THE COUNTERFACTUAL THAT CAME TO PASS: WHAT IF THE FOUNDERS HAD NOT CONSTITUTIONALIZED THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS?

AMANDA L. TYLER*

INTRODUCTION

Unlike the other participants in this Symposium, my contribution explores a constitutional counterfactual that has actually come to pass. Or so I will argue it has. What if, this Essay asks, the Founding generation had *not* constitutionalized the privilege of the writ of habeas corpus?

As is explored below, in many respects, the legal framework within which we are detaining suspected terrorists in this country today—particularly suspected terrorists who are citizens[1]—suggests that our current legal regime stands no differently than the English legal framework from which it sprang some two-hundred-plus years ago. That framework, by contrast to our own, does not enshrine the privilege of the writ of habeas corpus as a right enjoyed by reason of a binding and supreme constitution. Instead, English law views the privilege as a right that exists at the pleasure of Parliament and is, accordingly, subject to legislative override. As is also shown below, a comparative inquiry into the existing state of detention law in this country and in the United Kingdom reveals a notable contrast—namely, notwithstanding their lack of a constitutionally-based right to the privilege, British citizens detained in the United Kingdom without formal charges on suspicion of terrorist activities enjoy the benefit of far more legal protections than their counterparts in this country.

The Essay proceeds as follows: Part I offers an overview of key aspects of the development of the privilege and the concept of suspension, both in England and the American Colonies, in the period leading up to ratification of the Suspension Clause as part of the United States Constitution. Part II offers an overview of the dominant understanding of how the privilege and its suspension functioned in the constitutional scheme through at least the Civil War and Reconstruction periods. Part III turns to discuss the modern view of the Suspension Clause as illustrated in recent cases arising out of the war on

---

* Associate Professor of Law, George Washington University Law School. This Essay builds on my remarks offered at the 2011 Indiana Law Review Symposium, "'What if?' Counterfactuals in Constitutional History." I thank my fellow Symposium participants, our host, Gerard Magliocca, and Aziz Huq for helpful discussion of my remarks and comments on earlier drafts. I also thank Sean Sherman for research assistance.

1. It is important to clarify at the outset that unless stated otherwise, the discussion herein is limited exclusively to citizens detained on domestic soil for suspected terrorist activity. Detentions involving non-citizens and extra-territorial suspensions potentially invite a number of complicating factors to the inquiry. For more discussion, see Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. (forthcoming 2012) [hereinafter Tyler, *Forgotten Core Meaning*].

terrorism.[2] Part IV then takes the reader back to England to survey the existing legal landscape for detention of suspected terrorists in that country.

I. THE UNDERSTANDING OF THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS AND ITS SUSPENSION IN ENGLISH LAW DURING THE PERIOD LEADING UP TO RATIFICATION

Article I, Section 9 provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[3] These words both enshrine a term of art from English law and provide for the limited circumstances in which the protections embodied within the privilege may be suspended—namely, "in Cases of Rebellion or Invasion."[4] Thus, there are two sides to the Suspension Clause. The Clause both contemplates a dramatic emergency power (by permitting suspension of the privilege in certain circumstances) and operates as a significant constraint on what government may do in the absence of a valid suspension (by implicitly recognizing the availability of the privilege at all other times).

As noted, in adopting the Suspension Clause, the Founding generation imported the privilege and the power to suspend it from English tradition.[5] It is no wonder, accordingly, that Chief Justice John Marshall once said of "this great writ": "The term is used in the constitution, *as one which was well understood*."[6] Determining the import of the Clause requires, in turn, ascertaining what English law understood the privilege to embody as well as how the privilege related to the concept of suspension.

In other work, I have gone back to the pre-Ratification period in England to do just this—namely, to unearth just what it was that English law during this period understood the privilege to protect and its suspension to accomplish.[7] That work concludes that in the two hundred years leading up to Ratification, the privilege had evolved to become the principal safeguard against preventive detention for criminal or national security purposes for persons who clearly fell within the protection of domestic English law[8]—including, most especially, the crown's subjects.[9] Over time, the privilege came to equate with not just a generic

---

2. Parts I-III of this Essay rely heavily on my prior work in this area. *See generally* Tyler, *Forgotten Core Meaning*, *supra* note 1; Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600 (2009) [hereinafter Tyler, *Emergency Power*].

3. U.S. CONST. art. I, § 9, cl. 2.

4. *Id.*

5. *See* Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 18-85).

6. *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 201 (1830) (emphasis added); *see also Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 94 (1807) (noting that "resort may unquestionably be had to the common law" to ascertain the import of the writ).

7. *See* Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 23-53).

8. This Essay will use the phrases "persons within protection" and "persons owing allegiance" to convey the same idea—namely, to reference persons subject to the law of treason.

9. Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 7-8).

right to due process derived from Magna Carta, but—in keeping with the evolution of the common law writ, the Petition of Right, the Habeas Corpus Act, the Declaration of Rights, and the Trial of Treasons Act[10]—the privilege came to embody a particular demand that persons within protection suspected of posing a danger to the state be charged criminally and tried in due course or discharged.[11]

Parsing English history during this period also reveals that the privilege of the writ of habeas corpus and the crime of treason forged a special link in the celebrated Habeas Corpus Act of 1679.[12] The Act granted those persons subject to the law of treason and arrested for criminal or national security purposes the right to invoke the privilege to secure discharge if not timely tried for treason or other felonies. Specifically, Section 7 of the Habeas Corpus Act commanded that where one "committed for high treason or felony" was not indicted and tried by the second succeeding court term (a period typically spanning three to six months), the prisoner "shall be discharged from his Imprisonment."[13] By this period, high treason had long been settled to comprise, among other things, "forming and displaying by an overt act an intention to kill the king"; "levying war against the king"; and "adhering to the king's enemies."[14]

As one of the leading contemporary scholars of English law instructed, English law also subscribed during this time to the position that "those who raise war against the king may be of two kinds, subjects or foreigners: the former are not properly enemies but rebels or traitors."[15] Thus, writing in the 1700s in his *History of the Pleas of the Crown*, Sir Matthew Hale observed that disloyal subjects of the Crown are to be differentiated from foreign enemies and, as such, treated as rebels or traitors.

