

A “SECOND MAGNA CARTA”: THE ENGLISH  
HABEAS CORPUS ACT AND THE STATUTORY  
ORIGINS OF THE HABEAS PRIVILEGE

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“[I]f any person be restrained of his liberty . . . [,] he shall, upon demand of his coun[sel], have a writ of habeas corpus . . . . And by . . . *the habeas corpus act*, the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer.”

–Blackstone’s *Commentaries*<sup>1</sup>

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\* Professor of Law, University of California Berkeley School of Law. I dedicate this Article to the memory of my brilliant federal courts professor, Daniel Meltzer, who inspired me at every turn and was an extraordinary scholar and teacher, generous mentor, and wonderful friend.

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1 I WILLIAM BLACKSTONE, COMMENTARIES \*131. Blackstone’s *Commentaries* grew out of Blackstone’s lectures and were published between 1765 and 1769. The timing and circulation of his *Commentaries* meant that they wielded profound influence on the development of early American law.

## INTRODUCTION

It is a tremendous privilege to contribute to this special issue of the *Notre Dame Law Review* honoring the legacy of Daniel Meltzer's scholarship. Dan was, without question, a giant in our field. He was also a spectacular federal courts professor. As one of his former students, I was lucky enough to see him in action in the classroom. There, he was a towering figure who inspired his students with his brilliance, good humor, and unassuming nature. His approach to teaching fueled a deep intellectual curiosity in his students, and he seemed to enjoy most those moments when his students challenged a proposition that he had just advanced.

As a scholar, Dan was no different. As the others writing in this issue attest, Dan loved to engage with competing ideas—even when they were at odds with positions that he had taken in his own scholarship. My contribution to this collection is offered in that spirit, engaging as it does with some of Dan's work while also challenging some of its premises.

In 2007, Dan and his longtime regular co-author, colleague, and good friend, Richard Fallon, wrote a characteristically important and highly influential article on the common law origins of habeas corpus and their significance to modern habeas debates.<sup>2</sup> They entitled the work *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*.<sup>3</sup> In the article, the two sought to promote what they called a “common law model” for tackling the many difficult questions of the reach and content of habeas protections implicated by the War on Terror.<sup>4</sup> As they described it, “the Common Law Model views courts as having a creative, discretionary function in adapting constitutional and statutory language—which is frequently vague, and even more frequently reflects imperfect foresight—to novel circumstances.”<sup>5</sup> Their article contrasted “the Agency Model,” within which “courts should regard themselves as the agents of those who enacted, or ratified, pertinent statutory or constitutional provisions” and “should assume that those provisions were framed to be as determinate as possible.”<sup>6</sup>

In defending the Common Law Model, Fallon and Meltzer maintained that it “has historically dominated.”<sup>7</sup> They continued:

[A] common law approach to habeas corpus issues has been not only historically dominant, but also, for the most part, historically successful. In the main, courts have managed to adapt generally stated norms of positive law to evolving notions of fairness, while also accommodating the imperatives of

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2 See generally Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007).

3 See *id.*

4 See *id.* at 2033.

5 *Id.*

6 *Id.* (observing that under the agency model courts “should minimize judicial creativity”).

7 *Id.*; see also *id.* at 2043.

national security and practical governance. Much of the most important jurisdictional and substantive doctrine has been and remains judge-made.<sup>8</sup>

Fallon and Meltzer were of course right that habeas corpus has a rich and storied common law background, as is documented well and extensively in historian Paul Halliday's masterful book *Habeas Corpus: From England to Empire*.<sup>9</sup> They were also right that such a model offers many attractive aspects from a normative perspective, not the least of which is its ability to adapt to changed circumstances and offer a framework for tackling problems with no clear historical analogs. As this Article explores, however, in tracing the Anglo-American development of habeas corpus jurisprudence, it is important to account for the statutory roots of the habeas privilege as well—particularly because statutory developments were designed in important respects to alter and constrain the common law courts' approach to habeas corpus.

Specifically, the English Habeas Corpus Act of 1679, passed by Parliament in the waning years of the Stuart dynasty, came in direct response to perceived failings by the royal courts and their common law writ to do enough to check executive excess at the expense of individual rights.<sup>10</sup> Unearthing the story of the backdrop against which the Act was passed and tracing its role in English law going forward reveals that the Act was enormously significant in the development of English law's habeas jurisprudence—far more so than most jurists and scholars recognize today. Further, extensive evidence of the Act's influence across the Atlantic dating from well before, during, and after the Revolutionary War demonstrates that much of early American habeas law was premised upon efforts to incorporate the Act's key protections rather than developed through judicial innovation. Most important of all, there is every reason to believe that the Act, along with its suspension by Parliament on several occasions in the late seventeenth and eighteenth centuries, established the suspension model that the Founding generation imported into the United States Constitution's Suspension Clause.<sup>11</sup> In other words, focusing exclusively on the common law writ and its judicial origins gives insufficient attention to what was a tremendously significant factor in the development of Anglo-American habeas jurisprudence—namely, the English Habeas Corpus Act, the very object of which was to constrain judges and harness the common law writ toward specific ends.

In concluding *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, Fallon and Meltzer wrote that their goal in writing the article had been

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8 *Id.* at 2044. The article also observed that “the original office of habeas corpus was to ask whether—even in the absence of constitutional rights in the modern sense—a petitioner's detention was authorized by law.” *Id.* at 2065.

9 See generally PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* (2010).

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

11 That Clause provides: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONST. art. I, § 9, cl. 2.

“to put war-on-terror issues that arise in habeas corpus cases into a new, broader, and illuminating perspective.”<sup>12</sup> The article most certainly accomplished that goal. Even more than that, in offering a framework for approaching many hard questions that have arisen as part of the war on terrorism, Fallon and Meltzer sparked a host of new scholarly conversations on these topics.<sup>13</sup> Their proposed common law model, moreover, seems to have wielded considerable influence on the Supreme Court’s approach in the blockbuster War on Terror decision in *Boumediene v. Bush*.<sup>14</sup> In *Boumediene*, a five-Justice majority held that noncitizen detainees held by the United States Government as “enemy combatants” at the Naval base at Guantánamo Bay, Cuba, enjoyed the protection of the Suspension Clause.<sup>15</sup> Further, the Court concluded, the habeas privilege promised by that Clause required that the detainees be afforded a right to challenge their designation and military detention without criminal charges in an Article III court.<sup>16</sup> The influence of Fallon and Meltzer’s work on the majority is apparent from Justice Kennedy’s opinion for the Court, which relied upon their article in declaring that “common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances.”<sup>17</sup>

Justice Kennedy’s opinion in *Boumediene* is emblematic of the common law model that Fallon and Meltzer’s article promotes. The same is certainly true for the earlier War on Terror plurality decision by Justice O’Connor in *Hamdi v. Rumsfeld*.<sup>18</sup> *Hamdi* involved a habeas petition brought on behalf of a United States citizen challenging his long-term military detention as an enemy combatant.<sup>19</sup> After declaring that the proper framework for addressing his petition called for “balancing [the] serious competing interests” at stake,<sup>20</sup> the plurality opinion took into account a host of factors arising out of the circumstances of the capture and detention of Hamdi. Putting these together, the plurality concluded that Hamdi was entitled to a hearing with streamlined procedures to challenge his designation; at the same time, however, the plurality rejected his argument that his detention was categorically unconstitutional.<sup>21</sup> For Fallon and Meltzer, Justice O’Connor’s approach

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12 Fallon & Meltzer, *supra* note 2, at 2112.

13 A recent Westlaw search found over 100 citations to the article in legal journals and law reviews.

14 See generally *Boumediene v. Bush*, 553 U.S. 723 (2008).

15 See *id.* at 732.

16 See *id.*

17 *Id.* at 779–80 (citing Fallon & Meltzer, *supra* note 2, at 2102).

18 542 U.S. 507 (2004). I return to discuss *Hamdi* in greater depth below. See *infra* Part VII.

19 See *Hamdi*, 542 U.S. at 510.

20 *Id.* at 529 (plurality opinion).

21 See *id.* at 519 (“There is no bar to this Nation’s holding one of its own citizens as an enemy combatant.”).

struck a chord with the common law tradition of habeas corpus and validated the merits of the common law model.<sup>22</sup>

In my own scholarship, Fallon and Meltzer's work on habeas models prompted me to dig deeper into the historical backdrop that informed ratification of the Suspension Clause and think harder about the relevance of that history for questions of constitutional interpretation. This, in turn, has spurred work that has occupied me for many years since.<sup>23</sup> In the spirit of engaging with my federal courts professor one more time, this Article tells the story of the statutory origins of the habeas privilege—what Blackstone called a "second *magna carta*"<sup>24</sup>—and argues that any explication of the constitutional privilege and discussion of how courts should address modern Suspension Clause questions should account for the critical role that the English Habeas Corpus Act played in the development of Anglo-American habeas jurisprudence.

## I. THE ENGLISH HABEAS CORPUS ACT IN THE ANGLO-AMERICAN LEGAL TRADITION

The story of the writ of habeas corpus in Anglo-American jurisprudence is a complicated one. Part of the problem lies in the fact that historically, English law recognized both a common law and a statutory writ of habeas corpus.<sup>25</sup> The former, judicially created, was at its origins a prerogative writ that enabled the royal courts to act as an arm of the king in "demand[ing an] account for his subject who is restrained of his liberty."<sup>26</sup> The statutory writ, by contrast, was the product of parliamentary efforts to constrain the executive's authority.<sup>27</sup> Much of modern American habeas scholarship has downplayed the role of the statutory writ in the development of American habeas jurisprudence, but as I have detailed in other work, the English Habeas Corpus Act played a central role in that very development, wielding extensive influence over early American law. Indeed, no less than Blackstone, in the 1765 publication of his law lectures that were read by virtually every early

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22 See Fallon & Meltzer, *supra* note 2, at 2036 ("applaud[ing]" the plurality's approach in *Hamdi*).

23 See, e.g., AMANDA L. TYLER, *HABEAS CORPUS GOES TO WAR: TRACING THE STORY OF THE UNITED STATES CONSTITUTION'S HABEAS PRIVILEGE FROM THE TOWER OF LONDON TO GUANTÁNAMO BAY* (forthcoming 2017) (on file with author).

24 1 BLACKSTONE, *supra* note 1, at \*133.

25 See Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 611–12 (2008).

26 HALLIDAY, *supra* note 9, at 65. Historian Paul Halliday's work masterfully tells the story of this development. As Halliday recounts, in 1619, Chief Justice Henry Montagu described habeas corpus as a "writ of the prerogative by which the king demands account for his subject who is restrained of his liberty." *Id.* (quoting *Habeas Corpus al Cinque-Ports put un Borne Imprison La* (1619) 81 Eng. Rep. 975).

27 See Nutting, *supra* note 10, at 531–32.

American studying law, glorified the Habeas Corpus Act as a “bulwark” of “per[s]onal liberty” and a “second *magna carta*.”<sup>28</sup>

In other work, I have explored the profound influence of the English Habeas Corpus Act of 1679 on the development of Anglo-American habeas law and the Suspension Clause in particular.<sup>29</sup> This important English statute, glorified in the pages of Blackstone for serving as a powerful check on executive authority, led Parliament to invent the concept of suspension in order to displace its protections in times of war and threats to the throne.<sup>30</sup> This uneasy conceptual pairing of the Act’s protections and their suspension in times of crisis created a model that came to govern on both sides of the Atlantic during the American Revolutionary War.<sup>31</sup> The very same model came to be imported into the early American jurisprudence that developed in the immediate wake of the Declaration of Independence and ultimately provided the basis on which the Founding generation constitutionalized protections against suspension of the privilege in the United States Constitution’s habeas provision, the Suspension Clause.<sup>32</sup>

Notwithstanding Blackstone’s glorification of the Act, modern debates concerning the protections given and limits imposed by the Suspension Clause have taken place largely without reference to the role that the Act has played in the development of Anglo-American habeas jurisprudence.<sup>33</sup> Meanwhile, the Supreme Court has repeatedly embraced a methodological approach in cases involving the Suspension Clause—including a prominent recent case arising out of the war on terrorism<sup>34</sup>—which openly calls for careful attention to the historical backdrop against which the Clause was drafted.<sup>35</sup> The Court’s emphasis on the importance of history in this context follows from the fact that the privilege of the writ of habeas corpus was part

28 1 BLACKSTONE, *supra* note 1, at \*126, \*131, \*133. Blackstone’s *Commentaries* grew out of Blackstone’s lectures and were published between 1765 and 1769.

29 See generally TYLER, *supra* note 23; Amanda L. Tyler, *Habeas Corpus and the American Revolution*, 103 CALIF. L. REV. 635 (2015).

30 See Tyler, *supra* note 29, at 644.

31 For details on the Revolutionary War period, consult *id.* (detailing the suspension of the privilege applicable to American Rebels that was adopted and extended by Parliament throughout the war); see also Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 955–68 (2012) (detailing the suspensions that occurred in the states during the Revolutionary War).

32 U.S. CONST. art. I, § 9, cl. 2. For details on the early American adoption of the protections associated with the English Habeas Corpus Act and the concept of suspension, as well as the influence of the English Habeas Corpus Act on the drafting of the Suspension Clause, see generally TYLER, *supra* note 23; Tyler, *supra* note 31, at 954–75.

33 A prominent exception may be found in Justice Scalia’s dissent in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (Scalia, J., dissenting), in which he was joined by Justice Stevens in emphasizing the Act’s importance in the development of the constitutional privilege. See *id.* at 557–58.

34 See *Boumediene v. Bush*, 553 U.S. 723, 746 (2008) (positing that “‘at the absolute minimum,’ the [Suspension] Clause protects the writ as it existed when the Constitution was drafted and ratified” (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001))).

35 See *id.*

of the Anglo-American legal tradition long before the drafting and ratification of the United States Constitution.<sup>36</sup> As Chief Justice John Marshall once observed, when the Founding generation constitutionalized "this great writ," they invoked "[t]he term . . . in the [C]onstitution, as one which was well understood."<sup>37</sup> Thus, although some may question whether history should be *determinative* in resolving the many difficult questions that arise today regarding the proper interpretation and application of the Suspension Clause, few deny that history is highly *relevant* to the analysis of such questions.<sup>38</sup>

Those who wrote the Constitution were keenly aware of the long and celebrated role of the writ of *habeas corpus ad subjiciendum* in English law. Translated as "to undergo and receive" the "corpus," or body, of the prisoner, the writ was by its origins a judicial creation and served as the basis for courts to demand cause for a prisoner's detention from his jailer. As historian Paul Halliday's work shows, the common law writ came into regular use in the seventeenth century as a "prerogative writ"—that is, as the embodiment of royal power invoked by the Court of King's Bench in aid of the Crown's obligation to look after his subjects.<sup>39</sup> For the writ to evolve into something that would override the royal command as sufficient cause for detention would take additional developments. Specifically, it would take the English Habeas Corpus Act of 1679, a parliamentary creation intended to complement the common law writ and constrain the Crown from detaining outside the criminal process. Parliament's adoption of the Habeas Corpus Act was but one aspect of the rise of parliamentary supremacy and played a major role in a broader parliamentary effort to wrestle control over matters of detention from the king and his courts.<sup>40</sup>

This Article tells the story of that effort and its culmination in Parliament's adoption of the English Habeas Corpus Act by drawing upon a wealth of sources, including archival documents, parliamentary debates, diaries and private papers of key participants, and significant decisions and rulings of the royal courts. As the pages that follow show, with the Act's passage, Parliament finally controlled and defined what constituted legal cause to detain.<sup>41</sup> In the process, the royal command ceased to suffice as good cause. But in the face of war and Jacobite threats to retake the throne, Parliament soon created a distinct tool for setting aside the Act's protections—namely, *suspension*.<sup>42</sup> In a series of suspensions spanning from the late seventeenth century through the eighteenth century, Parliament set aside the Habeas Corpus Act

36 *See id.*

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

38 For greater discussion of the significance of history in interpreting the Suspension Clause, see Tyler, *supra* note 31, at 918–23.

39 *See* HALLIDAY, *supra* note 9, at 65.

40 *See generally* E.R. Turner, *Parliament and Foreign Affairs, 1603–1760*, 34 *ENG. HIST. REV.* 172, 172 (1919).

41 *See infra* Part III.

42 *See* HALLIDAY, *supra* note 9, at 170–73.

and all related legal protections in order to legalize arrests made outside the criminal process, arrests that otherwise would have resulted in discharge of the prisoner under the terms of the Habeas Corpus Act.<sup>43</sup>

The Founding generation knew a great deal concerning the benefits provided by the Act—indeed, denial of the Act’s protections to the colonists constituted a major complaint about British rule and contributed to the movement for independence.<sup>44</sup> Well-steeped in their Blackstone, the colonists read about how the Act was a “bulwark” of “personal liberty” and a “second *magna carta*.”<sup>45</sup> Unsurprisingly, they wanted to enjoy the benefits of this second *Magna Carta* for themselves.

In reviewing this important period in history, it bears highlighting at the outset that although without question over time habeas corpus would come to be associated with the protection of individual liberty, at its origins, habeas corpus was about *power*.<sup>46</sup> Specifically, the Habeas Corpus Act was caught up in the struggles between Parliament and the crown that dominated the better part of the seventeenth and eighteenth centuries.<sup>47</sup> Thus, although much of what follows here tells a story wrapped up in the language of individual rights, the Act must be viewed as part of a larger movement away from the royal absolutism that defined early periods in English history. Further, as will be shown, Blackstone’s glorification notwithstanding, at its origins, the Habeas Corpus Act was an imperfect safeguard of personal liberty. Indeed, after the Act’s adoption, Parliament wielded its attainder power aggressively to circumvent the Act and detain persons without formal process.<sup>48</sup> Further, just ten years after passing the Act, Parliament invented the concept of suspension to displace its protections.<sup>49</sup> In short, Parliament did not itself always adhere to the constraints it had imposed on the executive’s authority to detain through the Habeas Corpus Act.

Nonetheless, it is during the important decades chronicled here that the seeds of the association of habeas corpus with individual liberty were sown by the likes of Coke and Selden and with Parliament’s adoption of the English Habeas Corpus Act. In time, with the birth of a new country across the Atlantic and its constitutional framework that enshrined the privilege and provided for independent courts, the protections associated with the Habeas Corpus Act would finally warrant Blackstone’s praise.

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43 See Halliday & White, *supra* note 25, at 624–25.

44 See Tyler, *supra* note 31, at 954–57.

45 1 BLACKSTONE, *supra* note 1, at \*126, \*131, \*133. Blackstone’s *Commentaries* grew out of Blackstone’s lectures and were published between 1765 and 1769.

46 See *supra* notes 39–40 and accompanying text (discussing the rise of parliamentary supremacy leading up to the period in which Parliament adopted the Act).

47 See generally Halliday & White, *supra* note 25, at 620–24.

48 See Tyler, *supra* note 29, at 697 n.286.

49 See Tyler, *supra* note 31, at 934.



## II. TRACING THE ORIGINS OF THE PRIVILEGE

Modern accounts often tie the origins of the writ of habeas corpus to those of Magna Carta—the “Great Charter of the Liberties of England”—sealed by King John on a field at Runnymede in 1215.<sup>50</sup> Chapter 39 of the Great Charter declared, “No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.”<sup>51</sup>

Like almost every major development in the story of the privilege, the Great Charter emerged from a period of unrest and civil war in England. It represented a bargain of sorts between rebelling English nobility and King John, who was to remain in power in exchange for recognizing the liberties set forth in the compact.<sup>52</sup> The concept of due process, so important to modern Anglo-American civil liberties jurisprudence, may be grounded in the declarations set forth in Chapter 39 of Magna Carta.<sup>53</sup>

Picking up the story in the seventeenth century, Sir Edward Coke’s highly influential *Institutes on the Law of England* specifically connected Chapter 39 with the writ of habeas corpus, positing: “Now it may be demanded, if a man be taken, or committed to prison *contra legem terrae*, against the law of the land, what remedy hath the party grieved?”<sup>54</sup> To this, he answered: “He

50 See Halliday & White, *supra* note 25, at 582 n.13.

51 GREAT CHARTER OF LIBERTIES, ch. 39 (1215), *reprinted in* SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 42, 47 (George Burton Adams & H. Morse Stephens eds., MacMillan & Co. 1929) (1901) [hereinafter GREAT CHARTER OF LIBERTIES]. With the remaking of the Great Charter in 1225, Chapter 39 became Chapter 29. I refer to the relevant chapter throughout by its original numbering.

52 Within weeks of the events at Runnymede, the Pope instructed King John to repudiate the Charter, and John was dead by the end of the next year. Various monarchs issued several revised versions of Magna Carta over the remaining years of the thirteenth century, including two prominent issuances in 1225 by Henry III and 1297 by Edward I. See Vincent R. Johnson, *The Ancient Magna Carta and the Modern Rule of Law: 1215 to 2015*, 47 ST. MARY’S L.J. 1, 11–13 (2015).

53 For example, “by the end of the 14th century ‘due process of law’ and ‘law of the land’ were interchangeable” in English legal vocabulary. *Duncan v. Louisiana*, 391 U.S. 145, 169 (1968); see also DANIEL JOHN MEADOR, *HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY* 1–38 (1966) (connecting these concepts to modern due process principles and the writ of habeas corpus generally).

54 See EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 54 (6th ed. London, W. Rawlins 1681) (1628) [hereinafter 2 INSTITUTES]. It would be hard to overstate the influential nature of Coke, who had served as Attorney General under Elizabeth and Chief Justice under James I, on the development of English and American law. For much of the period following its publication, Coke’s work served as the “lawyer’s primer” and heavily influenced developments in English law. See HASTINGS LYON & HERMAN BLOCK, *EDWARD COKE: ORACLE OF THE LAW* 346 (1929); see also Thomas G. Barnes, *Introduction to Coke on Littleton*, in *LAW, LIBERTY, AND PARLIAMENT: SELECTED ESSAYS ON THE WRITINGS OF SIR EDWARD COKE* 24 (Allen D. Boyer ed., 2004). Further, “Coke’s *Institutes* were read in the American colonies by virtually every student of the law” and “seem[ed] to be almost the foundation of [American] law.” *Klopfer v. North Carolina*, 386 U.S. 213, 225 (1967) (first

may have an *habeas corpus* [action].”<sup>55</sup> Presiding over a habeas case on King’s Bench, Chief Justice Coke added: “By the law of God, none ought to be imprisoned, but with the cause expressed.”<sup>56</sup> The narrative that has emerged to describe this early view of habeas corpus goes something like this: the writ of habeas corpus was designed to ensure that a prisoner receives the due process promised by the Great Charter, which in turn demanded that a jailor present legal cause for a prisoner’s detention. This was the function of the common law writ, specifically the writ of habeas corpus *ad subjiciendum et recipiendum*, which translates as “to undergo and receive” the “corpus,” or body, of the prisoner. Courts used other common law writs of habeas corpus to compel the appearance of witnesses, move prisoners around, and demand responses in civil proceedings.

But the story of the privilege as it came to America is far more complex than this simplistic account reveals, in large measure because of the important influence that the English Habeas Corpus Act of 1679 wielded upon the development of early American law and the limits that the common law writ encountered during the decades immediately preceding the Act’s passage. Indeed, as is explored below, in the century leading up to the Act, royal command commonly sufficed to constitute sufficient cause for detention or, at the least, to preclude judicial inquiry into the same. But the privilege that came to be enshrined in the United States Constitution—grounded as it was upon the protections associated with the English Act—was not simply the embodiment of a promise of some process before a tribunal only to meet defeat in the face of executive command. Instead, the habeas privilege born out of the English Act constituted a far more significant check on the power of the executive to arrest and detain. As will be seen, the privilege associated with the Act and imported into the American legal tradition functioned to limit dramatically the causes for which the executive could legally detain persons who could claim the protection of domestic law.<sup>57</sup> Specifically, the Act required that one be charged criminally and proceeded against in due course—even in times of war—and it rejected outright the proposition that the royal command, standing alone, sufficed as lawful cause to detain.<sup>58</sup>

It was, of course, not always so. For example, the return in *Darnel’s Case*<sup>59</sup> in 1627—sometimes called the “Case of the Five Knights”—stated

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citing CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 157–87 (1911); MEADOR, *supra* note 53, at 23–24, then quoting CATHERINE DRINKER BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE (1552–1634), at 514 (1957) (quoting South Carolina Governor and later Supreme Court Justice, John Rutledge). Roscoe Pound once deemed Coke “the oracle of the common law.” ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 94 (1930).

55 2 INSTITUTES, *supra* note 54.

56 Codd v. Turback (1615) 81 Eng. Rep. 94.

57 See *infra* Part VII.

58 For a discussion, see Tyler, *supra* note 31, at 924–27.

59 Darnel’s Case (1627) 3 Cobbett’s St. Tr. 1 (Eng.). The knights were Sir Thomas Darnel, Sir John Corbet, Sir Walter Earl, Sir John Heveningham, and Sir Edmund Hampden. *Id.*; see also J.A. Guy, *The Origins of the Petition of Right Reconsidered*, 25 HIST. J.

nothing more than that the prisoners were held "*per speciale mandatum Domini Regis*"—in other words, by the special command of the King.<sup>60</sup> When Parliament refused to fund King Charles I's plans for continued English participation in the Thirty Years' War, he demanded that the rich nobles of England "loan" him money to support his military objectives.<sup>61</sup> When several knights refused the forced loans, Charles had them thrown in London's Fleet Prison.<sup>62</sup> Represented by some of the English bar's finest, the nobles petitioned the Court of King's Bench, the judges of which served at the pleasure of the King, for writs of habeas corpus to win their release.<sup>63</sup> The central question posed by their case concerned whether the King's vacuous return would suffice as lawful cause for their imprisonment.<sup>64</sup>

The knights' counsel attacked the position that the royal command on its own represented the law of the land, or "*legem terrae*," contemplated by Magna Carta.<sup>65</sup> Celebrated parliamentarian, lawyer, and legal scholar John Selden developed this argument most fully on behalf of the knights.<sup>66</sup> Referencing Chapter 39 of the Great Charter, Selden asserted that "if it were fully executed as it ought to be, every man would enjoy his liberty better than he doth."<sup>67</sup> He continued: "The law saith expressly, 'No freeman shall be imprisoned without due process of the law.'<sup>68</sup> Although recognizing that the words "*legem terrae*" could be interpreted to permit the King's return to stand, Selden contended that there were limits on what should be granted the force of law in justifying detention.<sup>69</sup> Specifically, Selden argued that the best interpretation of Magna Carta posited that "[n]o freeman shall be imprisoned without due process of the law"<sup>70</sup>—which he defined as comprising "due course of law, to be either by presentment or by indictment."<sup>71</sup> In

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289–91 (1982) (detailing the case). As Halliday notes, Sir Thomas Darnel "had made his submission and been released before arguments" in the case. HALLIDAY, *supra* note 9, at 392 n.3.

60 See MEADOR, *supra* note 53, at 13–14.

61 *Id.* at 13.

62 *See id.*

63 The jurisdiction of the Court of King's Bench reached so-called "pleas of the crown"—that is, most of the cases that involved the crown in some manner. As noted, during this period, its judges were paid by the king and served at his pleasure. See Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 813 (1989).

64 *See id.*

65 *See* Darnel's Case (1627) 3 Cobbett's St. Tr. 1, 17–18 (Eng.).

66 *Id.*

67 *Id.* at 18 (argument of Selden before King's Bench). Selden represented Sir Edmund Hampden. See Guy, *supra* note 59, at 293 n.15.

68 *Darnel's Case*, 3 Cobbett's St. Tr. at 18 (paraphrasing from the GREAT CHARTER OF LIBERTIES, *supra* note 51, at ch. 39).

69 *See id.*

70 *Id.*

71 *Id.* Discussing *Darnel's Case*, Professor Daniel Meador notes with insight equally applicable today: "The case is also noteworthy because it shows how the writ of habeas

so arguing, Selden equated due process with the specific process governing the initiation of formal criminal charges.<sup>72</sup>

Selden's argument was not entirely without support. Indeed, almost three hundred years earlier during the reign of Edward III and in conjunction with adoption of the treason statute that governed for many centuries, Parliament had essentially embraced the very same proposition when it declared:

Whereas it is contained in the Great Charter . . . that none shall be imprisoned nor put out of his Freehold, nor of his Franchises nor free Custom, unless it be by the Law of the Land; It is accorded assented, and stablished, That from henceforth none shall be taken by Petition or Suggestion made to our Lord the King, or to his Council, unless it be by Indictment or Presentment of good and lawful People of the same neighbourhood where such Deeds be done, in due Manner, or by Process made by Writ original at the Common Law . . . and forejudged of the same by the Course of the Law . . . .<sup>73</sup>

Selden invoked this statute and others to challenge head on the idea that the King's word alone constituted the law of the land.<sup>74</sup>

But the argument was countered forcefully by Attorney General Sir Robert Heath, who defended the King's authority to imprison the knights. Heath conceded that Magna Carta "is the foundation of [English] Liberties."<sup>75</sup> But any definition of "*legem terrae*," Heath argued, must recognize that:

[Th]e king is the head of the same fountain of justice, which your lordship administers to all his subjects; all justice is derived from him, and what he doth, he doth not as a private person, but as the head of the common wealth, as *justiciarius regni*, yea, the very essence of justice under God upon earth is in him . . . .<sup>76</sup>

Heath continued by all but labeling Selden's arguments fanciful, at one point asserting that "no learned man" would agree with the assertion that "no man should be committed, but first he shall be indicted or presented."<sup>77</sup> Then, after offering a lengthy recitation of why the statutes and precedents relied upon by the knights did not support their position, Heath defended the king's power to detain prisoners for state reasons.<sup>78</sup> He concluded in turn by drawing upon a wealth of precedents and current practices support-

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corpus is no greater protector of liberty than the judges' view as to what constitutes lawful custody." MEADOR, *supra* note 53, at 18.

72 See *Darnel's Case*, 3 Cobbett's St. Tr. at 18.

73 25 Edw. 3, stat. 5, c. 4 (1351) (Eng.).

74 See *Darnel's Case*, 3 Cobbett's St. Tr. at 18.

75 *Id.* at 38 (argument of Heath before King's Bench).

76 *Id.* at 37.

77 *Id.* at 38.

78 See *id.* at 49.

ing the position that the command of the king constituted the law of the land.<sup>79</sup>

All involved appreciated the momentousness of the case. During arguments, Lord Doderidge, one of the Justices on King's Bench, declared: "This is the greatest cause that ever I knew in this court."<sup>80</sup> Similarly, Lord Chief Justice Hyde labeled the case "of very great weight and expectation."<sup>81</sup> In the end, however, *Cobbett's State Trials* version of the proceedings reports that King's Bench viewed the precedents as supporting the King, concluding that the King's word constituted the "law of the land," and therefore justified the prisoners' remand to the Fleet.<sup>82</sup> For their release, they would have to look elsewhere—specifically, to the very person who had thrown them in prison in the first instance. In the words of Chief Justice Hyde, "we make no doubt but the king, if you seek to him, he knowing the cause why you are imprisoned, he will have mercy."<sup>83</sup>

King's Bench may well have reached a different result in the matter, given that the King had removed its Chief Justice, Randolph Crewe, the previous year reportedly because Crewe had shown "no zeal for the advancement of the Loan[s]."<sup>84</sup> More specifically, some reports suggest that Crewe had also informed the King through intermediaries that he believed that "no tax . . . can be laid upon the people without the authority of parliament, and that the King cannot imprison any of his subjects without a warrant specifying the offense with which they are charged."<sup>85</sup> Of course, if Crewe did hold this

79 *Id.* at 38–50. As Paul Halliday observes, justices of the peace and other special commissioners still enjoyed summary powers to imprison during this period. See HALLIDAY, *supra* note 9, at 138.

80 *Darnel's Case*, 3 *Cobbett's St. Tr.* at 31.

81 *Id.* at 50.

82 *Id.* at 59. As scholars have noted, there was considerable contemporary debate on whether the decisions created precedent or merely constituted a non-precedential refusal of bail to the knights. See Guy, *supra* note 59, at 289–94; Mark Kishlansky, *Tyranny Denied: Charles I, Attorney General Heath, and the Five Knights' Case*, 42 *HIST. J.* 53, 63–64 (1999) (emphasizing that the case turned on the knights' first return filed and therefore did not necessarily resolve questions going to perpetual detention). J.A. Guy concludes that the case records had been altered by royal counsel in an effort to bolster their precedential value, see Guy, *supra* note 59, at 296–99, but Mark Kishlansky has countered that view forcefully, see Kishlansky, *supra*, at 64–67.

83 *Darnel's Case*, 3 *Cobbett's St. Tr.* at 59.

84 *Id.* at 1; see also T. WORTHINGTON BARLOW, *CHESHIRE: ITS HISTORICAL AND LITERARY ASSOCIATIONS* 45–48 (Manchester, John Gray Bell 1855) (discussing Crewe and replicating a letter written by him discussing his dismissal).

