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## The Original Meaning of the Habeas Corpus Suspension Clause, the Right of Natural Liberty, and Executive Discretion

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**THE ORIGINAL MEANING OF THE HABEAS CORPUS  
SUSPENSION CLAUSE, THE RIGHT OF NATURAL  
LIBERTY, AND EXECUTIVE DISCRETION**

John Harrison \*

The Habeas Corpus Suspension Clause of Article I, Section 9, is primarily a limit on Congress’s authority to authorize detention by the executive. It is not mainly concerned with the remedial writ of habeas corpus, but rather with the primary right of natural liberty. Suspensions of the privilege of the writ of habeas corpus are statutes that vest very broad discretion in the executive to decide which individuals to hold in custody. Detention of combatants under the law of war need not rest on a valid suspension, whether the combatant is an alien or a citizen of the United States. The Suspension Clause does not affirmatively require that the federal courts have any jurisdiction to issue the writ of habeas corpus, and so does not interfere with Congress’s general control over the jurisdiction of the federal courts. The clause does not impose any limits on congressional authority with respect to the habeas corpus jurisdiction of state courts that would not exist in its absence.

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#### INTRODUCTION

The Constitution's most important protection of individuals' most important right forbids broad grants of discretion to the executive, and hence the President.<sup>1</sup> That protection is the Habeas Corpus Suspension Clause.<sup>2</sup> The clause mainly protects freedom from confinement—natural liberty—and not the remedy that vindicates that right in court—the writ of habeas corpus.<sup>3</sup> Suspensions of the privilege of the writ of habeas corpus are statutes that give the executive very broad discretion to hold individuals in confinement.<sup>4</sup> Grants of detention authority that substantially limit executive discretion are consistent with the clause.<sup>5</sup> The clause thus secures not only natural liberty, but also the principle that basic interests are secured by the law against the executive and are not held subject to the executive's arbitrary choices.<sup>6</sup> It implements the rule of law.

The clause's original meaning was almost completely lost for more than a century, for a quite understandable reason: its reference to the privilege of the writ of habeas corpus indicates that the clause deals with that writ.<sup>7</sup> As Professors Paul Halliday and Amanda Tyler have shown, however, it mainly protects a primary, substantive interest.<sup>8</sup> It limits Congress's authority to enable the federal executive to physically confine individuals and thereby interfere with their natural liberty.<sup>9</sup>

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<sup>1</sup> See U.S. CONST. art. I, § 9, cl. 2.

<sup>2</sup> *Id.*

<sup>3</sup> See Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 903–04 (2012).

<sup>4</sup> See *id.* at 904–06.

<sup>5</sup> See *id.* at 903–04.

<sup>6</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion).

<sup>7</sup> See Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 581 (2008).

<sup>8</sup> *Id.* at 586; Tyler, *supra* note 3, at 903–04.

<sup>9</sup> For decades the common view was that suspension of habeas corpus prevented the courts from issuing the writ of habeas corpus, and thereby inquiring into the lawfulness of confinement by the executive, but did not expand the executive's detention authority. See, e.g., Trevor W. Morrison, *Hamdi's Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411, 416 (2006) (asserting that suspension removes the remedy but does not authorize detention that was not already lawful). In 2008, Professors Halliday and White pointed out that “[t]he [British] suspension statutes expanded one power rather than curtail another. Even during periods of suspension, the common law writ of habeas corpus never lapsed, even if the Crown received new capacities to detain accused traitors without trial for carefully limited spells.” Halliday & White, *supra* note 7, at 618. Professor Halliday treats English practice in great detail in PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* (2010). In 2009, Professor Amanda Tyler published a study that emphasizes that suspensions go to the substance

Despite that substantial progress, important issues remain to be resolved. One concerns the kind of detention authority that qualifies as a suspension and hence may be granted only in case of invasion or rebellion. In *Hamdi v. Rumsfeld*, Justice Scalia argued in his dissent that U.S. citizens who are enemy combatants may be detained only pursuant to a valid suspension, not as prisoners under the law of war.<sup>10</sup> Professor Tyler takes a similar position, arguing that, absent a valid suspension, individuals subject to the law of treason may be held on criminal or national security grounds only pursuant to the ordinary requirements of criminal procedure.<sup>11</sup>

Another question concerns the relationship between the Suspension Clause and the judicial remedy of habeas corpus. The Supreme Court's current position is that the clause ensures that federal courts be able to administer the writ as it was known to the common law.<sup>12</sup> Another possibility is that the clause has no implications for the habeas authority of the federal courts, but limits Congress's power to restrict such authority as the state courts hold.

This Article reinforces the conclusion that the Suspension Clause is mainly a limit on Congress's power to give detention authority to the executive, and therefore mainly a protection of the substantive right of natural liberty. The clause limits Congress's power to confer on the executive very broad discretion to detain individuals.<sup>13</sup> It does not affect the executive's authority to hold prisoners under the law of war, whether they are citizens or aliens and whether the armed conflict is internal or international.<sup>14</sup> Law of war detention is governed by legal rules, not executive discretion, and British and American practice before the Constitution show that subjects and citizens could be held as prisoners of war without suspension of the privilege of habeas corpus.<sup>15</sup> The Suspension Clause does not give the federal courts authority to administer the writ, nor does it require that Congress confer such authority.<sup>16</sup> While the clause may limit Congress's power over the habeas jurisdiction of the state courts, any such limits are redundant of those that arise because Congress does not have general authority over the state courts' jurisdiction, and because its ability to restrict their jurisdiction that arises from Congress's substantive powers is subject to substantive limits, including the Suspension Clause itself.<sup>17</sup>

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of the interest in natural liberty by expanding executive detention authority. Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 605 (2009). Her most recent work on the subject is AMANDA L. TYLER, *HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY* (2017).

<sup>10</sup> *Hamdi*, 542 U.S. at 554 (Scalia, J., dissenting).

<sup>11</sup> Tyler, *supra* note 3, at 907.

<sup>12</sup> *Boumediene v. Bush*, 533 U.S. 723, 771, 780 (2008) (stating that the Suspension Clause secures the judicial remedy of habeas corpus).

<sup>13</sup> *See Hamdi*, 542 U.S. at 554 (Scalia, J., dissenting).

<sup>14</sup> *Id.* at 519 (plurality opinion).

<sup>15</sup> *See generally* Tyler, *supra* note 3.

<sup>16</sup> *See Halliday & White, supra* note 7, at 580.

<sup>17</sup> *See id.* at 697.

Part I deals with British usage and practice prior to the framing of the Constitution.<sup>18</sup> In British legal usage, “suspension of habeas corpus” and cognate terms were used to describe statutes that authorized criminal detention on weaker evidence, and for longer than allowed by the Habeas Corpus Act of 1679.<sup>19</sup> The Habeas Corpus Act applied only to detention on criminal or supposed criminal grounds, and statutes that were called suspensions of it expanded the criminal detention authority of the Crown.<sup>20</sup> “Suspension of the Habeas Corpus Act” and similar phrases were not applied to other statutes authorizing detention on national security grounds, including statutes providing for a military draft, and a statute adopted in 1782 that explicitly authorized the King to hold British subjects as prisoners of war.<sup>21</sup>

Part II turns to American practice immediately prior to the Constitution.<sup>22</sup> During the Revolution, American states extended the concept of suspension of habeas corpus beyond its British meaning.<sup>23</sup> A number of states adopted suspension statutes that authorized detention on grounds of dangerousness, without the suspicion of prior criminal behavior that British suspensions required.<sup>24</sup> During the Revolutionary War, the Continental Army held Loyalist American citizens who served with the British Army and were taken captive, as prisoners of war, just as the British held Americans as prisoners of war.<sup>25</sup> The application of the terminology of suspension of habeas corpus to the new American forms of discretionary detention authority became clear in the Massachusetts Constitution of 1780, which referred to such statutes as suspensions of the privilege of the writ of habeas corpus and provided the language of the Federal Suspension Clause.<sup>26</sup>

Part III traces the evolution of the Suspension Clause in the Federal Convention.<sup>27</sup> It then discusses references to the clause in the ratification debates. Part IV offers an interpretation of the substantive protection to natural liberty provided by the Suspension Clause.<sup>28</sup> A suspension of the privilege of the writ of habeas corpus is legislation granting the executive extremely broad discretion to detain.<sup>29</sup> British and American suspension statutes granted broad discretion and were regarded as dangerous for just that reason.<sup>30</sup> Detention authority bounded by law is not so dangerous and does not

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<sup>18</sup> See *infra* Part I.

<sup>19</sup> See Tyler, *supra* note 3, at 907.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 950.

<sup>22</sup> See *infra* Part II.

<sup>23</sup> See Tyler, *supra* note 3, at 962.

<sup>24</sup> *Id.* at 960–61.

<sup>25</sup> *Id.* at 1007.

<sup>26</sup> *Id.* at 963.

<sup>27</sup> See *infra* Part III.

<sup>28</sup> See *infra* Part IV.

<sup>29</sup> See Tyler, *supra* note 3, at 959.

<sup>30</sup> *Id.* at 932.

constitute suspension.<sup>31</sup> This reading explains why forms of detention authority that are substantially bound by law, including law of war detention, are not suspensions within the meaning of the clause.

The Suspension Clause is concerned mainly with the primary right of natural liberty and executive authority to restrict it, not with the judicial remedy of habeas corpus.<sup>32</sup> Part V addresses the question whether the Suspension Clause affects Congress's authority with respect to the writ.<sup>33</sup> It argues that the clause imposes no affirmative requirement that federal habeas jurisdiction exist, and in general does not affect Congress's power over habeas in federal court. Any restrictions the clause might impose on congressional legislation with respect to habeas in state court are cumulative of restrictions that exist without the clause, mainly because Congress does not have the general authority over state courts that it has over federal courts.<sup>34</sup>

#### I. HABEAS CORPUS SUSPENSION IN BRITISH LAW PRIOR TO THE AMERICAN CONSTITUTION

This section describes British legal usage and practice prior to the American founding. It shows that the phrase “suspension of the Habeas Corpus Act” and cognate phrases like “suspension of the habeas corpus” referred to a particular kind of statute: those that expanded the criminal detention authority of the Crown beyond what the Habeas Corpus Act of 1679 permitted.<sup>35</sup> Suspension statutes operated only on detention authority and did not affect the writ itself, which could be issued while a suspension was in effect.<sup>36</sup> “Suspension of the Habeas Corpus Act” and similar phrases were not used to refer to statutes that gave the Crown noncriminal detention authority, like statutes authorizing a military draft or enabling the Crown to hold rebels as prisoners of war in an internal conflict.<sup>37</sup>

##### *A. Habeas Corpus and Suspension in Britain up to the War of the American Revolution*

In 1215 King John promised that he would not deprive any freeman of liberty except with due process or according to the law of the land.<sup>38</sup> In 1626 Charles I needed money to pay for a war but did not want to summon a Parliament to impose

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<sup>31</sup> *Id.* at 922.

<sup>32</sup> *See id.* at 998–99.

<sup>33</sup> *See infra* Part V.

<sup>34</sup> *See* Halliday & White, *supra* note 7, at 697.

<sup>35</sup> *See* Tyler, *supra* note 3, at 953.

<sup>36</sup> *Id.* at 937.

<sup>37</sup> *See, e.g., id.* at 939.

<sup>38</sup> “No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land.” Magna Carta 1215, *translated in* J.C. HOLT, MAGNA CARTA 441, 461 (1992).

taxes.<sup>39</sup> King Charles resorted to mandatory loans and imprisoned five subjects who refused to pay.<sup>40</sup> They sought relief from King's Bench through the common law writ used to test the legality of executive detention, habeas corpus.<sup>41</sup> In response to the writ, the jailers said that the prisoners were held by express commandment of the King.<sup>42</sup> King's Bench remanded the petitioners to custody.<sup>43</sup> In 1628, Parliament addressed the issue of imprisonment at the King's command with the Petition of Right.<sup>44</sup> The Petition of Right asserted that the subject's right of personal liberty operates against the King, who is not allowed to imprison at his discretion.<sup>45</sup> Alluding to the forced loan cases, the petition recited that "divers of your subjects have of late been imprisoned without any cause showed," and that on habeas "no cause was certified, but that they were detained by your Majesty's special command."<sup>46</sup> The Petition, to which Charles gave his assent, asked "that no freeman, in any such manner as is before mentioned, be imprisoned or detained."<sup>47</sup> The King's express command was not a justification for detention, and hence not a good response to the writ of habeas corpus.<sup>48</sup>

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<sup>39</sup> See ROBERT S. WALKER, *THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY* 59 (1960).

<sup>40</sup> *Id.* Charles's desire to raise money without summoning Parliament "was the genesis of the infamous Forced Loan of 1626." *Id.*

<sup>41</sup> *Id.* at 59–60.

<sup>42</sup> "The writ issued to the Warden of the Fleet [Prison] who returned that the prisoners were held *per speciale mandatum Domini Regis* thereby raising the question of whether the court would continue to regard this return sufficient at law." *Id.* at 60. As Halliday explains, the question in that case (*Darnel's Case*, also called *The Five Knights Case*) was, "by what law might one person properly hold another in custody?" HALLIDAY, *supra* note 9, at 137. The answer, "[B]y his majesty's special commandment . . . was certain. Was it also sufficient?" *Id.* (quoting original writs and returns in the British National Archives, KB145/15/3).

<sup>43</sup> *Darnel's Case* (1627) 3 How. St. Tr. 1, 59 (Eng.). The remand to custody was a procedural step, and the judges did not say that the King had authority to confine subjects at his discretion. JAMES S. HART, JR., *THE RULE OF LAW, 1603–1660*, at 124 (2003). Professor Hart argues plausibly that Darnel and the other knights were concerned mainly with the legality of the forced loan, not their imprisonment, and that the return of the writ represented the King's counsel's decision not to put the forced loan directly at issue and instead to use the response that the petitioners were confined at the express command of the King, which was not itself an innovation. *Id.* at 122. As a result, the case came to turn, not on the forced loan, but on "a much broader issue: the King's powers of discretionary imprisonment." *Id.*

<sup>44</sup> Petition of Right 1628, 3 Car. 1 c. 1 (Eng.).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* § 5. The Petition previously referred to Magna Carta's requirement that "no Freeman may be taken or imprisoned or be disseised of his Freehold or Liberties or his free Customes or be outlawed or exiled or in any manner destroyed, but by the lawfull Judgment of his Peeres or by the Law of the Land." *Id.* § 3 (citing Magna Carta 1225, 9 Hen. 3, M.C. ch. 29).

<sup>47</sup> *Id.* § 8.

<sup>48</sup> *Id.* § 5.

To say that the Crown could not detain subjects at discretion did not mean that the Crown could not detain subjects.<sup>49</sup> English law provided several grounds on which individuals might be deprived of personal liberty.<sup>50</sup> Perhaps the most important came from the criminal law.<sup>51</sup> Not only could convicts be confined as punishment, but accused criminals also could be held by the executive pending trial.<sup>52</sup> Pretrial detention, unlike conviction, would not reflect the outcome of a trial.<sup>53</sup> Holding accused criminals before trial thus could be a useful tool for the executive to use against its enemies, especially if the King's judges were prepared to delay actual trials.<sup>54</sup>

In 1679, Parliament adopted the Habeas Corpus Act, also called the Liberty of the Subject Act.<sup>55</sup> The statute regulated pretrial detention on “criminal or supposed criminal” grounds, and was designed to ensure that defendants would be released on bail when appropriate and brought to trial promptly.<sup>56</sup> Accused criminals committed to prison were generally entitled to bail unless they were committed for “Treason or Felony plainly expressed in the Warrant of Commitment.”<sup>57</sup> Accused felons, including accused traitors, had to be brought to trial within two terms of court.<sup>58</sup> In those

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<sup>49</sup> See Richard Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24, 26–27 (1926).

<sup>50</sup> For example, English law long provided for arrest and imprisonment as part of civil process and to enforce judgment debts. *Id.*

<sup>51</sup> See, e.g., STUART E. PRALL, *THE BLOODLESS REVOLUTION* 136–37 (1985).

<sup>52</sup> *Id.*

<sup>53</sup> Describing criminal law in the common law courts in the late sixteenth and early seventeenth centuries, Holdsworth discussed the availability of arrest warrants on suspicion of treason or felony, which could come from any source, 5 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 191 (1927), the statutes that made bail difficult to obtain, *id.* at 190–91, and the result that persons arrested and not bailed would remain in prison until tried, *id.* at 191. Not only could suspicion come from private people, it was often based on “common rumor and repute.” 6 JOHN BAKER, *THE OXFORD HISTORY OF THE LAWS OF ENGLAND* 88–89 (2003).

<sup>54</sup> For James II, the criminal law was an important tool with which to damage his enemies, and common-law and statutory rules of criminal procedure an impediment. According to Stuart E. Prall:

If those whom James sought to coerce by means of the criminal law had the statutory right to a writ of habeas corpus and were thus guaranteed a fair and speedy trial following their arrest, on specific criminal charges, and then the right to have the case heard before a jury in their own district, then the king was unable to freely use the criminal law for his own purposes.

PRALL, *supra* note 51, at 136–37.

<sup>55</sup> See Tyler, *supra* note 3, at 924.

<sup>56</sup> Habeas Corpus Act 1679, 31 Car. 2 c. 2, § 1 (Eng.). The enacting clause noted the “great delays” used by jailers to whose custody “any of the Kings Subjects have been committed for criminall or supposed criminall Matters,” and stated that the statute was enacted “[f]or the prevention whereof and the more speedy Releife of all persons imprisoned for any such criminall or supposed criminall Matters.” *Id.*

<sup>57</sup> *Id.* § 2.

<sup>58</sup> *Id.* § 6.

respects, the Act protected the substantive right of natural liberty, limiting the circumstances and the time in which individuals could be held in prison on criminal grounds.<sup>59</sup>

To enforce those rules the Act also created a remedy: a specialized statutory form of the writ of habeas corpus.<sup>60</sup> Parliament instructed the courts to keep straight the common law and statutory writs by endorsing the documents to indicate which one was involved.<sup>61</sup> Like common-law habeas, the statutory version directed the jailer to justify the petitioner's detention.<sup>62</sup> If the imprisonment was unlawful, the court could then order the prisoner discharged.<sup>63</sup>

In 1688, James II fled Britain in face of a rebellion and was replaced by his nephew, William III, and his nephew's wife, James's daughter Mary II.<sup>64</sup> The new Protestant monarchs' hold on the throne was tenuous, however, with James leading a military force in Ireland and retaining much support in Britain.<sup>65</sup> Under English law as it then stood, subjects plotting against the monarch almost inevitably committed some crime, often treason itself.<sup>66</sup> The regular criminal process as set out in the Habeas Corpus Act, however, was not well suited to dealing promptly and preemptively with disloyal subjects.<sup>67</sup> Confinement pending trial for treason required sworn statements in writing and specific identification of the cause of detention, which might well not be available against careful and dangerous plotters.<sup>68</sup> Proving a

<sup>59</sup> James II chafed under those restraints and wanted to repeal the Habeas Corpus Act. *See* PRALL, *supra* note 51, at 137.

<sup>60</sup> 31 Car. 2 c. 2, § 1.

<sup>61</sup> *Id.* § 2. King's Bench paperwork distinguished between the statutory and common law writs. "After 1679, the verso of the writ also contains a note about whether the writ issued by common law or according to the terms of the Habeas Corpus Act." HALLIDAY, *supra* note 9, at 320. One of Halliday's major findings concerns the continued importance of the common law writ: "Especially in term, but during vacations too, judges performed their most innovative work using the common law writ, in part because the statute applied only to imprisonment for felony or treason." *Id.* at 242.

<sup>62</sup> 31 Car. 2 c. 2, § 2.

<sup>63</sup> *Id.*

<sup>64</sup> Clarence C. Crawford, *The Suspension of the Habeas Corpus Act and the Revolution of 1689*, 30 *ENG. HIST. REV.* 613, 616 (1915).

<sup>65</sup> *Id.* ("Ireland was in a state of revolt and the friends of James in Scotland were ready to take up arms.").

<sup>66</sup> Under the main treason statute, to "compass or imagine" the death of the King (or Queen in 1689) was treason. Treason Act 1351, 25 Edw. 3 c. 2 (Eng.). Plots to use force to dethrone the King were likely to fall within that category. For example, according to Hale, concerting a plan to imprison the King by force would be an overt act by way of compassing the King's death. 1 MATTHEW HALE, *HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN* 109 (Sollom Emlyn, ed., Savoy, E. & R. Nutt & R. Gosling 1736). Compassing the King's death "had been used subsequently by English judges to cover written or spoken subversive words and conspiracies to levy war." BRADLEY CHAPIN, *THE AMERICAN LAW OF TREASON: REVOLUTIONARY AND EARLY NATIONAL ORIGINS* 40 (1964).

<sup>67</sup> *See* Crawford, *supra* note 64, at 613–14.

<sup>68</sup> *Id.*

conspiracy to dethrone the King and Queen by force was hard, while conspiring was easy.<sup>69</sup>

In response, Parliament adopted legislation temporarily authorizing detention of suspected criminals on terms inconsistent with the Habeas Corpus Act.<sup>70</sup> Certain high officials were empowered to arrest and imprison on the basis of suspicion of high treason, without the usually requisite specific sworn statements.<sup>71</sup> Bail was denied to those so arrested, and their trials were put off beyond the schedule called for by the 1679 Act.<sup>72</sup> The 1688 statute was the first of what came to be called suspensions of the Habeas Corpus Act, or suspensions of the habeas corpus, or similar names.<sup>73</sup>

Like its successors, the first Suspension Act had several noteworthy features.<sup>74</sup> First, it expanded the authority of the executive to hold individuals in custody, and hence contracted the right of natural liberty.<sup>75</sup> Second, that expansion conferred wide discretion to choose whom to commit to prison: suspicion was easily found, and the Crown could decide which suspects to hold.<sup>76</sup> Third, it authorized detention on suspicion of crime, and hence had to override the Habeas Corpus Act, which limited imprisonment on criminal or supposed criminal grounds.<sup>77</sup> Fourth, commitments were subject to judicial scrutiny via the writ of habeas corpus, with which the Act did not interfere.<sup>78</sup> Under a suspension act, a proper commitment document would provide

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<sup>69</sup> See *id.* at 613–15 (noting the procedure by which a prisoner could gain release through the writ of habeas corpus).

<sup>70</sup> *Id.* at 619–20.

<sup>71</sup> See Habeas Corpus Suspension Act 1688, 1 W. & M. c. 2 (Eng.).

<sup>72</sup> Persons committed by the Privy Council for “Suspition of High Treason” were to be held in “safe Custodie . . . without Baile or Mainprize,” and no “Judge or other Person” was to “Baile or Try any such Person . . . soe Committed without Order from” the Privy Council. *Id.* The initial statute ran for one month, during which trial was deferred. Crawford, *supra* note 64, at 620, 622.

<sup>73</sup> *E.g.*, Crawford, *supra* note 64, at 613, 629.