Marrying this principle with the protections embodied in the Habeas Corpus Act resulted in a legal regime whereby the Crown could not treat English subjects like foreign enemies in times of war, but had to prosecute them within the ordinary criminal process.[16] By reason of the Habeas Corpus Act, that process encompassed a number of significant protections for those charged with high treason or a felony, including the right to a timely trial or discharge.[17] When, in the wake of the adoption of the Habeas Corpus Act in 1679, a series of

---

10. *Id.* (manuscript at 32).

11. *See id.*

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

13. *See id.* § 7. Later, Lord Holt would write in 1694 that "the design of the Act was to prevent a man's lying under accusation of treason, &c. above two terms." Crosby's Case, (1694) 88 Eng. Rep. 1167 (K.B.) 1169.

14. *See* Treason Act 1351, 25 Edw. III, St. 5, c. 2. The Edwardian statute established the law of high treason that remained largely in effect for five hundred years. *See* Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 29 n.161).

15. 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 159 (Sollom Emlyn ed., 1847).

16. *See generally* Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 30-32).

17. *See id.* (manuscript at 28-29).

wars triggered a longstanding period of instability, Parliament adopted the practice of suspending the Act's protections as a means of freeing the executive from having to comply with its stringent requirements.

In the immediate wake of the Glorious Revolution and while fighting to retain control of the throne, William asked Parliament in 1689 to suspend habeas corpus for the very first time.[18] During this period, the dethroned James and his supporters inside and outside the realm were not inclined to accept the newly-installed William as King.[19] Instead, they remained committed to returning the Stuarts to power. For his part, James had been received at the French Court and, "aided by foreign enemies and a powerful body of English adherents, was threatening . . . the crown with war and treason."[20] In the meantime, Ireland was already in revolt and Scotland was on the verge of the same.

In response to these many threats, William sought a suspension of Section 7 of the Habeas Corpus Act for the express purpose of bringing within the law arrests on *suspicion alone*—that is, without formal charges—of treasonous activity. As his emissary to Parliament explained things, the Crown wanted the power to confine persons "committed on suspicion of Treason only" and not formally charged with criminal activity, lest they be "deliver[ed]" by habeas corpus.[21] The same objective animated later suspensions enacted by Parliament in the decades that followed in order to empower the Crown to arrest on suspicion alone and hold preventively those persons suspected of Jacobite sympathies.[22] Throughout this period, English law came to embrace the position that it was *only* by a suspension of the privilege that detention without charges of persons within protection (i.e., subjects) for criminal or national security purposes could be made lawful—even during wartime.[23]

In keeping with this understanding, Parliament enacted a series of suspensions during the Revolutionary War to legalize the preventive detention of captured American soldiers on English soil during that War. As described by

---

18. *See* PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 247 (2010).

19. *See id.*

20. 2 THOMAS ERSKINE MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND: SINCE THE ACCESSION OF GEORGE THIRD, 1760-1860, at 253 (1864).

21. 9 Anchitel Grey, *Debates in 1689: March 1st-9th*, GREY'S DEBATES OF THE HOUSE OF COMMONS 128-48 (1769), *available at* http://www.british-history.ac.uk/report.aspx?compid=40490 (remarks of Richard Hampden).

22. *See* Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 37-51) (detailing these suspensions).

23. This explains why Blackstone wrote during this period that the default position of English law viewed it as "unreasonable to send a prisoner [to jail], and not to signify withal the crimes alleged against him." 1 WILLIAM BLACKSTONE, COMMENTARIES *137. For discussion of the decline in use of bills of attainder as a means around this rule, see Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 32 n.184, 40 n.234, & 42 n.250). It is important to put to the side historical exceptions to this rule involving situations in which prosecution was not an option. *See id.* (manuscript at 15 & 17 n.88) (discussing historical exceptions, including commitment of the mentally ill).

historian Paul Halliday, the English needed to transport captured American soldiers being detained on English ships to English soil for long-term detention because of overcrowding on the ships.[24] Unlike in the Colonies, however, the Habeas Corpus Act remained in full effect in England proper[25] and as such, promised the captured rebels a timely trial on criminal charges or discharge. Indeed, for this very reason, Lord Mansfield advised the Secretary of State for America, Lord George Germain, that so long as the colonists claimed subjecthood, their commitment on English soil could only be defended against a petition for a writ of habeas corpus by sworn criminal charges presented against them.[26]

Parliament's solution? Adoption of suspension legislation applicable to "every Person or Persons who have been, or shall hereafter be seised or taken in the Act of High Treason . . . or in the Act of Piracy" during the "*Rebellion and War" that was being "openly and traitorously levied*."[27] The original 1777 Act made it explicit that its purpose was to permit the detention of American prisoners—whom the Act deemed to be "traitors"—outside the normal criminal process. Thus, Parliament provided in the legislation that it was being adopted precisely because "*it may be inconvenient in many such Cases to proceed forthwith to the Trial of such Criminals,*"—namely, the revolting colonists—"*and at the same Time of evil Example to suffer them to go at large.*"[28] Against this backdrop, one can see why once Parliament approached the point of accepting that the colonists had broken their allegiance, that body permitted the series of suspensions to lapse and in their place adopted a law declaring that colonists in custody on English soil were officially "prisoners of war," whose rights would no longer be governed by domestic law but instead the "law of nations."[29]

---

24. *See* HALLIDAY, *supra* note 18, at 251.

