppes, for example, stated that the President (his father-in-law) “ought most certainly to have delivered over these persons to the civil authority.” *Id.* at 515 (statement of Rep. John Eppes). He also observed: “In this country, no man can be legally committed, or detained in custody, but by the civil authority.” *Id.* at 579.

⁵⁵³ 1 WARREN, *supra* note 512, at 304. As this passage indicates, there was also strong opposition to the fact that the prisoners had been moved from where the alleged conspiracy took place, an issue with which the Supreme Court also found fault in *Bollman*. See 8 U.S. (4 Cranch) at 111.

⁵⁵⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507, 575 (2004) (Scalia, J., dissenting).

⁵⁵⁵ Senator John Stevenson so described the suspension authority in the Reconstruction debates. See CONG. GLOBE, 42d Cong., 1st Sess. 761 (1871) (statement of Sen. John Stevenson).

and its attendant reign of terror. These two episodes constitute the only domestic suspensions in American history ever authorized directly by Congress.⁵⁵⁶ Both historical episodes are fully consistent with the formal view of the relationship between the privilege and the suspension power that controlled at the Founding. These episodes are explored here not necessarily as indicators of original meaning, but instead as comprising an important period in our nation's history during which the Founding view was essentially "liquidated."⁵⁵⁷

With the Confederate attack on Fort Sumter on April 12, 1861, the Civil War began. Just days later, President Abraham Lincoln unilaterally authorized Union military leaders to suspend the writ of habeas corpus where necessary to protect geographic areas that had to be held by the Union.⁵⁵⁸ As is well known, the President took this action without the formal blessing of Congress. Initially, the President could claim that Congress was unable to meet to grant him this authority. But that justification quickly fell by the wayside; in fact, Congress debated suspension legislation for two years before finally enacting it. Nonetheless, in the interim, Lincoln proclaimed numerous additional suspensions.⁵⁵⁹

I have detailed the events surrounding the Civil War suspension in prior work, and accordingly, I will discuss only key portions of those events here.⁵⁶⁰ In the period leading up to the 1863 legislation that formally authorized the President to suspend the writ as necessary to defend the Union, military officials arrested scores of persons under Lincoln's orders. "The arrests were made on suspicion. Prisoners were not told why they were seized . . . [T]he purpose of the whole process was *temporary military detention*," Lincoln historian James G.

⁵⁵⁶ On two occasions, suspensions were declared in territorial settings. The first was in the Philippines Territory in 1902, and the second was in Hawaii in 1941 after the bombing at Pearl Harbor. For additional details, see Tyler, *supra* note 2, at 663 & nn.311–12; and Tyler, *supra* note 7, at 346–47, 357–59, and sources cited therein.

⁵⁵⁷ THE FEDERALIST NO. 37 (James Madison), *supra* note 324, at 225 ("All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be *liquidated* and ascertained by a series of particular discussions and adjudications."); see also Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 538–39 (2003) (discussing how the Constitution's meaning can become "fixed" upon initial application).

⁵⁵⁸ 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"); Letter from Abraham Lincoln to Winfield Scott (Apr. 27, 1861), in 4 COLLECTED WORKS, *supra*, at 347, 347 (authorizing suspension of the privilege in the face of "resistance" encountered between Philadelphia and Washington).

⁵⁵⁹ See Tyler, *supra* note 2, at 638 n.177 (citing seven such suspensions).

⁵⁶⁰ See generally *id.* at 637–55. I draw heavily on this work here.

Randall has written.⁵⁶¹ Lincoln would later describe the arrests made during the wartime suspensions as following “not so much for what has been done, as for what probably would be done . . . *for the preventive*.”⁵⁶² Lincoln viewed the suspension authority as the only means by which such preventive arrests could be undertaken lawfully, at least with respect to persons enjoying the protection of the laws. For it was by invoking the suspension authority, Lincoln wrote, that these arrests became “constitutional.”⁵⁶³

According to Randall, Lincoln had been reluctant to suspend what he viewed as “the citizen’s safeguard against arbitrary arrest.”⁵⁶⁴ But once the President did invoke the suspension authority, he believed that by this act, he had brought such arrests within the law. Thus, while fully acknowledging that he had authorized his commanding general to “arrest, and detain, without resort to the ordinary processes and forms of law, such individuals as he might deem dangerous to the public safety,”⁵⁶⁵ Lincoln asserted to Congress that he had acted lawfully because these arrests followed under suspension proclamations.⁵⁶⁶ Lincoln wrote in 1863 that the Suspension Clause “plainly attests the understanding of those who made the constitution that . . . the[] purpose” of a suspension was so that “men may be held in custody whom the courts acting on ordinary rules, would discharge.”⁵⁶⁷

The “ordinary rules” to which Lincoln was referring were, of course, those protections inherent in the criminal process. This conclusion follows from Lincoln’s reliance upon the Suspension Clause as the source of power to arrest outside that scheme. Thus, Lincoln observed: “Of how little value the constitutional provision . . . will be rendered, if arrests shall never be made until defined crimes shall have been committed.”⁵⁶⁸ To be that much clearer, Lincoln pointed to the

⁵⁶¹ JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 150 (1926) (emphasis added); see also *id.* (observing that the object of these detentions was “precautionary”); *id.* at 149 (noting that during the early days of the war alone, “hundreds of prisoners were apprehended”). Randall further observed: “That all this procedure was arbitrary, that it involved the withholding of constitutional guarantees normally available, is of course evident.” *Id.* at 152.

⁵⁶² Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863), in 6 COLLECTED WORKS, *supra* note 558, at 260, 265 (emphasis added).

⁵⁶³ *Id.*

⁵⁶⁴ RANDALL, *supra* note 561, at 121.

⁵⁶⁵ See Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 COLLECTED WORKS, *supra* note 558, at 421, 429.

⁵⁶⁶ See *id.* at 430 (“It was not believed that any law was violated.”). Of course, the fact that Lincoln acted ahead of Congress in suspending the writ was enormously controversial at the time and remains so today. See, e.g., Saikrishna Bangalore Prakash, *The Great Suspender’s Unconstitutional Suspension of the Great Writ*, 3 ALB. GOV’T L. REV. 575, 602–13 (2010) (arguing that Lincoln did not have constitutional authority to suspend the writ); Tyler, *supra* note 2, at 638–39.

⁵⁶⁷ Letter from Abraham Lincoln to Erastus Corning and Others, *supra* note 562, at 264 (footnote omitted).

⁵⁶⁸ *Id.* at 265.

Suspension Clause and summarized: “The constitution itself makes the distinction”⁵⁶⁹ between “arrests by process of courts, and arrests in cases of rebellion.”⁵⁷⁰ Like most in Congress, Lincoln firmly believed that the Confederate states could not legally secede from the Union;⁵⁷¹ accordingly, he believed that their inhabitants retained their formal duty of allegiance. It followed that in order to hold Confederate soldiers and supporters without formal criminal charges, he had to suspend the privilege. This explains why on September 24, 1862, Lincoln ordered:

That the writ of habeas corpus is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority or by the sentence of any court-martial or military commission.⁵⁷²

Lincoln believed that suspension amounted to the power to legalize the preventive detention of those fighting with or supporting the Confederate cause.

To defuse a substantial controversy over whether the President or the legislature possessed the suspension power, Congress finally enacted suspension legislation in 1863. The debates surrounding this legislation and its terms reveal that members of Congress shared Lincoln’s view of the relationship between suspension and the protections embodied in the privilege. In the first section of the “Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases,” Congress 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. And whenever and wherever the said privilege shall be suspended, as aforesaid, no military or other officer shall be compelled, in answer to any writ of habeas corpus, to return the body of any person or persons detained by him by authority of the President . . . so long as said suspension by the President shall remain in force, and said rebellion continue.⁵⁷³

In the second and third sections of the Act, Congress placed substantial limits on the otherwise breathtaking delegation of suspension

⁵⁶⁹ *Id.* at 267.

⁵⁷⁰ *Id.* at 264–65.

⁵⁷¹ See 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”).

⁵⁷² Proclamation No. 1, 13 Stat. 730 (1862).

⁵⁷³ Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755, 755. The Act provided that no officer had to enter a return in habeas proceedings while a presidential order of suspension remained in force and the rebellion “continued.” *Id.*

authority in section 1.⁵⁷⁴ More important for instant purposes, these sections demonstrate that Congress viewed suspension as a limited exception — justified by the dramatic nature of the times — to the requirement that the detention of persons within protection be effected through the ordinary criminal process. These sections also suggest that Congress adhered to the view that those supporting and fighting with the Confederacy still owed allegiance to the Union and, accordingly, could not be held preventively without a suspension.

Section 2 provided that the Secretaries of State and War were required “as soon as may be practicable” to “furnish to the judges” of the federal courts:

[A] list of the names of all persons [who are] citizens of states in which the administration of the laws has continued unimpaired in the said Federal courts [and] who are now, or may hereafter be, held as prisoners of the United States, by order or authority of the [Executive], . . . as state or political prisoners, or otherwise than as prisoners of war.⁵⁷⁵

This section continued by requiring that in all cases where a sitting grand jury, after being furnished with such a list, “ha[d] terminated its session without finding an indictment or presentment, or other proceeding against any such person,” the court was under a “duty” to discharge the prisoner.⁵⁷⁶ This duty, however, only followed in those cases in which the prisoner had “taken an oath of allegiance to the Government of the United States, and to support the Constitution thereof; and that he or she will not hereafter in any way encourage or give aid and comfort to the present rebellion, or the supporters thereof.”⁵⁷⁷ Section 3, in turn, provided that anyone under indictment for violating federal law who was entitled to bail or recognizance under the laws in effect before the suspension remained so entitled even during a suspension.⁵⁷⁸ Finally, violations of sections 2 and 3 subjected federal officers to possible imprisonment and fines.⁵⁷⁹

Studying the Act’s terms reveals several things. To begin, the Civil War Congress was operating under the assumption that the Constitution required a suspension to empower the President to hold lawfully “citizens of states in which the administration of the laws ha[d] contin-

⁵⁷⁴ See *id.* §§ 2–3, 12 Stat. at 755–56.

⁵⁷⁵ *Id.* § 2, 12 Stat. at 755 (emphasis added).

⁵⁷⁶ *Id.*

⁵⁷⁷ *Id.* § 2, 12 Stat. at 755–56. The Act also permitted the judge in such cases to require as a condition of discharge that the person “enter into recognizance, with or without surety, in a sum to be fixed by said judge or court, to keep the peace and be of good behavior towards the United States and its citizens.” *Id.* § 2, 12 Stat. at 756. On the use of preventive sureties in England, see 4 BLACKSTONE, *supra* note 137, at *248–54.

⁵⁷⁸ Act of Mar. 3, 1863, ch. 81, § 3, 12 Stat. at 756.

