

2011

# The New Habeas Revisionism

Stephen I. Vladeck

*American University Washington College of Law*, [svladeck@wcl.american.edu](mailto:svladeck@wcl.american.edu)

Follow this and additional works at: [http://digitalcommons.wcl.american.edu/facsch\\_lawrev](http://digitalcommons.wcl.american.edu/facsch_lawrev)



Part of the [Law Commons](#)

---

## Recommended Citation

Vladeck, Stephen I., "The New Habeas Revisionism" (2011). *Articles in Law Reviews & Other Academic Journals*. Paper 101.  
[http://digitalcommons.wcl.american.edu/facsch\\_lawrev/101](http://digitalcommons.wcl.american.edu/facsch_lawrev/101)

This Article is brought to you for free and open access by the Scholarship & Research at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Articles in Law Reviews & Other Academic Journals by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [fbrown@wcl.american.edu](mailto:fbrown@wcl.american.edu).

## BOOK REVIEW

### THE NEW HABEAS REVISIONISM

HABEAS CORPUS: FROM ENGLAND TO EMPIRE. By Paul D. Halliday. Cambridge, Mass.: Harvard University Press. 2010. Pp. ix, 502. \$39.95.

*Reviewed by Stephen I. Vladeck\**

"We shall have to look to history for the essentials of the Great Writ, but not to one point in that history for its accidents."<sup>1</sup>

The history of habeas corpus in pre-revolutionary England has figured prominently in American constitutional litigation and legal scholarship for much of the past fifteen years.<sup>2</sup> Although this history has mattered for different reasons in different cases, the common theme has been the unprecedented degree to which courts have had to grapple with the purpose, meaning, and scope of the U.S. Constitution's Suspension Clause, which provides that "[t]he 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."<sup>3</sup> And given how assiduously jurists have traditionally avoided asking (let alone answering) such questions,<sup>4</sup> contemporary judges and scholars have found little settled by prior precedent. The result, in post-conviction, immigration, and extradition cases as much as in suits arising out of the detention of alleged terrorists, has been an extraordinary amount of ef-

---

\* Professor of Law, American University Washington College of Law. I have benefitted tremendously from the comments of Baher Azmy, Bobby Chesney, Eric Freedman, Amanda Frost, Jon Hafetz, Dan Marcus, Gerry Neuman, Ira Robbins, Amanda Tyler, Larry Yackle, and students in my Fall 2010 seminar on the history of habeas corpus; from faculty workshops at Southwestern Law School, the University of Auckland, the University of Georgia, the University of Iowa, and the University of Texas; from the research support of Dean Claudio Grossman; and from the source-gathering assistance of Adeen Postar. In the interest of full disclosure, I should note that I have served as co-counsel at various points to the Petitioner in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and to different amici curiae in a host of the other contemporary cases discussed in this review.

<sup>1</sup> Brief for Respondent at 33, *United States v. Hayman*, 342 U.S. 205 (1952) (No. 23).

<sup>2</sup> This increased focus was largely sparked by passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code), which included the most significant constraints on the federal courts' power to issue the writ that had (to then) ever been enacted.

<sup>3</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>4</sup> See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 301 n.13 (2001) ("The fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely.").

fort devoted to answering fundamental questions about what the Constitution requires.

There is relatively little in the Constitution's drafting history or ratification debates to illuminate the meaning of "[t]he Privilege of the Writ of Habeas Corpus."<sup>5</sup> Still, most jurists and commentators now seem to agree on the constitutional floor. As Justice Stevens put it in 2001, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'"<sup>6</sup> And yet, even that limited point of consensus begs a separate question: what *was* the scope of the writ in English law in 1789, the practice from which we presume the Founders meant to borrow?

In *Habeas Corpus: From England to Empire*, Paul Halliday, a University of Virginia historian, provides an answer to that question (and many others) by comprehensively surveying the scope of English habeas practice during the sixteenth, seventeenth, and eighteenth centuries. Rather than perusing the published reports of English judicial decisions or the works of contemporaneous treatise writers, Halliday went to the archives. His study examines every writ of habeas corpus *ad subjiciendum*<sup>7</sup> issued by King's Bench<sup>8</sup> in every fourth year between 1502 and 1798, and also covers writs issued during intervening non-survey years of particular importance (pp. 319–33). The result of Halliday's quadrennial review is a set of some 2757 distinct prisoners or detainees using the writ in the survey years, along with over 2000 other distinct users from other periods (pp. 4–5). From these numbers, Halliday conservatively extrapolates that over 11,000 prisoners re-

---

<sup>5</sup> See, e.g., ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 12 (2001) (noting that the drafting history of the clause at the 1787 Constitutional Convention was "sparse").

<sup>6</sup> *St. Cyr*, 533 U.S. at 301 (citation omitted); see also *Boumediene v. Bush*, 128 S. Ct. 2229, 2248 (2008). But see *Noriega v. Pastrana*, 130 S. Ct. 1002, 1006 (2010) (Thomas, J., dissenting from denial of certiorari) (claiming that the Court has "steadfastly declined to adopt a date of reference by which the writ's constitutional content, if any, is to be judged"). For the origins of the Court's odd focus on 1789, as opposed to 1787 (when the Constitution was written) or 1788 (when it was ratified), see Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantánamo: The Boumediene Decision*, 2008 SUP. CT. REV. 1, 15 n.62. To be clear, I do not mean to endorse the "as it existed in 1789" approach as anything *more* than a floor. Among other defects, it neglects the potential significance of subsequent developments, such as the ratification of the Bill of Rights and the Fourteenth Amendment. See Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555, 589–621 (2002).

<sup>7</sup> Although there are several different forms of the writ, the iteration with which Halliday (and current discussions) are exclusively concerned is habeas corpus "*ad subjiciendum*," that is, "the writ used to 'inquir[e] into illegal detention with a view to an order releasing the petitioner.'" *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (alteration in original) (quoting *Fay v. Noia*, 372 U.S. 391, 399 n.5 (1963)). Halliday discusses this distinction at pp. 16–17.

<sup>8</sup> For ease of reference, I refer to the tribunal throughout this essay as "King's Bench," even though it has been known as the "Upper Bench" as well as "Queen's Bench" for much of Halliday's study and today.

sorted to the writ during this period, as compared to the far smaller number from the same era reflected in the *English Reports* (p. 28).<sup>9</sup>

Judged purely as a work of archival research, Halliday's monograph is first-rate. By relying on primary source materials and endeavoring to place the individual writs in their proper historical context, Halliday's book provides a refreshingly original view of the "Great Writ," rather than a rehashing of older histories, most of which were not based upon the same sources (although they could have been). On its own, the story of these writs is a contribution to our historical understanding, adding to the conversation both episodes and themes that have been neglected for far too long.

But Halliday's book is not just legal history.<sup>10</sup> It is also — self-consciously<sup>11</sup> — methodologically driven historical revisionism.<sup>12</sup> In his words, "[I]f lawyers and judges want to act on claims about history, we must first make a fully contextualized reclamation of those past principles. Only then might history serve law: not as a grab bag of poor analogies, but as an otherwise unseen position from which to think anew about the questions that law must answer" (p. 4). Instead, as Halliday explains in the book's early pages, many of the nineteenth- and twentieth-century discussions of the history of habeas corpus in

<sup>9</sup> As Halliday notes, there is plenty of recent scholarship on the inadequacies of the *English Reports* as a remotely comprehensive historical source (p. 343 n.50) (citing J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 183–84 (4th ed. 2002)). See also A.W. BRIAN SIMPSON, LEADING CASES IN THE COMMON LAW 10–12 (1995); J.H. Baker, *Why the History of English Law Has Not Been Finished*, 59 CAMBRIDGE L.J. 62, 82–83 (2000).

In an article previewing what was to come in the book, Halliday (along with G. Edward White) explained that the most generous accounting of the *English Reports* yields 159 reports of 143 habeas cases in the three centuries leading up to 1789 — 1.44 percent of the projected total of Halliday's dataset. Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 591 n.35 (2008) (citing R.J. SHARPE, THE LAW OF HABEAS CORPUS (2d ed. 1989)).

<sup>10</sup> Halliday declines to unpack the story of his writs chronologically, explaining that "the book's three sections and nine chapters . . . are organized around concepts and practices rather than particular periods or strict chronology" (p. 7). Halliday continues: "If narrative is like a tone poem, then this book has been written as a fugue. . . . Take a theme, then repeat it, layering on new themes while playing them all against each other. Doing so brings out revealing dissonances" (p. 6). Thus, his is not so much a history of habeas as it is a study of habeas across a fixed time period, within which distinct themes (rather than time) serve as the independent variable. Although such an approach may reinforce some of Halliday's central conclusions, it also produces one of the few genuine flaws in the monograph: the repeated invocations of the same episodes in different chapters.

<sup>11</sup> For example, Halliday notes, "We read Coke, Blackstone, and a handful of printed reports, then claim that we know what the law 'was' in 1789 or some other moment. If we do that while countless parchment court records and case reports surviving only in manuscript lie unread in archives, then we have been derelict as historians. If we act upon such claims in our courts, we may be derelict in our jurisprudence, our claims resting on hollow foundations" (pp. 3–4).

<sup>12</sup> Although "revisionism" is often treated as synonymous with "negationism," I mean it here in its neutral context, as described in James McPherson, *Revisionist Historians*, PERSPECTIVES, Sept. 2003, at 5.

England exemplify the "Whig" histories that Herbert Butterfield decried in the 1930s.<sup>13</sup> These earlier commentators — including no less a figure than William Blackstone<sup>14</sup> — repeatedly attempted to "draw lines through certain events . . . to modern liberty," "forget[ting] that this line is merely a mental trick."<sup>15</sup>

To that end, the typical narrative of habeas in pre-revolutionary England

proclaims [habeas as] the result of an inescapable process, begun in a misty past, carried through Magna Carta, past a tyrannical king or two, and finally to its triumph: the realization of all that the writ portended with the help of democratic impulses working through statute-making bodies, whether British Parliaments, colonial assemblies, or American Congresses. (p. 2)<sup>16</sup>

Such a story, however and whenever told, is too convenient by half. To begin with, "[i]t is not a little ironic . . . that [habeas's] original purpose was not to release people from prison but to secure their presence in custody."<sup>17</sup> And yet, classical narratives fail to explain the virtual absence of meaningful developments between 1215 and the early seventeenth century, when the writ began to evolve.<sup>18</sup> Nor do they provide any explanation for why it was *then*, in particular, that the writ started to shape into the form it holds today, especially if meaningful statutory advancement did not take place until later. "So much awkward silence separates [the thirteenth century from the seventeenth]," Halliday notes, "that some authors have thrown up their hands" (p. 16). And even for those who have not, none can make up for the fact that "[n]o single line runs through the Middle Ages to the writ that was newly invigorated in the decades around 1605" (p. 18).<sup>19</sup> Finally, conventional histories are useless when it comes to explaining how, if habeas evolved linearly to become the "great writ of liberty," it proved so

<sup>13</sup> See H. BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* 1-8 (1931); see also Michael E. Parrish, *Friedman's Law*, 112 YALE L.J. 925, 954-55 (2003) (book review) (summarizing Butterfield's work, and how legal historians are particularly susceptible to writing "Whig" history).

<sup>14</sup> See, e.g., Halliday & White, *supra* note 9, at 589 & nn.28-30 (discussing Blackstone's contributions to — and misunderstandings of — habeas's history).

<sup>15</sup> BUTTERFIELD, *supra* note 13, at 12.

<sup>16</sup> As additional examples, Halliday cites two influential nineteenth-century American treatises linking habeas to the Magna Carta (pp. 16 & 339 n.15) (citing WILLIAM S. CHURCH, *A TREATISE ON THE WRIT OF HABEAS CORPUS* 3-4 (2d ed. 1893); and ROLLIN C. HURD, *A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT* 66-74 (2d ed. 1876)).

<sup>17</sup> BAKER, *supra* note 9, at 146.

<sup>18</sup> This historical gap has been referred to as the writ's "peculiar path to fame." See William F. Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U. L. REV. 983 (1978).

<sup>19</sup> Thus, Halliday identifies a series of changes in practice that first began to appear around 1605 (pp. 26-27).

feeble a constraint on the British Parliament in the eighteenth century and on colonial assemblies in the nineteenth. Thus, the story of habeas corpus in England “has been written less as a history than as an exercise in legal narcissism” (p. 2). And as Butterfield warned, such scholarship “is bound to lead to an over-simplification of the relations between events and a complete misapprehension of the relations between past and present.”<sup>20</sup> The result is that we have ended up with a narrative of habeas that may be normatively attractive, but that is historically misleading.<sup>21</sup> Because of our modern preoccupation with the rights that individuals hold against their governments, scholars have long understood habeas corpus incorrectly as part of a framework of individual liberties, belying the extent to which the importance of the writ in pre-revolutionary England was about the courts much more than it was about the litigants.

Even contemporary responses to Halliday’s work have resembled the Whig histories, focusing on the rights that particular prisoners would have possessed in ascertaining whether the Founders might have thought that “enemy aliens” were entitled to the protection of the Suspension Clause.<sup>22</sup> Instead, Halliday’s writs provide a narrative of pre-revolutionary English habeas as an instrument of increasing judicial power — as the means by which King’s Bench increasingly came to assert *its* authority, first at the expense of other judicial tribunals, and eventually at the expense of Parliament and the King himself.

It is not that the merits of these cases were irrelevant; a surprising percentage of the petitioners were bailed or discharged outright. But the lessons run deeper:

By exploring hundreds of cases across many decades, we can gain a sense of practices and principles, if not rules, that constituted a jurisprudence of normalcy. At the center of this jurisprudence stood the idea that the court might inspect imprisonment orders made at any time, anywhere, by any authority. This simple idea, grounded in the prerogative, marked the point from which the justices’ use of the writ expanded. Rather than analogize among cases — follow precedents — their thinking radiated in every direction from this core principle. (p. 160)<sup>23</sup>

---

<sup>20</sup> BUTTERFIELD, *supra* note 13, at 14.

<sup>21</sup> For example, Halliday notes: “Aggregating thousands of cases allows us to establish the patterns against which we can make serious claims about the meanings of lone cases: were they singular or exemplary, points on a trajectory, or points around which practice turned? Individual cases are literally meaningless without the contexts . . .” (p. 5).

<sup>22</sup> See, e.g., *infra* pp. 987–90. As I explain below, these contemporary accounts may also be guilty of a different offense — of writing what Professor Marty Flaherty has called “law-office history” or “history lite,” selectively invoking historical examples to support a particular thesis. See, e.g., Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

<sup>23</sup> See also Halliday & White, *supra* note 9, at 600 (“The single most important feature of habeas corpus jurisprudence, as it emerged in the seventeenth century, did not concern *how* King’s

To see how habeas came to be about judicial power independent of the rights of those who sought the writ is merely to scratch the surface of Halliday's research. In addition to the idea "*that* the judge judges" (p. 7), Halliday identifies three other motifs in his survey that are inconsistent with most conventional accounts. First, "this power to judge arose not from ideas about liberty, but from sovereignty as it was understood three and four centuries ago: as embodied in an actual person," that is, the monarch (p. 7). Second, "what constituted liberties was the result rather than the starting point of judicial decision-making" (p. 7). Third, "statute and empire, often acting together, revealed both the limits and possibilities of habeas corpus" (p. 7). In short, Halliday's book indicts classical accounts of English habeas for both their myopia and their hyperopia, inverting the means and ends of habeas based upon anachronistic understandings of the relationship between the courts, the Crown, and Parliament. The common law writ of habeas corpus was far more powerful than we have previously appreciated, and Parliament's role in the story was far more equivocal.

In their own right, these revisions to our understanding of pre-revolutionary English habeas would be a significant development in legal history scholarship. And although Halliday is not the first to make at least some of these particular claims,<sup>24</sup> his archival research provides the proof for which they had previously been wanting.

The point of this Review, though, is not merely to describe Halliday's work or to outline the contributions it makes to English legal history (which Part I attempts). Rather, I aim to demonstrate how Halliday's revisionism should also reorient our understanding of the U.S. Constitution's Suspension Clause, and in a manner that bears on a growing number of contemporary cases. Thus, after summarizing the origins and background of the clause, Part II moves on to the role that history — and Halliday's research — has (and should have) played in contemporary litigation arising out of the detention without trial of terrorism suspects. In particular, the history of the writ has been one of the most significant themes undergirding both the Su-

---

Bench justices decided the fate of prisoners. It concerned the fact *that* the justices decided their fate, regardless of who locked them up.").

<sup>24</sup> In addition to accounts of individual episodes, there are several earlier attempts at telling the full history of habeas in England. See, e.g., WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 12-94 (1980); ROBERT S. WALKER, THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY (1960); Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143, 146-61 (1952); Maxwell Cohen, *Habeas Corpus Cum Causa — The Emergence of the Modern Writ* (pts. 1 & 2), 18 CAN. B. REV. 10, 172 (1940); Edward Jenks, *The Story of the Habeas Corpus*, 18 LAW Q. REV. 64 (1902). Although some of these works are more comprehensive than others, none relies on the same manuscript sources as Halliday.

preme Court's 2008 decision in *Boumediene v. Bush*,<sup>25</sup> which held that the Suspension Clause applies to noncitizens detained at Guantánamo Bay, and subsequent litigation in the D.C. Circuit.<sup>26</sup> As Part II explains, Halliday's research suggests that these decisions, even when reaching the right results, have been based on fundamentally flawed understandings of history — of where the writ could go, and what it could do, at the time of the Founding.

Finally, insofar as we have lost sight of the history informing the writ at the Founding, Part III addresses when (and why) our understanding changed. To that end, Part III seizes on three distinct points of departure from English practice — cases in which the Supreme Court made the same kinds of mistakes that Halliday attributes to the Whig historians of English habeas. Ultimately, although we may well conclude that “originalism” in the context of the Suspension Clause is either untenable or undesirable, so long as the Supreme Court continues to insist that the writ “as it existed in 1789” matters, Halliday's book suggests that we have veered hopelessly off course — and that legislation is not the answer.

### I. HALLIDAY AND THE REVISIONIST HISTORY OF ENGLISH HABEAS

To tell a more accurate story of habeas corpus at the end of the Elizabethan era and thereafter, Halliday focuses on three classes of manuscript records from the Court of King's Bench, all of which are available in the National Archives at Kew: the recorda files of the Crown Side of King's Bench, the Crown Side controlment rolls, and the Crown Side rule and order books (pp. 319–22).<sup>27</sup> As Halliday admits, he is not the first to cull the controlment rolls for evidence of habeas usage by King's Bench during this time period (p. 343 n.50). Nevertheless, his efforts are by far the most comprehensive.

Taken as a whole, his data help to show — if not explain — the upsurge in habeas's application to unprecedented circumstances at the end of the sixteenth century. “At least until the death of Queen Mary, in 1558, 90 percent of prisoners using habeas corpus had been charged with felony or treason” (p. 29). In those cases, the writ's true purpose

<sup>25</sup> 128 S. Ct. 2229 (2008).

<sup>26</sup> See, e.g., *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3254 (U.S. Oct. 8, 2010) (No. 10-487); *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010); *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), *petition for cert. filed*, No. 10-7814 (U.S. Nov. 29, 2010); *Kiyemba v. Obama (Kiyemba II)*, 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010); *Kiyemba v. Obama (Kiyemba I)*, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010) (per curiam), *reinstated on remand*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam), *petition for cert. filed*, No. 10-775 (U.S. Dec. 8, 2010).

<sup>27</sup> See also Halliday & White, *supra* note 9, at 592 n.37.



was simply to produce the prisoners before King's Bench for trial. What necessitated the change in habeas's use was the proliferation of both nonfelony offenses created by legislation and novel forms of imprisonment and incarceration throughout the realm. In addition, a hodgepodge of "old courts or officers exercising new powers" performed the new legal work these developments precipitated, creating a "pressing need for one authority to police relations among the many jurisdictions that addressed these problems" (p. 22). As such, "[i]n the decades to each side of 1605, the justices responded to a host of political and cultural forces, making the writ into the means by which they took the survey of all other magistrates" (p. 9).

*A. Habeas and the Judges: Making (and Using) the Writ*

Although others have framed the story of habeas in the early 1600s as a battle for supremacy among competing jurisdictions,<sup>28</sup> it might better be understood as a battle for supremacy over "the law of the land," with King's Bench using its growing power to issue writs of habeas corpus to confine inferior tribunals — be they conciliar courts, church courts, or other non-common law tribunals — to those bodies' proper jurisdiction (in the justices' view, anyway) (p. 27). Put another way, King's Bench used the writ to transcend jurisdictions, championing substance (whether the jailer had a legal basis for confining the prisoner) over the jurisdictionally varied procedural forms. Thus, King's Bench routinely reviewed imprisonment, whether it was carried out pursuant to orders of individual landowners, the Privy Council, or anyone in between. "In doing so, the justices determined what counted as law, even when great nobles chafed against their commands" (p. 95). But in the first decades of the seventeenth century, "the potential oppressor was not the king or his minions in far away Whitehall. Rather, the oppressor was probably a justice of the peace who lived nearby, a legal amateur empowered to imprison using summary conviction process every time Parliament passed a statute defining a new regulatory misdemeanor" (p. 30).

Regardless, the single most important point that emerges from Halliday's research with regard to the evolution of habeas practice by King's Bench during the seventeenth century is the ease with which the justices expanded the writ to encompass novel facts, legal issues, and practical circumstances. Without precedent,<sup>29</sup> and relying on the

---

<sup>28</sup> See, e.g., DUKER, *supra* note 24, at 33–44.

<sup>29</sup> As Halliday notes: "There was no mention of precedents, no analogizing to ostensibly similar cases" (p. 100).

royal prerogative,<sup>30</sup> King's Bench in the first three decades of the seventeenth century "always had the last word, no matter when, how, or by whom one had been imprisoned" (p. 139). The unifying theme behind the hundreds of writs issued during this period was not any great revolution in substantive law (that development would come later), but rather a "jurisprudence of normalcy" (p. 139)<sup>31</sup> — the increasing frequency with which King's Bench "releas[ed] or remand[ed] the prisoners held by the commands of all other magistrates. . . . In doing so, the justices put themselves at the heart of the state" (p. 141), even as they purported to act on the King's behalf.

In the short term, this development had little practical effect. Quietly but unhesitatingly, though, in unknown cases as much as in famous ones, King's Bench situated itself as the overseer of detention pursuant to virtually any authority:

The jurisprudence of normalcy that the court had developed in order to watch the work of JPs or the Privy Council would be critical as novelties proliferated during the civil war and thereafter. Remarkably, judicial authority would persist, with the prerogative living on in the judges' hands even after the king himself was destroyed. (pp. 160–61)

And, as Halliday documents, the rest of the seventeenth century was full of novelties — new contexts and places into which writs of habeas corpus had previously not traveled. Perhaps most importantly, during the civil war, King's Bench used habeas corpus to "supervise[] imprisonment orders by military officers for the first time" (p. 165). King's Bench employed the practice in a range of contexts, including desertion (pp. 166–67); review of the judgments and sentences of courts-martial (p. 166); claims of unlawful impressments (p. 167); and cases in which individuals claimed they were wrongly detained as prisoners of war (pp. 168–73). The justices could not release individuals who were properly detained as POWs (whose detention was *per se* lawful) (p. 169), but they could resolve the jurisdictional fact question and order release when a mistake had been made (p. 169).<sup>32</sup> Indeed, "distinguishing foreign POWs from subjects potentially guilty of treason was only possible by using habeas corpus to make a review" (p. 171). Like the cases from the earlier part of the century, the military custody cases saw "the justices of King's Bench . . . continu[ing] to apply the basic lesson that the prerogative, running through habeas cor-

---

<sup>30</sup> As the justices explained in 1619, "[T]his court is [the] Supreme Court, in which the king sits, that may demand [an] account of the imprisonment of any of his subjects" (p. 82) (alterations in original) (internal quotation marks omitted).

<sup>31</sup> For Halliday's general summary of the "jurisprudence of normalcy" idea, see pp. 147–60.

<sup>32</sup> Halliday notes that "a person properly categorized as a 'prisoner [of] war' could only be dismissed by exchange" (p. 169). But the writ could be (and often was) used "to investigate whether a person was correctly labeled a POW" (p. 169).

pus, always taught: that no jurisdiction, whether normal or novel, was beyond their oversight" (pp. 173-74). As importantly, the justices exercised and expanded their authority straight through the civil war and the Interregnum, even after the King on whose authority they relied was executed.

To that end, litigants increasingly used habeas to test *private* imprisonment, whether by wives claiming that they were being locked up by tyrannical husbands (p. 124), children over whom there were conflicting claims to custody (pp. 127-32), individuals challenging the basis for their mental confinement (p. 127), or slaves challenging the legality of their servitude (pp. 174-76). Again, King's Bench never paused to consider the oddity of the new realms and unprecedented kinds of disputes into which it was sending the writ. As long as the jailer was bound to answer to the sovereign, jurisdiction to issue the writ was assumed.

Separate from the substantive novelties to which the writ increasingly was addressed, King's Bench throughout the seventeenth century also confronted jurisdictional novelties, especially situations in which prisoners prayed for the writ from far-away custody. In a series of cases beginning in 1601, the justices asserted their authority over dominions to which the ordinary civil process of English courts did not typically run, including Berwick-upon-Tweed, a unique enclave on the north bank of the river dividing Scotland from England (pp. 259-61). The jurisdictional theory underlying the writ in such cases, as Halliday explains, was that whatever other laws might govern in Berwick-upon-Tweed, it was one of Queen Elizabeth's dominions. That reality necessarily settled whether Her Majesty's prerogative — and, as such, prerogative writs — could be sent there, along with punitive sanctions should the writ be ignored (pp. 259-60 & 433 n.2). Put another way, the writ followed the sovereign's authority wherever it was invoked.

The lesson was clearly learned, for Lord Chief Justice Mansfield would reiterate 150 years later that it was the centrality of the prerogative as the animating force behind habeas that compelled the writ's application anywhere subjects of the crown could be commanded (p. 262). The identity, citizenship, and particular location of the prisoner were entirely irrelevant; the question was merely whether the jailer, wherever he was, could be held to account by the sovereign by and through his bench.<sup>33</sup> After all, "[p]eople, not places, were the objects of the writ's supervision" (p. 43). Thus, "[h]abeas corpus and the other prerogative writs . . . went everywhere not because they protected 'rights,' a modern conceit, but because they addressed the wrongs

---

<sup>33</sup> See Halliday & White, *supra* note 9, at 713 ("As a writ originating in the prerogative, habeas corpus was concerned with jailers more than with prisoners.").

committed by those who acted according to the king's franchise: specific powers the king granted to others so long as they were not abused" (p. 34).

It is unsurprising, then, that King's Bench took a similar approach to other remote parts of the realm, "remind[ing] one ostensibly exempt jurisdiction after another that they were not exempt" (p. 267). In the middle decades of the seventeenth century, the writ was sent to the Cinque Port of Winchelsea, the Channel Isles, and even Jamaica (pp. 267–69). Whether or not individual laws or liberties ran to these "dominions," prerogative writs clearly did, at least insofar as the Crown's sovereignty was recognized. Habeas therefore also did not turn on whether the prisoner was a subject of the realm or a foreigner: "[s]ubject status, or the lack of it, points more vividly than any other factor to the absence of concern about the legal nature of the detainee using habeas corpus" (p. 208).

Instead, the issue that eventually surfaced was neither the creativity of the justices nor any real or perceived constraints on the scope of the justices' authority to issue the common law writ: "Sea, not the common law writ, was the problem" (p. 269). It was easy to send writs to far-away places; it was harder to compel their return. Perhaps ironically, the expanding geographical sweep of the common law writ thereby helped to precipitate the Habeas Corpus Act of 1679, for, as Halliday explains, the difficulty in compelling obedience from overseas jailers was perhaps "the most significant rationale for the passage of the Habeas Corpus Act" (p. 269). But the critical point for present purposes is that this defect was a practical shortcoming in the writ, not a jurisdictional one (p. 233).<sup>34</sup> By the latter half of the seventeenth century, the jurisdiction of King's Bench seemed to follow the royal prerogative wherever it went.

The evolution of habeas during this period was not just jurisdictional. Halliday's research also shows the justices routinely resorting to equitable principles in expanding what the writ could do (pp. 87–93, 102–16). As he explains, "[n]o one called habeas corpus an equitable writ. But this should not keep us from considering the ways in which its use was equitable in everything but name" (p. 87). Thus, King's Bench used dexterity and flexibility to shape the writ as a hybrid capable of serving any number of distinct purposes, a practice that the justices tied directly to the source of their authority — the royal prerogative (pp. 74–87, 93–95).

To take one example, courts and commentators alike have consistently repeated the understanding that, at common law (and until

---

<sup>34</sup> As Halliday notes: "During debates, speakers emphasized that water or distance posed only physical problems, not legal ones" (p. 233).

1816),<sup>35</sup> the factual validity of the jailer's return was assumed — the prisoner was not entitled to offer facts appearing to controvert the return. And yet, as Halliday shows:

The apparent rule against controverting the return, like many rules, inspired new ways of proceeding. Judges followed the principles behind the rule — a commitment to decision-making based on well-grounded facts . . . expressed in reliable form — as they generated myriad ways to elicit evidence. Doing so did not entail “breaking” or “bending” the rule . . . . Rather, it involved reasoning from a central principle — in this case, the principle that valued certainty of the facts that would be used to decide the matter — to new ways of doing things that honored the motivations that generated the rule. (pp. 109–10)

In other words, although the justices appreciated that there were constraints on their power, they deployed every means at their disposal to sidestep those constraints or otherwise render them toothless. Thus, Halliday's writs reveal judges asking the prisoner's counsel for relevant information about his client; asking court officers to examine factual matters in dispute; and accepting various forms of written testimony, the only purpose of which could have been to offer evidence rebutting the return (pp. 110 & 377 nn.52–55). Most creatively, the justices also appear to have adopted a practice of delaying the formal filing of the return for as long as possible, since the return did not become part of the record until it was filed (pp. 111–12). Thus, Halliday encountered a number of cases where returns were amended *before* they were filed — a curious step if no intervening evidence had been considered (p. 112).

More systematically, Halliday's research demonstrates that, into the eighteenth century, the practice of oral “prayer” for the writ shifted increasingly toward written affidavits that tended to include varying degrees of factual detail. Thus, “the decision to issue the writ, rather than the determination of what to do upon its return, became the occasion for the most important discussions about facts and their legal meaning” (p. 112). To sidestep the bar on considering facts beyond the return (and, presumably, to expedite the process in cases in which no right to relief appeared), the justices moved toward a *nisi* procedure — effectively a rule to show cause why the writ should not be granted.<sup>36</sup> In turn, the bulk of the court's work came in calling upon the jailer to provide further support for the prisoner's continued detention — *before* ordering that the prisoner's body be produced (p. 113).<sup>37</sup> Thus,

---

<sup>35</sup> See Habeas Corpus Act, 1816, 56 Geo. 3, c. 100 (Eng.).

<sup>36</sup> Halliday elsewhere notes the origins of *nisi* practice in King's Bench (p. 48).

<sup>37</sup> Halliday notes: “By the 1730s, rulebooks increasingly noted the issuance of writs based on affidavits, signaling that the discussion of facts had moved to the beginning of the process. Many prisoners now had a full review of their imprisonment without the writ ever issuing: habeas cor-

the archives are littered with writs issued by King's Bench in naval impressment cases during Lord Chief Justice Mansfield's tenure (1756–1788) for which no returns appear to have been filed (pp. 115–16). With all of the work being handled in the *nisi* proceedings, the court could skip the formalities.

Whereas the *nisi* procedure represented a specific exercise of equitable authority by the justices, it was the more general reliance upon the “equity” of the writ that brought the jurisdiction of King's Bench to its zenith. For while the justices could order bail, remand, or release, they increasingly came to do far more under the cover of habeas: “By negotiating settlements, by constraining — sometimes undermining — the statutes or customs on which other magistrates acted, and by chastising those who wrongfully detained others, the justices defined what counted as jurisdiction and what counted as liberties” (p. 101).<sup>38</sup> Common law may have empowered the justices to issue the writ, but it was equity that enabled them to shape it — and to use habeas to shape the conduct of its recipients.

*B. Habeas and the Legislators:  
Parliament as a Double-Edged Sword*

Halliday's research also calls into question the role attributed to Parliament in classical histories of the writ, suggesting not just that legislative protection of habeas was unnecessary, but also that it may have been counterproductive. The most prominent example is the Habeas Corpus Act of 1679,<sup>39</sup> which Blackstone hyperbolically described as the “second Magna Carta, and stable bulwark of our liberties” (p. 258).<sup>40</sup> In Whig histories, “the statutory writ of the 1679 Habeas Corpus Act provides a moment for parliamentary self-congratulation that all but erased the significance of the role judges had played in developing the equitable dimensions of habeas corpus jurisprudence.”<sup>41</sup> And one need not look far to find contemporary commentators equating what was true about the 1679 statute with what must have been true about habeas, in general, at the time of the

---

pus without the writ” (p. 113). The U.S. Supreme Court adopted the same approach (that is, resolving the merits of the petition prior to issuing the writ) in *Walker v. Johnston*, 312 U.S. 275 (1941), without any reference to common law practice, and despite the fact that the habeas statute at the time *required* the production of the petitioner in every case. See 28 U.S.C. § 458 (1946).

<sup>38</sup> Halliday also notes that “[t]his variety of outcomes . . . demonstrates the equitable flexibility that the justices of King's Bench enjoyed when using habeas corpus” (p. 60), and that “[t]hese cases show the equity of a common law writ constrained by little more than the justices' creativity” (p. 121).

<sup>39</sup> 31 Car. 2, c. 2 (Eng.).

<sup>40</sup> Halliday quotes 1 WILLIAM BLACKSTONE, COMMENTARIES \*137. An internal quotation mark has been omitted.

<sup>41</sup> Halliday & White, *supra* note 9, at 611.

Founding.<sup>42</sup> Halliday's research demonstrates, though, that most advancements traditionally attributed to the statute can easily be documented in pre-1679 jurisprudence (pp. 239–41).

With regard to vacation writs (that is, when King's Bench was not in term), the misconception that writs could not issue in vacation prior to 1679 "arises less from confusion in the early modern period than from the limited sources we typically consult in writing the period's legal history" (p. 55). Thus, commentators have long quoted without any critical investigation Sir Edward Coke's observation in his famous *Institutes* that neither King's Bench nor Common Pleas could issue writs of habeas corpus "but in the term time."<sup>43</sup> In fact, vacation writs were routinely issued in two distinct ways. First, Coke notwithstanding, the writ *was* sometimes issued during vacation, as demonstrated by *teste* dates that fall outside of King's Bench's terms. As Halliday notes, "[s]cores of writs, from the fifteenth century through the eighteenth, have *teste* dates outside of term" (p. 56). To be sure, the publication of Coke's *Institutes* occasioned a significant decline in the number, but even then, "the practice did not die" (p. 56).

Second, and more ingeniously, the justices would issue the writ in vacation, but backdate the *teste* to the last day of the previous term. Halliday thus found a large number of writs where (1) the *teste* date was the last day of the term; (2) the *teste* date antedated the order by which the prisoner was detained; and (3) the writ was made returnable to a single justice in chambers on a date outside of term (p. 57). "Like all legal fictions, imagined *teste* dates permitted justices to air their doubts about vacation writs while they continued to use them" (p. 57). And, methodologically, the story of the vacation writs only further vindicates Halliday's central critique that "when we write legal history, we typically listen to what judges said — especially a famed one like Coke — rather than watch what they did" (p. 57). The reality, however, was that the 1679 Act's support for the practice of vacation writs "marked a revival, not an innovation" (p. 240).<sup>44</sup>

---

<sup>42</sup> See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 557–58 (2004) (Scalia, J., dissenting); *Whitmore v. Arkansas*, 495 U.S. 149, 162–63 (1990); *Peyton v. Rowe*, 391 U.S. 54, 58–59 (1968); see also *Kiyemba II*, 561 F.3d 509, 523 (D.C. Cir. 2009) (Griffith, J., concurring in the judgment in part and dissenting in part), *cert. denied*, 130 S. Ct. 1880 (2010).

<sup>43</sup> EDWARD COKE, *THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 81 (London, E. & R. Brooke 1797) (1644). Halliday quotes this observation on pp. 56 and 355 n.81.

<sup>44</sup> The Act *did* permit the issuance of writs in vacation by the jurists of other tribunals sitting in Westminster Hall, and thereby increased — by threefold — the number of judges who could provide such relief (p. 240).

As for the purported “great delays” in the making of returns to the writ, Halliday’s research proves that this concern was overblown.<sup>45</sup> The Act may have strengthened the available legal sanctions for failing to comply with writs — even those issued to far-away prisons — but Halliday’s research uncovered no significant change in the actual practice once these sanctions were on the books. As he concludes: “Again, this was no innovation. King’s Bench had long sent the writ to the palatinates, Wales, and Berwick, and most agreed that the common law writ could go to the Channel Isles, even if enforcing its return had been a problem” (p. 240).

Separate from these specific points, perhaps the strongest proof of how unnecessary the Habeas Corpus Act of 1679 proved to be is the extent to which King’s Bench continued to resort to its common law authority in the years and decades *after* the Act. The statute in its terms applied only to cases of imprisonment for felony or treason, and yet King’s Bench continued to issue the writ in other contexts, relying on authority that both predated and did not depend upon the Habeas Corpus Act. And lest there be any doubt about the prevalence and prominence of the common law writ after 1679, Halliday’s methodology once again proves the point: writs issued in the century after the Habeas Corpus Act included notations (mandated by the Act) specifying whether they were issued pursuant to statute or common law (pp. 241–42). It should come as little surprise, then, that some of the justices themselves were front and center in opposing Parliament’s failed 1758 bill to reform the writ; in their view, the common law provided all the authority they needed, and further legislation would only undermine their existing — and sweeping — common law powers (pp. 245–46).<sup>46</sup> Practice had revealed the 1679 Act to be a double-edged sword, “cutting down the common law writ by promoting the assumption that the writ could be effective only when supported by statute” (p. 246).

To that end, Halliday’s narrative reveals one last point of significance here: parliamentary interference with the writ was not just unnecessary; it may also have been counterproductive, “hid[ing] the once vigorous common law writ behind its chimerical statutory twin” (p. 258). As Halliday documents, every time Parliament discussed amending habeas corpus, those debates “occurred as Parliament extended its own use of imprisonment” (p. 225). And although parliamentary im-

---

<sup>45</sup> Halliday observes that “[w]rits issued after 1679 that specified a return date required return speeds that were no faster, on average, than before. In this regard, the act made little difference” (p. 240).

<sup>46</sup> For a full summary of the episode, see James Oldham & Michael J. Wishnie, *The Historical Scope of Habeas Corpus and INS v. St. Cyr*, 16 GEO. IMMIGR. L.J. 485, 487–95 (2002).



prisonment orders did not jeopardize the jurisdiction of King's Bench as such, they left the justices with decidedly little to do on the merits.

So it was that less than ten years after the Habeas Corpus Act of 1679, Parliament "suspended" habeas corpus for the first time, enacting a statute that empowered the Privy Council to imprison individuals alleged to have committed treason, or held on suspicion of treason, without "Baile or Mainprize."<sup>47</sup> The law provided for imprisonment "any Law or Statute to the contrary notwithstanding."<sup>48</sup> Thus, "[s]uspension operated not by suspending habeas corpus, but by expanding detention powers" (p. 249),<sup>49</sup> mooted the immediate effect of the writ by suspending the relief it could provide, albeit for a finite (and very short) period of time. And although the initial suspension act applied only to treason, subsequent suspension statutes extended the Privy Council's imprisonment power to anyone suspected of "treasonable practices" (pp. 248-49), a far more amorphous category in which an individual could be imprisoned merely on "suspicion," that is, without any evidence provided under oath.<sup>50</sup>

Of course, the Habeas Corpus Act of 1679 did not *cause* the onset of suspension acts. But as Halliday explains, it is more than a coincidence that parliamentary suspensions followed not long on the heels of Parliament's most sweeping foray into the law governing judicial review of detention. Both statutes followed from Parliament's increasing capture of the royal prerogative.<sup>51</sup> The Habeas Corpus Act presupposed that Parliament — rather than the justices — could dictate the circumstances and means by which the prerogative writ of habeas corpus would issue; the suspension acts presupposed that Parliament could decide for itself cases in which judicial oversight would be unavailable, at least for the duration of the suspension (after which the Habeas Corpus Act itself assured the return to normalcy qua judicial review).<sup>52</sup> As a result, "the most marked feature of statutory suspension was not the fact of suspension but its limits,"<sup>53</sup> the unwritten but omnipresent requirements informing every suspension act prior to 1777 that the suspension be justified by some specific "necessity,"<sup>54</sup> and that it be carefully limited in time (p. 250).

---

<sup>47</sup> 1 W. & M., c. 2 (Eng.).

<sup>48</sup> See *id.* For a full accounting of suspension acts between 1689 and 1783, see Halliday & White, *supra* note 9, at 617 nn.115-16.

<sup>49</sup> Put another way, it was not the writ that was suspended, but "Baile or Mainprize."

<sup>50</sup> Halliday & White, *supra* note 9, at 619.

<sup>51</sup> As Halliday notes, "[t]he logic of suspension followed in the wake of statutory extensions of the writ, consuming the judge's autonomy along the way" (p. 217).

<sup>52</sup> Halliday remarks that "[m]ore important than the common law writ's persistence during suspensions was the writ's revival when they ended" (p. 249).

<sup>53</sup> See Halliday & White, *supra* note 9, at 623.

<sup>54</sup> *Id.*

Until 1777, then, the suspension acts simultaneously reinforced and undermined the significance of habeas corpus. "[T]he suspension statutes did not in fact prevent supervision of detention by judges. Rather, they constrained judges' authority to release prisoners who had been jailed in specified ways" (p. 249). And yet, as much as the pre-1777 suspension acts left a vigorous writ largely undisturbed in (or, more to the point, *after*) the short term, they also left the unmistakable impression that such a reality was solely the result of legislative grace.

*C. 1777 to 1789: The High-Water Mark of the British Writ?*

What changed in 1777 was, candidly, our fault. With rebellion afoot in the North American colonies, Parliament faced growing numbers of American sailors in English captivity. Holding the captives as prisoners of war would lend legitimacy to American claims of independence. Instead, Parliament suspended habeas corpus in an unprecedented manner. First, there was no claim of domestic emergency — no rebellion on the home island or threat of invasion that might provide the "necessity" that Parliament had previously relied upon as the basis for suspending the writ.<sup>55</sup> Second, the period of suspension would eventually last for six years — all the way through the beginning of 1783 — by far the longest of any suspension Parliament had enacted to date.<sup>56</sup> Third, the 1777 suspension distinguished among subjects for the first time, applying only to those arrested for treason in any colony, on the high seas, or for piracy, and exempting from its scope "any other Prisoner or Prisoners than such as shall have been out of the Realm at the Time or Times of the Offence or Offences where-with he or they shall be charged."<sup>57</sup> Although the language of the 1777 suspension ironically "recognized the common law principles by which the writ had extended to precisely those places: not only to all dominions of the king outside England, but beyond, to the sovereignless sea" (p. 253), it nevertheless set a dangerous precedent for future suspensions in England, suggesting that Parliament could displace the writ based upon status, and without either of the constraints (necessity and brief duration) that had characterized every previous suspension.

In that regard, Halliday's analysis reveals one last conclusion of significance here: the drafting of the U.S. Constitution happened to coincide with what, in retrospect, may well have been the high-water mark of habeas in England. Sprinkled throughout Halliday's book are a number of statements about the scope of the writ, with the caveat

---

<sup>55</sup> See *id.* at 645–51 (summarizing the text of — and debates concerning — the 1777 suspension).

<sup>56</sup> See *id.* at 644 & n.204.

<sup>57</sup> 17 Geo. 3, c. 9, § 4 (1777) (Eng.).

"[a]t least until the 1790s" (pp. 133, 136). Nothing dramatic happened in 1790, but as Halliday explains, a series of developments in the years and decades thereafter, many of which were precipitated by the 1777 suspension, led to a significant decline in both the practical and legal significance of habeas corpus throughout the British Empire (pp. 253–56). For example, Parliament enacted a series of suspension statutes arising out of England's renewed wars with France between 1794–1795<sup>58</sup> and 1798–1801,<sup>59</sup> with the 1799 suspension act including provisions for stricter confinement of individual prisoners and unrelated authority for detention arising out of the rebellion then underway in Ireland.<sup>60</sup> Thus, for the first time, Parliament used the pretext of suspension with regard to one emergency to justify detention arising out of another.

"Beginning in the 1790s," though, "suspension became just one part of wider statutory campaigns against political dissent in all forms" (p. 255). In 1793, Parliament enacted the Aliens Act, which imposed a series of new sanctions — including detention without bail or deportation — on foreigners, especially Frenchmen, who failed to comply with a series of new regulations.<sup>61</sup> Parliament also enacted the Indemnity Act of 1801,<sup>62</sup> which appeared to let jailers off the hook for claims of false imprisonment or other abuse arising out of suspensions, even past ones (p. 431 n.167).<sup>63</sup> In sum, "[t]he 1790s would mark the start of a legislative onslaught on liberties of every kind, a unified assault against which the writ proved almost powerless" (p. 315). And even in the context of the writ's territorial scope, Parliament would eventually bar the justices from sending the writ into dominions with their own tribunals capable of issuing the writ.<sup>64</sup> It may not have mattered to colonists in Australia or India that they could no longer seek relief

<sup>58</sup> See, e.g., 34 Geo. 3, c. 54 (1794) (Eng.), renewed by 35 Geo. 3, c. 3 (1795) (Eng.).

<sup>59</sup> See, e.g., 38 Geo. 3, c. 36 (1798) (Eng.), renewed by 39 Geo. 3, c. 15 (1799) (Eng.); 39 Geo. 3, c. 44 (1799) (Eng.); 39 & 40 Geo. 3, c. 20 (1800) (Eng.); and 41 Geo. 3, c. 32 (1800) (Eng.).

<sup>60</sup> See 39 Geo. 3, c. 44, §§ 6–7 (1799) (Eng.).

<sup>61</sup> 33 Geo. 3, c. 4, §§ 15, 18–19 (1793) (Eng.). The Aliens Act "did permit review of such imprisonments . . . , but from the language of these sections, it is not clear this would carry the same procedural safeguards that a hearing of imprisonment on habeas corpus would provide" (p. 432 n.170).

<sup>62</sup> 41 Geo. 3, c. 66 (Eng.).

<sup>63</sup> Leaving aside historical confusion over the precedents for the Indemnity Act (or lack thereof) (p. 431 n.168), the Act clearly figures into the contemporary debate over whether a valid suspension of habeas corpus does not in fact *authorize* detention, but merely displaces judicial review for the duration of the suspension. Compare Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533 (2007), with David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59 (2006), and Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600 (2009).

<sup>64</sup> See Habeas Corpus Act, 1862, 25 & 26 Vict., c. 20 (Eng.).

from the justices in Whitehall, but it further reinforced Parliament's control of the writ (p. 301).

There is more to it,<sup>65</sup> but the short version is that the more Parliament intervened, the weaker the writ became. The last example aside, it wasn't that Parliament was formally interfering with the power of King's Bench, but that it was vitiating the justices' ability to do anything meaningful *with* that power. As Halliday laments, "[t]he logic of detention expanded as more people, regardless of their having performed any wrong previously known to law, became subject to forms of detention that barred judicial supervision" (p. 310). Whether or not the Suspension Clause should protect *more* than the writ "as it existed in 1789," Halliday's research demonstrates that, in the British Empire at least, "1789 was no minimum at all" (p. 314).

## II. THE SUSPENSION CLAUSE, HISTORY, AND THE DETAINEE LITIGATION

### A. *The Origins of the Suspension Clause*

Whatever effect it had on the development of English law, the 1777 suspension act also solidified in the minds of the American Founders the importance of protecting the writ of habeas corpus. Thus, many of the new state constitutions, between 1787 and 1860, provided either expressly or implicitly for the protection of the writ.<sup>66</sup> And even in those states without such provisions, there is ample evidence that common law habeas was routinely available throughout both the pre-revolutionary and antebellum periods, in a manner that largely resembled Halliday's description of English practice.<sup>67</sup>

When the delegates to the Constitutional Convention met in Philadelphia in 1787, then:

[T]hey did so against the backdrop of an English history of habeas corpus, which included two centuries of judicial innovation in habeas corpus jurisprudence. Innovation was made possible by the judiciary's capture of the royal prerogative. For nearly ninety years after 1689, that writ had continued in use, available to all natural subjects, and for all those within the king's dominions, except during carefully limited periods of suspension. . . . All shared in the liberties protected by the vigorous judicial oversight of any officer who imprisoned the king's subjects, and all shared in

<sup>65</sup> Halliday notes, for example, that beginning in the 1790s, Lord Chief Justice Kenyon — who replaced Mansfield upon his retirement in 1788 — began pushing for more vigorous adherence to the rule against controverting the return, refused to settle cases, and otherwise retreated from the expansive nature of habeas practice under his predecessors (p. 116).

<sup>66</sup> See Dallin H. Oaks, *Habeas Corpus in the States — 1776–1865*, 32 U. CHI. L. REV. 243, 247–51 (1965).

<sup>67</sup> See DUKER, *supra* note 24, at 98–115.

the loss of those liberties on those occasions when Parliament suspended the writ.<sup>68</sup>

As a result, the question was never whether the Founders would try to protect habeas, but how.<sup>69</sup> The actual debate at the Constitutional Convention was modest. On August 20, 1787, Charles Pinckney first submitted to the Committee on Detail language modeled on pre-1777 English practice, which would have protected the writ from suspension "except upon the most urgent and pressing occasions, and for a limited time not exceeding \_\_\_\_ months."<sup>70</sup> The provision returned to the floor on August 28, where, according to James Madison's notes, Pinckney suggested twelve months as the temporal limit on suspension.<sup>71</sup> John Rutledge responded that habeas should be inviolable, and that there should be *no* circumstances in which it could properly be suspended throughout the entire country.<sup>72</sup> Gouverneur Morris then proposed the language that, with one small modification, would become the Suspension Clause: "The privilege of the writ of habeas corpus shall not be suspended, unless where in cases of Rebellion or invasion the public safety may require it."<sup>73</sup> The first clause was approved unanimously; the second by a vote of seven states to three.<sup>74</sup>

Although these materials hardly provide full insight into what the Founders meant by "the privilege of the writ of habeas corpus," it is notable that the only meaningful debate the provision engendered either at Philadelphia or in the ratification debates that followed was over the scope of the suspension power. Critics suggested that it was another example of unenumerated federal powers, since it would be

---

<sup>68</sup> Halliday & White, *supra* note 9, at 670.

<sup>69</sup> Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 608 ("[I]n the Philadelphia Convention and in the struggle for ratification, there was never the slightest objection to according a special preeminence to the Great Writ.").

<sup>70</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 341 (Max Farrand ed., rev. ed. 1966). The implicit incorporation of pre-1777 practice raises the question of whether 1789 — or 1787, *see supra* note 6 — is even the correct baseline for understanding the scope of the English writ that the Founders meant to incorporate. One could make just as strong a case that the real question is the scope of the writ prior to 1777, which itself reinforces the difficulties inherent in the "as it existed" project.

<sup>71</sup> *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 70, at 438.

<sup>72</sup> *See id.*

<sup>73</sup> *Id.* The change, which took place in the Committee on Style, replaced "where" with "when." *See* Tyler, *supra* note 63, at 628. It is possible that this adjustment was meant as more than a semantic alteration — that the drafters intended to have the critical variable in suspensions be duration, and not location. But there is no evidence one way or the other as to the motive for the change.

<sup>74</sup> *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 70, at 438; *see also* Paschal, *supra* note 69, at 609–11. As Paschal concludes, "[e]ven as he proposed the negative phraseology, Pinkney [sic] gave voice to an affirmative purpose which all the evidence suggests was embraced by the Convention. . . . No one dissented from the proposition that the writ should be routinely available." *Id.* at 611.

unnecessary to limit the circumstances in which habeas *could* be suspended unless some other provision gave the government a suspension power.<sup>75</sup> But the Constitution's defenders responded that the Suspension Clause was actually a *grant* of power, delimiting the only circumstances in which the legislature (perhaps even *state* legislatures<sup>76</sup>) could preclude access to the writ.<sup>77</sup> That the latter view prevailed is evidenced, at least in part, by the absence of any mention of habeas corpus in the Bill of Rights, even though at least one state included a request for additional protection of the writ in its proposed amendments to the federal Constitution.<sup>78</sup> At least in the context of habeas, the Federalists and their opponents appeared to find common cause.

In addition, as Professor Francis Paschal observed, we can also gain insight from the fact that the exchange over the language of the Suspension Clause took place *after* the delegates had already agreed to the "Madisonian Compromise" — the drafting of the Constitution to allow (but not require) Congress to create lower federal courts.<sup>79</sup> Thus, Paschal concluded, "the Convention cannot be held to have depended on Congress for the realization of its hopes in respect to habeas corpus"; instead, "[t]he simplest view is that the Convention dealt with the possibility of no lower federal courts by directly commanding the courts, federal and state alike, to make the privilege of the writ routinely available."<sup>80</sup> The focus on habeas in *state* courts also supports the conclusion that the Founders understood English habeas as a hybrid of statutory and common law, since writs would presumably be available from state court judges whether or not Congress (or the state legislature) had provided for them.

Of equal importance, as Halliday and White explain, is the omission from the Suspension Clause (or the debates surrounding it) of any

<sup>75</sup> For summaries of the critiques along with quotations from (and citations to) them, see FREEDMAN, *supra* note 5, at 14–16.

<sup>76</sup> Cf. Paschal, *supra* note 69, at 612–13 & n.26 (noting how the omission of a specific reference to Congress reinforced the argument that the Clause left habeas generally available barring a valid suspension thereof).

<sup>77</sup> See FREEDMAN, *supra* note 5, at 16; see also Paschal, *supra* note 69, at 611 ("The negative phraseology was, it is safe to say, only a circumlocution to propose a suspending power in the least offensive way.").

<sup>78</sup> See Resolution of the New York Ratifying Convention (July 26, 1788), in 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 327, 330 (Jonathan Elliott ed., 2d ed. 1836). The proposal would have limited the duration of the suspensions that the Constitution authorized to the lesser of six months or twenty days after the beginning of the congressional session following the session in which a suspension act was passed. See *id.*

<sup>79</sup> See Paschal, *supra* note 69, at 615–16 & n.33.

<sup>80</sup> *Id.* at 616; see also AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 121 (2005) ("Since the Constitution nowhere required the creation of federal trial courts in the hinterlands, the crucial trial courts might well be state courts of general jurisdiction, armed with traditional common law powers, including authority to issue writs of habeas corpus.").

reference to geographic or citizenship-based limitations — the hallmark of the 1777 Suspension Act and its progeny. Instead, “the framers of the Suspension Clause implicitly restored the traditional order of writs and suspensions that had existed before the Parliamentary suspension acts that began in 1777.”<sup>81</sup> In that sense, the clear if unspoken relationship between the Suspension Clause and the 1777 Suspension Act may be even more significant, since it suggests that the Founders were well aware both of the nature of habeas practice in pre-1777 England and of the dramatic breaks that the 1777 suspension represented.<sup>82</sup> Thus, they crafted the Suspension Clause as a general constraint, requiring rebellion or invasion (and a concomitant threat to public safety) as precursors to *any* American suspension of the writ, regardless of the identity — or location — of the suspension’s subjects.<sup>83</sup>

So understood, what becomes clear about the Suspension Clause is the Founders’ simultaneous incorporation of, and decisive break from, English practice. The “privilege of the writ of habeas corpus” reflected the powerful, judicially controlled writ, the only formal limitation on which was Parliament’s (increasingly prevalent) suspension power. And the constraints on suspension, which imposed substantive (if ambiguous) limits on the circumstances in which American legislatures could intervene, were an attempt to remedy the one perceived shortcoming in contemporary English practice. As importantly, both the text of the Suspension Clause and its drafting and ratification history cut thoroughly against any argument that the Founders assumed that everything was as Coke, Blackstone, and others had written. As noted above, the evidence that exists on the subject, especially the experience with the 1777 suspension, suggests that the Founding narrative is wholly consistent with Halliday’s recitation of history. The Founders may well have been influenced by Coke, Blackstone, and the over-exaggeration of the Habeas Corpus Act of 1679, but the text on which they settled at Philadelphia appears to go well beyond those influences. Indeed, if habeas was to be modeled on the Whig view of its history,

---

<sup>81</sup> Halliday & White, *supra* note 9, at 671.

<sup>82</sup> As Halliday and White note, George Washington himself invoked the 1777 suspension as one of the wrongs against which the colonists were rebelling. *See id.* at 649.

<sup>83</sup> The Clause’s focus on “rebellion” or “invasion,” both domestic emergencies, has led some scholars to argue that the Founders did not understand habeas to apply overseas. *See, e.g.,* Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 521–24 (2007). As Halliday’s research shows, this view has things entirely backwards. Habeas in England *did* run overseas; otherwise, the 1777 Suspension Act would not have been necessary. And in any event, the debates at Philadelphia suggest that the Founders’ focus on domestic emergencies as the trigger for valid suspensions had nothing to do with a limited view of the writ’s territorial scope. Rather, it was because, contra the 1777 example, they did not believe that an extraterritorial emergency could ever justify a national suspension of the writ; indeed, some thought *no* emergency could. *See supra* p. 960.

the Suspension Clause would have been a bizarre way so to provide. On that view, habeas could be suspended simply by failing to provide for it.<sup>84</sup>

Notwithstanding these conclusions, prior to 2008, the U.S. Supreme Court had consistently declined to give meaningful substantive content to the Suspension Clause. The provision was seldom even mentioned in most of the Court's significant nineteenth-century habeas decisions, and even when it was invoked in cases like *Ex parte Bollman*,<sup>85</sup> the discussion was, charitably, rather cursory.<sup>86</sup>

Even in cases traditionally thought of as significant habeas decisions, the Suspension Clause received short shrift. In *Ex parte Milligan*,<sup>87</sup> the Court struck down military commissions convened unilaterally by President Lincoln during the Civil War largely as a violation of the defendant's Fifth and Sixth Amendment rights,<sup>88</sup> rejecting the government's argument that the Habeas Corpus Act of 1863<sup>89</sup> had effectively authorized President Lincoln's actions.<sup>90</sup> And although the Court thereby debated the *effect* of a valid suspension of habeas,<sup>91</sup> it devoted little attention to what the Suspension Clause otherwise meant. In *Johnson v. Eisentrager*,<sup>92</sup> the Court rejected the Article III courts' power to entertain habeas petitions by noncitizens convicted by an American military commission and detained overseas, without specifically holding that the Suspension Clause fails to protect noncitizens outside the territorial United States.<sup>93</sup> And in *United States v. Hayman*<sup>94</sup> and *Swain v. Pressley*,<sup>95</sup> the Court upheld a pair of statutes supplanting habeas with alternative remedies, holding in both cases that the Suspension Clause was not implicated, since the statutes left habeas intact where the alternative proved "inadequate or ineffective to test the legality of [the petitioner's] detention."<sup>96</sup>

---

<sup>84</sup> See *infra* note 200 and accompanying text.

<sup>85</sup> 8 U.S. (4 Cranch) 75 (1807).

<sup>86</sup> See, e.g., *id.* at 95.

<sup>87</sup> 71 U.S. (4 Wall.) 2 (1866).

<sup>88</sup> See *id.* at 118–22.

<sup>89</sup> Act of Mar. 3, 1863, ch. 81, 12 Stat. 755.

<sup>90</sup> See David J. Barron & Martin S. Lederman, *The Commander-in-Chief at the Lowest Ebb — A Constitutional History*, 121 HARV. L. REV. 941, 1005–08 (2008) (discussing the Habeas Corpus Act and the role it played in *Milligan*).

<sup>91</sup> Compare *Milligan*, 71 U.S. (4 Wall.) at 115, 130–31, with *id.* at 137 (opinion of Chase, C.J.).

<sup>92</sup> 339 U.S. 763 (1950).

<sup>93</sup> See *id.* at 768 (stating that “[n]othing in the text of the Constitution extends such a right” to alien enemies).

<sup>94</sup> 342 U.S. 205 (1952).

<sup>95</sup> 430 U.S. 372 (1977).

<sup>96</sup> 28 U.S.C. § 2255(e) (2006 & Supp. II 2008); D.C. CODE ANN. § 23-110(g) (LexisNexis 2010); see also *Swain*, 430 U.S. at 373; *Hayman*, 342 U.S. at 207 n.1.



Likewise, cases in which prisoners sought to use habeas corpus to challenge their state convictions in federal court tended to say little, if anything, about the Suspension Clause. When the Court first started considering nonjurisdictional challenges to state court convictions in the 1940s,<sup>97</sup> it skirted the vital question of whether such review might be necessitated by the Constitution. Instead, the Court pegged such authority to the Habeas Corpus Act of 1867,<sup>98</sup> the important post-Civil War statute that, *inter alia*, first gave the federal courts statutory habeas jurisdiction over state prisoners.<sup>99</sup> And when the Court turned to questions of the availability and scope of relitigation in postconviction habeas cases in the federal courts, the Suspension Clause — and the historical experience it presumably reflected — was often invoked, but seldom analyzed.<sup>100</sup> Whether relying explicitly or implicitly upon the constitutional avoidance canon, the Supreme Court left the clause's scope entirely unaddressed into the 1990s, when Congress began to force the issue.

Even then, though, the Court managed to sidestep the constitutional questions raised by the Antiterrorism and Effective Death Penalty Act of 1996<sup>101</sup> (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996<sup>102</sup> (IIRIRA), holding — twice — that different provisions of the statutes had not actually foreclosed *all* habeas relief.<sup>103</sup> In the Court's first Guantánamo case — *Rasul v. Bush*<sup>104</sup> — the Justices also relied on statutory interpretation to avoid

---

<sup>97</sup> See, e.g., *Waley v. Johnston*, 316 U.S. 101, 104–05 (1942) (per curiam); see also *Wainwright v. Sykes*, 433 U.S. 72, 79 (1977) (“[I]n *Waley v. Johnston*, the Court openly discarded the concept of jurisdiction . . . as a touchstone of the availability of federal habeas review, and acknowledged that such review is available for claims of disregard of the constitutional rights of the accused.”) (citations omitted) (internal quotation mark omitted). See generally Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 151–54 (1970) (describing four lines of decisions allowing nonjurisdictional collateral attacks on criminal judgments).

<sup>98</sup> Ch. 28, 14 Stat. 385 (current version at 28 U.S.C. § 2241 (2006)).

<sup>99</sup> See, e.g., *Johnson v. Zerbst*, 304 U.S. 458, 466 & n.19 (1938) (emphasizing that “Congress has expanded the rights of a petitioner for *habeas corpus*,” and citing to the habeas provisions of the Judicial Code, as amended by the Habeas Corpus Act of 1867).

<sup>100</sup> For one of the only exceptions, see Justice Brennan's opinion for the Court in *Fay v. Noia*, 372 U.S. 391, 399–415 (1963). Even there, though, Brennan's preeminent concern was the writ's historical treatment by the Court (or lack thereof); the Suspension Clause itself merited only a short discussion. See *id.* at 405–06 & n.15.

<sup>101</sup> Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

<sup>102</sup> Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified in scattered sections of 8 and 18 U.S.C.).

<sup>103</sup> See *INS v. St. Cyr*, 533 U.S. 289, 314 (2001); *Felker v. Turpin*, 518 U.S. 651, 654 (1996). The Suspension Clause — and the history informing it — clearly played a role in these cases, in *St. Cyr* in particular. But that role was indirect at best, and may have convinced the Court of the difficulties of the constitutional question and incentivized decisions on statutory grounds.

<sup>104</sup> 542 U.S. 466 (2004).

having to answer the question of whether the Suspension Clause required judicial review.<sup>105</sup> So too in *Hamdan v. Rumsfeld*,<sup>106</sup> where the Court construed section 1005(e)(1) of the Detainee Treatment Act of 2005<sup>107</sup> (DTA), which purported to divest the federal courts of jurisdiction over detainee habeas petitions (including Hamdan's),<sup>108</sup> as not applying to "pending" cases,<sup>109</sup> again avoiding the constitutional elephant in the room.<sup>110</sup>

Whatever the merits of these decisions, they helped to precipitate the Military Commissions Act of 2006<sup>111</sup> (MCA), where Congress expressly and unambiguously sought to preclude access to habeas corpus for noncitizens detained as "enemy combatants,"<sup>112</sup> *without* formally suspending habeas.<sup>113</sup> The Act — like the DTA before it — provided for a carefully circumscribed appeal to the D.C. Circuit of a detainee's military commission conviction or Combatant Status Review Tribunal (CSRT) status determination,<sup>114</sup> and so the question before the Supreme Court in *Boumediene v. Bush* was two-fold: whether the Guantánamo detainees were even entitled to invoke the Suspension Clause, and, if so, whether the MCA violated it.<sup>115</sup>

---

<sup>105</sup> See *id.* at 478–84.

<sup>106</sup> 548 U.S. 557 (2006).

<sup>107</sup> Pub. L. No. 109-148, 119 Stat. 2680 (codified as amended in scattered sections of 10, 28, and 42 U.S.C. (2006)).

<sup>108</sup> *Id.* § 1005(e)(1), 119 Stat. at 2739 (codified as amended in scattered sections of 10, 28, and 42 U.S.C.).

<sup>109</sup> See *Hamdan*, 548 U.S. at 584.

<sup>110</sup> Because various Justices disagreed with the Court's avoidance of the question in these cases, there are several extended discussions of the Suspension Clause in concurrences and dissents. See, e.g., *id.* at 669–72 (Scalia, J., dissenting); *INS v. St. Cyr*, 533 U.S. 289, 336–45 (2001) (Scalia, J., dissenting); *Swain v. Pressley*, 430 U.S. 372, 384–86 (1977) (Burger, C.J., concurring in part and concurring in the judgment); cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 554–69 (2004) (Scalia, J., dissenting) (arguing that, absent a valid suspension of habeas, the Clause prohibits the detention without trial of U.S. citizens).

<sup>111</sup> Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of the U.S. Code).

<sup>112</sup> See *id.* § 7(a), 120 Stat. at 2635–36 (codified at 28 U.S.C. § 2241(e)(1)).

<sup>113</sup> Whether or not Congress *could* constitutionally have suspended the writ in the case of (any or all of) the Guantánamo detainees, no one seriously argues that the MCA attempted to do so. See *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 16 (D.D.C. 2006); see also *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008) ("The MCA does not purport to be a formal suspension of the writ; and the Government, in its submissions to us, has not argued that it is.").

<sup>114</sup> See Military Commissions Act § 7(a), 120 Stat. at 2635–36 (codified at 28 U.S.C. § 2241(e)(2)); Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1005(e)(2)–(3), 119 Stat. at 2742–43 (codified as amended at 10 U.S.C. § 801 note (2006)).

<sup>115</sup> See *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007) (holding that the Suspension Clause did not apply to the Guantánamo detainees), *rev'd*, 128 S. Ct. 2229 (2008). The Court initially denied certiorari in *Boumediene* over three dissents. See *Boumediene v. Bush*, 549 U.S. 1328 (2007) (mem.). Just under three months later — on the last day of the 2006 Term — the Court reversed course, granting a petition for rehearing, vacating its denial of review, and granting certiorari. See *Boumediene v. Bush*, 551 U.S. 1160 (2007) (mem.).

*B. The Suspension Clause Today: Where Habeas Goes*

Unlike the decisions briefly surveyed above, Justice Kennedy's opinion for the majority in *Boumediene* attempted quite thoroughly (and consciously) to account for the English history that informs the Suspension Clause in deciding whether the clause protects noncitizens detained outside the territorial United States.<sup>116</sup> And yet, although Justice Kennedy walked carefully through the available historical sources, he ultimately found them inconclusive, at least given the specific way he framed the question:

Diligent search by all parties reveals no certain conclusions. In none of the cases cited do we find that a common law court would or would not have granted, or refused to hear for lack of jurisdiction, a petition for a writ of habeas corpus brought by a prisoner deemed an enemy combatant, under a standard like the one the Department of Defense has used in these cases, and when held in a territory, like Guantanamo, over which the Government has total military and civil control.<sup>117</sup>

Emphasizing the incompleteness of the historical record, and the "unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age," the majority "declin[ed] . . . to infer too much, one way or the other, from the lack of historical evidence on point."<sup>118</sup> Put another way, the Court spent eight pages deciding that English legal history, on this critical constitutional question, was essentially useless.<sup>119</sup> Instead, Justice Kennedy devoted much of the rest of his opinion to two distinct arguments: that the separation of powers doctrine has a lot to say about how to ascertain the territorial scope of the Suspension Clause, and that the United States exercises a unique form of sovereignty over Guantánamo.<sup>120</sup>

With regard to the separation of powers, Justice Kennedy repeatedly emphasized the relationship between the Suspension Clause and the rest of the Constitution, framing the habeas provision as an indispens-

---

<sup>116</sup> See *Boumediene*, 128 S. Ct. at 2244–51. The Court emphasized that "to the extent there were settled precedents or legal commentaries in 1789 regarding the extraterritorial scope of the writ or its application to enemy aliens, those authorities can be instructive for the present cases." *Id.* at 2244. The Court had the benefit of both an amicus curiae brief filed by legal historians that relied heavily on a draft of Halliday and White's *Virginia Law Review* article, and the article itself. Justice Kennedy repeatedly cited to both in his analysis. See, e.g., *id.* at 2244–45, 2248, 2251.

<sup>117</sup> *Id.* at 2248.

<sup>118</sup> *Id.* at 2251.

<sup>119</sup> In his dissent, Justice Scalia argued that the absence of clear historical evidence supported the conclusion that the Suspension Clause did *not* cover noncitizens held outside the territorial United States. See *id.* at 2303–06 (Scalia, J., dissenting).

<sup>120</sup> *Id.* at 2251–63 (majority opinion). Justice Kennedy had largely previewed the latter argument in his solo concurrence in *Rasul v. Bush*, 542 U.S. 466 (2004), agreeing that the federal habeas statute extended to Guantánamo, but reasoning that Guantánamo's unique territorial status factored into the analysis more than the majority had recognized. See *id.* at 487–88 (Kennedy, J., concurring in the judgment).

able judicial check on the power of the political branches.<sup>121</sup> As he explained:

The Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the “delicate balance of governance” that is itself the surest safeguard of liberty. The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account. The separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause.<sup>122</sup>

Invoking the separation of powers in at least ten additional passages,<sup>123</sup> Justice Kennedy’s point appeared to be that the Suspension Clause should be understood, in general, as protecting prisoners *by* protecting the power of courts — as “a means to an end — a structural mechanism protecting individual liberty by preserving the ability of the courts to check the political branches.”<sup>124</sup> Echoing his earlier opinion for the Court in *Legal Services Corp. v. Velazquez*,<sup>125</sup> the gist of his separation of powers rhetoric was that the merits of the detainees’ individual cases were largely irrelevant to the question of the courts’ power to resolve them.<sup>126</sup> One of “freedom’s first principles,” Justice Kennedy concluded, is “freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers,” and “[i]t is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.”<sup>127</sup>

From there, one might have expected Justice Kennedy to conclude that the separation of powers concerns undergirding the Suspension Clause are present regardless of *where* the detainee is held.<sup>128</sup> Instead,

<sup>121</sup> For more on this aspect of Justice Kennedy’s opinion, see Stephen I. Vladeck, Boumediene’s *Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107 (2009).

<sup>122</sup> *Boumediene*, 128 S. Ct. at 2247 (citations omitted).

<sup>123</sup> See Vladeck, *supra* note 121, at 2110 & n.18 (discussing and citing examples).

<sup>124</sup> *Id.* at 2110.

<sup>125</sup> 531 U.S. 533 (2001) (emphasizing the separation of powers concerns raised by funding restrictions on the claims that legal services lawyers could raise in lawsuits, and invalidating the restrictions under the First Amendment); see also Vladeck, *supra* note 121, at 2111 (explaining the analogy to *Velazquez* in more detail).

<sup>126</sup> Thus, Justice Kennedy’s opinion all but ignored Chief Justice Roberts’ dissent, which argued that it was premature to resolve the Suspension Clause question until and unless the detainees were able to demonstrate that their CSRT hearings violated their due process rights. See *Boumediene*, 128 S. Ct. at 2280–83 (Roberts, C.J., dissenting). Justice Kennedy’s implicit response, as I have suggested previously, came both in his general focus on the separation of powers and in his specific invocation of Justice Holmes. See Vladeck, *supra* note 121, at 2111–12 & n.32.

<sup>127</sup> *Boumediene*, 128 S. Ct. at 2277.

<sup>128</sup> See, e.g., *Boumediene v. Bush*, 476 F.3d 981, 995–1007 (D.C. Cir. 2007) (Rogers, J., dissenting), *rev’d*, 128 S. Ct. 2229.

Justice Kennedy turned to the Court's jurisprudence regarding extra-territorial application of *other* constitutional provisions (the Due Process Clause, in particular), borrowing from *Eisentrager* and Justice Harlan's concurrence in *Reid v. Covert*<sup>129</sup> the conclusion that

at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.<sup>130</sup>

Applying these factors, Justice Kennedy concluded that they weighed more heavily in favor of judicial review than they had in *Eisentrager*, and that the Suspension Clause therefore "has full effect at Guantanamo Bay."<sup>131</sup> Reasoning that the alternative review provided by the DTA and MCA was an inadequate substitute for habeas corpus,<sup>132</sup> the majority invalidated section 7(a) of the MCA, at least as applied to the Guantánamo detainees.<sup>133</sup> Although *Boumediene* thereby became the first time the Supreme Court ever invalidated an Act of Congress as violating the Suspension Clause, it left unclear to courts and commentators alike whether the crux of the holding was the separation of powers concerns, the unique status of Guantánamo, or some hybrid of both.<sup>134</sup>

In that respect, what is perhaps most frustrating about *Boumediene* is how close the Court came to doing right by English history, only to miss the forest for a want of trees. As noted above, Halliday's research establishes that the jurisdiction of King's Bench to issue writs of habeas corpus at the time of the Founding was effectively indifferent to the status or location of the detainee. So long as the royal prerogative reached the jailer, the court's jurisdiction was unchallenged, and the inquiry turned on the sufficiency of the jailer's return. We may obsess over the distinction between jurisdiction and the merits today, but to King's Bench in the eighteenth century, the latter was the exclusive concern when it came to writs of habeas corpus. Habeas was unique, a point that *Boumediene* appreciated in some places, but rejected in others — as evidenced, for example, by Justice Kennedy's reliance on the jurisprudence regarding the extraterritorial application

---

<sup>129</sup> See 354 U.S. 1, (1957); see *id.* at 74–75 (Harlan, J., concurring in the result).

<sup>130</sup> *Boumediene*, 128 S. Ct. at 2259.

<sup>131</sup> *Id.* at 2259–62.

<sup>132</sup> See *id.* at 2262–74.

<sup>133</sup> See *id.* at 2274–77.

<sup>134</sup> See, e.g., Robert M. Chesney, *International Decisions, Boumediene v. Bush*, 102 AM. J. INT'L L. 848, 853 (2008); see also Vladeck, *supra* note 121, at 2108–09 (cataloguing some of the other questions that *Boumediene* leaves unanswered).

of *other* constitutional provisions, especially individual parts of the Bill of Rights.

Ironically, the narrative that Halliday weaves actually *supports* Justice Kennedy's observations about the intended relationship between the Suspension Clause and the separation of powers.<sup>135</sup> To the extent that habeas in England increasingly became an instrument of judicial power at the expense of the monarch, its codification in the U.S. Constitution can be seen as the Founders' attempt to preserve that power — whether in state or federal courts. Access to the "privilege of the writ" said nothing about the prisoner's entitlement to relief; it merely guaranteed that an impartial magistrate would be the one to answer that question.<sup>136</sup> And to the extent that parliamentary abuses of habeas corpus became increasingly prevalent in eighteenth-century England, the Founders went out of their way to constrain the circumstances in which such access could be precluded — to protect the prisoners, of course, but to do so *by* protecting the courts.

The upshot of *Boumediene*, then, is that the majority seemed to believe all of this analysis, and yet found inconclusive the very history that proves it because of the absence of cases squarely on point. And that is precisely Halliday's methodological objection: "Individual cases are literally meaningless without the contexts — social and cultural, as well as those provided by other cases — through which we can hope to understand them" (p. 5). There were both substantive and structural reasons why English practice did *not* produce rule-bound decisions.<sup>137</sup> And in any event, any rules that could be discerned from the cases, like the rule barring the contravention of the return, were consistently honored in the breach.

Because *Boumediene* punted on this point, it left unclear whether subsequent courts should lean more heavily toward its underlying separation of powers discussion or its analysis of Guantánamo's uniqueness. At least with regard to the territorial scope of the Suspension Clause, that issue arose promptly in the context of noncitizens detained at the U.S. air base in Bagram, Afghanistan. In April 2009, the D.C. district court, applying *Boumediene*, concluded that the Suspension

---

<sup>135</sup> Halliday expressly rejects the notion that habeas in pre-revolutionary England was about the separation of powers, an understandable conclusion given the structural nature of the parliamentary system both then and now (p. 27). But the conclusion that English habeas was about *judicial* power is ubiquitous throughout his narrative, and takes on separation of powers undertones when viewed in light of America's divided constitutional system. Indeed, it could hardly have been lost on the Founders that they were simultaneously enshrining in the Constitution a prerogative writ and the structural independence of the judges who would issue it.

<sup>136</sup> As Justice Kennedy pointed out in *Boumediene*, the Suspension Clause was included in a Constitution that lacked a Bill of Rights. See *Boumediene*, 128 S. Ct. at 2244.

<sup>137</sup> Halliday, for example, suggests why there were seldom formal decisions in POW cases (p. 168).

Clause *should* apply, at least where the petitioners were neither citizens of, nor initially arrested in, Afghanistan.<sup>138</sup>

The D.C. Circuit reversed.<sup>139</sup> Writing for the court, Chief Judge Sentelle explained that, although the “citizenship and adequacy of process” factor from *Boumediene* weighed in favor of access to habeas,<sup>140</sup> the other two factors — the nature of the sites where apprehension and detention took place and the “practical obstacles” to habeas review — militated against review, all the more so given Bagram’s location in an active military theater.<sup>141</sup> And although the court of appeals recognized the possibility that such a holding might entice the government “to evade judicial review of Executive detention decisions by transferring detainees into active conflict zones, thereby granting the Executive the power to switch the Constitution on or off at will,”<sup>142</sup> it concluded that “the notion that the United States deliberately confined the detainees in the theater of war rather than at, for example, Guantanamo, is not only unsupported by the evidence, it is not supported by reason.”<sup>143</sup> Nowhere in the panel’s relatively short opinion was any reference made to the separation of powers, the history of the writ, or the extent to which *Boumediene* intimated that either had anything to do with proper analysis of the Suspension Clause’s scope.

And yet, whatever might be said about the persuasiveness of the D.C. Circuit’s reasoning, it is hard to fault the analytical framework that the panel employed, at least as a matter of precedent.<sup>144</sup> If the scope of the Suspension Clause really is meant to be guided by the three-factor framework that Justice Kennedy articulated in *Boumediene*, one might understand the court of appeals’s inclination to otherwise ignore the separation of powers thrust of his opinion. After all, however accurate the *Boumediene* Court’s recitation of history, and however on point its understanding of the relationship between the Suspension Clause and the separation of powers, the Court itself failed to link the two.

---

<sup>138</sup> See *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009), *rev’d*, 605 F.3d 84 (D.C. Cir. 2010).

<sup>139</sup> See *Al Maqaleh*, 605 F.3d 84.

<sup>140</sup> See *id.* at 95–96.

<sup>141</sup> See *id.* at 96–99.

<sup>142</sup> *Id.* at 98 (quoting Brief of Appellees at 34, *Al Maqaleh*, 605 F.3d 84 (No. 09-5266)) (internal quotation marks omitted).

<sup>143</sup> *Id.* at 99.

<sup>144</sup> To be sure, the court’s approach is troubling as a matter of practice, since (1) the detainee will seldom be in a position to prove the reason why the government chose to hold him at that particular site; (2) it is difficult to conceive of other reasons why the government would transfer detainees captured elsewhere *into* the Afghanistan military theater for purposes of detention; and (3) in any event, habeas jurisdiction should not turn on the subjective intent of government officers. My point here is simply that such an approach is not squarely inconsistent with *Boumediene*.

### C. The Suspension Clause Today: What Habeas Can Do

Separate from the debate over the territorial scope of the Suspension Clause, a series of cases involving a group of Uighurs — a Turkic Muslim minority of far-western China — has driven home just how little the history Halliday traces has figured into contemporary litigation over the *shape* of the habeas remedy.

The problem in the Uighur cases is easy enough to describe: the individuals at issue were turned over to the United States after being captured in Pakistan sometime in late 2001. In 2008, the D.C. Circuit concluded that they were no longer (and perhaps never were) subject to detention as “enemy combatants.”<sup>145</sup> But they could not be returned to China, since, as the government conceded, they credibly feared torture if sent home. Nor, after years of trying, was the U.S. government able to find a mutually agreeable third-party country to which at least some of the detainees could be transferred. The Uighurs brought a habeas petition seeking their immediate release into the United States and a second petition seeking at least notice and an opportunity to be heard before their transfer to a third-party country.<sup>146</sup>

With regard to their claim seeking release into the United States, the Uighurs prevailed initially in the district court, obtaining an order from Judge Urbina compelling the federal government to produce the detainees in his courtroom so that he could impose conditions upon their release into the United States.<sup>147</sup> Again, the D.C. Circuit reversed.<sup>148</sup> In a sweeping opinion for the court of appeals, Judge Randolph emphatically rejected the argument that the federal courts had the power to admit noncitizens into the country, which would be the practical effect of the district court’s order.<sup>149</sup> Holding, without reference to the analytical framework outlined in *Boumediene*, that the Guantánamo detainees had no due process rights,<sup>150</sup> Judge Randolph effectively concluded that the Suspension Clause did not carry with it

<sup>145</sup> See *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008).

<sup>146</sup> *Kiyemba I*, 555 F.3d 1022, 1024 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010) (per curiam), *reinstated on remand*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam), *petition for cert. filed*, No. 10-775 (U.S. Dec. 8, 2010). The notice petition was filed in (and granted by) the D.C. district court in 2005. The D.C. Circuit initially dismissed for lack of jurisdiction under the MCA, but vacated that judgment after *Boumediene*. See *Kiyemba II*, 561 F.3d 509, 511 (D.C. Cir. 2009) (describing the background), *cert. denied*, 130 S. Ct. 1880 (2010).

<sup>147</sup> See *In re Guantanamo Detainee Litig.*, 581 F. Supp. 2d 33, 43 (D.D.C. 2008), *rev’d sub nom. Kiyemba I*, 555 F.3d 1022.

<sup>148</sup> *Kiyemba I*, 555 F.3d at 1032.

<sup>149</sup> For this proposition, Judge Randolph invoked a pair of 1950s Supreme Court decisions that recognized immigration-based limits on the power of the courts to admit noncitizens who were stopped “at the border.” See *id.* at 1027–28 (citing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950)).

<sup>150</sup> See *id.* at 1026–27.



a corresponding right to release for a prisoner who prevailed on the merits, albeit without any discussion — other than an *ipse dixit* — of the clause or its history.<sup>151</sup>

Had Judge Randolph meaningfully considered the history informing the Suspension Clause, he might have found that the Uighurs' case presented a far closer question. Pre-revolutionary English practice always assumed that the power to issue the writ necessarily included the power to order the prisoner's release. Indeed, in a formal sense (albeit increasingly *not* literally),<sup>152</sup> the prisoner would be "before" the court, and in its custody, at the time of its decision (p. 59). If King's Bench had the power to order the jailer to release the prisoner — which, as noted above, it always did when the jailer answered to the king — it had the power to effectuate release.

To be sure, no corresponding jurisprudence in England recognized as a matter of substantive law that the king — and not the courts — had the power to admit noncitizens into the country. And so it is unreasonable to conclude, based purely on the historical evidence, that an order to release the prisoners *into the United States* would be consistent with the authority that King's Bench exercised prior to the Founding. But whereas the D.C. Circuit stopped there, Halliday's research suggests that English courts would have gone further, taking seriously the flexibility of the writ as a means of promoting equity. To that end, it *would* be consistent to order the government to release the prisoner within a specified, finite period of time, and to sanction the government if it failed to do so.<sup>153</sup> Indeed, such orders were standard practice for King's Bench throughout the seventeenth and eighteenth centuries. As Halliday documents, one of the most significant ways in which King's Bench asserted its power was through contempt fines — and sometimes even imprisonment — for jailers who disregarded the justices' authority (pp. 60–63, 92–93). It would have gone without saying that King's Bench had the power to order release in the abstract, and to punish those who failed to comply.<sup>154</sup>

---

<sup>151</sup> See *id.* at 1028 ("Whatever may be the content of common law habeas corpus, we are certain that no habeas court since the time of Edward I ever ordered such an extraordinary remedy."). The Supreme Court granted certiorari in *Kiyemba I* and set it for argument on the merits, only to issue a terse per curiam decision vacating the D.C. Circuit in light of changed circumstances noted by the government. See *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (per curiam). On remand, however, the court of appeals largely adhered to its original decision. See *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam), *petition for cert. filed*, No. 10-775 (U.S. Dec. 8, 2010).

<sup>152</sup> See *supra* p. 952 (noting King's Bench's increasing reliance on the *nisi* procedure).

<sup>153</sup> See, e.g., *Padilla v. Rumsfeld*, 352 F.3d 695, 724 (2d Cir. 2003) (ordering the Secretary of Defense to release a U.S. citizen detained as an "enemy combatant" from military custody within thirty days), *rev'd on other grounds*, 542 U.S. 426 (2004).

<sup>154</sup> Given the lack of other countries to which the Uighurs legally could have been sent, such a decision might have had the same practical effect — the release of the Uighurs into the United

Wholly apart from the unique issues raised in *Kiyemba I*,<sup>155</sup> though, the D.C. Circuit also rejected the Uighurs' application for notice and a right to be heard prior to their transfer to a third-party country.<sup>156</sup> At the heart of Judge Ginsburg's analysis for the *Kiyemba II*<sup>157</sup> majority was the Supreme Court's decision in *Munaf v. Geren*,<sup>158</sup> handed down the same day as *Boumediene*. In *Munaf*, the Court upheld the federal courts' jurisdiction to entertain habeas petitions by U.S. citizens detained by the United States in Iraq,<sup>159</sup> but dismissed their claim that they feared torture if transferred to Iraqi custody in light of the State Department's assurances to the contrary.<sup>160</sup> As Chief Justice Roberts wrote, "habeas is not a means of compelling the United States to harbor fugitives from the criminal justice system of a sovereign with undoubted authority to prosecute them."<sup>161</sup>

Of course, that statement belies the extent to which habeas *does* compel the United States to so act when transferring the fugitive would be unlawful, as where the petitioner credibly fears torture, for example.<sup>162</sup> More fundamentally, though, the *Munaf* Court's assumption that executive branch assurances are effectively conclusive in transfer and extradition cases wholly ignores Halliday's detailed evidence of English practice proving that, even during wartime, prisoners were routinely able to offer evidence controverting the return.<sup>163</sup> And

---

States. Critically, though, the choice of the United States as the ultimate venue for release would then have been an executive, rather than a judicial, decision.

<sup>155</sup> 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010) (per curiam), *reinstated on remand*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam), *petition for cert. filed*, No. 10-775 (U.S. Dec. 8, 2010).

<sup>156</sup> See *Kiyemba II*, 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010).

<sup>157</sup> 561 F.3d 509 (D.C. Cir.), *cert. denied*, 130 S. Ct. 1880.

<sup>158</sup> 128 S. Ct. 2207 (2008).

<sup>159</sup> See *id.* at 2216–18.

<sup>160</sup> See *id.* at 2226. Justice Souter wrote separately to emphasize that the Court was not deciding the "extreme case in which the Executive has determined that a detainee [in United States custody] is likely to be tortured but decides to transfer him anyway," or "a case in which the probability of torture is well documented, even if the Executive fails to acknowledge it." *Id.* at 2228 (Souter, J., concurring) (alteration in original) (citation and internal quotation marks omitted). And the majority, in a footnote, skeptically discussed — but declined to reach — whether a properly raised claim under the Convention Against Torture could provide the basis for relief. See *id.* at 2226 n.6 (majority opinion).

<sup>161</sup> *Id.* at 2223.

<sup>162</sup> Cf. *Khuzam v. Att'y Gen.*, 549 F.3d 235 (3d Cir. 2008) (considering such a claim in the context of a petition for review of a final order of removal, and thereby avoiding the question of whether the Suspension Clause requires a habeas remedy). I do not mean to oversell this point; there is no case law standing for the proposition that the Suspension Clause requires a habeas remedy in a case where a prisoner's transfer to a foreign country would violate federal or international law. But the Suspension Clause concerns in such a context should be clear. For more on this point, see Stephen I. Vladeck, Case Comment, *Non-Self-Executing Treaties and the Suspension Clause After St. Cyr*, 113 YALE L.J. 2007 (2004).

<sup>163</sup> In this regard, it is worth noting that *Munaf* reached the merits even though the lower courts had decided only the threshold jurisdictional question. See *Munaf*, 128 S. Ct. at 2215–19

the Chief Justice's assertion that "the nature of the relief sought by the habeas petitioners suggests that habeas is not appropriate in these cases"<sup>164</sup> is belied by the equitable flexibility King's Bench routinely demonstrated in shaping the habeas remedy, as, for example, in impressment cases, where simple discharge might not indemnify the impressed soldier from desertion charges (p. 167).

Still, *Munaf* was a highly fact-specific decision.<sup>165</sup> Unlike in *Munaf*, where the detainees specifically sought to block their transfer to Iraqi custody on the merits, the petitioners in *Kiyemba II* sought an injunction only requiring notice and a hearing prior to their transfer to *any* country, to allow them to litigate the merits. Nevertheless, the D.C. Circuit majority concluded that "[u]nder *Munaf*, . . . the district court may not question the Government's determination that a potential recipient country is not likely to torture a detainee."<sup>166</sup> And although Judge Ginsburg's opinion appeared to rest on the merits, rather than on the district court's jurisdiction, that distinction effectively collapses in the face of the government's blanket assertion that it does not ever transfer or otherwise repatriate detainees to countries in which they are "more likely than not" to be tortured.<sup>167</sup>

Judge Griffith dissented, noting at the outset that "[s]ince at least the seventeenth century, the Great Writ has prohibited the transfer of prisoners to places beyond its reach where they would be subject to continued detention on behalf of the government."<sup>168</sup> In particular, Judge Griffith invoked the Habeas Corpus Act of 1679, section 12 of which "included a prohibition against the transfer of prisoners to places where the writ did not run."<sup>169</sup> Of course, King's Bench had by then established its authority to entertain petitions where the prisoner sought to contest his transfer beyond the realm, but the statute gave teeth to such a claim. And in any event, the distinction between the common law and statutory powers of King's Bench seems less signifi-

---

(describing the district court's jurisdictional ruling yet noting the decision to "address the merits"). As such, and unlike in *Boumediene*, there was little — if any — briefing on the remedial scope of the writ.

<sup>164</sup> *Id.* at 2221.

<sup>165</sup> *See id.* at 2228 (Souter, J., concurring) (noting the eight specific circumstances on which the Court's opinion turned).

<sup>166</sup> *Kiyemba II*, 561 F.3d 509, 514 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010). Judge Kavanaugh filed a lengthy concurrence, largely amplifying the majority's analysis, and also responding to Judge Griffith's dissent. *See id.* at 516–22 (Kavanaugh, J., concurring).

<sup>167</sup> *See, e.g.*, *Mohammed v. Obama*, No. 10-5218, slip op. at 1 (D.C. Cir. July 8, 2010) (per curiam) ("Under *Kiyemba v. Obama* ('*Kiyemba II*'), . . . the district court may not prevent the transfer of a Guantanamo detainee when the government has determined that it is more likely than not that the detainee will not be tortured in the recipient country."), *stay denied*, 131 S. Ct. 32 (2010), *petition for cert. filed*, No. 10-746 (U.S. Nov. 5, 2010).

<sup>168</sup> *Kiyemba II*, 561 F.3d at 522 (Griffith, J., concurring in part and dissenting in part).

<sup>169</sup> *Id.* at 523 (citing Habeas Corpus Act, 1679, 31 Car. 2, c. 2, § 12 (Eng.)).

cant than the fact that, either way, habeas at the time of the Founding appears to have encompassed comparable claims to those that the *Kiyemba II* petitioners sought to raise.<sup>170</sup>

Moreover, that the habeas jurisdiction of King's Bench ran to *any* possible unlawful transfer, and not just to those raising claims of torture, is borne out by the various writs issued by Lord Chief Justice Mansfield to prevent the removal from England of individuals allegedly bound for slavery, or to inquire into the propriety of the induction of impressed seamen. Because English practice at the Founding supported the power of King's Bench to ensure the *ex ante* legality of an individual's transfer beyond its process, Judge Griffith concluded that "jurisdiction to hear the petitioners' claims against unlawful transfer — a fundamental and historic habeas protection — is grounded in the Constitution."<sup>171</sup>

To be sure, that the courts can resolve such claims says nothing about the means pursuant to which they should do so, and therefore Judge Griffith proceeded in the rest of his dissent to expound what he saw as the constitutionally required process in such cases.<sup>172</sup> But the larger point is the clear incompatibility between the Founding-era history of habeas and the categorical preclusion of relief embraced by the *Kiyemba II* majority. The merits of these cases may indeed prove quite tricky — particularly to the extent that they implicate the government's power to conduct foreign relations.<sup>173</sup> If, however, the Suspension Clause incorporated the prevailing practice in England at the time of the Founding, there is no doubt that it includes the power to prevent a potentially unlawful transfer until and unless the courts have had the ability to resolve the merits.

Nevertheless, and despite its grant of certiorari in *Kiyemba I*, the Supreme Court denied certiorari in *Kiyemba II*.<sup>174</sup> And whereas *Kiyemba I* has been limited to the facts of the Uighurs' cases,<sup>175</sup> the D.C. Circuit has consistently relied upon *Kiyemba II* to reverse a series of D.C. district court decisions enjoining the transfer of other detainees from Guantánamo.<sup>176</sup> More than *Kiyemba I*, then, *Kiyemba*

<sup>170</sup> In *Murray's Case*, for example, King's Bench twice intervened to prevent the deportation of a prisoner to Scotland (p. 236).

<sup>171</sup> *Kiyemba II*, 561 F.3d at 523–24 (Griffith, J., concurring in part and dissenting in part).

<sup>172</sup> See *id.* at 524–26.

<sup>173</sup> See, e.g., Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657, 698 (2006).

<sup>174</sup> See *Kiyemba v. Obama*, 130 S. Ct. 1880 (2010) (mem.).

<sup>175</sup> See *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam), *petition for cert. filed*, No. 10-775 (U.S. Dec. 8, 2010).

<sup>176</sup> See, e.g., *Mohammed v. Obama*, No. 10-5218 (D.C. Cir. July 8, 2010) (per curiam), *stay denied*, 131 S. Ct. 32 (2010), *petition for cert. filed*, No. 10-746 (U.S. Nov. 5, 2010). But see *id.*, slip op. at 3–4 (Tatel, J., concurring in part and dissenting in part) (explaining why *Kiyemba II* does not necessarily control in other cases). The Supreme Court denied the petitioner's application for

*II* — and its ahistorical understanding of the proper role of the habeas court — looks to be settled precedent that could bear on a number of cases for some time to come.

Finally, and separate from the constraints identified by the D.C. Circuit in *Al Maqaleh*,<sup>177</sup> *Kiyemba I*, and *Kiyemba II*, the court of appeals has also been engaged in a sustained imbroglio with the D.C. district court as to the substance of decisionmaking in the Guantánamo cases, including the scope of the government's detention authority under the 2001 Authorization for Use of Military Force<sup>178</sup> (AUMF), the burden of proof, the admissibility *vel non* of hearsay, and so on.<sup>179</sup> Of course, nothing in the pre-revolutionary history of habeas in England sheds much light on these specific issues; it is entirely anachronistic to expect that King's Bench meaningfully differentiated between "clear and convincing evidence" and the preponderance standard, or that it undertook sustained analysis of when hearsay evidence should and should not be admissible in habeas cases. Thus, and unlike the cases discussed above, one cannot plausibly object to the paucity of historical analysis in these decisions. Nonetheless, separate from the standards on which they have settled or the facts that they have considered, the D.C. Circuit's decisions in two cases in particular — *Al-Bihani v. Obama*<sup>180</sup> and *Al-Adahi v. Obama*<sup>181</sup> — have evinced a thinly veiled hostility to the very process of common law judicial decision-making that has characterized the post-*Boumediene* habeas jurisprudence in the D.C. district court. Moreover, they are further proof that, even after *Boumediene*, we are still asking the wrong historical questions in contemporary habeas litigation.

In *Al-Bihani*, for example, Judge Brown, who wrote the majority opinion — which adopted an extremely broad view of the scope of the government's detention authority, accepted a "preponderance" standard as constitutionally sufficient, and affirmed the admissibility of hearsay evidence<sup>182</sup> — also wrote separately to criticize the entire post-

---

a stay in *Mohammed*. See *Mohammed v. Obama*, 131 S. Ct. 32 (2010). Although no Justice dissented from the denial of certiorari in *Kiyemba II*, three dissented from the denial of the stay in *Mohammed*, suggesting that interim relief was appropriate "to afford the Court time to consider, in the ordinary course, important questions raised in this case and not resolved in *Munaf*." *Id.* at 32 (Ginsburg, J., dissenting) (citation omitted).

<sup>177</sup> 605 F.3d 84 (D.C. Cir. 2010).

<sup>178</sup> Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 note (2006)).

<sup>179</sup> For detailed discussions of these issues, see BENJAMIN WITTES ET AL., BROOKINGS INST., *THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING* (2010); and Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445 (2010).

<sup>180</sup> 590 F.3d 866 (D.C. Cir. 2010), *petition for cert. filed*, No. 10-7814 (U.S. Nov. 29, 2010).

<sup>181</sup> 613 F.3d 1102 (D.C. Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3254 (U.S. Oct. 8, 2010) (No. 10-487).

<sup>182</sup> See *Al-Bihani*, 590 F.3d at 868-81.

*Boumediene* project. Her concurrence was openly skeptical of “whether a court-driven process is best suited to protecting both the rights of petitioners and the safety of our nation,”<sup>183</sup> suggesting that “[t]he common law process depends on incrementalism and eventual correction, and it is most effective where there are a significant number of cases brought before a large set of courts, which in turn enjoy the luxury of time to work the doctrine supple.”<sup>184</sup> But, “in the midst of an ongoing war, time to entertain a process of literal trial and error is not a luxury we have.”<sup>185</sup> She concluded with a call for legislative intervention, since “[f]alling back on the comfort of prior practices supplies only illusory comfort.”<sup>186</sup>

Judge Brown was writing only for herself in her *Al-Bihani* concurrence.<sup>187</sup> And the sweeping analysis of her majority opinion on behalf of herself and Judge Kavanaugh has since been undercut by the other seven active D.C. Circuit judges.<sup>188</sup> Judge Randolph, however, showed a similar skepticism of the district court’s work in writing for the majority and reversing Judge Kessler’s grant of habeas relief in *Al-Adahi*. In particular, Randolph took issue both with the district court’s adoption of the preponderance standard, noting that “we are aware of no precedents in which eighteenth century English courts adopted a preponderance standard,”<sup>189</sup> and with its “failure to appreciate conditional probability analysis” in analyzing the facts of *Adahi*’s claim.<sup>190</sup> As is true in many of these cases, at least some of the critical discussion in *Al-Adahi* is redacted. But the fundamental disagreement in approach between the court of appeals and the district court is palpable on the surface of the opinion, as it has been in most of the D.C. Circuit’s post-*Boumediene* Guantánamo cases.<sup>191</sup>

---

<sup>183</sup> *Id.* at 881 (Brown, J., concurring).

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

<sup>185</sup> *Id.* at 882.

<sup>186</sup> *Id.*

<sup>187</sup> Judge Williams did not even agree with the majority’s analysis, explaining that he thought the case could be resolved without some of the more sweeping statements concerning the scope of detention authority or the appropriate procedural standards. *See id.* at 882–86 (Williams, J., concurring in part and concurring in the judgment); *see also* *Al-Bihani v. Obama*, 619 F.3d 1, 53–56 (D.C. Cir. 2010) (statement of Williams, J., respecting the denial of rehearing en banc).

<sup>188</sup> *See Al-Bihani*, 619 F.3d at 1 (Sentelle, C.J., and Ginsburg, Henderson, Rogers, Tatel, Garland, and Griffith, JJ., concurring in the denial of rehearing en banc). *But see id.* at 1–9 (Brown, J., concurring in the denial of rehearing en banc) (criticizing the seven-judge “statement”).

<sup>189</sup> *Al-Adahi v. Obama*, 613 F.3d 1102, 1104 (D.C. Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3254 (U.S. Oct. 8, 2010) (No. 10-487).

<sup>190</sup> *Id.* at 1105; *see id.* at 1104–09.

<sup>191</sup> Judge Randolph made his views (and his hostility to *Boumediene*) quite clear in a speech delivered to the Heritage Foundation in October 2010. *See* Hon. A. Raymond Randolph, Joseph Story Distinguished Lecture: The Guantanamo Mess, Address Delivered to the Heritage Foundation (Oct. 20, 2010), *available at* <http://www.heritage.org/Events/2010/10/Guantanamo-Mess>.

Whether the court of appeals or the district court has the better of the argument on the facts is impossible to answer categorically. But with regard to the propriety of the “common law process” in these cases, and the significance of “equity” in empowering the reviewing court to adapt the writ as circumstances warrant, there can be little doubt that the approach undertaken by the district courts is both consistent with Justice Kennedy’s instructions in *Boumediene*<sup>192</sup> and, to the extent it matters, the prevailing understanding of habeas in pre-revolutionary England. Novelty, as Halliday convincingly demonstrates, proved no threat to the authority of King’s Bench; it was an opportunity to reassert the flexibility, adaptability, and vigor of habeas — the “equity of the common-law writ,” as he repeatedly put it. And legislation designed to strengthen (or at least clarify) the writ, for which Judge Brown’s *Al-Bihani* concurrence expressly called, proved no panacea for the obstacles that courts faced; it was the means by which judicial power was only further eroded, increasingly subjecting control over detention to tyrannies of the majority. If nothing else, it is these lessons most of all that have been lost on the D.C. Circuit in the post-*Boumediene* habeas litigation.

### III. THE HISTORIOGRAPHY OF AMERICAN HABEAS

If the Supreme Court has held that, at a “minimum, the Suspension Clause protects the writ ‘as it existed in 1789,’”<sup>193</sup> and if Halliday’s research helps show, in a clear and accessible manner, what that actually means, why has this history been so thoroughly neglected in contemporary litigation? It would be too easy to suggest that the Guantánamo cases are unique in paying such little attention to history; there have been even more post-conviction cases as of late in which the Court has barely paid lip service to the origins of the writ.<sup>194</sup> And Halliday’s own work suggests that even the novelty of the post-September 11 detention cases should not bear on the analysis. If anything, the absence of a well-developed jurisprudence might only *better*

---

<sup>192</sup> See *Boumediene v. Bush*, 128 S. Ct. 2229, 2276 (2008) (“We make no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees’ habeas corpus proceedings. . . . These and the other remaining questions are within the expertise and competence of the District Court to address in the first instance.”); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 533–34, 538–39 (2004) (plurality opinion) (detailing the various issues district courts will have to resolve in deciding detainee habeas cases on the merits).

<sup>193</sup> *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (citation omitted).

<sup>194</sup> In *Holland v. Florida*, 130 S. Ct. 2549 (2010), for example, the Court concluded that equitable tolling *should* be available in post-conviction habeas cases brought under AEDPA, but failed to invoke the writ’s history other than to observe that “[t]he importance of the Great Writ, the only writ explicitly protected by the Constitution, . . . counsels hesitancy before interpreting AEDPA’s statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open.” *Id.* at 2562.

justify a return to first principles. So if our indifference to habeas's history is not a product of contemporary fortuities, where does it come from?

This Part offers some brief observations about the historiography of American habeas, and where we took some (in retrospect, fairly remarkable) wrong turns. My goal here is not to tell the entire story of the evolution of habeas corpus jurisprudence in the United States; many others have done that before, and very well, at that.<sup>195</sup> Rather, as this Part explains, the real source of our own Whig history of habeas is the Supreme Court's evisceration of the common law writ in the nineteenth century, and the unintended consequences of that development in the twentieth. My claim is not that there is a direct causal connection between the Court's missteps and the misuse or ignorance of history in contemporary detainee litigation, but rather that the gestalt of habeas reflected in the Court's early approach has so pervaded our jurisprudence as to render the true English account unrecognizable to modern eyes. Because of the cases described below, we don't know how *not* to write Whig histories of habeas.

#### *A. The Nineteenth-Century Demise of Common Law Habeas Jurisdiction*

As should be clear by now, one of the most significant features of habeas corpus in pre-revolutionary England was the vitality and dexterity of the common law writ, alongside — and often in place of — the writ provided by statute. To that end, perhaps the most radical way in which American practice has diverged from England's has been the evisceration, in two distinct pairs of nineteenth-century Supreme Court decisions, of the common law as a basis for habeas jurisdiction.

The first pair of cases, *Ex parte Bollman*<sup>196</sup> and *Ex parte Watkins*,<sup>197</sup> separately rejected the argument that Article III federal courts could issue common law writs of habeas corpus. In *Bollman*,<sup>198</sup> that conclusion came as dicta, since the entire point of Chief Justice Marshall's opinion was to explain why the Supreme Court had *statutory* jurisdiction to issue the writ pursuant to section 14 of the Judi-

---

<sup>195</sup> For two of the best concise histories of habeas in the United States, see RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 2.4d, at 42–82 (5th ed. 2005); and LARRY W. YACKLE, *FEDERAL COURTS: HABEAS CORPUS* (2d ed. 2010). See also JUSTIN J. WERT, *HABEAS CORPUS IN AMERICA: THE POLITICS OF INDIVIDUAL RIGHTS* (forthcoming 2011).

<sup>196</sup> 8 U.S. (4 Cranch) 75 (1807).

<sup>197</sup> 28 U.S. (3 Pet.) 193 (1830).

<sup>198</sup> For the background to *Bollman*, including President Jefferson's efforts to have Congress suspend habeas in the case of the two prisoners, see Paschal, *supra* note 69, at 623–32. See also FREEDMAN, *supra* note 5, at 20–21.



ciary Act of 1789, and why such jurisdiction was not inconsistent with *Marbury*.<sup>199</sup> Nevertheless, Chief Justice Marshall went out of his way to stress that “courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.”<sup>200</sup> Thus, although “for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law; . . . the power to award the writ by any of the courts of the United States, must be given by written law.”<sup>201</sup> In other words, the Article III courts — including the Supreme Court — were powerless to issue common law writs of habeas corpus,<sup>202</sup> and could only act pursuant to express statutory jurisdiction.<sup>203</sup>

To be fair, *Bollman* itself included little in the way of historical analysis. But twenty-three years later, Chief Justice Marshall added the historical background in *Ex parte Watkins*<sup>204</sup> to explain why section 14 did not empower a habeas court to reexamine the basis for a federal conviction (a point *Bollman* had not addressed):

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 [1679] was enacted, for the purpose of securing the benefits for which the writ was given. This stat-

---

<sup>199</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 148–49 (1803) (holding that Congress may not expand the Supreme Court’s original jurisdiction). Chief Justice Marshall’s ingenious solution in *Bollman* was that an application for habeas corpus to the Supreme Court, though technically “original” in the sense of being a new claim, was effectively (and constitutionally) “appellate” so long as it sought review of detention pursuant to the judgment of some lower court. See *Bollman*, 8 U.S. (4 Cranch) at 101 (“The decision that the individual shall be imprisoned must always precede the application for a writ of *habeas corpus*, and this writ must always be for the purpose of revising that decision, and therefore appellate in its nature.”); see also *Felker v. Turpin*, 518 U.S. 651, 667 n.1 (1996) (Souter, J., concurring).

<sup>200</sup> *Bollman*, 8 U.S. (4 Cranch) at 93.

<sup>201</sup> *Id.* at 93–94.

<sup>202</sup> See *id.* at 95; see also Halliday & White, *supra* note 9, at 693–99 (discussing *Bollman*). The Court would hold the same with regard to common law writs of mandamus six years later, in *M’Intire v. Wood*, 11 U.S. (7 Cranch) 504 (1813). In the mandamus context, at least, the Supreme Court would eventually recognize the unique authority of the D.C. Circuit, which until 1970 also exercised the “local” jurisdiction it inherited from Maryland common law, to issue common law writs against federal officers. See *United States ex rel. Stokes v. Kendall*, 26 F. Cas. 702, 713 (C.C.D.C. 1837) (No. 15,517), *aff’d*, 37 U.S. (12 Pet.) 524 (1838). But *Kendall* was the exception that proved the rule — that the Article III courts, in general, lacked the authority to issue writs based solely on the common law. For more on *Kendall* and its underappreciated implications for habeas, see Stephen I. Vladeck, *The Riddle of the One-Way Ratchet: Habeas Corpus and the District of Columbia*, 12 GREEN BAG 2D 71 (2008).

<sup>203</sup> For an extreme reading of Chief Justice Marshall’s logic, concluding that the Suspension Clause protects only the writ that Congress has already chosen to provide (and then, only from temporary suspensions), see *INS v. St. Cyr*, 533 U.S. 289, 339–40 (2001) (Scalia, J., dissenting).

<sup>204</sup> 28 U.S. (3 Pet.) 193 (1830).

ute may be referred to as describing the cases in which relief is, in England, afforded by this writ to a person detained in custody. It enforces the common law. This statute excepts from those who are entitled to its benefit, persons committed for felony or treason plainly expressed in the warrant, as well as persons convicted or in execution.<sup>205</sup>

Generations of scholars have relied on this passage as support for the proposition that habeas corpus in pre-revolutionary England did not extend to collateral challenges to convictions by courts of record.<sup>206</sup> But Chief Justice Marshall's discussion neglects a critical point about pre-revolutionary practice: the statutory writ was just one piece of the puzzle, and there was ample evidence that King's Bench could issue the *common law* writ to consider the validity of convictions, whether by courts-martial or courts of record. Relying solely on the Habeas Corpus Act of 1679 provides a decidedly truncated lens through which to examine English practice. Whether he misunderstood English history or misrepresented it,<sup>207</sup> Chief Justice Marshall thereby perpetuated a critically incorrect assumption about the scope of common law habeas corpus at the Founding.<sup>208</sup>

One last point about common law habeas bears mention: Although *Bollman* denied to the federal courts the power to issue common law writs of habeas corpus, it said nothing about the power of state courts to so provide, whether the prisoner was in state or federal custody. Indeed, throughout the antebellum era, state courts routinely issued writs of habeas corpus to discharge federal prisoners, whether pursuant to statutes or the common law.<sup>209</sup> So when Chief Justice Marshall disclaimed the power of Article III tribunals to issue common law writs of habeas corpus in *Bollman*, he was not generally rejecting the idea of common law habeas; rather, his reasoning implicitly funneled any such relief into the one forum that the Founders knew would be able to so provide: state courts.

The problem is that, in a pair of decisions bookending the Civil War, the Supreme Court rejected the power of state courts to direct writs of habeas corpus to federal jailers. Neither Chief Justice Taney's opinion for the Court in *Ableman v. Booth*<sup>210</sup> nor Justice Field's opi-

<sup>205</sup> *Id.* at 202.

<sup>206</sup> The most prominent example is Rex A. Collings, Jr., *Habeas Corpus for Convicts — Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335, 349–50 (1952).

<sup>207</sup> As Professor Eric Freedman has noted, counsel for the petitioners in *Bollman* specifically referenced English examples where the writ issued without any statutory authority. See FREEDMAN, *supra* note 5, at 22.

<sup>208</sup> The Court would formally extend this reasoning to individuals imprisoned pursuant to state court convictions in *Ex parte Dorr*, 44 U.S. (3 How.) 103 (1845).

<sup>209</sup> See, e.g., Todd E. Pettys, *State Habeas Relief for Federal Extrajudicial Detainees*, 92 MINN. L. REV. 265, 270–81 (2007). See generally Oaks, *supra* note 66.

<sup>210</sup> 62 U.S. (21 How.) 506 (1859).

nion for the Court in *Tarble's Case*<sup>211</sup> was a model of analytical clarity, and neither opinion considered the implications of its analysis read together with *Bollman*.<sup>212</sup> Nor did the *Tarble* Court consider whether it mattered that the intervening Habeas Corpus Act of 1867<sup>213</sup> had expanded federal habeas jurisdiction "to [its] constitutional limit,"<sup>214</sup> which might at least have supported a view that it was the existence of federal jurisdiction that warranted the preclusion of state court review.<sup>215</sup>

In both cases, the ban on state court habeas jurisdiction for federal prisoners may well have been motivated by concerns over the practical implications of an alternative rule.<sup>216</sup> But whatever the merits of those concerns, the effect of these decisions, read together with *Bollman* and *Watkins*, was to appear to constrain both federal prisoners and federal courts to a writ whose jurisdiction must come from Congress.<sup>217</sup> More than any future development, this result dramatically departed from what had been true in England at the time the Constitution was drafted, and forever warped our way of thinking about how habeas corpus was supposed to work.<sup>218</sup>

What cannot be gainsaid about the evisceration of common law habeas jurisdiction is the impact it subsequently had across the field. Indeed, the disappearance of the common law writ in the United States had much the same effect on our own historiography of habeas corpus as the Habeas Corpus Act of 1679 eventually had on English history, hiding "the once vigorous common law writ behind its chimer-

<sup>211</sup> 80 U.S. (13 Wall.) 397 (1872).

<sup>212</sup> The oversight is that much more troubling in *Tarble*, given the related concerns that Chief Justice Chase raised in his dissent. See *id.* at 412–13 (Chase, C.J., dissenting).

<sup>213</sup> Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

<sup>214</sup> DUKER, *supra* note 24, at 191; see also Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. 275, 279 (2008).

<sup>215</sup> See, e.g., RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 439 (5th ed. 2003) (noting the possible implied exclusion argument).

<sup>216</sup> See Ann Woolhandler & Michael Collins, *The Story of Tarble's Case: State Habeas and Federal Detention*, in FEDERAL COURTS STORIES 141, 158–60 (Vicki C. Jackson & Judith Resnik eds., 2009).

<sup>217</sup> Indeed, this reality helped to provoke the constitutional question at the heart of *Boumediene* — whether a statute stripping courts Congress did not have to create of jurisdiction over a cause of action Congress did not have to provide could possibly violate the Constitution. For a more detailed exposition, see Vladeck, *supra* note 202.

<sup>218</sup> As I have argued in detail elsewhere, the departure from the common law as a basis for jurisdiction said nothing about whether the common law would figure in other aspects of habeas jurisprudence. See Stephen I. Vladeck, *Common-Law Habeas and the Separation of Powers*, 95 IOWA L. REV. BULL. 39, 46–49 (2010), [http://www.uiowa.edu/~ilrbulletin/ILRB\\_95\\_Vladeck.pdf](http://www.uiowa.edu/~ilrbulletin/ILRB_95_Vladeck.pdf). In *Bollman*, Chief Justice Marshall expressly suggested that, "for the meaning of the term habeas corpus, resort may unquestionably be had to the common law," *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93–94 (1807), and at least into the 1960s, the federal courts took that invitation seriously.

ical statutory twin" (p. 258). Of course, nothing stopped Congress from improving upon the common law writ, but that did not mean that the statutory writ was exclusive. And yet, as in England, the more observers came to assume that the writ's effectiveness depended upon statutes, the more statutes became the means through which the writ's effectiveness could be undercut. To see this effect, consider just two of the recurring constitutional issues within habeas jurisprudence: the scope of review in post-conviction cases and the writ's territorial ambit.

*B. The Habeas Corpus Act of 1867 and the  
Scope of Post-Conviction Review*

At least initially, the significance of the Supreme Court's evisceration of common law habeas was heavily mooted by the Habeas Corpus Act of 1867 (if not by clever lower court decisions predating the Act<sup>219</sup>). In addition to expanding the scope of federal habeas jurisdiction to encompass those imprisoned pursuant to state court convictions (overruling section 14, at least as construed in earlier cases), the Act regularized the procedures in habeas cases.<sup>220</sup>

The issue that arose under the 1867 Act was not the federal courts' power, but what they would do with it. Both before and after the Civil War, habeas was part of a much larger and more complex debate over the means by which the Supreme Court could supervise state and federal criminal trials.<sup>221</sup> Although it is a bit of an oversimplification, the dominant view on the Court in the decades after 1867 was that federal courts could set aside a state conviction on the merits only in cases in which the trial court was without "jurisdiction" to proceed, and that post-conviction habeas otherwise did not extend to claims that could, and should, have been resolved on direct appeal.<sup>222</sup>

These cases are instructive because they proceeded on the assumption that the relationship between habeas and direct appeals was simply the relationship between two distinct sets of statutory remedies — that habeas was an alternative means of obtaining appellate review of a criminal conviction, so the expansion of one warranted the contrac-

---

<sup>219</sup> See FREEDMAN, *supra* note 5, at 42–45.

<sup>220</sup> See Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385–86.

<sup>221</sup> See generally HERTZ & LIEBMAN, *supra* note 195, § 2.4d (tracking the relationship between habeas and direct appeals).

<sup>222</sup> See, e.g., *Bowen v. Johnston*, 306 U.S. 19, 23–24 (1939); *Woolsey v. Best*, 299 U.S. 1, 2 (1936); *Frank v. Mangum*, 237 U.S. 309, 326–27 (1915); *Ex parte Royall*, 117 U.S. 241, 250–51 (1886); see also *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) ("[H]abeas corpus cannot be used as a means of reviewing errors of law and irregularities — not involving the question of jurisdiction — occurring during the course of trial; and the 'writ of habeas corpus cannot be used as a writ of error.'") (footnotes omitted) (quoting *Woolsey*, 299 U.S. at 2)).

tion of the other. As Professors Randy Hertz and James Liebman have summarized the case law:

All prisoners deserve one federal-court appeal as of right of their federal constitutional claims, if not on direct review in the Supreme Court, then on habeas corpus in the lower federal courts. As in other appeals, the scope of review was to be *de novo* on the law, deferential on the facts. In the federal prisoner context, the appeal generally would be a direct appeal to a United States Court of Appeals, unless the prisoner could not reasonably be expected to raise his claims in the immediate wake of trial. In the state-prisoner context, with direct Supreme Court review on the merits as of right having been limited to but a few cases each year, the bulk of the review responsibility would fall to the lower federal courts (and, at times, the Supreme Court) on habeas corpus.<sup>223</sup>

In other words, as Congress expanded the Supreme Court's appellate jurisdiction in criminal cases originating in both federal and state courts, the Court assumed that Congress was implicitly constraining the scope of post-conviction habeas — an assumption that makes sense only in a world in which habeas is entirely a statutory construct. The result, as Halliday notes, was unsurprising:

[F]ederal courts soon retreated into a deference of a kind that would have made great judges like Hale, Holt, and Mansfield blanch. Federal courts imposed on themselves self-limiting practices in their habeas jurisprudence by defining "jurisdiction" in the narrowest terms possible, and then acting on the assumption that the writ was only to be used to inspect whether another magistrate had jurisdiction over the matter and prisoner in question. Unlike their English forbears, U.S. judges often refused to go inside that jurisdiction to supervise its use, as King's Bench had done when monitoring church or admiralty courts, the imprisonment orders of JPs, the detentions of military officers and husbands, and even the work of the Privy Council on most occasions. (pp. 308–09)

To be sure, the Court abandoned what Judge Friendly described as the "kiss[ing of] the jurisdictional book"<sup>224</sup> in the early 1940s, generally opening the door to the relitigation of constitutional claims in habeas petitions,<sup>225</sup> and thereby clearing the way for the dramatic expansion in the scope and use of habeas in the decades that followed. But rather than rely on the conclusion that the earlier constraints on the scope of review had been inconsistent with the original understanding (and constitutional grounding) of habeas corpus, the Court throughout the 1940s relied on the Habeas Corpus Act of 1867 as the authority for this development.<sup>226</sup> In other words, the foundation on which the

<sup>223</sup> HERTZ & LIEBMAN, *supra* note 195, § 2.4d, at 71.

<sup>224</sup> Friendly, *supra* note 97, at 151.

<sup>225</sup> See *Waley v. Johnston*, 316 U.S. 101, 104–05 (1942).

<sup>226</sup> See, e.g., *Johnson*, 304 U.S. at 466 (noting the role of the Habeas Corpus Act of 1867 in "liberaliz[ing] the common-law procedure on habeas corpus" (quoting *Frank*, 237 U.S. at 330–31)).

Warren Court built the criminal procedure revolution of the 1950s and 1960s — the power of federal district courts effectively to supervise state criminal law — was grounded not in the Constitution, but in a statute whose very history was the subject of significant debate.<sup>227</sup>

In the short term, such reliance on constitutional avoidance made little practical difference. Even as Congress began legislating more and more frequently with regard to habeas, it did little in the 1950s and 1960s that overtly undermined the writ. But this reliance opened the door for what was to follow: the Court's own retrenchment of the writ in the 1970s and 1980s,<sup>228</sup> and congressional intervention in the 1990s.<sup>229</sup> As in England, where the notion that habeas was a creature of statute made it easier for Parliament to intervene, the disappearance of the common law writ in the United States appeared to leave the scope of habeas in post-conviction cases entirely at the whim of the legislature.<sup>230</sup>

### C. Ahrens, Eisentrager, and the Territorial Scope of the Writ

As a creature of statute, habeas was also susceptible to canons of statutory interpretation, including the presumption against extraterritoriality — the idea that a court generally does not have jurisdiction over matters outside its territory. So, when courts in the 1940s began systematically to confront the question of whether they could exercise jurisdiction over habeas petitions filed by prisoners held outside their territory,<sup>231</sup> they treated the issue as an ordinary matter of statutory interpretation, as opposed to an extraordinary matter for an extraordinary writ.

<sup>227</sup> Forests have been felled over Justice Brennan's reading of the history of the Habeas Corpus Act of 1867 in *Fay v. Noia*, 372 U.S. 391, 399–415 (1963). For the competing arguments, compare Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965) (arguing that the Court misinterpreted history in ruling on the 1867 Act), and Dallin H. Oaks, *Legal History in the High Court — Habeas Corpus*, 64 MICH. L. REV. 451 (1966) (same), with Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 661–63 (1982) (arguing the opposite).

<sup>228</sup> See generally Joseph L. Hoffman & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65.

<sup>229</sup> See generally Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996).

<sup>230</sup> Indeed, this development may help explain why courts have been so untroubled by arguments that the constraints on the scope of post-conviction habeas imposed by Congress in AEDPA implicate the Suspension Clause. See, e.g., *Evans v. Thompson*, 518 F.3d 1, 11–12 (1st Cir. 2008). But see *Irons v. Carey*, 505 F.3d 846, 859 (9th Cir. 2007) (Reinhardt, J., concurring specially) (“[I]t seems to me inconsistent with our fundamental obligations as judges to require us, except in unusual or exceptional circumstances, to rule for the state regardless of whether it violated the Constitution.”).

<sup>231</sup> See *Ex parte Endo*, 323 U.S. 283, 305 (1944) (reserving the question).

Thus, in *Ahrens v. Clark*<sup>232</sup> in 1948, the Supreme Court held that the federal habeas statute empowered a district court to entertain applications only from prisoners detained within the territorial jurisdiction of that court.<sup>233</sup> Beginning with the presumption against extraterritorial application,<sup>234</sup> Justice Douglas went on to parse the language of the Habeas Corpus Act itself, emphasizing that, "[a]lthough the writ is directed to the person in whose custody the party is detained, the statutory scheme contemplates a procedure which may bring the prisoner before the court."<sup>235</sup>

And although *Ahrens* reserved whether the same logic would apply when a prisoner was held outside the territory of *any* district court,<sup>236</sup> contemporary commentators understood its holding as requiring the same result in those cases, as well.<sup>237</sup> In not deciding this issue, *Ahrens* could pass itself off as a venue decision — a choice among multiple forums that each had jurisdiction. But if *Ahrens* also applied when the prisoners were held outside the territorial jurisdiction of *any* district court, then it intimated that there could be entire classes of prisoners to whom the federal habeas statute simply did not apply.

In pre-revolutionary England, by contrast, habeas was never understood by analogy to more conventional forms of civil process — quite to the contrary. The entire justification for sending the writ into jurisdictions that were otherwise exempt from English law was the uniqueness of habeas as an exercise of the King's prerogative. *Ahrens*'s treatment of habeas as an "ordinary" statutory remedy thus elided the distinction that had proved so critical to English jurisprudence in the seventeenth and eighteenth centuries, and necessarily vitiated the primary justification for why the writ *should* run into foreign domains.

Moreover, whereas the consequences of the evisceration of common law habeas took time to hash out in the context of post-conviction review, they became immediately apparent with regard to the writ's ter-

<sup>232</sup> 335 U.S. 188 (1948).

<sup>233</sup> *Id.* at 190.

<sup>234</sup> *Id.* ("We start from the accepted premise that apart from specific exceptions created by Congress the jurisdiction of the district courts is territorial. It is not sufficient in our view that the jailer or custodian alone be found in the jurisdiction." (citation omitted)).

<sup>235</sup> *Id.* (citation omitted). Douglas's reliance on the production of the prisoner was curious, given that the Court itself had dispensed with that requirement seven years earlier in *Walker v. Johnston*, 312 U.S. 275, 284 (1941).

<sup>236</sup> *Ahrens*, 335 U.S. at 192 n.4 ("We need not determine the question of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights.").

<sup>237</sup> See, e.g., Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587, 632 (1949); *Developments in the Law — Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1163 n.54 (1970) ("[I]f *Ahrens* is based on the power of a court to act it is hard to see what difference it should make to the court's power that the petitioner has no alternative forum.").

ritorial scope. Less than four months after *Ahrens*, the D.C. district court relied on *Ahrens* in dismissing habeas petitions filed by twenty-one German nationals convicted of war crimes by a U.S. military commission in China and imprisoned in Germany.<sup>238</sup> The D.C. Circuit reversed, holding that habeas corpus was a right to which anyone detained by the United States anywhere was entitled,<sup>239</sup> only to be reversed in turn by the Supreme Court in *Johnson v. Eisentrager*.<sup>240</sup> *Eisentrager*, as I have argued at some length, never held that noncitizens detained outside the United States are categorically precluded from pursuing habeas relief.<sup>241</sup> But it did hold that, on the facts before the Court, there was nothing that the writ could accomplish, so there was no constitutional problem with the district court's reading of *Ahrens*.<sup>242</sup>

The Supreme Court retreated from *Ahrens*'s "self-inflicted judicial wound"<sup>243</sup> in 1973, holding in *Braden v. 30th Judicial Circuit Court*<sup>244</sup> that federal courts could issue writs of habeas corpus so long as they had jurisdiction over the respondent.<sup>245</sup> *Braden*, in turn, played a critical role in *Rasul v. Bush*, which held that the habeas statute extended to Guantánamo because at least one of the named custodians was amenable to the D.C. district court's process.<sup>246</sup> But, again, these decisions prove the larger point: the perception of habeas as a creature of statute implied that Congress would be free to tweak these rules at its discretion. Prisoners may have prevailed in individual cases, but — at least until *Boumediene* — the legislature always prevailed in the end.

#### IV. CONCLUSION

In his short and laudatory review of Halliday's book for *The New Republic*, Professor Adrian Vermeule concluded that one of its "most obvious lessons" is that "habeas corpus, at least in many periods, has displayed a far narrower scope, and results from far less elevated judicial motivations, than its libertarian celebrants recognize."<sup>247</sup> Whether

<sup>238</sup> *Eisentrager v. Forrestal* (D.D.C. Oct. 6, 1948) (unpublished opinion), *reprinted in* Transcript of Record at 16–17, *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (No. 306).

<sup>239</sup> *Eisentrager v. Forrestal*, 174 F.2d 961, 963 (D.C. Cir. 1949).

<sup>240</sup> *Eisentrager*, 339 U.S. at 791.

<sup>241</sup> *See, e.g.*, Stephen I. Vladeck, *The Problem of Jurisdictional Non-Precedent*, 44 TULSA L. REV. 587, 595–600 (2009).

<sup>242</sup> *See Eisentrager*, 339 U.S. at 778–79 (discussing the considerable practical difficulties that issuance of a writ in the case would entail); *see also* Vladeck, *supra* note 241.

<sup>243</sup> *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1128 (2d Cir. 1974).

<sup>244</sup> 410 U.S. 484 (1973).

<sup>245</sup> *See id.* at 500.

<sup>246</sup> *Rasul v. Bush*, 542 U.S. 466, 483–84 (2004).

<sup>247</sup> Adrian Vermeule, *States of Detention*, THE NEW REPUBLIC (Mar. 1, 2010, 12:00 AM), <http://www.tnr.com/book/review/states-detention> (book review). Vermeule's review does not in-



or not that was true after the 1790s, it seems a wholly unsatisfying summary of Halliday's findings up to that point. Instead, Halliday's research reveals a writ that, for much of the seventeenth and eighteenth centuries, flourished in the hands of justices largely unencumbered by statutory constraints, who used their power to ensure that all imprisonment throughout the realm had some legal sanction. Their motivations may not have been to protect the specific substantive liberties that we celebrate today, but were instead to protect the role of the judiciary in enforcing the rule of law against commoners, aristocrats, and even the sovereign. That conclusion does not spring from any single decision (or the absence thereof); it emerges when the jurisprudence is properly understood as an aggregated whole.

Indeed, this may be the deeper lesson of Halliday's research: the writ of habeas corpus in seventeenth- and eighteenth-century England was about principles, not rules — about power, not rights. The justices never expressly refuted the rule against controverting the return, and yet they consistently flouted it (pp. 109–10). The justices never expressly held that the writ could reach anyone who answered to the sovereign, and yet they consistently sent it to places where ordinary civil process did not go (p. 34). And, more generally, the justices never expressly recognized the flexibility of the remedy that came to characterize habeas practice into the latter half of the eighteenth century, and yet they routinely demonstrated it (pp. 74–87, 93–95). As a result, Halliday's book does more than just refute time-honored conceptions of the scope of habeas in England at the Founding; it refutes the way in which we have reached those conceptions, proving not just that we have consistently taken the wrong lessons from the wrong sources, but also that we have been (and perhaps still are) asking the wrong questions, looking for individual cases to prove what the rules (that *must* have existed) must have been.

To better understand how Halliday's historical conclusions should reorient our approach to this period of English history, consider Professor Philip Hamburger's thorough recent treatment of the principle of "protection."<sup>248</sup> As relevant here, "protection" is shorthand for the idea that, at the time of the Founding, rights and allegiances were reciprocal, and so whether individuals were entitled to the protection of English (later American) law turned on whether they owed allegiance to the government.<sup>249</sup> Thus, whether the Suspension Clause protects

---

clude any citations, so it is impossible to identify the specific passages of Halliday's book from which he draws this conclusion. I suspect, though, that he is referring to the discussion of the writ as measured against the proliferation of suspension statutes and other means of authorizing detention, especially in the British colonies in the nineteenth century (pp. 274–302).

<sup>248</sup> See Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1881–98 (2009).

<sup>249</sup> See *id.* at 1826–29.

noncitizens outside the territorial United States should turn on whether the individual detainee is deserving of protection.<sup>250</sup> To further that conclusion, Hamburger purports to criticize Halliday's research<sup>251</sup> with regard to prisoners of war, arguing that nothing in the writs Halliday surveyed disproves that the only question judges asked was whether the prisoner was within protection (and therefore not subject to detention as a prisoner of war).<sup>252</sup>

In treating habeas as just another right — notwithstanding Halliday's compelling evidence that the English courts did not view it that way — Hamburger's reading repeats the Whig historians' error.<sup>253</sup> That is to say, Hamburger assumes that the merits (or lack thereof) drove the justices' approach to their power. In reality, the status or identity of the prisoners had virtually nothing to do with their *access* to the writ. The same distorted understanding helps to explain Vermeule's takeaway that Halliday's monograph reveals a "narrower scope" for habeas than we have previously appreciated.<sup>254</sup> But more than just conflating the jurisdiction of King's Bench with the merits, both of these accounts appear to embody the historical understanding asserted by Justice Scalia — that suspensions are "substantive," authorizing detention and not merely displacing relief.<sup>255</sup> On this view, to protect the writ was not just to require judicial review, but to bar *all* extracriminal detention of anyone entitled to protection.<sup>256</sup> By contrast, for those *not* entitled to protection, the writ was not just substantively precluded; it was jurisdictionally unavailable. But whereas the principle of protection undoubtedly factored into the merits of Halliday's cases (and helps to explain their results), it does not (and did not) go any further. Put another way, the justices did not understand their power to issue the writ to turn in any way on the merits of the prisoner's claim to relief.

---

<sup>250</sup> See *id.* at 1979–84.

<sup>251</sup> See Halliday & White, *supra* note 9.

<sup>252</sup> See Hamburger, *supra* note 248, at 1889–92.

<sup>253</sup> See, e.g., *id.* at 1832 n.15 ("Halliday and White recognize the danger that their work will be viewed as making rights indefinitely available to foreigners abroad . . ."). That habeas would have been available has no bearing on whether any rights would have been available.

<sup>254</sup> See Vermeule, *supra* note 247. Professor Amanda Tyler, too, has identified what she calls the "narrow" view of the Suspension Clause — "that a suspension extinguishes the judicial power to order a prisoner's discharge but accomplishes virtually nothing else." Tyler, *supra* note 63, at 604 (footnote omitted). Whatever the merits of this position, it is something of a misnomer to describe it as "narrow," since it may also compel the conclusion that judicial review is available in cases where, under the substantive view, it would not be.

<sup>255</sup> See sources cited *supra* note 63.

<sup>256</sup> Justice Scalia has advanced this view both in cases in which he believes the Suspension Clause does not apply, see, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229, 2303–07 (2008) (Scalia, J., dissenting); *Hamdan v. Rumsfeld*, 548 U.S. 557, 669–72 (2006) (Scalia, J., dissenting); *INS v. St. Cyr*, 533 U.S. 289, 336–41 (2001) (Scalia, J., dissenting), and in cases in which he believes it does, see *Hamdi v. Rumsfeld*, 542 U.S. 507, 555–69 (2004) (Scalia, J., dissenting).

And that is precisely Halliday's observation with regard to Whig histories of habeas; it is no criticism of King's Bench that liberties were not their first priority. After all, there were always substantive limits on the justices' authority, and, in many cases, there were practical obstacles as to its exercise. But it would be inconsistent with virtually every pattern Halliday identifies to conclude in retrospect that the defect was ever jurisdictional, such that, absent suspension, an otherwise meritorious claimant would have been denied access to relief.<sup>257</sup>

The question, then, is how (if at all) the flexibility and ever-evolving nature of the pre-revolutionary writ of habeas corpus in England can be reconciled with the Supreme Court's insistence that the Suspension Clause be understood — at least at a minimum — to protect the writ "as it existed in 1789." For a helpful take, consider the Supreme Court's 1952 decision in *United States v. Hayman*. In *Hayman*, the Supreme Court rejected an argument that 28 U.S.C. § 2255 — enacted in 1948 to provide a statutory alternative to post-conviction habeas for federal prisoners — violated the Suspension Clause, relying on the fact that the statute left habeas intact if the substitute proved "inadequate or ineffective to test the legality of [the prisoner's] detention."<sup>258</sup> What is intriguing about *Hayman* is the brief filed on the merits by Hayman's counsel, Harvard Law Professor Paul Freund.<sup>259</sup> Freund devoted eighteen pages to the argument that § 2255 was inconsistent with the Suspension Clause, relying on his own exegesis of the nature of habeas in pre-revolutionary England.<sup>260</sup> Freund captured in a nutshell many of the conclusions at the heart of Halliday's book — that habeas was primarily a common law, not statutory, remedy;<sup>261</sup> that the Habeas Corpus Act of 1679 was a distraction;<sup>262</sup> that the courts in the exercise of their common law authority routinely issued the writ in cases in which some of Freund's contemporaries assumed it did not apply;<sup>263</sup> that prisoners were able to offer facts controverting the return, particularly in impressment cases;<sup>264</sup> and that, in general, "the English practice was an evolving one, under continuous judicial

<sup>257</sup> For instance, Justice Scalia's dissent in *Boumediene* relies on *Cowle's Case*, 97 Eng. Rep. 587 (K.B. 1759), for the proposition that King's Bench lacked the power to send the writ to Scotland and Hanover. See, e.g., *Boumediene*, 128 S. Ct. at 2303–04 (Scalia, J., dissenting). But the court's refusal to send the writ in *Cowle* came "[n]otwithstanding the power which the judges have" to do so. *Cowle*, 97 Eng. Rep. at 599–600.

<sup>258</sup> *United States v. Hayman*, 342 U.S. 205, 223 (1952) (quoting 28 U.S.C. § 2255(e) (2006 & Supp. III 2009)) (internal quotation marks omitted).

<sup>259</sup> See Brief for the Respondent, *Hayman*, 342 U.S. 205 (No. 23).

<sup>260</sup> *Id.* at 27–45.

<sup>261</sup> See *id.* at 30.

<sup>262</sup> See *id.* at 30–31.

<sup>263</sup> See *id.* at 31.

<sup>264</sup> See *id.* at 34–35.

and parliamentary re-examination, and subjected to a series of liberalizing reforms by courts and legislature both before and after 1789.”<sup>265</sup>

Freund was not arguing against the government’s view of the writ “as it existed in 1789,” though. Rather, he was arguing against *any* attempt to peg the Suspension Clause to a particular historical moment. In his words, “[a]gainst this background of flux and empiric responsiveness, it would be mistaken in the extreme to try to capture the state of the law at a moment of time and identify it with the guarantee in the Constitution.”<sup>266</sup> One year later, in remarks given at an NYU symposium celebrating *Marbury*’s sesquicentennial, Freund elaborated, explaining that “[t]he organic element in an institution ought to be taken into account.”<sup>267</sup> The Constitution’s drafters adopted the “dynamic element” of habeas, Freund argued, and not some static variation, for “the whole history of habeas corpus shows that the courts in England were capable of developing the writ, and we did not adopt an institution frozen as of that date.”<sup>268</sup>

Halliday may well agree. As he notes in discussing the temptation to peg the Suspension Clause to the scope of the writ in 1789:

As a matter of American jurisprudence, this might make sense, so long as this requirement is not taken to rest on a claim about history. But it does. Underlying the proposed standard is condescension: a belief that during later epochs, including our own, habeas corpus has more nearly reached its ideal form. (p. 314)

Ever the consummate and careful historian, Halliday offers no judgment on the normative appropriateness of tying the Constitution to the scope of the writ in pre-revolutionary England. Rather, the point of his project is to emphasize the care with which such tethering must take place, and the conventional assumptions that are dispelled by a thoroughgoing assessment of English history. And one of those assumptions is the mentality that the scope of the writ both can and should be understood by reference to a fixed point in time.

In that sense, perhaps the real contribution of Halliday’s manuscript is to prove that Freund was right — that to truly understand the scope of the writ “as it existed in 1789” is to understand its protean dynamism, not any of its specific applications. In the same pages, Halliday thereby provides both a comprehensive assessment of the scope of the writ at the Founding and the means to understand why such a survey will always be incomplete. This is not to indict “originalism” as

---

<sup>265</sup> *Id.* at 33.

<sup>266</sup> *Id.*; see also *id.* (“No such fallacy has crept into this Court’s treatment of comparable guarantees, such as the right to assistance of counsel and freedom of the press.”).

<sup>267</sup> Discussion, Willard Hurst, *The Role of History*, in *SUPREME COURT AND SUPREME LAW* 59, 61 (Edmond Cahn ed., Simon & Schuster 1971) (1954).

<sup>268</sup> *Id.*

such, but rather to suggest that its proper application to habeas corpus produces a result that some may see as decidedly anti-originalist. Thus, whatever might be said about the original understanding of other constitutional provisions, Halliday's research suggests that habeas would have been seen by the Founders as a flexible, adaptable, and evolving remedy, regardless of its specific scope on September 17, 1787. Tying the Suspension Clause to the Founding makes sense only if one accepts that the result is a constitutional floor marked by fluid principles, not rigid practices. And even then, it remains for future generations, and not historians, to decide whether the Constitution does — or should — protect anything more.<sup>269</sup>

---

<sup>269</sup> See, e.g., Brief for the Respondent at 33–34, *Hayman*, 342 U.S. 205 (No. 23) (“In that sense it is fair to say of seventeenth and eighteenth century lawmakers that we do not sit in their councils; we invite them to sit in ours.” (citing CHARLES P. CURTIS, JR., *LIONS UNDER THE THRONE* 2 (1947))). For an intriguing overview of how habeas might be reconceived going forward, see NANCY J. KING & JOSEPH L. HOFFMAN, *HABEAS CORPUS FOR THE TWENTY-FIRST CENTURY* (forthcoming 2011).