<sup>74</sup> Professors Halliday and White comprehensively reviewed British suspension statutes, beginning with the 1688 Act. Halliday & White, *supra* note 7, at 613–19. As they explain, Parliament followed a formula, defining “who had special powers to imprison, how that power might be used, the duration of such powers, and the reversion to normal bail practices thereafter.” *Id.* at 617–18. While the Suspension Acts explicitly granted detention authority to the executive, “[t]he second and most surprising feature is that no statute ever ‘suspended’ ‘habeas corpus.’ The words ‘habeas corpus’ do not appear in any of them.” *Id.* at 618. That is because the statutes gave the executive additional power to detain, thereby making more detention lawful, and did not restrict the courts’ power to inquire into the lawfulness of detention. “The suspension statutes expanded one power rather than curtail another. Even during periods of suspension, the common law writ of habeas corpus never lapsed, even if the Crown received new capacities to detain accused traitors without trial for carefully limited spells.” *Id.*

<sup>75</sup> See 1 W. & M. c. 2. The Act’s title makes the point: “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.” *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Compare *id.*, with Habeas Corpus Act 1679, 31 Car. 2 c. 2 (Eng.).

<sup>78</sup> 1 W. & M. c. 2.

a good response to the writ by the jailer, but the courts could decide whether there was such a document.<sup>79</sup> Finally, although the 1688 statute was indeed a suspension of aspects of the Habeas Corpus Act, it did not say that it was suspending anything.<sup>80</sup>

The 1688 Act was also given a name that would be shortened. The statute was unofficially called a suspension of the Habeas Corpus Act.<sup>81</sup> That name was a good description, because Parliament had indeed temporarily made important parts of its earlier enactment inoperative.<sup>82</sup> The name acquired a short form that was not so descriptive, however. In Britain, such statutes also came to be called suspensions of the habeas corpus.<sup>83</sup> If the shorter phrase had been taken to mean a suspension of the

<sup>79</sup> For example, in 1696, while a suspension statute was in effect, King's Bench used the writ to review the confinement of James Hunt, who had been committed by a Justice of the Peace for corresponding with France. HALLIDAY, *supra* note 9, at 249. Justices of the Peace were not empowered to commit suspects under the Suspension Act, and Hunt was bailed. *Id.* Mansfield would later use the writ to determine whether a suspect committed under the Revolutionary War suspension fell within the Act. AN ARGUMENT IN THE CASE OF EBENEZER SMITH PLATT 11–12 (London, G. Kearsly 1777) [hereinafter Mansfield] (Lord Mansfield issued the opinion of the bench.).

<sup>80</sup> The statute did refer to the 1679 Act, but not by saying that the earlier Act was suspended. The 1688 Act provided that after it expired the persons committed under it were to have “the Benefit and Advantage” of the 1679 Act and other laws and statutes “relateing to or providing for the Liberty of the Subjects of this Realme.” 1 W. & M. c. 2.

<sup>81</sup> Referring to the various statutes in which Parliament had forbidden bail or trial according to the Habeas Corpus Act, Mansfield is reported to have said from the bench in 1777, “from the Effect that they had, though not in the Title, nor by any Words in any one of them, have always been called *Suspensions of the Habeas Corpus Act.*” Mansfield, *supra* note 79, at 12. When Lord North's suspension statute was introduced in the House of Commons in 1777, the running head in the *Parliamentary History* was “Debate in the Commons on the Bill for suspending the Habeas Corpus Act.” 19 THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 3–6 (London, T.C. Hansard 1814) [hereinafter PARLIAMENTARY HISTORY].

<sup>82</sup> See *supra* note 77 and accompanying text.

<sup>83</sup> Reporting on the introduction of Lord North's Suspension Act of 1777, the *London Evening Post* stated that the Act would “suspend the Habeas Corpus act” in the cases described. *House of Commons*, LONDON EVENING POST, Feb. 6–8, 1777, at 3. A week later, the same newspaper argued that in the past “the suspension of the Habeas Corpus” had been undertaken “when the *person* of the *King*, the *laws* and *religion* of the country were in the most *imminent danger*” which was not the case at that point. *Postscript*, LONDON EVENING POST, Feb. 13–15, 1777, at 4. That paper used the terms interchangeably. That month, another London newspaper reported the capture of the American General Lee and thought it likely that he would be the first person executed under the new Act for the suspension of the habeas corpus. DAILY ADVERTISER (London), Feb. 13, 1777, at 1. Lee was eventually treated as a prisoner of war and exchanged. See Jared Sparks et al., *Report on Exchange of Prisoners During the American Revolution*, in 5 PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY 325, 332 (Boston, John Wilson & Son 1862). A similar shortened form appeared in another London paper in 1778, which called the most recent renewal of the Suspension Act “the American Habeas Corpus Suspension Bill.” PUB. ADVERTISER (London), Dec. 9, 1778, at 2.

writ, it would have been inaccurate.<sup>84</sup> Suspensions did not interfere with the writ, but with other aspects of the Liberty of the Subject Act.<sup>85</sup> I have not encountered any British usage, however, in which the error is to be found. Every instance with which I am familiar in which “suspension of the habeas corpus” and similar phrases were used is a reference to the kind of statute called, at greater length, a suspension of the Habeas Corpus Act.<sup>86</sup> Suspensions of the Habeas Corpus Act authorized detention on criminal accusations, but on grounds, and for lengths of time, that would have violated that Act absent contrary legislation.<sup>87</sup>

In 1715, Parliament acted against a planned rebellion by supporters of the House of Stuart directed against the Hanoverian succession.<sup>88</sup> Because of the Acts of Union of 1706 and 1707, the Parliament of Great Britain was then legislating for both England and Scotland.<sup>89</sup> That Parliament adopted legislation closely based on the 1688 statute, legislation that authorized detention and barred trial or release by the courts.<sup>90</sup> By doing so, the statute suspended the English Habeas Corpus Act, though not in so many words.<sup>91</sup> The 1715 statute did, however, say that it was suspending something: the Scottish 1701 Act for Preventing Wrongous Imprisonment.<sup>92</sup> The Scottish statute resembled the English Liberty of the Subject Act in several important respects.<sup>93</sup> It required that commitment warrants express the “particular cause” of commitment, that bail be available for bailable offenses, and that the accused be promptly tried.<sup>94</sup> The Scottish statute was not a habeas corpus act, however, because the Scottish courts did not use habeas corpus.<sup>95</sup> Instead, criminal detainees could make an application to an appropriate

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<sup>84</sup> See Suspensions of Habeas Corpus Acts 1688, 1 W. & M. cc. 2, 7 (Eng.) (allowing for the indefinite detention of suspected individuals rather than a suspension of the writ).

<sup>85</sup> See *id.*

<sup>86</sup> See, e.g., HALLIDAY, *supra* note 9, at 248.

<sup>87</sup> See 1 W. & M. c. 7 (allowing indefinite detention of individuals “for Suspicion of High Treason or Treasonable Practices or by Warrant . . . for such Causes aforesaid”).

<sup>88</sup> See Tyler, *supra* note 3, at 943.

<sup>89</sup> Union with Scotland Act 1706, 6 Ann. c. 11 (Eng.) (English Act for union with Scotland); Union with England Act 1707, (RPS) 1706/10/257 (Scot.) (Scottish Act for union with England).

<sup>90</sup> Compare Habeas Corpus Suspension Act 1715, 1 Geo. 1 stat. 2 c. 8 (Gr. Brit.), reprinted in THE ANNALS OF KING GEORGE, YEAR THE FIRST (London 1716), with 1 W. & M. cc. 2, 7.

<sup>91</sup> The 1715 statute provided for detention on suspicion of treasonable practices and not just treason. 1 Geo. 1 stat. 2 c. 8.

<sup>92</sup> The 1715 Suspension Act provided:

That the Act made in *Scotland* in the Year of our Lord One Thousand Seven Hundred and One, intituled, *An Act for preventing wrongous Imprisonment, and against undue Delays in Trials*, until the said Four and Twentieth Day of *January*, in the Year of our Lord One Thousand Seven Hundred and Fifteen, be suspended as to all Cases of Treason and Suspicion of Treason.

*Id.*

<sup>93</sup> See Criminal Procedure Act 1701, (RPS) 1700/10/234 (Scot.).

<sup>94</sup> *Id.*

<sup>95</sup> See *id.*

judicial officer that was the functional equivalent of a petition for the writ, and the courts could then inquire into the lawfulness of detention and order release if appropriate.<sup>96</sup> No writ of habeas corpus was involved, however, so the Scottish statute did not mention it.<sup>97</sup>

The first suspension that used a cognate of “suspend” thus did not suspend habeas corpus, or the writ of habeas corpus, or the privilege of the writ of habeas corpus.<sup>98</sup> It temporarily displaced two statutes, one English and one Scottish, that limited the Crown’s authority to detain on criminal grounds.<sup>99</sup>

The limited scope of the Habeas Corpus Act and statutes suspending it, and the highly specific meaning of suspension of the Habeas Corpus Act and related phrases, were on display in an important legal debate in 1758.<sup>100</sup> In 1756, at the outset of what became the Seven Years War, Parliament passed a statute providing for involuntary military service.<sup>101</sup> Such statutes were called Recruiting Acts, or more pejoratively Impressment Acts or Press Acts.<sup>102</sup> Under them, subjects liable to be drafted were taken into custody.<sup>103</sup> Before being assigned to a regiment they were usually held at the Savoy Prison.<sup>104</sup> Statutes of that kind provided for executive detention for reasons of national security.<sup>105</sup> They were not called suspensions of the Habeas Corpus Act, or suspensions of the habeas corpus, or anything similar.<sup>106</sup>

That usage is instructive, but it should not be surprising. Detention at the beginning of involuntary military service is not detention on criminal or supposed criminal grounds, and so was not regulated by the Habeas Corpus Act.<sup>107</sup> Rather, the limits on the Crown’s detention authority came from the recruiting statutes themselves, which drafted only carefully identified categories of subjects.<sup>108</sup> As would

<sup>96</sup> *Id.*

<sup>97</sup> *See id.*

<sup>98</sup> *See* 1 Geo. 1 c. 8.

<sup>99</sup> Because the 1715 statute referred to the Scottish statute generally, it is possible that it blocked the courts from inquiring into the lawfulness of detention through the Scottish equivalent of habeas corpus. *See id.*

<sup>100</sup> *See generally* Kevin Costello, *Habeas Corpus and Military and Naval Impressment, 1756–1816*, 29 J. LEG. HIST. 215, 218–24 (2008) (discussing the 1758 debate in the House of Commons and House of Lords).

<sup>101</sup> *Id.* at 216; *see also* Recruiting Act 1756, 29 Geo. 2 c. 4 (Gr. Brit.).

<sup>102</sup> Costello, *supra* note 100, at 215–16 (referring to Recruiting Act of 1703 and Recruiting Act of 1756); *see also* 15 PARLIAMENTARY HISTORY, *supra* note 81, at 891 (unidentified participants in debate referring to the “Press Act” and “Recruiting Act”).

<sup>103</sup> Costello, *supra* note 100, at 218.

<sup>104</sup> *Id.* at 218 n.19.

<sup>105</sup> *See, e.g., id.* (indicating a rise in impressment during times of war).

<sup>106</sup> *See, e.g., supra* note 102 and accompanying text.

<sup>107</sup> *See* Costello, *supra* note 100, at 218 n.19.

<sup>108</sup> The draft was limited to men who “d[id] not follow or exercise any lawful calling or employment, or have not some other lawful and sufficient support.” Subjects entitled to vote for members of the House of Commons were specifically exempt from the draft. Recruiting Act 1756, 29 Geo. 2 c. 4 (Gr. Brit.).

be expected, subjects who claimed that they had been unlawfully taken in the draft sought judicial relief through the common law writ of habeas corpus.<sup>109</sup>

Soon after enforcement of the Recruiting Act of 1756 began, challenges to detention under it came before King's Bench.<sup>110</sup> Led by their new Chief Justice, Lord Mansfield, the judges devised a procedure that they believed would be better than habeas corpus.<sup>111</sup> Instead of issuing the writ, King's Bench would issue a rule directed to the recruiting commissioner, ordering him to show cause why the prisoner should not be discharged from the service.<sup>112</sup> The judges thought that the rule had several advantages over the writ.<sup>113</sup> First, unlike habeas corpus, it did not require that the petitioner be brought before the court in person.<sup>114</sup> Second, it avoided the long-standing question whether, and to what extent, the court in habeas could look behind the factual allegations made in the return of the writ.<sup>115</sup> Third, because the ultimate remedy was an order requiring discharge from the service and not just from custody, the rule ensured that successful petitioners could not be punished for desertion.<sup>116</sup>

King's Bench adopted the new procedure in 1757.<sup>117</sup> In early 1758, Sir Charles Pratt, Attorney General and a member of the House of Commons, introduced a bill that would have replaced the new show-cause procedure with another statutory version of habeas corpus, in addition to that created by the Habeas Corpus Act.<sup>118</sup> The bill, which Pratt may have introduced in part as an attack on Mansfield, passed the House of Commons in April 1758.<sup>119</sup> It was subject to heavy criticism in the House of Lords, including by Mansfield, and rejected.<sup>120</sup> The upper house then asked the common law judges to draft a bill that would improve habeas procedure in impressment cases but would not have the many problems identified in Pratt's initial draft.<sup>121</sup> Habeas reform based on the judges' proposal was eventually adopted in 1816.<sup>122</sup>

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<sup>109</sup> As Costello explains, habeas was regularly used by petitioners who claimed to have been wrongfully detained under a Recruiting Act like those of 1703 and 1756. Costello, *supra* note 100, at 215–16.

<sup>110</sup> *Id.* at 216.

<sup>111</sup> *See id.* at 216–18.

<sup>112</sup> *Id.* at 216–17.

<sup>113</sup> *Id.* at 217.

<sup>114</sup> *Id.*

<sup>115</sup> In the show-cause proceeding, the court would decide on the basis of affidavits, not just the petition for habeas corpus and the jailer's return of the writ. *Id.* at 217–18.

<sup>116</sup> Absent an order of discharge, “[i]t was conceivable that one could be released from the Savoy [Prison], then shot for desertion.” HALLIDAY, *supra* note 9, at 114.

<sup>117</sup> Costello, *supra* note 100, at 216–17.

<sup>118</sup> *Id.* at 218–19, 221.

<sup>119</sup> *Id.* at 219–22.

<sup>120</sup> *Id.* at 222–24, 233.

<sup>121</sup> *Id.* at 233.

<sup>122</sup> *Id.* at 249. The final version of the bill was adopted as Habeas Corpus Act 1816, 56 Geo. 3 c. 100 (UK).

Throughout the debates in both houses in 1758, it was clear that the statutory writ of habeas corpus created by the 1679 Act did not extend to allegedly illegal impressment, because involuntarily recruited soldiers were detained, but not on criminal or supposed criminal grounds.<sup>123</sup> According to the *Parliamentary History*, one argument in favor of the bill was that the statutory form of the writ was much superior to the common law form, but only the latter was available to impressed soldiers.<sup>124</sup> More striking, and clearer in both its content and attribution, was the response given by the common-law judges to the House of Lords as to an important technical question.<sup>125</sup> Much of the debate concerned the relative merits of the common-law writ and the statutory writ.<sup>126</sup> For that reason, the scope of the latter was an important question.<sup>127</sup> The Lords, using their privilege to consult the judges, asked them whether:

[T]he said statute of the 31st of king Charles 2, and the several provisions therein made for the immediate awarding and returning the writ of Habeas Corpus, do not extend to the case of any man compelled against his will, in time of peace, either into the land or sea service, without any colour of legal authority; or to any cases of imprisonment, detainer or restraint whatsoever, except cases of commitment for criminal or supposed criminal matters.<sup>128</sup>

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<sup>123</sup> See 15 PARLIAMENTARY HISTORY, *supra* note 81, at 876 (raising this argument in the House of Commons). See generally Costello, *supra* note 100 (discussing the debates in both Houses).

<sup>124</sup> The account of the debates that appears in the *Parliamentary History*, generally drawn from journalistic sources, does not always identify the speaker. See generally 15 PARLIAMENTARY HISTORY, *supra* note 81. A member of the House of Commons is said to have argued that “the benefit of the Habeas Corpus Act” should be extended “to impressed persons.” *Id.* at 833. The speaker maintained that under the “legal and equitable construction” of the 1679 statute impressed persons were entitled to its benefits, but that as there were doubts about that interpretation, the Act should be “explained by public authority” to include impressment. *Id.* The problem was that “the Press Act has created a legal cause of imprisonment, which did not exist before.” *Id.* at 884. Impressed subjects were “within the mischief intended to be redressed by [the Habeas Corpus Act]” and should “have the most speedy opportunity of pleading their claim to liberty.” *Id.* The subject of debate was the writ of habeas corpus and the contrast between the statutory and common law versions of that remedy. *Id.* While the speaker argued that the 1679 Act properly should be interpreted as applying to impressment, he almost certainly meant the remedy and not the substantive restrictions on the Crown’s criminal detention authority. The Crown did not have to bring lawfully impressed soldiers and sailors to trial in a specified period of time. See *id.* at 833.

<sup>125</sup> See *id.* at 898–919 (detailing a series of questions put to the judges by the Lords and their answers).

<sup>126</sup> See *id.* at 898–902.

<sup>127</sup> See Costello, *supra* note 100, at 229 (describing debate about differences between common law and statutory habeas).

<sup>128</sup> 15 PARLIAMENTARY HISTORY, *supra* note 81, at 917.

Nine of the eleven judges provided answers to the Lords' questions, and they all gave substantially the same response to the question about statutory habeas for impressed subjects.<sup>129</sup> Typical was the answer of Sir John Willes, Chief Justice of the Common Pleas:

That the words of the statute of the 31st Car. 2, and the several provisions therein made for the immediate awarding and returning the writ of Habeas Corpus, do not extend to the case of any man compelled against his will, in time of peace, either into the land or sea service, without any colour of legal authority; nor to any case of imprisonment, detainer, or restraint, except cases of commitment for criminal or supposed criminal matters.<sup>130</sup>

The debate in Parliament in 1758 underlined two related points, one about substance and the other about terminology. First, some, but only some, of the British law protecting personal liberty was found in the Habeas Corpus Act.<sup>131</sup> The principle that the Crown could not detain at pleasure was found in the common law, restated in the Petition of Right.<sup>132</sup> The restrictions on involuntary detention of drafted soldiers were found in the Recruiting Acts themselves.<sup>133</sup> Those statutes gave only limited authority to hold draftees in custody.<sup>134</sup> The courts enforced those limits, but not through the statutory writ of habeas corpus created by the 1679 Act.<sup>135</sup> Second, the terminology reflected the limited scope of the 1679 statute.<sup>136</sup> Statutes that expanded the Crown's authority to detain on criminal grounds beyond what was permitted by the earlier Act were called suspensions of it.<sup>137</sup> That was natural enough, because they displaced the limits the 1679 Act imposed.<sup>138</sup> Statutes that expanded the Crown's authority to detain on noncriminal grounds were called something else, like Recruiting Acts.<sup>139</sup>

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<sup>129</sup> *Id.* at 904–18.

<sup>130</sup> *Id.* at 918. To the same effect were the answers of Justice Noel, *id.* at 904, Justice Wilmot, *id.* at 906, Justice Bathurst, *id.* at 908, Baron Adams, *id.* at 909, Baron Smythe, *id.* at 911, Baron Legge, *id.* at 912, Justice Clive, *id.* at 914, Justice Dennison, *id.* at 915, and Chief Baron Parker, *id.* at 917. Sir Michael Foster of King's Bench and Chief Justice Mansfield did not provide opinions.

<sup>131</sup> *Id.* at 921.

<sup>132</sup> *Id.* at 877.

<sup>133</sup> *Id.* at 891.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* The common law writ was the generic means by which the legality of detention was determined. More specific procedures, like the statutory writ and the common law order to show cause in military recruitment, could replace it. *See id.*

<sup>136</sup> *Id.* at 876.

<sup>137</sup> *Id.* at 895–96 (bemoaning the ease with which habeas corpus could be suspended).

<sup>138</sup> *Id.* at 890 (arguing that suspension should be reserved only for legal exemptions).

<sup>139</sup> *See id.* at 891.

*B. British Suspension During the War of the American Revolution*

British practice in the War of the American Revolution confirms that in British usage suspension of the Habeas Corpus Act meant statutes that provided for imprisonment on criminal or supposed criminal grounds that were not consistent with the Act's requirements. Early in the conflict, Parliament adopted legislation that provided for indefinite criminal detention of certain Americans.<sup>140</sup> That legislation was called a suspension.<sup>141</sup> In 1782, Parliament adopted another statute specifically authorizing the Crown to treat detainees under the existing Suspension Acts as prisoners of war and to exchange them as such, without regard to their confinement on accusation or suspicion of crime.<sup>142</sup> The 1782 statute was not referred to as a suspension.<sup>143</sup> This reinforces the conclusion that suspension consisted only of legislation authorizing detention on criminal or supposed criminal grounds.<sup>144</sup> Just as a military draft did not come within the British concept of suspension of the Habeas Corpus Act, neither did legislation providing for holding prisoners of war, including prisoners of war in an internal conflict.<sup>145</sup>

In 1775, war broke out between King George and his subjects in North America.<sup>146</sup> In response to acts of armed hostility by the rebels, the King and Parliament employed the tools of war in a domestic conflict.<sup>147</sup> The King proclaimed a rebellion.<sup>148</sup> Two of his officials imposed martial law.<sup>149</sup> Parliament made American vessels

<sup>140</sup> Treason Act 1777, 17 Geo. 3 c. 9 (Gr. Brit.).

<sup>141</sup> *Id.*

<sup>142</sup> Exchange of American Prisoners Act 1782, 22 Geo. 3 c. 10 (Gr. Brit.).

<sup>143</sup> *Id.*

<sup>144</sup> *See id.*

<sup>145</sup> *See id.*

<sup>146</sup> *See* George III, Proclamation of Rebellion (Aug. 23, 1775), reprinted in 1 SOURCE BOOK OF AMERICAN HISTORY 1606–1926, at 189 (William MacDonald ed., 3d ed. 1926).

<sup>147</sup> *See id.*

<sup>148</sup> *See id.* at 189–90. King George did not limit his efforts to ordinary law enforcement. He directed his officers, “civil and military,” to take steps necessary to end the rebellion and bring the traitors to justice. *Id.* at 189.

<sup>149</sup> On June 12, 1775, General Thomas Gage, Royal Governor of Massachusetts, issued a proclamation explaining that “justice cannot be administered by the common law of the land,” and he therefore ordered “the use and exercise of the Law-Martial, within and throughout this Province for so long time as the present unhappy occasion shall necessarily require.” Thomas Gage, Proclamation of June 12, 1775, reprinted in 2 AMERICAN ARCHIVES: FOURTH SERIES 970 (Peter Force ed., Washington, M. St. Clair Clarke & Peter Force 1839). On November 7, 1775, the Royal Governor of Virginia, the Earl of Dunmore, proclaimed that:

I do in Virtue of the Power and Authority to ME given, by His MAJESTY, determine to execute Martial Law, and cause the same to be executed throughout this Colony: and to the end that Peace and good Order may the sooner be restored, I do require every Person capable of bearing Arms, to resort to His MAJESTY'S STANDARD, or be looked upon as Traitors to His MAJESTY'S Crown and Government . . .