⁵⁷⁹ See *id.* §§ 2–3, 12 Stat. at 755–56.

ued unimpaired” without criminal charges.⁵⁸⁰ In such cases, the Act permitted detention on very limited terms — that is, until the next sitting grand jury failed to indict a prisoner who was willing to take an oath of allegiance.⁵⁸¹ Only where a prisoner refused to take the oath did Congress permit detention outside the criminal process to continue.⁵⁸²

Further, reading sections 1 and 2 together also suggests that Congress believed a suspension was necessary to authorize the President lawfully to hold Confederate soldiers as “prisoners of war” during this period. Specifically, section 2 singled out “prisoners of war” as a category of persons who, while eligible for detention without benefit of the privilege pursuant to section 1’s suspension authorization, were to be denied the right to be indicted or released in due course upon taking an oath of allegiance.⁵⁸³ These aspects of the legislation would have been superfluous if Congress could have authorized the military through ordinary legislation or a general declaration of war to detain persons deemed to owe allegiance as “prisoners of war” when suspected of joining in arms with or aiding the Confederacy.

Resolving any remaining ambiguity on this score, President Lincoln’s proclamation that followed passage of the 1863 Act reveals that he operated under this same understanding. In September 1863, Lincoln announced his most sweeping suspension proclamation, in which he declared:

[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*, or officers, soldiers, or seamen enrolled or drafted or mustered or enlisted in, or belonging to, the land or naval forces of the United States, or as deserters therefrom, or otherwise amenable to military law, or the rules and articles of war, or the rules or regulations prescribed for the military or naval services by authority of the President of the United States, or for resisting a draft, or for any other offence against the military or naval service . . .⁵⁸⁴

The proclamation specifically encompassed persons held in military custody as “prisoners of war” — the category most likely to encompass Confederate soldiers picked up on the battlefield. Even Lincoln did not believe that the President had inherent authority to detain such

⁵⁸⁰ Presumably, for those citizens in states where the courts were not operating, Congress recognized that the protections set forth in section 2 would have been unenforceable.

⁵⁸¹ See Act of Mar. 3, 1863, ch. 81, § 2, 12 Stat. at 755.

⁵⁸² See *id.*

⁵⁸³ See *id.* § 2, 12 Stat. at 755–56.

⁵⁸⁴ Proclamation No. 7, 13 Stat. 734, 734 (1863) (emphases added).

persons in the absence of a suspension. (His dispute with Congress centered on whether he needed its assent to proclaim a suspension.⁵⁸⁵) He viewed this suspension (like that of September 24, 1862) as a necessary predicate to legalize such detentions.⁵⁸⁶ And, unless the Confederacy successfully seceded from the Union, the Suspension Clause would continue to constrain the Executive's power to detain the rebels.⁵⁸⁷

The extensive congressional debates leading up to the 1863 Act also reveal that participants were operating under the assumption that a suspension was constitutionally required for the Executive to detain prisoners during the war outside the criminal process. Thus, for example, Senator Jacob Collamer of Vermont, the principal author of the 1863 Act,⁵⁸⁸ declared that the purpose of a suspension is to "enable [the Executive] to take and to hold persons independent of their committing crimes, for State reasons, for public safety, for the public security."⁵⁸⁹ Elaborating on the point, Collamer observed that a suspension is necessary to empower the Executive to "secur[e]" persons from "the commission" of acts "dangerous to the Government" in instances where they could not be charged criminally.⁵⁹⁰

Senator James Doolittle of Wisconsin agreed, observing that suspension would provide the necessary legal justification for the President to arrest persons who had committed treason and might be "about to join the enemy" as well.⁵⁹¹ He remarked that, under the Act, the President:

[W]ill be authorized to seize upon [not only] those who are guilty of the crime of treason . . . [but also] those whom he knows, or has every reason to believe, are about to join the enemy, or give them aid or comfort; for it is to reach that class of men that it is necessary that the Executive should be clothed with this power. It is not enough that he may be permitted to

⁵⁸⁵ For discussion of the critical role that Congress should play in any suspension, see Tyler, *supra* note 2, at 687–91.

⁵⁸⁶ See *supra* p. 988.

⁵⁸⁷ Cf. *supra* pp. 950–51 (discussing Parliament's decision to permit the suspensions directed at the colonists during the Revolutionary War to lapse upon recognition that the colonies had "revolted").

⁵⁸⁸ See CONG. GLOBE, 39th Cong., 1st Sess. 2021 (1866) (statement of Sen. Lyman Trumbull) (stating that Senator Collamer was the author of the 1863 Act); Tyler, *supra* note 2, at 643–50.

⁵⁸⁹ CONG. GLOBE, 37th Cong., 3d Sess. 1206 (1863) (statement of Sen. Jacob Collamer).

⁵⁹⁰ *Id.* at 550 (noting that by a suspension "the President would be in the exercise of his power rightfully in arresting men who had been guilty of no crime, for the purpose of securing against the commission of [acts] . . . dangerous to the Government"); see also *id.* at 1206 ("I say again the suspension of the writ . . . has nothing to do with the arrest of criminals. . . . [A suspension] is not used for that. This *habeas corpus* is to be suspended to enable them to hold in arrest persons who have not committed crime.").

⁵⁹¹ *Id.* at 1194 (statement of Sen. James Doolittle).

arrest those who have been guilty of actual crime. In times of war it is necessary to arrest those who are about to engage in crime.⁵⁹²

Senator Morton Wilkinson of Minnesota likewise echoed this idea. The suspension was necessary, in his view, because “there are a great many ways in a rebellion of this magnitude in which a party can oppose the Government without committing those overt acts which render him liable to an indictment for treason.”⁵⁹³

Earlier in the debates, Senator Timothy Howe of Wisconsin had described the object of suspension in similar terms:

What is this suspension of the writ of *habeas corpus*? A man is taken as an enemy of the United States upon evidence which convinces the military authorities . . . that this individual is an enemy, and that his liberty, his license to go at large, is not consistent with the welfare and safety of the Republic. He has committed no overt act; he has committed no single act which your statutes describe and declare to be a crime.⁵⁹⁴

Senator Lyman Trumbull of Illinois likewise viewed a suspension as “allow[ing] . . . a temporary arrest of parties,” including those “preparing plots not yet matured so that you can arrest them for treason.”⁵⁹⁵

Whatever the various disagreements that members of Congress had in these debates, everyone appears to have simply taken for granted that without the proposed suspension, the President’s power to detain persons during the war for “the public safety” — whether they had already committed treason or not — would be constrained by the protections inherent in the criminal process.⁵⁹⁶

In the wake of the 1863 Act and Lincoln’s sweeping 1863 proclamation, Union officers took numerous prisoners, many on a preventive basis and many on the battlefield.⁵⁹⁷ In the meantime, the government largely failed to comply with the requirements of section 2 of the

⁵⁹² *Id.*

⁵⁹³ *Id.* at 1200 (statement of Sen. Morton Wilkinson); *see also id.* at 1472 (statement of Sen. Edgar Cowan) (observing that, as the English understood it, the purpose of a suspension was to arrest persons “out of excessive caution”).

⁵⁹⁴ CONG. GLOBE, 37th Cong., 1st Sess. 395 (1861) (statement of Sen. Timothy Howe).

⁵⁹⁵ CONG. GLOBE, 37th Cong., 3d Sess. 1092 (1863) (statement of Sen. Lyman Trumbull).

⁵⁹⁶ *See, e.g., id.* at 247 (statement of Sen. Jacob Collamer). Thus, for example, those who thought that the President had acted properly in suspending the writ ahead of Congress viewed his having done so as rendering legal the “military arrests” and “temporar[y]” detention of “persons . . . who have made themselves suspected of having carried on improper intercourse with the enemy, or who have rendered aid and assistance to the enemy, or are aiming to do so.” *Id.* at 544 (statement of Sen. Jacob Howard). The opponents of the bill did not quarrel with this conclusion but instead took a more limited view of the suspension authority. *See, e.g., id.* at 1195 (statement of Sen. John Carlile) (suggesting that a suspension was unconstitutional in “loyal” states and that where the courts were open, no one may be deprived of a speedy trial); *id.* at 1193 (statement of Sen. Lazarus Powell) (stating that only “prisoner[s] of war” may be arrested during “times of war” “without judicial process”).

⁵⁹⁷ *See generally* MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES (1991) (detailing the thousands of arrests made during the war).

Act.⁵⁹⁸ This latter point highlights the fact that here, as in many other contexts, the government did a great many things in preserving the Union that did not comport with the letter of the law.⁵⁹⁹

It was also the case that during this period the lines of allegiance were the subject of heated disagreement. Many at the time argued that the rebels had forsaken their allegiance and could be treated as foreigners outside protection.⁶⁰⁰ Members of Congress and the President moved increasingly toward the position that those fighting with the Confederacy or living within its borders could be denied the privileges of citizenship and treated as enemies under the laws of war.⁶⁰¹ In keeping with this idea, the Supreme Court upheld the President's blockade of Southern states in the *Prize Cases*⁶⁰² by deferring to the President's decision to treat those aligned with the Confederacy as belligerent enemies.⁶⁰³ Notably, the Court's reasoning rested in part on the assumption that such persons had "cast off their allegiance" to the Union.⁶⁰⁴ It followed that the law often required persons who had sided with the Confederacy to renew their allegiance to the Union in order to regain full enjoyment of its protections.⁶⁰⁵

⁵⁹⁸ See Tyler, *supra* note 2, at 651–52.

⁵⁹⁹ Cf. Richard H. Fallon, Jr., *Executive Power and the Political Constitution*, 2007 UTAH L. REV. 1, 21 (discussing *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487), in which Chief Justice Taney rejected Lincoln's unilateral suspension, and opining: "*Merryman* seems to me to be a very rare case in which the practical imperatives confronting the President morally justified his violation of constitutional law").

⁶⁰⁰ See, e.g., CONG. GLOBE, 37th Cong., 1st Sess. 341 (1861) (statement of Sen. Edgar Cowan) (opining that the Union may take as a prisoner of war "a citizen of our own who has cut himself away from the Government and severed his allegiance"); *The Law of Conquest the True Basis of Reconstruction*, 24 NEW ENGLANDER 111, 120 (1865) (opining that the rebels "have no longer any right of protection from our government or any right of citizenship under it, and become *de facto* foreigners" and that "[a]gainst them the government possesses full belligerent rights under the laws of war"); cf. GROSVENOR P. LOWREY, THE COMMANDER-IN-CHIEF 16 (New York, G.P. Putnam 1862) ("[T]he armed rebel, ha[s] voluntarily withdrawn from the protection of the Constitution and submitted himself to the arbitrament of war.").