25. For discussion of the consistent denial by the Crown of application of the Act to the American colonies, see Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 48-51).

26. *See* Letter from Lord Mansfield to Lord George Germain (Aug. 8, 1776), *in* 12 DOCUMENTS OF THE AMERICAN REVOLUTION: 1770-1783, at 179, 180 (K.G. Davies ed., 1976) (contrasting American prisoners with "prisoners of war," whom, Mansfield wrote, "the King might keep . . . where he pleased").

27. An Act to impower his Majesty to secure and detain Persons charged with, or suspected of, the Crime of High Treason, committed in any of his Majesty's Colonies or Plantations in *America*, or on the High Seas, or the Crime of Piracy, 17 Geo. III, ch. 9 (1777) (emphasis added) (royal assent given March 1777).

28. *Id.* (emphasis added). Lord North, who introduced the bill, said that its adoption was necessary to empower the Crown to treat the treasonous colonists "like other prisoners of war"—that is, to permit their detention outside the criminal process. 19 THE PARLIAMENTARY HISTORY OF ENGLAND: FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 3 (T.C. Hansard ed., Johnson Reprint Corp. 1966) (1777). No such legislation was necessary in the colonies, where the Crown had steadfastly denied application of the Habeas Corpus Act. *See* Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 50-51) (detailing this denial).

29. An Act for the better detaining, and more easy Exchange, of *American* Prisoners brought into *Great Britain*, 22 Geo. III, ch. 10 (1782).

II. THE EARLY AMERICAN UNDERSTANDING OF THE PRIVILEGE AND ITS SUSPENSION

The English backdrop leading up to Ratification helps put in context many of the comments made during the Constitutional Convention and Ratification debates about the Suspension Clause. In particular, the robust set of protections generally understood to run with the privilege in English law by that time helps explain why Alexander Hamilton took the position in support of Ratification that a Bill of Rights was unnecessary.[30] He expressly married the Suspension Clause with the right to a jury trial and believed, consistent with this history, that the securing of the privilege in the body of the Constitution and the fact that the writ embodied many of the constitutional protections later encompassed within the Bill of Rights—like the right to indictment and a speedy trial—rendered it such that amendments were unnecessary.[31] This backdrop also explains why Thomas Jefferson, when arguing against the recognition of any suspension power in the Constitution, pointed to the treason clause as the appropriate basis by which the government should and could proceed against persons owing allegiance who sided with the enemy in times of war.[32]

The understanding that controlled during the early days of the Republic was the same. In the absence of a suspension, as was the case, for example, during the Whiskey Rebellion, it was simply taken for granted that persons owing allegiance who took up arms against the government had to be dealt with through the criminal process. Indeed, that is how President Washington directed the insurgents during that period be treated.[33] This backdrop also explains why President Jefferson—despite his prior reluctance to embrace the concept of suspension during the Ratification debates—sought a suspension from Congress during his presidency to empower him to hold the alleged Burr conspirators in military detention without charges.[34] Once the House declined to adopt the suspension that had passed the Senate, all understood and accepted that the fate of the alleged conspirators would be resolved by the criminal process.[35]

As I also have documented extensively in other work, the same

---

30. *See* THE FEDERALIST NO. 83 (Alexander Hamilton). Hamilton wrote: "trial by jury in criminal cases, aided by the habeas corpus act . . . [is] provided for, in the most ample manner . . . ." *Id.*

31. *See id.*

32. *See* Letter from Thomas Jefferson to James Madison (July 31, 1788), *in* 13 THE PAPERS OF THOMAS JEFFERSON 440, 442 (Julian P. Boyd ed., 1956). For details on the understanding of the privilege and suspension during the colonial period, which was consistent with the English backdrop, see Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 57-74).

33. For details and citations, see Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 76).

34. For extensive discussion, see Tyler, *Emergency Power*, *supra* note 2, at 630-37.

35. *See* Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 77-85) (detailing events).

understanding of the relationship between the privilege, suspension, and allegiance also informed the formal legal framework during the Civil War and Reconstruction suspensions,[36] the only two domestic suspensions ever enacted by Congress.[37] The Reconstruction suspension, for example, followed from Congress's decision in 1871 to authorize President Grant to suspend the writ in order to combat the Ku Klux Klan in the South.[38] The authorization applied only where "the conviction of . . . offenders and the preservation of the public safety shall become in such district impracticable"[39]—that is, where the existing criminal justice framework had broken down. Such was the case in the South Carolina upcountry, a key Klan stronghold, and accordingly, President Grant suspended the writ in that area.[40] Attorney General Amos T. Akerman is reported to have remarked at the time that the Klan's actions "amount[ed] to war . . . and [could] not be effectively crushed on any other theory."[41] In the events that followed, military officials, led by Major Lewis Merrill, arrested scores of suspected Klan members.[42] As Merrill's aide in South Carolina, Louis Post, wrote, these arrests were "without warrant or specific accusation" of criminal conduct; persons were targeted based on their "presum[ed] . . . members[hip]" in the Klan.[43]

Two key points bear highlighting from this episode. First, when the suspension lapsed, it was understood that suspects could no longer be detained without charges and, accordingly, many of those in custody were referred for prosecution on federal criminal law charges, while those who were not charged were released.[44] Second, in evaluating the suspension immediately in its wake, Congress concluded "that where the membership, mysteries, and power of the organization have been kept concealed [suspension] is the most and perhaps *only* effective remedy for its suppression."[45] It goes without saying that there are

---

36. *See id.*; Tyler, *Emergency Power*, *supra* note 2, at 637-55. During the Civil War period, martial law prevailed in many of the areas that saw the worst of the fighting. *See* Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 93 n.574) (discussing martial law).

37. There have been two suspensions invoked in federal territories. For details, see Tyler, *Emergency Power*, *supra* note 2, at 663 & nn.311-12.

38. *See id.* at 655-62 (detailing both the Klan's reign of terror and the implementation of the suspension).

39. *Id.* at 657 (alteration in original) (citation omitted).

40. *See* Ulysses S. Grant, A Proclamation (Oct. 17, 1871), *in* 9 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 4090, 4090-92; Ulysses S. Grant, A Proclamation (Nov. 10, 1871), *in* 9 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 4093, 4093-95.

41. LOU FALKNER WILLIAMS, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS: 1871-1872, at 44-45 (Paul Finkelman & Kermit L. Hall eds., 1996).

42. *See id.* at 49.

43. Louis F. Post, *A "Carpetbagger" in South Carolina*, 10 J. NEGRO HIST. 10, 41 (1925). For more details, see Tyler, *Emergency Power*, *supra* note 2, at 655-62.

44. *See* Tyler, *Emergency Power*, *supra* note 2, at 657.

45. H.R. REP. NO. 42-22, pt. 1, at 99 (1872) (emphasis added). In the months leading up to the suspension, Merrill had investigated the Klan in the area, but his efforts were frustrated by the

parallels to be drawn between this episode and many of the challenges posed by the threat of terrorism today.

III. THE TREATMENT OF CITIZEN "ENEMY COMBATANTS" IN THE WAR ON TERROR

Notwithstanding this backdrop, a rather profound shift took place in the twentieth century in this country away from the understanding that previously held sway regarding the limits imposed by the Suspension Clause on the government's power to hold citizens for criminal or national security purposes. Although isolating an explanation for the shift presents considerable challenges, its ramifications are much clearer.

During and following World War II, preventive national security detentions in the absence of suspension legislation—including those of citizens—have become something of an accepted practice during wartime. The most stark example of this dramatic change in course consists of the forced detention of over 70,000 American citizens of Japanese ancestry on the West Coast during World War II on the purported basis that they *might* spy on behalf of the enemy Japanese Empire.[46] This mass detention of American citizens did not follow under the imprimatur of a suspension but instead came pursuant to military orders.[47] To take another example, consider Congress's decision during the Cold War to adopt the Emergency Detention Act of 1950 in which it disclaimed that it was suspending habeas corpus[48] but also authorized the President to declare an "internal security emergency" and detain individuals—including citizens—without charges based solely on the executive's belief that they were *likely* to engage in spying or sabotage on behalf of our enemies.[49] Recent legislative proposals seek to revive the equivalent of this law to deal with suspected terrorists, whether they be citizens or non-citizens.[50]

Even before recent legislative initiatives, many persons, including citizens, were detained as material witnesses in the immediate wake of the devastating attacks of September 11, 2001.[51] And, as part of the war on terrorism that

---

secrecy and compartmentalization of the organization. *See* David Everitt, *1871 War on Terror*, AM. HIST., June 2003, at 26, 30.

46. *See* Stephen Breyer, *Making Our Democracy Work: The Yale Lectures*, 120 YALE L.J. 1999, 2019-21 (2011) (detailing events of the period).

47. *See* Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 10-12) (detailing events).

48. Emergency Detention Act of 1950, 50 U.S.C. § 826 (1951) (repealed 1971).

49. *Id.* §§ 811-26.

50. Specifically, Senator John McCain, along with others, introduced a bill last year that approved the detention without trial of what the bill called "unprivileged enemy belligerents," a category expressly inclusive of citizens. *See* Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010, S. 3081, 111th Cong. § 5 (2010); *see also* H.R. 4892, 111th Cong. § 5 (2010).

51. *See* Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 12) (discussing these

followed those attacks, the government has taken numerous individuals as prisoners and labeled them "enemy combatants."[52] At one point, this category included at least two citizens whose cases drew considerable public attention and eventually reached the Supreme Court: José Padilla and Yaser Hamdi.[53]

In 2002, the government arrested Padilla on American soil when he deplaned at O'Hare International Airport en route from Pakistan (via Switzerland).[54] After a short stint as a material witness, the government moved Padilla to military detention and held him without criminal charges for over three years[55] based on the President's untested assertion that Padilla was working with al Qaeda and allegedly was planning to detonate a "dirty bomb."[56] During this time, the government extended considerable efforts to preclude Padilla from consulting with counsel.[57] Hamdi, in turn, was captured overseas by allied forces in Afghanistan (specifically, the Northern Alliance), who then turned him over for a bounty to the United States military.[58] The military initially transported Hamdi to Guantánamo Bay for detention and then, upon learning that he was a United States citizen, it transferred him to the United States for continued military detention. As in Padilla's case, the government took the position that Hamdi's status as an "enemy combatant" justified "holding him in the United States indefinitely—without formal charges or proceedings—unless and until it ma[de] the determination that access to counsel or further process [wa]s warranted."[59]

Both Padilla and Hamdi petitioned for writs of habeas corpus, arguing that their detention without charges violated the Constitution.[60] In both cases, the government defended the lawfulness of the petitioners' detention as enemy combatants pursuant to both the executive's inherent authority to command the military and authority conferred upon the executive by Congress in the Authorization for Use of Military Force (AUMF), which Congress had enacted in the immediate wake of the attacks of September 11, 2001.[61] The Supreme

---

detentions and the surrounding legal landscape).

52. *See id.*

53. *Id.*

54. *See* Rumsfeld v. Padilla, 542 U.S. 426, 430 (2004).

55. *See id.* at 430-32.

56. *See* Memorandum from George W. Bush, President of the U.S., to Donald Rumsfeld, Sec'y of Def. (June 9, 2002), *reprinted in* Padilla v. Hanft, 423 F.3d 386, 389 (4th Cir. 2005).

57. *See Padilla*, 542 U.S. at 464-65 (Stevens, J., dissenting) (arguing that the Court should hear Padilla's petition and that "[a]ccess to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process"). For more details on Padilla's case, see generally Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013 (2008).

58. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).

59. *Id.* at 510-11.

60. *Id.* at 511; *Padilla*, 542 U.S. at 432.

61. Pub. L. No. 107-40, 115 Stat. 224 (2001) (granting the executive the authority to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001

Court reached the merits only in Hamdi's case, finding procedural problems with Padilla's case.[62] In *Hamdi*, a plurality led by Justice O'Connor concluded that the constitutional promise of the privilege posed no barrier to the government holding a citizen without criminal charges for the duration of a war—even one such as the war on terrorism, which, she acknowledged, may have no end.[63] Indeed, without any apparent qualification, the plurality concluded: "*There is no bar to this Nation's holding one of its own citizens as an enemy combatant.*"[64] To reach this holding, the plurality relied heavily upon Ex parte *Quirin*,[65] a World War II decision in which the Court had concluded that "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war."[66]

All the same, the plurality concluded that Hamdi was entitled to some opportunity to argue that his initial classification as an enemy combatant was erroneous, though the plurality declined to rule out that the government could rely upon hearsay evidence in justifying a detention and left open the possibility that a military commission could serve this function.[67] *Hamdi* presents the only occasion on which the Supreme Court has opined on the constraints embodied in the constitutional privilege during wartime, for the earlier litigation in *The Japanese Cases* centered on issues of race and ethnicity.[68]

As already noted, Hamdi had been captured overseas by allied forces during a war of international character. Accordingly, it is not entirely clear how his case compares to the historical examples that I have discussed above, or to Padilla's case for that matter.[69] To the extent that the *Hamdi* Court's conclusion that citizens may be held as enemy combatants in the absence of a suspension governs Padilla's case—a case in which the government arrested a citizen suspected of

---

. . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons").

62. *See Padilla*, 542 U.S. at 451 (dismissing Padilla's habeas petition as filed in the wrong jurisdiction).

63. *Hamdi*, 542 U.S. at 519 (O'Connor, J.).

64. *Id.* (emphasis added). The brief explanation given by Justices Souter and Ginsburg of why they joined Justice O'Connor's opinion to make a Court in *Hamdi* leaves open whether they fully subscribed to this aspect of Justice O'Connor's opinion. *See id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (explaining that they joined this part of Justice O'Connor's opinion for the purpose of making a Court).

65. 317 U.S. 1 (1942).

66. *See Hamdi*, 542 U.S. at 519 (alterations in original) (quoting *Quirin*, 317 U.S. at 37-38).

67. *See id.* at 509 (O'Connor, J.); *id.* at 533-34 ("Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding."); *id.* at 538 ("There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal.").

68. *See* Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 9-12, 100-02).

69. For greater discussion of the possible distinctions between the two cases, see *id.* (manuscript at 102-10).

being a terrorist on domestic soil, far from a formal battlefield setting, and then referred him to military custody—it is an indication of just how far removed the Supreme Court's interpretation of the "privilege" enshrined in the Suspension Clause is from the conception of the privilege that controlled at the time of the Founding.

Recall the Jacobite sympathizers during William's struggles to retain the throne who were feared to be plotting his undoing. To hold such persons preventively during recurrent periods of unrest and war with France, William sought and regularly received a suspension of Section 7 of the Habeas Corpus Act from Parliament.[70] The same objectives animated the Reconstruction suspension targeting the Klan and its reign of terror.[71] It is frankly hard to see how Padilla's case is any different from these historical examples, yet applying the reasoning of *Hamdi* to Padilla's case suggests that Padilla's detention is lawful and may be authorized by ordinary legislation. In short, in this country, under the reasoning of *Hamdi*, suspension is no longer understood as a prerequisite to legalize such extraordinary detention.

IV. THE DETENTION OF TERRORISM SUSPECTS TODAY IN THE UNITED KINGDOM

This brings us back to the United Kingdom. In the period following ratification of the United States Constitution, England witnessed frequent suspensions and the robust protections long associated with the privilege of habeas corpus came under considerable and regular fire in English law.[72] Given the absence of a binding and supreme constitution in the English legal framework preserving the privilege, along with the absence of strict limitations on the circumstances within which a suspension could take place, it is easy to see how, over time, a natural and predictable reaction by Parliament to alleged threats to national security moved beyond the suspension model. Thus, in the twentieth century, with the rise in violence at the hands of the Irish Republican Army (IRA) and Loyalist factions, Parliament repealed Section 7 of the Habeas Corpus Act and authorized by ordinary legislation the temporary preventive detention of suspected terrorists.[73]

A turning point in the story of habeas corpus in England came earlier, however. During the world wars, "despite the almost religious prestige of habeas corpus, the government assumed detention powers that were essentially

---

70. *See supra* notes 21-23 and accompanying text.

71. *See supra* notes 36-43 and accompanying text.

72. *See* 2 MAY, *supra* note 20, at 255 (describing the effect of repeated suspensions as "any subject could now be arrested on suspicion of treasonable practices, without specific charge or proof of guilt: his accusers were unknown; and in vain might he demand public accusation and trial").

73. *See* Act of 1971, c. 23, § 56(4), sch. 11, pt. IV (repealing 31 Car. 2, c. 2, § 7); Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 MICH. L. REV. 1906, 1931-34 (2004) (detailing legal treatment of IRA violence).

unchecked."[74] During both wars, Parliament vested the Home Secretary with virtually unconstrained authority to detain persons for the public safety and in defense of the realm.[75] Pursuant to this authority, many were detained, including numerous citizens and, during World War II, even one sitting member of Parliament.[76] During both periods, moreover, the House of Lords upheld such detentions as lawful.[77] In the wake of the Second World War, many questioned whether more limited methods would have sufficed to address the dangers of the times. Even Churchill, once a supporter of such measures, came to conclude that "[t]he power of the Executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him the judgement [sic] of his peers, is in the highest degree odious and is the foundation of all totalitarian government . . . ."[78]

It was with the onset of IRA and Loyalist violence stemming from the conflict over Northern Ireland that the U.K.'s modern framework for detention of terrorists in the absence of charges really took hold, although its roots date all the way back to the partitioning of Ireland in 1922. By 1971, IRA and Loyalist violence had reached dramatic proportions. At that point, the U.K. government declared a state of emergency and invoked the emergency powers that had been provided for in the original laws governing the partition of Ireland.[79] Pursuant to those powers, the government claimed the right to hold persons for a range of purposes and, in extreme cases, for an indefinite period upon an executive determination that "internment was expedient in the interests of the preservation of peace."[80] During this same period, as already noted, Parliament repealed what was originally Section 7 of the Habeas Corpus Act in the Courts Act of 1971.[81] Together, these developments rendered habeas—for those detained for "the preservation of peace"—essentially meaningless.

As the violence relating to Northern Ireland continued, the U.K. government stepped back from the most aggressive of emergency regulations in 1972 and adopted a new regime that was slightly more protective of suspects. Parliament,

---

74. Schulhofer, *supra* note 73, at 1935.

75. *See id.*

76. *See id.*

77. *See* Liversidge v. Anderson, [1942] A.C. 206 (H.L.) (appeal taken from Eng.) (concluding that detention of British subject under Regulation 18B, enacted pursuant to the Emergency Powers (Defence) Act of 1939, that followed from the Home Secretary's determination that he was "of hostile origin or associations" was not subject to judicial review); King v. Halliday, [1917] A.C. 260 (H.L.) (appeal taken from Eng.) (upholding detention of naturalized British subject without charges pursuant to Regulation 14B of the Defence of the Realm Regulations, 1914).

78. Schulhofer, *supra* note 73, at 1936 (quoting A.W. BRIAN SIMPSON, IN THE HIGHEST DEGREE ODIOUS frontispiece, vii, 408 (1992)).

79. *See id.*

80. *See id.* at 1936 (citing Ireland v. United Kingdom, 2 Eur. Ct. H.R. (ser. B) 25, ¶¶ 81-84 (1978)).

81. *See* Act of 1971, c. 23, § 56(4), sch. 11, pt. IV.

in turn, renewed this regime every year through the 1990s.[82] With the rise of new threats of terrorism in the period leading up to the attacks of September 11, 2001, Parliament modified the U.K. legal framework for dealing with terrorism again.

Although still providing for temporary detention of suspected terrorists without charges, current U.K. law no longer encompasses the open-ended grant of authority to detain as it did at the height of violence relating to the status of Northern Ireland.[83] Specifically, under current law, preventive or investigative detention is provided for in the Terrorism Act of 2000[84] and control orders are permitted under the Prevention of Terrorism Act of 2005.[85] These acts apply to both citizens and foreigners. Both laws authorize enormous inroads on individual liberty outside of the criminal process. Notably, however, the Terrorism Act also includes important—and substantial—limitations on this power. The most restrictive of control orders, moreover, are subject to continuing judicial review.

The Terrorism Act of 2000 provides the police with the powers of both warrantless arrest[86] and pre-charge detention.[87] The Act allows police to arrest and detain a person without warrant or charge for up to forty-eight hours if the officer reasonably suspects the person of being a terrorist.[88] To continue to hold

---

82. For details, see Schulhofer, *supra* note 73, at 1936-43. Note that the European Court of Human Rights (ECHR) ruled that many of these practices violated various aspects of the European Convention on Human Rights ("Convention"), to which the United Kingdom is a signatory. Because the U.K. had given formal notice of intent to derogate from the relevant requirements and because there was little dispute over the fact that conditions amounted to a "public emergency threatening the life of the nation," the ECHR focused its ruling on the proportionality of the measures adopted and ultimately deferred to the U.K.'s choice of detention practices for addressing the emergency. *See Ireland*, 2 Eur. Ct. H.R. at 51, 90-92, 96-97.

83. Note that current U.K. law normally requires that those arrested must be charged or released within twenty-four or thirty-six hours, depending on the seriousness of the offense, or at most ninety-six hours with judicial approval. *See* Police and Criminal Evidence Act, 1984, c. 60, §§ 41-42 (Eng.). In 2004, the House of Lords declared the indefinite detention provision of Section 23 of the Anti-terrorism, Crime and Security Act of 2001, which applied only to foreign nationals suspected of terror-related activities who could not be legally deported, incompatible with Article 5 of the European Convention on Human Rights, rejecting the government's argument that indefinite detention was "required by the exigencies of the situation." *See* A v. Sec'y of State for the Home Dep't [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.) [43] (appeal taken from Eng.); *see also supra* note 82 and *infra* note 104 (discussing the Convention).

84. Terrorism Act 2000, c. 11 (Eng.), *available at* http://www.legislation.gov.uk/ukpga/2000/11/contents.

85. Prevention of Terrorism Act 2005, c. 2 (Eng.), *available at* http://www.legislation.gov.uk/ukpga/2005/2/contents.

86. *See* Terrorism Act 2000, c. 11, § 41.

87. *See id.* c. 11, sch. 8, Part III (as amended), *available at* http://www.legislation.gov.uk/ukpga/2000/11/schedule/8/part/III.

88. *See id.* c. 11, § 41 (as amended) ("A constable may arrest without a warrant a person whom he reasonably suspects to be a terrorist.").

a person without charges beyond the forty-eight hours, the police must petition to a "judicial authority" for an extension of the detention.[89]

A judicial authority may grant the extension warrant only if he or she is satisfied that:

> (1)(b) the investigation in connection with which the person is detained is being conducted diligently and expeditiously[; and]
> (1A) The further detention of a person is necessary . . .—
> (a) to obtain relevant evidence whether by questioning him or otherwise;
> (b) to preserve relevant evidence; or
> (c) pending the result of an examination or analysis of any relevant evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining relevant evidence.[90]

These requirements call upon the police to inform the court of extensive details regarding the investigation and are drafted with an eye toward the eventual filing of criminal charges. Experience shows, moreover, that the courts do not always grant such petitions.[91]

As originally conceived, the Terrorism Act permitted such detentions to be extended only once for up to seven days; amendments then extended this period first to fourteen and later to twenty-eight days.[92] In January 2011, the law reverted back to a maximum period of fourteen days of detention under this framework.[93] It remains the case within this framework that the prisoner is

---

89. The definition of a "judicial authority" varies by jurisdiction within the United Kingdom. *See id.* sch. 8, pt. III, § 29(4).

90. *Id.* sch. 8, pt. III, § 32.

91. *See* Clare Feikert, *Pre-Charge Detention for Terrorist Suspects: United Kingdom*, LIBR. CONGRESS (Oct. 2008), *available at* http://www.loc.gov/law/help/uk-pre-charge-detention.php.

92. Under the original version of the Terrorism Act of 2000, detention was authorized for no more than seven days. *See* Terrorism Act 2000, sch. 8, pt. III, § 29(3A). This period was extended to fourteen days under Criminal Justice Act 2003, c. 44, § 306, and later extended again to twenty-eight days under Terrorism Act 2006, c. 11, § 23. The twenty-eight-day period reflected a compromise reached in reaction to the Labour Party's introduction of a proposal to extend the period to ninety days. *See* Matthew Tempest*, Blair Defeated on Terror Bill*, GUARDIAN, Nov. 9, 2005, http://www.guardian.co.uk/politics/2005/nov/09/uksecurity.terrorism. When available, the extension from fourteen to twenty-eight days required approval by a High Court judge. *See* Terrorism Act 2006, c. 11, § 23(7).

93. *See* SEC'Y OF STATE FOR THE HOME DEP'T, REVIEW OF COUNTER-TERRORISM AND SECURITY POWER: REVIEW FINDINGS AND RECOMMENDATIONS 7, 13-14 (Jan. 2011) [hereinafter FINDINGS], *available at* http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/review-findings-and-rec?view=Binary (noting that the most recent extension of the twenty-eight-day period expired on January 24, 2011, and recommending that Parliament keep the maximum period of pre-charge detention set at fourteen days but draft emergency legislation to have on hand as needed to extend the period to twenty-eight days in the future). An attempt to

guaranteed review by a judge every seven days.[94] During this period, moreover, the detainee enjoys a right to both consult with and be represented by counsel at the extension hearings.[95]

Another tool to combat terrorism is found in the Prevention of Terrorism Act of 2005, which authorizes control orders. Such orders resemble highly restrictive orders of house arrest and/or monitoring that impose considerable restraints upon freedom of movement and association. The legislation providing for them was "designed to address the threat from a small number of people engaged in terrorism . . . whom the Government could neither successfully prosecute nor deport."[96] Since adoption of the Prevention of Terrorism Act of 2005, some forty-eight persons have been subjected to control orders, a group that includes twenty British citizens.[97] Significantly, there is no formal restriction on the length of time that a control order may be in place.[98] Those control orders that are deemed to "restrict" rather than "deprive" liberty are subject to only limited judicial review,[99] whereas those deemed to "deprive" liberty (namely, those that involve more severe restrictions on individual freedoms) require more rigorous judicial review to ensure that "on the balance of probabilities . . . the controlled person is an individual who is or has been involved in terrorism-related activity."[100] In the latter context, judicial review is called for every six months, but just as with restrictive orders, renewals apparently may proceed indefinitely.[101] Control orders are, in this respect, an important weapon in the

---

extend the twenty-eight-day period to forty-two days failed in 2008. *See, e.g.*, Nico Hines & David Byers, *Gordon Brown's Last-Ditch Appeal Fails as Lords Reject 42-day Bill*, THE TIMES (LONDON) (Oct. 13, 2008), *available at* http://www.timesonline.co.uk/tol/news/politics/article4935478.ece.

94. *See* Terrorism Act 2000, c. 11, sch. 8, pt. III, § 36.

95. *See id.* § 33. Note, however, that the judicial authority may exclude the detainee and his or her counsel during the presentation of sensitive material. *See id.* §§ 33(3), 34.

96. FINDINGS, *supra* note 93, at 36. "The objective of the orders was to prevent these individuals engaging in terrorism-related activity by placing a range of restrictions on their activities, including curfews, restrictions on access to associates and communications and, in some cases, relocation." *Id.* Parliament enacted the control orders regime partially in response to the House of Lords decision in *A v. Secretary of State for the Home Department*, finding portions of the Anti-terrorism, Crime and Security Act of 2001 incompatible with Article 5 of the European Convention on Human Rights. *See supra* note 83 (discussing the case).

97. *See* FINDINGS, *supra* note 93, at 36.

98. *See* Prevention of Terrorism Act 2005, c. 2, § 4 (Eng.). There are two kinds of control orders: derogating and non-derogating. *See id.* The former are so named because they impose obligations that require derogating from the European Convention on Human Rights, *see id.* § 1(10); *supra* note 82; *infra* note 104 (discussing the Convention), and therefore require more extensive procedures to impose by contrast to non-derogating orders.

99. *See* Prevention of Terrorism Act 2005, c. 2, § 2.

100. *See id.* § 4. The governing law sets out in greater detail the factors that the judge should consider. *See id.* These more restrictive control orders are derogating orders. *See supra* note 98.

101. *See* Prevention of Terrorism Act 2005, c. 2, §§ 4, 6, 8-12.

government's arsenal for fighting terrorism.[102] The most restrictive of control orders, however, are subject to ongoing judicial review. Notably, moreover, the Secretary of State for the Home Department recently recommended that the current control order regime be repealed, observing that the "system is neither a long term nor an adequate alternative to prosecution, which remains the priority."[103]

The key point for present purposes is this: by reason of the fact that English law has never elevated the privilege of habeas corpus to formal constitutional status and in light of the repeal of what was originally Section 7 of the 1679 Habeas Corpus Act, Parliament clearly possesses the power to authorize preventive detention without charges of British citizens through ordinary legislation. Put another way, Parliament may achieve this end through legislation that is not formally structured as a suspension of the privilege.[104] This practice is directly at odds with the conception of the privilege that held sway in the late seventeenth and eighteenth centuries and the model of suspension that emerged during that same period. Because, however, English law never enshrined the privilege of habeas corpus in a binding, supreme constitution, parliamentary override always remained a possibility. This being said, the current U.K. legal framework only permits the government to detain suspected terrorists without charges for a very brief period of time (currently, no more than fourteen days) and requires timely and recurring judicial review of both detentions and the most restrictive of control orders.[105]

---

102. The House of Lords has ruled that some of the restrictions in non-derogating control orders are so restrictive as to amount to a deprivation of liberty in contravention of Article 5 of the Convention and are, accordingly, incompatible. *See, e.g.*, Sec'y of State for the Home Dep't v. JJ [2007] UKHL 45, [2008] 1 A.C. (H.L.) [385] (appeal from Eng.); *see* also *supra* note 82; *infra* note 104 (discussing the Convention). Imposing these restrictions therefore requires that the Home Secretary proceed through the process of obtaining a derogatory control order.

103. *See* FINDINGS, *supra* note 93, at 41.

104. To be sure, the Convention continues to impose significant external constraints on English law and, under the U.K.'s Human Rights Act of 1998, U.K. courts enjoy the ability to declare domestic law "incompatible" with the Convention. *See* Human Rights Act 1998, c. 42, § 4 (Eng.); *see, e.g.*, A v. Sec'y of State for the Home Dep't, [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.) [43] (appeal taken from Eng.) (declaring the Anti-terrorism, Crime and Security Act of 2001 incompatible with the Convention). Rulings by the ECHR stress the importance of timely judicial review. Thus, one decision held that in this context fourteen days of detention without review was impermissible, even where Turkey had derogated from the Convention. *See* Aksoy v. Turkey, 23 Eur. Ct. H.R. 553, 589-90 (1996). Further, the ECHR has emphasized the need to resist major departures from the standard criminal justice system's definition of "reasonableness" in assessing the threat posed by suspects. *See, e.g.*, Fox, Campbell & Hartley v. United Kingdom, 13 Eur. Ct. H.R. 157, 167 (1990). Thus, it is reasonable to suggest that the Convention and ECHR have influenced recent developments in U.K. law.

105. As noted above, moreover, current U.K. law does not draw sharp distinctions between British citizens and foreigners.

CONCLUSION

Two major conclusions may be drawn from comparing the development of English and American law in the wake of Ratification with respect to the protections embodied in the privilege of the writ of habeas corpus, at least as those protections were understood in the late eighteenth century.

First, reading the Supreme Court's decision in *Hamdi* to control cases involving domestically-captured citizens who are suspected terrorists suggests that the original impetus for the Suspension Clause essentially has been forgotten, if not consciously discarded. In its place, we now appear to have a legal regime that places the ultimate decision whether to authorize wartime preventive detention of citizens for national security purposes in the hands of a legislature largely free of constitutional restraints. In so doing, our legal tradition has come in many respects to resemble the English framework that has always treated the privilege and the protections it historically embodied as existing in considerable measure by legislative grace.[106] In this respect, we have witnessed a constitutional counterfactual that has come to pass—namely, the Founders' deliberate choice to constitutionalize the privilege and the protections that it embodied at the Founding and to limit its suspension to specific extraordinary situations has been discarded in favor of a regime that renders it far easier for the political branches to entrench upon previously protected liberty interests during times of war.[107]

Second, a very interesting conclusion may be drawn from comparing the treatment of terrorism suspects today under English and American law. Specifically, those held without charges in the U.K. under its Terrorism Act (both citizens and foreign nationals) appear to enjoy greater liberty protections than their American citizen counterparts in this country. This conclusion follows from the fact that detentions in the United Kingdom are strictly cabined in duration, subject to regular judicial review, and often matched with a robust right to counsel.[108] By contrast, the plurality in *Hamdi* suggested that citizen-enemy combatants potentially could be held without charges for the duration of the war on terrorism—a war that may never end—once an arbiter determines that sufficient evidence exists to support the government's allegations that an individual may be a terrorist.[109]

---

106. Concededly, this suggestion may give too little credit to the entrenched, though unwritten, principles of the English Constitution.

107. For a much greater explication of this thesis, see generally Tyler, *Forgotten Core Meaning*, *supra* note 1.

108. In addition, the U.K. government has a greater record of bringing suspects in terrorist attacks to trial on criminal charges than does the United States, which has yet to try the suspects in custody for plotting the attacks of September 11. *See* Raymond Bonner, *2 British Anti-terror Experts Say U.S. Takes Wrong Path*, N.Y. TIMES, Oct. 22, 2008, at A12, *available at* http://www.nytimes.com/2008/10/22/world/europe/22britain.html.

109. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 519-21 (2004) (concluding that so long as the relevant conflict continued, the government could continue to hold an enemy combatant captured

In short, not only has the counterfactual "what if the Founders had not constitutionalized the privilege?" come to pass, but citizens in this country today appear to enjoy even less protection from preventive detention than their counterparts in the U.K. who do not possess the constitutional guarantee of the privilege of habeas corpus.[110]

---

under the auspices of the AUMF).

110. This conclusion raises a host of interesting questions over both the value and adaptability of constitutional regimes, some of which I hope to explore in future work.