Lord Dunmore, Proclamation of Nov. 12, 1775, reprinted in AFRICAN AMERICAN VOICES: A DOCUMENTARY READER, 1619–1877, at 78–79 (Steven Mintz ed., 4th ed. 2009).

lawful prize, treating them like the shipping of enemies in an international war.<sup>150</sup> From early in the conflict, rebel soldiers in North America were treated as prisoners of war.<sup>151</sup> They were detained, paroled, and exchanged.<sup>152</sup> In keeping with the domestic nature of the conflict, the King's officials sought to manage prisoner exchanges without taking any step that would treat the rebel governments as sovereign.<sup>153</sup>

While American soldiers were treated as prisoners of war, and not charged with treason, rebel sailors seeking prizes posed a different problem.<sup>154</sup> They threatened

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<sup>150</sup> In December 1775, Parliament adopted the American Prohibitory Act, which stated that many Americans were in "open rebellion," having "assembled together an armed force, engaged his Majesty's troops, and attacked his forts." American Prohibitory Act 1776, 16 Geo. 3 c. 5, § 1 (Gr. Brit.). The Act interdicted the colonies' trade, providing that "all manner of trade and commerce is and shall be prohibited with" the states listed by name. *Id.* To enforce that restriction it declared all vessels engaged in that trade "forfeited to his Majesty, as if the same were the ships and effects of open enemies." *Id.* As in international wars, the Royal Navy was authorized to take American shipping as prize. *Id.* § 3.

<sup>151</sup> See LARRY G. BOWMAN, CAPTIVE AMERICANS: PRISONERS DURING THE AMERICAN REVOLUTION 6 (1976).

<sup>152</sup> When fighting began in 1775, Americans were taken prisoner at Bunker Hill and in a failed invasion of Quebec. *Id.* Although the British regarded the Americans as rebels, they did not prosecute military captives for treason or some other criminal offense such as insurrection. *Id.* at 131. "[T]he British government chose to deal with the captives as if they were prisoners of war without officially declaring them such until the last year of the conflict." *Id.*

The British ministry addressed the question of POW status for Americans in a high-profile case involving American General Charles Lee, who was captured by the British in December 1776. Sparks et al., *supra* note 83, at 332 (report by Massachusetts Historical Society committee about holding citizens as prisoners of war in the Civil War, a committee that included leading historian Jared Sparks and also George Ticknor Curtis and Edward Everett). Lee previously had served in the British Royal Army and had retired. *Id.* British commander Sir William Howe believed that as an officer of the King on the retired list, Lee was a deserter subject to military justice. *Id.* When General Washington learned that Lee was held as a deserter, he threatened reprisals against British and Hessian officers captured by the Americans, and offered to make an exchange for Lee. *Id.* When Howe sought instructions from Colonial Secretary George Germain, Germain replied, "His majesty consents that Lee (having been struck off the half-pay list) shall, though deserving the most exemplary punishment, be deemed a prisoner of war; and may be exchanged as such, when you may think proper." *Id.* at 336–37 (quoting Letter from Lord George Germain to Sir William Howe (Sept. 3, 1777)).

<sup>153</sup> According to Bowman:

Exchanges were to be negotiated by the British military commanders in whatever fashion they deemed proper. The negotiations which preceded an exchange were to be conducted in a manner which pledged the honor of the commander, and not the government, that the bargain would be consummated. Until the end of the war, the exchanges were partial in character, and they were, in effect, a series of gentlemen's agreements which were never elevated to the status of a treaty.

BOWMAN, *supra* note 151, at 104.

<sup>154</sup> Letter from Lord George Germain to Lord Mansfield (Aug. 6, 1776), in 12 DOCUMENTS OF THE AMERICAN REVOLUTION, 1770–1783, at 177 (K.G. Davies ed., 1976) [hereinafter DOCUMENTS OF THE AMERICAN REVOLUTION].

British shipping and gave rise to demands from merchants that steps be taken to stop them.<sup>155</sup> If American sailors were prosecuted for piracy or treason while the conflict was ongoing, however, the Americans would retaliate against British prisoners in their hands.<sup>156</sup> The British ministry thus wanted to be able to hold Americans on criminal charges, so as to create a deterrent to prize-taking, without bringing them to trial on the timetable required by the Habeas Corpus Act.<sup>157</sup> A suspension statute

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> The problem of rebel sailors came to the ministry's attention in July 1776, when several American privateers were brought into port in London as prisoners. *Id.* at 176. Colonial Secretary Germain was unsure whether to charge them with piracy and possibly treason or hold them as POWs and return them to North America for exchange. *Id.* at 176–77. Seeking private advice from Chief Justice Mansfield, Germain explained that the case for deterring American sailors with the threat of prosecution was stronger than that with respect to soldiers. *Id.* at 177. The lure of prizes gave sailors incentives that soldiers, facing low pay and danger, lacked. *Id.* While Americans fighting on land with little pay faced discouraging prospects, sailors taking unarmed vessels as prizes could “acquire according to their ideas immense fortunes” at little personal risk. *Id.* As Germain recognized, immediate criminal prosecution almost certainly would lead to retaliation by the Americans against British prisoners in their hands. *Id.* at 176–77. Mansfield advised that the ministry temporize, not charging the Americans with treason or piracy for fear of retaliation, but holding them without saying they were prisoners of war. Letter from Lord Mansfield to Lord George Germain (Aug. 8, 1776), in 12 DOCUMENTS OF THE AMERICAN REVOLUTION, *supra* note 154, at 180. Only if the Americans sought relief through habeas corpus should they be committed on criminal charges. *Id.* Although Mansfield did not mention suspension legislation, suspension of the Habeas Corpus Act was a natural solution to the problem: under a suspension statute, captive Americans could be held indefinitely on criminal charges without being brought to a trial that would provoke retaliation. *See id.* at 179–80. They could thus be credibly threatened with eventual criminal prosecution while being held as de facto POWs during the conflict. A few months later, Lord North introduced suspension legislation. *See* 19 PARLIAMENTARY HISTORY, *supra* note 81, at 13. He did not say that sailors were the reason; neither did he say that only with suspension in effect could Americans be held as prisoners of war. *Id.*

In his letter to Germain, Mansfield recommended that the Americans be held as prisoners of war for the time being. Letter from Lord Mansfield to Lord George Germain, *supra*, at 183–84. He went on to write, “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.” *Id.* at 180. That passage may seem to imply that he thought that subjects could not be held as POWs and that by claiming to be treated as subjects the Americans would be pointing that out. *Id.* That inference is not correct. Mansfield almost certainly believed that subjects could be held as POWs, provided they were rebels. *See* MATTHEW HALE, THE PREROGATIVES OF THE KING 122–23 (D.C.E. Yale ed., 1976). Rebellion put rebels out of the King's protection, making them domestic enemies. *See id.* (discussing war between the King and his own subjects in rebellion). As such, they shared some of the burdens and benefits of foreign enemies. One burden was that enemies, foreign or domestic, were not proper parties in the King's courts, which were open only to persons within his protection. *See* Sparenburgh v. Bannatyne (1797) 126 Eng. Rep. 837, 841; 1 Bos. & Pul. 163, 170 (Eyre, C.J.) (stating that neither foreign enemies nor subjects who refuse to submit to the law are proper parties); Mrs. Alexander's Cotton, 69 U.S. (2 Wall.) 404, 419 (1865) (following a principle of public law,

was the natural solution, and a few months after the problem of American sailors became acute, Prime Minister North proposed and Parliament adopted suspension legislation.<sup>158</sup> It was renewed throughout the war.<sup>159</sup> Soldiers in North America continued to be treated as prisoners of war and were not committed on criminal charges pursuant to the Suspension Act.<sup>160</sup> Sailors held in Great Britain were so committed.<sup>161</sup>

Likewise committed on criminal charges under the suspension statutes were a small number of civilians, including one of special importance: Henry Laurens of South Carolina.<sup>162</sup> After serving as President of the Continental Congress, Laurens was sent on a diplomatic mission to the Netherlands in August 1780.<sup>163</sup> Laurens's vessel was captured by the Royal Navy off Newfoundland on September 3.<sup>164</sup> He was taken to London, where he arrived on October 5.<sup>165</sup> Laurens was promptly committed to the Tower of London on charges of treason under the Suspension Act.<sup>166</sup>

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applicable in civil and international wars, that residents of areas in insurrection are public enemies who may not sue in the sovereign's courts). Rebels therefore were not proper parties to seek any remedy, including habeas. A benefit of enemy status was that enemies had belligerent privilege. Acts of hostility against lawful targets were not crimes. *See, e.g.*, *Ford v. Surget*, 97 U.S. 594, 605 (1878) (stating that Confederate armies were accorded the privileges of belligerents). Domestic enemies differed from foreign enemies in that they still owed allegiance, so their acts of hostility were treason. But those acts were not murder or piracy. Had the Americans claimed to be treated as subjects by petitioning for habeas, they would have been disclaiming their status as enemies. *See* Letter from Lord Mansfield to Lord George Germain, *supra*, at 180. (As far as the Americans were concerned, they were foreign enemies, if they knew about American claims of independence.) If the American sailors were not enemies, they were pirates. *Id.* Advice telling them to disclaim a defense against capital charges would indeed have been wicked. Had they disclaimed the status of domestic enemy by petitioning for habeas, they would have been properly transferred from POW status to detention on charges of piracy. By advising Germain that the Americans be held as POWs pending any habeas petition, Mansfield was not encouraging the executive to act lawlessly. *Id.* Germain could properly assume that subjects taken in arms were domestic enemies, not within the King's protection and liable to be detained under the law of war. *See id.* If they rejected that status, the resulting prosecutions for piracy were, as Mansfield wrote, "their own doing." *Id.*

<sup>158</sup> Habeas Corpus Suspension Act 1776, 17 Geo. 3 c. 9 (Gr. Brit.).

<sup>159</sup> The initial suspension act and its extensions ran from February 20, 1777, to January 1, 1783. *Id.*; Habeas Corpus Suspension Act 1778, 18 Geo. 3 c. 1 (Gr. Brit.); Habeas Corpus Suspension Act 1779, 19 Geo. 3 c. 1 (Gr. Brit.); Continuance of Acts Act 20 Geo. 3 c. 5 (Gr. Brit.); Habeas Corpus Suspension Act 1781, 21 Geo. 3 c. 2 (Gr. Brit.); Habeas Corpus Suspension Act 1782, 22 Geo. 3 c. 1 (Gr. Brit.). When the final extension expired, the provisional articles of peace had been subscribed. They provided that all prisoners were to "be set at liberty." Provisional Articles art. VII, 8 Stat. 54 (1782).

<sup>160</sup> Sparks et al., *supra* note 83, at 338.

<sup>161</sup> BOWMAN, *supra* note 151, at 131 (stating that American sailors captured in European and African waters were taken to Mill and Forton prisons in Britain).

<sup>162</sup> DAVID DUNCAN WALLACE, *THE LIFE OF HENRY LAURENS* 358 (1915).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 363.

<sup>166</sup> *Id.*

The British government's decision to treat Laurens as an accused traitor by committing him under the suspension statute outraged the American Congress, which in response demanded that General Burgoyne return to captivity in America pursuant to the parole he had given after the British defeat at Saratoga.<sup>167</sup> Laurens's situation also disturbed British opponents of the administration, notably Edmund Burke.<sup>168</sup> A solution in which Laurens would be treated simply as a prisoner of war and exchanged, possibly for Burgoyne, was subject to the legal objection that Laurens had been committed for high treason and could not be discharged without being tried or pardoned.<sup>169</sup> That limitation on the Crown's options came from the use of the suspension statute.<sup>170</sup> A trial was out of the question, because of the American

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<sup>167</sup> RICHARD J. HARGROVE, JR., *GENERAL JOHN BURGOYNE* 233 (1983). Burgoyne had returned to England upon giving a parole that required him to come back to America on demand of Congress. *Id.* at 215. On April 3, 1781, Congress instructed General Washington to recall Burgoyne and all other officers absent on parole. Resolution of Apr. 3, 1781, *reprinted in* 19 *JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789*, at 345 (1912). In the *Journal* the resolution has a struck-out clause reading, “unless the Honorable Henry Laurens, Esqr., be also enlarged on his parole.” *Id.* Laurens was clearly the occasion for the recall, but Congress apparently decided not to make it explicitly conditional on his release from confinement. Washington wrote to British commander Sir Henry Clinton demanding that Burgoyne return pursuant to this parole. *See* Letter from George Washington to Sir Henry Clinton (Apr. 16, 1781), *in* 21 *THE WRITINGS OF GEORGE WASHINGTON* 464 (John C. Fitzpatrick ed., 1937). He withdrew the demand for Burgoyne's return shortly thereafter, *see* Letter from George Washington to Sir Henry Clinton (May 1, 1781), *in* 21 *THE WRITINGS OF GEORGE WASHINGTON*, *supra*, at 20, but the possibility of its renewal remained a threat as long as Laurens was confined. The American reaction to treason charges against Laurens, without any prospect of imminent prosecution because of the suspension of the Habeas Corpus Act's speedy trial requirement, suggests that even more severe retaliation would have followed had he actually been put to trial, let alone convicted or worse yet punished.

<sup>168</sup> “In August, 1781, Edmund Burke took up Laurens's case, nor did his interest flag until the prisoner's release.” WALLACE, *supra* note 162, at 383.

<sup>169</sup> Burke discussed the situation in a letter of December 2, 1781, to James Bourdieu. *See* Letter from Edmund Burke to James Bourdieu (Dec. 2, 1781), *in* 4 *THE CORRESPONDENCE OF EDMUND BURKE* 383–85 (John A. Woods ed., 1963). Burke explained that he had consulted a politically sophisticated lawyer friend of his, who stated that “it was not in the power of Ministers to exchange, as a prisoner of War, a person committed on the Ground on which Mr Laurens was committed.” *Id.* at 384. The warrant committing Laurens to the Tower under the Suspension Act stated that he had been charged with high treason and was to be held “until he shall be delivered by due Course of Law.” David Viscount Stormont & Wills Earl of Hillsborough, Warrant of Commitment, *in* 15 *THE PAPERS OF HENRY LAURENS* 617 (David R. Chesnutt & C. James Taylor eds., 2000). Burke also believed that the ministers were pleased with the possibility that Congress would demand that Burgoyne return to America, as they had come to detest the returned general. Letter from Edmund Burke to James Bourdieu, *supra*, at 384 (stating that ministers wished to keep Laurens and force Burgoyne to return to America). Burgoyne had sought to pin the blame for the defeat at Saratoga on orders he had received from London. HARGROVE, *supra* note 167, at 224–25. At one point Burgoyne, who was an M.P., nearly came to blows in the House of Commons with Secretary of State Germain. *Id.*

<sup>170</sup> Letter from Edmund Burke to James Bourdieu, *supra* note 169, at 384.

threat of retaliation.<sup>171</sup> Laurens refused to accept a pardon, believing that he was no traitor because he was no subject of the King.<sup>172</sup>

On December 17, 1781, Burke told the House of Commons that he intended to seek its leave to introduce a bill “relative to the exchange of prisoners of war; and to obviate a difficulty, in the Act for the suspension of the Habeas Corpus, which was at once disgraceful and inconvenient to the government of this country.”<sup>173</sup> That was the origin of the 1782 statute allowing the King to treat prisoners committed under the suspension as prisoners of war, and exchange them without regard to the terms of their commitment.<sup>174</sup>

That statute empowered the King to hold and exchange rebellious subjects as “prisoners of war.”<sup>175</sup> It endorsed the existing practice of detaining Americans purely

<sup>171</sup> Letter from Lord George Germain to Lord Mansfield, *supra* note 154, at 177.

<sup>172</sup> Among [Burke’s] plans suggested was a pardon, but Laurens answered Burke in December that he would not connive at or benefit by even a secret or unsolicited pardon, as it would be an implied confession of guilt, place him under obligations to the King, and make him an object of contempt in both countries.

WALLACE, *supra* note 162, at 383. Once the British government began to exchange sailors held under the Suspension Act, it obtained the King’s pardon before releasing them. SHELDON S. COHEN, *YANKEE SAILORS IN BRITISH GAOLS: PRISONERS OF WAR AT FORTON AND MILL, 1777–1783*, at 135 (1995). Reports indicate that upon being told they had received his Majesty’s most gracious pardon, some of the American sailors suggested what King George might do with it. *Id.* at 135–36.

<sup>173</sup> 22 PARLIAMENTARY HISTORY, *supra* note 81, at 853 (referring to suspension statute as a “suspension of the Habeas Corpus”). Burke quickly went on to explain that one leading reason for his planned bill was Laurens. *Id.* On December 20, 1781, Burke presented to the Commons a petition from Laurens complaining of his treatment in the Tower. *Id.* at 874. In response, Lord North defended the decision to hold Laurens “as a prisoner of state, instead of a prisoner of war.” *Id.* at 877. “Mr. Laurens was confined from the requisition of law and circumstances.” *Id.* The Solicitor General, James Mansfield, then commented that it was wise to confine Laurens under the suspension, because otherwise he would long since have been released: “Policy, law, and justice united in confining Mr. Laurens as a prisoner of state, and not a prisoner of war.” *Id.* It may seem that Mansfield meant that if not committed under the suspension statute Laurens could not have been held as a prisoner of war at all, and so would have been released, but that is unlikely. Mansfield probably thought that Laurens, if held as a prisoner of war, would have been exchanged promptly. That is what Burke thought; in a December 16, 1781 letter to Bourdieu he complained about the Suspension Act, which he disliked, “under which American prisoners who would have been exchanged on the other side of the water as prisoners of war have been confined in great Britain as criminals.” Letter from Edmund Burke to James Bourdieu (Dec. 16, 1781), in 4 *THE CORRESPONDENCE OF EDMUND BURKE*, *supra* note 169, at 393. If Solicitor General Mansfield had thought that the Crown lacked authority to hold Americans as POWs, he probably would have said that Laurens never would have been detained in the first place without the suspension statute, or never would have been brought to Great Britain.

<sup>174</sup> 22 PARLIAMENTARY HISTORY, *supra* note 81, at 853.

<sup>175</sup> The statute stated:

It may and shall be lawful for his Majesty, during the continuance of

as prisoners of war.<sup>176</sup> The statute began by noting that “since the commencement of the present war” the government had been exchanging Americans held as prisoners of war “with advantage to his Majesty’s service.”<sup>177</sup> The Act authorized the King to release or exchange Americans held under it as prisoners of war, without trial or pardon and without regard to the terms on which they had originally been committed.<sup>178</sup> In late 1781, Laurens was bailed pursuant to the then-existing suspension legislation; in 1782, after Burke’s statute was adopted, he was exchanged under it for Lord Cornwallis, who had been taken prisoner at Yorktown.<sup>179</sup>

Burke’s statute was no additional suspension of the Habeas Corpus Act.<sup>180</sup> It authorized the King to hold detainees as prisoners of war, without regard to any

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the present hostilities, to hold and detain in such prisons or places within *Great Britain*, as to his wisdom shall seem fit, as prisoners of war, all natives or other inhabitants of the thirteen revolted colonies not at his Majesty’s peace, who have been, or shall be, taken by sea or land, and brought into *Great Britain*: and it shall be lawful for his Majesty 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; as also to authorize any commissioner or commissioners to discharge or exchange all and every person or persons as aforesaid, according to the custom and usage of war, and the law of nations . . . .

Exchange of American Prisoners Act 1782, 22 Geo. 3 c. 10 (Gr. Brit.).

<sup>176</sup> *Id.*

<sup>177</sup> The Act began “since the commencement of the present war, exchanges of prisoners taken in *America*, or conveyed to *America*, have been there regularly made, with advantage to his Majesty’s service.” *Id.* The advantage almost certainly was exchange for British soldiers and sailors.

<sup>178</sup> That Act concluded by providing that “the detention, enlargement [release], or exchange aforesaid, shall be good and valid, any warrant of commitment, or cause therein expressed, or any law, custom, or usage, to the contrary notwithstanding.” *Id.*

<sup>179</sup> On December 29, 1781, after Burke’s bill had been introduced but before it was adopted, the Treasury Solicitor visited Laurens at the Tower and told him that the government had consented to his release on bail, consent required by the Suspension Act. 15 THE PAPERS OF HENRY LAURENS, *supra* note 169, at 622. On December 31, Mansfield sent a habeas to the Tower, and Laurens was brought to the Chief Justice’s chambers. *Id.* Before the Earl arrived, Laurens stated to the Chief Justice’s assistant the one condition under which he would accept his release: “I hold myself to be a citizen of the United, free and independent States of North America, and will not do any act which shall involve me in an acknowledgment of subjection to this realm.” WALLACE, *supra* note 162, at 388. Presently Mansfield came and accepted bond securing Laurens’s appearance at the Easter Term of King’s Bench. *Id.* After being bailed but before the provisional articles of peace were adopted, Laurens was exchanged for Lord Cornwallis. 6 THE CORNWALLIS PAPERS: THE CAMPAIGNS OF 1780 AND 1781 IN THE SOUTHERN THEATRE OF THE AMERICAN REVOLUTIONARY WAR 182–84 (Ian Saberton ed., 2010). Laurens thus was confined and bailed pursuant to the Suspension Act, and released via exchange pursuant to Burke’s legislation.

<sup>180</sup> *See* 22 Geo. 3 c. 10.

criminal charges.<sup>181</sup> Nor was it referred to as a suspension of habeas corpus, the Act, or the writ.<sup>182</sup> Burke could not have understood it as a suspension in any sense. He intensely disliked the Suspension Acts, and his thinking distinguished sharply between holding Americans as accused or suspected criminals under a suspension and holding them as prisoners of war.<sup>183</sup> A few days before he announced in Parliament that he would introduce the POW exchange bill, Burke described his plans and his thoughts in a letter to a friend.<sup>184</sup> He said that the idea of legislative authorization for the exchange originated with Laurens himself.<sup>185</sup> Laurens's suggestion, wrote Burke:

[C]oincided very much with my Notions at a time when I retired from parliamentary Attendance upon the agitation of that unfortunate bill under which American prisoners who would have been exchanged on the other side of the water as prisoners of war have been confined in great Britain as criminals. I shall give notice of my intention to move for such a bill after the holydays.<sup>186</sup>

In Burke's view, holding and exchanging Americans as prisoners of war were quite different from, and much better than, holding them as criminals under a suspension of the Habeas Corpus Act.<sup>187</sup> He could not have regarded his legislation authorizing the

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<sup>181</sup> *Id.*

<sup>182</sup> *See id.*

<sup>183</sup> Letter from Edmund Burke to James Bourdieu, *supra* note 173, at 390–93.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 393.

<sup>186</sup> *Id.* at 393 (describing opposition to Suspension Act).