⁶⁰¹ See, e.g., Proclamation No. 5, 12 Stat. 1258, 1259 (1861) (asserting in a presidential proclamation the legal authority to institute a blockade under "the laws of the United States and of the law of nations"). For a general discussion of this topic, see Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839 (2010).

⁶⁰² 67 U.S. (2 Black) 635 (1862).

⁶⁰³ See *id.* at 672–74.

⁶⁰⁴ *Id.* at 674. Of course, in the immediate wake of the war, the Court held that "[t]he Constitution . . . is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120–21 (1866).

⁶⁰⁵ See, e.g., Amanda L. Tyler, *The Story of Klein: The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts*, in FEDERAL COURTS STORIES 87, 88–91 (Vicki C. Jackson & Judith Resnik eds., 2010) (discussing the Amnesty Proclamation pursuant to which President Lincoln offered many Confederate supporters the restoration of rights to property (except slaves) as enticement to renew their allegiance to the Union).

Further, in many of the areas that saw the worst of the war (and accordingly witnessed the greatest number of arrests of Confederate soldiers), martial law prevailed due to the fact that federal courts had been displaced.⁶⁰⁶ As Attorney General Caleb Cushing described it at the time, a proclamation of martial law “must be regarded as the statement of an existing fact, rather than the legal creation of that fact” and follows where “civil authority has become suspended . . . by the force of circumstances.”⁶⁰⁷ Indeed, without functioning courts, a suspension would arguably be superfluous in such places.

From all of this, reasonable people can certainly disagree about the extent to which the Civil War period provides insights into broader questions of the meaning and application of the Suspension Clause. My point for present purposes is only this: whatever took place on the ground, the formal understanding held by the President and Congress of the relationship between the privilege and the suspension authority during this period remained largely consistent with that held at the Founding. Specifically, where allegiance remained unbroken in the eyes of the law and where courts remained open, it was only by a suspension that the President lawfully could claim the power to detain persons owing allegiance as so-called “prisoners of war” or “for State reasons” — that is, without criminal charges.⁶⁰⁸ Further, as one period

⁶⁰⁶ Traditionally, English law viewed martial law as a law of necessity. Thus, Hale described it as “in Truth and Reality . . . not a Law, but something indulged rather than allowed as a Law.” SIR MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 40 (n.p., J. Nutt 1713). Coke contrasted a state of martial law in which “the courts of justice be *as it were* shut up” with times “[w]hen the courts of justice be open, and *the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all.*” W.F. FINLASON, *A REVIEW OF THE AUTHORITIES AS TO THE REPRESSION OF RIOT OR REBELLION, WITH SPECIAL REFERENCE TO CRIMINAL OR CIVIL LIABILITY* 50 (London, Stevens & Sons 1868) (quoting 1 SIR EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* § 412 (Francis Hargrave & Charles Butler eds., Philadelphia, Robert H. Small 1853)) (internal quotation mark omitted). See generally *id.* at 49–88 (exploring the authorities on martial law). This conception of martial law suggests that its legitimacy turns on conditions rendering the existing institutions that are responsible for the provision of law and order entirely incapable. See, e.g., *id.* at 98 (“Martial law is quite different from ordinary military law, that it is justified by paramount necessity, and proclaimed by a military chief.” (quoting 1 KENT, *supra* note 160, at 370 n.a (7th ed., New York, William Kent 1851)) (internal quotation marks omitted)).

⁶⁰⁷ *Martial Law*, 8 Op. Att’y Gen. 374 (1857); see also *Milligan*, 71 U.S. (4 Wall.) at 127 (describing martial law as limited to “the theatre of active military operations, where war really prevails”).

⁶⁰⁸ The Supreme Court’s 1866 decision in *Ex parte Milligan* is also consistent with this view. The Court held that Milligan was entitled to be discharged from custody because he had been detained outside the scope of the 1863 suspension legislation and because his conviction by a military tribunal did not independently justify his continued detention. See *Milligan*, 71 U.S. (4 Wall.) at 116–18, 125–27. The holding in *Milligan* with respect to the power to try citizens before military tribunals is difficult to reconcile with the later holding of *Ex parte Quirin*, 317 U.S. 1 (1942), which upheld death sentences issued by a military tribunal to German saboteurs captured on American soil, including one who claimed United States citizenship. See *id.* at 37–38. *Quirin* distinguished *Milligan* as not involving an enemy belligerent subject to the laws of war, see *id.* at

commentator explained, it was understood that “[w]hen the term of suspension has passed, the right to apply for the Writ, or the privilege or benefit of the Writ revives; and any one in confinement, who has not been tried, may demand it, in order to bail or trial.”⁶⁰⁹ Any other reading of the Civil War episode (for example, as supporting the idea that rebellious citizens still deemed to owe allegiance could be detained without charges in the absence of a suspension⁶¹⁰) strains the express terms of the Constitution, which of course lists “Rebellion” as one of the only two justifications for a suspension.⁶¹¹

The Reconstruction suspension tells the same story. As I have detailed in prior work, Congress authorized President Grant to suspend the writ in order to combat the terror being wrought by the Ku Klux Klan in the South.⁶¹² The authorization came in section 4 of the Ku Klux Klan Act of 1871,⁶¹³ and by its express terms applied only where “the conviction of . . . offenders and the preservation of the public safety shall become in [a] district impracticable”⁶¹⁴ — that is, where the existing criminal justice framework had broken down. Such was the case in portions of the South, where several states were “unable to

45, but “Milligan allegedly had communicated with and aided the Confederacy and was, accordingly, charged specifically with violating ‘the laws of war,’” Fallon & Meltzer, *supra* note 24, at 2078 (quoting *Milligan*, 71 U.S. (4 Wall.) at 6). For more discussion, see *infra* p. 1016. Note that the Supreme Court’s disapproval in *Milligan* of trying ordinary citizens before military tribunals was not shared by the President or Congress at the time. Lincoln had proclaimed that the jurisdiction of military tribunals should extend to “all Rebels and Insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to Rebels against the authority of the United States.” NEELY, *supra* note 597, at 65 (quoting Proclamation No. 1, 13 Stat. 730 (1862)). Congress later passed legislation approving of the widespread use of military tribunals. See Act of Mar. 2, 1867, ch. 155, 14 Stat. 432; Tyler, *supra* note 2, at 654–55 (detailing such legislation).

⁶⁰⁹ G.M. WHARTON, REMARKS ON MR. BINNEY’S TREATISE ON THE WRIT OF HABEAS CORPUS 12 (2d ed., Philadelphia, John Campbell 1862).

⁶¹⁰ See, e.g., Kent, *supra* note 601, at 1884 n.155 (collecting sources expressing this view).

⁶¹¹ Concededly, there is support for the idea that once a rebellion escalates into a full-fledged civil war, the laws of war intercede to govern relations between the warring factions. See, e.g., *Juando v. Taylor*, 13 F. Cas. 1179, 1182 (S.D.N.Y. 1818) (No. 7558) (distinguishing rebellion from civil war). The authorities on this point include the highly influential Vattel. See 1 EMMERICH DE VATTEL, THE LAW OF NATIONS §§ 292–293, at 424–25 (London, n. pub. 1787) (1758) (“A civil war breaks the bands of society and government, or at least suspends their force and effect: it produces in the nation two independent parties, who consider each other as enemies Those two parties, therefore, must necessarily be considered as thenceforward constituting, at least for a time, two separate bodies, two distinct societies.” *Id.* § 293, at 425.). But at most, this position supports an extremely limited exception to the otherwise controlling rule.

⁶¹² See Tyler, *supra* note 2, at 655–62 (detailing both the Klan’s reign of terror and the implementation of the suspension).

⁶¹³ Ch. 22, 17 Stat. 13. This Act was modeled on the 1863 Act and included parallel provisions to section 2 of that act.

⁶¹⁴ *Id.* § 4, 17 Stat. at 13.

provide even the semblance of criminal law enforcement.”⁶¹⁵ President Grant had requested that Congress give him expanded authority to address the crisis,⁶¹⁶ and once granted it, he responded by suspending the writ in the South Carolina upcountry, a key Klan stronghold.⁶¹⁷ Attorney General Amos T. Akerman is reported to have remarked at the time that the Klan’s actions “amount[ed] to war” and could not “be effectively crushed on any other theory.”⁶¹⁸ In the events that followed, military officials, led by Major Lewis Merrill, arrested scores of suspected Klan members. As Merrill’s aide in South Carolina, Louis Post, wrote, these arrests were “without warrant or specific accusation” of criminal conduct; persons were targeted based on their presumed membership in the Klan.⁶¹⁹ The objectives of the arrests included uncovering the identity of key Klansmen and preventing witness intimidation.⁶²⁰

Two points bear highlighting from this episode. First, when the suspension lapsed, everyone understood that suspects could no longer be detained without charges, and accordingly, many of those in custody were referred for prosecution on federal criminal law charges, while others were released.⁶²¹ Second, in evaluating the suspension immediately after it ended, Congress concluded “that where the membership, mysteries, and power of the organization have been kept concealed [suspension] is the most and perhaps only effective remedy for its suppression.”⁶²² It probably goes without saying that there are significant parallels to be drawn between this episode and the threat posed by terrorism today.

⁶¹⁵ ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866–1876*, at 81 (1985).

⁶¹⁶ President Grant had requested expanded powers “for the purpose of securing to all citizens . . . enjoyment of the rights guaranteed to them by the Constitution and laws,” including presumably those rights granted by the Reconstruction Amendments. Ulysses S. Grant, A Proclamation (May 3, 1871), *reprinted in* 5 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS* 4088, 4088 (James D. Richardson ed., n.p., Bureau of Nat’l Literature 1897) [hereinafter *MESSAGES AND PAPERS*] (replicating the President’s message to Congress). Notably, the suspension came within legislation that included important civil rights provisions, such as what is now 42 U.S.C. § 1983. *See* Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13.

⁶¹⁷ *See* Ulysses S. Grant, A Proclamation (Oct. 17, 1871), *reprinted in* 5 *MESSAGES AND PAPERS*, *supra* note 616, at 4090, 4091; Ulysses S. Grant, A Proclamation (Nov. 10, 1871), *reprinted in* 5 *MESSAGES AND PAPERS*, *supra* note 616, at 4093, 4095.

⁶¹⁸ LOU FALKNER WILLIAMS, *THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871–1872*, at 44–45 (1996) (internal quotation mark omitted).

⁶¹⁹ Louis F. Post, *A “Carpetbagger” in South Carolina*, 10 *J. NEGRO HIST.* 10, 41 (1925).

⁶²⁰ For more details, see Tyler, *supra* note 2, at 655–62.

⁶²¹ *See id.* at 660–61.

