

The Founders' Thoughts on Habeas Corpus

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INTRODUCTION

The Supreme Court has held that the Suspension Clause of the U.S. Constitution¹ guarantees a right to habeas corpus relief which Congress may not impair without officially suspending habeas corpus, at a minimum as that relief was understood in 1789.² This paper explores how habeas corpus, and specifically the suspension of habeas corpus, was understood in 1789.

¹ U.S. CONST. art. I, §9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

² *INS v. St. Cyr*, 533 U.S. 289, 300–301 (2001). *Cf. Felker v. Turpin*, 518 U.S. 651, 663–664 (1996) (developments in habeas corpus law subsequent to 1789, such as the power of federal courts to issue the writ for prisoners held in state custody and to challenge the final judgment of state courts, may also be protected by the Suspension Clause). For the constitutional right to habeas corpus more generally, see *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) (announcing constitutional right to habeas corpus from federal courts, but that no federal court may issue the writ without legislative authorization); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (U.S. citizens are entitled to challenge their classification as enemy combatants); *Rasul v. Bush*, 542 U.S. 466 (2004) (habeas corpus available to those held in areas where U.S. exercises plenary and exclusive jurisdiction, but not ultimate sovereignty); *Hamdan*

There was an ambiguity in how the Founders presented the right of habeas corpus, an ambiguity that to some degree was present within the law as it stood. On the one hand, habeas corpus was conceived of as a means of ensuring that individuals were detained only for specified criminal offenses and not as part of a strategy of political coercion. There are rules regarding who may lawfully be detained, and on this view habeas corpus is a means for ensuring that those rules are respected. On the other hand, habeas corpus was seen as providing for a review of all detentions by an institution separate from the detaining authority, although not necessarily a review according to a bright-line rule. In one account, it is the rules that are important, in the other, a system of concurrent authority. Proponents of habeas corpus as a writ of liberty have usually appealed to both accounts, even as they have assigned a greater relative importance to one or the other. Because the practices surrounding habeas corpus have evolved, each account has rung truer at different periods in history. The phrase “habeas corpus” conjured elements of both accounts by the time of the Founding, but it had not crystalized into a single way of combining them, and some of the connotations carried by “habeas corpus” contradicted other connotations. Which account of how habeas corpus preserves individual liberty one emphasizes, moreover, informs whether a given action ought to be considered a suspension of the privilege of the writ of habeas corpus.

Habeas corpus descends from a prerogative writ issued by the Chancery in England. King’s Bench took over this writ around 1500,³ and the power to issue it was enjoyed as a matter of statute or convenience by other courts, as well.⁴ British colonies in North America gradually obtained the protections of habeas corpus, and the law that had accumulated around the writ was adopted in the United States after we had disclaimed all notions of royal prerogative. It was not, however, adopted the same way in all parts of the country.

At the same time, habeas corpus was a slogan, a rallying cry, much like “individual responsibility” or “social welfare.” Like all rallying cries, it meant different things to different people. The Habeas Corpus Suspension Clause is not sensible as the expression of any one of these meanings.

Within the constellation of meanings associated with habeas corpus, some interpretations compel us to doubt whether the privilege of the writ might ever have to be suspended at all. Since the Constitution provides for the privilege of the writ’s suspension, we might be inclined to excluded these interpretations from the constellation of plausible meanings.

These are, however, the interpretations with a stronger basis in law. They view habeas corpus primarily as a procedure by which the courts ensure that no one is held unlawfully. The substantive right of personal liberty, by contrast, would be established by other aspects of the English legal tradition that were carried over into the American colonies that limit the causes for which a person may be lawfully held. Habeas corpus was not initially associated with the Magna Carta’s right to personal liberty, and in many respects it makes sense to see habeas corpus simply as a procedure for asserting substantive rights rather than as the source of any.⁵ This is how habeas corpus is most often explained.⁶ The

v. Rumsfeld, 548 U.S. 557 (2006) (finding that Congress had failed to strip the Court of authority to review certain detentions at Guantanamo Bay Naval Station); Boumediene v. Bush, 553 U.S. 723 (2008) (finding that Congress may not prohibit courts from reviewing detentions at Guantanamo Bay Naval Station).

³ PAUL HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 60–63 (2010).

⁴ DANIEL MEADOR, *HABEAS CORPUS AND MAGNA CARTA* 15 (1966). Cf. HALLIDAY, *supra* note 3, at 235–36 (Common Pleas could issue the writ in ordinary criminal cases as a matter of common law).

⁵ MEADOR, *supra* note 4.

Supreme Court, in determining that enemy combatants detained at the Guantanamo Bay Naval Base had a constitutional right to habeas corpus relief, emphasized that “our opinion does not address the content of the law that governs petitioners’ detention.”⁷ It is particular substantive rights, rather than any procedure for asserting them, that more obviously might be sources of difficulty during an emergency.

Yet the attachment to habeas corpus exhibited by the Founders suggests that many of them did consider it to be a substantive right governing when imprisonment is unlawful. This substantive right, in order to be robust enough to protect the individual from political arrest, moreover, must be capable of conflicting with what is necessary during an invasion or insurrection. Furthermore, this substantive right is actually a suite of rights. A suite of substantive rights, however, is not either operative or suspended in the way the Constitution considers the privilege of the writ of habeas corpus to be.

I do not mean to argue that the Suspension Clause is meaningless. We can say for certain that imprisonment by federal officials without trial for actions not illegal when they were performed is forbidden as a matter of the Fifth Amendment’s Due Process Clause. It is almost as certain that the federal government cannot render the Due Process Clause a dead letter by failing to provide federal courts with the ability to issue writs of habeas corpus while simultaneously preventing state courts from issuing the writs for prisoners held in federal custody.⁸ The Suspension Clause has a definite meaning where we are unlikely to disagree over its meaning. That meaning does not, however, serve to settle disputes among those who are in agreement in their opposition to arbitrary arrest but part ways over whether certain detentions constitute arbitrary arrest.

I. HABEAS CORPUS BY STATUTE AND UNDER COMMON LAW

Some of the rights associated with habeas corpus are the result of statute. Others result from the writ as known to the common law. The difference between the two is relevant because it reveals that habeas corpus is a suite of rights and procedures rather than an indivisible unit. Moreover, there was debate over which elements of this suite, if any, were operative in North America and how liable each was to revision. Neither the common law writ nor that protected by statute simply corresponds to the distinction between a procedural and a substantive vision of habeas corpus that I draw in section III, but these preliminary remarks about habeas corpus are important for setting the Founders’ statements in context.

Habeas corpus as known in the 1780s was very different from habeas corpus at the writ’s inception. Edward Jenks famously remarked, “whatever may have been its ultimate use, the writ *Habeas Corpus* was originally intended not to get people out of prison, *but to put them in it.*”⁹ While recent scholarship observes that this comment mistakes an order to compel a person’s appearance in court for an order to arrest them, it does affirm that there was no necessary relationship between habeas corpus

⁶ *E.g.*, 3 WILLIAM BLACKSTONE, COMMENTARIES *131–38; BLACK’S LAW DICTIONARY 709 (6th ed. 1990); A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 118, 128–39 (Liberty Fund ed. 1982).

⁷ *Boumediene v. United States*, 553 U.S. 723, slip op. at 69 (2008).

⁸ *Cf.* Martin Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause*, 96 VIR. L. REV. 1361 (2010) (arguing that the Due Process Clause effectively repeals the authority to suspend habeas corpus, insofar as a suspension would eviscerate due process).

⁹ Edward Jenks, *Story of the Habeas Corpus*, 18 L. Q. REV. 64, 65 (1902).

and a right of personal liberty.¹⁰ As it relates to detention, the writ itself merely commands a jailer to appear in court with a prisoner, and so is an expression the court's power to coerce the jailer rather than any right of the prisoner.¹¹

Of course, when a prisoner is in court, the judge can also order him set free. The theory behind bringing a prisoner before the court solely in order to release him is that the King does not suffer his subjects to be detained except by the laws of the land, and so the courts able to speak in his name and so lay claim to the prerogative—the King technically sat on King's Bench—may inquire whether any subject's liberty has been violated. This is the origin of habeas corpus as a means of testing the legality of a prisoner's detention.

Still, the writ itself is merely an order from the court to whoever is detaining the prisoner to bring him before the court and make a return stating why he is being held. The law regarding the writ does not itself say who shall be released. Only those held unlawfully are entitled to go free. Laws apart from habeas corpus are the source of any entitlement to post bail¹² or the promise that no one will be imprisoned except pursuant to the established law of the land.¹³ Habeas corpus is a means to ensuring that these laws are respected. This is habeas corpus as known to the common law.

The problem with the writ of habeas corpus as known to the common law arises when it is the King himself and not some sheriff or justice of the peace who has ordered the imprisonment. The King's discretionary prerogative is the source of the court's authority to issue a prerogative writ, and so the court cannot challenge that prerogative. The King technically sat in Parliament and on the Privy Council, as well, and so they too could claim to speak in his name and exercise his prerogative in committing an individual to jail.

This issue arose in a case the full details of which would distract us from the main issue.¹⁴ In *Darnell's Case*, also known as the *Case of the Five Knights*,¹⁵ the amended return said only that the men in question were detained *per special mandatum Domini regis*, by the special command of his majesty. King's Bench found this to be a sufficient return. Reasons of state require secrecy,¹⁶ so the court could

¹⁰ R.J. SHARP, *THE LAW OF HABEAS CORPUS* 2–3 (2008). See also MEADOR, *supra* note 4.

¹¹ See *Wales v. Whitney*, 114 U.S. 564, 574 (1885). Cf. *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 494–95 (1973) (prisoners held in another state upon a detainer issued by a custodian subject to the court's process can be brought in upon a habeas corpus); MEADOR, *supra* note 4, at 41–43 (the fact that the writ works upon the custodian rather than the prisoner means it could be used to bring prisoners from overseas so long as the custodian was within the court's jurisdiction). But cf. HALLIDAY, *supra* note 3, at 236 (King's Bench sent the writ to the Channel Islands, even though it could not compel a return).

¹² *E.g.*, Statute of Westminster, 1275, 3 Edw., c. 15 (Eng.).

¹³ Magna Carta, 1225, 9 Hen. 3, c. 29 (Eng.).

¹⁴ One such detail is that it was plain for all to see that the men were being held illegally as part of a scheme to extort “loans” from them. The previous Chief Justice of King's Bench had been removed for refusing to acknowledge the legality of these forced loans; *Darnell's Case*, (1627) 3 How. St. Tr. 1, 1 n.* (K.B.). The legal principle expounded by King's Bench is what would set the law applied by different men under different conditions and what Parliament objected to, and so I examine only the logic of that principle.

¹⁵ *Darnell's Case*, (1627) 3 How. St. Tr. 1 (K.B.).

¹⁶ *Hinde's Case*, (1577) 74 Eng. Rep. 701 (C.P.) (while “causes ecclesiastical” do not suffice as a return on the writ, “if one be committed to prison, by the commandment of the Queens Privy Council, there the cause needs not to be shewed in the return, because it may concern the state of the realm, which ought not to be published”). Cf. *Hellyard's Case*, (1586) 74 Eng. Rep. 455 (C.P.) (refusing to remand on the order of a single secretary in the King's household); *Howel's Case*, (1588) 74 Eng. Rep. 66 (C.P.) (refusing to remand on the order of a single member of the Privy Council, but accepting an amended return that said the entire Privy Council had signed the order).

not demand a fuller return. We should not think for a moment that the Court believed that the King though his Privy Council would never imprison a subject except for the weightiest of reasons. Rather, King's Bench would have had to assert an independent judiciary and thus contest the claim that all justice flows from the King in order to insist that the Privy Council's return was insufficient; the fact that the Petition of Right and the Star Chamber Act received the royal assent was necessary to remove this power from the Privy Council without offending the King's sovereignty.¹⁷ Moreover, a court was not permitted to substitute itself for the ordinary trial court by controverting the facts attested on the return, only to look at whether the return attests facts sufficient for continued detention (although this is no longer the case).¹⁸

Paul Halliday's grand history of habeas corpus is intended to restore the dignity of the writ as it existed at common law and to blame legislative meddling for actually diminishing the scope of habeas corpus and its capacity to safeguard individual liberty. He argues that the various statutes added nothing to the common law writ's authority, which was not available to Englishmen alone and unlike a statute could not be repealed and so could never be suspended.¹⁹

Halliday is correct that the judges who sat on King's Bench could do a great deal with the common law writ. They could also do very little, if they so chose, and the great parliamentary statutes were prompted by long periods in which King's Bench did very little.

The Petition of Right, for example, did not limit its complaint to the fact that the *jailer's* return for the five knights' writs of habeas corpus did not certify any cause for detention. It further objected that the *Court* nonetheless remanded them to custody "without being charged with anything to which they might make answer according to the law."²⁰ Nevertheless, as Halliday notes, rates of release upon writs of habeas corpus fell after the Petition had been made.²¹ The act that abolished the Star Chamber also declared that every return on a writ for habeas corpus must certify "the true causes" of detention or imprisonment.²² Even so, Halliday finds that King's Bench returned some petitioners to prison with no cause of arrest shown on the return.²³

Political crimes, moreover, are still crimes. As a result, neither these acts nor the common law writ forbid holding subjects for political crimes.

It is not until we reach the 1679 Habeas Corpus Act that we find statements to the effect that those held for high treason or felony are eligible for release if not indicted within a matter of months, that they are eligible for bail if not tried within a few months more, that the executive cannot secret prisoners off to Scotland to evade judicial oversight, etc.²⁴ As the potential to be released on bail pending trial is an essential way in which habeas corpus functioned to prevent indefinite imprisonment, the prohibition of excessive bail in the English Bill of Rights²⁵ would be another statutory contribution to the substantive rights associated with habeas corpus.

¹⁷ WILLIAM DUKER, CONSTITUTIONAL HISTORY OF HABEAS CORPUS 43–44 (1980).

¹⁸ See SHARP, *supra* note 10, at 65–90.

¹⁹ HALLIDAY, *supra* note 3.

²⁰ Petition of Right, 1628, 3 Car., c 1, art. 5 (Eng.).

²¹ HALLIDAY, *supra* note 3, at 160.

²² Star Chamber Act, 1640, 16 Car., c 10, art. 6 (Eng.).

²³ HALLIDAY, *supra* note 3, at 154.

²⁴ Habeas Corpus Act, 1679, 31 Car. 2, c. 2, §§ 7, 12 (Eng.).

²⁵ Bill of Rights, 1689, 1 W. & M., Sess. 2, c. 1, § 10 (Eng.).

This is to say that “habeas corpus” did not connote a single entity. It was instead a patchwork of common law and statute. Its parts are thus, in theory, detachable. This raises the question of which parts the Founders associated with habeas corpus and which parts they thought were separate rights—which rights may be suspended only in the direst circumstances, which rights were subject to ordinary legislation, and which rights enjoyed infeasible protection.

II. HABEAS CORPUS IN EIGHTEENTH-CENTURY NORTH AMERICA

Habeas corpus was written into the law of the British colonies in North America in a variety of ways, and the laws regarding it differed from colony to colony. Likewise, the manner in which the right of personal liberty often associated with habeas corpus was secured in the period between the Declaration of Independence and the ratification of the Constitution was not uniform. This diversity is reflected in what various political writings of the time suggest regarding how habeas corpus preserves liberty and how much discretion is left to judges in conducting proceedings upon the writ. When some Founders thought of habeas corpus, they meant the Habeas Corpus Act of 1679, but this was not the case universally, and there are problems reconciling what the Founders said with either the common law writ alone or the full panoply of rights enumerated in the Habeas Corpus Act and related statutes.

A. *State Constitutions and Laws Prior to 1789*

Independence required new constitutions, and within a year or two of the Declaration of Independence, every state other than Connecticut and Rhode Island had replaced its colonial charter. Some states revised their constitutions again before the ratification of the Constitution. Habeas corpus as it existed in 1789 would be determined by these constitutions.

Most states quoted or paraphrased a line from Magna Carta that was by that time associated with habeas corpus: “No freeman shall be taken or imprisoned or disseised of his freehold or of his liberties or free customs, or be outlawed or exiled or any otherwise destroyed, nor will we go against him nor condemn him save by lawful judgment of his peers or by the law of the land.”²⁶ Connecticut did not revise its constitution, but its 1650 code of laws included, “no mans person shall be arrested, restrained, banished, dismembered nor any way punished [...] unless it bee by the vertue or equity of some express Law of the Country warranting the same, [...] or in case of the defect of Law in any particular case, by the word of God.”²⁷

Pennsylvania and North Carolina declared, “All prisoners shall beailable by sufficient sureties, unless for capital offenses, when proof is evident, or presumption great.”²⁸ A similar guarantee is found in the Northwest Ordinance,²⁹ with an important modification that will be discussed below. Vermont

²⁶ Magna Carta, 1225, 9 Hen. 3, c. 29 (Eng.), reproduced with simplifying modifications in MASS. CONST. OF 1780 pt. I § 12; MD. DECLARATION OF RIGHTS OF 1776 § 21; N.C. DECLARATION OF RIGHTS OF 1776 § 12; N.H. CONST. OF 1784 pt. I, art. 15; N.Y. CONST. OF 1777 § 13; PA. DECLARATION OF RIGHTS OF 1776 § 9; S.C. CONST. OF 1778 § 41; VIR. DECLARATION OF RIGHTS OF 1776 § 8. On the relationship between habeas corpus and this section of Magna Carta, see MEADOR, *supra* note 4.

²⁷ Code of Laws Established by the General Court, May 1650, 1 CONN. COLONIAL REC. 509 (J. Hammond Trumbull ed. 1850).

²⁸ N.C. CONST. OF 1776, § 39; PA. CONST. OF 1776 § 28.

²⁹ Northwest Ordinance § 14, art. 2 (1788), *in* 1 Stat. 51–52 (1789).

(which was in rebellion from New York and New Hampshire as well as from Great Britain) also adopted this clause, and added that the Supreme Court and all courts of common pleas should have the powers usually exercised by such courts.³⁰ This last provision would presumably include the power to issue writs of habeas corpus.

New Hampshire stated in its constitution, though not in the section securing individual rights, that “The privilege and benefit of the habeas corpus, shall be enjoyed in this state, in the most free, easy, cheap, expeditious, and ample manner, and shall not be suspended by the legislature, except upon most urgent and pressing occasions, and for a time not exceeding three months.”³¹ Massachusetts said the same, but permitted suspensions of up to twelve months.³² Georgia plainly and directly declared that “the principles of the habeas corpus act shall be a part of this constitution.”³³

Delaware and New Jersey, by contrast, said only that the common law and statutes of England that were in force in the colony prior to the new state constitution and that were not repugnant to it should remain in force.³⁴ Habeas corpus would be covered, even as it was not mentioned.

Not every state spoke of “habeas corpus,” then, most of them simply noting that the laws should continue on as before or guaranteeing particular rights that form a part of the habeas corpus suite. Most of them declared a right but without ensuring access to the procedure that could protect that right. Those that did speak of habeas corpus, however, did so as though it were a single entity the content of which was not and could not be in question.

B. Political Writings Prior to 1789

Many of the speeches and pamphlets of the time also speak of habeas corpus as a single entity without feeling the need to clarify what that entity encompassed. In 1774, the Continental Congress spelled out some of the “rights of Englishmen” which it felt all those in North America under British rule should enjoy, one of these rights being habeas corpus. Yet it mentioned only that the writ was useful against “illegal restraint,” without saying what made restraint illegal.³⁵ In 1776, the anonymous author of “Four Letters on Interesting Subjects” said only that the Habeas Corpus Act secured persons “against unjust imprisonments.”³⁶ At the Massachusetts ratifying convention, Increase Sumner explained that the writ looks to whether a person was legally or illegally committed.³⁷

³⁰ VT. CONST. OF 1777 ch. II, §§21, 35.

³¹ N.H. CONST. OF 1784 pt. II, art. 91.

³² MASS. CONST. OF 1780 pt. I, § 12 & pt. II, ch. 6, art. 7.

³³ GA. CONST. OF 1777 § 60.

³⁴ DEL. CONST. OF 1776 art. 25; N.J. CONST. OF 1776 §22. Other states had similar statements regarding the continuity of law, but singled out the right of personal freedom in the ways noted; see MD. CONST. OF 1776 § 61; MASS. CONST. OF 1780 pt. II ch. 6 art. 6; N.H. CONST. OF 1784 pt. II art. 90; N.Y. CONST. OF 1777 § 35; S.C. CONST. OF 1776 § 29 (retained S.C. CONST. OF 1778 § 34. Pennsylvania ensured the continuity of law by statute; 9 PA. STAT. L. 29 (James Mitchell & Henry Flanders eds., 1903).

³⁵ CONTINENTAL CONGRESS, APPEAL TO THE INHABITANTS OF QUEBEC (1774), *in* AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 233 (Charles Hyneman & Donald Lutz eds., 1983).

³⁶ FOUR LETTERS ON INTERESTING SUBJECTS (1776), *in* AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 387 (Charles Hyneman & Donald Lutz eds., 1983).

³⁷ 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 108–9 (Elliot ed., 2nd ed., 1836) [hereinafter ELLIOT’S DEBATES].

James Iredell, at the North Carolina convention that failed to ratify the Constitution, said that writs of habeas corpus secure the citizen against “arbitrary imprisonment” prior to a trial.³⁸ “[B]y the privileges of *habeas corpus*, no man can be confined without inquiry; and if it should appear that he has been committed contrary to law, he must be discharged.”³⁹

These statements testify to the importance of habeas corpus. They might suggest that the protections provided by the writ are primarily procedural in nature, but this would be to interpret their references to “illegal” or “unlawful” restraint in too positivistic a fashion. The author of “Four Letters on Interesting Subjects” felt free to replace “unlawful” with “unjust” in the standard formula, for example. The content of habeas corpus was not considered to be problematic, and so that content went unstated beyond the vague assertion that it had something to do with protecting individual liberty.

One way of settling which elements of habeas corpus law the Founders meant by the phrase “habeas corpus” is to assert that they meant all of them, an inflexible attachment to everything touching upon liberty. This surmise cannot be sustained, however, for then the unremitting force of habeas corpus would prohibit the creation of new felonies: new felonies bring with them new reasons why one can be held without bail, and political crimes that ought not be crimes at all are usually classified as felonies. Some details of what habeas corpus meant, such as the specific time frames for responding to writs of habeas corpus and the fines to be levied for various delays, must be alterable without that alteration constituting a suspension of habeas corpus. Courts now routinely solicit affidavits before deciding whether there is cause to issue the writ, and this procedure has largely supplanted those in existence in 1789. It would be odd to say, however, that this change ran counter to the Constitution just because it reduces the need to issue the writ in some cases, and thereby reduces the number of writs actually issued.

Habeas corpus came to be used as a nascent appeals procedure, yet the creation of a formal appeals procedure and the limitation on the writ’s appellate usage to collateral attacks on a conviction in no reasonable sense constitutes a suspension of habeas corpus, even though this purely procedural form of the writ (usually *cum causa* rather than the *ad subjiciendum* most strongly associated with personal liberty) does enjoy some protection under the Suspension Clause.⁴⁰ While we cannot restrict what was meant by habeas corpus to the *ad subjiciendum* form of the writ, neither can we extend it to all versions of the writ. William Burg, for example, was imprisoned 1662 by order of the Virginia General Assembly for fornication with a mayor’s widow, and if he left prison on liberty to visit her, or she came to him, he was to be transferred to a different city by a habeas corpus.⁴¹ Forty-five years prior to Independence, Parliament had declared that no one being sued for impersonating a lawyer could have their case stayed by a writ of habeas corpus.⁴² This was clearly a matter of ensuring that the suits would proceed quickly and in the venue indicated by Parliament, not an attack on personal liberty. Habeas corpus has a core and a periphery that must be distinguished, then.

³⁸ 4 ELLIOT’S DEBATES, *supra* note 37, at 145.

³⁹ 4 ELLIOT’S DEBATES, *supra* note 37, at 171.

⁴⁰ See generally *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996) (citing cases on the growth of habeas corpus as an appeals procedure, announcing to constitutional right to that procedure, and upholding certain modifications to that procedure).

⁴¹ 2 VIR. STAT. L. 162 (William Henig ed. 1810).

⁴² Attorney and Solicitor Regulation Act, 1732, 2 Geo. 2, c. 23, § 25 (G.B.).

C. *The Diversity of Habeas Corpus Law in North America*

There is a further difficulty of discerning what habeas corpus meant in the states as a result of their colonial inheritance. The question is whether the writ existed because it existed in England and in the form it existed there, or whether the writ owed its life entirely to colonial charters or legislation.

Blackstone had argued that the common law did not extend to the United Kingdom's overseas colonies, although these colonies themselves might have incorporated aspects of the common law in their own municipal laws.⁴³ Joseph Story argued in response that the common law did reach North America, although his argument rests upon the false assertion that the land was uninhabited when the colonies were founded.⁴⁴ Recent scholars have attempted to show that the common law did operate in practice in North America, but their evidence does not show that it did so directly (rather than as mediated through the colonies' own municipal laws) and suffers from other problems.⁴⁵

Whether the common law extended to America is not entirely a moot point. Regardless of the status of habeas corpus in 1774, of course, almost every state said something about detention in its revised constitution. Nonetheless, the authority under which courts issued writs of habeas corpus in North America prior to Independence, whether as a matter of common law or colonial law, matters when it comes to how legal developments in England would affect the law across the Atlantic and thus what a lawyer would have understood in the various states that referred to "habeas corpus" without further explanation or that provided only for the continuity of law after war broke out with Great Britain.

⁴³ 1 WILLIAM BLACKSTONE, COMMENTARIES *106–109.

⁴⁴ See 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§146–55 (1833). Cf. *Blankard v. Galdy*, (1694) 91 Eng. Rep. 356 (K.B.) (uninhabited country discovered by English subjects was under all the laws in force in England). Other defenders of English liberty in North America conceded that the land was conquered infidel territory, but insisted that the colonists were the conquerors and so could not have lost their rights by emigration, an argument with a stronger foundation in Locke than in law (cf. JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. 2, § 177 (Peter Laslett ed., Cambridge Univ. Press 1988) (1689); had the colonists been correct that English law follows the Englishman abroad, there would never have been needed the prohibition in the Habeas Corpus Act on transporting subjects to Scotland or beyond the seas in order to evade review). The colonists claimed habeas corpus as their birthright as Englishmen. ROLLIN HURD, TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS 92, 101 (2nd ed., F. Hurd ed. 1876).

⁴⁵ E.g., HALLIDAY, HABEAS CORPUS, *supra* note 3, at 252–53 (Great Britain's 1777 suspension of habeas corpus presumes that North American revolutionaries were entitled to it); William Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393, 419 (1968) (the Privy Council's invalidation of a Connecticut law for being contrary to English law shows that English law was operative in North America). Halliday's argument relies upon the exception's proving the rule, a method of interpretation that he does not generally adopt; his interpretation of what judges could do with habeas corpus under common law, in particular, is not molded by a sense that the statutes regarding habeas corpus were necessary. Stoebuck refers to *Winthrop v. Lechmere* (1727), *in* 7 CONN. COLONIAL REC. 571 (J. Hammond Trumbull ed. 1873). The petition approved by the Privy Council, however, based its argument on the fact that the Connecticut legislature was empowered by the colonial charter to make only those laws that were "wholesome and reasonable, and not contrary to the law of England;" *id.* at 572. This limit on what the legislature could enact does not imply that the common law would otherwise be in force without any enactment, however. The Connecticut General Court did not trust to common law to declare certain acts illegal or ensure arrest and punishment only for those charged with crimes in its 1650 code of laws, and any defects in the laws promulgated by it were to be supplied by the "word of God," with no mention of the law of England; see *Code of Laws Established by the General Court, May 1650*, 1 CONN. COLONIAL REC. 509 (J. Hammond Trumbull ed. 1850).

Specifically, the status of English law in the colonies is important for the status of the Habeas Corpus Act in the colonies. The existence of the common law writ in North America, by whatever authority, is relatively insignificant when compared with the question of whether the Habeas Corpus Act reached America. Parliamentary statutes did not apply outside of England and Wales unless explicitly said to do so. The Habeas Corpus Act did name other places to which it applied, but not a single colony then in existence was mentioned. William Duker concludes that, even if not directly comprehended by the language of the 1679 Act, practice or colonial legislation made the effects of the Act felt only in Virginia, North Carolina, South Carolina, and Georgia, while it was the common law writ that was known throughout the rest of the colonies.⁴⁶

While everyone in America might have felt that they were entitled to English law in the abstract, there was not this same agreement when it came to the Habeas Corpus Act. In 1750, for example, the Rhode Island General Assembly reported which English statutes it thought were operative in the colony. The list took less than a page, and omitted any mention of the Habeas Corpus Act, Star Chamber Act, or Petition of Right.⁴⁷

Acting as a delegate from Pennsylvania at the Constitutional Convention, James Wilson observed that habeas corpus would never have to be suspended since judges could remand anyone they thought was dangerous to custody.⁴⁸ Given the content of the Habeas Corpus Act, this suggests that he understood only the common law writ to be operative. In his *Lectures on Law* he lamented that the benefit of the Habeas Corpus Act was denied to the colonies.⁴⁹

A similar view prevailed in London. The Habeas Corpus Act prohibits transferring prisoners “beyond the seas” in order to evade the reach of habeas corpus. Any Englishman transferred beyond the seas contrary to the Act was entitled, not to a writ of habeas corpus, but to bring an action for false imprisonment.⁵⁰ This suggests that in Parliament’s mind the writ was not operative on the other side of the Atlantic Ocean. England repeatedly blocked colonial attempts to legislate habeas corpus into existence, before relenting and granting habeas corpus protections piecemeal.⁵¹

The limited extent of their right to habeas corpus relief under British law was not recognized by most of the colonists, however, and the early state constitutions are not written as though some defect in their enjoyment full habeas corpus protection had to be remedied. The Chief Justice of Pennsylvania presented himself as bound by the Habeas Corpus Act, down to the £10,000 fine he would incur for not releasing twenty prisoners held by Congress’s command during the Revolutionary War.⁵²

D. The Habeas Corpus Act in Political Rhetoric

Let us now turn to the consideration of the possibility that what was meant by “habeas corpus” in the public mind was the protections of the Habeas Corpus Act, whether or not the early Americans

⁴⁶ DUKER, *supra* note 17, at 115.

⁴⁷ 5 R.I. COLONIAL REC. 289 (John Bartlett ed. 1860).

⁴⁸ James Wilson, paraphrased in James Madison’s notes on the Convention for Aug. 28, 1787, in COLLECTED WORKS OF JAMES WILSON 157 (Kermit Hall & David Hall eds., 2007).

⁴⁹ James Wilson, *Lectures on Law*, in COLLECTED WORKS OF JAMES WILSON 401, 901–2 (Kermit Hall & David Hall eds., 2007).

⁵⁰ Habeas Corpus Act, 1679, 31 Car. 2, c. 2, §12 (Eng.).

⁵¹ LEONARD LEVY, ORIGINS OF THE BILL OF RIGHTS 44–67 (1999).

⁵² Letter from Thomas McKean, C.J., Pa. Sup. Ct., to John Adams (Sep. 19, 1777) in 5 PAPERS OF JOHN ADAMS 289 (Robert Taylor et al. eds., 1983).

were entitled to the protections of that Act as a matter of British law. If it was true that “habeas corpus” meant in the public mind “habeas corpus as enjoyed in England in 1776,” then the state’s invocation of the phrase in their constitutions would transform this popular understanding into law.

Some people certainly meant the protections of the Habeas Corpus Act when they spoke about the writ. The *Federal Farmer* understood the Suspension Clause as referring to the Act,⁵³ and the Georgia Constitution spoke of habeas corpus in terms of the principles of the Act.⁵⁴ The possibility that the Founders were thinking of the Act would also explain why the Suspension Clause is presented as a limitation on Congress’s legislative power: Congress cannot alter the Habeas Corpus Act except to combat invasion or rebellion, and even then only so long as the public safety requires it.

The first problem with this view is that even the Habeas Corpus Act is too narrow to cover the range of meaning associated with “habeas corpus.” For example, there was controversy in Great Britain over whether a bill that altered the reasons for which a person might lawfully be held without bail was to be considered a suspension of habeas corpus, in part because that bill had originally been titled, “a bill for suspending the Habeas Corpus Act, as far as it should relate to the persons of foreigners.”⁵⁵ In the end, holding these persons without bail was not considered to require a suspension of habeas corpus, however. Habeas corpus means that those who are entitled to bail should be bailed, but the Habeas Corpus Act did not declare that new criminal offenses could not be created or the laws of bail and mainprise altered. Still, some people considered some alterations to the laws regulating the proceedings upon the writ to be a suspension of the writ itself and in a way more broadly protective of personal liberty than the Habeas Corpus Act.

The Habeas Corpus Act did not permit prisoners of war to be released on bail. Nonetheless, many (although not all) Founders thought that habeas corpus would have to be suspended during an emergency, even to hold prisoners of war. (This is discussed in more detail below in section III.A.). Again, what some people associated with habeas corpus outstripped the protections of the Habeas Corpus Act.

The second problem is that the Habeas Corpus Act covers *more* than what was considered the right of habeas corpus. The Act did not just release those held for misdemeanors on bail. It also provided a time frame in which indictments and trials for high treason and felony must be completed.⁵⁶ That is to say, it guarantees a speedy trial. Yet it is clear that early Americans did not equate habeas corpus with a right to a speedy trial, for they felt that the latter was lacking even though the former had been secured, and so they ratified the Sixth Amendment to guarantee it. At the time that *Darnel’s Case* was decided, most people were imprisoned upon summary orders by justices of the peace, not upon a presentment or indictment.⁵⁷ The Habeas Corpus Act requires that alleged felons and traitors be indicted or tried by the end of the next term of King’s Bench or session of the Assizes, but it is similarly clear that the Founders did not equate habeas corpus with the requirement for an indictment rather than an information in criminal proceedings.

Rather than attempting to understand the Founder’s thoughts on habeas corpus in terms of whether they thought the Habeas Corpus Act to operate or just the common law writ, we should view their opinions as lying on a continuum between habeas corpus understood as a suite of substantive

⁵³ FEDERAL FARMER NO. 16 (1788), in 2 COMPLETE ANTIFEDERALIST 8.196, 8.202 (Herbert Storing ed. 1981).

⁵⁴ GA. CONST. OF 1777 art. 60.

⁵⁵ HALLIDAY, *supra* note 3, at 355–56. The law in question was the Aliens Act, 1793, 33 Geo. 3, c. 4 (G.B.) (aliens who failed to register with the government could be held without bail).

⁵⁶ Habeas Corpus Act, 1679, 31 Car. 2, c. 2, §7 (Eng.).

⁵⁷ HALLIDAY, *supra* note 3, at 138.

rights regarding personal liberty and habeas corpus understood as merely the means by which procedural due process is obtained. In the former view, the substantive rights are relatively clear. In the latter, judges might possess some more leeway. That is, the Suspension Clause is best understood as an amalgam of two strategies for handling emergencies.

III. TWO VISIONS OF HABEAS CORPUS

The Suspension Clause is an amalgam of two different views of habeas corpus. These views are tied to two different strategies for addressing the problem of emergency powers, viz. how to permit the government to respond to events flexibly and energetically while preventing some segments of society from abusing the rest through control of the government. I have discussed how these strategies imply different definitions of the rule of law and different visions of checks and balance elsewhere, where I referred to them as *extralegalism* and *concurrent authority*.⁵⁸

In one view, habeas corpus is a robust constellation of rights to be released from imprisonment. The crime of *lèse majesté* is unknown and treason is well-defined. Judges do not weigh a person's goodness or the threat they might pose, but instead enforce a clear set of rights to release. It is these rights that make one free, while judges merely sign the paperwork. One cannot draw up the same list of rights for peacetime and extremity without introducing the sort of vagueness this strategy eschews, however, and so such a habeas corpus must be suspended.

In the other view, habeas corpus is primarily judicial oversight. The court is entrusted with a wide latitude to keep people in prison as the court judges appropriate. Individual liberty is served by the court's possession of this discretionary power of review because the prisoner's confinement is not determined solely by some offended sovereign or a justice of the peace on a power trip. Only treason within the judiciary would necessitate suspending the writ of habeas corpus so understood.

Neither view is simply true of the writ of habeas corpus and most people believed something of a mixture of the two. Still, order can be brought to the Founders' statements about habeas corpus by viewing them in light of these two strategies.

A. *Habeas Corpus as Substantive Right*

While one might say that habeas corpus was valued because it was the procedure by which one could assert one's substantive rights, many Founders did not separate the substantive rights encapsulated in what constituted lawful imprisonment from habeas corpus. If habeas corpus were merely a procedure guaranteeing due process, there would have been no need for the Fifth Amendment's Due Process Clause, and there is no textual evidence to support a conjecture that the Fifth Amendment was understood by the Founders as repealing the Suspension Clause.⁵⁹ Some

⁵⁸ Ross Corbett, *The Suspension of Law During Crisis*, 27 POLITICAL SCIENCE QUARTERLY 627 (2012). For the extralegalist strategy, see OREN GROSS AND FIONNUALA NÍ AOLÁIN, *CRISIS AND LAW* (2009); Mark Tushnet, *Emergencies and the Idea of Constitutionalism*, in *THE CONSTITUTION IN WARTIME* (Mark Tushnet ed. 2005). *But see* Mark Tushnet, *Political Constitution of Emergency Powers*, in *EMERGENCIES AND THE LIMITS OF LEGALITY* (Victor Ramraj ed. 2008) (moving away from earlier embrace of extralegalism).

⁵⁹ *Cf.* Redish & McNamara, *supra* note 8 (arguing that the Due Process Clause is incompatible with and thus supersedes the Suspension Clause, not that it was understood as repealing the Suspension Clause at the time).

Founders expressed precisely what they thought habeas corpus meant, and it had more to do with the substantive rights that governed proceedings upon the writ than with the procedure of the writ itself. They thought that it did provide specific guarantees of release that would prove inconvenient in cases of rebellion or war on American soil. Some of those who articulated habeas corpus as a substantive right of personal liberty also forbade its suspension entirely, but we nonetheless learn what they thought the right of habeas corpus included.

As noted, the constitutions adopted in Pennsylvania, North Carolina, and Vermont at the start of the Revolutionary War all contained the clause, “All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when proof is evident, or presumption great.”⁶⁰ Not willing to trust to the potentially misunderstood formula “habeas corpus,” they spelled out what was meant. For them habeas corpus was not really a guarantee of judicial oversight, but instead a right on the part of the individual to be free even when charged with a crime, except under defined circumstances.

The right to personal liberty that these colonists associated with habeas corpus would clearly conflict with the public safety during an invasion—which is ironic, given that they were passed during a time of war. The Habeas Corpus Act had covered only those detained for misdemeanors, felonies, petty treasons, or high treasons, but these constitutions covered every prisoner. Detaining prisoners of war would require that a court rule them not to be prisoners. This would certainly be against the tenor of the constitutions’ guarantees, since they were written as though a protection that spoke only in terms of “unlawful imprisonment” would be too vague, granting government officials, both executive and judicial, too much discretion. The problem with the common law writ is that *Darnell’s Case* was rightly decided. Many Founders wanted to spell out who was entitled to release. This stands in contrast to the Petition of Right’s and the Star Chamber Act’s guarantee that no freeman should be detained without the true cause being certified, it being assumed that “prisoner of war” constituted a just and legal cause of confinement. Indeed, some Founders apparently thought that “prisoner” was too vague or liable to abusive misinterpretation. When this clause found its way into the Northwest Ordinance, it read that all *persons* shall be bailable, except for capital offenses.⁶¹ This is one view of habeas corpus, and unless prisoners of war are neither prisoners nor persons, there is clear need for this kind of habeas corpus to be suspended at times.

If personal liberty is to be protected by specifying who may be held and who must be released, the rules governing each class must be detailed. Saying that those who pose a public danger may be held without bail simply invites the executive magistrate to assert a public danger and dare the court to claim a superior knowledge of the danger posed. The Supreme Court did not permit courts to deny bail in order to prevent a public danger until the 1980s,⁶² so wary have the courts been of permitting the executive to engage in this kind of contest with the judiciary. Courts have traditionally been unwilling to controvert the executive’s or legislature’s assertion of a national security interest.⁶³ As discussed above,

⁶⁰ N.C. CONST. OF 1776 § 39; PA. CONST. OF 1776 § 28 (1776); VT. CONST. OF 1777 ch. II, § 35.

⁶¹ Northwest Ordinance §14, art. 2 (1788), *in* 1 Stat. 51–52 (1789).

⁶² *United States v. Salerno*, 481 U.S. 739 (1984) (upholding considerations of public safety in setting bail under the Bail Reform Act of 1984), citing *Schall v. Martin*, 467 U.S. 253 (1984) (upholding preventative detention of juveniles pending trial).

⁶³ *E.g.*, *Darnell’s Case*, (1627) 3 How. St. Tr. 1 (accepting the Privy Council’s command as a sufficient return on a writ of habeas corpus); *Moyer v. Peabody*, 212 U.S. 78 (1909) (states may imprison U.S. citizens without probable cause during an insurrection, and the governor’s finding that an insurrection exists is conclusive); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding military curfew order for persons of Japanese ancestry); *Yasui v. United*

they have not even been inclined to, at times. Insofar as the right to release does not permit executive and judicial officials a discretion that they could abuse, it also forbids them a discretion that might be necessary.

This is not a nuanced view of habeas corpus, but it does seem to have been a widespread one. As it stands, it is fatuous legalism—most state constitutions made no provision for the suspension of habeas corpus, and some explicitly forbade any extralegal executive prerogative⁶⁴—but it can be refined in one of two ways. One is to grant the executive the discretion to classify some people as being held under the laws of war and to permit to the judiciary a discretionary power to review the propriety of that classification. The jejune view of habeas corpus was informed by hostility toward magisterial discretion, however, whether exercised by the executive or the judiciary, and saying that the solution is to give *both* of them *more* discretion than these clauses allow is certainly a hard sell. The other refinement does not involve altering what one thinks habeas corpus guarantees, but instead permits that habeas corpus might be suspended.

We can see just this kind of movement in the evolving opinions of Thomas Jefferson. He wanted the power of habeas corpus to be “eternal and unremitting.”⁶⁵ In a letter to James Madison, he asked,

Why suspend habeas corpus in insurrection and rebellions? The parties who may be arrested may be charged instantly with a well defined crime; of course the judge will remand them. If the public safety requires that the government should have a man imprisoned on less probable testimony in these than in other emergencies, let him be taken and tried, retaken and retried, while the necessity continues, only giving him redress against the government for damages.⁶⁶

Here, the right of habeas corpus is a right to be charged with a crime and tried quickly or released, not discretionary judicial oversight. One marvels at the grotesque abuse of process and disregard of jury verdicts Jefferson thought preferable to infringing upon this right. (His remarks also reveal that his conception of habeas corpus was not informed by a reading of the Habeas Corpus Act, which forbids precisely the re-arrest of those set free upon a writ of habeas corpus.⁶⁷)

States, 320 U.S. 115 (1943) (companion case to *Hirabayashi*); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding military orders forbidding persons of Japanese ancestry to leave a military zone or to remain within it without reporting to an internment camp). More generally, the “courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs;” *Dept. of Navy v. Egan*, 484 U.S. 518, 530 (1988), citing *Orloff v. Willoughby*, 345 U.S. 83 (1953) (persons liable to induction because they possess particular skills are not entitled to release from service if assigned duties unrelated to those skills); *Burns v. Wilson*, 346 U.S. 137 (1953) (the scope of review of the judgments of courts martial is less than the scope of review of those of civilian courts); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (refusing to enjoin the employment of the National Guard in certain cases); *Schlesinger v. Councilman*, 420 U.S. 738 (1975) (charges tried by court martial need not be connected to military service); *Chappell v. Wallace*, 462 U.S. 296 (1983) (enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations).

⁶⁴ See MD. DECLARATION OF RIGHTS OF 1776 § 7; N.C. DECLARATION OF RIGHTS OF 1776 § 5; VT. CONST. OF 1786 ch. 1, § 17; VIR. BILL OF RIGHTS OF 1776 § 7.

⁶⁵ Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 12 PAPERS OF THOMAS JEFFERSON 440 (Barbara Oberg ed. 1955).

⁶⁶ Letter from Thomas Jefferson to James Madison (Jul. 31, 1788), in 13 PAPERS OF THOMAS JEFFERSON 442 (Barbara Oberg ed. 1955).

⁶⁷ See Habeas Corpus Act, 1679, 31 Car. 2, c. 2, §6 (Eng.).

The following year, he relented: the rules of habeas corpus as he understood them might have to be suspended. So he took to writing more rules to govern that suspension (though he did recognize his lack of practical experience in such matters, or at least that he had not yet given it sufficient thought, and left the key numbers blank):

The following [alteration to the Bill of Rights] would have pleased me: [...] No person shall be held in confinement more than ___ days after he shall have demanded and been refused a writ of habeas corpus by the judge appointed by law, nor more than ___ days after such a writ shall have been served on the person holding him in confinement, and no order given on due examination for his remandment or discharge, nor more than ___ hours in any place of greater distance than ___ miles from the usual residence of some judge authorized to issue the writ of habeas corpus; nor shall the writ be suspended for any term exceeding one year, nor in any place more than ___ miles distant from the station or encampment of enemies or insurgents.⁶⁸

While he does not here define the conditions under which one ought to be eligible for release upon a habeas corpus, we do see that those conditions would prevent detaining enemies captured in war.

Again, for Thomas Jefferson and many other Founders like him, habeas corpus was an inflexible and clear right to be released from imprisonment, subject to all the inconveniences that attend clear and inflexible rules. They nonetheless insisted upon these rules. They thought it preferable to have rigid rules that must be violated than to permit government discretion. This strategy for addressing the problem of emergency powers is sometimes referred to as *extralegalism*.⁶⁹

B. Habeas Corpus as Guarantee of Due Process

We cannot ignore what habeas corpus meant in the popular mind, since the Constitution was ratified by the people rather than being the work of lawyers. Still, we can imagine reasons why James Wilson and those who conceived of habeas corpus as he did would be wrong in their judgment that access to the writ as known to the common law would never need to be blocked. At any rate, it is clear that not every Founder hewed to the substantive vision of habeas corpus discussed in the previous section.

James Madison, in his report on the Virginia Resolution condemning the Alien and Sedition Acts, noted that access to habeas corpus must be had in the administration of preventative (as opposed to penal) justice,⁷⁰ meaning that the right of the writ in his mind did not mean that a person could not be held except pending trial for a crime already committed. His response to Thomas Jefferson's objection to the Suspension Clause was not to remove the suspending power altogether. Rather, he would allay Jefferson's concerns by removing most (but not all) pretexts for suspending habeas corpus, permitting that crimes be tried in a different county, but still in the same state, if an invasion or rebellion was

⁶⁸ Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), in 5 WORKS OF THOMAS JEFFERSON 487, 493 (Paul Ford ed. 1904).

⁶⁹ See GROSS AND NÍ AOLÁIN, *supra* note 58; Corbett, *supra* note 58.

⁷⁰ JAMES MADISON, REPORT ON THE VIRGINIA RESOLUTIONS, VIR. H.D. (1800), in 4 ELLIOT'S DEBATES, *supra* note 37, 546, 555.

closing the courts.⁷¹ This leaves the only grounds for suspending habeas corpus as the coercion of an entire state, which Madison would not have disallowed.

The *Federal Farmer* mentioned habeas corpus in a list of largely procedural rights. Congress, he wrote, was forbidden to pass *ex post facto* laws, to interfere with trial by jury, or to suspend the writ of habeas corpus except in extreme emergency. What exactly the *Federal Farmer* meant by habeas corpus is not clear from the passage that follows. The letter suggests that these procedural rights be positively protected rather than their violation prohibited, and proceeds to suggest how these procedural rights would be stated affirmatively.⁷² Not every aspect of this positive articulation would be a part of habeas corpus, however. Still, it is clear that habeas corpus was a matter of the procedures by which government was to act rather than something that restricted when one may be held in the *Federal Farmer's* mind.

William Greyson apparently considered habeas corpus to be a synonym for every procedural right enjoyed under English law, and even the entire constitutional order. He declared at the Virginia ratifying convention that suspending the writ was tantamount to appointing a Roman dictator and authorizing hangings without trial.⁷³

As noted, James Wilson thought that habeas corpus would never have to be suspended because, when the public safety required it, the judge could simply remand prisoners into custody.⁷⁴ This can be true only if the operation of habeas corpus did not carry with it a substantive right to be released unless charged with a crime or tried within the next term of the court.

A similar view of a judge's discretion informed Pres. George Washington's order to the general he left to suppress the Whiskey Rebellion. Drafted by Alexander Hamilton, the order read in part, "You are aware that the judge cannot be controlled in his functions; but I count on his disposition to cooperate in such a general plan as shall appear to you consistent with the policy of the case."⁷⁵

Habeas corpus was not simply separate from a right of personal liberty in an abstract sense for Madison, Wilson, Washington, and Hamilton, a procedure for enforcing strict rules but technically distinct from those rules. Rather, judges had a hand in weighing public safety against what would now be called the individual's liberty interest and the legal discretion necessary to be flexible in doing so.

1. *Due Process and Liberty*

We might ask, then, why a guarantee of procedural due process would be a writ of liberty. Petty or incompetent magistrates might of course arrest individuals without cause, but as needless arrest is inefficient and unduly antagonizes a population, one might imagine that superior officers within the executive could intervene. Habeas corpus, as a procedural matter, is not simply the hope that an arrest made by a local deputy might be reviewed by a sheriff. If this were enough, we would not need to fear military justice: a lieutenant's decision might be reviewed by a major.

⁷¹ See Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in WRITINGS 418, 422–23 (Jack Rakove ed. 1999); proposed amendment to U.S. Const. art. III, §2, cl. 3, in WRITINGS, *supra*, at 443–444.

⁷² FEDERAL FARMER NO. 16, *supra* note 53, at 8.199.

⁷³ 3 ELLIOT'S DEBATES, *supra* note 37, at 569. Greyson was clearly thinking of the dictatorships of Caesar and especially Sulla, rather than the actual practice of the dictatorship for most of Rome's history. Cf. Marianne Hartfield, *The Roman Dictatorship: Its Character and Its Evolution* (Nov. 3, 1982) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with University Microfilms International).

⁷⁴ Wilson, *supra* note 46, at 157.

⁷⁵ 1 AMERICAN STATE PAPERS: MISCELLANEOUS 113 (1834).

Rather, it is the institutional separation of the judiciary from the detaining authority that would make this procedural writ a bulwark of personal liberty. It is not that the judiciary rules in the case according to law: administrators are capable of learning and applying law. Nor is it, we hope, that the judiciary has a different set of goals from the executive or military. Or, at least, there is no reason to expect that judicial officials would somehow be more immune to whatever forces civil libertarians conjure as reasons why the executive branch and the military cannot be trusted. Rather, the whole contribution that the judiciary makes, on this view, stems from the fact that it is an institutionally separate review of detention. Daniel Meador splits habeas corpus entirely from the right of personal liberty, yet notes nonetheless that “there is protection in the very fact of being able, through the writ, to have a court take a look at the confinement.”⁷⁶ The judiciary is a concurrent authority, and habeas corpus merely means that the executive cannot act in particular cases without its decisions being reviewed and countermanded by an external, jealous, and even ambitious body.

Of the thirty some Catholics who requested release upon writs of habeas corpus following their arrests in association with the fictitious Popish Plot, for example, thirteen were released or bailed.⁷⁷ This occurred after the passage of the Habeas Corpus Act. There was a split in the disposition of their cases that cannot be accounted for by the application of a bright-line rule. The judges were clearly weighing the evidence against them, considering the danger each might pose, etc. The magistrates who arrested them had presumably done the same. The judges mirrored the discretion exercised by the arresting officers.

The existence of this kind of review does some of the liberty-preserving work accomplished by clear rules discussed in the previous section. Consequently, there is less of a need to bind either the reviewing or the detaining authority with clear rules about who is entitled to release, and so less of a justification for suspending habeas corpus because of the unsuitability of those rules to present circumstances. This reliance upon concurrent authority is a different strategy for addressing the problem of emergency powers from that discussed in section III.A., implying different things about the essence of law and the proper separation of powers.⁷⁸

Of course, having one’s case reviewed is no protection when the judges concur with or are afraid of one’s persecutors. If a jailer refused to bring a prisoner before the court prior to the Habeas Corpus Act, the court could then issue another writ, and if that one were ignored, the court would have to issue a third writ, and only if that one were ignored would it issue a writ of attachment against the jailer. William Blackstone lists this waltz of initial writ, *alias*, and *pluries* as one of the means by which the courts *colluded* with the executive to detain state prisoners.⁷⁹

Even after the Habeas Corpus Act, the Earl of Danby had his petition for a writ of habeas corpus denied, despite having been accused of no crime or any particular act of treason, despite having the King’s pardon for anything he might have done, and despite having already languished in his cell for more than forty months. The reason was that he was being held by order of the House of Commons.⁸⁰ During the American Revolution, Congress asked Pennsylvania to arrest some twenty Quakers and Anglicans based upon an already discredited forgery linking them with disloyal activities; they were

⁷⁶ MEADOR, *supra* note 4, at 44. Meador goes on to note that this protection counts for little if the law permits one to be detained, or if the judges are inclined to keep one confined.

⁷⁷ HALLIDAY, *supra* note 3, at 238.

⁷⁸ See Corbett, *supra* note 58.

⁷⁹ 3 WILLIAM BLACKSTONE, COMMENTARIES *135.

⁸⁰ DUKER, *supra* note 17, at 59.

released only because they were held by executive authority rather than court order.⁸¹ As Daniel Meador has noted, “the writ of habeas corpus is no greater protector of liberty than the judges’ view as to what constitutes lawful custody.”⁸²

Judges possessing discretion might misuse that discretion. The reason why habeas corpus is not a perfect protector of individual liberty is also why it might have to be suspended.

2. *Suspending Due Process*

In questioning why the Founders thought that habeas corpus might have to be suspended, it is worth entertaining the thesis, argued forcefully by Duker,⁸³ that the Suspension Clause originally referred only to Congress’s ability to prevent state courts from issuing writs of habeas corpus regarding federal prisoners. While not the interpretation shared by all of the Founders, it does raise the question of why this prohibition might need to be ignored in case of rebellion. If the question is not whether an individual may be detained but whether a state court is entitled to question the federal government’s detention of an individual, why might rebellion require taking this issue away from the state courts? One obvious answer would be state complicity in the rebellion, which would at least explain why the Federalists Duker relies upon did not make plain their reasons for permitting congressional interference with state habeas proceedings. The Suspension Clause in their mind relates to the possibility of civil war, or at least a war of twelve states against one.

Chief Justice Roger Taney’s ruling in *Ex parte Merryman* suggested that John Merryman was entitled to his liberty, since the reasons given for his detention did not suffice for specific acts of treason.⁸⁴ It is unclear whether Taney meant that attacking Union supply lines and openly recruiting for the Confederacy did not amount to treason, or that there was a deficiency in the manner in which a military officer not trained in the law accused him of these things which Taney would refuse to overlook while the Capital was surrounded by hostile forces—neither reading of *Ex parte Merryman* does Taney credit. The effect his ruling would have had if heeded, however, together with his selective quotation from the Declaration of Independence to suggest that the South was reacting to Lincoln the way the Founders had reacted to George III, suggests that the author of *Dred Scott* was not merely taking a stand against the presidential suspension of habeas corpus, but setting himself up to declare that the federal government lacked, as Pres. James Buchanan had said it lacked,⁸⁵ the authority to prevent the Southern states from seceding. This possibility would explain why Merryman’s actions did not constitute treason, in Taney’s view. The general in command of Fort McHenry, where Merryman was being held, had initially sent a subordinate to apologize to Taney for not answering the writ of habeas corpus, to outline the charges against Merryman, and to ask for time to consult with Pres. Lincoln about how to proceed. Taney instead immediately issued a writ of attachment requiring a federal marshal to bring the general himself before the court for punishment. The record of *Ex parte Merryman* shows Taney reminding the federal marshal, after he had been denied entry to Fort McHenry to arrest its commanding officer, that the marshal had the authority to call up the posse comitatus to storm the fort and that only the

⁸¹ McKean, *supra* note 50.

⁸² MEADOR, *supra* note 4, at 18.

⁸³ DUKER, *supra* note 17.

⁸⁴ *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861).

⁸⁵ James Buchanan, *Fourth Annual Message to Congress*, in 11 WORKS OF JAMES BUCHANAN 7, 18–19 (John Moore ed. 1910).

likelihood of the marshal's defeat had dissuaded Taney from punishing him for having failed to storm the fort.⁸⁶ Taney presented himself as merciful in not punishing the marshal for failing to call upon secessionist rioters to assault union troops.

The writs of habeas corpus issued by Judge William Merrick of the Circuit Court for the District of Columbia around the same time had an obvious intention to harass local military authorities. Merrick attempted to release soldiers who wanted to leave the army or whose parents opposed their enlistment and in this way prevent the army from enforcing discipline in the face of a numerically superior enemy. He had reportedly rejoiced in the prospect of Washington's capture by Confederate forces and refused to issue the oath of office to several of Lincoln's appointees. Confederate sympathizers were seen frequenting his house and, in order to discourage them, a guard was posted.⁸⁷ Merrick took this opportunity to grandstand and feigned house arrest to goad his fellow judges on the Circuit Court into attacking the military's supremacy over the judiciary.⁸⁸ Congress abolished his court.⁸⁹ Supporters of the bill denied that they were attempting to remove judges from the bench without an impeachment trial. They were simply making the courts more efficient, they said, even though there had been no requests from the courts, clerks, or attorneys for such a reorganization, as the bill's opponents pointed out repeatedly.⁹⁰ One Senator in favor of the reorganization did remark, however, "I have not the greatest faith in the present judges. [...] As to one of [them], I mean Judge Merrick, I believe his heart is sweltering with treason."⁹¹

Those who argued that there would never be a need for *Congress* to suspend habeas corpus because it was within the power of the states to do so were mistaken. The Suspension Clause would be part of the coercive power of the federal government over the states. This is why it was suspended in South Carolina: the local courts could not be counted on to return indictments and convictions concerning members of the Ku Klux Klan, at the very least because of intimidation, and often to due sympathy.⁹² More generally, there might be cause to suspect a judge of collaborating with the enemy without there being time to remove them from office, the overwhelming evidence necessary to sustain an attempt to remove them from office, or a Congress itself free enough from obstructionist collaborators to remove them from office. Nor can Congress remove state judges at all.

3. *A Federal Writ of Habeas Corpus*

Habeas corpus may have denoted a procedure by which other rights were enforced in some Founder's minds, but within this procedural understanding of habeas corpus there was yet a further disagreement. The Suspension Clause might establish a right to a writ of habeas corpus issued by a federal court and thus an obligation on Congress's part to empower one or more of the federal courts to issue the writ. Alternatively, the Suspension Clause might not contemplate the existence of any habeas corpus relief at the level of the federal judiciary at all. The state courts would still be the primary

⁸⁶ *Ex parte Merryman*, 17 F. Cas. at 146–47.

⁸⁷ Jonathan White, *Sweltering with Treason*, 39 PROLOGUE MAGAZINE 2-27 (Summer 2007), <http://www.archives.gov/publications/prologue/2007/summer/merrick.html>.

⁸⁸ *Id. Cf. United States ex rel. Murphy v. Porter*, 27 F. Cas. 599 (C.C.D.C., 1861).

⁸⁹ District of Columbia Courts Reorganization Act of 1863, ch. 91, 12 Stat. 762.

⁹⁰ CONG. GLOBE, 37th Cong., 3rd Sess. 1049–52, 1128–40, 1480–83, 1538–39 (1863).

⁹¹ *Id.* at 1139.

⁹² This was done by the Ku Klux Klan Act of 1871, ch. 22, § 4, 17 Stat. 13, 15.

guarantors of individual liberty and the Constitution would prohibit Congress from preventing them from reviewing imprisonment by federal authority except in cases of rebellion or invasion. Since the states themselves could regulate their own courts if the substantive rights associated with habeas corpus needed to be abrogated for a time, the sole purpose of the Suspension Clause as it relates to the federal government on this view would be to coerce the states.

William Duker argues that this view simply was the original meaning of the Suspension Clause. Specifically, he maintains that the Suspension Clause referred to federal interference in state habeas corpus proceedings rather than establishing any individual right to habeas corpus at the federal level, and that it was not until *Ex parte Bollman* that the current understanding of the Clause achieved any kind of official recognition.⁹³

Duker's argument is as follows. The Constitution created the Supreme Court and permitted, but did not require, Congress to create inferior courts. The Supreme Court's original jurisdiction was limited, and indeed covered cases where habeas corpus would not normally be available. Inferior courts might have original jurisdiction in these cases, but insofar as the Supreme Court could review their decisions, this would give it the ability to issue writs of habeas corpus only where detention had been by order of these federal courts. Thus, there was no court whose existence was constitutionally mandated that could issue writs of habeas corpus for prisoners held by the *executive's* authority. The meaning of the Suspension Clause must be determined in light of this. If habeas corpus was to have a necessary existence, it must have had that existence in the states. The Suspension Clause must therefore be read as saying that *state* courts can issue writs for prisoners held in *federal* custody and that Congress could not suspend state habeas proceedings except when the public safety required it.⁹⁴

Duker is supported by some Founding-era authorities. The Virginia ratifying convention proposed an amendment to the Constitution guaranteeing that every freeman should have the right to challenge the lawfulness of his imprisonment. Duker points to this as evidence that the convention did not take the Constitution to have created a right to habeas corpus.⁹⁵ Charles Pinckney was indifferent to the question of whether the clause regarding habeas corpus was phrased in the affirmative ("shall be enjoyed") or in the negative ("should not be suspended"), because the delegates to the Constitutional Convention were not debating how to establish habeas at the federal level, Duker argues, but were rather referring to a right already established at the state level. John Rutledge thought the Suspension Clause unnecessary, as the states could suspend habeas corpus individually but there would never be a need to suspend it everywhere at once, a sentiment that is comprehensible only if he were considering only state habeas relief.⁹⁶

Duker further argues that the first statement that the Suspension Clause established an individual right to federal habeas corpus relief did not occur until 1807 in *Ex parte Bollman*, and that *Bollman* was a politically motivated decision intended by Chief Justice Marshall to embarrass the Jefferson administration.⁹⁷ He points to the difficulty of reconciling *Bollman* with *Ex parte Kearney*,⁹⁸ an opinion delivered by Joseph Story but while John Marshall was still Chief Justice: *Bollman* and *Swartwout*, like *Kearney*, were imprisoned by court order rather than executive discretion, and habeas

⁹³ DUKER, *supra* note 17.

⁹⁴ DUKER, *supra* note 17, at 126–80; *see also* MEADOR, *supra* note 4, at 33.

⁹⁵ DUKER, *supra* note 17, at 134.

⁹⁶ *Id.* 127–31.

⁹⁷ DUKER, *supra* note 17, at 135–41.

⁹⁸ *Ex parte Kearney*, 20 U.S. (7 Wheat.) 38 (1822).

corpus proceedings are supposed to afford greater deference to court-ordered detentions. This rule was followed in *Kearney*, who was not released, but not in *Bollman*.⁹⁹

Duker's evidence for Marshall's unprincipled partisanship is not conclusive. *Kearney* was jailed for contempt, and Story is explicit in his ruling that a finding of contempt amounts to a conviction.¹⁰⁰ Consequently, the Court would have had to issue a habeas corpus in his case as part of an appellate procedure, which it cannot do absent congressional authorization. *Bollman* and *Swartwout*, on the other hand, had not yet been convicted of treason, and Marshall was not satisfied that the actions with which they had been charged amounted to treason.¹⁰¹ The Court, moreover, did have the authority to issue writs of habeas corpus for prisoners "committed for trial before some court of the [United States]."¹⁰²

Duker's reasoning for why his is the necessary reading of the Suspension Clause is also too strong. His argument that the Supreme Court would not have original jurisdiction over any case in which there might be a need for a writ of habeas corpus relies on taking the Constitution's enumeration of the Court's original jurisdiction to be exhaustive, the ceiling rather than the floor. Marshall did say as much¹⁰³ and his interpretation remains the law, but it was not obvious at the time he delivered his opinion, and his logic still seems somewhat tortured.¹⁰⁴

Regardless of whether Duker's interpretation of the Suspension Clause is the only plausible one, however, he does provide textual evidence that suggests that some Founders did read it as he does, and he attempts to show that his interpretation was the consensus prior to *Bollman*. Duker's strongest piece of evidence in this regard is John Rutledge's statement at the Constitutional Convention, and there is no reason to presume that his was an isolated view. Much of Duker's evidence that his view enjoyed broad support, however, is ambiguous.

Virginia was not alone in requesting an amendment to provide a remedy for unlawful imprisonment. North Carolina and Rhode Island, when they eventually joined the Union, asked for the same amendment, and all three states further requested that Magna Carta's guarantee that no man would be imprisoned except by the judgment of his peers or by the law of the land be written into the Constitution. Their requests were identical even down to the section numbers in the messages sent to Congress.¹⁰⁵ This might imply that the ratifiers did not feel that there was a right to habeas relief under the Constitution as adopted. Yet this is not the only way to take the objection, which is to say, it does not unambiguously support Duker's thesis against the alternative. More often, the question was why the Suspension Clause was phrased as a limit on a power not expressly granted to Congress, as though Congress possessed powers beyond those enumerated. Patrick Henry, for example, spoke against the clause at the Virginia ratifying convention because of the theory of constitutional interpretation it supported.¹⁰⁶ The *Federal Farmer* made the same point.¹⁰⁷ These states may have desired that the

⁹⁹ DUKER, *supra* note 17, at 227–29.

¹⁰⁰ *Ex parte Kearney*, 20 U.S. (7 Wheat.) at 42–43.

¹⁰¹ *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 126–35 (1807).

¹⁰² Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82.

¹⁰³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173–75 (1803).

¹⁰⁴ *Cf.* LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 208–09 n.5 (3rd ed. 2005) (remarking that Marshall's reasoning rested upon "a transparently false assertion").

¹⁰⁵ North Carolina Proposed Declaration of Rights § 9–10 (1789), in 4 ELLIOT'S DEBATES, *supra* note 37, at 243, 243; Ratification of the Constitution by Rhode Island §§ 9–10 (1790), 1 ELLIOT'S DEBATES, *supra* note 37, at 334, 334; Virginia Proposed Declaration of Rights §§ 9–10 (1788), in 3 ELLIOT'S DEBATES, *supra* note 37, at 657, 658.

¹⁰⁶ 3 ELLIOT'S DEBATES, *supra* note 37, at 461.

¹⁰⁷ FEDERAL FARMER NO. 16, *supra* note 53, at 8.202.

federal right to habeas corpus that already existed be affirmatively protected in order to avoid the necessity of implied rights and powers.

Duker notes opposition to granting Congress the authority to suspend habeas corpus at all. Three states at the convention voted to approve the language, “the privilege of the writ of Habeas Corpus shall not be suspended,” but not the subsequent clause permitting its suspension during rebellion or invasion.¹⁰⁸ Luther Martin declared that the Suspension Clause would enable Congress to round up everyone who might excite opposition to congressional usurpation.¹⁰⁹

Yet this is evidence only for the worry that Congress might be able to suspend state habeas, not that there would be no federal habeas. It is compatible with the view that any suspension would affect both state and federal habeas, or that in the absence of suspension there would be federal habeas. It is not evidence *for* a federal right of habeas corpus, but the fact that it is compatible with both hypotheses means that it cannot be advanced in support of one over the other.

Indeed, if the Suspension Clause were about coercing the states, as it must have been if Duker is correct, surely it would have figured more prominently in the Antifederalists’ doom-saying about the effect of a standing army and the power of “calling forth the Militia to execute the Laws of the Union.”¹¹⁰ Luther Martin was of course concerned over habeas corpus’s being suspended in order to coerce the states, but this was not the primary complaint voiced by the opponents of the Constitution. Instead, “*John De Witt*” sounds the alarm that a puny insurrection in Georgia will be used to justify the suspension of habeas corpus in Massachusetts.¹¹¹ The delegates to the Pennsylvania convention who failed in their efforts to defeat ratification complained that the clause was in the negative rather than affirming positively the existence of the habeas corpus right.¹¹²

Duker argues that Alexander Hamilton’s remarks in *Federalist* Nos. 83 and 84 do not give the impression of a federal habeas guarantee, saying that Hamilton’s reference to a “habeas corpus act” more likely signifies recent New York legislation, not the famous act of 1679. This argument requires that Hamilton have been incredibly duplicitous in his choice of words. In *Federalist* No. 83, Hamilton claims that the “great engines of judicial despotism” have been provided against “in the most ample manner in the plan of the convention” through “trial by jury in criminal cases, aided by the *habeas corpus* act.”¹¹³ The guarantee of trial by jury in criminal cases that is here paired with habeas corpus applies to the federal government. In the next paper, when Hamilton speaks of “the *habeas corpus* act” without qualification, it is clear that he means the Act of 1679.¹¹⁴ For Hamilton to say that the Constitution *does* contain a bill of rights of a sort because it establishes habeas corpus but to have meant, as Duker would have it, that habeas corpus is “established” by a New York law just recently enacted, would be audaciously misleading.

¹⁰⁸ 2 RECORDS OF THE FEDERAL CONVENTION 438 (Max Farrand ed. 1911).

¹⁰⁹ LUTHER MARTIN, GENUINE INFORMATION, *in* 3 RECORDS OF THE FEDERAL CONVENTION 172, 213 (Max Farrand ed. 1911).

¹¹⁰ U.S. CONST. art. I, § 8, cl. 15.

¹¹¹ “JOHN DE WITT” NO. 2, *in* ANTIFEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 194, 197–98 (Ralph Ketcham ed. 1986).

¹¹² ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF PENNSYLVANIA TO THEIR CONSTITUENTS, *in* 3 COMPLETE ANTIFEDERALIST 11.1, 11.32 (Herbert Storing ed. 1981).

¹¹³ THE FEDERALIST NO. 83, at 467 (Alexander Hamilton) (Clinton Rossiter ed. 1999).

¹¹⁴ See THE FEDERALIST NO. 84, at 480 (Alexander Hamilton) (Clinton Rossiter ed. 1999).

Duker similarly surmises that James Wilson’s statement to the Pennsylvania ratifying convention that “the right of *habeas corpus* was secured by a particular declaration in its favor,”¹¹⁵ so far from actually vouching for a constitutional right to federal habeas, in fact “could very well have been made with studied ambiguity.”¹¹⁶ Yet this would be even more damaging to Duker’s case if it were true: it would imply that some among the ratifiers thought that there was a positive right to habeas corpus declared in the Constitution and that Wilson, like Hamilton, took pains to avoid disabusing them of this opinion. That is, it would be evidence for the existence of the view among those who ratified the Constitution that the Suspension Clause guaranteed an individual right to federal habeas corpus protection.

At the Virginia ratifying convention, Edmund Randolph said that habeas corpus would be *more* secure in America than in England, since its guarantee would be constitutional rather than legislative.¹¹⁷ This could not be true if the Suspension Clause referred solely to state habeas corpus, since the Suspension Clause does not function as a restriction upon the states.¹¹⁸ Article I, sec. 9, which contains the Suspension Clause, covers limitations on the federal legislative power. Limitations upon the states are stated in sec. 10, and where an act is to be forbidden to both, e.g., bills of attainder or *ex post facto* laws, it is repeated in both sections. Randolph later affirmed that, but for the Suspension Clause, Congress’s power to regulate the courts would have enabled it to do away with habeas corpus altogether.¹¹⁹ As Congress may regulate only the federal courts, he must have meant a federal writ of habeas corpus. The *Federal Farmer*, in arguing against the Constitution, conceded that Congress’s ability to regulate the federal courts was subject to the limitation “that the benefits of the habeas corpus act shall be enjoyed by individuals.”¹²⁰

Duker’s other evidence stands, however. There seems no avoiding the conclusion, therefore, that the existence of federal habeas was the object of an unexplored and unresolved disagreement at the ratification of the Constitution. Some Founders thought that only state courts would issue the writ (on behalf of those held in federal custody, if need be) and that Congress might suspend state habeas only in certain cases. Others thought that the Constitution established a positive right to habeas corpus in the federal courts. This means that some thought that the Suspension Clause was simply about removing the concurrent authority of the courts, other did not.

CONCLUSION

The Suspension Clause suggests that habeas corpus might have to be suspended during certain emergencies. Looking to the Founders to reveal why they thought this might be the case, it becomes clear that there was not agreement over why it might have to be suspended. Some saw habeas corpus

¹¹⁵ 2 ELLIOT’S DEBATES, *supra* note 37, at 456.

¹¹⁶ DUKER, *supra* note 17, at 133.

¹¹⁷ 3 ELLIOT’S DEBATES, *supra* note 37, at 203.

¹¹⁸ DUKER, *supra* note 17, at 155. *Cf.* Luther v. Borden, 48 U.S. 1, 216 (1849) (Rhode Island was competent to declare martial law during the Dorr Rebellion); Moyer v. Peabody, 212 U.S. 78 (1909) (a state governor’s authority to suppress insurrection includes the detention of prisoners without habeas corpus).

¹¹⁹ 3 ELLIOT’S DEBATES, *supra* note 37, at 464.

¹²⁰ FEDERAL FARMER NO. 16, *supra* note 53, at 8.201.

as a rigid rule to be released, others emphasized its status as an independent review. The Suspension Clause is sensible only as an amalgam of these two views.

When we ask whether a particular action suspends habeas corpus, or does impermissible damage to it, our answer depends upon a specific vision of what habeas corpus provides. In order to interpret the Suspension Clause, we must ask what habeas corpus means, specifically, how habeas corpus is “the great palladium of liberty.”¹²¹ This is an inquiry into the spirit or reason of habeas corpus, what Blackstone called “the most universal and effectual way of discovering the true meaning of a law” (at least “when the words are dubious”).¹²²

One vision sees habeas corpus as a means of securing due process of law without specifying what one is legally due. It is captured by A.V. Dicey’s remark that the “Habeas Corpus Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty.”¹²³ Habeas corpus is the means by which the courts assert their concurrent authority with the executive regarding detention. This is not a sufficient guarantee of individual liberty, however, for the simple reason that this review is conducted by a court that must decide by laws that it does not make: it cannot defend the individual against the source of law. There is also no guarantee that judges less likely to abuse what discretion they do have than executive personnel.

There is another view of habeas corpus that focuses on the reasons for which a person may be detained. Habeas corpus does not protect against *unlawful* imprisonment so much as *political* or otherwise odious imprisonment. Insofar as habeas corpus is related to the right of personal liberty, what one cares about is the proceedings upon the writ and that they be determined according to a clear criminal code, a right to a speedy trial, and a prohibition on excessive bail. This view outstripped the protections the Habeas Corpus Act, the Star Chamber Act, the Bill of Rights, and the Petition of Right actually afforded and, moreover, was acknowledged to be too solicitous of the individual’s liberty in times of danger. This view preferred a narrow law that would occasionally have to be set aside.

Each vision, then, reflects a more general strategy for how to address crises without enabling the government to become the engine for one faction’s despoiling the others. These two strategies imply contradictory visions of law and the separation of powers.¹²⁴ As a result, we cannot say that the *spirit* of the Suspension Clause is an amalgam of both in the way that the clause itself seems to be an amalgam of both. The strategies pull us in opposite directions when we look to the “spirit” of the law. The Suspension Clause cannot protect both a rigid substantive right to release and a discretionary review by judges, and it did not to the Founders. We must choose to favor one or the other, at least when the law applicable to a particular case is in dispute.

It is clear from the history that what we consider habeas corpus is the result of interlocking but separable pieces, including the common law writ proper, the Star Chamber Act’s and Petition of Right’s demand that the causes of arrest be shown, the requirement for a speedy trial, the guarantee against excessive bail, the prohibition of summary justice, and a clear list of felonies, infractions, and misdemeanors that are more specific than *lèse majesté* or treason. It is also clear that there was no

¹²¹ Quoted from Wilson, *supra* note 48, at 901.

¹²² 1 WILLIAM BLACKSTONE, COMMENTARIES *61.

¹²³ DICEY, *supra* note 6, at 118.

¹²⁴ Corbett, *supra* note 58.

single vision at the time of the Founding that would tell us which pieces may be altered without “suspending” habeas corpus.

It would be unfair to say that the Founders had no clear idea of habeas corpus, that they protected something with strong emotional connotations but little denotative force, a political rallying cry but nothing more. After all, if they had simply declared themselves against unjust imprisonment, they would not have imagined that there might be legitimate grounds to suspend habeas corpus. Rather, it is difficult for us to say what the Suspension Clause guarantees because there were multiple yet nonetheless specific views of what it meant. And while there was open debate over the true principles of republican government, for example, this debate occurred because in the course of ratifying the Constitution it was realized that people used “republicanism” to mean different things.¹²⁵ It might be too flippant to say that the Constitution was put to a vote and that the Antifederalist view of republicanism lost, but we can at least point to that debate and that vote. Regarding habeas corpus, on the other hand, the debate was over whether it was sufficiently protected. That there was disagreement over what it meant did not come up.

¹²⁵ Compare BRUTUS NO. 1 (1787), in 2 COMPLETE ANTIFEDERALIST 9.1, 9.10–16 (Herbert Storing ed. 1981), with THE FEDERALIST NOS. 10, 39 (James Madison), on the true principles of republicanism; compare also THE FEDERALIST NO. 10 (James Madison), with BRUTUS NO. 4 (1787), in 2 COMPLETE ANTIFEDERALIST 9.45, 9.45 (Herbert Storing ed. 1981), on the “great desideratum” in politics.