<sup>187</sup> Introducing the bill on December 17, 1781, Burke explained that holding Americans as prisoners of war was more humane than confining them on criminal charges. 22 PARLIAMENTARY HISTORY, *supra* note 81, at 855. Ethan Allen, Burke said, “had been brought to England in irons; but he was sent back without irons, and exchanged in America.” *Id.* His bill would “render the prisoners of war taken by this country certain of having the severity of their fate softened, and made somewhat tolerable, by that tender and mild treatment which all civilized belligerent powers made the rule of their conduct during a time of hostility.” *Id.* at 857. In November 1777, when he spoke against the first extension of the Suspension Act, Burke similarly indicated that detaining Americans as prisoners of war was lawful and preferable to holding them as accused criminals. 19 PARLIAMENTARY HISTORY, *supra* note 81, at 462. “Your generals on the other side of the Atlantic have established a public cartel, such as is agreed to, with an alien enemy, for the exchange of prisoners.” *Id.* (If that is a correct quotation, Burke also understood that the Americans were like, but were not, alien enemies.). The rejection of any such agreement for Americans captured in Europe showed “the inconsistency of administration.” *Id.* at 463.

[Britain's] subjects in America, taken with arms in their hands, the last stage of resistance to the civil power [were] treated as fair, open, alien enemies[,] [while] the mere suspicion of the same crime in Europe [was] treated with all the rigour due to acts of the most deliberate and inveterate treason.

*Id.* The administration's position, he said, was “preposterous and absurd” and the extension

former as an instance of the latter. It is also quite unlikely that Burke's understanding of the difference was idiosyncratic. By the time his bill was adopted, a majority of the House of Commons had come to oppose the policy of offensive operations in North America.<sup>188</sup>

The 1782 statute was not a suspension.<sup>189</sup> Nor was it an early recognition of American independence, as Professor Tyler suggests it was.<sup>190</sup> On that score, Parliament's words could hardly have been more clear. Burke's statute referred to "revolted colonies," not the United States of America.<sup>191</sup> British usage at the time distinguished sharply between revolted colonies and the United States.<sup>192</sup> The former were part of the empire; the latter would be an independent country.<sup>193</sup>

"Revolted" meant "in rebellion" and not "independent," and "colonies" meant colonies, not separate sovereigns. That usage is evident from the way the King and his Parliament employed the words.<sup>194</sup> On March 17, 1778, King George told both Houses of Parliament of a message from the French Ambassador informing him that

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"unnecessary" because it created a power to confine "people, who in the end, must come in under the faith of a cartel [a POW exchange agreement]." *Id.* Either the Suspension Act should expire or the government should maintain consistency by dissolving the cartel in America. *Id.* (No formal cartel existed, although POW exchanges took place without one.). Burke disapproved of suspension, regarded the Americans as subjects, and thought they should be treated as fair, open, alien enemies, even though they were not the last, being subjects. He did not think that holding British subjects as prisoners of war was unlawful, and did not think that suspension of the Habeas Corpus Act was needed to make it lawful, as he proposed holding Americans as POWs on both side of the Atlantic as one way to maintain consistency.

<sup>188</sup> Letter from Edmund Burke to James Bourdieu, *supra* note 173, at 393 (describing opposition to Suspension Act). In late February 1782, the House of Commons adopted an address to the King that harshly criticized "the further prosecution of offensive war on the continent of North America, for the purpose of reducing the revolted colonies to obedience by force." 22 PARLIAMENTARY HISTORY, *supra* note 81, at 1085. Lord North and his ministry resigned a few weeks later on March 20, 1782, and were replaced with a cabinet headed by the Marquis of Rockingham. HARRY M. WARD, THE AMERICAN REVOLUTION 191–92 (1995).

<sup>189</sup> See Exchange of American Prisoners Act 782, 22 Geo. 3 c. 10 (Gr. Brit.).

<sup>190</sup> By adopting Burke's proposal, "Parliament chose a course commensurate with the direction of peace negotiations—namely, one that suggested that it no longer viewed the colonists as owing allegiance but instead viewed them as members of a newly formed and wholly separate nation." Tyler, *supra* note 3, at 950–51. In her more recent work Professor Tyler says that Burke's bill was adopted "once the British recognized the inevitability that the lines of allegiance would be severed with the Americans." Amanda L. Tyler, *Habeas Corpus and the American Revolution*, 103 CALIF. L. REV. 635, 693 (2015) [hereinafter Tyler, *Habeas Corpus and the American Revolution*]. As this Article explains, American independence was not inevitable at that point, except perhaps in hindsight. See *infra* notes 205–09 and accompanying text. Moreover, legal consequences that attach to inevitable events do not actually arise until the event occurs, no matter how clearly it was coming. As the maxim goes, the living have no heirs. The consequences of the most inevitable event of all come with it, not before.

<sup>191</sup> 22 Geo. 3 c. 10.

<sup>192</sup> Tyler, *Habeas Corpus and the American Revolution*, *supra* note 190, at 693.

<sup>193</sup> See 22 Geo. 3 c. 10 (referring to "revolted colonies").

<sup>194</sup> 19 PARLIAMENTARY HISTORY, *supra* note 81, at 908.

France had entered into a treaty with “certain persons employed by his Majesty’s revolted subjects in North America.”<sup>195</sup> In response to that “offensive communication” the King had recalled the British ambassador.<sup>196</sup> The French knew the words that would make their point: the offensive communication began, “[t]he United States of North America, which are in full possession of the Independence declared by their act of the 4th July 1776.”<sup>197</sup>

The actions of King George and Parliament after the 1782 POW statute confirm that it was no recognition of American independence.<sup>198</sup> Later that year Parliament took a step toward reconciliation, but not yet independence, the words and substance of which demonstrated that in Parliament’s view America was still part of the Empire.<sup>199</sup> In June, Parliament adopted “[a]n act to enable his Majesty to conclude a peace or truce with certain colonies in North America.”<sup>200</sup> That statute named New Hampshire and Massachusetts Bay and all the others, but called them colonies, not states.<sup>201</sup> It was needed to relieve the economic sanctions that Parliament had previously imposed on the colonies in the Prohibitory Act.<sup>202</sup> That it did not recognize actual independence is shown by the continued reference to colonies, now without the demeaning word “revolted,” and to a possible truce, which would be an interim measure, and also by the fact that the power it gave to suspend sanctions was only temporary.<sup>203</sup>

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<sup>195</sup> *Id.* at 912 (message to the House of Lords). In Henry IV, Part 1, King Henry refers to Edmund Mortimer, who has joined a rebellion that the King plans to put down, as “revolted Mortimer.” WILLIAM SHAKESPEARE, HENRY IV PART 1 act 1, sc. 3, l. 92. Shakespeare’s King Henry was no more acknowledging that Mortimer had usurped his crown or carved out a new realm than King George was acknowledging that the Americans had achieved independence. King George had used similar terminology in opening the first session of Parliament after the Americans declared independence. 18 PARLIAMENTARY HISTORY, *supra* note 81, at 1369. In justifying his efforts to return the Americans to obedience to the laws, he explained: “No people ever enjoyed greater happiness, or lived under a milder government, than those now revolted provinces.” *Id.*

<sup>196</sup> 19 PARLIAMENTARY HISTORY, *supra* note 81, at 912.

<sup>197</sup> *Id.* at 913.

<sup>198</sup> See Exchange of American Prisoners Act 1782, 22 Geo. 3 c. 10 (Gr. Brit.).

<sup>199</sup> Truce with America Act 1782, 22 Geo. 3 c. 46 (Gr. Brit.).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> The bill was introduced by Attorney General James Wallace, who explained that it was designed “to remove certain bars and impediments which stood in the way of peace,” including, for example, the Prohibitory Act, which cut off all commerce between Great Britain and the colonies until they were restored to the King’s peace. 22 PARLIAMENTARY HISTORY, *supra* note 81, at 1103.

<sup>203</sup> 22 Geo. 3 c. 46. The King, in his speech from the throne ending the session of Parliament at which that Act was adopted, discussed peace and harmony, but not independence. The King stated:

The extensive powers with which I find myself invested to treat for reconciliation and amity with the colonies which have taken arms in North America, I shall continue to employ in the manner most conducive to the attainment of those objects [“the return of peace,” stated earlier in

The King himself identified the point at which recognition of American independence occurred.<sup>204</sup> In his speech opening Parliament on December 5, 1782, after the provisional treaty had been adopted,<sup>205</sup> he explained that in keeping with the wishes of his Parliament and his people, he had directed all his efforts to a reconciliation with the North American colonies:

Finding it indispensable to the attainment of this object, I did not hesitate to go the full length of the powers vested in me, and offered to declare them free and independent states, by an article to be inserted in the treaty of peace. Provisional articles are agreed upon, to take effect whenever terms of peace shall be finally settled with the court of France.<sup>206</sup>

Parliament too recognized the provisional treaty as the point of independence.<sup>207</sup> Only after that treaty had been adopted did the British legislature enact a statute permanently lifting trade restrictions with respect to a political body that it called, for the first time, the United States of America.<sup>208</sup>

The political situation in 1782 explains why King and Parliament were not ready to recognize American independence in March of that year, when Burke's bill was adopted.<sup>209</sup> The government that replaced Lord North's in the spring adopted a diplomatic strategy under which independence was not to be accepted unilaterally by Britain. The King continued to hope for reconciliation.<sup>210</sup> Lord Shelburne,

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the speech], and with an earnestness suitable to their importance.

23 PARLIAMENTARY HISTORY, *supra* note 81, at 202.

<sup>204</sup> 23 PARLIAMENTARY HISTORY, *supra* note 81, at 206.

<sup>205</sup> *Id.* at 205–06.

<sup>206</sup> *Id.* at 206.

<sup>207</sup> *See* Trade with America Act 1783, 23 Geo. 3 c. 26 (Gr. Brit.).

<sup>208</sup> *Id.* (lifting sanctions on the United States). Referring to the King's decision to treat Charles Lee as a prisoner of war and not to try him as a traitor or a deserter, the Sparks Committee of the Massachusetts Historical Society wrote in 1861:

We [the Americans] were still the “rebels” we had been declared to be by the Proclamation of 1775,—a character in which we never ceased, indeed, to be regarded in the view of the king and his ministers, and in the popular judgment of the British nation, until the Preliminary Treaty put an end to the pretension.

Sparks et al., *supra* note 83, at 337–38.

<sup>209</sup> SAMUEL FLAGG BEMIS, *THE DIPLOMACY OF THE AMERICAN REVOLUTION* 192 (1935).

<sup>210</sup> George III found “hard . . . to stomach” the resolutions calling for an end to offensive operations, even though in principle they allowed him “to attempt to reduce [the colonies] to obedience by peaceful means or by diplomacy.” *Id.* Bemis maintained that under the circumstances no peace was possible without American independence, *id.*, but then pointed out that the new ministry's Secretary of State responsible for the American negotiations, Lord Shelburne, still hoped for “the union of Great Britain and America under the same king, but with separate sovereign parliaments.” *Id.* In his speech of December 5, 1782, opening the new session of

directing the negotiations that were taking place in Paris, held American independence as a bargaining chip.<sup>211</sup> Offering it to the colonists might induce them to abandon their French allies for a separate peace.<sup>212</sup> Independence was thus not to be preemptively conceded, but to be given only in exchange for valuable diplomatic consideration.<sup>213</sup> No such consideration had been forthcoming when Burke's bill was adopted.<sup>214</sup>

In British usage at the time of the framing, "suspension of the Habeas Corpus Act" and cognate phrases referred only to legislation that authorized the Crown to hold subjects on criminal grounds without complying with the requirements of the Habeas Corpus Act.<sup>215</sup> Those phrases did not refer to statutes that authorized other forms of detention related to national security, like confinement pursuant to a military draft or as a prisoner of war in an internal armed conflict.<sup>216</sup>

## II. AMERICAN SUSPENSIONS IN THE WAR OF THE AMERICAN REVOLUTION

During the Revolution, the American states developed a new form of executive detention that came to be called suspension of the privilege of the writ of habeas corpus.<sup>217</sup> The American statutes resembled British suspensions of the Habeas Corpus Act in that they granted the executive substantial discretion to detain, but some of them differed from British suspensions in an important way. Several states did not require even suspicion that the detainee had committed a crime. Posing a danger was enough.<sup>218</sup>

The Continental Army followed the practice of the British Ministry regarding its own citizens as prisoners of war.<sup>219</sup> Some members of the British military were American Loyalists who, in the view of the state governments, had become American

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Parliament after the provisional articles had been entered into, King George made clear his views about the price he had paid for peace: "In thus admitting their separation from the crown of these kingdoms, I have sacrificed every consideration of my own, to the wishes and opinion of my people." 23 PARLIAMENTARY HISTORY, *supra* note 81, at 206–07.

<sup>211</sup> JONATHAN R. DULL, A DIPLOMATIC HISTORY OF THE AMERICAN REVOLUTION 140 (1985).

<sup>212</sup> The new cabinet under the Marquess of Rockingham was divided on this point, with Foreign Secretary Charles James Fox favoring an immediate grant of independence. *Id.* "Shelburne, more cautious, was willing to recognize American independence only as part of a comprehensive peace settlement with the United States." *Id.* Probably seeing the line Shelburne's thinking took, American Minister Benjamin Franklin "eventually managed to convince Shelburne that if Britain offered sufficiently generous peace terms America would help Britain reach agreement with France and Spain by threatening to make a separate peace." *Id.* at 141. Only at the end of July 1782, did "Shelburne finally capitulate[] to the necessity of accepting American independence." *Id.* at 145.

<sup>213</sup> *Id.*

<sup>214</sup> See Exchange of American Prisoners Act 1782, 22 Geo. 3 c. 10 (Gr. Brit.).

<sup>215</sup> Petition of Right 1627, 3 Car. 1 c. 1, § 5 (Eng.).

<sup>216</sup> See *id.*

<sup>217</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>218</sup> See *infra* notes 232–35 and accompanying text.

<sup>219</sup> See *supra* notes 152 and 157 and accompanying text (explaining the practice of the British Ministry).

citizens and hence committed treason by levying war on their own country.<sup>220</sup> General Washington decided to hold such prisoners as POWs, and not as accused traitors, in order to avoid retaliation.<sup>221</sup>

*A. America's New Form of Suspension*

Americans were far from united in support of war and independence.<sup>222</sup> Active Loyalism easily could be treason, or some lesser but still serious offense.<sup>223</sup> Ill-disposed persons, however, might be dangerous before they had done anything harmful to the cause of independence, and before they were suspected of having done anything. In response to this situation, several American states enacted detention statutes that went beyond British suspensions of the Habeas Corpus Act, which required suspicion that a crime had been committed.<sup>224</sup> A leading example is a Massachusetts statute of 1777, which authorized detention 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.”<sup>225</sup> Such persons were to be held “without bail or mainpri[z]e” until they were discharged by order of the Council or the General Court (the legislature).<sup>226</sup> (Massachusetts’s practice is

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<sup>220</sup> 5 JOURNALS OF THE CONTINENTAL CONGRESS 475 (Worthington Chauncey Ford ed., 1906).

<sup>221</sup> Letter from George Washington to Thomas Gage (Aug. 11, 1775), in 1 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES 289 (Philander D. Chase ed., 1985).

<sup>222</sup> See *infra* notes 224–35 and accompanying text (discussing statutes passed by states, representing various positions).

<sup>223</sup> A war of secession puts residents of the secessionary part in a difficult position, as both the established government and the secessionists will demand their loyalty and threaten to punish disloyalty as treason. In June 1776, the Continental Congress resolved that “all persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to said laws, and are members of such colony.” 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 220, at 475. The resolution provided a definition of treason and recommended that the Colonies pass laws to punish it. *Id.* In October of that year New Jersey adopted a statute that in effect told Loyalists to change sides or leave. Act of Oct. 4, 1776, ch. 5, 1776 N.J. Laws 5. It followed the Congress’s suggestion in providing that all who abided within the state and derived protection from its laws owed allegiance, and provided for the punishment of treason “from and after the Publication hereof,” thereby giving notice to all residents that henceforth they would be held to allegiance to the new regime. *Id.*

<sup>224</sup> *E.g.*, Act of May 19, 1777, ch. 45, 1777 Mass. Acts 641.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* Mainprize was an old writ similar to bail that enabled someone who had been arrested to be released by giving sureties who would assure his appearance. 3 WILLIAM BLACKSTONE, COMMENTARIES \*128. Eliminating bail is not the same as barring habeas corpus. Bail is a means by which someone who is lawfully detained is allowed substantial physical freedom while still having to return for trial. A grant of bail is not a complete release from custody, the way release on habeas corpus is, because a bail proceeding does not adjudicate the lawfulness of confinement the way a habeas proceeding does. Thus, the Massachusetts statute did nothing explicit to bar judicial inquiry into whether the people arrested were properly held. *Id.* It did

especially importance because of its influence on the terminology used in the Suspension Clause, and is discussed in more depth below.)<sup>227</sup>

Virginia’s grant of executive detention authority was a bit more focused than that of Massachusetts, but not much.<sup>228</sup> It enabled the Governor (with the Council’s advice) to confine anyone “whatsoever, whom they may have just cause to suspect of disaffection to the independence of the United States or of attachment to their enemies.”<sup>229</sup> Although the cause had to be just, it had only to be cause to suspect, and nothing more than disaffection to the Revolution had to be suspected.<sup>230</sup> The governor did not have to suspect that a crime had been committed.<sup>231</sup>

New Jersey authorized its Council of Safety “to apprehend any Person disaffected to, or acting against the Government, or whom they shall suspect of being disaffected to, or of having dangerous Designs against the Government, and such Person to commit to any Gaol within this State.”<sup>232</sup> The latter clause allowed detention on suspicion of dangerous purpose and not just suspicion of having committed a crime.<sup>233</sup> New York created a board of commissioners for dealing with conspiracies, and authorized it:

[T]o 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.<sup>234</sup>

It is possible to be dangerous without having committed any crime and possible to be suspected of being dangerous while in fact being harmless.

Maryland granted its governor and council, in case of invasion, “full power and authority to arrest, or order to be arrested, all persons whose going at large the governor and council shall have good grounds to believe may be dangerous to the safety of this state,” to confine those so arrested, to limit them to particular districts of the state,

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keep the courts from allowing people who were lawfully detained to go free temporarily by arranging bail. *Id.*

<sup>227</sup> See discussion *infra* Section II.C.

<sup>228</sup> Act of May 17, 1781, ch. 7, 1781 Va. Acts, 10 Hening’s Statutes at Large 413–14.

<sup>229</sup> *Id.* The Virginia statute operated on the right and, despite mentioning habeas, not on issuance of the writ. *Id.* It did not deny access to habeas, but provided that no one was to be set at liberty by bail, mainprize, or *habeas corpus*. *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> See *id.*

<sup>232</sup> Act of Oct. 11, 1777, ch. 40, § 4, 1777 N.J. Laws 85.

<sup>233</sup> *Id.*

<sup>234</sup> Act of Feb. 5, 1778, ch. 3, 1778 N.Y. Laws 9. The statute went on to direct judges and magistrates not to bail anyone so confined, nor to deliver such persons from the jails unless they had been indicted and tried. *Id.*

or to release them on security.<sup>235</sup> The statute also provided that, during any invasion, “the *Habeas Corpus* Act shall be suspended, as to all such Persons arrested by the Order of the Governor and Council.”<sup>236</sup>

Pennsylvania empowered its executive to arrest and detain any person or persons “who shall be suspected from any of his or her acts, writings, speeches, conversations, travels, or other behaviour” of doing a variety of acts that would aid the British.<sup>237</sup> The Act recited the evidence on which the executive was to rely, but just about anything would qualify as evidence and the judgment was left to the executive.<sup>238</sup> This statute resembled British suspensions in that it called for suspicion that the

<sup>235</sup> Act of 1777, ch. 20, § 12, 1777 Md. Laws.

<sup>236</sup> *Id.* What the Maryland legislators understood about the clause suspending the Habeas Corpus Act is not clear. At the time, Maryland did not have a statute embodying the 1679 Act. Dallin H. Oaks, *Habeas Corpus in the States—1776–1865*, 32 U. CHI. L. REV. 243, 251–52 (1965) (stating that Maryland first adopted a Habeas Corpus Act in 1809). The legislators may have believed that the English Act had been received into Maryland law, and that the form of preventive detention provided for by their statute was inconsistent with it. It is also possible that they meant to prevent the issuance of the writ. The renewals of discretionary detention authority in 1778 and 1779 said that persons detained under them were not to have “any benefit or advantage from the habeas corpus act.” Act of Mar. 1778, ch. 13, § 2, 1778 Md. Laws; Act of Oct. 1778, ch. 10, § 2, 1778 Md. Laws; Act of Nov. 1779, ch. 17, § 2, 1779 Md. Laws. The writ may have been a benefit of the Act the legislators had in mind. Later Maryland legislation suggests that the statutes simply meant that detainees were not to be released via habeas. *See* Act of Oct. 1780, ch. 50, § 1, 1780 Md. Laws. The 1780 statute authorizing the Governor and Council to detain persons suspected of trading with the enemy provided that those restrained under it “shall not be discharged by *habeas corpus*.” *Id.* The same language forbidding discharge on habeas was used in 1781. Act of May 1781, ch. 28, § 5, 1781 Md. Laws. That may have been the point all along, a point that became explicit only after some time and thought. In a state that had no Habeas Corpus Act of its own, the phrase “habeas corpus act” might refer to the writ, or relief through it. *See, e.g.*, Act of Mar. 1778, ch. 13, § 2, 1778 Md. Laws.

<sup>237</sup> Act of Sept. 16, 1777, ch. 27, 1777 Pa. Laws, *reprinted in* LAWS ENACTED IN A GENERAL ASSEMBLY OF THE REPRESENTATIVES OF THE FREEMEN OF THE COMMON-WEALTH OF PENNSYLVANIA 52 (Lancaster, Francis Bailey 1777) [hereinafter LAWS ENACTED]. The Pennsylvania legislature’s journal records a resolution of September 14, 1777, creating a committee “to prepare and bring in a Bill to empower the President and Council to arrest and detain suspected Persons, and to restrain for some limited Time the Operation of the *Habeas Corpus* Act.” JOHN MORRIS, JR., MINUTES OF THE GENERAL ASSEMBLY OF PENNSYLVANIA 88 (Lancaster, Francis Bailey 1777). The reference to suspected persons suggests that the resolution’s sponsors wanted a British-style suspension of the Habeas Corpus Act, a law that would authorize the executive to hold people suspected of having already committed crimes. *See id.* It is not clear whether the statute as adopted provided for detention on suspicion of crime. If it did, it was inconsistent with the British Habeas Corpus Act, and so would have been regarded as a suspension of it. *See* Habeas Corpus Act 1679, 31 Car. 2 c. 2, § 1 (Eng.) It is also possible that the Pennsylvania legislators believed that a law limiting issuance of the writ of habeas corpus would be inconsistent with the Habeas Corpus Act whether or not the petitioner was detained on criminal or supposed criminal grounds.