⁶²² S. REP. NO. 42-41, pt. 1, at 99 (1872). In the months leading up to the suspension, Merrill had investigated the Klan in the area, but his efforts were frustrated by the secrecy and compartmentalization of the organization. *See* David Everitt, *1871 War on Terror*, *AM. HIST.*, June 2003, at 26, 30.

Consistent with the Founding-era understanding of suspension, when these domestic invocations of the suspension power — the only two in American history on the federal level — are viewed together, they demonstrate that the idea of holding a “citizen enemy combatant” on American soil in the absence of a suspension is one without grounding in our constitutional tradition. The two territorial suspensions that followed in the twentieth century likewise support this conclusion.⁶²³

V. THE SUSPENSION CLAUSE IN THE CONSTITUTIONAL FRAMEWORK TODAY

This Part explores how modern jurisprudence respecting the detention of persons within protection during wartime has departed dramatically from the original understanding of the Suspension Clause. It begins by summarizing that understanding before returning to modern historical examples and the Supreme Court’s decision in *Hamdi* to show how these episodes stand at odds with the original understanding of that Clause. Finally, this Part concludes by noting some of the important questions remaining to be explored in this area.

A. *The Original Understanding of the Suspension Clause*

As it came to America, “[t]he writ of *habeas corpus* [was] a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause.”⁶²⁴ As this description of the privilege written by Chief Justice Marshall highlights, the key question posed by the Suspension Clause inquiry is what constitutes “sufficient cause” to detain consistent with the Constitution. Put another way, as Professor Zechariah Chafee once observed, the import of the writ “depends on the location of the line between lawful and unlawful imprisonments.”⁶²⁵

As the history of the relationship between the privilege and the suspension power reveals, the original understanding of the line “between lawful and unlawful imprisonments” was well established with respect to the domestic wartime detention of persons within protection. Long before ratification, it had been settled that executive assertions of

⁶²³ For discussions of these suspensions — which occurred in the Philippines and Hawaii — see Tyler, *supra* note 7, at 346–47, 357–59; and Tyler, *supra* note 2, at 663 nn.311–12.

⁶²⁴ *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.); see also *Price v. Johnston*, 334 U.S. 266, 283 (1948) (observing that the writ affords “a swift and imperative remedy in all cases of illegal restraint upon personal liberty”); 3 STORY, *supra* note 195, § 1333, at 206 (observing that the writ “is the appropriate remedy to ascertain, whether any person is rightfully in confinement or not, and the cause of his confinement; and if no sufficient ground of detention appears, the party is entitled to his immediate discharge”).

⁶²⁵ Chafee, *supra* note 45, at 159.

unilateral authority to detain were insufficient, regardless of the justification.⁶²⁶ As Blackstone put it, individual liberty “cannot ever be abridged at the mere discretion of the magistrate.”⁶²⁷ The exercise of such wholly unchecked (and often abused) authority by the Crown and the Privy Council had fueled the evolution of the writ of habeas corpus into what Blackstone would eventually call the great “bulwark of our liberties.”⁶²⁸

And by the time of the Founding, when persons of whom allegiance was demanded were suspected of treasonous or other criminal conduct, the privilege had come to guarantee them much more than a generic promise of due process of law. More specifically, the privilege had come by this point to be equated with a host of protections including the rights to presentment or indictment, speedy trial, and reasonable bail where applicable.⁶²⁹ This understanding followed from the marriage of the privilege with many of the rights established in Magna Carta, the Petition of Right, the Habeas Corpus Act, and the Declaration of Rights.⁶³⁰ One can now easily understand why Alexander Hamilton advanced the position in the *Federalist Papers* that a Bill of Rights was unnecessary. He believed, consistent with this history, that the privilege embodied many of the constitutional protections that would later be listed among the Bill of Rights, rendering express recognition of the same superfluous.⁶³¹

⁶²⁶ See, e.g., WALKER, *supra* note 143, at 96–107 (discussing the reception of habeas corpus in colonial America).

⁶²⁷ 1 BLACKSTONE, *supra* note 137, at *130.

⁶²⁸ *Id.* at *133; see also 3 BLACKSTONE, *supra* note 137, at *133 (observing that individual liberty is “established on the firmest basis by the provisions of *magna carta*, and a long succession of statutes enacted under Edward III,” including the treason statute).

⁶²⁹ See *supra* section II.A. Whatever the modern conception of due process (such as the protection it provides from the deprivation of government benefits as recognized in *Mathews v. El-dridge*), influential early American treatises like Story’s *Commentaries* equated “due process of law” with specific protections that were in keeping with the understanding of the privilege that controlled during that period. Thus, Story described the Due Process Clause as “in effect affirm[ing] the right of trial according to the process and proceedings of the common law.” 3 STORY, *supra* note 195, § 1783, at 661 (emphasis added) (equating due process with “due presentment or indictment, and being brought in to answer thereto by due process of the common law,” *id.*); cf. U.S. CONST. amend. V (“[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . .”); *Duncan v. Louisiana*, 391 U.S. 145, 169 (1968) (Black, J., concurring) (“[T]he origin of [due process] was an attempt by those who wrote Magna Carta to do away with the so-called trials of that period where people were liable to sudden arrest and summary conviction in courts and by judicial commissions with no sure and definite procedural protections and under laws that might have been improvised to try their particular cases.”). *Mathews*, in short, is entirely inapposite to the inquiry posed in *Hamdi*.

⁶³⁰ See *supra* section II.A.

⁶³¹ See THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 324, at 510–13; see also U.S. CONST. amend. V (providing, among other things, that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury”); *id.* amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy

More generally, just like their English predecessors, the Founding generation distinguished in wartime between enemies and those of whom allegiance was demanded. By this understanding, only enemies could be detained lawfully outside the criminal process as prisoners of war in the absence of a suspension. Those subject to the law of treason, by contrast, enjoyed the “benefit” of the privilege that promised they could not be detained for criminal or national security purposes without substantiated criminal charges and eventual trial on the same.⁶³² The only exception to this rule followed where an act of suspension operated to displace the privilege and its many protections.⁶³³ As historian Paul Halliday has observed, moreover, “when suspension ended, the writ sprang immediately back to life.”⁶³⁴

There is, all the same, a dramatic disconnect between the original understanding of the Suspension Clause that controlled through Reconstruction and that which seems to hold sway today. The examples discussed in Part I suggest an increasing modern political and legal acceptance of the idea that wartime conditions justify detaining citizens without charges for national security purposes based on mere suspicion of disloyalty. Consistent with this idea, Congress recently enacted as part of Defense Department appropriations legislation provisions that sanction the detention of prisoners, including citizens, for both investigative and preventive reasons as part of the ongoing war on terrorism.⁶³⁵ The new legislation merely codifies existing practices in the

and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation”); *id.* amend. VIII (“Excessive bail shall not be required”). Like Alexander Hamilton, Zechariah Chafee later observed that the privilege enshrined in the Suspension Clause constitutes “the most powerful weapon for enforcing numerous clauses in the Amendments of 1791.” Chafee, *supra* note 45, at 144; *see id.* at 144–45 (listing rights enforced by the privilege and observing that “very little of what I have just said is even hinted at in the constitutional debates,” for “[t]he importance of the writ itself is virtually taken for granted”).

⁶³² Being subject to the law of treason meant both being exposed to its harsh penalties and enjoying the extensive protections that ran with such a serious charge (including the requirement of two witnesses to an overt act). *See* U.S. CONST. art. III, § 3 (“Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”).

⁶³³ As discussed above, bills of attainder proved another exception in English tradition, but they came out of favor in English law and are expressly prohibited in the United States Constitution. *See supra* notes 199, 253.

⁶³⁴ HALLIDAY, *supra* note 142, at 250.

⁶³⁵ *See* National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1021 (2011) (enacted); *see also* Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010, S. 3081, 111th Cong. § 5 (2010) (“An individual, including a citizen of the United States, determined to be an unprivileged enemy belligerent . . . may be detained without criminal charges and without trial for the duration of hostilities . . . in which the individual has engaged, or which the individual has purposely and materially supported”); Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010, H.R. 4892, 111th Cong. § 5 (2010) (same). Notably, President Obama has written that despite this authorization his “Administration will not authorize the

war on terrorism and takes the *Hamdi* Court at its word that “[t]here is no bar to this Nation’s holding one of its own citizens as an enemy combatant.”⁶³⁶

With the benefit of knowing the history surrounding the adoption of the Suspension Clause, there is a formidable case to be made that many, if not all, of these examples stand entirely at odds with the original understanding and underlying purposes informing the adoption of that clause.

B. *Modern Departures from the Original Understanding*

Let us begin with the World War II internment of Japanese American citizens. It is important here to put aside issues of race, which have dominated the critical discourse surrounding this historic episode.⁶³⁷ With the outbreak of war, the military forcibly removed thousands of American citizens of Japanese descent from their homes and transported them to “relocation camps” for long-term preventive detention. Camp residents could not leave without the prior permission of the military authority.⁶³⁸ These actions were all taken based on unsubstantiated and generalized suspicions of disloyalty. Congress had not suspended the privilege in the relevant geographic area (the western states); instead, the mass detentions occurred pursuant to military orders and an expansive vision of the government’s war powers.⁶³⁹

Determining the lawfulness of the detention of Japanese Americans during this period does not present a hard question. Recall the Jacobite sympathizers who were feared to be plotting William’s undoing during his struggles to retain the throne.⁶⁴⁰ To hold such persons outside the criminal process during recurrent periods of unrest and war with France, William sought (and often received) from Parliament a suspension of the Habeas Corpus Act. The very purpose of those suspensions was to relieve the Crown for a time from having to proceed against such persons on charges of treason or other crimes and to em-

indefinite military detention without trial of American citizens” because “doing so would break with our most important traditions and values as a Nation.” President Barack Obama, Statement by the President on H.R. 1540 (Dec. 31, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>.

⁶³⁶ 542 U.S. 507, 519 (2004) (plurality opinion).

⁶³⁷ Concededly, some scholarship in the immediate wake of the Supreme Court’s treatment of these issues recognized the significance of the fact that those detained had not been charged or tried for any crime and that the detentions were suspect under the decision in *Milligan*. See, e.g., Rostow, *supra* note 38, at 527 (“Why doesn’t the *Milligan* case apply *a fortiori*? If it is illegal to arrest and confine people after an unwarranted military trial, it is surely even more illegal to arrest and confine them without any trial at all.”).

⁶³⁸ See *supra* pp. 909–10.

⁶³⁹ Cf. *Korematsu v. United States*, 323 U.S. 214, 218–20 (1944) (upholding aspects of the military orders under a deferential standard).