85 1 JOHN LORD CAMPBELL, *THE LIVES OF THE CHIEF JUSTICES OF ENGLAND* 307 (Phila., Blanchard & Lea 1851); see also 1 THOMAS BIRCH, *THE COURT AND TIMES OF CHARLES THE FIRST 168–70* (London, Henry Colburn 1849) (replicating correspondence dating to 1626 describing the events); *THE JOURNAL OF SIR SIMONDS D'EWES* 124 (Wallace Notestein ed., 1923) (replicating MP D'Ewes' journal noting that a motion was made in 1640 to have Crewe testify as to why he had been "putt out of his place" as part of parliamentary investigations into the judges who had supported the King in the Ship-Money case). For more on Ship-Money, see *infra* note 127 and accompanying text.

view, Selden's arguments would have met sympathetic ears. It seems that Crewe's dismissal may well have sealed the Knights' respective fates. This being said, many historians suggest that the case made perfect sense in terms of accepted "contemporary legal justification[s]" for detention<sup>86</sup> and a wealth of precedents.<sup>87</sup>

And so, Selden's argument did not prevail on this occasion. He therefore took his cause to another forum—Parliament—enlisting the support of fellow House of Commons member and great English jurist Sir Edward Coke, among others, in the process.<sup>88</sup> Parliament adopted the Petition of Right the following year, but only after extensive debates that pitted Selden and Coke against Heath once more.<sup>89</sup> Coke's remarks during the debates shed considerable light on his view of the law. Coke began by invoking Saint Paul, quoting the Acts of the Apostles for the idea that "[i]t is against reason to send a man to prison without shewing a cause."<sup>90</sup> Turning to the specific problem posed by the Case of the Five Knights, Coke argued that if a detention be upheld

*per mandatum domini regis*, or 'for matter of state' . . . then we are gone, and we are in a worse case than ever. If we agree to this imprisonment 'for matters of state' and 'a convenient time,' we shall leave Magna Carta and the other statutes and make them fruitless, and do what our ancestors would never do.<sup>91</sup>

Notably, here Coke argued that the law *already* denied the king the power to detain for "state reasons" absent specific cause, yet he also promoted the Petition as going further to clarify the point.<sup>92</sup>

Given its impetus, it is hardly surprising that the Petition essentially embraced Selden's arguments from the Case of the Five Knights and repudi-

86 HALLIDAY, *supra* note 9, at 138, 222–23; *see also id.* at 156–60 (elaborating on the king's discretion and prerogative).

87 *See* Kishlansky, *supra* note 82, at 70, 73, 78–79.

88 *See id.* at 55–56.

89 *See* HALLIDAY, *supra* note 9, at 139.

90 Darnel's Case (1627) 3 Cobbett's St. Tr. 1, 69 (Eng.) (remarks of Sir Edward Coke); *see also id.* at 78 (same). Note that Coke had not always held this view. He had once opined that the Privy Council had the power to commit without citing a cause. In discussing his earlier remarks while promoting the Petition of Right, Coke said they were made "by some young student that did mistake" and declared: "I have now better guides." 2 COMMONS DEBATES 1628, 190–93, 213 (Robert C. Johnson & Mary Frear Keeler eds., 1977) [hereinafter COMMONS DEBATES] (remarks of Sir Edward Coke given Mar. 29 & 31, 1628). As counsel for the Earl of Shaftsbury later argued in 1677, in Coke's "more mature age he was of another opinion, and accordingly the law is declared in the Petition of Right." *See* The Case of the Earl of Shaftsbury (1677) 6 Cobbett's St. Tr. 1269, 1285 (Eng.); *see also* HALLIDAY, *supra* note 9, at 30 (noting that release rates for prisoners dropped during Coke's tenure on King's Bench).

91 3 COMMONS DEBATES, *supra* note 90, at 95 (remarks of Sir Edward Coke given Apr. 26, 1628).

92 For details on the Petition and why Coke sought to cloak it in existing law, *see* ROGER LOCKYER, THE EARLY STUARTS 336–45 (1989).

ated King’s Bench’s resolution of the matter.<sup>93</sup> Specifically, after quoting Chapter 39 of the original version of Magna Carta—the Petition set forth the following grievance and demand:

[Y]our subjects have of late been imprisoned without any cause shewed: And when for their deliverance they were brought before your justices by your Majesties writts of habeas corpus . . . , no cause was certified, but that they were detained by your Majesties speciall comaund signified by the lords of your privie counsell, and yet were returned backe to severall prisons without being charged with any thing to which they might make aunswere according to the lawe . . . . They . . . pray . . . that no freeman in any such manner as is before mentioned be imprisoned or detained.<sup>94</sup>

The Petition also responded more broadly to the events that had preceded *Darnel’s Case* by, among other things, purporting to restrict declarations of martial law, ban forced quartering of soldiers, and prohibit unilateral taxation by the king.<sup>95</sup> It was, in this respect, very much a repudiation of Charles’s attempts to govern without Parliament and therefore embedded within the power struggle between Parliament and the monarchy that came to define much of seventeenth-century England.<sup>96</sup>

A king increasingly at odds with his Parliament, Charles I had resisted initial efforts to enact portions of what became the Petition of Right in the form of legislation. Under Coke’s leadership, however, the House of Commons moved ahead with the Petition in order to register its grievances. The King reluctantly accepted the Petition, presumably with the intention of securing greater parliamentary support for his military objectives going forward.<sup>97</sup> Within a year, however, the King was once again at war with the Houses over his demand for taxes of tonnage and poundage, which Parliament had denied him in contrast to his predecessors.<sup>98</sup> As part of this long-standing dispute, Charles dissolved Parliament yet again.<sup>99</sup> It would be decades before the Petition would evolve from mere aspiration to push the law in the direction of limiting the monarch’s authority to detain, in part due

93 These and other efforts led John Milton to refer to Selden as “the chief of learned men reputed in this Land.” JOHN MILTON, *AREOPAGITICA* (Richard C. Jebb ed., Cambridge Univ. Press 1918) (1644). For more on the origins of the Petition and the parliamentary debates, see Linda S. Popofsky, *Habeas Corpus and “Liberty of the Subject”: Legal Arguments for the Petition of Right in the Parliament of 1628*, 41 *HISTORIAN* 257 (1979).

94 The Petition of Right 1628, 3 Car. 1, c. 1, §§ 5, 8 (Eng.).

95 *Id.* §§ 1, 6, 7.

96 For an overview of the economic context of this struggle, consult North & Weingast, *supra* note 63, at 808–24.

97 3 HL JOUR. (1628) 842–44 (Eng.). Among other things, Charles I had pledged support to his uncle, Christian IV of Denmark, in the ongoing wars on the Continent.

98 Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1101 (2009).

99 For details, see *id.* at 1101–12 (2009); Linda S. Popofsky, *The Crisis over Tonnage and Poundage in Parliament in 1629*, 126 PAST & PRESENT 44 (1990).

to the debatable legal status of the Petition itself.<sup>100</sup> Indeed, as if to drive home the point that the Petition had changed little, Charles I threw John Selden and eight other members of Parliament in the Tower of London in 1629 in response to their open opposition to the King's actions.<sup>101</sup> Some in the group had prevented the House speaker, John Finch, from leaving his chair so as to adjourn the Commons in keeping with the King's command but over the protest of its members.<sup>102</sup> Among this group was Sir John Eliot, a regular foe of Charles, who had led a campaign against the right of the King to levy tonnage and poundage and promoted the Petition of Right.<sup>103</sup> It was not Eliot's first visit to the Tower, but it would be his last.

When Selden and the other prisoners went before King's Bench to seek their freedom via writs of habeas corpus, Attorney General Heath responded with a flurry of arguments against bailing the prisoners.<sup>104</sup> First, he cited backdated royal warrants as cause for imprisonment.<sup>105</sup> Second, he argued that "[a] Petition in parliament is not a law" and thereby denied any legal effect to the Petition of Right.<sup>106</sup> It followed that, under this view, the royal

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100 During this period, Parliament differentiated between bills that became statutes and petitions. The latter, particularly "petitions of right," were viewed as the appropriate means for "addressing the crown on matters of prerogative, as a way of offering counsel, and of presenting grievances." Elizabeth Read Foster, *Petitions and the Petition of Right*, 14 J. BRIT. STUD. 21, 27 (1974). With respect to the Petition of Right presented to King Charles in 1628, there is reason to think that some members of Parliament viewed it as declaring the state of existing law, and thereby hoped to bind judges to the same recognition by securing the King's assent. See E.R. Adair, *Historical Revisions: XIV—The Petition of Right*, 5 HISTORY 99, 101 (n.s. 1920); Foster, *supra*, at 43. As noted, the petition followed failed efforts to pass a bill encompassing many of the same terms. See Foster, *supra*, at 26. Further, although parliamentary adoption of the Petition of Right followed some of the standard procedures for passage of a statute (including witnessing the requisite number of readings in both Houses of Parliament), it did not comply with all such procedures and the terms of King Charles' assent were distinct from those that he gave to bills having the force of statutes. See Adair, *supra*, at 102. Accordingly, as explained in the text, it took additional statutory developments for the grievances set forth in the Petition to become binding law. It follows that English historian Henry Hallam's claim that the Petition of Right plainly established that "no freeman could be detained in prison, except upon a criminal charge or conviction, or for a civil debt" gives too much effect to the Petition standing alone. HENRY HALLAM, *THE CONSTITUTIONAL HISTORY OF ENGLAND, FROM THE ACCESSION OF HENRY VII TO THE DEATH OF GEORGE II 475* (William Smith ed., New York, Harper & Bros. 1880) (1827).

101 See generally 2 Parl. Hist. Eng. (1629) cols. 513–25.

102 See Chafetz, *supra* note 98, at 1110–11 (detailing Finch affair (citing 2 Parl. Hist. Eng. (1628) cols. 490–91)). When Parliament reconvened in 1629, the House of Commons resolved that Finch had committed "a breach of Privilege of the house" by failing "to obey the commands of the house." Stroud's Case, 3 Cobbett's St. Tr. (1629) 235, 293–94 (Eng.). Later that year, the Long Parliament ordered reparations to several of the prisoners. See *id.* at 293–94, 310–15.

103 See generally Parl. Hist. Eng. (1628) cols. 488–90.

104 See *Stroud's Case*, 3 Cobbett's St. Tr. at 280–82.

105 See *id.* at 281.

106 See *id.*



command sufficed as legal cause.<sup>107</sup> Finally, the Attorney General levied general accusations of treasonous conduct.<sup>108</sup> In response, Edward Littleton countered on behalf of Selden (with his client's able assistance) that the Petition of Right was both enforceable and had changed the state of the law, making the case very simple. As he put it, "[t]o detain the prisoner by the command of the king singly, is against the Petition of Right."<sup>109</sup> Littleton spoke with some authority on the topic, having played a significant role in the Commons' drafting of the grievances set forth in the Petition. In Littleton's view, the Petition requires that "out of the Return, the substance of the offence ought always to appear . . . [and provide] cause upon which any indictment might be drawn up."<sup>110</sup> Following the levying of formal criminal charges, moreover, Littleton understood the Petition to guarantee that the prisoner "shall have his trial."<sup>111</sup> It followed, Littleton concluded, that if the King had true cause to believe treason was afoot, the proper procedure was to indict the prisoners on charges, not detain them on the sole basis of royal command.<sup>112</sup>

Once again, Selden's attack on the king's authority to detain outside the criminal process would fail, but not without garnering some legal traction. There was drama, as well. One chronicler of the period reports:

When the Court was ready to have delivered their Opinions in this great business, the Prisoners were not brought to the bar, according to the rule of the court. Therefore proclamation was made for the Keepers of the several prisons to bring in their Prisoners; but none of them appeared, except the Marshal of the King's-Bench, who informed the Court, that [a prisoner] . . . in his custody, was removed yesterday, and put in the Tower of London by the king's own warrant: and so it was done with the other prisoners; for each of them was removed out of his prison [and put in the Tower by royal warrant] . . .<sup>113</sup>

Why had the King removed all the prisoners to the Tower? As another writer of the period, Bulstrode Whitelocke (whose father served on King's Bench during the case) recorded:

The Judges were somewhat perplexed about the Habeas Corpus for the Parliament-men, and wrote an humble and stout Letter to the king, "That by their oaths they were to bail the Prisoners; but thought fit, before they did it,

107 *See id.* at 281–82.

108 *See generally id.* at 235–97; John Reeve, *The Arguments in King's Bench in 1629 Concerning the Imprisonment of John Selden and Other Members of the House of Commons*, 25 J. BRIT. STUD. 264, 264–87 (1986). Heath asserted that the Petition did not apply to petitioners' cause, while elsewhere stating that "the king intends to proceed against them in convenient time." *Stroud's Case*, 3 Cobbett's St. Tr. at 284–85.

109 *Stroud's Case*, 3 Cobbett's St. Tr. at 261.

110 *Id.* at 259.

111 *Id.*

112 *See id.* at 261. Littleton added: "[I]f it be truly treason, then they might have returned treason, and then the party was not to be bailed of right, till there should be a failure of prosecution." *Id.*

113 *Id.* at 286.

or published their Opinions therein, to inform his majesty thereof, and humbly to advise him (as had been done by his noble progenitors in like case) to send a direction to his Justices of his bench, to bail the prisoners."<sup>114</sup>

Unsurprisingly, "the king . . . was not pleased with their determination; [and] commanded them not to deliver any opinion in this case without consulting with the rest of the judges; who delayed the business."<sup>115</sup> It was at this point that the King removed all the prisoners not already there to the Tower, communicating to King's Bench that he had done so "because of their insolent carriage at the bar."<sup>116</sup> With no prisoners before them, there was little King's Bench could do:

[N]otwithstanding [the absence of the prisoners], it was prayed by the counsel for the prisoners, that the Court would deliver their Opinion as to the matter in law: but the Court refused to do that, because it was to no purpose; for the Prisoners being absent, they could not be bailed, delivered, or remanded.<sup>117</sup>

In the end, although potentially prepared to change the course of habeas law and restrict executive power, King's Bench never announced its opinion in the case.<sup>118</sup> The prisoners remained in the Tower for the summer until Charles—perhaps eager to avoid his court finally wading into the political thicket—offered the prisoners bail upon the giving of sureties for good behavior. Led by Selden, who now argued his cause personally, the prisoners refused, for they viewed the requirement of a surety as imputing their guilt. Instead, Selden declared: "We demand to be bailed in point of Right."<sup>119</sup> The King was unmoved. From this point, the prisoners' stories diverged: some were charged and convicted of sedition; two remained imprisoned until 1640; Selden languished for two more years in prison, and Eliot famously suffered three severe years in the Tower, where he died and is buried.<sup>120</sup>

Selden's plight instructs that one should not view the Petition as having dramatically altered the course of English law in any immediate fashion.<sup>121</sup>

114 *Id.* at 288 n.† (citing 1 BULSTRODE WHITELOCKE, MEMORIALS OF THE ENGLISH AFFAIRS FROM THE BEGINNING OF THE REIGN OF CHARLES THE FIRST TO THE HAPPY RESTORATION OF KING CHARLES THE SECOND 14 (Oxford Univ. Press 1853) (1682)).

115 WHITELOCKE, *supra* note 114, at 14.

116 *Id.*

117 *Stroud's Case*, 3 Cobbett's St. Tr. at 286.

118 Even this outcome was not clear until right before King's Bench was set to announce its opinion. The King originally promised to deliver Selden and Benjamin Valentine to the court, but he changed his mind "upon more mature deliberation," deciding that all prisoners should share the same plight and that none would be presented to the court "until we have cause . . . to believe they will make a better demonstration of their modesty and civility." *Id.* at 287.

119 *Id.* at 289.

120 See Reeve, *supra* note 108, at 284–86.

121 Paul Halliday's extensive review of writs filed during this period shows that it remained common practice during this period for many subjects to be "imprisoned by

All the same, the Petition clearly influenced the thinking of leading contemporary jurists, introduced rights-based language to the English legal tradition, and set in motion important developments in English statutory law that would come to pass over the next few decades.

### III. BUILDING UP TO 1679: THE MOVEMENT TO RESTRICT THE ROYAL COMMAND AS JUSTIFICATION FOR DETENTION THROUGH HABEAS CORPUS LEGISLATION

It would take five decades before Parliament finally adopted a statute that made real the aspirations of the Petition of Right and constrained the executive's ability to detain outside the criminal process in the Habeas Corpus Act of 1679. Legislative efforts leading up to the 1679 Act go as far back as before the Petition of Right, with Parliament having unsuccessfully attempted to pass habeas legislation in 1621 and 1624. The year 1641, by contrast, finally witnessed some progress. That year, by statute, Parliament "absolutely dissolved" the "Court commonly called the Star Chamber" and all the conciliar courts for having acted beyond their authority and levying punishments not warranted by law.<sup>122</sup> Parliament invoked as authority for its legislation the principles set forth in the Petition of Right and various statutes from the reign of Edward III, including the famous provision tethered to the long-standing treason statute.<sup>123</sup> Significantly, the 1641 law, known as the Star Chamber Act, declared that any person imprisoned by the king, his Council Board, or any member of the Privy Council had the right to challenge his detention through a writ of habeas corpus before the Courts of King's Bench or Common Pleas.<sup>124</sup> The Act called upon those judges to "examine and determine whether the cause of . . . commitment appearing upon the . . . return be just and legall."<sup>125</sup> Finally, to enforce its mandate that the jailor be bound to make a return, the law provided that anyone acting "contrary to the direction and true meaning" of the Act did so at the risk of suffering liability to the prisoner for treble damages.<sup>126</sup>

The Star Chamber Act marked an important development by clearly subjecting executive detention to judicial review and setting forth statutorily-based procedures for certain habeas cases. It is no surprise that the law came during a time when Parliament generally sought to claim for itself powers previously claimed by the king.<sup>127</sup> Indeed, during this period and well

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means other than presentment or indictment, before 1627 and long after." HALLIDAY, *supra* note 9, at 139. All the same, the Petition was part of the story of Charles I's downfall (the king having resisted its terms) and England's temporary conversion to a Commonwealth under the rule of Oliver Cromwell.

122 The Habeas Corpus Act 1641, 16 Car. 1, c. 10 (Eng.).

123 *See id.*

124 *See id.* § 6.

125 *Id.*

126 *Id.*

127 Many have commented on the egregious exercises of arbitrary power by the Star Chamber, acting as an arm of the monarch. *See, e.g.*, F.W. MAITLAND, THE CONSTITUTIONAL

beyond, Parliament continued to claim—and exercise—the power to imprison individuals at its pleasure completely free of judicial scrutiny through attainder and impeachment proceedings.<sup>128</sup>

In the immediate wake of the Star Chamber Act, Charles attempted to arrest six members of Parliament on charges of treason, thereby bringing the power struggles between the monarch and the Houses to a head.<sup>129</sup> The English Civil War followed, ushering in the rule of Oliver Cromwell along with a dramatic rise in the frequency of both executive and parliamentary imprisonment of political enemies without process of any kind.<sup>130</sup> During this period, those in power also increasingly employed the practice of sending prisoners to “legal islands” (whether true islands or the Tower of London) to escape the reach of writs of habeas corpus.<sup>131</sup> While Parliament toyed with adopting habeas legislation to regulate the practice,<sup>132</sup> Cromwell died and more war followed, ushering in the Restoration of the monarchy under Charles II, son of Charles I. His reign would witness the greatest advancements in statutory habeas law, and would at the same time lay the groundwork for a period of extended unrest that would highlight its limitations.

Several events in the 1660s reveal increased parliamentary attention to the unsettled nature of both the reach and scope of protections inherent in

HISTORY OF ENGLAND 263 (1908) (calling the Star Chamber “a court of politicians enforcing a policy, not a court of judges administering the law”); *see also* FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 169 (1960) (same). Another example of parliamentary assertions of power from this period may be found in Parliament’s decision in 1641 to decry the leveling of Ship-Money and the judicial opinions that had upheld the King’s authority to declare an emergency and take the property of subjects for the common defense. For details, *see* D.L. Keir, *The Case of Ship-Money*, 52 L.Q. REV. 546 (1936).

128 *See* HALLIDAY, *supra* note 9, at 226. Halliday tells the story of one noteworthy case in 1643, when the House of Lords arrested Sir Robert Berkeley “while presiding in King’s Bench” and tried him only to conclude that he shall remain imprisoned “during the pleasure of this House.” *Id.* at 220 (quoting 6 HL JOUR. (1643) 214 (Eng.)) (citing W.J. JONES, *POLITICS AND THE BENCH: THE JUDGES AND THE ORIGINS OF THE ENGLISH CIVIL WAR* 137–43 (1971); CONRAD RUSSELL, *PARLIAMENTS AND ENGLISH POLITICS, 1621–1629*, at 103–14 (1979)); *see* G.V. Benson & J.M. Blatchly, *Sir Francis Bacon*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004), <http://www.oxforddnb.com/view/article/991?docPos=1>; Sheila Doyle, *Sir Robert Berkeley*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, <http://www.oxforddnb.com/view/article/2222?docPos=1>; *see also* HALLIDAY, *supra* note 9, at 226–29 (detailing additional stories of parliamentary detention free of judicial review during the 1640s and 1650s).

129 For details, *see* Chafetz, *supra* note 98, at 1112–15.

130 *See generally id.*

131 *See* HALLIDAY, *supra* note 9, at 229–31 (detailing several prominent cases).

132 The Interregnum did witness some notable progress in habeas law, for starting in 1649, the Commonwealth Parliament enacted several ordinances to make available the writ of *habeas corpus cum causa* to poor prisoners jailed for “debt, breach of promise, contract or covenant.” Maxwell Cohen, *Habeas Corpus Cum Causa—The Emergence of the Modern Writ—II*, 18 CAN. B. REV. 172, 175–76 (1940) (quoting 2 HENRY SCOBELL, *ACTS AND ORDINANCES OF PARLIAMENT* 99 (London, H. Hills & J. Field 1658)). As Maxwell Cohen notes, the return of the Stuarts led to the abrogation of this legislation. *See id.* at 178.

the law of habeas corpus. In 1667, for example, the House of Commons began impeachment proceedings against the Earl of Clarendon for his role in sending prisoners to "remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law."<sup>133</sup> In the midst of a disagreement with the House of Lords over whether Clarendon should be imprisoned pending the proceedings, one member of the Commons (who was, no less, a disciple of John Selden) felt no reservation about claiming that parliamentary-ordered detention in cases of suspected treason did not violate Magna Carta because "Parliaments are confined to no rules or precedents, where there is a concern of their own safety."<sup>134</sup> The statement is deeply troubling from a civil liberties perspective to a reader conversant in the idea of independent courts with settled rules of criminal procedure. This goes a long way toward explaining why in time, Americans writing their Constitution, while providing for judicial independence, would react to the practice by prohibiting legislative bills of attainder outright.<sup>135</sup> But during this period, Parliament's claim to act independent of the supervision of the royal courts must be viewed against the backdrop of decades of a parliamentary struggle for privilege and protection from what it viewed as the "oppress[ive] . . . power of the crown."<sup>136</sup>

Indeed, to emphasize the tension between the royal courts and Parliament, in 1667, the Commons charged the Chief Justice of the Court of King's Bench, Sir John Kelyng, with employing "an arbitrary and illegal Power . . . of dangerous Consequences to the Lives and Liberties of the People of *England*" and "vilif[ying] . . . *Magna Charta*, the great Preserver of our Lives, Freedoms, and Property."<sup>137</sup> One of the more specific complaints levied against the Chief Justice focused on Kelyng's action in a recent case in which he prevented "a *Habeas Corpus* and a *Plures* to be issued out, so that the party was constrained to petition the King."<sup>138</sup> John Milward, a member of Parliament

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133 Earl of Clarendon Case (1667) 6 Cobbett's St. Tr. 317, 330–31 (Eng.) (continuing to criticize Clarendon for doing so "to produce precedents for the imprisoning any other of his majesty's subjects in like manner").

134 1 DEBATES OF THE HOUSE OF COMMONS, FROM THE YEAR 1667 TO THE YEAR 1694, at 53 (Anchitell Grey ed., London, D. Henry, R. Cave & J. Emonson 1763) [hereinafter GREY'S DEBATES] (remarks of John Vaughan given Nov. 26, 1667); see also *id.* at 51 ("The discretion of the Parliament ought to be unconfined.") (remarks of Sir John Littleton given Nov. 25, 1667).

135 See U.S. CONST. art. I, § 9.

136 1 BLACKSTONE, *supra* note 1, at \*159 ("Privilege of parliament was principally established, in order to protect it's [sic] members not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the crown."). For more on this period, see generally JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS (2007).

137 9 HC JOUR. (1667) 35–36 (Eng.).

138 1 GREY'S DEBATES, *supra* note 134, at 63 (spelling the Chief Justice's name "Keeling"). After the Chief Justice testified before the Commons, the House declined to proceed in the matter. See *id.* at 64.

who kept a diary during this period, described the Chief Justice's defense of his denial of bail to the habeas petitioner as follows:

"[H]e answered that he did it in a time of danger, and the person whom it was denied was a dangerous person and had formerly been in rebellion, and although the Act of Oblivion had pardoned his former offences, yet he did not think it safe to suffer a person of such ill principles to go at large in a time so full of danger."<sup>139</sup>

Milward was likely describing "Feimer's Case," reported in Sir Edward Northey's Notebooks as having presented King's Bench with a petition for habeas corpus filed by a state prisoner who had already spent five years in the Tower based solely on a counciliar order. As Northey reports, King's Bench was no more welcoming to the petition than it had been to the petition in the case of the Five Knights some forty years earlier. In ordering the prisoner remanded, Northey's Notebooks recount that Kelyng declared: "Likely he is a dangerous person. We know not what times we live in. We must use a justifiable prudence and not strain the strict rules of law to enlarge those persons which will use their liberties to get the kingdom in a flame."<sup>140</sup>

In the immediate wake of these events, Parliament returned its attention in 1668 to habeas corpus legislation directed at constraining the courts in such cases. That year, Lord St. John introduced a bill "to prevent the denying *habeas corpus*."<sup>141</sup> Although the bill died with the proroguing (or adjournment) of Parliament, it seems to have laid the groundwork for the 1679 Act insofar as "[i]t directed that no man should be kept in prison above six months, but should be brought to his trial, and if then he was not legally proceeded against within six months he should have his *habeas corpus* upon the first moving for it."<sup>142</sup> An intervening round of habeas legislation in 1674 intended "to prevent imprisonment beyond [the] sea" and institute regular procedures for habeas proceedings.<sup>143</sup> It too failed, but only after passing the Commons and introducing additional concepts that would eventually make their way into the successful 1679 legislation.<sup>144</sup>

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139 John Milward, Diary Entry (Dec. 13, 1667), in *THE DIARY OF JOHN MILWARD, ESQ.* 169 (Caroline Robbins ed., 1938) [hereinafter *MILWARD'S DIARY*]; see also Diary Entry (Dec. 11, 1667) in *id.* at 163; Diary Entry (Dec. 13, 1667) in *id.* at 166–70 (describing events surrounding the Chief Justice's testimony before the House). John Milward served in Parliament and kept a diary spanning the years 1666–1668. See *id.* at ix.

140 See Northey's Notebook 226, in *Hill Manuscripts at Lincoln's Inn, London* (Pascal term, 19 Charles II, "Feimer's Case"); Nutting, *supra* note 10, at 531 (quoting same).

141 John Milward, Diary Entry (Apr. 11, 1668), in *MILWARD'S DIARY*, *supra* note 139, at 253.

142 Diary Entry (Apr. 24, 1668) in *id.* at 278; see also Diary Entry (Apr. 11, 1668) in *id.* at 253; Diary Entry (May 7, 1668) in *id.* at 299.

143 HALLIDAY, *supra* note 9, at 233.

144 See *id.* at 233–34. As historian Paul Halliday describes, the failure of the 1674–1675 bill likely stemmed from the distraction posed by an extraordinary series of contemporary events that witnessed the Commons imprisoning a group of lawyers in the Tower, the Lords sending writs of habeas corpus to the Tower on the lawyers' behalf, and the Commons ordering the Tower jailor to ignore those writs. See *id.* at 234.

Debates preceding the 1674 bill shed light on the problems that concerned Parliament during this period. As the title of that bill suggested, it was directed in part at the practice of sending prisoners to places where writs could not run.<sup>145</sup> More fundamentally, however, the bill picked up right where Selden and Coke had left off with the Petition of Right. Promoting the legislation, Sir Thomas Clarges complained that there were "[m]ore warrants to the Tower under the king's hand now, than in 200 years before."<sup>146</sup> Clarges posited that he "[w]ould have men committed to legal prisons" and allow "a man [to] know his accuser" rather than continue the current state of affairs, in which "the subject can have no remedy" for imprisonment by royal command.<sup>147</sup> Joining rank with Clarges, Colonel Birch also complained of the common practice "to commit by the King's or some great Minister's warrant," while positing that "it is not reasonable" in such cases that the king "*should be both Party and Judge.*"<sup>148</sup>

Arguing against the legislation, Attorney General North saw "no need of such a Law."<sup>149</sup> Secretary Coventry in turn invoked the security of the state as reason to proceed with caution. "Suppose" he suggested, "[there is] war here, and a correspondency; and suppose the King receives a letter, 'that he is betrayed by his Secretary,' and he imprisons him; if he must have a deliverance, you can never have any intelligence."<sup>150</sup> When the debates resumed a few days later, Coventry asked, if "the King's warrant" will no longer suffice as "cause," what might his secretaries do "in case a man would kill the King"?<sup>151</sup> In other words, Coventry suggested that limiting the king's power to imprison by expanding habeas corpus protections would undermine crucial intelligence-gathering efforts and the ability to prevent attacks on the king himself. Coventry's arguments foreshadowed debates that later followed in 1696 in the wake of an assassination plot,<sup>152</sup> and similar themes are found in the broader debates that continue to this day on the role of the habeas privilege in wartime.<sup>153</sup>

The year 1677 witnessed a renewed effort by the Commons to enact a habeas bill, but once again the Lords failed to pass it before the end of the parliamentary session. Then—finally—circumstances favored the passage of habeas legislation in 1679. Many commentators have cautioned against over-

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145 During the debates, one reads many complaints about the practice of sending prisoners to Tangier and other places to escape judicial writs. See, e.g., 2 GREY'S DEBATES, *supra* note 134, at 364–67.

146 4 Parl. Hist. Eng. (1673–74) col. 662.

147 2 GREY'S DEBATES, *supra* note 134, at 338; see *id.* (continuing: "the Ministers say, 'it is his Majesty's Warrant,' a thing very indecent, and unfit to be done!").

148 *Id.* at 367 (emphasis added).

149 *Id.* at 365.

150 *Id.* at 414.

151 *Id.* at 424.

152 See CLARENCE CORY CRAWFORD, THE SUSPENSION OF THE HABEAS CORPUS ACT IN ENGLAND 51–52, 58 (1906).

153 See, e.g., JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2009).

emphasizing the role of the Habeas Corpus Act of 1679 in the story of the privilege. English historian Henry Hallam, for one, wrote that the Act “introduced no new principle, nor conferred any right upon the subject.”<sup>154</sup> It is true that the Act worked together with the common law writ in many respects. To begin, the Act harnessed the preexisting writ as a vehicle for enforcing its terms.<sup>155</sup> The common law writ, as Blackstone noted, also continued to serve as the vehicle for redress available in “all . . . cases of unjust imprisonment” that were not covered by the Act.<sup>156</sup> Likewise, it is also fair to suggest that a fair number of the procedural aspects of the Act had already been adopted by the courts. (Not unrelated is the fact that the King had replaced Chief Justice Kelyng by this point with Sir Mathew Hale, a judge who demonstrated a tendency to be far more progressive on this score.)<sup>157</sup> As the next Part discusses, however, it would be wrong to view the Act as having changed nothing.

#### IV. A “SECOND *MAGNA CARTA*”: THE ENGLISH HABEAS CORPUS ACT OF 1679

Indeed, the Act accomplished two very important things. First, it imposed substantial limitations on the scope of lawful detention by the executive. Second, because these constraints could only be disregarded by English judges under threat of penalties prescribed in the Act, the Act also dramatically curtailed judicial discretion. In so doing, the privilege associated with the Act came to hold a fixed status that its common law ancestor, which permitted judges far greater discretion in deciding when to grant relief to petitioners, had never known. These significant constraints—unyielding as they were—quickly became apparent to Parliament, leading it

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154 HALLAM, *supra* note 100, at 475. Hallam was not entirely consistent on this point. *See id.* at 475–76 (observing that the Act “cut off the abuses by which the government’s lust of power, . . . had impaired so fundamental a privilege”); *see also* 2 THOMAS BABINGTON MACAULAY, *THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND* 3 (New York, Harper & Bros. 1848) (describing the Act as “the most stringent curb that ever legislation imposed on tyranny”); Cohen, *supra* note 132, at 185, 195 (positing that “[f]ew, if any, Acts of Parliament have achieved the fame of this *Habeas Corpus Act* of 1679” and arguing that the Act improved habeas law). For his part, the English jurist Albert Venn Dicey wrote that the British Habeas Corpus Acts “declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty.” A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 195 (8th ed. 1915).

155 Chief Justice John Marshall later observed that the “statute . . . enforces the common law,” but, as discussed below, even this is not entirely right. *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201–02 (1830).

156 3 BLACKSTONE, *supra* note 1, at \*137 (observing that “all other cases of unjust imprisonment” not covered by the Act were “left to the habeas corpus at common law”).

157 *See* Nutting, *supra* note 10, at 539. Earlier in the seventeenth century—specifically, around the time of the Petition of Right—English judges began to employ the writ as a tool for inquiring into both the cause of initial arrest and the cause of continued detention of those who could claim to fall within the protection of domestic law. *See* HALLIDAY, *supra* note 9, at 48–53.



to invent the concept of suspension in order to displace the Act's terms in times of war.

It was, moreover, the Habeas Corpus Act of 1679 that gave the writ its celebrated status in Blackstone's famous *Commentaries on the Laws of England*, published between 1765 and 1769 and widely read, particularly in the American colonies. Blackstone—building on Coke's *Institutes*—linked the privilege with the Great Charter's guarantee that one may be detained only in accordance with due process.<sup>158</sup> In Blackstone's words, "Magna carta . . . declared, that no man shall be imprisoned contrary to law: the habeas corpus act points him out effectual means . . . to release himself."<sup>159</sup>

Perhaps it is no accident, therefore, that the Act came to play a central role in the development of American habeas corpus jurisprudence, given the profound influence of Blackstone and Coke on American legal development more generally and the timing of Blackstone's publication specifically. Also influential was Henry Care's popular treatise on *English Liberties*, first published in London in the late seventeenth century and then reprinted and widely circulated in the American colonies in the eighteenth century, which called the Act a "*most wholesome Law*" and championed it as a cure for the failings of the common law writ. As Care wrote:

The Writ of *Habeas Corpus* is a Remedy given by the Common Law, for such as were unjustly detained in Custody, to procure their Liberty: But before this Statute was rendered far less useful than it ought to be, partly by the Judges, pretending a Power to grant or deny the said Writ at their Pleasure, in many Cases; and . . . [who] would oft-times alledge, That they could not take Bail, because the Party was a Prisoner of State . . .<sup>160</sup>

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158 See 3 BLACKSTONE, *supra* note 1, at \*132–35; 2 INSTITUTES, *supra* note 54, at 54; see also *Boumediene v. Bush*, 553 U.S. 723, 740 (2008) (citing 9 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 112 (1926) for the proposition that the writ of habeas corpus gradually guaranteed Magna Carta's promise); 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 30 (New York, O. Halstead 1827) (writing of the Act that "[i]ts excellence consists in the easy, prompt, and efficient remedy afforded for all unlawful imprisonment, and personal liberty is not left to rest for its security upon general and abstract declarations of right").

159 4 BLACKSTONE, *supra* note 1, at \*432. As is well known, the writings of Coke and Blackstone represented the most influential sources on English law to which the Founding generation turned in shaping American law. For example, Coke's *Institutes* "were read in the colonies by virtually everyone who undertook the study of law," and Blackstone's *Commentaries* "turned out to be even more influential on American law and lawyers in the formative decades than Coke's *Institutes*." MEADOR, *supra* note 53, at 23, 28; see also Amanda L. Tyler, *Suspension as an Emergency Power*, 118 *YALE L.J.* 600, 614–22 (2009) (surveying sources on this point).

160 HENRY CARE, *ENGLISH LIBERTIES, OR THE FREE-BORN SUBJECT'S INHERITANCE* 185 (W.N. ed., 5th ed., Bos., J. Franklin 1721); see also CHARLES JAMES FOX, *HISTORY OF THE EARLY PART OF THE REIGN OF JAMES THE SECOND* 24–25 (Phila., Abraham Small 1808) ("[T]he Habeas Corpus Act [is] the most important barrier against tyranny, and best framed protection for the liberty of individuals, that has ever existed in any ancient or modern commonwealth.").

In the period leading up to and encompassing the Revolutionary War, moreover, Americans came to appreciate all too well the importance of the Act as central to the story of habeas corpus. The American colonists decried the crown's refusal to grant them the protections of the Habeas Corpus Act in the American colonies; those Americans unlucky enough to be captured and brought to English soil during the war, moreover, were subject to a suspension of the Act's protections.<sup>161</sup>

Before exploring the Act's terms, we must first tackle the longstanding question whether Parliament actually passed the law in the first place. Contemporary lore had it that at the time of a crucial vote in the House of Lords, one of the tellers, Lord Grey, was set to count the Lords favoring the bill as they passed through a doorway to reenter the House.<sup>162</sup> The story goes that Grey decided to test the other teller's attentiveness by counting one generously-sized Lord as ten and then when the joke went unnoticed, he recorded the number, thereby securing the requisite votes in favor of the bill.<sup>163</sup> In support of the story, one writer points to inconsistencies between the vote numbers and the reported attendance in the Lords' Chamber that day.<sup>164</sup>

It is a great story, but as Professor Helen Nutting once observed, it is also "highly improbable."<sup>165</sup> After all, James II was soon to take the throne and designate the Habeas Corpus Act as one of two laws that he wished to see repealed—surely he would "have taken advantage of a real miscount to overturn the act."<sup>166</sup> In addition, the attendance lists of the period were "notoriously inaccurate,"<sup>167</sup> the Lords had passed earlier versions of the bill without incident, and the Lords had the final say on the terms of the bill as it emerged from the Conference with the House.<sup>168</sup>

This being said, the statute came during a period of great unrest in English history. Many in Parliament were highly critical of Charles II's repeated proroguing of the Houses to render impossible the passage of legislation with which he did not agree.<sup>169</sup> After speaking against the practice, Francis Jenks found himself sent to the Gatehouse by the Privy Council.<sup>170</sup>

161 See generally Tyler, *supra* note 29, at 647.

162 See J.E. POWELL, GREAT PARLIAMENTARY OCCASIONS 63–65 (Queen Anne Press, 1960). Powell relies on the account of the events given by Gilbert Burnet in his *History of His Own Times*, written shortly after passage of the Act. See *id.* at 65.

163 *Id.*

164 *Id.*

165 Nutting, *supra* note 10, at 527 n.1.

166 *Id.*

167 *Id.*; see also Godfrey Davies & Edith L. Klotz, *The Habeas Corpus Act of 1679 in the House of Lords*, 3 HUNTINGTON LIBR. Q. 469, 469–70 (1940) (highlighting numerous mistakes in the attendance lists for the House of Lords on the relevant date of the vote).

168 See 4 Parl. Hist. Eng. (1679) cols. 1148–49 (recording the evolution of the bill to final form). The Lords passed an earlier version of the bill on May 2, prior to the storied vote of May 27. See 13 HL JOUR. (1679) 549 (Eng.).

169 See Earl of Shaftsbury Case, 6 Cobbett's St. Tr. 1269, 1297–98 (Eng.).

170 See J.L. DE LOLME, THE CONSTITUTION OF ENGLAND, OR AN ACCOUNT OF THE ENGLISH GOVERNMENT 362 (London, T. Spilsbury 1775).

When, in turn, the Earl of Shaftsbury defended Jenks and argued that pro-roguing Parliament for longer than a year was unlawful, the Lords sent him to the Tower of London. He languished in the Tower for a year before finally agreeing to apologize to the King and Lords.<sup>171</sup> Shaftsbury's failure to secure relief in the courts for his own detention highlights the reality of the period that control over the law of detention was much more about power than individual liberty. Specifically, when Shaftsbury sought relief in the form of a writ of habeas corpus from King's Bench, the Justices declared that the House of Lords was superior to them and therefore its orders were not subject to review before their court.<sup>172</sup>

Meanwhile, the question whether James—Duke of York, brother of Charles II, and a Catholic convert—would succeed to the throne on Charles's death controlled most political affairs. Concerns over his ascendancy had already fueled legislation barring Catholics from membership in the Houses of Parliament and generating witch-hunts for supporters of the so-called "Popish Plot," which allegedly sought to usher in Catholic rule by speeding Charles II's demise.<sup>173</sup> One finds interspersed with the Commons' debates over the habeas bill the introduction of bills to discover and convict "Popish Recusants"<sup>174</sup> along with votes in favor of declaring the Duke of York a "Papist" who "has given the greatest Countenance and Encouragement to the present Conspiracies and Designs of the Papists against the King."<sup>175</sup> Likewise one finds records of the ongoing impeachment trials of the "Five Popish Lords" who had been ordered to the Tower of London by the very same Earl of Shaftsbury after being deemed guilty by the House of treason against the state.<sup>176</sup> Professor Nutting's work aptly highlights the irony that the Habeas Corpus Act came at a time "when men seemingly were more interested in getting their fellow Englishmen into jail than out of it."<sup>177</sup>

Who drafted the bill remains the subject of some dispute. According to some historians, it may have been Attorney General Sir William Jones.<sup>178</sup>

171 See *Earl of Shaftsbury Case*, 6 Cobbett's St. Tr. at 1298–1302. For extensive details on Shaftsbury's case, see *id.* at 1269–310. Shaftsbury was one of three House members sent to the Tower by the Lords. Upon learning of their fate, the Earl of Salisbury and Shaftsbury both requested that they be permitted to bring their cooks, "which the king resented highly, as carrying in it an insinuation of the worst sort." *Id.* at 1272 n.†. Shaftsbury apologized by calling his earlier remarks "ill-advised" and "humbly beg[ged] the pardon" of the King and the House of Lords. *Id.* at 1298.

172 See *id.* at 1272 n.†.

173 See generally JOHN POLLOCK, *THE POPISH PLOT: A STUDY IN THE HISTORY OF THE REIGN OF CHARLES II* (London, Duckworth & Co. 1903).

174 9 HC JOUR. (1647) 618 (Eng.).

175 *Id.* at 616.

176 See *Five Popish Lords Case* (1678) 7 Cobbett's St. Tr. 1217, 1218–576 (Eng.); see also 9 HC JOUR. (1647) 584, 617 (Eng.) (ordering a committee to inspect the journals of the House of Lords covering the proceedings regarding the impeached Lords).

177 Nutting, *supra* note 10, at 527.

178 See HALLIDAY, *supra* note 9, at 238–39; Nutting, *supra* note 10, at 540. Relying on the Lords' committee book, Nutting identifies Lord North as having promoted most of the Lords' amendments to the bill. See *id.*

Many helped move the bill along the Commons, including Sir Thomas Clarges who had previously promoted the 1674 bill. Shaftsbury, an exclusionist who openly sought to block the Duke of York from inheriting the throne, is often credited with having shepherded the bill through the Lords. In so doing, he had help from various colleagues, including Baron Holles, who years earlier had secured passage of the Star Chamber Act in 1641.<sup>179</sup> Once introduced, the bill quickly moved through the Commons but stalled in the face of numerous amendments at the hands of the Lords, which created the need for more than one conference between the chambers to settle terms. The bill passed when the Commons accepted most of the Lords' amendments, probably spurred on by the fact that the King was on his way to the House of Lords to give his assent to all outstanding bills, including the Habeas Corpus Act, before calling the parliamentary session to an end.<sup>180</sup>

Given that the legislation was written to curtail royal powers and promoted by those who would curtail his line, it is curious that Charles II gave his assent to the Act at all. English Whig historian Thomas Macaulay wrote that although the King did not favor the legislation, "he was about to appeal from his Parliament to his people on the question of the succession, and he could not venture, at so critical a moment, to reject a bill which was in the highest degree popular."<sup>181</sup> Others have suggested that the King's assent came in part because many of the Act's terms were no longer controversial in light of evolving judicial practices and that by assenting to the law, the King hoped to secure leniency from Parliament in its treatment of his close adviser Lord Danby, whom Parliament had recently sent to the Tower.<sup>182</sup>

The Houses entitled the legislation "An Act for the better securing the Liberty of the Subject, and for preventing of Imprisonments beyond the Seas" and declared that it was intended to address "great delays" by jailers "in making Returns to Writts of Habeas Corpus to them directed" as well as other abuses undertaken "to avoid . . . yielding Obedience to such Writts."<sup>183</sup> By its terms, the Act sought to remedy the fact that "many of the Kings Subjects have beene and hereafter may be long detained in Prison, in such Cases where by Law they are baylable." Toward that end, the Act declared that it was "[f]or the prevention whereof and the more speedy Releife of all persons imprisoned for any such criminall or supposed criminall Matters."<sup>184</sup> In defining its scope as such, the Act did not speak to cases of civil detention, but limited its reach to those cases involving "*all persons imprisoned for any such criminall or supposed criminall Matters*"—a category that very soon would come

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179 See HALLIDAY, *supra* note 9, at 239. As Halliday notes, Holles had been imprisoned by the Privy Council earlier in his life. See *id.* (citing K.H.D. HALEY, *THE FIRST EARL OF SHAFTESBURY* 359–60 (1968)).

180 13 HL JOUR. (1679) 595 (Eng.).

181 1 MACAULAY, *supra* note 154, at 232.

182 See, e.g., Nutting, *supra* note 10, at 542.

183 Habeas Corpus Act 1679, 31 Car. 2, c. 2 (Eng.), *reprinted in* 3 *THE FOUNDERS' CONSTITUTION* 310 (Philip B. Kurland & Ralph Lerner eds., 1987).

184 *Id.*

to be understood as embracing not just ordinary criminals, but domestic enemies of the state as well.<sup>185</sup>

In an attempt to codify regular procedures for such cases, section two of the Act set forth how courts and jailers should respond upon the filing of a petition for a writ of habeas corpus. The law provided that the jailer "shall within Three dayes after the Service" of a writ "make Returne of such Writt" and bring "the Body of the Partie soe committed or restrained" before the relevant court while "certify[ing] the true causes of his Detainer or Imprisonment."<sup>186</sup> Section three of the Act set forth procedures for obtaining writs during the vacation periods of the courts,<sup>187</sup> a response to recent events, including the Francis Jenkes case in 1676, in which vacation writs had been denied even where bail likely should have been granted.<sup>188</sup> Section five of the Act, building on the model established in the Star Chamber Act, set forth escalating penalties to be paid to the prisoner, in cases where jailers violated the obligation to make a return and produce the prisoner.<sup>189</sup> Sections six and nine curtailed the common abuses of re-committing discharged prisoners for the same offense and moving prisoners around to escape a court's jurisdiction.<sup>190</sup> Section eleven clarified that the writ would run to various islands and "privileged Places" within the Kingdom notwithstanding the judicial precedents that had previously deemed these places the equivalent of legal islands.<sup>191</sup> To reach yet further abusive practices by the king and his ministers, section twelve declared that the imprisonment of any "Subject of this Realme" in Scotland, Ireland, Jersey, Guernsey, Tangier (a common destination for prisoners condemned by the Earl of Clarendon), or "Parts Garisons Islands or Places beyond the Seas . . . within or without the Dominions of His Majestie," is "hereby enacted and adjudged to be illegal."<sup>192</sup>

Many of these provisions are most significant for providing a measure of certainty as to habeas procedures and also the availability of the writ—whether in vacation term or from privileged places, for example.<sup>193</sup> But the

185 *Id.* (emphasis added). Section 8 of the Act specifically disclaimed coverage of civil causes. *See id.* § 8.

186 *Id.* § 2.

187 *Id.* § 3.

188 Jenkes Case (1676) 6 Cobbett's St. Tr. 1189, 1190, 1196, 1207 (Eng.). The Council had committed Jenkes for contempt but the Chief Justice of King's Bench and the Lord Chancellor both refused to grant his writ because it came during vacation. For a full description of the case against Jenkes, see *id.* at 1190–1208.

189 *See Habeas Corpus Act 1679* § 5.

190 *See id.* §§ 6, 9.

191 *Id.* § 11.

192 *Id.* § 12. Section four provided that one who failed to petition for habeas corpus for two terms could not obtain habeas corpus during vacation time. *See id.* § 4.

193 Paul Halliday's work shows that vacation writs were sometimes issued before the Act, see HALLIDAY, *supra* note 9, at 55–56, but practice was far from uniform and such writs were denied in several high profile cases in the decade leading up to enactment of the English Act (including the Jenkes case, discussed earlier), see *id.* at 236–37, 239. Halliday's work documents a similar story with respect to the Privy Council's practice of sending prisoners

seventh section of the Act did much more than this. That section both connected the writ of habeas corpus with the criminal process and placed specific limits on how and when the executive lawfully could detain the most serious of criminals—even alleged traitors. By its terms, the section covered “any person or persons . . . committed for High Treason or Fellony.”<sup>194</sup> Where a prisoner committed on this basis was not indicted within two court terms (a period typically spanning only three-to-six months), the Act provided that the justices of King’s Bench and other criminal courts “are hereby *required* . . . to sett at Liberty the Prisoner upon Baile.”<sup>195</sup> Going further, section seven also declared that “if any person or persons committed as aforesaid . . . shall not be indicted and tryed the second Terme . . . or upon his Tryall shall be acquitted he *shall be discharged* from his Imprisonment.”<sup>196</sup> In other words, the Act promised the most dangerous of suspects the remedy of discharge where they were not timely tried and convicted. Referring to this section, Chief Justice John Holt would write fifteen years after its passage that “the design of the Act was to prevent a man’s lying under accusation of treason, &c. above two terms.”<sup>197</sup>

Going back to the reign of Edward III, high treason had long included, among other things, plotting the demise of the king or his line, levying war against the king, and adhering or providing aid to the king’s enemies.<sup>198</sup> As Blackstone elaborated in his *Commentaries*, treason encompassed a whole range of acts that today we would view as taking up arms against the government or the equivalent of terrorism.<sup>199</sup> It followed that high treason not only encompassed aiding “foreign powers with whom we are at open war,” but also

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to legal islands, detailing one case in which the passage of the Act made all the difference. *See id.* at 240; *see also id.* at 231 (detailing additional cases).

194 Habeas Corpus Act 1679 § 7.

195 *Id.* (emphasis added).

196 *Id.* (emphasis added). These judicial mandates came under threat of financial penalty. *See id.* § 10. Note that over time the relevant language from section 7 moved to section 6 of the Act. Nevertheless, all references here reflect the section’s original placement. Judges initially often evaded the Act’s protections by setting excessive bail; for that reason, the Declaration of Rights in 1689 outlawed the practice. *See* Declaration of Rights 1689, 1 W. & M., sess. 2, c. 2, § 1 (Eng.).

197 Crosby’s Case (1694) 88 Eng. Rep. 1167, 1168; *see also Ex parte Beeching* (1825) 107 Eng. Rep. 1010, 1010 (Abbott, C.J.) (“The object of the Habeas Corpus Act was to provide against delays in bringing persons to trial, who were committed for criminal matters.” (citations omitted)). Note that “[t]hose charged with misdemeanours were not protected [by this section], probably because they were considered to have a right to be bailed pending trial.” JUDITH FARBEY & R.J. SHARPE, *THE LAW OF HABEAS CORPUS* 160 (3d ed. 2011).

198 *See* The Treason Act 1351, 25 Edw. 3, stat. 5, c. 2 (Eng.) (establishing the law of high treason); *see also* Clarence C. Crawford, *The Writ of Habeas Corpus*, 42 AM. L. REV. 481, 490 n.30 (1908) (“Edw. III., St. 5, C. 2 . . . laid the basis for the law of high treason for five hundred years.”). “[A]ttempt[s] w[ere] made to fill in the more important gaps” in the original treason statute “by additional legislation and by judicial interpretation,” both of which “led to much abuse.” *Id.* In such cases, Parliament often redefined the crime of high treason itself. *Id.*

199 4 BLACKSTONE, *supra* note 1, at \*83.

providing assistance to "foreign pirates or robbers, who may happen to invade our coasts, without any open hostilities between their nation and our own"<sup>200</sup>—that is, aiding non-state actors hostile to the monarch. Blackstone also instructed that high treason "most indisputably" included adhering to or aiding "fellow-subjects in actual rebellion at home."<sup>201</sup> The common aspects of treason included "giving [the enemy] intelligence, . . . sending them provisions, . . . selling them arms, . . . treacherously surrendering a fortress, or the like."<sup>202</sup> Each of these acts was most likely to occur in time of war, yet the Habeas Corpus Act did not include any exception for wartime. For this very reason, Charles II's successor, his brother James, viewed the Act as "a great misfortune," lamenting that "it oblige[d] the Crown to keep a greater force on foot th[an] it needed otherwise to preserve the government" and deal with the "disaffected, turbulent, and unquiet spirits" and "their wicked designs."<sup>203</sup>

It was because the crime of high treason was so serious—it was generally a capital offense with no opportunity for bail—that Blackstone counseled that its sanctions must be safeguarded from abuse by the government.<sup>204</sup> Thus, Blackstone wrote that high treason must be "the most precisely ascertained" of crimes, for if it "be indeterminate, this alone . . . is sufficient to make any government degenerate into arbitrary power."<sup>205</sup> He likewise cautioned that the "opportunity to create abundance of constructive treasons" was equally dangerous to liberty.<sup>206</sup> Chief Justice Mathew Hale also cautioned against deviating from the settled legal framework for punishing treason:

How dangerous it is by construction and analogy to make treasons, where the letter of the law has not done it: for such a method admits of no limits or bounds, but runs as far as the wit and invention of accusers, and the odiousness and detestation of persons accused will carry men.<sup>207</sup>

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200 *Id.*

201 *Id.* Misprision of treason was also a serious crime during this period. It encompassed, among other things, concealing knowledge of treasonous plots (something thought to constitute aiding and abetting). *See id.* at \*120. For more on the crime of high treason during the pre-ratification period, see MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION FOR THE TRIAL OF THE REBELS IN THE YEAR 1746, IN THE COUNTY OF SURRY AND OF OTHER CROWN CASES 183–251 (London, W. Clarke & Sons 1809).

202 4 BLACKSTONE, *supra* note 1, at \*82.

203 ANDREW AMOS, THE ENGLISH CONSTITUTION IN THE REIGN OF KING CHARLES THE SECOND 203 (London, V. & R. Stevens & G.S. Norton 1857) (quoting James II, *For My Son, the Prince of Wales*, in 2 THE LIFE OF JAMES THE SECOND 621 (J.S. Clarke ed., London, Longman, Hurst, Rees, Orme & Brown 1816) (1692)).

204 *See* 4 BLACKSTONE, *supra* note 1, at \*92.

205 *Id.* at \*75.

206 *See also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1791, at 667–68 (Cambridge, Mass., Brown, Hilliard, Gray & Co. 1833) (discussing the dangers of multiplying types of treason).

207 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE [THE HISTORY OF THE PLEAS OF THE CROWN] 86–87 (London, E. & R. Nutt & R. Gosling 1736).

Recognizing the importance of safeguards in treason cases, Parliament enacted the Treason Act in 1696. Following on the heels of the Habeas Corpus Act, the legislation instituted additional protections for those charged with the crime of high treason.<sup>208</sup> These included the requirement of two witnesses to an overt act,<sup>209</sup> a requirement later imported into the United States Constitution's Treason Clause,<sup>210</sup> and other protections that had not been previously granted to those accused of common law crimes, including the rights to counsel and to compel witnesses for one's defense.<sup>211</sup> In so doing, the Act marked a major step in inaugurating a revolution in criminal procedure.

Viewing all of these developments together, it was no stretch for Henry Care's popular treatise on English law to point to Magna Carta, the Habeas Corpus Act, and the 1696 treason statute as the great protectors of English liberties.<sup>212</sup> It is also true, however, that much of this legal framework was the product not so much of a deep concern for civil liberties *per se*, but represented instead the product of a concerted effort by Parliament to protect its privileges and wrestle control of such matters from the monarch.<sup>213</sup>

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Thus, at long last Selden and Coke's aspiration to constrain the executive's power to detain outside the criminal process finally came to be. No longer did the king and his ministers enjoy free reign to detain without proceeding toward criminal trial, nor did the royal courts enjoy any longer discretion to disregard these same limitations on executive detention when ruling on habeas corpus petitions. Instead, by the terms of the Habeas Corpus Act, Parliament claimed for itself control over the relevant legal framework for the detention of prisoners. The constraints imposed by that Act, while ultimately central to the story of individual liberty in the American constitutional tradition, must be viewed at its origins as part of the rise of parliamentary supremacy, including Parliament's assertion of much greater control over matters of war and foreign affairs during this period.<sup>214</sup> No longer would the royal command suffice as justification for operating outside

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208 See The Treason Act 1695, 7 & 8 Will. 3, c. 3, § 1 (Eng.).

209 See *id.* § 2 (“[N]oe Person or Persons whatsoever shall bee indicted tryed or attainted of High Treason . . . [without] the Oaths and Testimony of Two lawfull Witnesses either both of them to the same Overtact or one of them to one and another of them to another Overtact. . .”).

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

211 See 7 & 8 Will. 3, c. 3; see also JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 67–105 (A.W. Brian Simpson ed., 2003) (detailing background of the Act and observing that it launched a revolution in criminal procedure).

212 See CARE, *supra* note 160, at 185.

213 As Hayek has written, “[i]ndividual liberty in modern times can hardly be traced back farther than the England of the seventeenth century. It appeared first, as it probably always does, as a by-product of a struggle for power rather than as the result of deliberate aim.” HAYEK, *supra* note 127, at 162 (footnote omitted).

214 On this development, see generally Turner, *supra* note 40.



the constraints of parliamentary law. In time, Scotland and Ireland adopted the same habeas protections in their own acts—Scotland in 1701 and Ireland in 1782<sup>215</sup>—while attempts to invoke the protections of the Habeas Corpus Act by the American colonists were repeatedly frustrated by the crown.<sup>216</sup>

For American colonists studying English law during this period, the inability to claim the benefits of the Habeas Corpus Act and related legal protections such as trial by jury and the various protections of the Trial of Treasons Act—all of which the crown denied them—would foster a deep resentment of English rule. Indeed, in the period leading up to the Revolutionary War, these same Americans were steeped in Henry Care's treatise on *English Liberties* and Blackstone's recently published *Commentaries*, which labeled the Habeas Corpus Act a "second *magna carta*"<sup>217</sup> and celebrated its promise that "no man is to be arrested, unless charged with such a crime, as will at least justify holding him to bail, when taken."<sup>218</sup> Blackstone also rejected general warrants "to apprehend all persons suspected, without naming or particularly describing any person in special" as "illegal and void."<sup>219</sup> Whether so-called Whig History or not, Care and Blackstone's work dominated the popular and political discourse surrounding habeas corpus with the effect of making the Habeas Corpus Act the central component of the story.

But the American experience did not know many of the rights and protections about which Care and Blackstone wrote. In the period leading up to the Revolutionary War, American colonists suffered the increasing issuance of general search warrants (called writs of assistance) and, James Otis's eloquent protests notwithstanding, were repeatedly told by the crown that they did not enjoy the same rights as their English counterparts across the Atlan-

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215 See The Criminal Procedure Act 1701, 12 Will. 3, c. 6 (Scot.) (declaring that "the imprisonment of persons without expressing the reasons and delaying to put them to trial is contrary to law"); Habeas Corpus Act 1781, 21 & 22 Geo. 3, c. 11, § XVI (Ir.) (importing much of the language of the 1679 Habeas Corpus Act verbatim, with this notable addition: a provision allowing the Irish Council to suspend the act "during such time only as there shall be an actual invasion or rebellion in this kingdom or Great Britain").

216 See Tyler, *supra* note 29, at 645–48 (providing details); see also TYLER, *supra* note 23 (same).

217 1 BLACKSTONE, *supra* note 1, at \*133.

218 4 *id.* at \*286; see also 1 *id.* at \*133 ("[I]t is unreasonable to send a prisoner [to jail], and not to signify withal the crimes alleged against him."). Here, Blackstone was paraphrasing Acts 25:27, in which a Roman magistrate explained to St. Paul: "[I]t seemeth to me unreasonable to send a prisoner, and not withal to signify the crimes *laid* against him." Acts 25:27 (King James). Coke also drew on this passage in his speeches. 2 Parl. Hist. Eng. (1628) cols. 266–71, *reprinted in* 3 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 1243–50 (Steve Sheppard ed., 2003) (speech given by Coke on April 3, 1628, in Conference with the Lords); see also HALLIDAY, *supra* note 9, at 1 (noting same).

219 4 BLACKSTONE, *supra* note 1, at \*288; see also EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 176 (6th ed. London, W. Rawlins 1681) (1644) (stating that justices of the peace could not issue warrants to arrest on suspicion alone); 2 THOMAS ERSKINE MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND 252 (Bos., Crosby & Nichols 1864) (writing that "[t]he illegality of general warrants" was settled by this time).

tic. There, Blackstone instructed, the Habeas Corpus Act had made “the remedy . . . now complete for *removing* the injury of unjust and illegal confinement,” and being “apprehended upon suspicion” alone was no longer legal anywhere the Act remained in force.<sup>220</sup> It would take a revolution for these principles to take hold in America.

#### V. AN IMPERFECT SAFEGUARD

Even where the Act did apply, its limitations quickly came to light. For example, following its passage, the practice of moving prisoners to so-called “legal islands” (even those specifically mentioned in the Act) continued. In 1683, when the government learned of the so-called Rye House Plot to murder Charles II and his brother James, then the Duke of York, it arrested a number of alleged conspirators, including twelve Scotsmen.<sup>221</sup> Despite the fact that these prisoners had been arrested in England on suspicion of treason committed there, the Scots Privy Council, presided over by the King himself, ordered the prisoners dispatched to Scotland.<sup>222</sup> Upon arrival, some were tried, but several others were never tried and instead tortured repeatedly for intelligence.<sup>223</sup> The decision to deport the prisoners appears to have been driven entirely by the absence of the governance of the Habeas Corpus Act in Scotland at that time and therefore highlights the geographic limitations of the Act that would become increasingly important in the next century.<sup>224</sup>

It is also the case that during this period the exceptions to the Act’s coverage—even where it applied—proved substantial. Consider the story of Charles II’s illegitimate son, the Duke of Monmouth, who had been exiled from England in 1683 in the wake of the failed Rye House Plot, in which he had played a role. In the immediate wake of the death of the King and Charles’s brother’s crowning as James II two years later, Monmouth returned to England determined to foster rebellion and wrestle the throne from his uncle. After Monmouth was defeated in battle and captured, James ordered him sent to the Tower of London. Monmouth never enjoyed a criminal trial, but instead within days of his capture, Parliament passed a bill of attainder in which it found him summarily guilty of treason and ordered his execution.<sup>225</sup>

220 3 BLACKSTONE, *supra* note 1, at \*137–38 (emphasis added).

221 See W.B. Gray, *The Scottish Deportees of 1683 and the Habeas Corpus Act*, 35 JURID. REV. 353, 354–55 (1923).

222 See *id.* at 355–56.

223 See *id.* at 357–58.

224 See *id.* at 360. For more on the geographic limitations of the Habeas Corpus Act during the American Revolutionary War, see generally Tyler, *supra* note 29.

225 See An Act to Attaint James Duke of Monmouth of High Treason 1685, 1 Jac. II, c. 2 (Eng.) (“Whereas James Duke of Monmouth has in an hostile Manner Invaded this Kingdome and is now in open Rebellion Levying Warr against the King contrary to the Duty of his Allegiance, Bee it enacted . . . That the said James Duke of Monmouth Stand and be Convicted and Attainted of High-Treason and that he suffer Paines of Death and Incurr all Forfeitures as a Traitor Convicted and Attainted of High Treason.”).

His gruesome public beheading on Tower Hill followed in due course, and scores of his followers were executed or sold into slavery without trial. Parliament would continue to wield its potent and essentially unchecked attainder power for some time to come.<sup>226</sup>

With the flight of James II from the throne only a handful of years later and in response to attempts by those loyal to him to retake the throne for his line, Parliament would create yet another means of side-stepping the mandates of the Habeas Corpus Act. Ironically, in so doing, Parliament would both confirm and underscore the potency of Act's protections where they could not be so evaded.

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Indeed, it is because the Habeas Corpus Act did not include any exception for wartime that Parliament soon created the concept of suspension, which became inextricably intertwined with the Act and its seventh section. The first suspension came just ten years after adoption of the Habeas Corpus Act in the immediate wake of the Glorious Revolution. While fighting to retain control of the throne that he had just assumed, William asked Parliament in 1689 to suspend the Habeas Corpus Act in order to counter the Jacobite supporters of the dethroned James Stuart who sought to return his line to power.<sup>227</sup> In response to the many threats posed by the Jacobites, William presented Parliament with a request that it suspend the seventh section of the Habeas Corpus Act for the express purpose of authorizing him to arrest solely on *suspicion*—that is, without formal charges—of treasonous activity. His emissary, Richard Hampden, conveyed the request to Parliament by stating that the Crown sought the power to confine persons “committed on suspicion of Treason only,” lest they be “deliver[ed] . . . by *Habeas Corpus*.”<sup>228</sup> As Paul Halliday has noted, it is remarkable that Hampden delivered the King’s message and it shows just “how much political circumstances

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226 One year after the passage of the Habeas Corpus Act, a member of Parliament explained this exception this way:

I have perused the Habeas Corpus bill, and do find, that there is not any thing in it that doth reach, or can be intended to reach to any commitment made by either house of parliament during session. The preamble of the Act, and all the parts of it, do confine the extent of the Act to casesailable, and directs such courses for the execution of the act, as cannot be understood should relate to any commitment made by either house. This house is a court of itself, and part of the highest court in the nation, superior to those in Westminster-hall . . . .

4 Parl. Hist. Eng. (1679) cols. 1263–64 (remarks of Sir William Jones) (addressing a motion to admit bail). Indeed, by this time, it was fairly well-settled that the courts could not review orders of the houses of Parliament. See CHAFETZ, *supra* note 137, at 28, 32–34. The common defense for parliamentary independence of the royal courts predicated the need for such independence on the Commons being “intrusted with the liberty of the people.” *Id.* at 34 (quoting R. v. Paty (1704) 92 Eng. Rep. 232, 233).

227 For discussion of this suspension and its extensions, see Tyler, *supra* note 31, at 934–51.

228 9 GREY’S DEBATES, *supra* note 134, at 129–30 (remarks of Richard Hampden).

had changed” in the prior decade, for Hampden had been “an active supporter” of the Habeas Corpus Act.<sup>229</sup> Even more remarkable about Hampden’s efforts to expand executive power to detain is the fact that he was the great-nephew of one of the Five Knights imprisoned for failing to pay the King’s forced loans some sixty years earlier, Sir Edmund Hampden.<sup>230</sup>

In the decades of wartime and instability that followed removal of the Stuart line from the throne, Parliament enacted several more suspensions to address ongoing war with France and the Jacobite revolts. All of these suspensions by their terms empowered the Crown to arrest those believed to pose a danger to the state on suspicion alone.<sup>231</sup> In each case, Parliament suspended the Act’s protections in order to free the executive from having to comply with its stringent requirements and in so doing expand the executive’s authority to arrest and detain in the name of national security.<sup>232</sup> Suspension was not viewed, however, as a necessary predicate to hold persons classified as prisoners of war, who by definition were treated as falling outside the protection of domestic English law and who instead looked to the Law of Nations for protection. (As Hale explained, for this reason, such persons could not claim the protections of the Habeas Corpus Act.<sup>233</sup>) This very same model governed the important suspension legislation that Parliament adopted during the American Revolutionary War, which it allowed to lapse once independence became a foregone conclusion and it declared American prisoners in England at that point to be prisoners of war.<sup>234</sup> In time, the same model would be imported into early American habeas jurisprudence.

229 HALLIDAY, *supra* note 9, at 247.

230 See JOHN PHILIPOT, *THE VISITATION OF THE COUNTY OF BUCKINGHAM MADE IN 1634, 70–71* (W. Harry Rylands ed., 1909) (presenting a genealogical tree of the Hampdens of Buckinghamshire); *THE HISTORY OF PARLIAMENT: THE HOUSE OF COMMONS 1604–1629* (Andrew Thrush & John P. Ferris eds., 2010) (entry on John Hampden) <http://www.historyofparliamentonline.org/volume/1604-1629/member/hampden-john-1595-1643>; *THE HISTORY OF PARLIAMENT: THE HOUSE OF COMMONS 1660–1690* (B.D. Henning ed., 1983) (entry on Richard Hampden), <http://www.historyofparliamentonline.org/volume/1660-1690/member/hampden-richard-1631-95>.

231 For details on the English suspensions of the seventeenth and eighteenth centuries, see Tyler, *supra* note 31, at 934–51; see also TYLER, *supra* note 23.

232 See Tyler, *supra* note 31, at 934–38 (discussing how these suspensions expanded executive power).

233 See I HALE, *supra* note 207, at 159 (“[T]hose that raise war against the king may be of two kinds, subjects or foreigners, the former are not properly enemies but rebels or traitors . . .”). For greater discussion of how this distinction applied during the Jacobite wars, see HALLIDAY, *supra* note 9, at 170–73.

234 For details on this period and suspension, see generally Tyler, *supra* note 29, and Tyler, *supra* note 31, at 969–75. As I explored in this earlier work, once Parliament recognized that American prisoners held in England during the Revolutionary War were soldiers fighting for a newly independent and foreign sovereign, it allowed the suspension legalizing their detention to lapse and declared them to be prisoners of war whose relationship with England would be governed by the Law of Nations. See Tyler, *supra* note 29, at 691–93 (citing *An Act for the Better Detaining, and More Easy Exchange, of American Prisoners Brought into Great Britain 1782*, 22 Geo. 3, c. 10 (Gr. Brit.)).

VI. THE INFLUENCE OF THE ENGLISH HABEAS CORPUS ACT ON EARLY AMERICAN LAW

From the beginning of English settlement in America, the colonists claimed to possess "all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England."<sup>235</sup> But as I have detailed in other work, this claim rarely equated with the reality on the ground. Despite attempts on the part of several colonies to adopt or invoke the protections of the Habeas Corpus Act as their own, the king and his ministers consistently denied colonists outside England the "privilege" of the benefits of the Act. To give one prominent example, in 1684, New York submitted its Charter of Liberties and Privileges to the Committee of Trade and Plantations (part of the Privy Council) for approval, having secured the approval of the then-Duke of York. In the charter, the New York colonists claimed the general right to "be governed by and according to the Laws of England."<sup>236</sup> Within a month of inheriting the throne from his brother, the Duke of York—now crowned James II—vetoed the charter on the stated basis that "[t]his Priviledge is not granted to any of His Ma<sup>ty</sup>s Plantations where the Act of Habeas Corpus and all such other Bills do not take Place."<sup>237</sup> Similarly, in 1692, the Massachusetts colony attempted to pass a Habeas Corpus Act that essentially copied the 1679 English Act. The Privy Council disallowed this attempt as well, decreeing in 1695:

[W]hereas . . . the writt of *Habeas Corpus* is required to be granted in like manner as is appointed by the Statute 31, Car. II. in England, which priviledge has not as yet been granted in any of His Ma<sup>ty</sup>s Plantations, It was not thought fitt in His Maj<sup>ty</sup>s absence that the said Act should be continued in force and therefore the same hath been repealed.<sup>238</sup>

To the extent that any doubt remained on this score, Massachusetts's colonial governor declared in 1699 that the "Habeas corpus act [is] not to be in force in the colonies."<sup>239</sup> Other colonies experienced similar rebukes from the crown on this score.<sup>240</sup>

235 Sullivan's Draught (Oct. 14, 1774), in 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 63, 68 (Worthington Chauncey Ford ed., 1904), [hereinafter JOURNALS OF THE CONTINENTAL CONGRESS].

236 Observations upon the Charter of the Province of New-York (Mar. 3, 1685), in 3 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW-YORK 357 (John Romeyn Brodhead ed., Albany, N.Y., Weed, Parsons & Co. 1853).

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

238 An Act for the Better Securing the Liberty of the Subject, and for Prevention of Illegal Imprisonment, ch. 42 (1692), in 1 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 95, 99 (Bos., Wright & Potter 1869) (internal quotation marks omitted) (quoting Letter from the Privy Council).

239 PAUL M. HAMLIN & CHARLES E. BAKER, SUPREME COURT OF JUDICATURE OF THE PROVINCE OF NEW YORK 1691–1704, at 389 (1952) (alteration in original) (internal quotation marks omitted).

240 See TYLER, *supra* note 23, at 645–48 (providing details).

Over time, the denial of the protections of the Habeas Corpus Act to the colonists became a major source of complaint regarding British rule. In 1774, for example, the Continental Congress documented a number of grievances regarding British rule in a letter to the people of Great Britain. The Congress decried the fact that colonists were “the subjects of an arbitrary government, deprived of trial by jury, and when imprisoned cannot claim the benefit of the habeas corpus Act, that great bulwark and palladium of English liberty.”<sup>241</sup> It is therefore hardly surprising to find that in constructing their own independent legal frameworks in the immediate wake of the Declaration of Independence, the early states were quick to import the privilege that they associated with the English Habeas Corpus Act and adopt it as their own. During the Revolutionary War, moreover, at least six states enacted suspension legislation modeled on British practice for the express purpose of legalizing detention of persons suspected of aiding the British outside the criminal process.<sup>242</sup> Putting all of this together, there is extensive evidence surrounding the development of American law during the colonial and early period of American independence suggesting that the influence of the English Habeas Corpus Act on early American law was both profound and widespread.

As already noted, many colonies had tried, unsuccessfully, to adopt the English Act’s protections as their own. And, with independence, these same states moved quickly to import the Act’s terms into their new legal frameworks. Examples abound. To take one, by March of 1776, when South Carolina inaugurated its new independent government, the State’s General Assembly took up as one of its very first matters the adoption of an “Ordinance to vest the several Powers . . . formerly granted to the Council of Safety in the President and Privy Council to suspend the Habeas Corpus Act.”<sup>243</sup> During the war that followed, South Carolina would become one of several states to enact suspensions of the protections associated with the Habeas Corpus Act in order to address the threatened invasion of the British.<sup>244</sup> Georgia provides another example. That state included in its Constitution of 1777 express provision that “[t]he principles of the *habeas-corporis* act shall be a part of this constitution.”<sup>245</sup> As though to drive home the point that the

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241 Address to the People of Great Britain (Oct. 21, 1774), in 1 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 235, at 81, 88; see also Letter to the Inhabitants of Quebec (Oct. 26, 1774), in *id.* at 103, 107–08 (reiterating same complaints).

242 See TYLER, *supra* note 23 (providing details and discussing case law turning on the application of the Habeas Corpus Act during this period); Tyler, *supra* note 31, at 955–68 (providing details).

243 JOURNAL OF THE GENERAL ASSEMBLY OF SOUTH CAROLINA, MARCH 26, 1776–APRIL 11, 1776, at 21, 24, 26 (A.S. Salley, Jr. ed., 1906).

244 An Ordinance to Empower the President or Commander-in-Chief for the Time Being, with the Advice of the Privy Council, to Take Up and Confine All Persons Whose Going at Large May Endanger the Safety of this State (Oct. 17, 1778), in 4 THE STATUTES AT LARGE OF SOUTH CAROLINA 458 (Thomas Cooper ed., Columbia, S.C., A.S. Johnston 1838).

245 GA. CONST. of 1777, art. LX.

English Act proved the basis of its Constitution's habeas provision, Georgia's legislature also annexed verbatim copies of the Act to the original distribution of the 1777 Constitution.<sup>246</sup>

Additional examples of the Act's influence during the early development of American law are widespread and include, as noted, the enactment of suspensions in at least six states during the Revolutionary War, some of which expressly displaced the protections associated with the "Habeas Corpus Act," as the suspensions adopted in Maryland and Pennsylvania did.<sup>247</sup> (It bears highlighting here, moreover, that the states directed suspensions at persons deemed to owe allegiance to the new country. By contrast, British soldiers taken in arms were treated as "prisoners of war" who could be held in a preventive posture and who were amenable to exchange under the Law of Nations.<sup>248</sup>)

In the wake of the war, a wave of state statutes adopted the terms of the English Habeas Corpus Act in their own habeas corpus statutes, and more generally, many states purported to adopt important British statutes and common law practices by "receiving" them into state law.<sup>249</sup> Arguably the

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

247 See Tyler, *supra* note 31, at 958–68 (detailing these suspensions); see also An Act to Punish Certain Crimes and Misdemeanors, and to Prevent the Growth of Toryism, ch. 20, § 12 (Feb. 5, 1777), in 1 THE LAWS OF MARYLAND 338, 340–41 (Virgil Maxcy ed., Philip H. Nicklin & Co. 1811) ("The Governor shall have full power and authority to arrest . . . all persons whose going at large the governor . . . shall have good grounds to believe may be dangerous to the safety of this state, and the same persons to confine" and that "the *habeas corpus* act shall be suspended, as to all such persons"); JOURNAL AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF THE COMMON-WEALTH OF PENNSYLVANIA 88 (John Dunlap, Phila. 1777) (providing that the Pennsylvania Assembly passed the suspension in order "to restrain for some limited Time the Operation of the *Habeas Corpus* Act").

248 See, e.g., 3 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, *supra* note 235, at 399–400 (Dec. 2, 1775) ("Resolved, That such as are taken be treated as prisoners of war, but with humanity, and allowed the same rations as the troops in the service of the Continent. . ."). Echoing Hale, Thomas Paine highlighted the importance of the lines of allegiance in his widely circulated pamphlet *Common Sense*. There, he argued that "[a] line of distinction should be drawn between English soldiers taken in battle, and inhabitants of America taken in arms. The first are prisoners, but the latter traitors. The one forfeits his liberty, the other his head." Thomas Paine, *Common Sense*, in 1 THE COMPLETE WRITINGS OF THOMAS PAINE 43–44 (Philip S. Foner ed., 1945). Additional discussion of how this distinction was drawn may be found in Tyler, *supra* note 31.

249 Maryland provides one example. The State clearly embraced the protections of the seventh section of the English Habeas Corpus Act, given that its suspension legislation in 1777 expressly suspended "the *habeas corpus* act." Operation of the Act likely derived from the State's recognition of its force through either or both its 1776 Constitution, which declared that the people are entitled to "the benefit of such of the English statutes" both by reason of their enactment as well as their "use[ ] and practi[ce] by the courts," MD. CONST. of 1776, Declaration of Rights ¶ 3, and reception statutes, including a 1771 statutory resolution laying claim to the common law and such English statutes "as are securita-

most significant of those adoptions took place just three months before the Constitutional Convention convened in Philadelphia in 1787, when New York passed a statute practically identical to the 1679 English Habeas Corpus Act. The New York statute, embracing the seventh section of its English predecessor, made express the requirement that any person “committed for any treason or felony” who is not “indicted and tried [by] the second term [of the] sessions of oyer and terminer, or gaol delivery, after his commitment . . . shall be discharged from his imprisonment.”<sup>250</sup> As in England in 1679, moreover, the incorporation of the Habeas Corpus Act’s protections often (though not always) resulted from legislative action.<sup>251</sup>

Highlighting the pervasive influence of the English Habeas Corpus Act on the development of early American law, the great New York jurist and legal scholar Chancellor James Kent observed in 1827 that “the statute of 31 Charles II. c. 2 . . . is the basis of all the American statutes on the subject.”<sup>252</sup> Along the same lines, Justice Joseph Story wrote in his famous *Commentaries on the Constitution of the United States* that by 1833 the English statute “has been, in substance, incorporated into the jurisprudence of every state in the Union.”<sup>253</sup> In short, the story of the development of early American habeas law is one that underscores the commitment of the Americans to adopt the English Habeas Corpus Act as their own.

The profound influence of the Act upon the development of early American habeas law also extended to the Constitutional Convention. I explore this influence at length in other work;<sup>254</sup> here, I will simply highlight a handful of the many pieces of evidence revealing the Act’s continuing centrality to the story of the privilege. First, Alexander Hamilton celebrated (and, of course, promoted) the proposed Constitution in the *Federalist Papers* specifically for “provid[ing] in the most ample manner” for “trial by jury in criminal cases, aided by the *habeas corpus* act.”<sup>255</sup> Second, Luther Martin, one of the few other Convention delegates who also wrote and spoke about the draft Suspension Clause (albeit critically), described the Clause as bestowing the power on the federal government to “suspend[ ] the habeas corpus

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tive of the Rights and Liberties of the Subject . . . .” 63 ARCHIVES OF MARYLAND, PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND, 1771, at 81 (1946).

250 An Act for the Better Securing the Liberty of the Citizens of this State, and for Prevention of Imprisonments (Feb. 21, 1787), in 1 LAWS OF THE STATE OF NEW YORK 369, 371–72 (New York, Thomas Greenleaf 1792). As Chancellor Kent noted in his *Commentaries*, “[t]he substance of [New York’s] statute provisions on the subject . . . closely followed” the terms of the English Act. KENT, *supra* note 158, at 24.

251 This is not to say that judicial action did not prove, in some states, as the means by which these protections came to be imported into early state law. To the contrary, in some circumstances judicial adoption and/or confirmation of the protections was often crucially important, but this was likely because of the Privy Council’s regular practice of vetoing legislative efforts to adopt the Act. For more details, see TYLER, *supra* note 23.

252 KENT, *supra* note 158, at 24.

253 3 STORY, *supra* note 206, § 1335, at 208.

254 See TYLER, *supra* note 23; Tyler, *supra* note 31, at 969–75.

255 THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 2003).



act.”<sup>256</sup> Third, during an important early Suspension Clause decision, Chief Justice John Marshall instructed that in construing the provision one must look to “that law which is in a considerable degree incorporated into our own,” after which he went on to emphasize the importance of the “the celebrated *habeas corpus* act” of 1679 as complementing the common law writ and “securing the benefits” that the writ was originally designed to achieve. As he observed:

The English judges, being originally under the influence of the crown, neglected to issue this writ where the government entertained suspicions which could not be sustained by evidence; and the writ when issued was sometimes disregarded or evaded, and great individual oppression was suffered in consequence of delays in bringing prisoners to trial. To remedy this evil the celebrated *habeas corpus* act of the 31st of Charles II. was enacted, for the purpose of securing the benefits for which the writ was given.<sup>257</sup>

Finally, many decades later, in an important habeas decision handed down during Reconstruction, the Supreme Court again highlighted the Act’s importance to the story of the Suspension Clause, pointing to the Act as “firmly guarantee[ing]” the “great writ” and highlighting that the Act of Charles II “was brought to America by the colonists, and claimed as among the immemorial rights descended to them from their ancestors” who then gave it “*prominent sanction in the Constitution.*”<sup>258</sup>

## VII. HABEAS CORPUS MODELS IN MODERN JURISPRUDENCE

Over time, the extensive influence of the English Habeas Corpus Act of 1679 on the development of early American law has been largely overlooked in the debates that surround the United States Constitution’s Suspension Clause. But the Act—and particularly the protections associated with its seventh section, which limited detentions of persons who could claim the protection of domestic law to those predicated upon timely trial on criminal charges—proved enormously influential upon early American thinking about the privilege of the writ of habeas corpus. The same may be said of the concept of suspension, which Parliament created for the very purpose of displacing the Act’s prohibition of detentions of prisoners held “for matters of state” (as Coke referred to them).<sup>259</sup> Veneration of the Habeas Corpus Act was commonplace in early American popular and political discourse. This dialogue, in turn, set the stage for the Constitutional Convention that adopted a provision specifically embracing the very suspension model that Parliament had created—which, of course, connected back to the Habeas

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<sup>256</sup> Luther Martin, *The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia* (1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 19, ¶ 2.4.72, at 62 (Herbert J. Storing ed., 1981) (emphases omitted).

<sup>257</sup> *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830).

<sup>258</sup> *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1868) (emphasis added).

<sup>259</sup> See 2 INSTITUTES, *supra* note 54, at 51.

Corpus Act. The Founding generation understood the British suspension model all too well, having been subjected to a series of parliamentary suspensions directed exclusively at American “Rebels” during the Revolutionary War.<sup>260</sup> Because the Founding generation both venerated the Habeas Corpus Act and appreciated the dramatic nature of suspension, it constitutionalized strict limitations on when this dramatic emergency power would be permitted—specifically countenancing suspension only “when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>261</sup>

All of this suggests that understanding the origins of and context within which the English Habeas Corpus Act of 1679 came into being has a great deal to contribute toward our understanding of what the Founding generation hoped to achieve when it included the Suspension Clause in the Constitution. And if, as Chief Justice Marshall believed, history is highly relevant to how we should interpret and apply that Clause, then recovering the Act’s influence on early American habeas law has the potential to contribute significantly to modern debates over the meaning and reach of the Suspension Clause.

To that end, any discussion of the Suspension Clause today must account for the enormously important role that the English Habeas Corpus Act has played in Anglo-American habeas jurisprudence. It is equally important, moreover, to recognize that the Act constituted statutory law that Parliament adopted for the very purpose of limiting the scope of lawful detention by the executive and constraining judges to uphold those limitations on executive detention unless and until Parliament suspended them. That is, Parliament understood the Act’s mandates to control unless Parliament itself took the dramatic step of suspending the Act. In other words, judges were not free to disregard the Act, even in times of war.<sup>262</sup>

Returning to where we began, there is much in this history to suggest that a common law model does not provide a full descriptive account of Anglo-American habeas law as a historic matter given the enormously influential habeas privilege associated with the Habeas Corpus Act.<sup>263</sup> To be sure, this is not to deny that there have been many significant common law devel-

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260 See An Act to Impower his Majesty to Secure and Detain Persons Charged with, or Suspected of, the Crime of High Treason, Committed in any of his Majesty’s Colonies or Plantations in *America*, or on the High Seas, or the Crime of Piracy 1777, 17 Geo. 3, c. 9 (Gr. Brit.); 35 HL JOUR. (1777) 78, 82–83 (Gr. Brit.) (noting royal assent given March 3, 1777). Parliament extended the Act throughout the War. See Tyler, *supra* note 29, at 677–78 & n.201.

261 U.S. CONST. art. I, § 9, cl. 2.

262 For extensive discussion of parliamentary suspension debates highlighting how seriously the participants took displacing the Act’s protections, see Tyler, *supra* note 31, at 934–51.

263 Put another way, given the importance of the Habeas Corpus Act in Anglo-American jurisprudence, it is fair to question the assertion that a common law model has “dominated” historically. See Fallon & Meltzer, *supra* note 2, at 2033, 2043.

opments in habeas jurisprudence over that same history,<sup>264</sup> some of which are detailed in the story above. (One must recall, for example, that the statutory privilege associated with the Habeas Corpus Act harnessed the common law writ to enforce its terms and that some states incorporated the Act’s protections through judicial decisions.) It is also true that the common law model has much to commend it as a normative matter. For example, such a model can adapt in order to address the myriad questions on which history will not provide clear guidance.<sup>265</sup> This is because the common law model contemplates that judges possess some discretion to mold and remake habeas law as they believe is warranted by ever-changing experience and circumstances. Along similar lines, moreover, the common law writ has also accounted for the expansion of habeas protections into new realms, both substantive and geographic.<sup>266</sup>

Nonetheless, studying the origins of the Anglo-American habeas privilege reveals that one of the most important and influential developments in Anglo-American habeas jurisprudence was born out of statutory law enacted by Parliament for the very purpose of constraining not just the executive, but *also* the royal courts. In other words, this history suggests that those habeas protections associated with the Habeas Corpus Act were designed to be fixed and subject to displacement solely at the hands of Parliament through suspension legislation. Put another way, the history of the Act and its extensive influence over the development of habeas law suggest that an “Agency Model” describes many important developments in habeas jurisprudence.<sup>267</sup>

If indeed the Founding generation incorporated this same model into the Suspension Clause, as the evidence suggests they did, and that choice should wield some measure of influence over how the Clause is interpreted today—two related, but very much separate propositions—then this history has the potential to contribute significantly to a range of modern Suspension Clause debates. There is a robust debate on the importance of history in constitutional interpretation generally<sup>268</sup> and in federal courts jurisprudence specifically.<sup>269</sup> (No one seriously questions that history might be relevant to constitutional interpretation; modern debates instead turn on how much influence it should wield.) In my own work, I have written that “in undertaking historical inquiry in the field of federal courts, one must be careful about

264 As noted earlier, Paul Halliday’s important work details these developments extensively. See generally HALLIDAY, *supra* note 9.

265 See Fallon & Meltzer, *supra* note 2, at 2043–45 (setting forth some of the benefits of the common law model). This point is important insofar as arguably there are many such questions that may come up as part of the war on terrorism.

266 See generally HALLIDAY, *supra* note 9 (demonstrating the point).

267 See Fallon & Meltzer, *supra* note 2, at 2033 (discussing the “Agency Model”).

268 This question has provided fodder for a massive amount of scholarly literature that space constraints do not permit me to discuss here.

269 Two of the best contributions on this question came by the pen of Professor Fallon. See generally Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753 (2015); see also, Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1046–47 (2010).

assigning certain data points from the Founding period determinative weight, rather than treating them as part of a larger conversation about the role of the judicial power in our constitutional framework.”<sup>270</sup> This being said, there are reasons to think that the extensive historical backdrop to the Suspension Clause is worthy of careful consideration in explicating its meaning, and not just because John Marshall said so (though that is certainly one good reason). To begin, modern Supreme Court case law, including the majority opinion in *Boumediene v. Bush*, points to history as an important guide<sup>271</sup> and the Suspension Clause “enshrine[s] terms of art that had well-settled meaning in English law at the time of the Founding.”<sup>272</sup> In this respect, the Clause by its very terms invites attention to the English legal backdrop, not unlike the Seventh Amendment’s text, which “preserve[s]” the civil jury-trial right as it was known “at common law.”<sup>273</sup> Finally, by setting the privilege off against suspension, the Suspension Clause both embraces the English suspension model built on the English Habeas Corpus Act and stands as the Constitution’s only “express provision for exercise of extraordinary authority because of a crisis.”<sup>274</sup>

If history is indeed relevant to how courts interpret the Suspension Clause, the material unearthed here may have much to contribute to some of the questions at the heart of modern debates. Consider, for example, some of the important habeas cases that have arisen out of the war on terrorism. I have in mind specifically the Supreme Court’s 2004 decision in *Hamdi v. Rumsfeld*.<sup>275</sup> *Hamdi* involved a native-born United States citizen who was captured by the Northern Alliance in Afghanistan in 2001 and turned over to the United States military. At the hand-off, the Northern Alliance reported that it had captured Hamdi fighting with the Taliban. The military transported Hamdi to Guantánamo Bay, Cuba, where it detained many persons captured in the ongoing war on terrorism. At that point, when it learned that Hamdi was a citizen, the government transferred him to two different military detention facilities on domestic United States soil. All the while, the government labeled Hamdi an “enemy combatant” and detained him in the absence of criminal charges. Hamdi’s father filed a habeas petition on his son’s behalf challenging the lawfulness of the son’s detention, and in time the Supreme Court took up the case for review.

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270 Amanda L. Tyler, *Assessing the Role of History in the Federal Courts Canon: A Word of Caution*, 90 NOTRE DAME L. REV. 1739, 1741 (2015).

271 See *Boumediene v. Bush*, 553 U.S. 723, 746 (2008) (“[A]t the absolute minimum, the [Suspension] Clause protects the writ as it existed when the Constitution was drafted and ratified.” (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001))); see also *St. Cyr*, 533 U.S. at 301 (“[A]t the absolute minimum, the Suspension Clause protects the writ ‘as it existed in 1789.’” (quoting *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996))).

272 Tyler, *supra* note 31, at 920.

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

274 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring). I elaborate on some of these points in Tyler, *supra* note 31, at 918–23.

275 542 U.S. 507 (2004).

Before the Court, the government argued that Hamdi was not entitled to independent review of his classification as an "enemy combatant" or his detention on that basis. Hamdi's lawyers, by contrast, argued that as a citizen, he could not be detained outside the criminal process in the absence of a suspension. A fractured Court reached a holding that embraced neither position and instead fashioned a habeas remedy to the particular facts and circumstances of Hamdi's case. Specifically, in a plurality opinion by Justice O'Connor, the Court sanctioned the idea that "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant."<sup>276</sup> In other words, the Court concluded, there is no constitutional bar precluding military detention on American soil of a citizen without criminal charges and timely trial—even when undertaken in the absence of a suspension.

All the same, Justice O'Connor's opinion recognized that "detention without trial 'is the carefully limited exception'" in our constitutional tradition.<sup>277</sup> This, in turn, led her to conclude that a citizen detained as part of the war on terrorism is entitled to "a meaningful opportunity to contest the factual basis" for his classification as an enemy combatant "before a neutral decisionmaker."<sup>278</sup> In fleshing out what such a hearing would entail, Justice O'Connor's opinion posited that the appropriate framework should "balanc[e] [the] serious competing interests" at stake, specifically "'the private interest that will be affected by the official action' against the Government's asserted interest."<sup>279</sup> In Hamdi's case, Justice O'Connor believed that such balancing must account for the fact that the government interest in preventing persons captured in battle from returning to the battlefield is significant. Her opinion also put considerable stock in the fact that Hamdi had been captured overseas.<sup>280</sup> Further, in discussing which measures could satisfy due process considerations, Justice O'Connor declined to rule out that the government could rely upon hearsay evidence or that the relevant hearing could be provided in a military tribunal.<sup>281</sup>

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276 See *id.* at 519 (plurality opinion). Justice O'Connor's opinion was joined in full by Chief Justice Rehnquist and Justices Kennedy and Breyer. Justices Souter and Ginsburg concurred, although their cursory explanation stating why they joined Justice O'Connor's opinion obscures whether they agreed with this and other points in her opinion. See *id.* at 553–54 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment).

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

278 *Id.* at 509.

279 *Id.* at 528–29 (quoting and relying upon *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

280 See *id.* at 531; see also *id.* at 523 (observing that Hamdi had been "captured in a foreign combat zone").

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

In dissent, Justices Scalia and Stevens protested that in the absence of a suspension, the United States Constitution prohibits the government from detaining a citizen in a posture akin to a prisoner of war.<sup>282</sup> Put another way, without a suspension, the dissent argued, the Constitution requires that “[c]itizens aiding the enemy [be] treated as traitors subject to the criminal process.”<sup>283</sup> In reaching this conclusion, the dissent relied extensively on the role of the English Habeas Corpus Act in Anglo-American habeas jurisprudence and its historical linkage with the concept of suspension.<sup>284</sup>

For many jurists and scholars, the fact that Hamdi had been captured overseas in a battlefield setting was enormously significant, and it distinguished his case from another citizen enemy combatant case that arose during this same period, that of José Padilla.<sup>285</sup> The United States government took Padilla into custody at Chicago’s O’Hare airport under a material witness warrant stemming from the investigation into the attacks of September 11, 2001; one month later, after a presidential order declared him an “enemy combatant” in the war on terrorism, the government transferred him to military custody, where he remained for several years.<sup>286</sup> Padilla’s habeas case also made it to the Supreme Court, but unlike Hamdi’s case, Padilla’s did not produce an opinion on the merits.<sup>287</sup>

Professors Fallon and Meltzer “applaud[ed] the approach of the plurality opinion in *Hamdi*” and emphasized that a “crucial fact” was “Hamdi’s seizure on a foreign battlefield.”<sup>288</sup> Padilla’s domestic capture, by contrast, in their view suggested that his detention in military custody without charges was unconstitutional.<sup>289</sup> In drawing these distinctions, moreover, Fallon and Meltzer’s work highlights how the Common Law Model has the flexibility to account for the circumstances of particular cases and give them differing weight. By contrast, Justice Scalia’s dissent in *Hamdi*—which Fallon and Meltzer labeled as emblematic of the Agency Model—did not allow for such flexibility. In particular, they argued, Justice Scalia’s position was insufficiently sensitive to the fact that “the exigencies of seizure on a battlefield make the demands of the ordinary criminal process too unyielding.”<sup>290</sup>

Here is where history might have something to add. If one approaches the analysis of these two cases through a common law model that takes a multitude of factors into account, there are many distinctions that may be

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

283 *Id.* at 559.

284 *Id.* at 557–58.

285 For citations, see Tyler, *supra* note 31, at 1004 n.653.

286 For details, see *id.* at 912–13.

287 This is because the Court concluded that Padilla had filed his habeas petition in the wrong jurisdiction. See *Rumsfeld v. Padilla*, 542 U.S. 426, 451 (2004). When Padilla refiled his petition and it was before the Supreme Court anew on a petition for certiorari, the government transferred him to civilian custody and indicted him on various criminal charges. For details, see Tyler, *supra* note 31, at 913.

288 Fallon & Meltzer, *supra* note 2, at 2036, 2072.

289 See *id.* at 2072–75.

290 *Id.* at 2072–73.

drawn between Hamdi's and Padilla's situations. But stepping back, we should ask if this is really the right starting point for assessing the two cases. Historically, there is ample evidence to suggest that the two cases would have been treated the same. To begin, Hamdi had long been held on United States domestic soil by the time his case reached the Supreme Court and in this respect, his situation was analogous to a host of historical examples in which English and British subjects captured beyond the geographic reach of the Habeas Corpus Act were then transported to and imprisoned on English soil, at which point everyone took for granted that they could now claim the protections of the Act. Those protections, in turn, promised such persons the remedy of discharge unless they were timely tried on criminal charges or detained under the imprimatur of a suspension. The historic analogues to Hamdi's case include subjects captured on the high seas fighting for the Jacobite cause while sailing under the French flag as well as those who fought for the Continental Army during the American Revolutionary War (and who the British considered to remain, at least until independence became a foregone conclusion, British subjects). In these cases and others, when the prisoner subjects were brought to English soil for detention, it followed under prevailing political and legal understandings that such persons could not be detained outside the criminal process in the absence of a suspension.<sup>291</sup>

In other words, by design, the framework created by the Habeas Corpus Act was far less concerned with differences in circumstances between cases than perhaps a common law model is. As detailed at length here, this result followed in large measure because the Act was born out of a parliamentary desire to constrain judicial actions that had been shown to under-protect liberty interests in exactly these kinds of cases—namely, those in which the executive maintained that “interests of state” justified detention outside the criminal process. If, in turn, the Founding generation incorporated into the Suspension Clause the Act's core protections found in its seventh section, then there is reason to question whether factors like those said to distinguish Hamdi's and Padilla's cases should be relevant to the Suspension Clause inquiry today. Put another way, depending on the importance of this historical backdrop to modern constitutional interpretation, the influence and application of the Habeas Corpus Act suggest that Hamdi and Padilla's cases should stand on equal footing. More generally, there is reason to question how well a model that recognizes judicial discretion to disregard the Habeas

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291 For details on the treatment of Jacobite supporters, see HALLIDAY, *supra* note 9, at 170–73 (detailing some Jacobite cases). For additional details relating to these examples, see TYLER, *supra* note 23 (detailing cases arising during the Jacobite wars and American Revolutionary War); Tyler, *supra* note 29 (discussing the Revolutionary War); Tyler, *supra* note 31, at 1004–09 (discussing both historical analogues). As detailed in these sources, such persons were not treated as prisoners of war but as domestic enemies of the state or traitors. With respect to prisoners of war, as Paul Halliday's work reveals, the Habeas Corpus Act was of no help because they could not claim its protections. Put another way, as Halliday's survey of hundreds of cases during the seventeenth and eighteenth centuries concludes, King's Bench “never released a person it concluded had been properly designated as a POW.” HALLIDAY, *supra* note 9, at 171.

Corpus Act's core protections, as arguably Justice O'Connor's opinion in *Hamdi* did, stands up against this important chapter in the development of Anglo-American habeas jurisprudence. My larger point is simply this: in tackling modern questions going to the meaning and application of the Constitution's Suspension Clause, there is good reason to include discussion of the English Habeas Corpus Act framework that governed during the century preceding the drafting of the United States Constitution in the larger discussion.

#### CONCLUSION

The material unearthed and recounted here has the potential to inform not only questions raised in cases like *Hamdi*, but many other important questions that arise under the Suspension Clause as well. These include important separation of powers questions as well as questions going to who may claim the Clause's protections, its geographic sweep, and its relationship to the laws of war. My contribution in these pages, chronicling the story of an enormously important part of the development of Anglo-American habeas law, is offered here in the hope that it will contribute to these debates going forward.

The Dan Meltzer I knew loved to debate federal courts issues, and he and I had many conversations about *Hamdi* in which we challenged one another to think harder about the larger issues implicated by the case and the war on terrorism more generally. I can think of no better way to honor his memory than to have one more conversation with him by engaging with his work on this subject.