<sup>238</sup> Ch. 27, 1777 Pa. Laws, *reprinted in* LAWS ENACTED, *supra* note 237, at 51–52.

detainee had actually done something, but mere suspicion was enough and quite a few acts would qualify.<sup>239</sup> If the acts it listed were all crimes, as they may have been, the Act resembled a suspension of the Habeas Corpus Act as the British used that term because it provided for detention on criminal grounds.<sup>240</sup> The Pennsylvania statute also dealt with liability of officers, providing that officials were “indemnified, and saved harmless of and from all process, suits and actions . . . against them.”<sup>241</sup> Unlike most similar statutes, it did specifically limit the writ, directing that no judge or officer of any court was to “issue or allow of any writ of habeas corpus, or other remedial writ, to obstruct the proceedings of the said Executive Council, against suspected persons, in time of eminent danger of the state.”<sup>242</sup>

Many participants in the framing and ratification of the Constitution were personally familiar with extraordinary authorizations of security detention.<sup>243</sup> A leading feature of such statutes was that they conferred unlimited or nearly unlimited discretion on the executive and did not require even suspicion that a crime already had been committed.<sup>244</sup>

#### *B. American Citizens as Prisoners of War During the Revolution*

During the Revolutionary War, as far as the revolutionaries were concerned, Britain was a foreign power and most British soldiers taken prisoner were POWs in an international conflict.<sup>245</sup> Some few of the British forces, however, were traitors in

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<sup>239</sup> *Id.*; see sources cited *supra* note 53.

<sup>240</sup> See generally ch. 27, 1777 Pa. Laws reprinted in LAWS ENACTED, *supra* note 237, at 51.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* The Pennsylvania statute may have led Professor Phillip Hamburger astray in his understanding of suspension. See Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1904 (2009). Hamburger maintains that security detention of persons within protection required suspension of habeas, by which he means legislation limiting courts’ authority to issue the writ, whereas detention of persons who were not within protection did not. *Id.* Hamburger distinguishes between authorization of detention and suspension, meaning limitation on issuance of the writ. *Id.* at 1905. British suspension statutes, however, did not affect the writ, but operated only on the executive’s detention authority. Halliday & White, *supra* note 7, at 613–19. Limitations on issuance of the writ were therefore not necessary, as Hamburger suggests they were, to “satisfy any constitutional doubts about the authority to detain and remove persons who were within protection.” Hamburger, *supra*, at 1919. As Hamburger discusses, the Pennsylvania detention statute during the Revolution did block issuance of the writ. *Id.* at 1911–17. Most American suspension statutes said nothing about the remedy, however. The Pennsylvania legislature had a good reason to take the distinct and unusual step of telling the courts not to issue the writ: the writ commands that the prisoner be brought before the court, and with the British Army nearby, detainees might escape in transit from confinement to their judicial hearing and bring valuable intelligence to the enemy. See *id.* at 1913.

<sup>243</sup> See Halliday & White, *supra* note 7, at 670–77.

<sup>244</sup> *Id.* at 618–19.

<sup>245</sup> Hamburger, *supra* note 242, at 1855–57.

American eyes.<sup>246</sup> Several states had made support for the King by their residents treason, a move that had the effect of demanding that Loyalists switch sides or leave.<sup>247</sup> But many supporters of the Crown, believing the rebels to be the traitors and not themselves, did neither.<sup>248</sup> Some of them joined the royal forces and were taken prisoner.<sup>249</sup> The Americans thus faced, for a few of their prisoners, the question whether a citizen and presumptive traitor who was also a member of the enemy forces, and strictly as such subject to and protected by the law of war, could be held as a POW.<sup>250</sup>

For the Continental Army's Commander in Chief, the answer was yes. On November 27, 1777, a New Jersey militia force under General Philemon Dickinson skirmished with the enemy on British-held Staten Island and took about thirty prisoners.<sup>251</sup> The prisoners were members of a corps of New Jersey Loyalist volunteers serving under General Cortlandt Skinner.<sup>252</sup> On November 30, the New Jersey Council of Safety ordered that four of them, three officers and a commissary, be committed to jail in Trenton on charges of high treason.<sup>253</sup>

William Livingston, Governor of New Jersey, advised General Washington that the captured Loyalist soldiers were being held as criminals, and on December 11, Washington replied that he thought doing so unwise, given the possible British response.<sup>254</sup> "I therefore think we had better submit to the Necessity of treating a few individuals, who may really deserve a severer fate, as prisoners of War, than run the Risque of giving an opening for retaliation upon the Europeans in our Service."<sup>255</sup>

Washington understood his enemy well. On December 19, 1777, British General John Campbell wrote to General Dickinson, complaining of a report that his captured officers were "confined like Felons in the common Jail."<sup>256</sup> Campbell said that if the reports were true, and the treatment continued, American "Officers of equal Rank, who

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<sup>246</sup> *Id.* at 1851–55.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 1855–60.

<sup>249</sup> *Id.* at 1860–64.

<sup>250</sup> *Id.*

<sup>251</sup> Letter from Major Gen. Philemon Dickinson to George Washington (Nov. 28, 1777), in 12 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES, *supra* note 221, at 434.

<sup>252</sup> *Id.* at 436 n.2.

<sup>253</sup> *Id.*

<sup>254</sup> Letter from George Washington to William Livingston (Dec. 11, 1777), in 12 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES, *supra* note 221, at 596.

<sup>255</sup> *Id.*

<sup>256</sup> Letter from William Livingston to George Washington (Dec. 26, 1777), in 13 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES, *supra* note 221, at 5–6, 6 n.3 (quoting Letter from Brigadier Gen. John Campbell to Major Gen. Philemon Dickinson (Dec. 19, 1777)). General Campbell's outrage at the mode in which his officers were confined underlines the difference between detention as a prisoner of war and as an accused criminal, and the advantages, both material and symbolic, of the former compared to the latter. *See id.*

were taken on [Staten] Island the 22d Day of August last, may be selected to undergo like Treatment, however repugnant to the Humanity of Britons to inflict it.”<sup>257</sup>

Campbell’s letter threatening retaliation was forwarded to Governor Livingston, who apparently had already received Washington’s views on the subject.<sup>258</sup> On December 26, Livingston wrote to Washington that he was “quite content to have [the three officers] treated as Prisoners of war, being fully convinced by your Excellency’s observations on the Subject of the Propriety of the Measure.”<sup>259</sup> The fourth prisoner, Commissary Browne, was being held for trial for a theft allegedly committed before he joined the British forces, and Livingston said that he had no objection should Washington also wish to hold Browne as a prisoner of war after that trial.<sup>260</sup> The same day he wrote to Washington, Livingston wrote to Colonel Sylvanus Seely of the New Jersey Militia, who was the Governor’s conduit to General Dickinson, and through him to the complaining British General, Campbell.<sup>261</sup> In the letter to Seely, Livingston explained that the three officers were New Jerseyans who had deserted to join the enemy after “such Adherence was declared Felony by our Law” and that, as a civil magistrate, he had no option but to commit them for trial, “unless General Washington should chuze to treat the [officers] . . . as Prisoners of War.”<sup>262</sup> Livingston went on to say that, as Washington had determined to treat these three as prisoners of war, they would be delivered to the Continental Army’s Commissary of Prisoners when called for.<sup>263</sup>

George Washington and William Livingston believed that a citizen captured while bearing arms for the enemy could be treated as either a traitor or a prisoner of war.<sup>264</sup> They also understood that the former route could have lethal consequences not only for the alleged traitors, but for Americans held by the enemy.<sup>265</sup> Evidently assuming that the law of war authorized detention of citizens who were also enemy combatants, they found a solution to their problem under which no Americans, alleged traitors or prisoners of the enemy subject to retaliation, were hanged.<sup>266</sup> In 1787, with Washington in the chair and William Livingston representing New Jersey, the Federal

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<sup>257</sup> *Id.* (quoting Letter from Brigadier Gen. John Campbell to Major Gen. Philemon Dickinson (Dec. 19, 1777)).

<sup>258</sup> *Id.* at 5.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* Preventing Browne’s trial for theft, Livingston explained, would cause great umbrage among New Jerseyans. *Id.* Trying a captured soldier for a nonmilitary offense was very different from trying him for treason, and hence would not be ground for retaliation as would be a treason prosecution.

<sup>261</sup> *Id.* at 6 n.3 (citing Letter from William Livingston to Colonel Sylvanus Seely (Dec. 26, 1777)).

<sup>262</sup> *Id.* Livingston’s reasoning indicates that under New Jersey law the captives’ service with the British did not expatriate them and thereby relieve them of the obligations of allegiance.

<sup>263</sup> *Id.*

<sup>264</sup> See Letter from George Washington to William Livingston, *supra* note 254, at 596; Letter from William Livingston to George Washington, *supra* note 256, at 5.

<sup>265</sup> Letter from George Washington to William Livingston, *supra* note 254, at 596.

<sup>266</sup> See *id.*

Convention drafted a Constitution that gave Congress the power to declare war and contained the Suspension Clause.<sup>267</sup> Two delegates to the convention at least were familiar with the practice of holding likely traitors who were also members of the enemy forces as POWs and not as accused criminals.<sup>268</sup>

*C. The Massachusetts Constitution of 1780 and the Terminology of Suspension of the Privilege of the Writ of Habeas Corpus*

During the Revolutionary War, Massachusetts was one of the states that gave its executive authority to detain people on suspicion of dangerousness.<sup>269</sup> Such statutes were a step beyond British suspensions of the Habeas Corpus Act because most of them did not require even suspicion that a crime had been committed.<sup>270</sup> In 1780, Massachusetts adopted a new constitution which reflected the practice of suspension.<sup>271</sup> It provided,

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.<sup>272</sup>

The first clause was affirmative.<sup>273</sup> Although it did not deal with details of jurisdiction and procedure, it required that the remedy of habeas corpus be available in the courts.<sup>274</sup> The second clause restricted what it called suspension of the “privilege . . . of the writ of habeas corpus.”<sup>275</sup> As far as I have been able to determine, that was the first appearance in a statute or constitution of that phrase. Shortly after the new constitution was adopted, the Massachusetts legislature made clear that the kind of discretionary detention authority it had been conferring during the revolution fell within that concept.<sup>276</sup> In 1782, it adopted another statute conferring authority of that type, and called it a suspension of the privilege of the writ of habeas corpus.<sup>277</sup>

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<sup>267</sup> U.S. CONST. art. I, § 8, cl. 1; *id.* art I, § 9, cl. 2.

<sup>268</sup> *See supra* note 264 and accompanying text.

<sup>269</sup> *See supra* note 224–25 and accompanying text.

<sup>270</sup> *See supra* note 77 and accompanying text.

<sup>271</sup> MASS. CONST. ch. VI, art. VII.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> Act of June 27, 1782, ch. 2, 1782 Mass. Acts 6.

<sup>277</sup> The 1782 statute, titled “An Act to Suspend the Privilege of the Writ of Habeas Corpus for Six Months,” enabled the Governor and Council to detain “without Bail or Mainprize, any Person or Persons whose being at large may be judged by His Excellency and the Council, to

In 1785, the Massachusetts legislature explicitly integrated the power of suspension into the operations of the writ.<sup>278</sup> A statute codifying habeas procedure enabled the courts to ensure that individuals purportedly detained pursuant to a suspension really were so detained, without in the process disrupting government efforts to deal with an emergency.<sup>279</sup> The statute provided that, in general, the courts would issue the writ upon application of a detainee.<sup>280</sup> Issuing the writ calls for the prisoner to be brought before the court for adjudication.<sup>281</sup> The statute also provided, however, that the writ was not to issue when “upon view of the copy of the warrant” of commitment the court saw that the prisoner fell into one of several listed categories.<sup>282</sup> Those categories included “persons with regard to whom the benefit of the said writ shall be suspended by the legislature, agreeable to the constitution.”<sup>283</sup>

Under the 1785 statute, the courts would enforce the limits of the detention authority granted by suspension legislation without actually issuing the writ.<sup>284</sup> As then-recent events in Pennsylvania showed, during times of war or rebellion transporting detainees entailed a serious risk of escape.<sup>285</sup> The commitment warrant, unlike the prisoner, was not going to run away. By examining it, a court could determine whether the warrant was genuine and whether it relied on statutory detention authority that applied to the prisoner.<sup>286</sup> A genuine warrant relying on such authority would resolve all relevant legal issues and leave open no questions that called for bringing the prisoner before the court.<sup>287</sup> When a petitioner was held pursuant to such a warrant, actually issuing the writ was unnecessary.<sup>288</sup> Absent a warrant falling into one of the statutory categories, the writ would issue, the prisoner would come before the court, and the court would decide whether to release or remand the detainee.<sup>289</sup>

The following year, with the new habeas procedure in place, the Massachusetts legislature once again exercised its power to authorize discretionary detention by the

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be Dangerous to the Peace and Well-being of this or any of the United States; any Law, Usage or Custom to the contrary notwithstanding.” *Id.* at 6–7. That detention authority was extended for another four months in February, 1783, in a statute entitled “An Act to Suspend the Privilege of the Writ of Habeas Corpus for Four Months.” Act of Feb. 5, 1783, ch. 34, 1782 Mass. Acts 105.

<sup>278</sup> Act of Mar. 16, 1785, ch. 72, 1784 Mass. Acts 178.

<sup>279</sup> *Id.* at 178–79.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 181.

<sup>282</sup> *Id.* at 179.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 178–79.

<sup>285</sup> *See supra* note 242 and accompanying text (discussing Pennsylvania’s limitation on having prisoners brought before court in response to danger of escape).

<sup>286</sup> 1784 Mass. Acts, at 179–80.

<sup>287</sup> *See id.*

<sup>288</sup> *Id.* at 178–79.

<sup>289</sup> *Id.* at 181.

executive.<sup>290</sup> In response to Shays' Rebellion, the legislature passed "An Act for Suspending the Privilege of the Writ of Habeas Corpus."<sup>291</sup> Reciting that violent opposition to the government's authority "render[ed] it expedient and necessary, that the benefit derived to the Citizens from the issuing of Writs of Habeas Corpus, should be suspended," the statute gave the Governor and Council authority to 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."<sup>292</sup> The statute did not further describe the benefit derived from issuance of the writ.<sup>293</sup> That benefit may have been release from custody, but the writ once issued did not always lead to release.<sup>294</sup> It did lead to judicial application of the substantive law of personal liberty to the executive's decision to detain the prisoner.<sup>295</sup> In an important sense that benefit was not available to prisoners held under a valid suspension statute.<sup>296</sup> They were legitimately detained in the executive's discretion, without regard to ordinary principles of personal liberty.<sup>297</sup> Under the 1785 Habeas Act, the courts would make sure that the executive's discretion had indeed been exercised, but if it had been they would not issue the writ or proceed any further.<sup>298</sup> Because the writ would not issue with respect to prisoners for whom its benefits had been suspended, whatever those benefits were, they were suspended.<sup>299</sup>

### III. THE SUSPENSION CLAUSE IN THE FRAMING AND RATIFICATION OF THE CONSTITUTION

The available records of the Federal Convention are not very informative concerning the delegates' understanding of suspension of the privilege of the writ of habeas corpus. Those records do indicate that the language of the Suspension Clause derives from the very similar language of the Massachusetts Constitution. They also suggest that the delegates regarded the clause as a limit on the power of Congress, not a grant of authority to the courts. Available records of the ratification debates suggest that proponents and opponents connected it with the English Habeas Corpus Act, but offer little insight into understandings of the Act. Those records, including *The Federalist*, do show that suspension was understood to confer wide discretion on the executive to detain individuals and that it was thought to be dangerous for just that reason.<sup>300</sup>

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<sup>290</sup> Act of Nov. 10, 1786, ch. 41, 1786 Mass. Acts 102.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *See id.* at 103.

<sup>295</sup> *See id.* at 102.

<sup>296</sup> *See id.* at 102–03.

<sup>297</sup> *Id.*

<sup>298</sup> Act of Mar. 16, 1785, ch. 72, 1784 Mass. Acts 178, 180.

<sup>299</sup> *Id.* at 179.

<sup>300</sup> *See infra* Section III.B.

*A. The Drafting of the Suspension Clause*

Habeas Corpus received only very limited attention at the Federal Convention. Early in the convention's proceedings, on May 20, 1787, Edmund Randolph presented the Virginia Plan for a new government, which became the starting point for the convention's deliberations.<sup>301</sup> That same day, the younger of the two Charles Pinckneys on the South Carolina delegation also presented a draft constitution of a federal government.<sup>302</sup> Pinckney's plan received no further attention.<sup>303</sup> Although Pinckney later indicated that his draft included a provision that dealt with habeas corpus, whether it actually did is doubtful.<sup>304</sup>

Whether or not Pinckney's May proposal mentioned habeas, on August 20 he submitted a number of resolutions, one of which closely resembled the Massachusetts habeas provision: "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 limited time not exceeding [ ] months."<sup>305</sup> The motion was referred to the Committee of Detail.<sup>306</sup> While the committee did not modify its report in light of Pinckney's resolutions,<sup>307</sup> habeas and suspension came before the convention on August 28, while it was considering the committee's proposed article concerning the judiciary.<sup>308</sup> The journal for that day reports that, after adding a criminal jury trial provision to that article, the convention adopted another amendment adding: "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."<sup>309</sup> The journal does not report the source of the amendment.<sup>310</sup>

Madison's Notes attribute the motion to Pinckney and say that it was adopted with an amendment that had been offered by Gouverneur Morris.<sup>311</sup> "Mr. Pinckney,

<sup>301</sup> See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 16 (Max Farrand ed., 1937).

<sup>302</sup> *Id.*

<sup>303</sup> See *id.* at 33–38.

<sup>304</sup> The documentary record, including the watermark on a paper that Pinckney sent to Secretary of State John Quincy Adams in 1819, led Max Farrand to doubt that Pinckney's proposal on May 20 mentioned habeas corpus. 3 *id.* at 602–09.

<sup>305</sup> 2 *id.* at 334 (including a blank for the number of months). At that point the committee already had reported.

<sup>306</sup> *Id.* at 342.

<sup>307</sup> *Id.* at 366–68.

<sup>308</sup> *Id.* at 434–35.

<sup>309</sup> *Id.* at 435.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.* at 438. Professor Mary Bilder maintains that Madison's Notes are especially unreliable for dates after August 21, 1787. MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION 141 (2015). At that point, she says, Madison ceased his practice of producing what are now the Notes on the basis of his rough notes (now lost) within a few

urging the propriety of securing the benefit of the Habeas corpus in the most ample manner, moved ‘that it should not be suspended but on the most urgent occasions, & then only for a limited time not exceeding twelve months.’”<sup>312</sup> John Rutledge, also of South Carolina, then is quoted as saying that the habeas corpus should be declared inviolable, as it would never be necessary to suspend it at the same time in all the states.<sup>313</sup> Madison’s account then attributes to Gouverneur Morris the motion that appears in the Convention Journal.<sup>314</sup> James Wilson doubted whether a suspension was necessary in any case, “as the discretion now exists with Judges, in most important cases to keep in Gaol or admit to Bail.”<sup>315</sup> According to Madison, the first part of Morris’ motion, saying that the privilege should not be suspended, was adopted unanimously, while the qualifying phrase authorizing suspension in limited cases was approved by a vote of seven states to three.<sup>316</sup>

The Journal does not record a motion like the proposal Madison attributed to Pinckney, with a twelve-month time limit for suspensions.<sup>317</sup> It is possible that Pinckney did not make a motion, but rather a less formal proposal that then took the form of the motion that appears in the Convention Journal and that Madison attributed to Morris. It is also possible that Pinckney made a longer motion, combining what Madison recorded as a prefatory explanation by Pinckney and his actual proposed amendment. Whatever the proposal’s sources, Madison described a proposal that closely tracked the language of the Massachusetts Constitution.<sup>318</sup> Perhaps Pinckney made such a motion that was not seconded, while Morris proposed a version with only the prohibitory part that was seconded.

If Madison’s Notes are correct about Pinckney’s contribution on August 28, an anomaly concerning the Suspension Clause can be explained. Whoever introduced it, the amendment adopted that day changed the article concerning the judiciary, the predecessor to Article III of the Constitution.<sup>319</sup> The Suspension Clause, however, appears in Article I, Section 9, which imposes limits on federal power, mainly congressional power.<sup>320</sup> A provision like the one in the Massachusetts Constitution

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days of taking them. *Id.* In her view, the Notes for dates after August 21 were composed after the fall of 1789. *Id.* Moreover, Bilder concludes that after August 21, Madison’s rough notes became sketchier. *Id.* at 144–45. My ascriptions of views to delegates based on Madison’s Notes are subject to that qualification.

<sup>312</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 301, at 438.

<sup>313</sup> *Id.* Rutledge’s remarks suggest that the states would retain the power to suspend the writ, whatever Rutledge thought that would consist of. *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* That statement suggests that Scottish-educated Wilson was thinking about British suspensions, under which individuals were detained on criminal charges. *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 435.

<sup>318</sup> Compare MASS. CONST. ch. VI, art. VII, with 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 301, at 435.

<sup>319</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 301, at 186–87, 435.

<sup>320</sup> U.S. CONST. art. I, § 9.

would naturally have appeared in the judiciary article, because it dealt first with the judicial remedy of habeas corpus and then with suspension.<sup>321</sup> If Pinckney had such a provision in mind, or actually proposed one, then he had good reason to raise the issue while the judiciary provision was under consideration. The Convention had just adopted another amendment concerning judicial procedure, securing the criminal jury trial.<sup>322</sup> Securing the remedy of habeas corpus would have been closely related.<sup>323</sup>

When the Committee of Style turned the report of the Committee of Detail as amended into a near-final draft of the Constitution, it moved the clause concerning suspension of habeas corpus out of the judiciary article and into the list of affirmative restrictions.<sup>324</sup> The committee may have decided that as adopted the clause did not call for the courts to provide the remedy of habeas corpus, but instead limited the power of suspension, whatever it was and whoever had it.<sup>325</sup> So while Pinckney may well have been thinking about both functions when he raised the issue on August 28, the amendment the convention adopted that day performed only one of them, the one that belongs in Article I, Section 9.<sup>326</sup>

What we know of the Federal Convention's decisions and deliberations is thus consistent with the hypothesis that in the Convention's view the Suspension Clause was a limit on congressional power over the substance of detention authority, not, or not only, the judicial remedy of habeas corpus.<sup>327</sup> The evidence is very limited, however. If suspension does expand executive detention authority, that evidence tells us virtually nothing about which grants of that kind of authority were and were not understood to be suspensions subject to the limitations the clause imposes.<sup>328</sup>

### *B. The Suspension Clause in the Ratification Debates*

During the ratification debates, in state conventions and in the press, the Suspension Clause received only very limited attention as far as the surviving records indicate. The source to which many today will look first, *The Federalist*, is typical

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<sup>321</sup> *Supra* notes 271–74 and accompanying text.

<sup>322</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 301, at 434.

<sup>323</sup> If Pinckney reasoned in that fashion, he may not have noticed a difference between jury trials and habeas corpus. Trial by jury in criminal cases can be secured by providing that if there are any federal criminal trials, they will be by jury. Habeas corpus is an affirmative remedy that can be provided only if there is a court to grant it. An affirmative grant of habeas jurisdiction requires an affirmative grant of jurisdiction, and the federal courts' mandatory jurisdiction under the Constitution is very limited.

<sup>324</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 301, at 596 (indicating a Suspension Clause in Article I, Section 9 of the draft constitution reported by the Committee of Style).

<sup>325</sup> *See id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 341, 438.

<sup>328</sup> *See id.*

in that it treats the Suspension Clause briefly and as part of another topic.<sup>329</sup> In *Federalist No. 83*, Hamilton pointed to the Suspension Clause and the Article III criminal jury requirement in response to the criticism that the Constitution did not secure the civil jury.<sup>330</sup> He replied that the criminal jury was what really mattered.<sup>331</sup> “Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions” were the “great engines of judicial despotism,” and are all related to criminal proceedings.<sup>332</sup> “The trial by jury in criminal cases, aided by the *habeas corpus* act, seems therefore to be alone concerned in the question. And both of these are provided for in the most ample manner in the plan of the convention.”<sup>333</sup>

Hamilton’s invocation of the Habeas Corpus Act indicates that he knew about the Act’s close connection to criminal detention, but does not tell whether he specifically had in mind the statute’s reference to “criminall or supposed criminall Matters.”<sup>334</sup> His ascription of the Act to the Suspension Clause suggests that he thought that the clause brought into the Constitution some of the Act’s principles, though he did not say which.<sup>335</sup> In the context of judicial despotism through arbitrary criminal proceedings, probably the most important feature of the Act was its timetable for trial; the requirement of bail for lesser offenses was less important, because despots use prosecution for treason and other felonies.<sup>336</sup> It is unlikely that Hamilton believed the Suspension Clause to impose a timetable based on the terms of the English courts found in the Act, which had little relevance to the federal courts yet to be created under a constitution yet to be adopted.<sup>337</sup> Perhaps he thought that the clause embodied a speedy trial requirement, like the one ultimately adopted in the Sixth Amendment, that was more abstract than the specific schedule in the Habeas Corpus Act.<sup>338</sup>

In his next paper, *Federalist No. 84*, Hamilton responded to the criticism that the Constitution had no bill of rights.<sup>339</sup> He pointed to the restrictions imposed on the federal government by Article I, Section 9, and contrasted them with the limitations found in New York’s constitution.<sup>340</sup> “The establishment of the writ of *habeas corpus*, the prohibition of *ex post facto* laws, and of TITLES OF NOBILITY, to

<sup>329</sup> THE FEDERALIST NO. 83, at 558, 562 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); THE FEDERALIST NO. 84, *supra*, at 575, 577 (Alexander Hamilton).

<sup>330</sup> THE FEDERALIST NO. 83, *supra* note 329, at 558, 562 (Alexander Hamilton).

<sup>331</sup> *See id.* at 562.

<sup>332</sup> *Id.*

<sup>333</sup> *Id.* at 562–63.

<sup>334</sup> Habeas Corpus Act 1679, 31 Car. 2 c. 2, § 1 (Eng.).

<sup>335</sup> *See* THE FEDERALIST NO. 83, *supra* note 329, at 562–63 (Alexander Hamilton).

<sup>336</sup> 31 Car. 2 c. 2.

<sup>337</sup> *See* THE FEDERALIST NO. 83, *supra* note 329, at 558 (Alexander Hamilton).

<sup>338</sup> U.S. CONST. amend. VI; 31 Car. 2 c. 2; *see* THE FEDERALIST NO. 84, *supra* note 329, at 577 (Alexander Hamilton).

<sup>339</sup> THE FEDERALIST NO. 84, *supra* note 329, at 575 (Alexander Hamilton).

<sup>340</sup> *Id.* at 575–76.

which we have no corresponding provisions in our constitution, are perhaps greater securities to liberty and republicanism than any it contains.”<sup>341</sup> “The creation of crimes after the commission” of an act, and “arbitrary imprisonments,” he said, were “the favourite and most formidable instruments of tyranny.”<sup>342</sup> Hamilton then quoted Blackstone on the dangers of secret confinement by the government and pointed to Blackstone’s encomiums on the Habeas Corpus Act, the “remedy for this fatal evil” and a “BULWARK of the British constitution.”<sup>343</sup>

Hamilton’s reference to establishment of the writ, and to the Act as a remedy, suggest that he meant to say that the clause would make the judicial remedy provided by the Act available.<sup>344</sup> If in both numbers that mention the Suspension Clause he meant that the clause would bring the Habeas Corpus Act into the Constitution, then it followed that the statutory writ would come with it.<sup>345</sup> That premise also implies that the clause entailed the remedy only with respect to criminal detention, as to which the statutory writ operated.<sup>346</sup>

In just what way Hamilton thought the Suspension Clause provided for the Habeas Corpus Act is not clear. Central to the Act was its timetable for felony trials, which was keyed to the English court system’s calendar.<sup>347</sup> The yet-to-be-established lower courts under the yet-to-be-ratified Constitution had no terms of court that could figure in a rule-like speedy trial requirement such as the Act imposed.<sup>348</sup> Perhaps Hamilton thought that the Suspension Clause stood for a more abstract implementation of the Act’s speedy trial principle, as the Sixth Amendment would come to.<sup>349</sup>

In both *Federalist No. 83* and *No. 84*, Hamilton did stress the danger of arbitrary imprisonment.<sup>350</sup> The Habeas Corpus Act was designed to curb the power of the crown to imprison on criminal or supposed criminal grounds, and so restricted a leading form of arbitrary detention.<sup>351</sup> Hamilton may have thought that by restricting legislation that enabled detention at the discretion of the executive—suspension of the Habeas Corpus Act—the Suspension Clause required that in general confinement by the executive be in accordance with criteria provided by the law, not the executive’s discretion.<sup>352</sup> A limitation on the circumstances under which the executive

<sup>341</sup> *Id.* at 577.

<sup>342</sup> *Id.*

<sup>343</sup> *Id.* (quoting 4 BLACKSTONE, *supra* note 226, at \*421).

<sup>344</sup> *See id.*

<sup>345</sup> *See id.*; THE FEDERALIST NO. 83, *supra* note 329, at 562 (Alexander Hamilton).

<sup>346</sup> Habeas Corpus Act 1679, 31 Car. 2 c. 2, § 1 (Eng.).

<sup>347</sup> *Id.*

<sup>348</sup> *See* U.S. CONST. art. III.

<sup>349</sup> U.S. CONST. amend. VI; *see* THE FEDERALIST NO. 84, *supra* note 329, at 577 (Alexander Hamilton).

<sup>350</sup> THE FEDERALIST NO. 83, *supra* note 329, at 562 (Alexander Hamilton); THE FEDERALIST NO. 84, *supra* note 329, at 577 (Alexander Hamilton).

<sup>351</sup> *See* THE FEDERALIST NO. 84, *supra* note 329, at 577 (Alexander Hamilton).

<sup>352</sup> *See id.*

could decide for itself whom to confine would go farther in protecting natural liberty than would a speedy trial requirement in criminal cases, even though the latter was a very important point in the British statute.<sup>353</sup>

Hamilton's brief discussion thus points in more than one direction. He may well not have thought about the clause's meaning in depth, at the Federal Convention or while writing *The Federalist*. Hamilton most likely was not present on the day the clause was adopted, though he did serve on the Committee of Style, which put the clause in Article I, Section 9.<sup>354</sup> Both times Hamilton discussed the Suspension Clause in *The Federalist*, it was in response to a criticism of other aspects of the Constitution, not as part of an exposition of that provision similar, for example, to his account of the heads of federal jurisdiction in Article III.<sup>355</sup> His collateral statements about the Suspension Clause may not have reflected careful thought.

When the Suspension Clause appeared elsewhere in the ratification debates, it often arose in the same context as in *Federalist Nos. 83 and 84*: the debate over affirmative limitations and in particular a bill of rights.<sup>356</sup> According to critics, the clause undermined the Federalists' argument that affirmative limitations were not needed because liberty was protected by the principle of enumerated federal power.<sup>357</sup> The clause limits a power that Congress has only by implication: nowhere does the Constitution specifically authorize suspension.<sup>358</sup> The principle of enumerated power, critics argued, was less protective than might seem.<sup>359</sup> If Congress had implied

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<sup>353</sup> Habeas Corpus Act 1679, 31 Car. 2 c. 2, § 1 (Eng.).

<sup>354</sup> According to the editors of the *Papers of Alexander Hamilton*, Hamilton left the Convention for New York soon after August 13 and probably returned between September 1 and 6. 4 THE PAPERS OF ALEXANDER HAMILTON 235, 243 n.1 (Harold C. Syrett ed., 1962). The Suspension Clause was adopted on August 28. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 301, at 438.

<sup>355</sup> See THE FEDERALIST NO. 80, *supra* note 329, at 534 (Alexander Hamilton) (arguing that the scope of the judicial power under Article III implements correct principles regarding the federal judicial function).

<sup>356</sup> See THE FEDERALIST NO. 83, *supra* note 329, at 562 (Alexander Hamilton); THE FEDERALIST NO. 84, *supra* note 329, at 575–77 (Alexander Hamilton).

<sup>357</sup> See Brutus, *Brutus II*, N.Y.J., Nov. 1, 1787, reprinted in 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 154–59 (John P. Kaminski et al. eds., 2003).

<sup>358</sup> See U.S. CONST. art. I, § 8.

<sup>359</sup> Brutus, an especially sophisticated Anti-Federalist writing in New York, argued that the Suspension Clause showed that the Constitution included implied powers that could affect important rights, so the principle of enumerated federal power was not adequate and the Constitution should have a bill of rights. Brutus, *supra* note 357, at 154–59. Responding to the Federalist argument that affirmative limitations were not needed because everything that was not given in a grant of power was reserved by the people, *id.* at 156, Brutus pointed to the Suspension Clause and other limitations in Article I, Section 9.

Does this constitution any where grant the power of suspending the habeas corpus, to make ex post facto laws, pass bills of attainder, or grant titles of nobility? It certainly does not in express terms. The only answer that can be given is, that these are implied in the general powers granted. With

power to suspend habeas corpus, it might have implied power to regulate the press.<sup>360</sup> While the Suspension Clause thus figured in a larger debate about enumerated power and affirmative limitations, its content had nothing to do with that debate. The opponents' arguments rested on the clause's character as an affirmative limitation, not on the substance of that limitation.<sup>361</sup> Exchanges about the clause in that respect thus cast little light on that content.

As the difficulty in identifying Hamilton's assumptions shows, statements that the clause would secure the Habeas Corpus Act or the habeas corpus are not very informative for today's readers.<sup>362</sup> The Act had a requirement of specificity in commitment

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equal truth it may be said, that all the powers, which the bills of rights, guard against the abuse of, are contained or implied in the general ones granted by this constitution.

*Id.* at 158.

<sup>360</sup> At the beginning of his explanation that the Suspension Clause and other parts of Article I, Section 9 guarded against implied powers, Brutus gave "the liberty of the press" as an example of a right that should have been explicitly protected and not left to the principle of enumerated powers. *Id.* at 157–58.

Responding to that argument in the Virginia ratifying convention, Edmund Randolph, a delegate to the Federal Convention, gave a response that shows the difficulty of interpreting many statements about habeas corpus and its suspension in the ratification debates. Randolph replied that "by virtue of the power given to Congress to regulate courts, they could suspend the writ of *habeas corpus*." 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 357, at 1348. That statement may suggest that Randolph believed that suspension would interfere with the judicial remedy. On the other hand, British suspensions gave the Crown discretion to detain by changing the procedural rights of accused criminals. Suspension acts reduced the requirements for a proper criminal commitment and delayed trial beyond the statutory timetable. Confinement on mere suspicion during the term of a detention act allowed virtually arbitrary detention. Lawful grounds for criminal arrest and the schedule of criminal trials are aspects of criminal procedure and so proper objects for legislation regulating the courts. Randolph thus may have thought that, absent the Suspension Clause Congress, like Parliament, would have been able to confer wide detention authority on the executive by changing the rules about confinement on criminal charges.

<sup>361</sup> See Brutus, *supra* note 357, at 154–59.

<sup>362</sup> In the Pennsylvania ratifying convention, Jasper Yeates described the Suspension Clause as "directing that the privilege of the *habeas corpus* act shall not be suspended except in times of immediate danger." Jasper Yeates, Speech Before the Pennsylvania Ratifying Convention (Nov. 30, 1788), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 357, at 435. Yeates, a Pennsylvania native and lawyer who had studied at the Inns of Court, may have associated the language of the Suspension Clause with the British concept of suspension of the Habeas Corpus Act. In a February 1788 letter to Alexander Donald, Thomas Jefferson expressed the hope that nine states would ratify to "secure to us the good" the Constitution contains, while the other four would hold out for a bill of rights that would ban "suspensions of the habeas corpus." Letter from Thomas Jefferson to Alexander Donald (Feb. 7, 1788), in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 357, at 353–54. Jefferson may well have meant that phrase to be short for suspension of the Habeas Corpus Act, or he may have meant to refer to legislation that would operate on the remedy of habeas corpus, which British suspension acts did not. Even seeming references to the writ properly speaking may really have been to the Act. In a speech on June 4, 1788, to the

warrants, a timetable for trial of felonies, and a remedy to enforce those requirements, the statutory writ.<sup>363</sup> It implemented the principle that arbitrary detention on criminal or supposed criminal grounds was impermissible, and, along with the common law, was part of the British legal system's protection of natural liberty against executive discretion.<sup>364</sup> A statement that the Suspension Clause secures the Habeas Corpus Act could refer to any of those features or some combination of them.<sup>365</sup> The phrase "the habeas corpus" was even less clear, because it could refer to the Act or the writ, and as to the latter could mean the statutory writ, the common law writ, or both.<sup>366</sup>

While the sources do not make possible a clear and detailed account of participants' understanding of the Suspension Clause, they do associate the clause with fear of arbitrary detention by the executive. That was Hamilton's theme in both numbers of *The Federalist* in which he discussed the clause.<sup>367</sup> In January 1788, with the Massachusetts ratifying convention just begun, Boston newspaper *The American Herald* editorialized to the convention concerning the dangers of suspension: "[I]t will be in the power of the President, or President and Senate, as Congress shall think proper to empower, to take up and confine for any cause, or for any suspicion, or for no cause, perhaps any person, he or they shall think proper," and confine that person throughout the suspension, which may last indefinitely.<sup>368</sup>

As the *Herald's* comments show, the Suspension Clause cut two ways.<sup>369</sup> It both affirmed and limited the power to suspend, and so was both a protection and proof of

Virginia ratifying convention, delegate George Nicholas is reported to have discussed the many contests between the English Crown and the people that terminated in favor of the people, including "[t]he habeas corpus under Charles the II<sup>d</sup>." George Nicholas, Speech Before the Virginia Ratifying Convention (June 4, 1788), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 357, at 928. As an editorial note in the *Documentary History* explains, Nicholas meant the Act. *Id.* at 942 n.14. That statute was passed under Charles II, while the writ had existed long before. A few days later, in a speech on June 6, he responded to fears about federal power under the Constitution by pointing out that "[t]he suspension of the writ of *habeas corpus* is only to take place in cases of rebellion, or invasion. This is necessary in those cases . . ." *Id.* at 1002. Possibly Nicholas had switched from talking about the Act on June 4 to talking specifically about the writ on June 6, though he may well have meant the Act on the latter day too. *See id.* at 928, 1002. (It is also possible that his specific phrasing was not correctly reported on one day or both.) Whether Nicholas knew that British statutes suspending the Habeas Corpus Act did not affect the writ, except by changing the law that the courts applied under it, is doubtful.

<sup>363</sup> Habeas Corpus Act 1679, 31 Car. 2 c. 2 (Eng.).

<sup>364</sup> *See id.*

<sup>365</sup> *See* Yeates, *supra* note 362, at 435 (stating that the Suspension Clause protects the "privilege of the *habeas corpus* act").

<sup>366</sup> *See supra* note 362 and accompanying text (explaining the confusion in terminology).

<sup>367</sup> *See* THE FEDERALIST NO. 83, *supra* note 329, at 562 (Alexander Hamilton); THE FEDERALIST NO. 84, *supra* note 329, at 577 (Alexander Hamilton).

<sup>368</sup> *To the Convention of Massachusetts*, AM. HERALD (Boston), Jan. 14, 1788, *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 357, at 709, 712.

<sup>369</sup> *See id.*

power.<sup>370</sup> Both aspects came up in the debates in Maryland.<sup>371</sup> Addressing the Maryland House of Delegates on November 29, 1787, Federal Convention delegate James McHenry stressed the protective aspect.<sup>372</sup> Public safety may require suspension, he argued, but in the absence of that necessity, “the virtuous Citizen will ever be protected in his opposition to power.”<sup>373</sup> Luther Martin, who attended the Federal Convention for Maryland and refused to sign the Constitution, emphasized the arbitrary use of the power to suspend.<sup>374</sup> The national government could deem opposition to it by a state rebellion, “and suspending the habeas corpus act, may *seize* upon the persons of those *advocates of freedom*, who have had *virtue* and *resolution* enough to excite the opposition, and may *imprison* them during its pleasure in the *remotest* part of the union.”<sup>375</sup>

While Americans’ knowledge of the details of British suspension may have been limited, many understood the fundamental point: suspension greatly enhanced the ability of the executive to detain whomever it wished.<sup>376</sup>

#### IV. THE AMERICAN CONCEPT OF SUSPENSION IN THE 1780S AND THE MEANING OF THE SUSPENSION CLAUSE

This part of the Article argues that the Suspension Clause limits Congress’s authority to give the executive very broad discretion to detain individuals. Grants of detention authority that are substantially constrained by legal rules are not suspensions and are not limited to cases of rebellion or invasion. Section A brings together the historical background concerning British and American suspensions and shows that their defining feature, and the reason they were thought of as dangerous, is the discretion they conferred on the executive. Section B then explains how the text of the Suspension Clause can be understood to be directed specifically at discretionary detention by the executive.

##### *A. Suspension and Discretion*

This Section presents a conceptualization of suspension that synthesizes the British and American suspension statutes that form the background to the Suspension Clause. It argues that the underlying feature shared by those statutes is a grant of extremely broad discretion to the executive to detain individuals. In general, those

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<sup>370</sup> Compare *id.*, with THE FEDERALIST NO. 83, *supra* note 329, at 562 (Alexander Hamilton).

<sup>371</sup> Maryland’s Constitutional Convention Delegates, Address Before the State House of Delegates (Nov. 29, 1787), in 11 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 357, at 84, 197.

<sup>372</sup> See *id.* at 84.

<sup>373</sup> *Id.*

<sup>374</sup> Luther Martin, *Genuine Information VIII*, BALT. MD. GAZETTE, Jan. 22, 1788, reprinted in 11 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 357, at 197.

<sup>375</sup> *Id.*

<sup>376</sup> See, e.g., *id.*

statutes expanded detention authority without affecting the judicial remedy of habeas corpus at all.<sup>377</sup>

British and American practice and usage provide the applications that the concept of suspension of the privilege of the writ must account for. They identify two kinds of statutes that were understood to be suspensions: British-style grants of authority to hold suspected and accused criminals indefinitely and American-style grants to hold people who were thought to be dangerous indefinitely.<sup>378</sup> That practice also identifies many interferences with natural liberty such that a statute explicitly authorizing them would not be a suspension. Imprisonment for debt, civil commitment for mental disability, quarantine, and arrest in the process of military enlistment are all examples.<sup>379</sup> So is detention of prisoners of war, without regard to the nationality of the prisoner.<sup>380</sup>

Long-standing British and American views about natural liberty, and the writ of habeas corpus, provide a theme that explains that pattern: suspensions create exceptionally broad executive discretion to choose whom to detain.<sup>381</sup> The discretion conferred by American suspensions ranged from wide to virtually unfettered.<sup>382</sup> British suspensions required suspicion of crime, but that too gave the executive a very wide scope of choice.<sup>383</sup> Even if a suspension act required suspicion of treason, treason was

<sup>377</sup> As discussed above, in 1785 Massachusetts adopted a general habeas corpus law under which the writ would not have to issue when the commitment warrant showed that the petitioner was held pursuant to a valid suspension. That arrangement kept the courts from actually issuing the writ and having the prisoner brought before them while preserving the judicial role of ensuring that detention was in accordance with law. *See supra* notes 278–89 and accompanying text.

<sup>378</sup> *See supra* notes 217–18, 224–26 and accompanying text.

<sup>379</sup> In the 1758 debate in Parliament concerning impressment and habeas corpus, an unidentified opponent of legislation that would extend the 1679 Act to involuntary recruits pointed to a problem with extending habeas to all forms of detention, not just commitment on criminal grounds: such a law could be used to bring before the court an individual on a ship under quarantine, with a “noxious consequence” that was “too obvious to be explained.” 15 PARLIAMENTARY HISTORY, *supra* note 81, at 890. In the longer version of his opinion for the House of Lords on the 1758 bill, Chief Justice Wilmot of the Common Pleas pointed to several forms of non-criminal detention not covered by the Habeas Corpus Act or the statutory writ: “Persons who are bailed, Paupers in Hospitals or Workhouses, Madmen under Commissions of Lunacy, or Confined by Parish Officers.” JOHN EARDLEY WILMOT, *Answer to Questions Put to the Judges, NOTES OF OPINIONS AND JUDGMENTS DELIVERED IN DIFFERENT COURTS* 91–92 (London, Luke Hansard 1802). Imprisonment for debt was also a familiar feature of English law. Ford, *supra* note 49, at 26–27 (discussing the history of imprisonment for debt). The debate in 1758 was about imprisonment as part of the military draft, another form of noncriminal deprivation of liberty. *See supra* notes 100–16 and accompanying text.

<sup>380</sup> The British Statute of 1782 confirms this point. *See supra* notes 142–45 and accompanying text. Whether the Crown’s powers under the unwritten law applicable in an internal war included holding subjects as POWs is a distinct question. I think that it did, but the 1782 statute alone is enough to show that subjects could be held as POWs in an internal war without suspension of the Habeas Corpus Act.

<sup>381</sup> *See supra* notes 74–76, 246 and accompanying text.

<sup>382</sup> *See supra* notes 217–18 and accompanying text.

<sup>383</sup> *See supra* notes 74–76 and accompanying text.

easily committed by plotting. Suspension acts generally were adopted when plots were in the air, often along with actual armed action as in the Jacobite rebellions.<sup>384</sup> Suspicion, of course, was easy to come by, and could amount to nothing more than rumor. An unsworn allegation that someone was involved in a plot against the King was enough.<sup>385</sup>

Other forms of detention were much more governed by law that constrained the executive, to the extent that the executive was involved in decision making. In particular, those forms rested on legal rules that very substantially limited the class of people to be detained, and often did not involve the executive at all. Imprisonment for debt required a judgment.<sup>386</sup> Civil commitment of the mentally ill rested on individualized determinations concerning the detainee's mental condition.<sup>387</sup> Recruiting Acts were quite detailed.<sup>388</sup> Quarantine statutes, which sometimes provided for the exercise of executive judgment, directed that judgment to the quite specific and reasonably objective question of likelihood of contagion.<sup>389</sup>

Detention of enemy aliens under the law of war was similarly governed by legal principles that identified with precision the individuals who could be deprived of their liberty.<sup>390</sup> From 1798 to today, the President has had statutory authority to detain enemy alien civilians who are present in this country in time of war or invasion.<sup>391</sup>

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<sup>384</sup> See *supra* notes 88–97 and accompanying text (discussing Parliament's reaction to a 1714 rebellion); see also Militia Act 1745, 19 Geo. 2 c. 2 (Gr. Brit.) (permitting the King to detain anyone suspected of conspiring against him in response to the 1745 Jacobite rebellion).

<sup>385</sup> See *supra* notes 70–73 and accompanying text.

<sup>386</sup> Ford, *supra* note 49, at 27–28 (discussing the development of arrest to enforce judgments at common law).

<sup>387</sup> For example, eighteenth-century statutes authorized Justices of the Peace to order the confinement of individuals whose mental disturbance made it dangerous for them to go abroad. See Justices Commitment Act 1743, 17 Geo. 2 c. 5, § 20 (Gr. Brit.).

<sup>388</sup> See, e.g., Recruiting Act 1756, 29 Geo. 2 c. 4 (Gr. Brit.) (laying out substantive criteria and procedures for draft of soldiers).

<sup>389</sup> For example, the Quarantine Act of 1753 authorized the Privy Council to identify places from which it was probable that infection would be brought and imposed quarantine on vessels originating in those places. Quarantine Act 1753, 26 Geo. 2 c. 6 (Gr. Brit.).

<sup>390</sup> See *infra* notes 391–93.

<sup>391</sup> The first Alien Enemies Act was adopted in 1798. Alien Enemies Act, ch. 66, 1 Stat. 577, 577 (1798) (codified as amended at 50 U.S.C. § 21). In cases of declared war or invasion or predatory incursion, it authorized the executive to apprehend, secure, restrain, or remove alien enemies. *Id.* As the Court noted in 1948, and as remains true today, “[t]his Alien Enemy Act has remained the law of the land, virtually unchanged since 1798.” *Ludecke v. Watkins*, 335 U.S. 160, 162 (1948); 50 U.S.C. § 21 (detention authority in case of declared war or invasion or predatory incursion). “[I]t would savor of doctrinaire audacity now to find the statute offensive to some emanation of the Bill of Rights.” *Ludecke*, 335 U.S. at 171. In *Ludecke*, the Court upheld the continued detention of a German national after the end of actual hostilities because “the political branch of the Government ha[d] not brought the war with Germany to an end.” *Id.* at 170.

Detention authority under the Alien Enemies Act is triggered by a declaration of war without

That authority applies only to enemy nationals.<sup>392</sup> In similar fashion, authority to detain enemy combatants as prisoners of war grows out of and is constrained by the law of war, which identifies the individuals subject to detention.<sup>393</sup> During its most recent declared war, the United States held tens of thousands of prisoners of war in this country.<sup>394</sup> Congress never suspended habeas corpus during that conflict.<sup>395</sup>

The line between law and discretion is the boundary between detention authorities that were and were not regarded as suspensions.<sup>396</sup> That distinction was no accident. The principle that personal liberty was a right of the subject or citizen, not a privilege to be dispensed by the sovereign at pleasure, was fundamental to Anglo-American law.<sup>397</sup> A leading function of the Petition of Right was to assert that principle.<sup>398</sup> The

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rebellion or invasion, and so the statute cannot be justified as an exercise of the power to suspend consistent with the Suspension Clause. 50 U.S.C. § 21. The original Alien Enemies Act was adopted along with the much more controversial and confusingly named Alien Friends Act. Alien Friends Act, ch. 58, 1 Stat. 570 (1798) (authorizing detention and removal of nationals of countries with which the United States was at peace). While Congress's power to enact the Alien Friends Act was hotly disputed, its authority to authorize detention of alien enemies was undoubted. In 1800, James Madison led a committee of the Virginia legislature which prepared the *Report of 1800*. The report explained and justified the Virginia Resolutions of 1798, which harshly criticized the Alien Friends Act. Madison and his colleagues had no objection to the Alien Enemies Act.

These two cases are so obviously, and so essentially distinct, that it occasions no little surprise that the distinction should have been disregarded [by critics of the Virginia Resolutions] . . . . With respect to alien enemies, no doubt has been intimated as to the federal authority over them; the constitution having expressly delegated to Congress the power to declare war against any nation, and of course to treat it and all its members as enemies.

17 JAMES MADISON, *Report of 1800*, in THE PAPERS OF JAMES MADISON 303, 317–18 (David B. Mattern et al. eds., 1991). Madison was principal author of the *Report*, *id.* at 303–07 (describing the drafting of the *Report*), and the Virginia Resolutions themselves, 17 JAMES MADISON, *Virginia Resolutions*, in THE PAPERS OF JAMES MADISON, *supra*, at 185, 185–91 (describing the drafting and text of the Virginia Resolutions).

<sup>392</sup> See 50 U.S.C. § 21.

<sup>393</sup> See generally Tyler, *supra* note 3.

<sup>394</sup> According to Professor Arnold Krammer's study of German prisoners of war held in the United States, almost 400,000 German combatants were interned in this country, along with more than 50,000 Italian and 5,000 Japanese service members. ARNOLD KRAMMER, NAZI PRISONERS OF WAR IN AMERICA vii (1979).

<sup>395</sup> See Amy Barrett & Neal K. Katyal, *Common Interpretation: The Suspension Clause*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/763#:~:text=The%20writ%20of%20habeas%20corpus%20has%20been%20suspended%20four%20times,and%20in%20Hawaii%20after%20the> [https://perma.cc/HTL3-4VXC] (listing the times Congress suspended habeas corpus).

<sup>396</sup> See *infra* notes 452–55 and accompanying text.

<sup>397</sup> 1 BLACKSTONE, *supra* note 226, at \*134–35.

<sup>398</sup> Petition of Right 1628, 3 Car. 1 c. 1 (Eng.).

remedy of habeas corpus rested on the principle that the courts could apply legal rules to determine whether detention was lawful.<sup>399</sup> If confinement at the discretion of the executive were permissible, the writ would have no effect even when issued.<sup>400</sup>

On both points Blackstone hardly could have been more clear.<sup>401</sup> The common law of England strongly protected natural liberty, and in particular protected it from the will of the executive magistrate:

[P]ersonal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article [regarding bodily security]; that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and, that in this kingdom, it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws.<sup>402</sup>

The remedial process protecting that right was habeas corpus.<sup>403</sup> Blackstone recognized that the right could be and was limited by the law, which he distinguished from executive discretion.<sup>404</sup> The danger from the latter was evident to him:

Of great importance to the public is the preservation of this personal liberty; for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper, (as in France it is daily practiced by the crown), there would soon be an end of all other rights and immunities.<sup>405</sup>

Sometimes, Blackstone explained, the hazards associated with arbitrary executive power over natural liberty had to be borne.<sup>406</sup> “And yet sometimes, when the state is in real danger, even this [confinement at the will of the executive] may be a necessary measure.”<sup>407</sup> The executive alone, however, was not allowed to decide whether that grave a danger was at hand.<sup>408</sup>

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<sup>399</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*134.

<sup>400</sup> *Id.* at \*134–37.

<sup>401</sup> *Id.*

<sup>402</sup> *Id.* at \*134

<sup>403</sup> *Id.* at \*135.

<sup>404</sup> *Id.* at \*134–35.

<sup>405</sup> *Id.*

<sup>406</sup> *Id.* at \*136.

<sup>407</sup> *Id.*

<sup>408</sup> *Id.*

But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient; for the parliament only, or legislative power, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* Act for a short and limited time, to imprison suspected persons without giving any reason for so doing.<sup>409</sup>

Blackstone likened suspension to the Roman appointment of a dictator, and said that it should be done only “in cases of extreme emergency.”<sup>410</sup>

Fear of executive discretion crossed the Atlantic, and was manifest during the ratification debates when they touched on the Suspension Clause.<sup>411</sup> In discussing the clause in connection with the need for a bill of rights, Hamilton stressed the dangers of arbitrary executive power over natural liberty.<sup>412</sup> Other participants similarly expressed concern about the power of the executive.<sup>413</sup>

In 1807, twenty years after the Federal Convention met, Congress seriously considered suspension for the first time, in response to the Burr conspiracy.<sup>414</sup> The Senate adopted a suspension statute after debate of which we have little record today, but the House proceeded less hastily and ultimately rejected the bill.<sup>415</sup> In that debate the fear of untrammelled executive choice drove the opposition.<sup>416</sup> According to the *Annals of Congress*, Representative Burwell opposed suspension, arguing that “[n]othing but the most imperious necessity would excuse us in confiding to the Executive, or any person under him, the power of seizing and confining a citizen, upon bare suspicion, for three months, without responsibility for the abuse of such unlimited discretion.”<sup>417</sup> Representative James Eliot of Vermont was unwilling to

<sup>409</sup> *Id.*

<sup>410</sup> *Id.*

<sup>411</sup> *See supra* Section III.B.

<sup>412</sup> *Supra* notes 330–33 and accompanying text.

<sup>413</sup> *Supra* notes 367–68 and accompanying text.

<sup>414</sup> DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829*, at 131 (2001).

<sup>415</sup> *Id.* at 131–33 (describing congressional reaction to calls for suspension). The bill used the British form of suspension, authorizing the President to hold suspected traitors without beginning the regular criminal process. *Id.*

<sup>416</sup> Tyler, *supra* note 3, at 632. Professor Tyler explains that:

[T]hose who spoke were overwhelmingly of the view that a suspension would constitute a sweeping grant to the executive of discretionary authority to arrest and detain free from the normal legal restraints on his powers. . . . this belief, along with a general skepticism as to the need for such dramatic legislation under existing circumstances, ultimately swayed House members to reject the Senate bill.

*Id.*

<sup>417</sup> 16 ANNALS OF CONG. 405 (1807). The *Annals* are not verbatim records, and so represent the best account available to us but are not wholly reliable.

give the President and any executive officers under him “unlimited and irresponsible power over the personal liberty of [the] citizens . . . . What a vast and almost illimitable field of power is here opened, in which Executive discretion may wander at large and uncontrolled!”<sup>418</sup> Representative John Eppes of Virginia, thought that the situation did not justify placing the people’s liberty at the will of a single individual, and was not ready “to suspend the personal rights of the citizen, and to give him, in lieu of a free Constitution, the Executive will for his charter.”<sup>419</sup>

Suspension was not debated at length for more than fifty years after the Burr episode.<sup>420</sup> When the Union faced its greatest test, habeas corpus was a substantial issue.<sup>421</sup> President Lincoln purported to suspend the writ on his own authority, and in 1863 Congress enacted legislation that both authorized and limited noncriminal security detention.<sup>422</sup> During the congressional debates it was accepted by all participants that suspension meant giving the executive wide latitude to detain.<sup>423</sup> Opponents denounced it for that reason, while supporters argued that the great rebellion, accompanied by hidden disloyalty, demanded that this extraordinary step be taken.<sup>424</sup> Democratic Senator Willard Saulsbury of Delaware decried the plan to put “the liberty of every citizen” at the “absolute will” of the President.<sup>425</sup> Republican Senator Jacob Collamer of Vermont maintained that the framers foresaw “trials to the nation, when its existence will be in jeopardy,” and in those circumstances permitted suspension.<sup>426</sup> When that happened, the executive could take the extreme step of arresting “people who had not committed crimes, and hold[ing] them to prevent their committing crimes that would put the nation in jeopardy.”<sup>427</sup>

Throughout British and American history, suspensions of habeas corpus have been seen as grave measures, not just because they involve restrictions on natural

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<sup>418</sup> *Id.* at 407–08.

<sup>419</sup> *Id.* at 411.

<sup>420</sup> *See Ex parte Merryman*, 17 F. Cas. 144, 147 (C.C.D. Md. 1861) (describing President Lincoln’s suspension of the writ without congressional authorization). Lincoln’s suspension of the writ and the ensuing debate marked the next lengthy debate after 1807.

<sup>421</sup> *See infra* notes 422–27 and accompanying text.

<sup>422</sup> *See Merryman*, 17 F. Cas. at 146; Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755 (providing for suspension of the writ).

<sup>423</sup> *See, e.g.*, CONG. GLOBE, 37th Cong., 3d Sess. 1202–03 (1863). Senator Wilkinson argued that “the strong arm of this Government ought to lay hold of every man who, in an hour like this, is arraying himself directly or indirectly against the Government in its efforts to put down this rebellion.” *Id.* at 1202. Senator Howard complained that the bill would allow any member of the military to detain “the whole population of the United States, under the Constitution, both in the loyal States and in the rebel States.” *Id.* Senator Saulsbury questioned “the propriety of the policy . . . of arresting citizens in States without warrant where the courts of justice are open, and in which the laws can be faithfully and freely administered.” *Id.* at 1203.

<sup>424</sup> *See id.* at 1203.

<sup>425</sup> *Id.*

<sup>426</sup> *Id.* at 247.

<sup>427</sup> *Id.*

liberty, but because they involve vast discretion in the executive. To some extent, they are a relaxation of the rule of law itself: the principle that the executive operates according to legal rules and not its will.<sup>428</sup> While strictly speaking an authorization of discretionary action maintains the rule of law, being a law itself, it does so in form but not substance. Hence its substance, even when useful to the common good, is deeply troubling.

*B. The Writ, the Right, and the Text*

Any historically sound reading of the Suspension Clause must include Professor Tyler's and Professor Halliday's basic insight: the clause limits Congress's power to grant detention authority to the executive.<sup>429</sup> It is about the right of natural liberty, and not just the writ of habeas corpus, if it is about the writ at all.<sup>430</sup> Any textually sound reading of the clause must explain how it is possible that a provision that refers to "[t]he Privilege of the Writ of Habeas Corpus" operates with respect to the substantive interest the writ protects.<sup>431</sup>

One answer to this puzzle, which has considerable historical force, is that references to the privilege of the writ of habeas corpus had taken on a nonliteral meaning through linguistic drift. The starting point was the Habeas Corpus Act and suspension thereof. That standard name is itself not the best description, even though the statute dealt with the writ, because it mainly dealt with authority to confine.<sup>432</sup> An alternate and more descriptive name was the Liberty of the Subject Act.<sup>433</sup> But "Habeas Corpus Act" became dominant, and so statutes that did not affect issuance of the writ came to be known as suspensions of the Habeas Corpus Act.<sup>434</sup> They also were called suspensions of the habeas corpus.<sup>435</sup> That last phrase was even more opaque than a reference to the Act, because it would not even tell the uninformed reader or listener that it referred to a statute rather than a judicial remedy.<sup>436</sup> As habeas corpus was a distinctive entitlement of those who lived under the common law, English or American, calling it a privilege was natural enough.<sup>437</sup>

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<sup>428</sup> U.S. CONST. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed.").

<sup>429</sup> See HALLIDAY, *supra* note 9, at 249; Tyler, *supra* note 3, at 903–04.

<sup>430</sup> See Tyler, *supra* note 3, at 986 (stating 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" (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 575 (2004) (Scalia, J., dissenting) (alterations in original))).

<sup>431</sup> U.S. CONST. art. I, § 9.

<sup>432</sup> See Habeas Corpus Act 1679, 31 Car. 2 c. 2 (Eng.).

<sup>433</sup> See *id.* ("An Act for the better securing the Liberty of the Subject . . .").

<sup>434</sup> See *supra* note 73 and accompanying text.

<sup>435</sup> See *supra* note 73 and accompanying text.

<sup>436</sup> See Neil McFeeley, *The Historical Development of Habeas Corpus*, 30 SW. L.J. 585, 586–87 (1976) (detailing the history of habeas corpus as a common law writ).

<sup>437</sup> See Halliday & White, *supra* note 7, at 593 ("[T]he English understood habeas corpus

Thus, a phrase that referred obliquely to an expansion of detention authority might acquire a new form even less transparent to its meaning.

The primary answer to the textual problem is the Massachusetts Constitution's habeas corpus provision.<sup>438</sup> It said that "[t]he privilege and benefit of the writ of habeas-corpus" was to be enjoyed, and was to be suspended only in exigent circumstances and for a limited time.<sup>439</sup> The Massachusetts legislature characterized statutes that expanded executive detention authority—without affecting the remedy at all—as suspensions of the privilege of the writ.<sup>440</sup> Such statutes qualified as, and indeed were central examples of, suspension of the privilege and benefit of the writ.

That bald fact by itself is enough to show that the parallel language in the Federal Constitution referred to statutes like British suspensions of the Habeas Corpus Act and American revolutionary security-detention statutes that authorized discretionary confinement without affecting the judicial remedy.<sup>441</sup> A careful inquiry shows that behind that simple fact of usage is a reasonably straightforward reading of the words that refers to the right of natural liberty. The writ itself is a remedy, and it is natural enough to think that the privilege "of" the writ is the entitlement that it issues according to law.<sup>442</sup> But the preposition "of" conveys a connection without precisely specifying that connection. A warm day of summer is a day during summer, while a warm coat of wool is made of wool. Any remedy is closely connected to the substantive right that it enforces, so the right of natural liberty is the privilege or the benefit of the writ. Performance is the benefit of specific performance, just as the benefit of an umbrella is protection from the rain.

In that sense, the privilege of the writ of habeas corpus is the legal interest that the writ characteristically protects. To suspend that privilege is to contract that legal interest temporarily. In the British system of liberty that Blackstone extolled, a crucial part of the law regarding natural liberty was that confinement at the mere will of the executive was unlawful.<sup>443</sup> The King's special commandment was not a good return of the writ because the King could not confine his subjects simply because he thought it wise.<sup>444</sup> He had to act according to some law other than his own discretion.<sup>445</sup> Suspensions of the privilege of habeas corpus thus restricted that

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as a privilege. One of the king's *brevia mandatoria* (writs of command), it arose from the royal prerogative and issued, on motion, at the discretion of the justices sitting in King's Bench.").

<sup>438</sup> MASS. CONST. ch. VI, art. VII.

<sup>439</sup> *Id.*

<sup>440</sup> *Supra* notes 292–97 and accompanying text.

<sup>441</sup> Compare U.S. CONST. art I, § 9, with MASS. CONST. ch. VI, art. VII, and Habeas Corpus Act 1679, 31 Car. 2 c. 2 (Eng.).

<sup>442</sup> See Amanda Tyler, *Is Suspension a Constitutional Remedy?*, 59 STAN. L. REV. 333, 337 (2006) (describing the writ of habeas corpus as a "unique . . . constitutional remedy").

<sup>443</sup> See 1 WILLIAM BLACKSTONE, COMMENTARIES \*134–35.

<sup>444</sup> See *id.* at \*135.

<sup>445</sup> See *id.*

very basic substantive principle that the remedy of habeas corpus enforced by measuring the executive's decision against the law.<sup>446</sup>

Suspension of the privilege of the writ of habeas corpus thus can reasonably be understood to include a temporary replacement of law with executive will. While that phrase is not as informative as it could be, the old British terminology of suspension of the Habeas Corpus Act would not have been well suited to the framers' purpose.<sup>447</sup> American grants of enhanced detention authority often did not require even suspicion of crime and so would not have been contrary to the Habeas Corpus Act because they did not authorize commitment on criminal or supposed criminal grounds.<sup>448</sup> Moreover, the Constitution did not impose on the new national government rules about criminal confinement similar to those in the 1679 Act.<sup>449</sup>

In reaching for the language of the Massachusetts Constitution, the Federal Convention thus struck a reasonable compromise between using familiar terminology and fully spelling out what they had in mind.<sup>450</sup> To do the latter would not have been easy, because they sought to capture a subtle point. The Convention might have referred to restriction of the right of personal liberty or personal freedom, using those terms—as Dicey later would—to mean the right not to be subject to imprisonment, arrest, or physical coercion without legal justification.<sup>451</sup> In a sense, however, that right remains intact during a suspension, because a law giving the executive discretion is a law, although not one that performs the usual function of law in this context.<sup>452</sup> Moreover, that phrase might be taken to refer to the interest in natural liberty, and the Convention did not mean to limit all federal restrictions on natural liberty to cases of rebellion or invasion. For example, quarantine laws were and are a natural exercise of the commerce power.<sup>453</sup> Because the writ of habeas corpus was the means by which substantive legal constraints on detention were enforced against the executive, referring to the privilege of the writ was a reasonable way to refer to the existence of law-like limitations on executive authority.<sup>454</sup>

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<sup>446</sup> See *id.* at \*136.

<sup>447</sup> See *supra* notes 378–80 and accompanying text.

<sup>448</sup> See *supra* notes 412–28 and accompanying text.

<sup>449</sup> For example, the Habeas Corpus Act required that accused traitors be tried within two terms of the courts. Habeas Corpus Act 1679, 31 Car. 2 c. 2 (Eng.). The Constitution does not prescribe court terms.

<sup>450</sup> Compare U.S. CONST. art. I, § 9, with MASS. CONST. ch. VI, art. VII.

<sup>451</sup> “The right to personal liberty as understood in England means in substance a person’s right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification.” A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 124 (8th ed. 1915). Later in that paragraph, Dicey referred to “personal freedom in this sense,” apparently using the two formulations interchangeably. *Id.*

<sup>452</sup> See, e.g., Act of Mar. 3, 1863, ch. 81, 12 Stat. 755 (a statute providing for the suspension of the writ of habeas corpus).

<sup>453</sup> The Surgeon General has authority to limit introduction of persons and property from foreign countries in order to prevent the spread of disease to this one. 42 U.S.C. § 265.

<sup>454</sup> See *supra* notes 411–27 and accompanying text.

One difficulty in recovering the original meaning of the Suspension Clause results from the fact that even many reasonably sophisticated Americans no doubt were not well informed about actual British and American usage and practice.<sup>455</sup> Probably some Americans believed that the British Habeas Corpus Act regulated detention in general, and did not know that it was limited to criminal detention. In similar fashion, some probably believed that the 1679 Act was the source of the writ of habeas corpus, and not just the statutory version that it created while leaving the common-law writ in place.<sup>456</sup> Many almost certainly did not know that British suspension acts did not limit the writ, and that they therefore suspended only the substantive limits on criminal detention and not the remedial part of the 1679 Act.<sup>457</sup> Given the variety of American suspension statutes during the Revolution, among those who knew about those acts, very likely many did not know that some of those statutes limited the issuance of the writ but most did not.

The reading presented here rests on an interpretive premise that this Article will identify but not defend. The premise is that, when a legal text refers to an existing legal phenomenon, the text refers to the phenomenon, even if the enactors of the text may be mistaken about that phenomenon. Someone who adopted a rule about suspensions of the habeas corpus, referring thereby to the British statutes that were called by that name, might have been in error about the content of those statutes. In my view, the reference is to the statutes, not to the drafter's incorrect understanding of them.

That approach may require the integration of facts about the law that no one at the time had brought together. While the association of suspension with executive discretion was well known when the Constitution was adopted, it may be that no individual had come to the conclusion that discretion is the feature that unites British and American suspensions. In order to understand the Suspension Clause, which refers to the legal practices that were called suspension of habeas corpus and similar names, that integration must be performed. The reading presented here, which relies only on legal facts and concepts available at the time of the framing, may thus be both novel and true to the original meaning.<sup>458</sup>

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<sup>455</sup> See *infra* notes 456–57 and accompanying text.

<sup>456</sup> See *supra* notes 40–63 and accompanying text.

<sup>457</sup> See *supra* notes 173–216 and accompanying text.

<sup>458</sup> Other important twenty-first century interpretations of the Suspension Clause share the limitation that they cannot simply point to someone who endorsed them at the time of the framing. Justice Scalia did not, and Professor Tyler does not, identify any individual who articulated the readings they propose. For example, Professor Tyler does not present any source who says that a suspension is a law that authorizes detention of individuals who are within protection where the detention does not conform to the existing rules of criminal confinement. See *generally* Tyler, *supra* note 3. Given the current state of historical knowledge, any interpretation of the Suspension Clause that reflects the facts concerning suspension is likely to bring those facts together in a way that no single individual is today known to have done.

## V. THE SUSPENSION CLAUSE AND THE WRIT OF HABEAS CORPUS

This Part addresses the question whether the Suspension Clause limits Congress's authority with respect to the writ of habeas corpus. It argues that, because of other aspects of the Constitution, even if the privilege of the writ of habeas corpus includes the judicial remedy of the writ and not only the right of natural liberty, the clause has the same effect it would have if the privilege referred only to the right. That is not exactly to say that the clause provides no protection for the writ; it provides only the protection that would arise as an incident to protection of the substantive interest of natural liberty.

Whatever it may mean about the writ, the Suspension Clause is primarily a substantive protection of the right of natural liberty.<sup>459</sup> Just as the First Amendment protects the freedom of speech against congressional abridgement, so the Suspension Clause limits the circumstances under which Congress may adopt a certain kind of limit on natural liberty.<sup>460</sup> In that respect, the Suspension Clause is no more about the jurisdiction of the federal courts than the First Amendment.

This feature of the clause, which Professors Halliday and Tyler recovered for this century, undercuts the reading according to which it in effect affirmatively requires that the federal courts have habeas jurisdiction.<sup>461</sup> As has long been known, that interpretation of the clause encounters serious textual and structural objections.<sup>462</sup> The Constitution does not require that there be any lower federal courts.<sup>463</sup> It does ensure that there will be a Supreme Court and does give that court jurisdiction.<sup>464</sup> Only a little bit of that jurisdiction is original, however, and habeas is an original proceeding.<sup>465</sup> The vast bulk of possible habeas cases are outside the Court's original jurisdiction. As far as Article III is concerned, the habeas corpus jurisdiction of the federal courts could be vanishingly small.<sup>466</sup>

In order to require federal habeas corpus jurisdiction, the Suspension Clause would have to be an affirmative mandate that overrides the permission implied by Article III's reference to "such inferior Courts as the Congress may from time to time ordain and establish."<sup>467</sup> The Suspension Clause is written as a limitation, not

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<sup>459</sup> See Tyler, *supra* note 3, at 903–04 (describing the Suspension Clause as "arguably the single most important source of protection of individual liberty in the Constitution").

<sup>460</sup> U.S. CONST. art I, § 9 (the writ of habeas corpus may be suspended only "when in Cases of Rebellion or Invasion the public Safety may require it").

<sup>461</sup> See HALLIDAY, *supra* note 9, at 261; Tyler, *supra* note 3, at 903–04.

<sup>462</sup> A penetrating statement of the difficulties appears in Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantanamo: The Boumediene Decision*, 2008 SUP. CT. REV. 1, 11–12.

<sup>463</sup> *Id.* at 12.

<sup>464</sup> U.S. CONST. art. III, §§ 1–2.

<sup>465</sup> U.S. CONST. art. III, § 2 (establishing the appellate and original jurisdiction of the Supreme Court).

<sup>466</sup> Article III jurisdiction does not explicitly include habeas review. See U.S. CONST. art. III, § 2.

<sup>467</sup> U.S. CONST. art. III, § 1. According to the orthodox view of Article III, the Constitution

an affirmative command.<sup>468</sup> The clause also contrasts with the Massachusetts provision on which it was based.<sup>469</sup> The Massachusetts Habeas Corpus Clause reads in full:

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.<sup>470</sup>

The framers worked from the second part but did not include the first.<sup>471</sup> They included no affirmative grant or requirement of a grant.<sup>472</sup> Moreover, the Suspension Clause appears in Article I, but Article III would have been the place to put a grant of jurisdiction that Congress could not alter, like the original jurisdiction of the Supreme Court.<sup>473</sup>

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reads as it does on this point because the Federal Convention decided to leave the question whether to have inferior federal courts to Congress. As James Madison was instrumental in reaching that result, it is often known as the “Madisonian Compromise.” Michael G. Collins, *The Federal Courts, the First Congress, and the Non-Settlement of 1789*, 91 VA. L. REV. 1515, 1519 (2005). (Professor Collins shows that contrary views have been held from the very beginning. *Id.* at 1543–48. It is not entirely clear what Madison himself thought about the topic when he served in the First Congress. *Id.* at 1555–62.) Professor Meltzer discussed the implication of this feature of the Constitution:

For if Congress need not create federal courts at all, or may confer on them only such portions of the categories of jurisdiction set forth in Article III, Section 2, as it thinks advisable, then it might seem to follow that there could be no inherent right to habeas corpus review *in federal court*.

*See* Meltzer, *supra* note 462, at 12.

<sup>468</sup> As Professor Meltzer explained, the text:

[D]oes not explicitly guarantee the availability of habeas corpus, in the way the Bill of Rights guarantees particular protections. Rather, the Suspension Clause appears in a list of provisions in Article I, Section 9 that limit the power of the government (and, specifically of Congress, in some cases explicitly and in others implicitly) to enact certain kinds of laws.

*Id.* at 10–11 (footnote omitted).

<sup>469</sup> Compare U.S. CONST. art. I, § 9, cl. 2, with MASS. CONST. ch. VI, art. VII.

<sup>470</sup> MASS. CONST. ch. VI, art. VII.

<sup>471</sup> *See supra* Section III.A.

<sup>472</sup> *See* U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus *shall not be suspended* . . .” (emphasis added)).

<sup>473</sup> As discussed above, the drafting history of the Suspension Clause suggests that the Federal Convention’s Committee of Style may have realized that the clause belonged in Article I, Section 9, and not Article III, because it had only a prohibition and not an affirmative requirement like that found in the Massachusetts Constitution. *Supra* notes 319–28 and accompanying text.

One answer to this difficulty is to say that the power to issue habeas corpus writs and decide pursuant to them is vested in the judges of the Supreme Court separately.<sup>474</sup> While the Court itself has only very limited trial-level jurisdiction, that limitation does not apply to the Justices themselves.<sup>475</sup> It indeed does not, because the grant of judicial power itself does not, nor the grant of jurisdiction.<sup>476</sup> The former is to the federal courts in general, the latter is to the Supreme Court.<sup>477</sup> Judges exercise judicial power by participating in the decisions of courts.<sup>478</sup> A multimember court may act through just one of its judges, as United States District Courts routinely do today, or through a group of judges smaller than the entire complement, as the Courts of Appeals generally do.<sup>479</sup> In similar fashion, a Justice of the Supreme Court may act for the Court, and the Justices do.<sup>480</sup> But as far as the Constitution is concerned, it is the Court that is acting; Article III grants no judicial power, and no jurisdiction, to Supreme Court Justices as such.<sup>481</sup>

If the Suspension Clause is a mandate for habeas corpus jurisdiction, it clashes with Article III in another way.<sup>482</sup> Not only does the latter provision require only a

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<sup>474</sup> Professor Edward Hartnett proposes habeas authority in individual Justices as a solution to a problem posed by the Constitution as the Court interprets it. Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251, 275 (2005). The problem arises from four principles that together are incompatible: (1) Lower federal courts are optional for Congress to create, *id.* at 254–56; (2) the Supreme Court does not have original jurisdiction over most habeas cases, *id.* at 256–58; (3) according to the Supreme Court, state courts may not grant habeas relief to detainees held by federal officers, *id.* at 258–60; and (4) the Suspension Clause requires that habeas be available to review detention by federal officers, *id.* at 260–61. According to Hartnett, the ability of individual Justices to issue the writ reconciles the Suspension Clause’s demand that the writ generally be available with the limits on the jurisdiction of the Court itself and the possible and necessary unavailability of lower federal and state courts respectively. *Id.* at 275. Another way to resolve the supposed puzzle is to conclude that the Suspension Clause does not affirmatively mandate any federal habeas jurisdiction. That conclusion is much easier to reach if the Clause’s function is primarily to protect the substantive interest in natural liberty and not the judicial remedy that protects it. *See id.* at 266–67.

<sup>475</sup> *See id.* at 256–57, 271–73 (noting that under *Marbury*, the Supreme Court does not have original habeas jurisdiction because original jurisdiction is strictly limited to that established by Article III, whereas individual Justices or judges have had the power to issue habeas writs since the original Judiciary Act of 1789).

<sup>476</sup> *See* U.S. CONST. art. III, § 1 (vesting judicial power in the federal courts); *id.* § 2 (providing for original jurisdiction in the Supreme Court).

<sup>477</sup> *Id.* §§ 1–2.

<sup>478</sup> *See id.*

<sup>479</sup> *See* 28 U.S.C. § 132 (single judge of district court may exercise court’s judicial power); *id.* § 46 (courts of appeals may sit in panels or en banc).

<sup>480</sup> *See, e.g.*, SUP. CT. R. 22.

<sup>481</sup> *See* U.S. CONST. art. III, §§ 1–2.

<sup>482</sup> *Compare* U.S. CONST. art. I, § 9, cl. 2, *with* U.S. CONST. art. III, § 2 (listing the types of cases to which the judicial power of the United States extends).

supreme court with very limited original jurisdiction, it also specifies the cases to which the judicial power of the United States extends.<sup>483</sup> Not all possible habeas corpus proceedings are on that list.<sup>484</sup> An example from the time of the framing illustrates the point. Habeas was sometimes used to determine whether the petitioner lawfully could be held as a slave; *Somerset* was such a case.<sup>485</sup> Consider a habeas proceeding by a putative slave against a putative master, both born and residing in the same state, in which the supposed slave claimed to have been manumitted by a previous owner. Such a habeas case would come within none of the Article III heads of jurisdiction, but it would be a habeas case.<sup>486</sup> If the Suspension Clause creates habeas jurisdiction, that case would be within it.<sup>487</sup> If the response is that the Suspension Clause is implicitly limited by Article III, then it is limited by the optional status of most federal trial-level jurisdiction.<sup>488</sup>

The text of the Suspension Clause is thus an unlikely vehicle for an affirmative grant of jurisdiction or a mandate to Congress to create jurisdiction. The assumption that the clause's function is somehow to make sure that the writ is available might nevertheless require an unlikely reading of the text. But with the recognition that the clause is primarily a substantive protection of natural liberty, that assumption drops away, and with it any imperative to bend the text and structure to achieve the clause's supposed purpose.<sup>489</sup>

To say that the Suspension Clause does not affirmatively require habeas jurisdiction is not to say that it does not refer to the writ. As explained above, the privilege of the writ of habeas corpus includes the interest in freedom from detention at the discretion of the executive.<sup>490</sup> The privilege may also include the remedy that protects natural liberty.<sup>491</sup> If it does, exercises of Congress's power over the jurisdiction of the lower federal courts nevertheless do not count as suspension of the privilege.<sup>492</sup> Article III and Article I together give Congress broad discretion concerning the lower federal courts.<sup>493</sup>

<sup>483</sup> U.S. CONST. art. III, § 2.

<sup>484</sup> *See id.*

<sup>485</sup> *See generally* *Somerset v. Stewart* (1772) 98 Eng. Rep. 499; Lofft 1 (holding that slavery was not permitted by the law of England).

<sup>486</sup> *See id.*; U.S. CONST. art. III, § 2 (limiting the federal judicial power).

<sup>487</sup> *See* U.S. CONST. art. I, § 9, cl. 2.

<sup>488</sup> *See id.* art. III, §§ 1–2. If Article III's grant of jurisdiction limits the Suspension Clause, its provision that Congress may establish inferior courts must also limit the Suspension Clause. *See id.*

<sup>489</sup> The difficulties with interpreting the Suspension Clause as a guarantee that the writ will be available in turn reinforce the reading according to which it limits Congress's power over natural liberty. That reading explains the clause's function and does not require that it perform functions its text is not suited to and that do not accord well with the rest of the Constitution.

<sup>490</sup> *See supra* notes 381–428 and accompanying text.

<sup>491</sup> *See supra* notes 429–31 and accompanying text.

<sup>492</sup> *See infra* notes 493–94 and accompanying text.

<sup>493</sup> Article I, Section 8 gives Congress power “[t]o constitute Tribunals inferior to the supreme Court,” U.S. CONST. art. I, § 8, and Article III, Section 1 vests the judicial power “in one supreme

When that discretion is exercised so as not to grant habeas corpus jurisdiction, that congressional decision is not naturally described as a suspension of the writ, because that which was not there to begin with is not suspended. As a result, even if the privilege of the writ of habeas corpus includes the writ itself, and not just the right it protects, exercises of Congress's jurisdictional powers do not constitute suspensions, and so do not violate the clause insofar as it refers to the writ. That conclusion arises because of the interaction between the clause, which refers not just to habeas corpus but also suspensions of it, and the fact that the Constitution itself grants the federal courts hardly any habeas corpus jurisdiction.

That is not necessarily to say that the clause has no effect at all on jurisdiction. The privilege of the writ includes, if it is not limited to, the law protecting natural liberty.<sup>494</sup> One of the long-standing debates in American constitutional law is whether a congressional rule about jurisdiction can be inconsistent with a substantive provision like the First Amendment.<sup>495</sup> According to some commentators, a jurisdictional rule that is designed to keep some constitutional claims out of court, or influence the way in which they are decided, may violate the constitutional provision that gives rise to the claim.<sup>496</sup> If that is correct, then the Suspension Clause should be treated the way other substantive limits on congressional power are treated in this respect. The Suspension Clause thus has the same effect on Congress's authority over the jurisdiction of the federal courts as does a wholly substantive limitation like the First Amendment. Whether there is any such effect is a separate question.

While a failure to grant remedial authority is hard to describe as a suspension of it, congressional restrictions on the habeas authority of state courts might more readily come within the Constitution's language. According to one standard reading of the clause, congressional limitations on state habeas are suspensions of the privilege of the writ and so are limited to rebellion and invasion. The classic statement of this position is by William Duker.<sup>497</sup> At first glance this reading has much to commend it from the standpoint of the Constitution's structure. Most important is that it comports with the clause's formulation as a prohibition, not a conferral of

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Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

<sup>494</sup> See *supra* Section IV.A.

<sup>495</sup> In his classic treatment of the topic, Gerald Gunther distinguished internal limits on Congress's power that arise from Article III and external limits that arise from other parts of the Constitution, especially the affirmative limits like those found in the first eight amendments. See Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 900 (1984).

<sup>496</sup> See *id.*

<sup>497</sup> See WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 126 (1980). A recent review of writing on the topic appears in Todd E. Pettys, *State Habeas Relief for Federal Extrajudicial Detainees*, 92 MINN. L. REV. 265, 309–11 (2007). Professor Pettys does not consider the possibility that the Suspension Clause primarily limits restrictions on the right of natural liberty rather than the judicial proceeding of habeas corpus. *Id.*

authority or a command to exercise it.<sup>498</sup> Moreover, it comports with the basic principle that the Constitution largely takes for granted, but does not create, a judicial system, with attendant remedies, through which legal challenges to government action may be brought.<sup>499</sup> That judicial system, as Henry Hart stressed, begins with the state courts.<sup>500</sup> They are the institutions that are specifically recruited by Article VI to vindicate the supremacy of federal law, including the Constitution.<sup>501</sup> Protection of the habeas jurisdiction of the state courts may seem a natural precaution insofar as it preserves a well-known remedy that protects a very basic interest.

But it may not have seemed so natural to the Federal Convention, and is not so natural after a careful consideration of the document the convention produced. When the framers decided to insulate from federal power any legal right or institution that exists independently of the Constitution and federal law, their first instrument was to avoid including a power that could affect the right or institution.<sup>502</sup> Congress has no power over the jurisdiction of the state courts as such, and more generally it has no power over the structure of the state governments as such.<sup>503</sup> This basic feature of the Constitution is reinforced by the few places in which the document does deal

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<sup>498</sup> See Pettys, *supra* note 497, at 309.

<sup>499</sup> See *id.* at 310.

<sup>500</sup> Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953). Meltzer noted the connection between Hart's thinking and Duker's claim about the Suspension Clause: "In the more specific context of habeas corpus, this view suggests that the Suspension Clause, rather than guaranteeing *federal court* habeas corpus jurisdiction, instead restricts the power of Congress to interfere with *state court* habeas jurisdiction." Meltzer, *supra* note 462, at 17–18 (citing DUKER, *supra* note 497, at 126–80).

<sup>501</sup> U.S. CONST. art. VI (requiring that "the Judges in every State shall be bound" by federal law).

<sup>502</sup> THE FEDERALIST NO. 84, *supra* note 329, at 577–78 (Alexander Hamilton) (stating that the Constitution, through the principle of enumerated federal power, limits governmental authority and is itself a bill of rights).

<sup>503</sup> State courts must apply federal law, but in general they do so within their own jurisdiction and pursuant to their own procedures. "The general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.'" *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 584, 508 (1954)). The Court has recognized a power in Congress to regulate the procedures in state court when it exercises its substantive powers, but those cases do not rely on a congressional power over state procedure or jurisdiction as such. Compare *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 363 (1952) (holding that state courts must follow federal rules regarding jury trial in cases resting on federal causes of action), with *Johnson v. Fankell*, 520 U.S. 911, 922–23 (1997) (holding that state procedural rules are applicable regarding appeal in a case resting on a federal cause of action because Congress has not prescribed a rule under its substantive powers). The principle that Congress does not have general power to direct the state governments is reflected in *Printz v. United States*, 521 U.S. 898, 898–99 (1997), which held that Congress could not require state law enforcement officers to execute federal law.

with the relationship between the two governments. In particular, their judiciaries are brought together at one point: the appellate jurisdiction of the Supreme Court of the United States as conferred by Article III.<sup>504</sup> Congress can make laws necessary and proper to carry that jurisdiction into effect, and can also make exceptions to it, but it has no granted power about the state courts.<sup>505</sup>

Congress does not have general power over state court jurisdiction.<sup>506</sup> Whether or not the privilege of the writ includes the judicial remedy, Congress cannot affect the remedy in state court by exercising a power it lacks. Insofar as it would protect state court habeas, the Suspension Clause is thus cumulative of a restriction that arises from the principle of enumerated powers. But while Congress does not have general control of state court jurisdiction, it does have two kinds of power that may be used to regulate it. First, Congress can establish tribunals inferior to the Supreme Court, giving them jurisdiction within the scope set out in Article III.<sup>507</sup> It can make that jurisdiction exclusive of the state courts', and has done so as to some cases since the Judiciary Act of 1789.<sup>508</sup> Congress thus can provide that habeas cases that are within the Article III judicial power are to be heard exclusively in federal court. But while it may be necessary and proper to limit the state courts in order to strengthen the federal courts, simply limiting the state courts has no such connection to the power to establish inferior federal tribunals and no such constitutional sanction.<sup>509</sup> The power to carry out federal court jurisdiction does not enable Congress to remove cases from state jurisdiction without creating corresponding federal jurisdiction.

Second, Congress may be able to limit state court jurisdiction in the exercise of its non-judicial powers. Congress clearly may give federal officers privileges to act in ways that otherwise would be unlawful, as for example when it authorizes the use of military force to put down rebellion.<sup>510</sup> Under the Supremacy Clause, state courts must apply such federal law when it comes within their jurisdiction.<sup>511</sup> It is also possible, though I think doubtful, that Congress may restrict the jurisdiction of

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<sup>504</sup> See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 338–39 (1816) (holding that Article III contemplates appeals from state courts to the Supreme Court of the United States). Congress could give lower federal courts appellate jurisdiction over state courts, but has never done so. See *id.*

<sup>505</sup> U.S. CONST. art. I, § 8, cl. 18 (establishing the power to carry into execution other powers); *id.* art. III, § 2, cl. 2 (establishing that Congress may make exceptions to the Supreme Court's appellate jurisdiction).

<sup>506</sup> See U.S. CONST. art. III, § 1 (referring only to the judicial power of the United States).

<sup>507</sup> U.S. CONST. art. III, § 1.

<sup>508</sup> Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 76 (granting district court admiralty jurisdiction exclusive of state courts).

<sup>509</sup> See *supra* notes 16–17 and accompanying text.

<sup>510</sup> See, e.g., Insurrection Act of 1807 (current version at 10 U.S.C. §§ 251–53) (allowing for federal force to put down rebellions in states).

<sup>511</sup> U.S. CONST. art. VI, cl. 2 (“[A]nd the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.”).

the state courts in order to protect federal officers, without creating corresponding federal court jurisdiction. Any non-judicial power it may have to limit state-court jurisdiction and remedies, however, is subject to affirmative limitations that apply to the relevant power.<sup>512</sup> If Congress may not authorize executive officials to detain people, it may not restrict state-court remedies in order to facilitate that detention. If the Suspension Clause referred only to the interest in natural liberty, it nevertheless would limit jurisdictional restrictions enacted in order to authorize invasions of that interest. Here too, protection of the writ would be redundant of another aspect of the Constitution, this time the Suspension Clause's protection of natural liberty itself.

The Suspension Clause is not an affirmative requirement, and hence does not mandate any federal habeas corpus jurisdiction.<sup>513</sup> It is a limit on congressional power, most importantly on the power to authorize detention. If the privilege of the writ includes the judicial remedy, that aspect of the clause still does not add anything to other features of the Constitution that limit congressional authority. Congress's lack of general authority over state court jurisdiction, the internal limits on its ability to make federal court jurisdiction exclusive, and the Suspension Clause's substantive protection of natural liberty, combine to duplicate any effect that would arise from including the judicial remedy itself within the clause's scope.

#### CONCLUSION

For many decades, the Suspension Clause has been subject to a basic confusion: the assumption that it is primarily concerned with a judicial remedy, rather than a primary right. Focusing instead on natural liberty and executive detention is very fruitful. First, that focus leads to the original meaning of the clause, according to which it protects natural liberty against executive discretion. Next, that focus shows how strange is the reading according to which the clause is only about the remedy. If Congress may enable the executive to hold people at discretion, the writ of habeas corpus is of little importance. The return made on behalf of King Charles I, that the petitioner is confined on commandment of the proper executive official, would be sufficient.<sup>514</sup> Habeas corpus is a remedy. It enforces, but does not contain, the substantive law of natural liberty.

With this new understanding, the Suspension Clause takes its place as a substantive protection of a genuinely fundamental right: freedom from confinement at the discretion of the executive. It is perhaps the Constitution's most basic protection of liberty.

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<sup>512</sup> See Robert J. Reinstein, *The Limits of Congressional Power*, 89 TEMP. L. REV. 1, 3 (2016).

<sup>513</sup> *Supra* notes 467–73 and accompanying text.

<sup>514</sup> See *supra* notes 39–43 and accompanying text.