⁶⁴⁰ See *supra* section II.B.

power it to detain free from judicial interference. The parallels between the plight of the Japanese Americans during World War II and that of the Jacobite sympathizers during William's reign are substantial — indeed, it is hard to see any basis for distinguishing one from the other. Put most simply, the World War II detention of Japanese Americans on the West Coast stands entirely at odds with everything that the Founders thought they were accomplishing in adopting the Suspension Clause.⁶⁴¹ This explanation reveals why, during this period, a military lawyer in the Hawaiian Territory counseled his superiors that it was “only in the Territory,” where martial law and a suspension prevailed, “that internment of citizens is possible.”⁶⁴²

The same conclusion may be drawn with respect to Congress's authorization of preventive detentions under the Emergency Detention Act,⁶⁴³ as discussed above in Part I, as well as Senator McCain's recent proposal, which essentially would revive that Act. Both purport to authorize by ordinary legislation (in contrast to a suspension) the detention of American citizens on American soil based solely on “subversive” and suspicious activities — namely, acts that suggested ties to communism during the McCarthy era or acts that today suggest ties to terrorism. Again, the entire history of the Suspension Clause — whether concerning the Jacobite sympathizers, rebellious colonists fighting for independence, disaffected colonists aiding the British, or persons supporting the Confederacy in the Civil War — tells a story in which a valid suspension was required to accomplish this end.

Finally, there is the so-called “War on Terror.” There is, at the outset, serious debate over whether this episode really should be labeled a war or whether it is better viewed as something else.⁶⁴⁴ In the case of

⁶⁴¹ Thus, the Suspension Clause provides an explanation concerning the unconstitutionality of the mass detention separate from one grounded in equal protection principles. To highlight the possible significance of the distinction, imagine that the government had issued a facially race-neutral order that compelled the detention of all citizens who had made contact with someone in Japan in the prior year. Even if such an order could survive equal protection scrutiny, it would remain problematic under the Suspension Clause.

⁶⁴² Harry N. Scheiber et al., *Hawai'i's Kibei Under Martial Law: A Hidden Chapter in the History of World War II Internments*, 22 W. LEGAL HIST. 1, 65 (2009) (quoting Memorandum from Maj. Louis F. Springer to Col. William Morrison (Dec. 31, 1943)) (internal quotation marks omitted). For details on the detention of persons of Japanese ancestry in the Hawaiian Territory during this period, see generally *id.* at 1–102.

⁶⁴³ Professor Chafee once pointed to this Act as underscoring the importance of defining what constitutes a lawful basis for imprisonment as part of the Suspension Clause inquiry, arguing that if Congress were permitted to expand that which constitutes a legal basis for imprisonment, the Suspension Clause's role in safeguarding liberty would be undermined. See Chafee, *supra* note 45, at 160; see also MEADOR, *supra* note 146, at 48 (discussing the Act).

⁶⁴⁴ See, e.g., Bruce Ackerman, *Terrorism and the Constitutional Order*, 75 FORDHAM L. REV. 475, 477 (2006) (“Terrorism is merely the name of a technique: the intentional attack on innocent civilians. . . . Once we allow ourselves to declare war on a technique, we open up a dangerous

José Padilla, the government sought to treat him as a wartime enemy despite the fact that Padilla was a citizen who was arrested on American soil. After detaining Padilla briefly as a material witness, the government then held him in military confinement without criminal charges for over three years based on the President's untested assertion that Padilla was working with al Qaeda and that he was planning to detonate a "dirty bomb." There was, however, no easy argument for tying Padilla's case to a particular conflict of international character.⁶⁴⁵

As a conceptual matter, however one labels the struggle against terrorism, Padilla's case stands no differently from the examples already discussed in this section. Indeed, parallels may be drawn between his case and virtually every historical example explored above leading up to Reconstruction. To take but some examples, there is no principled way to distinguish Padilla's case from the plight of the Jacobites who plotted to restore James II to the throne or from the English subjects who chose to fight for France during this period — the latter of whom Lord Mansfield suggested enjoyed the full protections of English law and therefore held out as instructive on the constraints that limited the Crown's authority to hold rebellious American colonists on English soil without criminal charges during the Revolutionary War.⁶⁴⁶

There are also substantial parallels to be drawn between the war on terrorism today and the Reconstruction suspension. During Reconstruction, it was simply taken for granted that in order to detain members of the Klan outside the criminal process and trace the conspiracy to its core, Congress and the President had to suspend the privilege. Indeed, as already noted, in the wake of this episode Congress pointed to suspension as "the most and perhaps only effective remedy for . . . suppression" of an organization where its "membership, mysteries, and power . . . have been kept concealed."⁶⁴⁷ In Padilla's case, the government ultimately charged and tried him, but this conclusion to his story should not obscure the fact that Padilla was detained by the military unconstitutionally for almost four years prior to being charged with any crime.

path, authorizing the government to lash out at amorphous threats without the need to define them.").

⁶⁴⁵ See *supra* pp. 912–13. As discussed below, Hamdi's case is arguably different in this respect. See *infra* pp. 1004–11.

⁶⁴⁶ See *supra* pp. 947–48. Similarly, the allegations against Padilla do not distinguish him from those English subjects who, "encouraged by . . . enemies abroad," fought in Scotland to reinstate the Stuart line and at whom Parliament directed its 1745 suspension. See *supra* pp. 943–44.

⁶⁴⁷ S. REP. NO. 42-41, pt. 1, at 99 (1872).

C. *Returning to Hamdi*

Hamdi's case poses more complicated considerations and accordingly deserves greater attention. This being said, it should be clear by now that the Court's categorical statement in *Hamdi* that "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant"⁶⁴⁸ simply does not hold up. Indeed, as just noted, it clearly would be wrong if applied to Padilla's case.

But Hamdi's case is not perfectly analogous to Padilla's. The plurality opinion in *Hamdi* emphasized the fact that he had been "captured in a *foreign* combat zone"⁶⁴⁹ — that is, both in a battlefield setting and overseas. The plurality also noted that he had been captured as part of the war in Afghanistan⁶⁵⁰ — a more specific conflict than the expansive "War on Terror" and one of international character. Finally, the plurality pointed to *Ex parte Quirin* as support for the idea that the government may treat persons claiming citizenship as enemies subject to the laws of war.⁶⁵¹ There exist other possible justifications for the outcome in *Hamdi* as well. Perhaps there is significance in Hamdi's allegedly having formally joined an enemy army, or perhaps the very novelty of the war on terrorism supports the Court's holding. Nonetheless, my conclusion with respect to Hamdi's case is in keeping with the other modern examples already explored — namely, that his detention on American soil as an enemy combatant in the absence of a suspension stands at odds with the American constitutional tradition.

Begin with Hamdi's capture in a battlefield setting. Both jurists and scholars have pointed to this fact as distinguishing the *Hamdi* and *Padilla* cases,⁶⁵² sometimes for functional reasons⁶⁵³ and sometimes based on an understanding of the provisions for the war power in the

⁶⁴⁸ 542 U.S. 507, 519 (2004) (plurality opinion).

⁶⁴⁹ *Id.* at 523.

⁶⁵⁰ *See id.* at 521.

⁶⁵¹ *See id.* at 519.

⁶⁵² *See, e.g.,* Fallon & Meltzer, *supra* note 24, at 2072 (contrasting *Hamdi* and *Padilla* by pointing to "[t]he crucial fact [of] Hamdi's seizure on a foreign battlefield"). Only Justice Breyer voted with the plurality in *Hamdi* and with the dissent in *Padilla*, suggesting that he possibly, though not necessarily, drew the same distinction between the cases.

⁶⁵³ *See, e.g.,* *Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring in the denial of rehearing en banc) ("It is precisely at the point of armed combat abroad that the government's detention interests in gathering vital intelligence, in preventing detainees from rejoining the enemy and in stemming the diversion of military resources abroad into litigation at home are at their zenith."); *Hamdi v. Rumsfeld*, 316 F.3d 450, 465 (4th Cir. 2003) ("[D]etention in lieu of prosecution may relieve the burden on military commanders of litigating the circumstances of a capture halfway around the globe."); *vacated*, 542 U.S. 507 (2004); Fallon & Meltzer, *supra* note 24, at 2071–81 (discussing the functional considerations implicated by battlefield captures and proposing a test that would draw a distinction between "battlefield and nonbattlefield contexts," *id.* at 2081, for wartime detention of citizens outside the criminal process).

Constitution.⁶⁵⁴ There is no question that the functional considerations are especially compelling in battlefield settings. Collecting evidence and securing witnesses in the battlefield setting undoubtedly present tremendous challenges and may impose undesirable distractions from achieving important military objectives. There is also little question that the war power is at its zenith in the battlefield setting. But to accept these points does not mean, at least as a historical matter, that they should influence the Suspension Clause inquiry.

Recall that English law generally considered persons owing allegiance “that raise war against the king” as “not properly enemies but rebels or traitors”⁶⁵⁵ and provided that, as such, “they shall be punished as Traytors.”⁶⁵⁶ One of the principal forms of treason, of course, was and remains levying war against a government to which one owes allegiance — that is, taking up arms against the same.⁶⁵⁷ Section 7 of the Habeas Corpus Act of 1679 expressly linked the privilege with the crime of treason and did so without providing for any wartime exceptions.⁶⁵⁸ The early English suspensions displaced these commands derived from the Habeas Corpus Act for the very purpose of empowering the Crown to detain outside the criminal process. Accordingly, a substantial part of the conduct at which Parliament directed the many pre-ratification suspensions encompassed those persons who took up arms and actually “levied war” against the Crown. Consider those fighting with James II’s grandson Charles in Scotland, at whom Parliament directed its 1745 suspension, or the rebellious American colonists, at whom it directed the 1777 suspension legislation.

Put another way, these and other suspensions represent strong evidence of a long-standing view that suspension was necessary to bring within the law the detention without charges of persons deemed to owe allegiance, even when they were captured on the battlefield in the act of armed conflict with their government. Other examples explored above also supporting this conclusion include the stateside Revolutionary War suspensions, the Civil War suspension proclamations of Pres-

⁶⁵⁴ See e.g., *Hamdi*, 337 F.3d at 341–42 (Wilkinson, J., concurring in the denial of rehearing en banc) (cautioning against “ignor[ing] the fundamentals of Article I and II — namely that they entrust to our armed forces the capacity to make the necessary and traditional judgments attendant to armed warfare, and that among these judgments is the capture and detention of prisoners of war”).

⁶⁵⁵ 1 HALE, *supra* note 181, at 159.

⁶⁵⁶ COKE, *supra* note 182, at 5.

⁶⁵⁷ See *id.* at 4–5 (discussing the English treason law); see also U.S. CONST. art. III, § 3 (defining “[t]reason against the United States” as encompassing “levying War against them, or . . . adhering to their Enemies, giving them Aid and Comfort”). Note that English law defined treason as, among other things, aiding non-state actors who were waging war against the Crown. See, e.g., *supra* p. 930.

⁶⁵⁸ See *supra* pp. 929–30.

ident Lincoln, and Congress's 1863 suspension legislation.⁶⁵⁹ In short, the history reveals that a battlefield/nonbattlefield distinction with respect to the place of capture generally has been irrelevant to the Suspension Clause inquiry.

Next, there is the fact that Hamdi was captured overseas on foreign soil. My research has yet to turn up a case in which a person owing allegiance was captured outside formal English or American territory and then detained outside the territory as a prisoner of war, only to win discharge in English or American courts by reason of the privilege. Thus, to the extent that there remain limitations on the geographic reach of the constitutional privilege in the wake of the Supreme Court's 2008 opinion in *Boumediene v. Bush*,⁶⁶⁰ which applied the Suspension Clause to Guantánamo Bay, Cuba,⁶⁶¹ the location where one is captured and then detained may well be significant.⁶⁶² Of course, even assuming geographic limitations on the reach of the privilege exist, they say nothing about the *content* of its protections and instead speak only to its availability in certain cases.

⁶⁵⁹ See *supra* Parts III–IV. As discussed above, Lincoln issued numerous suspension proclamations during this period, including his 1863 proclamation suspending the privilege nationwide with respect to, among others, persons held as “prisoners of war.” See Proclamation No. 7, 13 Stat. 734, 734 (1863). As the plurality opinion in *Hamdi* noted, the *Instructions for the Government of Armies of the United States, in the Field* suggested that “captured rebels” would be treated “as prisoners of war.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion) (quoting FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES, IN THE FIELD ¶ 153, at 34 (New York, D. Van Nostrand 1863), reprinted in 2 FRANCIS LIEBER, THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER ¶ 153, at 273 (Philadelphia, J.B. Lippincott & Co. 1881)) (internal quotation marks omitted). It is not clear, however, what to make of this fact. Indeed, when read alongside the terms of Lincoln's September 1862 proclamation, the 1863 Act, and Lincoln's follow-on proclamation, all that the field manual suggests is that “captured rebels” could be held in such a posture because the various suspensions declared during the war had legalized their detention.

⁶⁶⁰ 128 S. Ct. 2229 (2008).

⁶⁶¹ See *id.* at 2240 (granting noncitizen detainees held at Guantánamo Bay a right to judicial review of their detentions). Whether the holding in *Boumediene* should be extended beyond Guantánamo Bay is the subject of considerable debate as well as ongoing 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).

⁶⁶² Exploring the historical geographic reach of the writ presents a complicated inquiry that space constraints do not allow here. I refer the reader to a number of sources. See *Boumediene*, 128 S. Ct. at 2277 (holding that noncitizen detainees held at Guantánamo Bay, Cuba, are entitled to protections deriving from the Suspension Clause); *Johnson v. Eisentrager*, 339 U.S. 763, 798 (1950) (Black, J., dissenting) (opining that “our courts can exercise [habeas corpus] whenever any United States official illegally imprisons any person in any land we govern”); 3 BLACKSTONE, *supra* note 137, at *131 (stating that the writ “run[s] into all parts of the king's dominions: for the king is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted”); Halliday & White, *supra* note 116, at 586 (reading the history of the writ as showing that “it was not the location of an incarceration that was taken as controlling the issuance of the writ, but the sovereign status of the officials holding a prisoner in custody”); Hamburger, *supra* note 140, at 1882 (positing that “habeas could reach neither an individual outside protection nor a location outside sovereign territory”).

In any event, with respect to Hamdi's case, once the government learned that he was a citizen, it transported him to American soil for detention. At this point, it becomes difficult to distinguish for purposes of the Suspension Clause Hamdi's plight from that of the treasonous American colonists taken prisoner during the Revolutionary War. Recall that as English ships took on an increasing number of colonists, including many captured in battle on the "sovereignless sea," Parliament suspended the privilege in order to make lawful the delivery of those prisoners onto English soil (where the Habeas Corpus Act granted its protections to all English subjects) for detention without charges.⁶⁶³ It was only when Parliament viewed the colonists as having broken their allegiance to Britain that it permitted the suspension to lapse and declared that those Americans held in custody on English soil without charges would then be treated as "prisoners of war" whose rights would no longer be governed by domestic law but instead by the "law of nations."⁶⁶⁴

To be sure, one might argue that Hamdi's circumstances are more analogous to those of an English subject who fled to enlist with the French army and was then captured in battle beyond the reach of the writ and brought back to England for detention. Significantly, what indications we have from the historical record suggest that here, too, English law would have granted the prisoner in such circumstances the protections embodied in the privilege — namely, the promise that he would be charged and tried in due course or released. Recall that Lord Mansfield, when advising Lord North's administration on the proper treatment of American colonists captured during the Revolutionary War, highlighted the cases of "many French officers" who "were in gaol as rebels, being either born in the King's dominions or if born abroad the sons of British subjects."⁶⁶⁵ As he noted, "they were tried and condemned," rather than held as prisoners of war.⁶⁶⁶ It was on this basis that he advised that so long as the American privateers "claim to be considered as subjects and apply for a *habeas corpus*, it is their own doing; *they force a regular commitment for their crime.*"⁶⁶⁷

The work of Paul Halliday brings to light archival evidence lending further support to the conclusion that seventeenth-century English law granted subjects captured in the service of a foreign enemy the protections of the Habeas Corpus Act when brought to English soil for detention. For example, as Halliday reports, in 1692, the English captured Irishman John Golding at sea serving as second-in-command of

⁶⁶³ HALLIDAY, *supra* note 142, at 253.

⁶⁶⁴ See *supra* notes 317–322 and accompanying text.

⁶⁶⁵ Letter from Lord Mansfield to Lord George Germain, *supra* note 301, at 180.

⁶⁶⁶ *Id.*

⁶⁶⁷ *Id.* (emphasis added).

a Jacobite vessel “flying French colors.”⁶⁶⁸ The return to his writ relayed these details and stated that he was being held as a “prisoner of war.”⁶⁶⁹ In response, King’s Bench bailed Golding on his “giving surety to appear at the next Admiralty sessions,” where he was then tried and convicted of treason.⁶⁷⁰ As this and other cases explored in Halliday’s work suggest, during this period, King’s Bench made a practice of referring subjects captured in the service of a foreign enemy and initially detained as “prisoners of war” to the criminal process on the basis that subjects could not be held as prisoners of war. In keeping with this idea, during this period, the Privy Council issued instructions that “when enemy ships were taken, written examinations of their crews should be made to ascertain their nationality.”⁶⁷¹

This discussion naturally leads to the question which law governs the wartime detention of persons within protection. In *Hamdi*, Justice O’Connor relied heavily on *Quirin* for the proposition that “[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war.”⁶⁷² In her view, the power to try citizens before military tribunals for crimes in violation of the laws of war supported the conclusion that the capture of prisoners in wartime — whether they be citizens or not — should be governed by the laws of war as well. Those laws, in turn, permit the detention of prisoners of war for the duration of hostilities.⁶⁷³

The Constitution surely presupposes the background operation of the laws of war, derived as they are from the law of nations,⁶⁷⁴ and there is no question that the laws of war have long permitted the taking of prisoners of war. As Emmerich de Vattel, one of the most influential sources on the laws of war at the time of the Founding, de-

⁶⁶⁸ HALLIDAY, *supra* note 142, at 170.

⁶⁶⁹ *Id.* (internal quotation marks omitted).

⁶⁷⁰ *Id.* (citing archival sources). Halliday reports that Golding was then executed. *Id.* Golding’s case highlights the double-edged nature of claiming the benefits of subjecthood in such circumstances — along with these benefits comes exposure to the harsh sanctions of the domestic law of treason.

⁶⁷¹ *Id.* at 405 n.142 (citing archival sources from 1694 to 1695). Recall as well that Parliament enacted several suspensions expressly to reach subjects who were working in concert with the French and even fighting with the expectation of being joined by the French. *See supra* pp. 943–44 (discussing the 1744 and 1745 suspensions).

⁶⁷² *See Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion) (alteration in original) (quoting *Ex parte Quirin*, 317 U.S. 1, 37–38 (1942)) (internal quotation marks omitted).

⁶⁷³ To be sure, the *Hamdi* Court purported to apply some protections derived from domestic law to Hamdi’s case, including modern due process principles. *See id.* at 529–32.

⁶⁷⁴ On the relationship between the law of nations and the Constitution at the Founding, see, for example, David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010).

clared in expounding the rights of nations in war, “enemies” captured “may lawfully be secured and made prisoners” so that “they may not take up arms” again and “the enemy may be weakened.”⁶⁷⁵ But it does not follow from this proposition that the laws of war should be understood to trump domestic law in ascertaining the limits on governmental power over the liberty of a citizen owing allegiance. To the contrary, the extensive historical evidence explored in this Article supports the conclusion that at the time of the Founding, it was well settled that persons within protection who took up arms against the state were entitled to the full benefits of domestic law and, specifically, the privilege.⁶⁷⁶ (Indeed, during this period Vattel defined “enemy” by instructing: “It is the political ties which determine the quality.”⁶⁷⁷)

The British treatment of the rebellious colonists during the War for Independence is again instructive here. As Parliament expressed in the terms of its suspension legislation directed at the colonists, its purpose was to make legal the colonists’ detention on English soil outside the criminal process. Thus, Parliament explained that it was responding to the fact that “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.”⁶⁷⁸ Further, it was only when Parliament accepted that the colonists had “revolted” and broken their allegiance that it permitted the suspension to lapse as no longer necessary.⁶⁷⁹ At this point, for those colonists remaining in custody on English soil, Parliament declared that they would now be treated as “prisoners of war” who would have to turn to the “law of nations” for protection.⁶⁸⁰ In short, there is overwhelming evidence that a prisoner’s entitlement to the protections of domestic law tracked allegiance during the Founding period.

⁶⁷⁵ See 3 VATTEL, *supra* note 611, § 148, at 421 (Northampton, Thomas M. Pomroy 1805) (1758). Notably, the laws of war have long provided their own set of protections for those engaged in conflict. Prisoners of war, for example, are entitled to certain basic conditions. See, e.g., *id.* §§ 150–152, at 422–24. The laws of war also prohibit the killing of an enemy once he ceases to resist. See *id.* § 149, at 421–22. Vattel’s treatise, first published in French in 1758, was translated for publication in English in 1760. On Vattel’s considerable influence, see generally Charles G. Fenwick, *The Authority of Vattel*, II, 8 AM. POL. SCI. REV. 375 (1914).

⁶⁷⁶ In his famous law lectures of 1791, James Wilson opined that the law of nations “respects the duties of states” and is “applied to the conduct of states.” 1 JAMES WILSON, *Of the Law of Nations*, in THE WORKS OF JAMES WILSON, *supra* note 442, at 148, 154.

⁶⁷⁷ 3 VATTEL, *supra* note 611, § 71, at 390. This being said, one could certainly argue that the laws of war govern until the government becomes aware of the citizenship of a prisoner. Cf. *supra* p. 1008.

⁶⁷⁸ 17 Geo. 3, c. 9 (1777) (Gr. Brit.) (internal quotation mark omitted).

⁶⁷⁹ See *supra* notes 315–322 and accompanying text.

⁶⁸⁰ See *supra* pp. 950–51.

Two World War II cases appear to support the result in *Hamdi*, however. There is *Quirin* and there is the case of *In re Territo*.⁶⁸¹ With respect to *Quirin*, the problematic circumstances in which the Court decided the case should give modern jurists some pause in terms of its value as precedent.⁶⁸² It is also possible to distinguish the issues posed in *Quirin* (involving the trial of a citizen for war crimes) from those posed in *Hamdi* (involving the detention of a citizen as the equivalent of a prisoner of war). As one legal scholar has noted, citizens and enemy aliens, “though arguably similarly situated for purposes of war crimes trials, are differently situated when it comes to preventing their return to the battlefield.”⁶⁸³ This distinction follows from the fact that the laws of war countenance the preventive detention of enemy aliens; after all, it “is ordinarily the only option available . . . because the laws of war immunize them from criminal punishment for their legitimate acts of war.”⁶⁸⁴ In any event, with respect to the question posed in *Hamdi*, the volumes of historical evidence explored in this Article underscore that *Quirin*’s conclusions are at odds with the original understanding of the Suspension Clause.

The *Territo* case is more on point. Just as the Court did in *Hamdi*, the Ninth Circuit in *Territo* relied on *Quirin* to reject the argument that “citizenship . . . necessarily affects the status of one captured on the field of battle.”⁶⁸⁵ Following from this, the court sanctioned the detention of an American citizen who had been captured in Italy fighting for the Italian army and held as a prisoner of war on American soil until the end of hostilities.⁶⁸⁶ Here again, one could argue that the international character of the conflict and *Territo*’s formal affiliation with a foreign power (exemplified by his wearing of its uniform) take the case out of the traditional mold. But as the discussion has already noted, the historical evidence suggests that these circumstances should be viewed as irrelevant to the inquiry.⁶⁸⁷ It follows then that *Territo* is also at odds with the original understanding that informed the Suspension Clause.

To all of this, one might suggest that putting on the enemy’s uniform should be construed as the equivalent of renouncing one’s citizenship. The government did not advance such an argument in *Ham-*

⁶⁸¹ 156 F.2d 142 (9th Cir. 1946).

⁶⁸² See, e.g., Fallon & Meltzer, *supra* note 24, at 2078–79 (detailing the rushed argument and issuance of the initial order and the fact that the opinion followed after the defendants had been executed).

⁶⁸³ David Golove, *United States: The Bush Administration’s “War on Terrorism” in the Supreme Court*, 3 INT’L J. CONST. L. 128, 139 (2005).

⁶⁸⁴ *Id.*

⁶⁸⁵ *Territo*, 156 F.2d at 145.

⁶⁸⁶ *Id.* at 145–47.

⁶⁸⁷ See *supra* pp. 1007–08.

di, but it did so in *Quirin*.⁶⁸⁸ The *Quirin* Court never reached the matter, and the issue presents a complicated inquiry worthy of its own full-scale article, particularly in light of legislation recently introduced in both houses of Congress that would strip the citizenship of anyone who “engag[es] in, or purposefully and materially support[s], hostilities against the United States.”⁶⁸⁹ For now, it bears observing only that American law generally frowns on implied renunciations of citizenship.⁶⁹⁰ Indeed, discussing this very question during the Founding period, Thomas Jefferson wrote that the laws “would never . . . render treason . . . innocent by giving it the force of a dissolution of the obligation of the criminal to his country.”⁶⁹¹ The animating principle is that this obligation, derived as it was from allegiance, both protected citizens and rendered siding with the enemy a criminal act worthy of severe punishment.⁶⁹²

D. *The Suspension Clause in Wartime*

Putting aside the specifics of Hamdi’s case, there is a more fundamental problem with the *Hamdi* plurality’s approach to the Suspension Clause inquiry. In embracing the idea that pragmatic judicial balancing should play a role in assessing the propriety of wartime detentions outside the criminal process of persons within protection, the opinion is entirely at odds with the specific model of suspension that the Founding generation incorporated into the Suspension Clause. By its very design, that clause rejects the idea that where the privilege has not been suspended, the liberty interests that traditionally find enforcement in its remedy could be balanced against governmental inter-

⁶⁸⁸ See Fallon & Meltzer, *supra* note 24, at 2079 (making this point and citing Brief for Respondent at 86–91, *Ex parte Quirin*, 317 U.S. 1 (1942) (Nos. 1–7)).

⁶⁸⁹ See Enemy Expatriation Act, S. 1698, 112th Cong. § 2 (2011); Enemy Expatriation Act, H.R. 3166, 112th Cong. § 2 (2011).

⁶⁹⁰ See, e.g., *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967) (“Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.”); cf. *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 246 (1830) (Story, J.) (“The general doctrine is, that no persons can by any act of their own, without the consent of the government, put off their allegiance, and become aliens.”).

⁶⁹¹ Letter from Thomas Jefferson to the U.S. Minister of France (Gouverneur Morris) (Aug. 16, 1793), in 6 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 497, at 371, 381 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1895) (“[T]he laws do not admit that the bare commission of a crime amounts of itself to a divestment of the character of citizen, and withdraws the criminal from their coercion. They would never prescribe an illegal act among the legal modes by which a citizen might disfranchise himself; nor render treason, for instance, innocent by giving it the force of a dissolution of the obligation of the criminal to his country.”); see also RAWLE, *supra* note 481, at 141 (“The citizen who unites himself with a hostile nation, waging war against his country, is guilty of a crime of which the foreign army is innocent; with him it is treason, with his associates it is, in the code of nations, legitimate warfare.”).

⁶⁹² See RAWLE, *supra* note 481, at 141 (“[I]n its outset [treason] is deemed the highest crime that can be committed, and of course, no subsequent circumstances can raise it higher.”).

ests in preserving national security. Borrowing from one of the speakers in Henry Hart's *Dialogue*, relying upon "the remedy of habeas corpus" as "sav[ing] the constitutionality of the prior procedure . . . turns an ultimate safeguard of law into an excuse for its violation."⁶⁹³ Put another way, championing the role of the privilege as a means of obtaining judicial review at the expense of the specific rights that historically found protection through its enforcement does a disservice to what the Founding generation hoped to achieve in ratifying the Suspension Clause.

It goes without saying that the interest in preserving national security is compelling. But to suggest that the Founders did not fully appreciate the importance of those interests does not give them sufficient credit. Appreciate those interests they did. One must recall the backdrop against which they wrote the Constitution: the aftermath of a war in which it was often very difficult to ascertain friend or foe. The Founders well understood that on certain dramatic occasions the Executive might need the power to detain persons suspected of disaffection outside the criminal process in order to preserve the Republic. Toward that end and relying on their understanding of English legal tradition, they provided a specific procedure by which the government's interests could be taken into account and such detentions could be made lawful — namely, an act suspending the privilege of the writ of habeas corpus.⁶⁹⁴ To be sure, a suspension must garner the support of the House, the Senate, and the President. The Founders knew that these procedural requirements would make suspension more difficult to enact but regarded them as essential in order to safeguard cherished individual liberties. Absent a valid suspension, the original understanding was that the Executive lacks authority to detain United States citizens on American soil for national security purposes outside the ordinary criminal process, and the privilege interceded to enforce this principle. As Senator Doolittle put it during the Civil War suspension debates: "[I]t is to reach that class of men [those about to join the enemy] that it is necessary that the Executive should be clothed with this power."⁶⁹⁵

The Founders also understood, based on their knowledge of the English experience, that the political branches could abuse this ex-

⁶⁹³ Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1382 (1953); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 576 (2004) (Scalia, J., dissenting) ("The role of habeas corpus is to determine the legality of executive detention, not to supply the omitted process necessary to make it legal.").

⁶⁹⁴ See generally Tyler, *supra* note 2, at 613–30 (documenting the English origins of suspension and debates about suspension during the Constitutional Convention and ratification).

⁶⁹⁵ CONG. GLOBE, 37th Cong., 3d Sess. 1194 (1863) (statement of Sen. James Doolittle) (discussing those "about to join the enemy").

traordinary power. For this reason, they imposed severe constraints on when it could be invoked, limiting such occasions to times of “Rebellion or Invasion [when] the public Safety may require it.”⁶⁹⁶ To be sure, one might say that the Suspension Clause is formalistic. But this is beside the point. Whatever one labels their decision, the Founders consciously chose to incorporate English tradition⁶⁹⁷ and to recognize the suspension authority as the specific lever with which the political branches could balance the needs of national security against the liberty interests of those enjoying the protection of domestic law during times of war.⁶⁹⁸ Judicial balancing of these interests in the absence of a suspension usurps the responsibilities of the political branches and bypasses the important checks built into the legislative process and detailed in the Constitution.⁶⁹⁹

⁶⁹⁶ U.S. CONST. art. I, § 9, cl. 2.

⁶⁹⁷ Although Parliament initially codified the portion of the Habeas Corpus Act relevant to this Article at section 7, *see* Habeas Corpus Act of 1679, 31 Car. 2, c. 2, § 7 (Eng.), *reprinted in* 3 THE FOUNDER’S CONSTITUTION 310, 311 (Philip B. Kurland & Ralph Lerner, eds. 1987), over time the relevant language moved to section 6 of the Act. (Nevertheless, all references and citations in this Article reflect the section’s original placement.) To be sure, with Parliament having repealed section 7 in 1971, *see* Courts Act 1971, c. 23, § 56(4) (U.K.) (repealing 31 Car. 2, c. 2, § 7), things have moved away from the English model of suspension in place at the Founding such that today in Great Britain “anti-terrorist emergency legislation has a habit of being transposed into normal, non-emergency legislation,” Rodney C. Austin, *The New Constitutionalism, Terrorism, and Torture*, 60 CURRENT LEGAL PROBS. 79, 97 (2007) (listing several examples). But this shift follows from the fact that the privilege remains subject to statutory modification in the English legal tradition. For more on the current state of English law on these questions, see Amanda L. Tyler, *The Counterfactual that Came to Pass: What if the Founders Had Not Constitutionalized the Privilege of the Writ of Habeas Corpus?*, 45 IND. L. REV. 13–20 (2011).

⁶⁹⁸ This is why Justice Jackson called the Suspension Clause the Constitution’s only “express provision for exercise of extraordinary authority because of a crisis.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring). Of course, the Constitution also assigns the federal government the power “to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; [and] to provide for their support” to enable it to handle “national exigencies.” THE FEDERALIST NO. 23 (Alexander Hamilton), *supra* note 324, at 149. But it has never followed that the general power to wage war necessarily displaces individual rights enshrined in the Constitution. Consider, in this regard, the property rights of persons falling within protection of domestic law. In times of war, the government undoubtedly has greater justification to “take” property for public use, but the law generally has enforced, even in such circumstances, the Constitution’s requirement that the government pay just compensation for that which it takes. *See, e.g., United States v. Russell*, 80 U.S. (13 Wall.) 623, 628 (1871) (noting that “[e]xigencies . . . do arise in time of war” that justify takings while concluding that “the government is bound to make full compensation to the owner”). This understanding naturally raises the question why liberty rights should be considered malleable during times of war if property rights are not.

⁶⁹⁹ *Cf.* Halliday & White, *supra* note 116, at 628 (observing that in adopting suspensions, “members of Parliament assumed that in times of crisis they were better suited to locate the balance between liberty and security than judges”). I have written previously on how crucial both the legislative and judicial checks are in the context of a suspension. *See* Tyler, *supra* note 2, at 687–93.

In response to each of these points, one might respond that the Founders could not have envisioned the kinds of challenges presented by modern warfare and that, accordingly, today the law must possess a certain measure of flexibility to adapt to and address new challenges.⁷⁰⁰ As support for this position, one might point to the very nature of the writ as an institution that has been in constant evolution⁷⁰¹ and argue that it should continue to evolve to take account of changed circumstances. The conflict with terrorism is, in this regard, arguably an entirely new kind of war, the likes of which we have never witnessed. The problem with stressing the novelty of the war on terrorism, however, is that such an argument could form the predicate for expanding a whole range of exceptions to the historical protections inherent in the Suspension Clause and other constitutional provisions.⁷⁰² Further, such arguments do a disservice to the very idea of a binding constitution when they are advanced for the purpose of disregarding what was a deliberate choice on the part of those who drafted and ratified our Constitution both to enshrine terms of art with settled and rather precise meaning and to adopt a well-established framework for addressing the inevitable emergencies that would arise. Specifically, this framework, on the one hand, leaves it to the political branches during such crises to weigh the tradeoffs between the interests of national security and civil liberties and decide whether suspension is warranted and, on the other hand, leaves it to the judiciary to enforce the full scope of protections embodied in the privilege when a valid suspension is not in effect.

⁷⁰⁰ This position represents one way to read the functional arguments of those scholars who endorse *Hamdi*. See *supra* note 113.

⁷⁰¹ On this score, Professor Paul Freund once observed:

The organic element in an institution ought to be taken into account, and so as to habeas corpus I would say that whether or not a specific wrong could be redressed by habeas corpus . . . as of 1787 is not controlling, because the whole history of habeas corpus shows that the courts in England were capable of developing the writ, and we did not adopt an institution frozen as of that date.

Willard Hurst, *The Role of History, in* SUPREME COURT AND SUPREME LAW 55, 61 (Edmond Cahn ed., 1954) (quoting Freund's unedited remarks at a 1953 symposium); see also *id.* (quoting another remark by Freund: "My point is that there is involved in such institutions or practices a dynamic element which itself was adopted by the framers."); *Boumediene v. Bush*, 128 S. Ct. 2229, 2276 (2008) ("[T]he Suspension Clause does not resist innovation in the field of habeas corpus."); *id.* at 2248 (observing that "[t]he Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded" since the Founding).

⁷⁰² Consider, as one example, what constitutes the "battlefield." One could certainly argue that to the extent that Padilla really did return to the United States to detonate a dirty bomb as the government alleged at the time of his capture, see *supra* p. 1003, then his arrest in Chicago took place on the battlefield, at least as he understood it.

E. Potential Implications

The many significant implications of the historical evidence surveyed in this Article remain to be fully explored. First, there is the matter of whether the government can bypass the traditional constraints of the Suspension Clause through other means. Recall, for example, that the government initially took Padilla and many others into custody following September 11, 2001, pursuant to the material witness statute.⁷⁰³ That statute authorizes the government to detain an individual “[i]f it appears . . . that [his] testimony . . . is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena.”⁷⁰⁴ Whether certain invocations of the material witness statute violate the Suspension Clause presents an important inquiry, but one that space does not permit exploring here. All the same, it bears noting that the concept of a material witness has English roots⁷⁰⁵ and was recognized in the First Judiciary Act.⁷⁰⁶ Given this background, one could view the material witness concept as a limited historical exception to the commands of the Suspension Clause, not unlike other exceptions such as the commitment of the legally insane.⁷⁰⁷ Even assuming such a view, though, it does not follow that the political branches have the power to expand the historically limited conception of a material witness such that in doing so they displace the underlying principles informing the Suspension Clause.

Second, the history reveals that the rules have long been different for persons who fall outside the protection of domestic law. Both English and early American law, for example, viewed persons outside protection as enemies in times of war and thereby permitted their preventive detention during ongoing conflict, even without a suspension, in keeping with the law of nations.⁷⁰⁸ Nothing in the Supreme Court’s recent decision in *Boumediene v. Bush*⁷⁰⁹ appears to abandon this traditional distinction, although the majority made a point of highlighting that its “opinion does not address the content of the law that governs” the detention of noncitizens at Guantánamo Bay, Cuba, as part of the war on terrorism.⁷¹⁰ Assuming that any such distinction remains sig-

⁷⁰³ See, e.g., *Rumsfeld v. Padilla*, 542 U.S. 426, 430–31 (2004).

⁷⁰⁴ 18 U.S.C. § 3144 (2006); see also *id.* (“Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.”).

⁷⁰⁵ See, e.g., Joseph Casula & Morgan Dowd, Comment, *Cessante Ratione Legis Cessat Ipsa Lex (The Plight of the Detained Material Witness)*, 7 CATH. U. L. REV. 37, 37–38 (1958).

⁷⁰⁶ See Act of Sept. 24, 1789, ch. 20, §§ 30, 33, 1 Stat. 73, 88–90, 91–92.

⁷⁰⁷ See also *supra* note 139 (listing other historical exceptions).

⁷⁰⁸ See *supra* notes 316–322 and accompanying text.

⁷⁰⁹ 128 S. Ct. 2229 (2008).

⁷¹⁰ *Id.* at 2277.

nificant, ascertaining where the line of protection falls represents an important inquiry that warrants careful consideration.⁷¹¹

Finally, the historical evidence explored here may speak to the debate over the use of military tribunals to try persons within protection along with the amenability of such persons to prosecution for violations of the laws of war. Recall, for example, that the Continental Congress drew a distinction between those persons owing allegiance who were subject to the law of treason and others — specifically, “persons, not members of, nor owing allegiance to, any of the United States,” deeming the latter, who may be tried before military courts martial, subject to the “law and usage of nations.”⁷¹² The historical evidence strongly (though not uniformly⁷¹³) suggests that as a general rule domestic legal protections enjoyed by persons within protection may not be displaced by the laws of war.⁷¹⁴ To the extent that this conclusion applies to the jury-trial right, it is more consistent with the Supreme Court’s decision in *Milligan* than with the Court’s later opinion in *Quirin*.⁷¹⁵ *Milligan* rejected the government’s attempt to try a citizen before a military tribunal for violating the “laws of war” during the Civil War,⁷¹⁶ while *Quirin* upheld the legitimacy of the domestic military trial of a citizen-saboteur during World War II, deeming him a belligerent under the laws of war.⁷¹⁷ Ultimately, however, the way in which history informs debates over the use of military tribunals in our constitutional framework implicates difficult and important matters that remain to be explored in future work.⁷¹⁸

CONCLUSION

Somewhat presciently, Justice Story once observed that “[i]t is only by engrafting on the” provision for habeas corpus in our legal tradition “the doctrines of the common law, that this writ is made the great

⁷¹¹ See, e.g., *supra* notes 140, 346 (citing sources exploring this issue).

⁷¹² 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 299, at 692, 693 (replicating Resolution of Aug. 21, 1776); see also *supra* pp. 976–77 (discussing the Whiskey and Fries’s Rebellions).

⁷¹³ See *supra* note 608 (noting that Lincoln and Congress disputed the holding in *Milligan*).

⁷¹⁴ See *supra* Parts II–III.

⁷¹⁵ For additional discussion of both cases, see *supra* note 608.

⁷¹⁶ See Fallon & Meltzer, *supra* note 24, at 2078 (noting that *Milligan* had been so charged).

⁷¹⁷ For details of the *Quirin* case, consult G. Edward White, *Felix Frankfurter’s “Soliloquy” in Ex parte Quirin: Nazi Sabotage & Constitutional Conundrums*, 5 GREEN BAG 2d 423 (2002). See also Richard H. Fallon, Jr., Essay, *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 389 (2010) (discussing the potential implications of both *Quirin*’s and *Milligan*’s holdings for the war on terrorism).

⁷¹⁸ Among other things, such work must account for the fact that our tradition has long accepted the trial of members of the American military by courts martial. Cf. U.S. CONST. amend. V (excepting certain cases “arising in the land or naval forces” from the requirement of “presentment or indictment”).

bulwark of the citizen against the oppressions of the government.”⁷¹⁹ In unearthing these “doctrines” — or, more specifically, the English and colonial legal traditions — to which Justice Story referred, this Article has endeavored to explain why Story, and Blackstone before him, described habeas corpus as a “bulwark” of liberty and why the Founding generation considered the privilege “essential to freedom.” The historical evidence demonstrates that by the time of ratification, the privilege had come to embody a right of those persons enjoying the protection of domestic law not to be detained without charges for criminal or national security purposes in the absence of a valid suspension of the privilege. This conclusion follows from the strong connection forged in the period leading up to ratification between the privilege and a host of individual rights, including the rights to presentment or indictment on criminal charges and speedy trial on the same. Much of this story has its roots in the English Habeas Corpus Act of 1679, which played a central role in the development of the concept of suspension and had a profound influence on those who wrote and ratified our Constitution.

Consistent with this influence, the history explored in this Article demonstrates that in the Suspension Clause, the Founding generation enshrined this conception of the “privilege” and adopted a well-entrenched framework for addressing the inevitable emergencies that would arise in the future — specifically, 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. By its very design, the clause holds out the specific lever by which the Constitution can adapt in times of emergency to give the Executive expanded powers to detain persons within protection outside the criminal process. In striking this balance, the Suspension Clause functions both as an “express provision for exercise of extraordinary authority because of a crisis”⁷²⁰ and as one of the single most important protections of individual liberty found in the Constitution.

⁷¹⁹ *United States v. Coolidge*, 25 F. Cas. 619, 621 (C.C.D. Mass. 1813) (No. 14,857).

⁷²⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring).