

Habeas Corpus and the American Revolution

Amanda L. Tyler*

Modern debates concerning the protections afforded by the Suspension Clause of the U.S. Constitution have taken place within the Supreme Court's chosen methodological approach in this context, which openly calls for careful attention to the historical backdrop against which the Clause was drafted. This approach is hardly surprising given that long ago Chief Justice John Marshall declared that when the Founding generation constitutionalized "this great writ," they invoked "[t]he term . . . in the [C]onstitution, as one which was well understood." No matter how well the Founding generation understood the content, reach, and application of the "privilege of the writ of habeas corpus," however, significant portions of the relevant historical backdrop to the ratification of the Suspension Clause remain lost to the annals of history. In particular, the details surrounding one of the most consequential periods in the history leading up to the adoption of the Suspension Clause—namely, the treatment and legal classification of the American colonists by the British during the American Revolutionary War—remain largely unexplored in legal scholarship.

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Professor Tyler seeks to recover and tell this story here by drawing upon a wealth of sources, including archival documents, parliamentary debates, contemporary press accounts, colonial papers, diaries and private papers of key participants, and significant decisions and rulings of the British courts. As these materials reveal, determinations regarding the reach and application of the English Habeas Corpus Act of 1679, rather than solely the common law writ of habeas corpus, were of tremendous consequence during this important period in Anglo-American legal history. Where the Act was in force and where prisoners could claim its protections, the legal framework demanded that such persons be charged criminally and tried in due course or otherwise be discharged. Significantly, the privilege associated with the English Act did not speak merely to process; it further imposed significant substantive constraints on what causes would be deemed legal justification for detention in the first instance. The important role that the Act played in the Revolutionary War legal framework, moreover, suggests that modern jurisprudence has underappreciated the Act's enormous influence upon the development of habeas law in the Anglo-American tradition. Finally, the history recovered here demonstrates more generally that during the Revolutionary War, suspension, geography, and allegiance each played significant roles in determining the availability of the privilege of the writ of habeas corpus to those who would claim its protections.

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INTRODUCTION

“[I]t had been customary upon similar occasions of rebellion, or danger of invasion, to enable the king to seize suspected persons. . . . But as the law stood . . . it was not possible at present officially to apprehend the most suspected person. . . . It was necessary for the crown to have a power of confining them like other prisoners of war.”

Lord Frederick North, speaking to the British House of Commons in 1777¹

Modern debates in American constitutional law concerning the protections afforded by the Suspension Clause of the U.S. Constitution converge around several key questions.² First, what precisely does the “privilege of the writ of habeas corpus” set forth in that clause, and protected therein from being suspended except in very limited circumstances, actually embody? More specifically, does the “privilege” encompass a right of access to judicial review similar to that provided for by the due process clauses of the Constitution, or might the privilege encompass an additional array of protections from government deprivations of liberty?³ Second, may any person detained by the U.S. government invoke the protections embodied in the Suspension Clause, or is its application more limited in scope? In today’s world, one might rephrase the question to ask whether the Suspension Clause applies to all so-called “enemy combatants” captured as part of the war on terrorism, or only to some subset of that group.⁴ And if only to some, what is

1. 19 THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 4 (London, T.C. Hansard 1814) [hereinafter COBBETT’S PARLIAMENTARY HISTORY] (remarks of Lord Frederick North given Feb. 6, 1777).

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

3. The Supreme Court divided along several lines when faced with this question in 2004. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion) (concluding that “[t]here is no bar to this Nation’s holding one of its own citizens as an enemy combatant” in a case involving the detention without criminal charges of an American citizen captured in Afghanistan and imprisoned in the United States); *id.* at 554 (Scalia, J., dissenting) (opining that because Hamdi was a citizen held within the United States, he could only be detained without criminal charges pursuant to a valid suspension of the privilege, which had not occurred). Two Justices joined the plurality opinion for the purpose of reaching a judgment. *Id.* at 539 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment). For more on the *Hamdi* case, see Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 911–19 (2012).

4. The Court faced one permutation of this question in 2008. *See Boumediene v. Bush*, 553 U.S. 723, 733, 798 (2008) (holding that the Suspension Clause entitled noncitizen detainees held at Guantánamo Bay to judicial review of their detentions).

the critical distinction that triggers protection under the Clause? Third, to what extent do the protections embodied in the Suspension Clause apply outside the territorial United States? Put another way, does the Suspension Clause constrain the U.S. government wherever it operates, or is its application constrained by matters of geography?⁵

In the wake of the attacks of September 11, 2001, the Supreme Court has faced each of these questions in headline-grabbing cases.⁶ The Court has done so, moreover, by invoking a methodological approach that demands careful attention to the historical backdrop against which the Founding generation adopted the Suspension Clause. Thus, of late, the Court has often premised its analysis of constitutional habeas claims on the idea that “‘at the absolute minimum,’ the [Suspension] Clause protects the writ as it existed when the Constitution was drafted and ratified.”⁷ The idea that history should inform such inquiries is hardly novel. Chief Justice John Marshall wrote long ago of “this great writ,” positing that “[t]he term is used in the [C]onstitution, as one which was well understood.”⁸ Marshall’s pronouncement reminds us that the privilege of the writ of habeas corpus enjoys a rich history in the Anglo-American legal tradition that long predates the drafting of our Constitution. It is no wonder, then, that although some may question whether history should be *determinative* in resolving the many difficult questions that arise today regarding the proper interpretation and application of the Suspension Clause, few deny that history is highly *relevant* to the analysis of such questions.⁹

No matter how well the content, reach, and application of the “privilege of the writ of habeas corpus” may have been known to the Founding generation, however, significant portions of the relevant historical backdrop to the ratification of the Suspension Clause remain lost to the annals of history. In particular, the details surrounding one of the most significant periods leading

5. Here, again, the 2008 *Boumediene* decision is on point. *See id.* at 733–34, 749–55, 793–94. Whether the holding in *Boumediene* should be extended beyond Guantánamo Bay is the subject of considerable debate among both scholars and jurists. Among many questions that have been the subject of recent litigation is whether prisoners detained by American forces in Afghanistan are entitled to habeas review of their detentions. *See Al Maqaleh v. Gates*, 605 F.3d 84, 92–99 (D.C. Cir. 2010) (concluding that *Boumediene* does not extend to the American military base in Bagram, Afghanistan).

6. *See Boumediene*, 553 U.S. 723; *Hamdi*, 542 U.S. 507; *see also* *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (involving the question whether an American citizen seized on American soil could be detained in the United States as an enemy combatant); *id.* at 451 (dismissing Padilla’s habeas petition for being filed in the wrong jurisdiction); *Padilla v. Hanft*, 547 U.S. 1062 (2006) (denying certiorari review of Padilla’s refiled habeas petition).

7. *Boumediene*, 553 U.S. at 746 (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)); *see also St. Cyr*, 533 U.S. at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996) (“[A]t the absolute minimum, the Suspension Clause protects the writ as it existed in 1789.”) (internal quotation marks omitted)).

8. *Ex parte Watkins*, 28 U.S. 193, 201 (1830).

9. For greater discussion of the significance of history in interpreting the Suspension Clause, *see* Tyler, *supra* note 3, at 918–23.

up to the adoption of the Suspension Clause—namely, the treatment and legal classification of the American colonists by the British during the American Revolutionary War—remain almost entirely unexplored in legal scholarship. This project seeks to recover and tell that story, while highlighting its potential implications for modern applications of the Suspension Clause.

In prior work, I have attempted to recover and bring to light many chapters of the historical backdrop leading up to the adoption of the Suspension Clause, giving special attention to the suspensions of the English Habeas Corpus Act of 1679 (“the Act” or “the English Act”) that followed in the wake of its adoption, the suspensions that many states enacted during the Revolutionary War, and the debates surrounding the ratification of the Suspension Clause.¹⁰ Here I seek to complement those works by unearthing the details surrounding a historical episode that likely influenced the Founding generation a great deal as they considered how to constitutionalize the privilege of the writ of habeas corpus in their new legal frameworks. Specifically, this project explores in detail both the role of habeas corpus in the English legal tradition as it functioned during the American Revolution and the suspension during the war of the application of the English Habeas Corpus Act to American prisoners held on British soil.

Most of this story is being told here for the first time. To unearth its various parts requires drawing upon a wealth of sources, including archival documents, parliamentary debates, contemporary press accounts, colonial papers, diaries and private papers of key participants, and significant decisions and rulings of the British courts, including, most prominently, decisions rendered by the great Chief Justice of King’s Bench, Lord Mansfield. Studying this period in Anglo-American legal history is important not merely because those who wrote the Constitution were well aware of the relevant events, but also because several members of the Founding generation actually played significant roles in those events. Indeed, in determining how to treat British prisoners, George Washington, as head of the Continental army, had to wrestle with the very same questions of status and legal constraints that governed the British treatment of American prisoners. Meanwhile, during the war, the British charged with treason and imprisoned in the Tower of London another important member of the Founding generation, Henry Laurens, who had earlier served as President of the Continental Congress. Laurens’s detention in the absence of criminal prosecution was only legal because it fell within the framework of a suspension enacted by Parliament to govern the detention of American prisoners in England during the war. Laurens’s story and the stories of other prominent Americans who were detained in England during the war,

10. See generally Tyler, *supra* note 3; Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600 (2009) (exploring in detail those episodes following ratification when the political branches considered invoking the suspension authority and, in some cases, actually did so, as during the Civil War, Reconstruction, and World War II).

including Ethan Allen, Ebenezer Smith Platt, and Isaac Gouverneur, have much to teach us about the role that habeas corpus played in the Revolutionary War-era legal frameworks. Indeed, these and other accounts reveal that during this period, British political leaders and jurists had to wrestle with the very questions going to the content, reach, and application of the privilege of the writ of habeas corpus that are at the heart of Suspension Clause debates today.

More specifically, as the material that follows reveals, during the war, British officials were forced to resolve when, where, and to whom the protections of the English Habeas Corpus Act applied—all the while reaffirming the content of those protections as they had come to be settled over the course of the prior century. Further, the historical materials explored here show that determinations regarding the reach and application of the English Habeas Corpus Act of 1679 were of tremendous consequence during this important period in Anglo-American legal history. Where the Act was in force and where prisoners could claim its protections, the law demanded that such persons be charged criminally and tried in due course or otherwise be discharged. Significantly, the privilege associated with the English Act did not speak merely to process: it also imposed significant constraints on what causes would be deemed legal justification for detention in the first instance. This backdrop explains why the North administration went to the British Parliament requesting a suspension to legalize the detention in England of American rebels—considered traitors by the Crown—in the absence of criminal charges. As Lord Mansfield had advised the administration, in England, where the Habeas Corpus Act was unquestionably in force, it promised a timely criminal trial to those who could and did claim the protection of domestic law—a category of persons long understood to encompass traitors.¹¹

The important role that the English Habeas Corpus Act played in the Revolutionary War legal framework suggests that modern jurisprudence has underappreciated the Act's enormous influence upon the development of habeas law in the Anglo-American tradition, while perhaps overstating the influence of the common law writ of habeas corpus in that same tradition. Indeed, extensive evidence surrounding the development of state law during the colonial and early period of independence suggests that the influence of the English Habeas Corpus Act on early American law was both profound and widespread. For example, many of the original states prioritized adopting the Act's terms in the immediate wake of independence. To take but two examples, as one of its very first matters in March of 1776, South Carolina's newly declared independent General Assembly confirmed the English Act's operation

11. See Tyler, *supra* note 3, at 929–47 (providing details surrounding the passage of the 1679 Habeas Corpus Act, the contemporaneous English law of treason, and the early suspensions of the Act in the late seventeenth and early eighteenth centuries to legalize the detention without charges of suspected traitors).

in the state,¹² and Georgia included in its Constitution of 1777 an express provision that “[t]he principles of the *habeas-corpus* act, shall be a part of this constitution.”¹³ As though to drive home the point, Georgia attached verbatim copies of the English Habeas Corpus Act to its original distribution.¹⁴ Additional examples of the Act’s influence during this period abound. Further, during the Revolutionary War, the British Parliament was not the only body to suspend the protections associated with the English Act. Indeed, when threatened with invasion, several of the newly declared independent states enacted their own suspension acts modeled on the English example in order to legalize the detention of the disaffected.¹⁵

Finally, the history recovered here reveals that, during the Revolutionary War, suspension, geography, and allegiance each played major roles in determining the availability of the privilege of the writ of habeas corpus to those who would claim its protections. This history may shed considerable light on modern debates, and it is toward that end that it is presented here. If nothing else, this history suggests that some of the questions that courts have had to address within the context of the war on terrorism are not entirely new, including the matter of how to treat the so-called enemy within—suspected traitors—during times of war. More generally, although this history is not recounted here for the purpose of definitively resolving how courts should decide the many difficult contemporary questions going to the content and reach of the Suspension Clause, it is offered in order to lay a solid foundation for future analysis of these questions by jurists and scholars.

I.

THE ENGLISH HABEAS CORPUS ACT IN COLONIAL AMERICA

A. The Habeas Corpus Act of 1679 and Parliamentary Acts of Suspension

Those who wrote the Constitution were keenly aware of the long and celebrated role of the writ of *habeas corpus ad subjiciendum* in English law, what Blackstone, one of the leading sources on English law consulted by the Founding generation, described as a “bulwark of our liberties.”¹⁶ By design, the common law writ of habeas corpus, which predated the statutory writ and constituted a judicial response to the Privy Council’s penchant for “frequently commit[ting] persons without indictment, trial or any other semblance of due

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

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

14. CHARLES FRANCIS JENKINS, BUTTON GWINNETT: SIGNER OF THE DECLARATION OF INDEPENDENCE 109 (1926).

15. See Tyler, *supra* note 3, at 958–68 (detailing these suspensions).

16. 1 WILLIAM BLACKSTONE, COMMENTARIES *133.

process,”¹⁷ empowered the courts to demand cause for a prisoner’s detention from his jailer. As historian Paul Halliday’s work shows, the common law writ came into regular use in the seventeenth century as a “prerogative writ”—that is, as the embodiment of royal power invoked by the Court of King’s Bench in aid of the Crown’s obligation to look after his subjects.¹⁸ For the writ to evolve into something that would constrain the Crown when dealing with his subjects would take something more. That something more was the English Habeas Corpus Act of 1679, a parliamentary creation intended to complement the common law writ. The Founding generation knew a great deal concerning the benefits provided by the Act. Indeed, as is explored below, denial of the Act’s benefits to the colonists constituted a major complaint about British rule and contributed to the call for independence.

I have explored in detail the events leading up to the adoption of the English Habeas Corpus Act along with its provisions in other work.¹⁹ For present purposes, a brief account will suffice to establish the relevant backdrop to the Revolutionary War period. This parliamentary creation, entitled “An Act for the better securing the Liberty of the Subject and for Prevention of Imprisonments beyond the Seas,” declared that it was intended to address “great Delays” by jailers “in making Returnes of Writts of Habeas Corpus to them directed” as well as other abuses undertaken “to avoid their yeilding Obedience to such Writts.”²⁰ By its terms, the Act sought to remedy the fact that “many of the King’s subjects have beene and hereafter may be long detained in Prison in such Cases where by Law they are baylable.”²¹ Toward that end, the Act declared that it was “[f]or the prevention whereof and the more speedy Releife of all persons imprisoned for any such criminall or supposed criminall Matters.”²² In defining its scope as such, the Act did not speak to cases of civil detention, but limited its reach to those cases involving anyone imprisoned “for any Criminall or supposed Criminall Matter,” a category that would come to be understood as embracing not just ordinary criminals, but domestic enemies of the state as well.²³

17. ROBERT S. WALKER, *THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY* 58 (1960).

18. PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 9 (2010). As Halliday recounts, in 1619, Chief Justice Sir Henry Montagu described “habeas corpus as a ‘writ of the prerogative by which the king demands account for his subject who is restrained of his liberty.’” *Id.* at 65 (quoting (1619) Palmer 54, 81 Eng. Rep. 975 (K.B.)).

19. See Tyler, *supra* note 3, at 923–34; see also AMANDA L. TYLER, *HABEAS CORPUS GOES TO WAR: TRACING THE STORY OF THE UNITED STATES CONSTITUTION’S HABEAS PRIVILEGE FROM THE TOWER OF LONDON TO GUANTÁNAMO BAY* (forthcoming 2016).

20. 1679, 31 Car. 2, c. 2, § 1 (Eng.), reprinted in 3 *THE FOUNDER’S CONSTITUTION* 310 (Philip B. Kurland & Ralph Lerner eds. 1987).

21. *Id.*

22. *Id.*

23. Section 8 of the Act specifically disclaimed coverage of civil causes. See *id.* § 8.

Many of the Act's provisions codified preexisting judicial developments and were most significant in providing a measure of certainty as to both procedures and the availability of the writ. For example, the third section of the Act set forth procedures for obtaining writs during vacation periods of the courts. The eleventh and twelfth sections provided for an expansive reach of the Act to so-called "privileged places" and other areas previously beyond the reach of habeas courts. But the seventh section of the Act did much more than this. That section both connected the writ of habeas corpus with the criminal process and placed specific limits on how and when the Crown lawfully could detain the most serious of criminals, including those persons deemed to be enemies of the state. By its terms, the section covered "any person or persons . . . committed for High Treason or Felony."²⁴ Where a prisoner committed on this basis was not indicted within two court terms (a period typically spanning only three to six months), the Act provided that the judges of King's Bench and other criminal courts "are hereby *required* . . . to sett at Liberty the Prisoner upon Baile."²⁵ Going further, section seven also declared that "if any person or persons committed as aforesaid . . . shall not be indicted and tryed the second Terme . . . or upon his Tryall shall be acquitted, he shall be discharged from his Imprisonment."²⁶ In other words, the Act promised the most dangerous of suspects the remedy of discharge where they were not timely tried. Referring to this section, Chief Justice John Holt wrote fifteen years after its passage that "the design of the Act was to prevent a man's lying under an accusation for treason, &c. above two terms."²⁷

Going back to the reign of Edward III, high treason had long been settled to include, among other things, plotting the demise of the Crown or the royal line, levying war against the Crown, and joining or providing aid to the Crown's enemies.²⁸ As Blackstone subsequently elaborated in his influential *Commentaries*, high treason not only encompassed aiding "foreign powers with

24. *Id.* § 7. Note that over time the relevant language from section 7 moved to section 6 of the Act. Nevertheless, all textual references here reflect this and the other sections' placement in the original version of the Act.

25. *Id.* (emphasis added).

26. *Id.* Judges initially often evaded the Act's protections by setting excessive bail; for that reason, the Declaration of Rights in 1689 declared that courts should not require excessive bail. *See* Declaration of Rights, 1688, 1 W. & M., sess. 2, c. 2, § 1 (Eng.).

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

28. 1351, 25 Edw. 3, stat. 5, c. 2 (Eng.) (establishing the law of high treason that remained largely in effect for five hundred years); *see also* Clarence C. Crawford, *The Writ of Habeas Corpus*, 42 AM. L. REV. 481, 490 n.30 (1908) ("[A]ttempt[s] w[ere] made to fill in the more important gaps [in the original treason statute] by additional legislation and by judicial interpretation," both of which "led to much abuse."). In such cases, Parliament often redefined the crime of high treason itself.

whom we are at open war,” but also providing assistance to “foreign pirates or robbers, who may happen to invade our coasts, without any open hostilities between their nation and our own.”²⁹ Blackstone also instructed that high treason “most indisputably” included adhering to or aiding “fellow-subjects in actual rebellion at home.”³⁰ The common aspects of treason included “giving [the enemy] intelligence, . . . sending them provisions, . . . selling them arms, . . . treacherously surrendering a fortress, or the like.”³¹ Each of these acts was most likely to take place in time of war, yet the Habeas Corpus Act did not include any exception for wartime.

It was for this very reason that Parliament invented the concept of suspension. The first suspension came just ten years after adoption of the Habeas Corpus Act, in the immediate wake of the Glorious Revolution. While fighting to retain control of the throne that he had just assumed, William asked Parliament in 1689 to suspend the Habeas Corpus Act in order to counter the Jacobite supporters of the dethroned James Stuart who sought to return his line to power.³² In response to the many threats posed by the Jacobites, William presented Parliament with a request that it suspend section seven of the Habeas Corpus Act for the express purpose of authorizing him to arrest solely on *suspicion*—that is, without formal charges—of treasonous activity. As his emissary conveyed the request to Parliament, the Crown sought the power to confine persons “committed on suspicion of Treason only,” lest they be “deliver[ed]” by habeas corpus.³³ The story was the same with the many suspensions enacted by Parliament in the decades of wartime and instability that followed, all of which by their terms empowered the Crown to arrest those believed to pose a danger to the state on suspicion alone.³⁴ In each case, Parliament suspended the Act’s protections in order to free the executive from having to comply with its stringent requirements. Thus, during this period, English law came to embrace the understanding that it was *only* by a suspension of the privilege that detention outside the criminal process of persons who could claim the benefit of the Habeas Corpus Act could be made lawful—even *during wartime*. Suspension was not viewed, however, as a

29. 4 WILLIAM BLACKSTONE, COMMENTARIES *83.

30. *Id.* Misprision of treason was also a serious crime during this period. It encompassed, among other things, concealing knowledge of treasonous plots (something thought to constitute aiding and abetting). See *id.* at *120. For more on the crime of high treason during the preratification period, see MICHAEL FOSTER, *Discourse I. on High Treason, in A REPORT OF SOME PROCEEDINGS ON THE COMMISSION OF OYER AND TERMINER AND GOAL DELIVERY FOR THE TRIAL OF THE REBELS IN THE YEAR 1746 IN THE COUNTY OF SURRY, AND OF OTHER CROWN CASES 183–251* (Oxford, Clarendon Press 1762).

31. 4 WILLIAM BLACKSTONE, COMMENTARIES *82.

32. For discussion of this suspension and its extensions, see Tyler, *supra* note 3, at 934–41.

33. 9 DEBATES OF THE HOUSE OF COMMONS, FROM THE YEAR 1667 TO THE YEAR 1694, at 129–30 (Anchitell Grey ed., London, n. pub. 1763) (remarks of Richard Hampden).

34. For details on the English suspensions of the seventeenth and eighteenth centuries, see Tyler, *supra* note 3, at 941–44.

necessary predicate to hold persons classified as prisoners of war. This is because, as Hale instructs, such persons were understood to fall outside the application of the Habeas Corpus Act.³⁵

Although these principles were well-settled by the middle of the eighteenth century, the onset of the American Revolutionary War placed tremendous pressure on each of them in turn. As is explored below, the challenges presented by the revolting colonies tested the limits and definition of allegiance, the geographic reach and application of the Habeas Corpus Act, and the legal understanding of when suspension was required to legitimize the detention of persons outside the formal criminal process during times of war. It is this story to which we now turn.

B. The Denial of the Benefits of the Habeas Corpus Act to the American Colonists

From the beginning of English settlement in America, the colonists claimed to possess “all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England.”³⁶ But this claim rarely equated with the reality on the ground. Despite attempts on the part of several colonies to adopt or invoke the protections of the Habeas Corpus Act as their own, the Crown consistently denied colonists outside England the “privilege” of the benefits of the Act. The story of New York’s efforts is instructive. In 1684, that colony submitted its Charter of Liberties and Privileges to the Crown’s Committee of Trade and Plantations (part of the Privy Council) for approval, having secured the approval of the then-Duke of York. In the charter, the New York colonists claimed the general right to “be governed by and according to the Laws of England.” Within a month of inheriting the throne from his brother, the Duke of York—now crowned James II—vetoed the charter on the stated basis that “[t]his Priviledge is not granted to any of His Ma^{ty} Plantations where the Act of Habeas Corpus and all such other Bills do not take Place.”³⁷

35. 1 MATTHEW HALE, *HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN* 159 (Sollom Emlyn ed., Philadelphia, Robert H. Small 1847) (“[T]hose that raise war against the king may be of two kinds, subjects or foreigners: the former are not properly enemies but rebels or traitors. . . .”). For greater discussion of how this distinction applied during the Jacobite wars, see HALLIDAY, *supra* note 18, at 170–73.

36. [1774] 1 *JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789*, at 68 (Worthington Chauncey Ford ed., 1904) (replicating 1774 Statement of Violation of Rights).

37. *Observations upon the Charter of the Province of New-York*, in 3 *DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW-YORK* 357, 357 (John Romeyn Brodhead ed., Albany, New York, Weed, Parsons & Co. 1853); see David S. Lovejoy, *Equality and Empire: The New York Charter of Liberties, 1683*, 21 *WM. & MARY Q.* 493, 510–14 (1964) (detailing story). Following the ascension of William and Mary, the New York Assembly again sought recognition of a range of rights and privileges enjoyed by the English. See *An Act Declaring What Are the Rights and Privileges of Their Majesties’ Subjects Inhabiting Within the Province of New York* (May 6, 1691), in 3 *THE REVISED STATUTES OF THE STATE OF NEW-YORK* app. pt. 1, at 2 (Albany, New York, Packard & Van Benthuyzen 1829) (positing that “no freeman shall be taken and imprisoned . . . but by the lawful judgment of his peers, and by the law of this province”).

In 1692, the Massachusetts Bay Colony attempted to pass a Habeas Corpus Act that essentially copied the 1679 English Act. The Privy Council disallowed this attempt as well, decreeing in 1695:

[W]hereas . . . the writt of *Habeas Corpus* is required to be granted in like manner as is appointed by the Statute 31, Car. II. in England, which priviledge has not as yet been granted in any of His Maj^{ty}s Plantations, It was not thought fitt in His Maj^{ty}s absence that the said Act should be continued in force and therefore the same hath been repealed.³⁸

To the extent that any doubt remained on this score, Massachusetts's colonial governor declared in 1699 that the "Habeas corpus act [is] not to be in force in the colonies."³⁹

Against this backdrop, it was not uncommon for colonial governors to claim detention powers more expansive than those enjoyed by the Crown. In one case from 1699, New York Governor Lord Bellomont advised his lieutenant governor with respect to two prisoners who had been taken into custody, "commit 'em to gaol without baile or mainprize, which I am positive you can legally justifie, and there's no removing them by *Habeas corpus*, for there is no such law in force in any of the Plantations."⁴⁰ In an earlier case from 1687, prisoners jailed for their town's vote objecting to taxation by the royal council reported that they were "denied the privilege of Habeas Corpus," along with the benefit of "the Magna Charta . . . and the statute laws that secure the subjects' properties and estate" by a court that included Chief Justice Joseph Dudley of the Dominion of New England.⁴¹ By the prisoners' account, Dudley told them: "[W]e must not think the Laws of England follow us to the ends of the earth. . . . [Y]ou have no more privileges left you than not to be sold as slaves."⁴² One sees now why the prominent New England Puritan minister

Nonetheless, as detailed in the text, the Crown continued to deny the colonists the benefit of the Habeas Corpus Act.

38. An Act for the Better Securing the Liberty of the Subject, and for Prevention of Illegal Imprisonment, ch. 42, 1692–1693 MASS. ACTS 95, 99 (quoting Letter from the Privy Council) (internal quotation marks omitted).

39. [Introduction] PAUL M. HAMLIN & CHARLES E. BAKER, SUPREME COURT OF JUDICATURE OF THE PROVINCE OF NEW YORK 1691–1704, at 389 (1959) (alteration in original) (internal quotation marks omitted).

40. Letter from Lord Bellomont to Lieutenant Governor of New York (June 23, 1699), in 18 CALENDAR OF STATE PAPERS, COLONIAL SERIES, AMERICA AND WEST INDIES, 1700, at 699–700 (Cecil Headlam ed., 1910).

41. EMORY WASHBURN, SKETCHES OF THE JUDICIAL HISTORY OF MASSACHUSETTS FROM 1630 TO THE REVOLUTION IN 1775 106 (Boston, C.C. Little 1840) (recounting statements on the case from six Ipswich residents, including Rev. Mr. John Wise).

42. *Id.*

Cotton Mather could have complained during this time: “Wee are Slaves, without the Habeas Corpus-Act.”⁴³

Over time, the denial of the protections of the Habeas Corpus Act to the colonists became a major source of complaint regarding British rule. In 1774, for example, the Continental Congress documented a number of complaints about British rule in a letter to the people of Great Britain. The Congress decried the fact that colonists were “the subjects of an arbitrary government, deprived of trial by jury, and when imprisoned cannot claim the benefit of the habeas corpus Act, that great bulwark and palladium of English liberty.”⁴⁴ That same year, while soliciting Canadian support for the cause of independence, the Continental Congress declared among the most fundamental rights: the right to be governed by representatives of the people’s choosing, the right to trial by jury, and the privilege of habeas corpus.⁴⁵ In its words, “These are the rights, without which a people cannot be free and happy. . . .”⁴⁶ These complaints underscore the importance of the denial of habeas corpus and related rights in fueling the movement for independence, as well as explain their centrality to the subsequent development of the American legal framework governing individual liberties. During this period and the subsequent Founding period, moreover, it was the Habeas Corpus Act, and not so much the common law writ of habeas corpus, that was central to colonial thinking about such liberties. As one pair of scholars noted in studying this period:

Latter-day students of the use of the writ in Colonial times have argued that it derived from the common—not the statute—law [and] even that repeals of the various charters of liberty and declarative acts of rights and privileges lessened the basic liberties of the Colonists not at all. The Colonists themselves were not so indifferent.⁴⁷

As the Revolutionary War unfolded, the colonists came to appreciate all the more the importance of the Act as a limitation on executive detention authority, for as discussed below, they saw its terms suspended in England to enable the long-term detention of American rebels there. It is no wonder that upon

43. HAMLIN & BAKER, *supra* note 39, at 401 (quoting Letter from Cotton Mather to John Cotton (Nov. 1686), in [ser. 4, vol. 8] COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 383, 390 (1868)) (internal quotation marks omitted).

44. [1774] 1 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 36, at 88; *see also id.* at 107–08 (reiterating same complaints) (replicating Lettre Adressée aux Habitans de la Province de Quebec (Oct. 26, 1774)).

45. *Id.* at 107–08.

46. *Id.* at 108; *see also id.* (listing also “holding lands by the tenure of easy rents” and “freedom of the press”). The Congress declared: “These are the rights . . . which we are, with one mind, resolved never to resign but with our lives.” *Id.* The letter describes the role of habeas corpus as follows: “If a subject is seized and imprisoned, tho’ by order of Government, he may, by virtue of this right, immediately obtain a writ, termed a Habeas Corpus, from a Judge, whose sworn duty it is to grant it, and thereupon procure any illegal restraint to be quickly enquired into and redressed.” *Id.* at 107.

47. HAMLIN & BAKER, *supra* note 39, at 400–01.

breaking away from the “cord” that bound them to the Crown (namely, their allegiance to the same), they would soon claim its benefits for themselves.⁴⁸

II.

REBEL DETENTION POLICY AND THE HABEAS CORPUS ACT

In 1775, British troops met local colonial militia at Lexington and Concord, and then at Bunker Hill. Before long, the colonists formed the Continental Army and royal officials were fleeing America. With battles came prisoners. The treatment of the American “rebels” would pose a series of very intricate and difficult questions about the reach and framework of English law. How the British addressed these questions would come to wield considerable influence over the subsequent development of early American law.

In the wake of Bunker Hill, the Second Continental Congress convened in 1775 to make one final attempt at reconciliation with Great Britain through the Olive Branch Petition. Realistic about its chances of success, the Congress also established the Continental Army. King George III responded in August by issuing a proclamation declaring that “many of Our Subjects in divers Parts of Our Colonies and Plantations in *North-America*, . . . forgetting the Allegiance which they owe to the Power that has protected and sustained them, . . . have at length proceeded to an open and avowed Rebellion, by . . . traitorously preparing, ordering and levying War against us.”⁴⁹ He ordered all officers and “obedient and loyal Subjects” to suppress the rebellion with the objective of “bring[ing] the Traitors to Justice” and “Punishment.”⁵⁰ There was no question, it seems, that the Americans were traitors who needed to be reminded of their obligations as royal subjects and punished for their intransigence. Indeed, just one year earlier, Attorney General Edward Thurlow and Solicitor General Alexander Wedderburn had advised the Earl of Dartmouth (secretary of state for American affairs) that the colonists’ acts surrounding the Boston Tea Party events “amount to the crime of high treason”—specifically, “the levying of war against His Majesty.”⁵¹

48. Indeed, leading up to, during, and immediately following the Revolutionary War, many states either adopted legislation predicated directly upon the English Habeas Corpus Act or incorporated the Act’s terms into their common law.

49. KING GEORGE III, A PROCLAMATION FOR SUPPRESSING REBELLION AND SEDITION (London, Aug. 23, 1775).

50. *Id.*

51. Letter from Edward Thurlow and Alexander Wedderburn to the Earl of Dartmouth (Feb. 11, 1774), The National Archives (Great Britain) [hereinafter TNA] CO 5/160, fo. 40, reprinted in [Transcripts 1774] 8 DOCUMENTS OF THE AMERICAN REVOLUTION 1770–1783, at 46, 47 (K.G. Davies ed., 1975). This advice came in response to a letter from the Earl of Dartmouth seeking counsel on whether the Crown could proceed against the colonists for treason. See Letter from the Earl of Dartmouth to Attorney- and Solicitor-General (Feb. 5, 1774), TNA CO 5/160, fo. 1, reprinted in 8 DOCUMENTS OF THE AMERICAN REVOLUTION, *supra*, at 37–42 (providing a narrative of the relevant events and asking whether “the acts and proceedings stated in the foregoing case or any of them amount to the crime of high treason” and if so, “who are the persons chargeable with such crime and what will be the proper and legal method of proceeding against them?”). The attorney and solicitor

But of course, suppressing the rebellion and “bring[ing] the Traitors to Justice” was not going to be that simple. With war now waging on multiple fronts, it was only a matter of time until the British were forced to address the status of Americans taken prisoner in battle—a question that itself did not admit of easy answers.

The matter came to a head with the capture of none other than Ethan Allen and his famed “Green Mountain Boys.” In September of 1775, after seizing the important strategic post of Fort Ticonderoga in New York, Captain Allen and his Boys headed north into Canada in an ill-fated attempt to take Montreal. After his capture, Allen was turned over to British General Richard Prescott, who, Allen recorded in his journal, treated him poorly and threatened him with a traitor’s execution.⁵² By November, British Lieutenant Governor Cramahé had ordered Allen and several of his fellow “Rebel Prisoners” aboard Royal Navy ships bound for England, “having no proper Place to confine them in, or Troops to guard Them” in Canada.⁵³ On board, according to Allen’s own *Narrative*, the Rebels were “shackled together by pairs, viz. two men fastened together by one hand-cuff, being closely fixed to one wrist of each of them, and treated with the greatest severity, nay as criminals.”⁵⁴ The prisoners landed in Falmouth, England, only days before Christmas in December 1775. They would not stay long.

Meanwhile, General Prescott had been captured and taken into the custody of the Continental Army. With news of Allen’s harsh treatment at the hands of the British having now reached the Americans, General George Washington wrote to British General William Howe on December 18, declaring that Prescott would suffer the same treatment as Allen.⁵⁵ Washington complained specifically about the fact that Allen had been reportedly “thrown into irons, and [made to suffer] all the hardships inflicted upon common

generals advised a host of means by which the Crown could proceed against the suspected traitors. *See* Letter from Edward Thurlow and Alexander Wedderburn, *supra*, in 8 DOCUMENTS OF THE AMERICAN REVOLUTION, *supra*, at 47–48 (suggesting that the Crown could proceed “either by prosecuting them for their treason in the country in the ordinary course of justice; or arresting them there . . . and transmitting them hither to be tried . . . ; or by sending over a warrant of a Secretary of State, grounded on sufficient information upon oath, to arrest and bring over the offenders to be tried here”). They stressed, however, that “the state of evidence . . . as it stands[,] is scarce sufficient” to sustain charges of high treason “unless [it] can be more distinctly established.” *Id.* at 48. For more details on these events, consult Neil L. York, *Imperial Impotence: Treason in 1774 Massachusetts*, 29 LAW & HIST. REV. 657, 670–76 (2011).

52. ETHAN ALLEN, A NARRATIVE OF COLONEL ETHAN ALLEN’S CAPTIVITY, WRITTEN BY HIMSELF 36 (Burlington, Vermont, H. Johnson & Co. 3d ed. 1838) [hereinafter ALLEN NARRATIVE] (recording Prescott’s statement: “I will not execute you now; but you shall grace a halter at Tyburn, God damn you.”).

53. Extract of Letter from Lieutenant Governor Cramahé to the Earl of Dartmouth (Nov. 9, 1775), TNA SP 44/91/443.

54. ALLEN NARRATIVE, *supra* note 52, at 38.

55. Letter from George Washington to General William Howe (Dec. 18, 1775), in 3 THE WRITINGS OF GEORGE WASHINGTON 201–02 (Jared Sparks ed., Russell, Odiome, & Metcalf, & Hilliard, Gray & Co. 1834).

felons.”⁵⁶ This was not the first time that the Americans had threatened retaliation, nor would it be the last. Indeed, Washington had previously threatened retaliatory treatment of British prisoners in the wake of reports of British mistreatment of American prisoners in August, and Thomas Jefferson penned a “Declaration on the British Treatment of Ethan Allen” threatening retaliation, particularly upon Prescott, soon after Washington complained about Allen’s treatment.⁵⁷ In his letter to Howe, Washington also suggested that the time had come for the parties to enter a cartel for the exchange of prisoners.⁵⁸ American practice, after all, viewed British soldiers taken in arms “as prisoners of war” who could be held in a preventive posture and who were amenable to exchange under the Law of Nations.⁵⁹

Upon arrival in England, Allen and his fellow prisoners were imprisoned at Pendennis Castle in Cornwall. Allen was already something of a legend by this point, and during his brief stint at the castle, his notoriety only grew. Allen’s *Narrative* describes, for example, how on a daily basis persons “came in great numbers out of curiosity, to see me.”⁶⁰ During his time in England, Allen wrote that he “was treated as a criminal . . . , and continued in irons, . . .

56. *Id.* at 201.

57. Thomas Jefferson, Draft of a Declaration on the British Treatment of Ethan Allen (Jan. 2, 1776), in 1 THE PAPERS OF THOMAS JEFFERSON 276–77 (Julian Boyd ed., Princeton Univ. Press 1950); see Letter from George Washington to Lieutenant General Thomas Gage (Aug. 11, 1775), in 3 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 55, at 77–79 (Worthington Chauncey Ford ed., New York, G.P. Putnam’s Sons 1889).

58. 3 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 55, at 202 (“The law of retaliation is not only justifiable in the eyes of God and man, but absolutely a duty, which, in our present circumstances, we owe to our relations, friends, and fellow citizens.”). Washington’s threat of retaliation came on the heels of a congressional proclamation that “whatever punishment shall be inflicted upon any persons in the power of our enemies for favouring, aiding, or abetting the cause of American liberty, shall be retaliated in the same kind, and the same degree upon those in our power, who have favoured, aided, or abetted, or shall favour, aid, or abet the system of ministerial oppression. The essential difference between our cause, and that of our enemies, might justify a severer punishment: The law of retaliation will unquestionably warrant one equally severe.” [1775] 3 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 36, at 412. “Cartel” was a term commonly used during this period to indicate a formal agreement for the exchange of prisoners.

59. See, e.g., [1775] 3 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 36, at 399–400 (Dec. 2, 1775) (“Resolved, That such as are taken be treated as prisoners of war, but with humanity, and allowed the same rations as the troops in the service of the Continent. . . .”); [1776 Jan. 1–June 4] 4 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 36, at 119, 264 (Feb. 8, 1776) (adopting the oath prisoners of war must take to be granted parole); *id.* at 264 (Apr. 9, 1776) (resolving that “a list of the prisoners of war in each colony be made out and transmitted to the house of assembly, convention, council, or committee of safety of such colonies respectively”); [1776 June 5–Oct. 8] 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 36, at 850 (Oct. 7, 1776) (calling for the creation of “a commissary of prisoners of war . . . in each of the United States” that would “make monthly returns of the state and condition of the prisoners” to the Board of War).

60. ALLEN NARRATIVE, *supra* note 52, at 50; see also *id.* at 55–56 (“It was a common thing for me to be taken out of close confinement, into a spacious green in the castle, or rather parade, where numbers of gentlemen and ladies were ready to see and hear me.”).

in consequence of the orders which the commander of the castle received from General Carlton.”⁶¹

Allen’s case posed significant legal questions for his British captors. Was he truly a criminal, as the irons and other aspects of his detention (including the failure of the British to make any distinctions among their prisoners based on military rank) suggested? Or was he a prisoner of war? And if he were the former, could he be held without criminal charges or did the Habeas Corpus Act apply? The way Allen’s case was handled suggests that the British were still working through these questions and that political considerations factored heavily into the calculus. In short order, however, the British stood firm to the position that the Americans were rebels and traitors—most assuredly *not* wartime prisoners of a foreign sovereign—and as such, they were criminals. This explains Allen’s detention in irons. Whether the Americans could be detained without criminal trial posed a more complicated question. As things unfolded, the answer came to turn entirely on the reach of the Habeas Corpus Act.

Immediately upon Allen’s landing, the British legal elite began debating what to do in his case.⁶² On the morning of December 27, Solicitor General Wedderburn, who would later serve as attorney general for much of the Revolutionary War, wrote a letter to his cousin William Eden, under-secretary of state, sharing his views on Allen’s case.⁶³ Wedderburn wrote the letter only hours before attending a cabinet meeting that had been called by the Earl of Suffolk, secretary of state for the northern department, to determine the fate of Allen and his fellow prisoners. Wedderburn wrote to Eden that his view of “the Business does not differ much” from that of the attorney general, Lord Thurlow.⁶⁴ He then continued:

I am persuaded some unlucky incident must arise if Allen & his People

61. *Id.* at 51; *see also id.* at 56 (recalling that when he asked one spectator for “punch . . . he then gave it to me with his own hand, refusing to drink with me in consequence of my being a state criminal”).

62. It appears that there may have been a meeting about Allen’s case on December 23, 1775—just one day after Allen’s arrival at Pendennis. On that day, Lord Germain summoned Thurlow and Wedderburn to meet at Lord Germain’s office on the evening of December 23, 1775, to discuss the Rebel prisoners. Letter to the Attorney & Solicitor General (Dec. 23, 1775), TNA CO 5/159/75. The *London Evening Post* reports of the prisoners’ arrival suggest that even the King knew of Allen’s case. *See* LONDON EVENING POST, Jan. 2–4, 1776 (noting “[u]pon [Allen’s] confinement, a message was sent to Pownall, to know what method should be taken with him. Pownall referred it to Lord G. Germain; he referred it to Lord Dartmouth, and his Lordship laid it before the K---; who ordered them to be continued in confinement until further orders”). The reference to Pownall is to Thomas Pownall, member of Parliament and former colonial governor of Massachusetts.

63. Letter from Alexander Wedderburn to William Eden (Dec. 27, 1775), *reprinted in* [OCT. 18 & NOV. 2, 1898] PROCEEDINGS OF THE VERMONT HISTORICAL SOCIETY app. 147, 147–48 (Burlington, Vermont, Free Press Association Printers 1899), *also reprinted in* 5 B.F. STEVENS’S FACSIMILES OF MANUSCRIPTS IN EUROPEAN ARCHIVES RELATING TO AMERICA NO. 462 (London, Malby & Sons 1890) [hereinafter STEVENS’S FACSIMILES].

64. *Id.* at 147.

are kept here. It must be understood that Government does not name to execute them, the Prosecution will be remiss & the Disposition of some People to thwart It very active. I would therefore send them back, but I think something more might be done than merely to return them as Prisoners to America.⁶⁵

Wedderburn went on to question Allen's loyalty to the American cause. He suggested that if Allen's lands (of which he had been dispossessed due to a Council order settling the boundary between Hampshire and New York) were restored, Allen might be convinced "not only [to] have his pardon from Gen[eral] Howe, but a Company of Rangers" to serve the British cause.⁶⁶ Wedderburn concluded by suggesting that even if Allen were not immediately amenable to the proposal, "[T]here is still an Advantage in finding a decent reason for not immediately proceeding ag[ainst] him as a Rebel"—namely, that "[s]ome of the People who came over in the Ship with Him . . . might easily settle this bargain" with him.⁶⁷ Nonetheless, Wedderburn also recognized that if Allen "does not accept" the terms of the offer, "he & they [his men] must be disposed of as the Law directs."⁶⁸

What transpired at the cabinet meeting was not recorded. What we do know is that Allen's presence was viewed with displeasure by the administration,⁶⁹ and it appears that those participating in the meeting reached a decision to send Allen and his fellow prisoners back to America immediately. Indeed, the very same day, Lord Suffolk signed a warrant for the delivery of the prisoners along with an order that they be sent to Boston.⁷⁰ Also that same day, Lord George Germain, secretary of state for the Americas, wrote to the Lords of the Admiralty that it was "The King's Pleasure" that Allen and the other prisoners be removed to his Majesty's ship *Solebay*, which should "put to Sea with the first fair wind" setting course for Boston, where the prisoners were to be turned over to General Howe.⁷¹ Within days, the men were put on the *Solebay* and the ship sailed for America by way of Ireland in the early days of January 1776.⁷²

65. *Id.* at 147–48.

66. *Id.* at 148.

67. *Id.*

68. *Id.*

69. On the same day as the meeting to determine Allen's fate, Lord Germain wrote the Earl of Sandwich, head of the Lords of Admiralty: "The prisoners from Quebec, now confined in Pendennis Castle, will occasion many difficulties: I wish the general had not sent us such a present." See Letter from Lord George Germain to the Earl of Sandwich (Dec. 27, 1775), in 1 THE PRIVATE PAPERS OF JOHN, EARL OF SANDWICH, FIRST LORD OF THE ADMIRALTY 1771–1782, at 85–86 (G.R. Barnes & J.H. Owen eds., 1932).

70. TNA SP 44/91/445 (replicating Dec. 27, 1775, Warrant).

71. Letter from Lord George Germain to the Lords Commanders of the Admiralty (Dec. 27, 1775), TNA CO 5/122/398.

72. ALLEN NARRATIVE, *supra* note 52, at 134 (detailing departure on *Solebay* and dating his boarding of the ship on January 8); *A Letter from Plymouth Dated Dec. 31*, LONDON EVENING POST, Jan. 4–6, 1776 (noting that the *Solebay* had already sailed for Ireland); Letter from Rich. Came to

Why was Allen sent back so quickly? A review of contemporary evidence suggests many possible reasons. To draw upon one source, two months after the *Solebay* sailed for America, in March of 1776, members of Parliament discussed Allen's case while debating the use of foreign mercenaries in the Revolutionary War. Lord Richmond, a regular antagonist of the North administration, took the opportunity to call for clear terms on the exchange of prisoners in the war while asserting that the government had avoided bringing Allen to trial "either because they knew that he could not be legally tried, or feared an English jury could not be prevailed on to find him guilty."⁷³ In response, the Earl of Suffolk, who recall had convened the meeting of December 27 to determine Allen's fate, deemed Richmond's observations in error. "I do assure his grace," Suffolk declared, "that . . . we neither had a doubt but we should be able legally to convict [Allen], nor were we afraid that an English jury would have acquitted him; nor further, was it out of any tenderness to the man, who I maintain had justly forfeited his life to the offended laws of his country."⁷⁴ Instead, the "true motives" for sending Allen back, Suffolk said, had to do with the fact that the "rebels had lately made a considerable number of prisoners."⁷⁵ In light of this, Suffolk continued, "we accordingly avoided bringing him to his trial from considerations of prudence; from a dread of the consequences of retaliation; not from a doubt of his legal guilt, or a fear of his acquittal by an English jury."⁷⁶ Implicit in Suffolk's statements was the idea that Allen and his fellow prisoners offered more value as barter for prisoner exchanges in America than as convicted criminals in England. Subsequent internal administration correspondence is at odds with

Brook Watson, Esq. (Jan. 18, 1776), TNA TS 1/526/179 (reporting that the *Solebay* sailed on January 7). Allen would be moved several times upon arrival in America, in keeping with General Howe's movements. After several months, he was finally paroled in New York City and ultimately released as part of a prisoner exchange in 1778. Notably, even after the administration sent him back to America, Allen was still labeled a "Prisoner of State, not of War" by the English. See Charles A. Huguenin, *Ethan Allen, Parolee on Long Island*, in XXV VERMONT HISTORY 103, 120 (Vermont Historical Society ed., 1957) (quoting British General Riedesel and citing Letter from General Riedesel to General Gates (Oct. 2, 1777) (on file with New York Public Library, Manuscript Room)).

73. 18 COBBETT'S PARLIAMENTARY HISTORY 1196–97 (London, T.C. Hansard 1813) (remarks given Mar. 5, 1776).

74. *Id.* at 1199.

75. *Id.*

76. *Id.* The debate recounted here—which includes no mention of a writ of habeas corpus—provides the only source for the assertion in one modern account reporting that "[t]he Duke of Richmond, John Wilkes, and other members of the pro-American opposition forced the government's hand by obtaining a writ of habeas corpus, meaning that Allen would have to be formally charged in an English court or released." EDWIN G. BURROWS, FORGOTTEN PATRIOTS 40 (2008). Another historian reports a similar story, without any cited support, positing that Allen's irons were removed as "the result of a writ of habeas corpus filed in his behalf in London by English MPs opposed to the war. Before the actual writ could be served on prison officials at Pendennis Castle, Germain rushed orders to Falmouth to have Allen and his thirty-four cellmates hustled aboard the HMS *Solebay* . . ." WILLARD STERNE RANDALL, ETHAN ALLEN: HIS LIFE AND TIMES 408 (2011). The role of a possible habeas corpus petition in the matter is explored further *infra* at text accompanying notes 80–98.

Suffolk's claim about the lack of concern on the part of the administration over the ability to prosecute Allen, but either way, it is clear that political considerations animated the decision at least in part.⁷⁷ The administration's earlier decision to decline to prosecute the principals in the Boston Tea Party (despite deeming their actions treasonous), reportedly based on Attorney General Edward Thurlow's and Solicitor General Alexander Wedderburn's "doubt[s] whether the evidence was sufficient to convict them,"⁷⁸ lends further support to the idea that the administration was generally concerned over its ability to prosecute the rebels successfully. Still more support may be found in the Earl of Dartmouth's directive to General Thomas Gage, who commanded the British forces in North America and had been appointed to serve as governor of the Massachusetts Colony in 1774, to investigate treasonous acts by the colonists. In deciding whether to bring prosecutions for treason, Dartmouth instructed Gage to take into account the "prejudices of the people": "[H]owever clear and full the evidence might be," if such prejudices "would in all probability prevent a conviction," then it "would be better to desist from prosecution, seeing that an ineffectual attempt would only be triumph to the faction and disgraceful to government."⁷⁹

Various contemporary sources—including Allen's own *Narrative*—suggest that in addition to political calculations, another factor may have influenced the decision to send him back. Specifically, Allen wrote that once on board the *Solebay*, his irons were removed and "[t]his remove was in consequence, as I have been since informed, of a writ of habeas corpus, which had been procured by some gentlemen in England, in order to obtain me my liberty."⁸⁰ Numerous other contemporary sources suggest that at a minimum, a habeas action was in the works. *The Annual Register* for 1775, for example,

77. Lord Germain's letter to Lord Mansfield from the following summer, discussed below, suggests that Germain was quite concerned over the ability to prosecute Allen successfully. Letter from Lord George Germain to Lord Mansfield (Aug. 6, 1776), TNA CO 5/43/342, *reprinted in* [Transcripts 1776] 12 DOCUMENTS OF THE AMERICAN REVOLUTION, 1770–1783, at 176–77 (K.G. Davies ed., 1976).

78. 1 THE DIARY AND LETTERS OF HIS EXCELLENCY THOMAS HUTCHINSON, ESQ. 219–20 (Peter Orlando Hutchinson ed., Boston, Houghton, Mifflin, & Co. 1884) (describing Lord Mansfield's report of the relevant discussions, along with Mansfield's view that "things never would be right until some of them were brought over" to be prosecuted).

79. Letter from the Earl of Dartmouth to Lt. Gen. Thomas Gage (No. 1) (Apr. 9, 1774), TNA CO 5/763 fo. 77, *reprinted in* 8 DOCUMENTS OF THE AMERICAN REVOLUTION, *supra* note 51, at 89. This note of caution followed instructions that Gage "employ [his] utmost endeavours to obtain sufficient evidence against the principal actors" and where "upon indictment of them there is a probability of their being brought to punishment, it is His Majesty's pleasure that you do in such case direct the proper steps to be taken for their prosecution." *Id.* at 88–89. Notably, one historian has observed that "[t]ime and again Attorney General Edward Thurlow and Solicitor General Alexander Wedderburn showed a reluctance to try Americans for treason in English courts, despite their ruling on numerous occasions that treasonous acts had been committed." York, *supra* note 51, at 700. General Gage had fought with the King's army at Culloden. See JACK RAKOVE, REVOLUTIONARIES: A NEW HISTORY OF THE INVENTION OF AMERICA 67 (2010).

80. ALLEN NARRATIVE, *supra* note 52, at 57–58.

reported of the prisoners: “whilst their friends in London were preparing to bring them up by *habeas corpus*, to have the legality of their confinement discussed, they were sent back to North-America to be exchanged.”⁸¹ Immediately following this report, moreover, the *Register* noted that another “American rifleman, who was taken prisoner [in Quebec]” had been “discharged, as no crime was alleged against him.”⁸² The *London Evening Post* ran similar stories, including one on January 2, 1776, in which it reported that Allen and his fellow prisoners “have sent up to their friends in town to sue out the writ of Habeas Corpus, to know on what law or authority they are detained in their present state, at a distance from the capital.”⁸³ And days later, the *Post* ran a passage drafted by a so-called “friend to the CONSTITUTIONAL LAW of this country” that “call[ed] upon the yet *remaining Sons of Liberty*, immediately to set on foot a public subscription for trying the right of transporting British subjects above three thousand miles from their own country (as has been done in the *bringing over* and *confining* Mr. Ethan Allen, and others of the Provincials).”⁸⁴ Meanwhile, two other British newspapers reported that matters had evolved to the point that counsel had been retained on behalf of the Americans, noting: “Mr. Dunning and Mr. Alleyne are retained as Council in behalf of Ethan Allen, and the rest of the prisoners lately brought from America.”⁸⁵

The newspaper reference is to John Dunning, opposition member of Parliament and former solicitor general,⁸⁶ and John Alleyne. Both had earlier made appearances on either side of the habeas proceedings in the famous *Somerset’s Case*, a habeas petition challenging the legality of slavery.⁸⁷ Alleyne, moreover, had only a few months earlier represented American

81. 18 THE ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE, FOR THE YEAR 1775, at 187 (London, J. Dodsley 1780).

82. *Id.* at 187–88. The rifleman was apparently a Virginian captured in Canada. The *London Evening Post* reported that his discharge came as a result of there being “no grounds for his commitment.” *Extract of Letter from Bristol, Jan. 3, 1776*, LONDON EVENING POST, Jan. 4–6, 1776.

83. LONDON EVENING POST, Jan. 2–4, 1776 (“Col. Ethan Allen, Mr. George Walker, and 32 other Provincials, sent over in irons from Quebec, and already lodged in Pendenn’s Castle, in Cornwall, it is said, have sent up to the their friends in town to sue out the writ of Habeas Corpus, to know on what law or authority they are detained in the present state, at a distance from the capital.”). This same story ran verbatim contemporaneously in numerous British newspapers.

84. LONDON EVENING POST, Jan. 6–9, 1776. The writer volunteered the sum of five guineas “to so constitutional a purpose.”

85. GAZETTEER & NEW DAILY ADVERTISER, Jan. 6, 1776 (London, England) (Issue 14,624); *see also* CHESTER CHRON. OR COM. INTELLIGENCER, Jan. 8, 1776 (Chester, England) (Issue 37) (“Mr. Dunning and Mr. Alleyne are retained in behalf of Ethan Allen, and the rest of the prisoners lately arrived from America.”).

86. Dunning had once represented Benjamin Franklin in the Hutchinson Letters affair before the Privy Council. *See The Life of Benjamin Franklin*, in 10 THE WRITINGS OF BENJAMIN FRANKLIN 141, 266–68 (Albert Henry Smyth ed., 1907).

87. *Somerset v. Stewart*, [1772] 98 ENG. REP. 499 (K.B.) (freeing a slave brought to England from outside the realm on the basis that the positive law of England did not sanction slavery’s existence there).

Stephen Sayre in his habeas proceedings, and later, he would represent American Ebenezer Smith Platt in a similar attempt to win his discharge from British detention during the Revolutionary War via a habeas petition.⁸⁸ (Both cases are discussed below.) In short, Dunning and Alleyne—both experts in habeas practice and connected to the American cause—were the logical candidates for the job of representing Allen and his cohort in any habeas proceedings.

How far any legal efforts on behalf of the American prisoners went is unclear. There is neither record of a writ being sought on Allen's behalf in the Old Bailey, nor is there any archival record of a writ, return, or entry in the Court of King's Bench records of the period. King's Bench would have been on vacation from the end of November well into January, so the only means of obtaining a writ on Allen's behalf during his time in England would have been to obtain a vacation writ issued by an individual justice.⁸⁹ If such a writ were filed with King's Bench, however, no record exists of it in the bound writs preserved from that period.⁹⁰

The lack of record in these courts suggests—though by no means proves, given the imperfect recordkeeping of vacation writs during this period—that no one actually filed a petition for a writ of habeas corpus on Allen's behalf during the less than two-week-period he spent in England. It does not say anything, however, about whether a petition was in the works—as a wealth of contemporary reports suggests, including a letter sent from England to the Continental Congress⁹¹—or whether even the mere possibility of such a filing

88. Alleyne represented the petitioner in *Somerset's Case*. On his role in Sayre and Platt's case, see 20 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME 1296 (T.B. Howell ed., London 1816) [hereinafter HOWELL'S STATE TRIALS] (noting that Alleyne was part of Sayre's legal team); WESTMINSTER J. & LONDON POL. MISCELLANY, Issue 1688 (Mar. 1, 1777) (noting that Alleyne represented Platt in his first habeas petition to the Old Bailey).

89. See A HANDBOOK OF DATES FOR STUDENTS OF BRITISH HISTORY 119, 143 (C.R. Cheney ed., Cambridge Univ. Press 2000) (1945) (recording the sitting dates for Michaelmas Term 1775 and Hilary Term 1776).

90. The *Old Bailey Proceedings* was a publication that recorded much of what transpired in the Old Bailey. It is now fully digitized and accessible online at <http://www.oldbaileyonline.org/>. It has no record of any proceedings involving Ethan Allen. Further, a search of the King's Bench files at the National Archives in London, including entry books and cords of writs of habeas corpus, failed to unearth any trace of a petition being filed on Allen's behalf before that court. A search of the Treasury Solicitor papers also failed to uncover evidence of a filing.

91. Specifically, a friend to the American cause wrote John Hancock in February of 1776 with news of "Colonel *Allen*, and the prisoners with him." The author noted, "Our friends in *London* attended to their case while here, and would have exerted every nerve to effect their release had they not been so unexpectedly removed." Letter from William Palfrey to President of Congress, enclosing letter to John Hancock, Esq., President of Congress dated Feb. 16, 1776 (May 19, 1776), in [ser. 4, vol. 6] AMERICAN ARCHIVES: CONSISTING OF A COLLECTION OF AUTHENTICK RECORDS, STATE PAPERS, DEBATES, AND LETTERS AND OTHER NOTICES OF PUBLICK AFFAIRS, THE WHOLE FORMING A DOCUMENTARY HISTORY OF THE ORIGIN AND PROGRESS OF THE NORTH AMERICAN COLONIES; OF THE CAUSES AND ACCOMPLISHMENT OF THE AMERICAN REVOLUTION; AND OF THE CONSTITUTION OF GOVERNMENT FOR THE UNITED STATES, TO THE FINAL RATIFICATION THEREOF 508 (Peter Force

may have influenced the decision to send Allen back to America. That said, the existence of reports linking prominent counsel with extensive habeas experience and a record of representing Americans to Allen's case strongly suggests that opposition circles had taken up the legal plight of the prisoners, and it is fair to presume that the administration was well aware of the same.

There is, moreover, significant evidence to suggest that the administration felt considerable pressure to make the problems posed by Allen's detention in England go away—and fast. As one admiralty lord wrote the Earl of Sandwich, head of the Lords of the Admiralty, on December 29: “The principal object being to *get the prisoners out of reach as soon as possible*, one of the Secretary of State's messengers set out yesterday morning at 2 o'clock with our orders to the Solebay at Plymouth to call at Falmouth. He was to proceed with a warrant to Pendennis Castle to deliver them to the Solebay or any other ship that may call there for them. . . .”⁹² Time, it seems, was of the essence. Why? It is hard to imagine that politics alone warranted such urgency. To the contrary, the letter to the Earl of Sandwich implies that the administration was deeply concerned about a petition being filed on Allen's behalf to invoke the protections of the Habeas Corpus Act and thereby force his trial or discharge. Contemporary commentary in at least one London newspaper, moreover, pointed to the administration's desire “to elude the Habeas Corpus Act” as the very reason for sending Allen back to America.⁹³ In short, extensive evidence suggests that the possibility that counsel representing Ethan Allen would

ed., Washington, D.C. 1846) [hereinafter AMERICAN ARCHIVES]; see also *Extract of Letter from Dublin, Jan. 8*, LONDON EVENING POST, Jan. 23–25, 1776 (“The public may be assured, that Col. Allen and the rest of the prisoners from Canada, were kept in irons, both on their passage and in Pendennis Castle; and that to elude the Habeas Corpus, the Ministry ordered them to be put on board of a man of war, which sailed away with them. . . .”). Writing in the wake of the Revolutionary War, William Gordon concluded the same. See 2 WILLIAM GORDON, THE HISTORY OF THE RISE, PROGRESS, AND ESTABLISHMENT, OF THE INDEPENDENCE OF THE UNITED STATES OF AMERICA 239 (London 1788) (“Ethan Allen and his fellow prisoners, who had been confined in Pendennis Castle, Cornwall: from whence they were removed by direction of government, upon a discovery, that there was an intention of bringing them before the proper magistrate, by the habeas corpus act, in order to ascertain, whether they were legally chargeable with any crime, that could warrant their confinement.”). Things happened so quickly in Allen's case that it does not appear that the administration ever drew up a warrant for his commitment. See 10 THE PARLIAMENTARY REGISTER, OR, HISTORY OF THE PROCEEDINGS AND DEBATES OF THE HOUSE OF LORDS 339 (London, J. Almon 1778) (Mar. 31, 1778) (remarks of the Earl of Effingham and Lord Weymouth).

92. Letter from Lord Hugh Palliser to the Earl of Sandwich (Dec. 29, 1775), in 1 THE PRIVATE PAPERS OF JOHN, EARL OF SANDWICH, *supra* note 69, at 87 (emphasis added).

93. *To the Printer of the Public Advertiser*, PUB. ADVERTISER, Issue 14474 (Feb. 22, 1776) (referring to Allen's arrival in Corke as resulting from “a Violation of Law” and “criminal too, as it was notoriously done to elude the Habeas Corpus Act”). The conclusion drawn here contrasts with that reached by Professor John Harrison. See John C. Harrison, *The Habeas Corpus Suspension Clause as a Limit on Executive Discretion* (Univ. of Va. Law Sch. Law & Legal Theory Working Paper Series, Working Paper No. 123, 2009), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1191&context=uvalwps> (questioning the role of habeas in Allen's return to America).

invoke the protections of the English Habeas Corpus Act played a major role in the decision to send him quickly back to America.

It is also the case that the filing of a habeas petition in Allen's case—true or not—quickly became the stuff of American lore and influenced the direction of early American habeas law. As noted, Allen connected his being sent home to the filing of a habeas petition in his *Narrative*, a book that was widely read in the colonies upon its first publication in 1779.⁹⁴ Even before this time, in 1777, Chief Justice Thomas McKean of the Pennsylvania Supreme Court, who would later serve as President of Congress, granted habeas relief to twenty Quakers held without charges in Philadelphia who were suspected of passing information to the British. The decision was widely unpopular, especially in Congress, so much so that McKean felt compelled to defend his actions in a letter to John Adams. He did so in part by claiming that “No gentleman thought it amiss in the judge, who allowed the habeas corpus for Ethan Allen and his fellow-prisoners upon the application of Mr. Wilks &c.”⁹⁵

The suggestion that John Wilkes would have been behind any legal efforts made on Allen's behalf is highly plausible. Wilkes was lord mayor of London, a controversial, radical member of Parliament, and a prominent American sympathizer who that same year had compared the American Revolution to the Glorious Revolution.⁹⁶ Wilkes himself had spent time in the Tower of London for criticizing George III.⁹⁷ And Wilkes had been a driving force behind the

94. At this time, the book was published in installments in, among other places, the *Pennsylvania Packet*. See, e.g., PA. PACKET OR GEN. ADVERTISER (Nov. 11, 1779) (publishing the portion of Allen's *Narrative* discussing his return to America).

95. Letter from Thomas McKean to John Adams (Sept. 19, 1777), in 5 THE PAPERS OF JOHN ADAMS 289 (R.J. Taylor et al. eds., 1983).

96. JOHN WILKES, 1 THE SPEECHES OF JOHN WILKES 27 (London, 1777); see also JOHN SAINSBURY, DISAFFECTED PATRIOTS: LONDON SUPPORTERS OF REVOLUTIONARY AMERICA 1769–1782, at 13–14 (1987). Indeed, the Wilkites (as Wilkes' radical camp was known) commonly took on individual causes before the courts to advance various rule-of-law ideals, including due process norms. See John Brewer, *The Wilkites and the Law, 1763–74: A Study of Radical Notions of Governance*, in AN UNGOVERNABLE PEOPLE: THE ENGLISH AND THEIR LAW IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 128, 136 (John Brewer & John Styles eds., 1980). George III is said to have called Wilkes “that Devil Wilkes.” James Lander, *A Tale of Two Hoaxes in Britain and France in 1775*, 49 HIST. J. 995, 998 (2006). Wilkes was also well known in the colonies as a supporter of the American cause. To take one example, his Letter to “The Electors of Great Britain” setting out his position against the war was published in the *Boston Gazette* on Christmas day. BOSTON GAZETTE & COUNTRY J., Dec. 25, 1775, at 1–2; see also BOSTON GAZETTE & COUNTRY J., Jan. 29, 1776, at 2 (replicating Wilkes's October 28, 1775, speech in Parliament opposing the war). He later opposed North's Act in Parliament and contributed to collections made for the benefit of America's prisoners held in England during the war. See SHELDON S. COHEN, YANKEE SAILORS IN BRITISH GAOLS 154 (1995).

97. Wilkes's imprisonment in the Tower in 1763 lasted only days. See ARTHUR H. CASH, JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY 98–120 (2006) (detailing events). In 1771, Wilkes played a role in the release of printers who had been arrested for publishing parliamentary debates. The Commons summoned Wilkes' compatriots in the matter, Lord Mayor Brass Crosby and Alderman Richard Oliver, both members of Parliament, to answer for what they had done. The Commons then ordered Crosby and Oliver to the Tower, where their plight witnessed such

successful invocation of the Habeas Corpus Act in American Stephen Sayre's case just two months prior to the arrival of Allen and his fellow prisoners in England. Finally, Wilkes had strong ties to both Alleyne and Dunning.⁹⁸

Sayre's case was a precursor to Allen's and likely influenced the administration's handling of Allen and his fellow American prisoners when brought to England. Sayre was an American banker living in London who had been heavily involved in London pro-American causes with his friend Wilkes.⁹⁹ In October of 1775, he was arrested and charged with directing a plot to kidnap and detain King George III in the Tower of London before forcing the monarch to leave the country.¹⁰⁰ When a lieutenant of American birth reported the story to the principal secretary of state, the Earl of Rochford, and claimed that Sayre had attempted to enlist him in the scheme, Rochford wasted little time in issuing a warrant ordering Sayre's arrest on charges of high treason. Rochford, however, could not secure the second witness necessary to sustain the charges. This led him to reduce Sayre's charge to "treasonable practices" in a new warrant that directed the Earl of Cornwallis, constable of the Tower of London, to take Sayre and keep him in "close custody."¹⁰¹ Per these terms, Sayre was denied the benefit of visits from anyone other than his wife. But this did not stop Sayre's friends, including the same John Alleyne who later reportedly took on the case of Ethan Allen, from petitioning for a writ of habeas corpus to secure Sayre's release from the Tower.¹⁰² On October 28, 1775, just five days after Sayre's arrest, Lord Mansfield, Chief Justice of King's Bench, released Sayre on bail following a makeshift hearing at Mansfield's house in Bloomsbury Square. Reportedly, Mansfield "called for the warrant of commitment, and immediately on perusing it, pronounced that he had not the least doubt of Mr. Sayre's being entitled to bail; as he observed, [the] gentleman was only charged with treasonable practices."¹⁰³

considerable popular support that upon their release weeks later, they returned to the lord mayor's residence accompanied by a procession and gun salutes. *See id.* at 278–87.

98. As noted below, Alleyne worked with Wilkes on Stephen Sayre's habeas petition. Dunning had earlier represented one of the printers in a civil action arising out of his arrest related to the publication of controversial writing by Wilkes. In his arguments on behalf of the printer, Dunning successfully challenged the use of general warrants. *See id.* at 132.

99. *See* JOHN R. ALDEN, *STEPHEN SAYRE: AMERICAN REVOLUTIONARY ADVENTURER* 33–66 (1983).

100. *See id.* at 70–82.

101. *Id.* at 78. Sayre once served as sheriff for London. *See* SAINSBURY, *supra* note 96, at 52.

102. *See* *The Trial of an Action brought by Stephen Sayre, esq. against the Right Hon. William Henry Earl of Rochford*, 20 *HOWELL'S STATE TRIALS*, *supra* note 88, at 1285–1316 (1776).

103. *Id.* at 1296. For details, consult the transcript of Sayre's civil action. *See id.*; *see also id.* at 1296 n*. Bail was put up by Sayre, John Reynolds—Wilkes's longtime lawyer and friend—and Coote Purdon. *See id.* Wilkes attended the arguments before Lord Mansfield. Reportedly, Sayre expressed his gratitude to Lord Mansfield for his release on bail, saying that he "hoped his lordship would always act in the like impartial manner according to the constitution." Mansfield, in turn, is said to have responded "I hope so too . . . let us both act according to the constitution, and we shall avoid all difficulties and dangers." ALDEN, *supra* note 99, at 82–83 (citing contemporary periodical sources). Sayre went before Mansfield alone on a vacation writ, as King's Bench was not in session at this time.

Why was Sayre released? As the account of Lord Mansfield's words suggests, his case presented a straightforward application of the right to bail as promised by the Habeas Corpus Act. It was apparently of no relevance that Sayre was charged with participation in a scheme that directly threatened the King's reign. Within weeks, another of Sayre's attorneys, Arthur Lee—a prominent member of Wilkes's opposition circles in London and later American commissioner representing the United States in France—successfully moved at the Old Bailey to discharge Sayre's recognizance when it became obvious that the government would not proceed against him.¹⁰⁴ Rochford's downfall followed in short order.

By the following summer, Sayre had borrowed a tactic from his friend Wilkes and sued Rochford for false imprisonment, winning one thousand pounds before the judgment was thrown out on the basis of pleading errors.¹⁰⁵ Presiding in Sayre's civil case in the Court of Common-Pleas, Lord Chief Justice De Grey observed that the “present was a cause of the utmost importance, as it involved in it these two very material points, the safety of the government, and the safety and security of the subject.”¹⁰⁶ This very same tension soon would prompt Parliament to revisit past practices as it was faced with increasing numbers of American prisoners brought to English shores.

A. The Need for a Clear Legal Framework: The Capture of the Yankee Leads the Administration to Seek Lord Mansfield's Counsel

The same month that Allen and his fellow prisoners arrived in England, Vice Admiral Graves, then in command of the North American station, sent another group of “Rebels” to England on board the *Tartar*. The group of prisoners consisted of seventy Americans who had been captured from an American privateer sailing under a commission issued by the Continental Congress. Along with details of the prisoners' capture, Graves wrote the Lords of Admiralty with a plea for direction as to how to handle American prisoners going forward, highlighting the problems with keeping prisoners in America. First, Graves noted that “there is no Commission in Boston to try prisoners

See A HANDBOOK OF DATES, *supra* note 89, at 135, 143 (providing dates for Trinity and Michaelmas Terms, 1775).

104. *The Monthly Chronologer*, in 44 LONDON MAG. OR GENTLEMAN'S MONTHLY INTELLIGENCER 659 (R. Baldwin 1775). For details on Arthur Lee, see SAINSBURY, *supra* note 96, at 34, 52.

105. See *Sayre v. The Earl of Rochford*, (1776) 96 Eng. Rep. 687; 2 Black. W. 1166. Wilkes, who had been charged with seditious libel only a few years earlier in a highly publicized case arising out of his role in publishing material highly critical of the King, later won a civil trespass suit against those who ransacked his home in the process. Notably, the judge in Wilkes's civil case declared the use of general warrants to search private property illegal, a position later confirmed by King's Bench in 1765. See CASH, *supra* note 97, at 160–62 (detailing Wilkes's suit); *Money v. Leach*, (1765) 97 Eng. Rep. 1075 (K.B.); 2 Black. W. 1166.

106. *Stephen Sayre, esq. against the Right Hon. William Henry Earl of Rochford*, 20 HOWELL'S STATE TRIALS, *supra* note 88, at 1312 n.*.

Guilty of Acts of Rebellion or High Treason committed on the High Seas.”¹⁰⁷ Second, he informed the Lords that “many inconveniences will arise from keeping Prisoners on board and in the present state of things a few only can be kept Prisoners in Boston.”¹⁰⁸

Nonetheless, the North administration quickly ordered the officers returned to America (the privates having chosen to enter the King’s service rather than remain prisoners). It did so, in Lord Germain’s words, “for the same obvious reasons that induced the sending back the Rebel Prisoners taken in Arms upon the attack of Montreal,” a reference of course to Allen’s case.¹⁰⁹ In a letter to General William Howe (who by this point had relieved Gage on the land, while his brother Admiral Richard Howe had relieved Graves on the sea), Lord Germain wrote that he hoped the prisoners could be exchanged for British prisoners in American custody. But Germain also reminded Howe that “it cannot be that you should enter into any Treaty or Agreement with the Rebels for a regular Cartel for the Exchange of Prisoners.”¹¹⁰ Instead, Germain entreated Howe to rely on his “Discretion” to determine the “means of effecting such [an] Exchange without the King’s Dignity & Honor being committed, or His Majesty’s Name used in any Negotiation for that purpose.”¹¹¹

Why was Howe precluded from entering into a formal cartel? Because doing so would have been tantamount to recognizing the American prisoners as soldiers in the service of a foreign sovereign, rather than traitors who needed to return to their proper allegiance. Because British policy was quite clear on this point—namely, that the Americans were traitors and criminals—Howe would have to avoid entering into any formal cartel and effect exchanges instead in his own name through personal agreements with George Washington. Washington, for his part, insisted that the American prisoners be recognized as

107. Letter from Vice Admiral Graves to Mr. Stephens (Dec. 15, 1775), TNA CO 5/123/66.

108. *Id.* Some coverage of the case of the *Tartar* prisoners lends support to the inference that there was some domestic sympathy for the plight of American prisoners in England. See LONDON EVENING POST, Jan. 9–11, 1776 (“A letter from Portsmouth says, that people flock from all parts of the country to have a sight of the prisoners . . . ; that a great deal of money has been collected for their support during their residence in England; and that the people pay as much respect to them as if they had saved this nation from destruction.”). One has to be careful about extrapolating too much from the *Evening Post*, however, as it was very much a pro-American paper. See SAINSBURY, *supra* note 96, at 30.

109. Letter from Lord George Germain to The Honorable Major General Howe (Feb. 1, 1776), TNA CO 5/93/16.

110. *Id.*

111. *Id.*; see also Letter from Lord George Germain to The Lords of Admiralty (Jan. 19, 1776), TNA CO 5/123/168; Letter from Lord George Germain to The Lords of Admiralty (Feb. 2, 1776), TNA CO 5/123/179; Letter from George Germain to Sir Guy Carlton (Aug. 22, 1776), TNA CO 43/8/99.

prisoners of war.¹¹² As the war progressed, notwithstanding the informal sanctioning by the British government of prisoner exchanges in America, Howe steadfastly refused to enter into any formal cartel lest it “imply an acknowledgement inconsistent with the claims of the English Government.”¹¹³ His successor, Sir Henry Clinton, likewise refused to enter into any formal cartel lest it “acknowledg[e] . . . independency,” and instead declared that personal agreements between Washington and him would govern prisoner exchanges in America.¹¹⁴ Throughout the war, moreover, the British engaged in sustained efforts to bring the wayward Americans back into allegiance by offering the King’s pardon to those who would pledge to quit their support for the American cause.¹¹⁵

Meanwhile, on the seas, the British continued to capture American ships and more American prisoners. Despite the initial practice of the North government to send such prisoners back to America almost immediately following their arrival in England, British ships continued to bring American prisoners to English ports. It was now necessary for the administration to settle the legal framework that governed the American prisoners held on English soil.

To do so, the North administration would consult a regular advisor, the Chief Justice of King’s Bench and great English jurist, Lord Mansfield,¹¹⁶ the

112. Letter from General William Howe to Lord George Germain (July 8, 1777), reprinted in MASSACHUSETTS HISTORICAL SOCIETY, REPORT OF EXCHANGES OF PRISONERS DURING THE AMERICAN REVOLUTIONARY WAR 17 (Boston, 1861).

113. MASSACHUSETTS HISTORICAL SOCIETY REPORT, *supra* note 112, at 17 (quoting Letter from Lord George Germain to General William Howe (Sept. 3, 1777)), 19 (quoting 5 THE WRITINGS OF GEORGE WASHINGTON; BEING HIS CORRESPONDENCE, ADDRESSES, MESSAGES, AND OTHER PAPERS, OFFICIAL AND PRIVATE 317 n.* (Jared Sparks ed., 1847)).

114. MASSACHUSETTS HISTORICAL SOCIETY REPORT, *supra* note 112, at 20 (quoting Clinton). One report studying this period describes the British practice as follows: “[W]hile the British Government was unwilling to make that species of convention *durante bello*, which is known to the public law as a cartel between nations at war, they constantly permitted exchanges [in America], under the rules of war, for purposes of military convenience, and in relief of the sufferings of their own officers and privates in captivity.” *Id.* at 23.

115. The pardon, of course, relieved the beneficiary of the stigma of criminal wrongdoing. Here, too, we see evidence of a consistent view that the Americans were traitors and criminals regardless of where they might be found. The creation of commissioners for pardons in America began in early 1776. See Letter from Edward Thurlow & Alexander C. Wedderburn to Lord George Germain (Feb. 22, 1776), TNA CO 5/160/64 (presenting their draft of a commission for accepting pardons). In May of that year, British Lieutenant General Henry Clinton issued a proclamation offering amnesty to those who would abandon the American cause (excepting two prominent American soldiers). See Proclamation by Sir Henry Clinton (May 22, 1780), available at NewsBank Archive of Americana, Early American Imprints, Series 1, no. 43809. In November of 1776, General Howe and his brother Admiral Richard Howe, serving as peace commissioners, issued a proclamation offering free and full pardon to Americans who would pledge “peaceable obedience to his Majesty” and “to desist and cease from all such treasonable actings and doings.” Proclamation by Lord Howe (Nov. 30, 1776), in [ser. 5, vol. 3] AMERICAN ARCHIVES 928 (Peter Force ed., Washington, D.C. 1853). Efforts to win over Americans with the promise of amnesty continued well into the war.

116. See James C. Oldham, *Murray, William, First Earl of Mansfield (1705–1793)*, 39 OXFORD DICTIONARY OF NAT’L BIOGRAPHY 996–97 (2004) (noting that Mansfield, for example, regularly attended Privy Council meetings during the war).

same judge who had earlier bailed American Stephen Sayre from the Tower of London. On August 6, 1776, Lord Germain wrote to Mansfield, seeking guidance concerning how to treat four American officers of the Boston sloop called the *Yankee*, which was now at the port of London.¹¹⁷ Commanded by Henry Johnson, the *Yankee* had been “fitted out and armed for the purpose of intercepting British ships,” a task at which it had achieved some success, having captured two British prizes and taken on some of their respective crews as prisoners.¹¹⁸ On July 3, 1776, however, several of the British prisoners “turned the captors into prisoners,”¹¹⁹ confining the Americans in irons below deck and setting sail for England.¹²⁰ Upon arrival, they sailed the *Yankee* right up the Thames River to London, where the Americans were put on display for all to see.¹²¹

The Americans consisted of four officers and their crew, the latter of whom Germain had no problem putting into service on one of the King’s ships heading to East India. In Germain’s view, however, there were “several obvious objections to giving the same treatment to the other four, and it is perhaps a decisive one that it would certainly expose His Majesty’s commissioned officers to a cruel and disgraceful retaliation.”¹²² “[S]end[ing] them back” was certainly an option, Germain noted, “as was very wisely suggested and practiced with regard to the Canada prisoners who were brought to Pendennis Castle,” again a reference to Ethan Allen and his fellow American prisoners.¹²³ Germain took pains to note, however, that the two situations did not present the same considerations. First, “the motives which then made it the duty of government to temporize no longer exist in the same degree and will, it may be expected, totally cease in the course of the present campaign.”¹²⁴ Second, Germain observed, “the crime of these men is very different from that

117. Letter from Lord George Germain to Lord Mansfield (Aug. 6, 1776), TNA CO 5/43/342, reprinted in 12 DOCUMENTS OF THE AMERICAN REVOLUTION, *supra* note 77, at 176–77.

118. *Id.* at 176.

119. *Id.*

120. See *Account of the Capture of the Yankee, Privateer, Captain Johnson* (London, Aug. 10, 1776), in [ser. 5, vol. 1] AMERICAN ARCHIVES 756 (Peter Force ed., Washington, D.C. 1848).

121. See *id.* (describing the imprisonment of Captain Johnson and his crew); *Address to the Lord Mayor of London on the Cruel Treatment of Captain Johnson and his Crew*, in [ser. 5, vol. 1] AMERICAN ARCHIVES, *supra* note 120, at 754–56 (offering a first person account of the harsh conditions of confinement onboard the *Yankee*); *Extract of a Letter from Dover, in England: Capture of the Yankee, Privateer, and Ill Treatment of Captain Johnson* (July 31, 1776), in [ser. 5, vol. 1] AMERICAN ARCHIVES, *supra* note 120, at 684 (describing the precautions that the prisoners turned captors took with Captain Johnson and his crew and the complaints of the prisoners); *To the Lord Mayor*, BOS. GAZETTE & COUNTRY J., Dec. 9, 1776, at 2 (detailing capture).

122. Letter from Lord George Germain to Lord Mansfield (Aug. 6, 1776), TNA CO 5/43/342, reprinted in 12 DOCUMENTS OF THE AMERICAN REVOLUTION, *supra* note 77, at 176–77.

123. *Id.* at 177.

124. *Id.*

of Ethan Allen and his associates, and a tendency of leaving it unpunished is infinitely more interesting and extensive.”¹²⁵

He continued by distinguishing aspects of the present situation from the earlier treatment of Allen and his compatriots:

The rebels, engaged in a land service in which there is no plunder to be gained nor any better return than sixpence a day for all the hardships and hazards which they undergo, will whenever the interval comes for cool reflection find sufficient discouragement in the mere circumstances of their situation. But the reasoning of rebels who turn to piracy is very different; they expose themselves to little or no personal danger in the attacking of unarmed vessels, and if they make one valuable capture they acquire according to their ideas immense fortunes. If, added to this, they find that when accidentally or otherwise taken prisoners, they are to be dismissed without punishment, they will then have the complete and irresistible temptation of great probable gain without any possible risk. These considerations are too obvious to escape our merchants, who are at this moment particularly interested in the subject. And the illegal acts, which in the case of Allen had the tacit approbation of the kingdom, would I apprehend be very differently considered if extended to the four men abovementioned.¹²⁶

Germain, it seems, viewed both cases as involving “illegal acts” and “crime[s].”¹²⁷ But the political circumstances surrounding the two situations differed on at least two scores and counseled against sending the *Yankee* officers back to America for exchange or putting them into the King’s service. First, Germain believed that declining to punish rebels like the *Yankee* officers would have the effect of only encouraging more attacks on unarmed British merchant vessels by American privateers. Second, he suggested that, unlike the case of Allen and his associates, here the plight of the American prisoners had engendered little sympathy—or, in his word, “approbation”—within the kingdom. On this point, Germain hinted that the administration felt the pressure of British merchants to punish these prisoners for their acts.¹²⁸

Nonetheless, Germain suggested that perhaps the best course was to “keep[] the men aboard a guardship for the present” while noting that “if any factious man should force us to commit them, that the trial can be forced on in the Admiralty courts.” Germain closed by posing three specific questions to his friend:

1. Whether to give up all Idea of commencing a legal Prosecution against these Men for their Crime.
2. Whether to keep them in a

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* Notably, in his letter, Germain set forth various grounds on which the cases were *politically* distinct, but said nothing as to whether they were *legally* distinct.

guardship 'till the Turn of the Campaign is more decided. 3. Whether to commit them at once for the Piracy.¹²⁹

Lord Mansfield replied two days later. He wrote to Germain: "The subject of your letter is important and in every light attended with difficulty."¹³⁰ Mansfield thought it "might be the best expedient" if the officers would ask for leave to enter the service of the King in the East Indies, but he also recognized that the officers were unlikely to do so. He continued:

Their crime abstractedly and upon the face of it is piracy, and it is better so to treat it, though under all the collateral circumstances I take them to be guilty of high treason in levying war. It seems most clear that they ought not to be set at liberty. I am not able to answer the many objections to sending them back. There is no analogy between the reason and circumstances which wisely prevailed in the case of Allen etc. and the present.¹³¹

Mansfield said nothing more on the comparison with Ethan Allen's case, so the reader is left to presume that Mansfield probably agreed with Germain on the distinctions between the two cases.

As for the prospect of trying the four officers, Mansfield informed Germain that "[t]here cannot be an Admiralty session in the ordinary course till about January next."¹³² If the administration committed them to Newgate for piracy, though, Mansfield wrote that "it is possible to throw upon this step the colour of a trial and execution."¹³³ "But," he continued, "if it be clear that they should not be dismissed or sent back, though perhaps these men may never . . . be thought the object of execution or even trial, the only deliberation is how to keep them."¹³⁴ In other words, Mansfield now set to tackle the question how the administration might keep the four officers in custody *without* trying them. His remarks on this point are noteworthy:

If they were prisoners of war the King might keep them where he pleased; consequently aboard a guardship no *habeas corpus* could deliver them. It is tenderness to avoid treating them as rebels or pirates, and in sound policy prudent to suspend any extensive acts either way. If these 4 are so wickedly advised as to claim to be considered as subjects and apply for a *habeas corpus*, it is their own doing; they force a regular commitment for their crime. Upon the return to the writ, if they are not committed before, opposition should be made to their discharge on the part of the Attorney-General upon information of their crime properly sworn, as a ground for their

129. *Id.*

130. Letter from Lord Mansfield to Lord George Germain (Aug. 8, 1776), TNA CO 5/43/345, reprinted in 12 DOCUMENTS OF THE AMERICAN REVOLUTION, *supra* note 77, at 179.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 180.

commitment.¹³⁵

Here, Lord Mansfield confirmed the legal distinction between prisoners of war and subjects who could invoke the Habeas Corpus Act. In so doing, he warned Germain that, to the extent that the captured Americans claimed royal subjecthood, their commitment on English soil could be defended against a petition for discharge under the Habeas Corpus Act only by sworn criminal charges presented against them. Notably, Lord Mansfield here also noted that “[d]uring the last rebellion and after . . . , many French officers were in gaol as rebels, being either born in the King’s dominions or if born abroad the sons of British subjects; they were tried and condemned.”¹³⁶ Putting on the French uniform, it seems, had not relieved the British subjects of their duty of allegiance, for which they were in turn held criminally accountable.¹³⁷

In the end, Mansfield advised his friend “to direct the 4 to be kept aboard [a guardship] till further order, always being prepared in case of a *habeas corpus*.”¹³⁸ The administration followed the advice, with Lord Suffolk reporting to the Lords of the Admiralty only days later that he had been “directed to signify . . . the King’s Commands” that the four officers “aboard the Rebel Privateer call’d the Yankee of Boston, be properly secured for the present aboard such Vessel belonging to His Majesty as your Lordships may find most convenient.”¹³⁹ Within two weeks, Captain Johnson had escaped,¹⁴⁰ as did another *Yankee* officer some months later. (The latter was recaptured

135. *Id.*

136. *Id.* (noting that despite their convictions, none were executed and all were “sent back”).

137. In this respect, Lord Mansfield’s understanding of how English law governed the detention of the so-called “rebels” was in keeping with the Crown’s treatment of those who pledged allegiance to the dethroned James II when captured during the Jacobite challenges to the Hanoverian line during the reign of William and Mary and their successors. *See* HALLIDAY, *supra* note 18, at 170–73 (discussing some examples); *see also* Williams’ Case, 29 F. Cas. 1330 (C.C.D. Conn. 1799) (No. 17,708) (Ellsworth, C.J.) (Supplemental Note by Cobbett based on the record offered “for the purpose of giving greater precision”) (discussing the case of Aeneas Macdonald, who “served under the Pretender at Culloden” and noting that in his case “the judges all held, that notwithstanding his removal to France, he still remained a subject, and the jury found him guilty of high treason”).

138. Letter from Lord Mansfield to Lord George Germain, (Aug. 8, 1776), TNA CO 5/43/345, reprinted in 12 DOCUMENTS OF THE AMERICAN REVOLUTION, *supra* note 77, at 180.

139. Letter from Lord Suffolk to Lords of the Admiralty (Aug. 16, 1776), TNA SP 42/49/255. Suffolk directed that the crew be put in the King’s service on a vessel heading to the East Indies or Mediterranean station. *Id.*; *see also* Letter from Philip Stephens to Vice Admiral Sir James Douglas (Sept. 30, 1776) (ordering the Crew put in service on the *Rippon* or otherwise distributed to “other Ships that want Men”), in 6 NAVAL DOCUMENTS OF THE AMERICAN REVOLUTION 619 (William James Morgan ed., 1972).

140. *Independent Chronicle* Thursday, January 23, 1777 (reporting Johnson’s escape), in 7 NAVAL DOCUMENTS OF THE AMERICAN REVOLUTION 1024 (William James Morgan ed., 1976); 1 GARDNER W. ALLEN, A NAVAL HISTORY OF THE AMERICAN REVOLUTION 267 (1913). For his part, Johnson found his way back to America to join the Continental Navy, where he rose to the rank of captain. *See id.*

only to escape a second time from English imprisonment.¹⁴¹) The other officers also attempted to win their freedom via escape, but it seems that only one succeeded.¹⁴²

B. The Prisoners Keep Coming and One American Invokes the Habeas Corpus Act Before the British Courts

Mansfield's advice was nothing more than a stopgap measure. The time by which the British would have to confront the role of the Habeas Corpus Act as it applied to the many American prisoners being brought to English shores was fast approaching. By late 1776, ships delivering American prisoners to England were now arriving in a constant stream. Lord Suffolk, inundated with requests from the Lords of Admiralty as to how to proceed in such cases, repeatedly advised that all prisoners be detained "in safe Custody till further Orders."¹⁴³

One such American was Ebenezer Smith Platt. Platt had been involved in the first capture of a British ship in the colonies, although it was only some time later that the British took him into custody in Jamaica. Platt's transport from Jamaica to England followed aboard the *Pallas*.¹⁴⁴ Platt's story suggests that the Habeas Corpus Act was indeed very important—and well known—to Americans. The administration initially detained Platt, like the officers of the *Yankee*, on a ship at port rather than on land, having moved him to the *Centaur* from the *Pallas*.¹⁴⁵ During this time, before he had even set foot on English soil, Platt requested permission to "send for an attorney . . . [so] that I may lay before him a State of my Case, in order to have the benefit of the Habeas Corpus Act . . . and want nothing but to be tried by the Laws of my King &

141. Downer, *Eliphalet*, CONNECTICUT BIOGRAPHICAL DICTIONARY 252 (Caryn Hannan et al. eds., 2008); Deposition of Eliphalet Downer (Mar. 30, 1777) (detailing the surgeon's initial escape), in 8 NAVAL DOCUMENTS OF THE AMERICAN REVOLUTION 723 (William James Morgan ed., 1980).

142. *Journal of Timothy Connor, Massachusetts Privateer Brigantine* (Forton Prison, July 30, 1777) (reporting of the remaining *Yankee* officers that "four more broke out . . . one got off clear and the other three was re-taken"), in 9 NAVAL DOCUMENTS OF THE AMERICAN REVOLUTION 539–40 (William James Morgan ed., 1986).

143. Letter from Lord Suffolk to the Lords of the Admiralty (Jan. 15, 1777), TNA SP 42/50/33 (giving orders respecting 121 American prisoners arriving on the *Raisonable*); see also, e.g., Letter from Lord Suffolk to the Lords of the Admiralty (Dec. 2, 1776), TNA SP 42/49/292 (giving orders respecting thirteen American prisoners arriving on the *Pallas*); Letter from the Lords of the Admiralty to Lord Suffolk (Dec. 19, 1776), TNA SP 42/49/294 (requesting instructions for nine American prisoners arriving on the *Towey*); Letter from Lord Suffolk to the Lords of the Admiralty (Jan. 8, 1777), TNA SP 42/50/25 (giving orders respecting nine American prisoners arriving on the *Squirrel*); Letter from the Lords of the Admiralty to Lord Suffolk (Jan. 20, 1777), TNA SP 42/50/39 (reporting arrival of captured rebel privateer sloop, *The Charming Sally*, and requesting instructions for treatment of the prisoners taken with the sloop).

144. See Letter from Ebenezer Smith Platt to the Commissioners (Apr. 21, 1778), in 6 THE PAPERS OF JOHN ADAMS 44 (R.J. Taylor et al. eds., 1983); see also Sheldon S. Cohen, *The Odyssey of Ebenezer Smith Platt*, 18 J. AM. STUDIES 255, 258–63 (detailing Platt's involvement in the capture and the circumstances of his arrest).

145. See *id.*

Country.”¹⁴⁶ Mansfield’s concern over an American claiming the benefits of the Act had finally come to pass. The way that Platt’s case unfolded demonstrates that Platt’s confidence in the Act was not unfounded, just naive.

When Platt landed in England in December 1776, his requests for an attorney caused sufficient concern that Lord Suffolk sought the advice of the attorney and solicitor generals as to how best to proceed in the matter.¹⁴⁷ Thurlow and Wedderburn responded by stressing the importance of being able to prove that Platt’s actions bore “a connection with the treasonable force . . . in arms within [Georgia].”¹⁴⁸ “Supposing that to be the case,” they continued, “[i]t will be proper to commit him for trial in the ordinary course. . . .”¹⁴⁹ But, they noted, “[t]he temper of our Laws certainly requires that every Prisoners should be allowed the means of suing out a Habeas Corpus.”¹⁵⁰ Concluding, they advised: “[I]t seems better to proceed to His examination; and to discharge Him, if nothing appears in proof against Him; or to commit Him regularly if a sufficient foundation be laid for that.”¹⁵¹ In other words, Thurlow and Wedderburn counseled the administration to levy criminal charges or else be prepared to see a court discharge Platt upon his invocation of the protections of the Habeas Corpus Act.

Notably, Platt’s captors also delivered three witnesses to testify to his treason—specifically, officers of the British ship *Philippa*, which Platt and others had purportedly captured outside Savannah and stripped of its stock of gunpowder for the use of the American rebels.¹⁵² On this basis, the administration committed Platt to Newgate Prison in London on January 23, 1777, pursuant to a warrant issued by Justice of the Peace William Addington charging Platt with “High Treason at Savannah in the Colony of Georgia in North America.”¹⁵³ Nonetheless, Platt remained determined to win his discharge by invoking the Habeas Corpus Act in the English courts. What he may not have known at the time was that his early chances of success were

146. Letter from Ebenezer S. Platt to Captain Hughes of the *Centaur* (Oct. 4, 1776), TNA TS 11/1057.

147. Letter from Lord Suffolk to the Lords of the Admiralty (Dec. 10, 1776), TNA SP 42/49/298.

148. Letter from Edward Thurlow and Alexander Wedderburn to the Earl of Suffolk (Dec. 10, 1776), TNA TS 11/1057.

149. *Id.*

150. *Id.*

151. *Id.*

152. Letter to Wm. Chamberlain from Captain Maitland (Jan. 10, 1777), TNA TS 11/1057. Notably, the Continental Congress ordered the seized gunpowder to be sent to the aid of General George Washington’s troops in Boston, where it played a key role in the Continental forces taking control of the city. See Cohen, *supra* note 144, at 260–61.

153. *The King v. Platt*, (1777) 168 Eng. Rep. 181, 182, 1 Leach 157, 158 (replicating warrant), TNA TS 11/1057 (copy of original warrant).

substantial, given that the three original witnesses against him had escaped and fled in late December.¹⁵⁴

Platt's litigation strategy, however, turned out to be disastrous. In February, his counsel—the very same John Alleyne who had earlier reportedly taken on Ethan Allen's case—presented Platt's petition for habeas corpus to the Court of Oyer and Terminer and General Gaol Delivery at the Old Bailey. This made sense insofar as the Old Bailey immediately bordered Newgate. But it was a catastrophic jurisdictional mistake in light of the governing law of treason and what was soon to transpire in Parliament. On the first point, the treason statute of Henry VIII provided that all treasons committed outside the realm of England would be heard before the Court of King's Bench or else before a special commission set up for the purpose.¹⁵⁵ Because this meant that only King's Bench could grant Platt's bail or discharge, the Justices of Gaol Delivery declared that his petition “to a Court of Gaol Delivery, who have no power at all to try the prisoner, is nugatory and void.”¹⁵⁶ Nonetheless, the Justices studying Platt's case were quite clear that he was entitled to the full benefits of the Act. As they put it, “the prisoner may apply, under the *Habeas Corpus* Act, to the Court of King's Bench, to be tried or bailed; and if not tried in two terms after his prayer is received, he will be intitled to his discharge; but this Court cannot interpose.”¹⁵⁷ In short, Platt just had to file his writ in the proper court. But before Platt could do so, Parliament would intervene.

III.

REVISITING SUSPENSION IN PARLIAMENT

While Platt's counsel was arguing on his behalf at the Old Bailey, just a short distance away Parliament began discussions of a bill that would render the proceedings all but moot. In early February, debate began on a bill to suspend the Habeas Corpus Act with respect to American prisoners detained in England. Lord North, prime minister and head of the Commons, explained why such a bill was necessary when he introduced the measure in the Commons:

[T]here had been, during the present war in America, many prisoners made, who were in actual commission of the crime of high treason; and, there were persons, at present, guilty of that crime, who might be taken, but perhaps for want of evidence could not be kept in gaol. That it had been customary upon similar occasions of rebellion, or danger of invasion, to enable the king to seize suspected persons. . . . But as the

154. Letter from W. Cornwallis to Philip Stephens (Dec. 25, 1776), TNA SP 42/49/306 (reporting escape).

155. 35 Hen. VIII, c. 2 (“[A]ll . . . Treasons . . . done perpetrated or commytted or hereafter to be done perpetrate or committed by anye person or persons out of this Realme of Engalnde, shalbe from hensforth inquired of herd and determynd before the Kings Justices of his Benche. . . .”); 33 Hen. VIII, c. 23.

156. *The King v. Platt*, 168 Eng. Rep. at 187, 1 Leach at 169.

157. *Id.* 168 Eng. Rep. at 187, 1 Leach at 170.

law stood . . . it was not possible at present officially to apprehend the most suspected person. . . . *It was necessary for the crown to have a power of confining them like other prisoners of war.*¹⁵⁸

Another account of Lord North's speech reports that he set forth among the "purposes of the bill" the necessity of being able to confine the prisoners "in the same manner that was practiced with respect to other prisoners of war, until circumstances might make it advisable to proceed criminally against them."¹⁵⁹

The next day in the Commons, Lord Germain read the proposed bill, which by design responded to the commission of "acts of treason and piracy" by "certain of his Majesty's colonies" and the fact that "many persons have been seized and taken, who are expressly charged or strongly suspected of . . . treasons and felonies, and many more such persons may be hereafter so seized and taken." Germain noted that because it was simply not possible "to proceed forthwith to the trial of such criminals," the bill permitted detention of such persons without bail or mainprize for as long as it remained in force.¹⁶⁰

The bill, like the war that triggered it, was controversial from the start. Governor Johnstone, though agreeing that it was necessary to "bring[] back the Americans to their allegiance," thought this possible "without the dangerous measure of attacking the grand palladium of the British constitution, the freedom of men's persons."¹⁶¹ Others ridiculed the asserted basis for the legislation, drawing sharp contrasts with prior episodes of suspension. To take one example, the very same John Dunning who had reportedly taken on Ethan Allen's cause pointed to the earlier eighteenth-century episodes of rebellion in Scotland as creating a "necessity" for suspension. Here, however, he argued that there was no "rebellion within the kingdom." "Are we," he asked, "afraid that the people American will pass the Atlantic on a bridge, and come over and conquer us?"¹⁶² Still others feared that the law would be used to detain not just those taken in arms, but any person from the rebellious colonies.¹⁶³

158. 19 COBBETT'S PARLIAMENTARY HISTORY, *supra* note 1, at 4 (emphasis added) (remarks of Lord North on the "Debate in the Common on the Bill for suspending the Habeas Corpus Act," given Feb. 6, 1777). North made two additional points while seeking leave to bring in the bill. First, he stressed that unlike prior historical episodes of suspension, he "would not be thought to hint at any necessity of trusting ministers at present with such a power in general." Second, North observed that under current law, many of the prisoners "could be legally confined only in the common gaols, which would be entirely impracticable." *Id.*

159. 20 THE ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE FOR THE YEAR 1777, at 54 (London, J. Dodsley 1778).

160. 19 COBBETT'S PARLIAMENTARY HISTORY, *supra* note 1, at 4-5 (remarks of Lord Germain given Feb. 7, 1777).

161. *Id.* at 5-6 (remarks of Governor Johnstone). As with Johnstone's remarks, for example, the Habeas Corpus Act was referred to repeatedly by speakers as a "great palladium of the liberties of the subject" and "the palladium of English liberty." *Id.* at 11 (remarks of Charles James Fox); *id.* at 40 (remarks of James Luttrell).

162. *Id.* at 7 (remarks of John Dunning).

163. *See id.* at 16 (remarks of Paul Feilde).

Dunning's comments also reflected those of many others when he raised the concern that the law would "empower[]" the Crown to "apprehen[d], on the mere grounds of suspicion."¹⁶⁴ To this, Attorney General Thurlow expounded that "nothing more was meant by the Bill, than to apprehend, commit, and confine persons actually charged, or suspected of committing, the crime of high treason in American, or on the high seas, or of piracy."¹⁶⁵ This being said, Thurlow did note that "the present Bill . . . was meant to prevent mischief, not with a view to rigorous punishments. . . ."¹⁶⁶ There was some tension between Thurlow's two remarks—the bill targeted persons actually charged with or suspected of committing treason, while its objective was not necessarily punishment. The way in which the administration executed the law, however, ultimately supported Thurlow's vision in large measure.¹⁶⁷

Opponents trotted out the case of Stephen Sayre as an example of the abuse of power that the bill would permit. In response, Lord North defended the handling of Sayre's case, while also highlighting that the bill would now constrain magistrates from releasing on bail any person charged on suspicion of treason. North next made his case for the necessity of "entrust[ing] such extraordinary powers" in the "King's servants" that "would not be proper on ordinary occasions."¹⁶⁸ Those in the opposition were not convinced, and raised the specter of gross abuses on the part of the very same "servants" that North wanted them to trust.¹⁶⁹ Thurlow once again rose in response, noting that if "powers should be abused, that would be a very proper subject for parliament hereafter to enquire into."¹⁷⁰

Unsurprisingly, the bill's opponents in the Commons included John Wilkes, who cited the case of Ebenezer Platt in arguing against the bill. Wilkes called Platt's case "another violation of the law, an evasion of the Habeas Corpus Act." Platt, Wilkes observed, had yet to face his accusers and had been moved from ship to ship upon his arrival in England, allegedly to defeat the

164. *Id.* at 7 (remarks of John Dunning); *see also id.* at 9 (lamenting that under the bill, "[n]o man is exempt from punishment because innocence is no longer a protection"). Charles James Fox raised similar concerns, even invoking the plight of Stephen Sayre. *See id.* at 12 (remarks of Charles James Fox) ("[T]his Bill cares not a fig whether you are guilty or innocent."); *Id.* ("Suspensions, however ill founded, upon tales, however improbable, are received . . . as facts not to be controverted; witness the information of Richardson against Sayre. . . .").

165. *Id.* at 9–10 (remarks of Edward Thurlow) ("It was absurd and preposterous to the last degree, to suppose it was framed intentionally to reach or overtake persons presumed to be disaffected to this government, within this realm.").

166. *Id.*

167. As noted below, the British instituted some screening mechanisms for committing American prisoners in England, yet never prosecuted any American for treason during the war.

168. *Id.* at 13–14, 16; *id.* at 17 (emphasizing that "detaining [persons reached by the bill] till they could be released by a writ of Habeas Corpus" would "controvert[]" the bill's "very principle, the necessity, at this critical season, of strengthening the hands of government").

169. *See, e.g., id.* at 18 (remarks of James Wallace); *id.* at 19 (remarks of Serjeant Glynn).

170. *Id.* at 19 (contending "it was a most extraordinary mode of reasoning to argue against the use of the Bill, from the possible abuse of it").

service of earlier writs of habeas corpus upon his custodian. Wilkes accordingly moved that the bill be amended to require “an oath of two witnesses to the charge [of treason], and of their being confronted with the prisoner” before any person could be committed.¹⁷¹ The proposal went nowhere and instead triggered reactionary proposals to expand the bill’s reach. Richard Rigby, for example, thought it better to pass a “general suspension of the Habeas Corpus Act” to reach “covert” support for the Americans wherever it may be discovered.¹⁷² Temple Luttrell, in turn, cited a recent case in Dublin, in which merchants sending arms to America had won bail “for want of a law of this kind,” as reason to expand the bill’s reach to “this kingdom and Ireland.”¹⁷³

Throughout the debate in the Commons, members routinely referred to the proposed legislation as a “suspension of the Habeas Corpus Act” and conceived of the bill as a natural outgrowth of the earlier suspension acts.¹⁷⁴ (Attorney General Thurlow, for example, invoked the famous case of William Wyndham and Parliament’s 1715 suspension, claiming that the present bill was modeled on that earlier episode.¹⁷⁵) But, from what appears to have been a concern over triggering protests against arguable domestic application of the Act, the administration was careful not to promote or write the bill as an outright suspension of the Habeas Corpus Act.¹⁷⁶ Members nonetheless articulated great reservations about the bill on this score,¹⁷⁷ leading to approval

171. *Id.* at 30 (remarks of John Wilkes).

172. *Id.* at 34 (remarks of Richard Rigby).

173. *Id.* at 39 (remarks of Temple Luttrell).

174. *See, e.g., id.* at 9 (remarks of John Dunning) (“[W]hatever the title of the Bill may be, it is not an American, so much as it is a British suspension of the Habeas Corpus Act.”); *id.* at 11 (remarks of Charles James Fox) (“[E]xpressing his astonishment . . . at the insolence and temerity of ministers, who could thus dare to snatch [the Habeas Corpus Act] from the people, by mandate manufactured by themselves . . .”); *id.* at 17 (remarks of George Dempster) (referring to “the propriety of suspending the Habeas Corpus Act”); *id.* at 17–18 (remarks of Abel Moysey); *id.* at 30 (remarks of John Wilkes) (observing that “[the] Bill . . . is to suspend the Habeas Corpus Act”); *id.* at 37–38 (remarks of the attorney general) (connecting the proposed legislation to prior acts of suspension). In debating an extension of the original bill, many members of Parliament continued to refer to it as a suspension. *See id.* at 465–66 (remarks of Edmund Burke) (referring to “suspending the Habeas Corpus” and warning that “this suspension may become a standing suspension, and consequently, the eternal suspension and destruction of the Habeas Corpus”); *see also id.* at 464 (remarks of William Baker) (referring to “the late bill for the suspension of the Habeas Corpus Act”).

175. *Id.* at 38 (remarks of the attorney general).

176. The summary of the debates in the *Annual Register* directly supports this explanation for why the bill did not expressly suspend the Habeas Corpus Act. *See* 20 ANNUAL REGISTER, *supra* note 159, at 59. All the same, it is curious that the legislation does not mention the Habeas Corpus Act by name. Nonetheless, it was routinely deemed a suspension by virtually everyone who referred to it during this period, including countless members of Parliament both in the original debates and the renewal debates over the course of the war.

177. *See, e.g.,* 19 COBBETT’S PARLIAMENTARY HISTORY, *supra* note 1, at 18–19 (remarks of John Morton) (raising such concerns); *id.* at 22 (remarks of Thomas Powys) (same). It did not matter that Lord North had claimed the “the inhabitants of Great Britain . . . were not within the Act.” *Id.* at 17.

of an amendment to clarify that the bill should be read to apply not to persons suspected of aiding the American cause from England, but instead only to persons who “shall have been out of the Realm at the Time or Times of the Offence or Offences wherewith he or they shall be charged.”¹⁷⁸ With the amendment, the bill easily passed the Commons by a vote of 112 to 33.¹⁷⁹ What little we know about the debates in the House of Lords suggests that they largely tracked those of the Commons before the chamber also passed the bill.¹⁸⁰

As passed, the legislation provided:

WHEREAS a Rebellion and War have been openly and traiterously levied and carried on in certain of his Majesty’s Colonies and Plantations in *America*, and Acts of Treason and Piracy have been committed on the High Seas, and upon the Ships and Goods of his Majesty’s Subjects, and many Persons have been seised and taken, who are expressly charged or strongly suspected of such Treasons and Felonies, and many more such Persons may be hereafter so seised and taken: And whereas such Persons have been, or may be brought into this Kingdom, and into other Parts of his Majesty’s Dominions, and it may be inconvenient in many such Cases to proceed forthwith to the Trial of such Criminals, and at the same Time of evil Example to suffer them to go at large; be it therefore enacted . . . That all and every Person or Persons who have been, or shall hereafter be seised or taken in the Act of High Treason committed in any of his Majesty’s Colonies or Plantations in *America*, or on the High Seas, or in the Act of Piracy, or who are or shall be charged with or suspected of the Crime of High Treason, [committed in the same domains], or of Piracy, and who have been, or shall be committed, in any Part of his Majesty’s Dominions, for such Crimes . . . or for Suspicion of such Crimes, or any of them, by any Magistrate having competent Authority in that Behalf . . . shall and may be thereupon secured and detained in safe Custody, without Bail or Mainprize, until the first Day of *January*, [1778]; and that no Judge or Justice of Peace shall bail or try any such Person or Persons without Order from his Majesty’s most honourable Privy Council, [during this period]; any Law, Statute, or Usage, to the contrary in anywise notwithstanding.¹⁸¹

Thus, the Act applied only to acts “committed in any of his Majesty’s Colonies or Plantations in *America*, or on the High Seas.” It also plainly governed those

178. John Dunning proposed the clarifying amendment, which was amended in turn by Charles Wolfran Cornwall and then adopted. *See id.* at 49. The ultimate language included in the Act is quoted. *See* 17 Geo. 3, c. 9, pt. IV, pmbl. (1777) (Gr. Brit.).

179. *See* 19 COBBETT’S PARLIAMENTARY HISTORY, *supra* note 1, at 51.

180. *See id.* at 51–53.

181. 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. 3, c. 9 (1777) (Gr. Brit.); *see* 35 H.L. JOUR. (1777) 78, 82–83 (Gr. Brit.) (noting royal assent given Mar. 3, 1777).

engaged in piracy—a clause included to reach the acts of American privateers, for Parliament would never acknowledge such persons as sailing under proper letters of marque issued by an independent foreign government.

Like the suspensions that preceded it during the late seventeenth and early eighteenth centuries, this legislation granted temporary allowance for detention without trial and conviction of “[p]ersons” who were either charged with high treason or more generally “suspected” of the same.¹⁸² As its terms made clear, the entire purpose of the suspension was to permit the detention of prisoners during the war outside the normal criminal process. Parliament explained that it adopted the Act because “it may be inconvenient in many such Cases to proceed forthwith to the Trial of such Criminals”—that is, the rebellious American colonists—“and at the same Time of evil Example to suffer them to go at large.” Toward that end, the legislation, which came to be known as “North’s Act,” called for the designation of “one or more Places of confinement within the Realm, for the Custody of such Prisoners,” such that they would not be kept in “the Common Gaol[s].”¹⁸³

In this important episode, one finds reinforcement of the key lessons of earlier periods of unrest in English history. First, the episode highlights the important relationship between the Habeas Corpus Act’s promise of a timely trial and the suspension of that right by Parliament. Second, the limited nature of North’s Act—applying as it did only to Americans imprisoned in England based on actions committed in America or on the high seas—reveals that the geographic reach of the Habeas Corpus Act mattered enormously in constructing the legal framework governing the treatment of American prisoners. Finally, as with earlier episodes of English suspensions,¹⁸⁴ it was Parliament and not the executive that controlled the terms of British detention policy, at least where the Habeas Corpus Act governed.

A. The New Legal Landscape: Suspension for American Rebels Held in England

Lord Suffolk wasted little time in notifying the Lords of the Admiralty of the new legislation. On the day that the law received the King’s assent, Suffolk immediately sent notice to the Lords of its passage and asked them to designate “one or more Place or Places of Confinement within the Realm for the Custody of such Prisoners . . . to be appointed in the Manner & for the Purposes [set forth in the Act]—instead of the Common Gaols.”¹⁸⁵ In response, the Lords recommended Mill Prison in Plymouth and Forton Prison in Portsmouth, both

182. 17 Geo. 3, c. 9 (1777) (Gr. Brit.). For details on the earlier suspensions, consult Tyler, *supra* note 3, at 934–44.

183. 17 Geo. 3, c. 9, pmb. & pt. II (1777) (Gr. Brit.).

184. *See generally* Tyler, *supra* note 3, at 934–44 (discussing earlier suspensions).

185. Letter from Lord Suffolk to the Lords of the Admiralty (Mar. 4, 1777), TNA SP 42/50/61 (stating that he was writing on the day of assent).

of which had been “used for the Custody of Prisoners during the last War.”¹⁸⁶ Within weeks, the attorney and solicitor generals had drafted general warrants for detaining prisoners at the two prisons who fell within the terms of North’s Act. Lord Suffolk then ordered that “all persons subject to the provisions of the said Act” who had already been brought to England, along with “all others subject to the said provisions[], who may hereafter be brought[,] . . . be committed to one of the [two] Places of Confinement. . . .”¹⁸⁷ Within months, Mill and Forton would hold hundreds of American prisoners.

On the other side of the Atlantic, reaction to North’s Act was swift and angry. To take but one prominent example, just a few months after passage of the Act, George Washington’s widely published 1777 “manifesto” complained that “arbitrary imprisonment has received the sanction of British laws by the suspension of the Habeas Corpus Act.”¹⁸⁸ And, as almost three thousand Americans subsequently detained in England during the war would learn, suspension meant indefinite detention without trial.

This brings us back to Ebenezer Platt, who remained at Newgate throughout the debates over North’s Act. By the time Platt re-filed his petition for a writ of habeas corpus with the Court of King’s Bench at the start of the Easter Term on April 16, 1777, suspension had become the law.¹⁸⁹ It followed that Platt’s petition was doomed from the start. His request to be tried, bailed, or discharged came before King’s Bench on May 12, the last day of the term. Attorney General Thurlow, aided by James Wallace and James Mansfield, argued for the Crown. Their case was straightforward. Relying upon North’s Act, they asserted that “[p]ersons guilty, or suspected to be guilty, of High Treason in *America*, or Piracy on the high Seas . . . shall be imprisoned and secured without Bail or Mainprize till the 1st of January, 1778, and that no Judge or Justice of the Peace shall bail or try such Persons, unless under

186. Letter from the Lords of the Admiralty to Lord Suffolk (Mar. 6, 1777), TNA SP 42/50/63. The prisons were run by the Board for Sick and Hurt Seamen, which operated under the auspices of the Admiralty Lords. See Catherine M. Prelinger, *Benjamin Franklin and the American Prisoners of War in England During the American Revolution*, 32 WM. & MARY Q. 261, 264 (1975).

187. Letter from Lord Suffolk to the Lords of Admiralty (Apr. 16, 1777), TNA SP 42/50/98; Letter from Lord Suffolk to the Lords of Admiralty (Apr. 23, 1777), TNA SP 42/50. American prisoners were also held in smaller numbers in other locations, including Kinsale in Ireland. See COHEN, *supra* note 96, at 30; see also FRANCIS D. COGLIANO, AMERICAN MARITIME PRISONERS IN THE REVOLUTIONARY WAR 131 (2001) (detailing transfer of American prisoners from Kinsale to Mill Prison).

188. George Washington, *Manifesto of General Washington, Commander in Chief of the Forces of the United States of America, in Answer to General Burgoyne’s Proclamation* (July 19, 1777), in 47 THE GENTLEMAN’S MAGAZINE, AND HISTORICAL CHRONICLE FOR THE YEAR 1777, at 456–57 (Sylvanus Urban ed., London, D. Henry Sept. 1777), reprinted in CONTINENTAL J. & WKLY. ADVERTISER (Boston) (Mar. 5, 1778), at 3.

189. See TNA TS 11/1057 (Order of the Court of King’s Bench receiving and filing Platt’s petition); TNA KB 21/41 (King’s Bench Entry Book).

License from the Privy Council, signed by six Privy Counsellors.”¹⁹⁰ Platt’s counsel nonetheless repeated an argument made years earlier by the prisoners held in the Tower during the 1722 suspension (a group that included the Bishop of Rochester)—namely, that the words of the statute, speaking as they did to judges in the singular, did not bind the judges of the Court of King’s Bench. Once again, the argument failed, though not before levying some good points. “If any Law is to be construed strictly,” Platt’s counsel argued, “surely that is which acts in direct Contradiction of that great Bulwark of our Liberties the Habeas Corpus Act; if any law is to be construed strictly, surely that is which affects an unfortunate Man denied the Privilege of evincing his Innocence to the World, and that boasted Birth-Right of every *Englishman*, a Trial by his Peers.”¹⁹¹

In an opinion by Lord Mansfield, joined by his fellow judges, King’s Bench told Platt that it was powerless to grant him any relief. Mansfield began by observing that in relevant part, the Habeas Corpus Act was “made to accelerate the Trial of Persons committed for Treason or Felony.”¹⁹² Nonetheless, Mansfield noted, on several occasions, Parliament had set aside that promise, and those acts, “from the Effect that they had . . . have always been called *Suspensions of the Habeas Corpus Act*.”¹⁹³ This followed, Mansfield observed, because “the Act of Habeas Corpus says *they shall be tried or bailed* under this Proviso; these temporary Acts say *during a limited Time they shall not be tried*, nor consequently for Non-Trial *shall not be bailed*; that has been the Effect of them, and therefore they have obtained that Name.”¹⁹⁴ As to whether North’s Act could be construed as not applying to the Court of King’s Bench, Mansfield again relied on historical practice, noting that “there is not a single Instance alleged of one Man . . . who has had the Benefit of this Clause of the Habeas Corpus Act, by Virtue of its not extending to the *Court of King’s Bench*.”¹⁹⁵ Indeed, as Mansfield observed, case notes

190. AN ARGUMENT IN THE CASE OF EBENEZER SMITH PLATT, NOW UNDER CONFINEMENT FOR HIGH TREASON 2 (London, G. Kearsly 1777). Here, I draw from the notes taken and published by a “Gentleman of the Law” who observed the arguments and purported to transcribe Lord Mansfield’s speech in delivering the court’s decision in Platt’s case, which constitutes the best source we have recording what transpired.

191. *Id.* at 6.

192. *Id.* at 11.

193. *Id.* at 12.

194. *Id.*

195. *Id.* at 13. Here Mansfield’s opinion echoes the brief filed on behalf of the Crown, which made this argument and relied on earlier suspension acts that had used the same language. Brief For the Crown, The King against Platt, TNA TS 11/1057 (“[A]ltho’ many persons were in custody during those periods yet it does not appear that the Court of King’s Bench in any one instance presumed to Bail a prisoner comprehended within the perview of those [prior] Statutes [suspending the Habeas Corpus Act].”).

from the Bishop of Rochester's case in 1722 show that King's Bench had earlier rejected the very same argument.¹⁹⁶

Mansfield next remarked that “[t]he purpose of the Act is to prevent the Necessity of the Trial,” which itself derived from the positive law that constituted the Habeas Corpus Act. As the 1777 Act set aside the commands of that positive law, he declared, “of course it extends to the Judges of the Court of *King's Bench*.” Any other construction “would destroy the whole Meaning” of the Act.¹⁹⁷ Finally, Mansfield closed by declaring that he was “clear, without a Particle of Doubt,” that Platt's petition for relief was the kind of case “that the Act . . . was particularly made to prevent.”¹⁹⁸ The court ordered Platt remanded to Newgate and “kept in safe Custody until he shall be from thence discharged by due course of law.”¹⁹⁹

Platt's frustration with his plight at this point is revealed in a letter he wrote to Benjamin Franklin just days after his appearance before King's Bench. Franklin was then heading up diplomatic efforts from Paris on behalf of American prisoners in England. Platt reported: “Since my Confinment here I have taken every Legal step to Indeavour to be brought to tryall but could not, and fear I shall not be, as I am now detained under that Accursd, and Arbitrary Law, for the suspension of the Habeous Corpus Act until January 1778.”²⁰⁰ In fact, Platt languished at Newgate for an even longer period in light of Parliament's decision to extend the suspension legislation targeting the American rebels through 1778. (Parliament would renew the extension five

196. Here, too, Mansfield relied upon arguments levied in the Crown's brief arguing against bail. *See* Brief For the Crown, The King against Platt, TNA TS 11/1057. Notably, Mansfield stated in announcing his opinion that he was “taking it now all along that the Case is clearly within the 7th Section of the Habeas Corpus Act, just as a Case of High-Treason in *England* would have been,” while also noting that “there is a Provision with Regard to foreign Crimes in the 16th Section of the Act.” In other words, Mansfield did not question—though he suggested a basis on which one could—whether the full benefits of Section 7 of the Act would have governed Platt's case in the absence of a suspension. AN ARGUMENT IN THE CASE OF EBENEZER SMITH PLATT, *supra* note 190, at 14. The very existence of the suspension, however, demonstrates that it was predicated upon a parliamentary belief that the benefits of Section 7 would apply to royal subjects brought to England for detention. (After all, the suspension only applied to cases arising out of treasonous practices in America and on the high seas.)

197. AN ARGUMENT IN THE CASE OF EBENEZER SMITH PLATT, *supra* note 190, at 14–17. Mansfield reasoned that since “no single Judge can try” a party for treason, the prohibition against any “judge” awarding bail or other relief, if construed as Platt would have it, would be pointless insofar as it would constrain a party from doing something that it could not have done in the first instance. *See id.* at 17.

198. *Id.* at 17. Correspondence from one supporter of the American cause in London to Benjamin Franklin suggests that Lord Mansfield gave extra-judicial advice to Platt. The March 1777 letter reports that Mansfield recommended Platt petition the King directly and take an oath of allegiance to win his freedom. Letter from Elizabeth Wright to Benjamin Franklin (Newgate, Mar. 10, 1777), in 23 THE PAPERS OF BENJAMIN FRANKLIN 457, 458 (William B. Wilcox et al. eds., 1983) [hereinafter FRANKLIN PAPERS].

199. KB 21/41 (King's Bench Entry Book, 1777).

200. Letter from Ebenezer Smith Platt to Benjamin Franklin (Newgate, Mar. 10, 1777), in 23 FRANKLIN PAPERS, *supra* note 198, at 457.

times, leaving North's Act in place through the year 1782.²⁰¹) It was not until April 1778 that the diplomatic efforts of Benjamin Franklin and the Committee for American Prisoners in Paris finally succeeded in negotiating Platt's release.²⁰²

In the wake of the passage of North's Act, hundreds of other American prisoners would find themselves committed to Mill and Forton Prisons. Meanwhile, early efforts directed by Benjamin Franklin out of Paris for the exchange of American prisoners in Europe met great resistance. Lord Stormont would not even entertain such proposals, reportedly saying: "I never treat with rebels, unless to receive submission."²⁰³ By autumn of 1777, during debates in Parliament over whether to extend North's Act, the opposition drew attention to the inconsistent treatment of American prisoners depending upon what side of the Atlantic they were held. In the Commons, for example, Edmund Burke complained over the failure to reach a cartel for the exchange of American prisoners in Europe, and charged that North's Act was "only to save appearances."²⁰⁴ In the House of Lords, the Duke of Richmond once again raised the plight of Ebenezer Platt, noting that "[a]ll he asks is to be brought to trial."²⁰⁵ But the administration remained firm in its conviction that North's Act remained both a necessary and prudent course for dealing with American prisoners detained within the realm. Thus, in defending the first extension of North's Act, Lord Chancellor Henry Bathurst observed:

It was certainly necessary that some punishment should be inflicted on persons taken in the act of enmity against us; but what ought it to be? since it was plainly not expedient that they should be discharged, and not political, from the apprehension of retaliation, to put them to immediate death. What was the alternative? . . . [T]he only just medium had been adopted; that of preserving them until the conclusion of the war, so that they might retain the power of punishment without doing it at a time when the consequences might fall upon such of our

201. See 22 Geo. 3, c. 1 (1782) (Gr. Brit.); 21 Geo. 3, c. 2 (1781) (Gr. Brit.); 20 Geo. 3, c. 5 (1780) (Gr. Brit.); 19 Geo. 3, c. 1 (1779) (Gr. Brit.); 18 Geo. 3, c. 1 (1778) (Gr. Brit.).

202. Letter from Matthew Ridley to the American Commissioners (Apr. 3, 1778), in 26 FRANKLIN PAPERS 227 (William B. Wilcox et al. eds., Yale University Press 1987). In January 1778, Platt directly petitioned Lord Suffolk that he be brought to trial or admitted to bail. See Letter from Ebenezer Smith Platt to the Earl of Suffolk (Jan. 8, 1778), TNA TS 11/1057. For more on how Platt came to Franklin's attention, consult Prelinger, *supra* note 186, at 265–66.

203. 19 COBBETT'S PARLIAMENTARY HISTORY, *supra* note 1, at 462–63 (remarks of Edmund Burke, quoting Lord Stormont); see also 21 THE ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE FOR THE YEAR 1778, at 58 (London, J. Dodsley 1800) (noting same). Stormont recorded his response as worded slightly differently, but to the same effect: "The King's Ambassador receives no applications from rebels, unless they come to implore his Majesty's mercy." Prelinger, *supra* note 186, at 263 (citing Report from Lord Stormont to Lord Weymouth (Apr. 3, 1777), TNA SP 78/302).

204. 19 COBBETT'S PARLIAMENTARY HISTORY, *supra* note 1, at 463 (remarks of Edmund Burke).

205. *Id.* at 561 (remarks of the Duke of Richmond).

subjects as were now in a similar situation in America.²⁰⁶

Similar defenses were advanced in support of subsequent renewals of North's Act throughout the war.²⁰⁷

Evidence suggests that in compliance with the terms of North's Act, at least initially, the government took measures to screen prisoners before their committal. For example, in one of the prisoner narratives preserved from this period, William Russell notes that upon arrival in England, he was told "to go on shore to be examined" and that he was then "[e]xamined by 2 justices and committed to Mill Prison in Plymouth for Piracy, Treason, and Rebellion against his Majesty on the High Sea."²⁰⁸ Another prisoner, Charles Herbert, described a similar commitment procedure. After being called together with a group of American prisoners before "the judges and examined," Herbert recorded, the prisoners were asked about the location of their birth, whether they had a commission from Congress, and the details of their service and capture. Later, he reported, "[W]e were called up a second time, one at a time, and asked the same questions, to which we answered." After being examined still a third time, Herbert wrote, "[W]e were called up together, as at the first, and our commitments were read to us and delivered to the constable."²⁰⁹ As

206. *Id.* at 561 (remarks of the Lord Chancellor).

207. For example, several American newspapers reported on the motion by Sir Grey Cooper in November of 1780 for a bill to extend North's Act for a fourth time on the basis that "should [the Act] expire in January next (which was the present limitation of its existence) no prisoner charged with such offences could be detained after that period, and three or four hundred persons now in confinement must of course be set at liberty." *House of Commons, Nov. 10, INDEP. LEDGER & AM. ADVERTISER*, Apr. 9, 1781 at 1. Of course, Grey's statements are not entirely true, as the option of trying the Americans as traitors remained available, at least in theory. Grey's motion spurred some in the opposition to complain about the detention of Americans in Britain "without benefit of our equal laws and free constitution." *See id.* (reporting remarks of Sir George Younge). William Baker in turn remarked on the inconsistency of committing the American prisoners on charges of high treason "and then exchange[ing them] in cartels." *Id.*

208. Russell's account is detailed in COGLIANO, *supra* note 187. *See id.* at 42 (quoting Russell's journal). Many first-person accounts of life in Mill and Forton Prisons exist, including *A Yankee Privateersman in Prison in England, 1777-1779*, in 30 *NEW ENG. HIST. & GENEALOGICAL REG.* 343-52 (John Ward Dean ed., 1876). Several others are discussed in COHEN, *supra* note 96; Olive Anderson, *The Treatment of Prisoners of War in Britain during the American War of Independence*, 28 *INST. HIST. RES., BULL.* 63, 76 n.1 (1955); Jesse Lemisch, *Listening to the "Inarticulate": William Widger's Dream and the Loyalties of American Revolutionary Seamen in British Prisons*, 3 *J. SOC. HIST.* 1, 5-29 (1969).

209. COGLIANO, *supra* note 187, at 46 (quoting CHARLES HERBERT, *RELIC OF THE REVOLUTION* 44 (Boston, C.H. Peirce 1847)). A similar journal account described how "three justices" examined a group of nine Americans both separately and together for four hours before their committal to Mill Prison for High Treason. *See Samuel Cutler's Diary*, 32 *NEW ENG. HIST. & GENEALOGICAL REG.* 184, 186 (Rev. Samuel Cutler ed., Boston, David Clapp & Son 1878). Yet another talked about being "examined[,] tried & committed . . . as Rebels & Pirates" by warrants issued by "commissioners." John K. Alexander, *Forton Prison During the American Revolution: A Case Study of British Prisoner of War Policy and the American Prisoner Response to that Policy*, in 103 *ESSEX INST. HIST. COLLECTIONS* 365, 369 (1967). One British historian described the general framework as permitting detention on charge of treason or piracy "provided adequate evidence could

late as 1780, moreover, Russell wrote in his journal that a number of Americans who had not been properly committed were turned away from Mill Prison at the gate.²¹⁰ For those ordered committed, the examiners issued warrants charging them with treason.²¹¹

Although William Russell would refer to Mill Prison as a “Castle of Despair,” the reality is that conditions were dramatically better at Mill and Forton Prisons than on the floating prison ships on which the British kept countless American prisoners in the New York Harbor, where disease and death rates were staggering.²¹² (There is little wonder that the worst of these prison ships, the HMS *Jersey*, was often referred to as “Hell Afloat.”) All the same, the British government regularly made a point of reminding the Americans detained in England that they were not prisoners of war, as that term was understood under the Law of Nations, but instead criminals and “rebels” still bound by “the cord.”²¹³ This reminder took many forms, including reportedly giving the American prisoners lesser food rations than their French counterparts,²¹⁴ who by contrast were deemed prisoners of war once the two countries were in a declared state of war.²¹⁵ This differential treatment likewise encompassed subjecting American prisoners to irons as a disciplinary measure and requiring the lucky few who benefited from the sporadic prisoner exchanges that Benjamin Franklin negotiated successfully to request the King’s

be submitted to the committing magistrate of their capture on an armed vessel.” See Anderson, *supra* note 208, at 66 (1955).

210. COGLIANO, *supra* note 187, at 47 (quoting Russell’s journal).

211. Alexander, *supra* note 209, at 365, 369 (citing sources).

212. See COGLIANO, *supra* note 187, at 69, 142–65 (comparing the British prisons in England and America and detailing Russell’s stay on the *Jersey* upon his second capture at the hands of the British); Lemisch, *supra* note 208, at 9–13, 14–15, 17–20. How well the American prisoners were treated in Britain is the subject of some dispute among historians. John Alexander explains some of the “strikingly divergent views” as resulting in large part from whether scholars have relied primarily on British or American sources. Alexander, *supra* note 209, at 365.

213. For extensive discussion of the significance of falling within the “protection” of English law through expected allegiance, consult generally Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823 (2009).

214. Compare Anderson, *supra* note 208, at 72, 83 (noting that the Americans received two-thirds of the bread rations of regular prisoners of war), and COHEN, *supra* note 96, at 174 (detailing a 1782 letter sent by Mill prisoners to the Lords of the Admiralty complaining about lesser bread rations, and the Admiralty’s defensive response that the bread quality was comparably better than that given to prisoners of other nations), with COGLIANO, *supra* note 187, at 54–55 (noting that the Americans divided the standard rations for four men by six prisoners).

215. See Anderson, *supra* note 208, at 67. France and Great Britain entered a formal cartel for the exchange of prisoners in March 1780. See *id.* at 71. In time, Spanish and Dutch prisoners were also kept at the prisons originally designated for detaining Americans. See COGLIANO, *supra* note 187, at 49 n.52 (citing archival documents and correspondence). It bears noting that during this period, the British government sometimes prosecuted under domestic law aliens who entered the King’s realm and committed crimes when they were not in the service of a foreign wartime enemy. This practice illustrates that the lines of protection did not exclusively track subjecthood. For more on this issue, consult TYLER, *HABEAS CORPUS GOES TO WAR*, *supra* note 19.

pardon before they would be released.²¹⁶ (Of the approximately three thousand Americans detained in Britain during the war, only about three hundred enjoyed their release as a result of such exchanges before the end of hostilities between the countries.²¹⁷ The much higher rates of exchange in America were largely the result of the fact that there was simply nowhere for the British to detain many of the captured rebels.) For those Americans who remained imprisoned in England, the government had no obligation to bring them to trial given the numerous extensions of North's Act, and it followed that the British government never did try any American for treason.²¹⁸

Lord Germain's papers from this period underscore the administration's determination to treat the Americans as criminals and not as prisoners of war. Interestingly, they also reveal adherence (at least on his part) to the idea that even within the context of a suspension, prisoners should not be committed without sufficient evidence to support formal charges of treason or piracy, such that the individuals fell within the strict terms of North's Act. Thus, in one notable exchange, Lord Germain wrote to Quebec Governor Frederick Haldimand in March of 1780 complaining that a rebel had been sent over without any evidence "to justify his detention," thereby compelling the prisoner's discharge. Germain advised:

[U]pon this occasion I think it proper to observe to you, that the sending [of] Persons to England of whose disaffection you have not full proof & that proof being authentically transmitted along with them is only exposing the weakness of Government . . . , for no person can be kept in Confinement in this Country unless committed upon a Criminal Charge verified by the Oath of one or more credible Witness, nor can they without such Charge be restrained from quitting the Kingdom. . . .²¹⁹

216. COGLIANO, *supra* note 187, at 131, 133. The British navy tried to lure defectors "before they were committed to prison," for "[o]nce charged with treason and piracy, would-be enlistees required pardons from the king before they could enter the navy." *Id.* at 116.

217. See Prelinger, *supra* note 186, at 262. On the securing of pardons in such cases, see COHEN, *supra* note 96, at 143. Later in the war, this requirement appears to have been dispensed with in such cases. See *id.* at 177. On the prisoner exchanges negotiated by Benjamin Franklin, see, e.g., *id.* at 150–60; Sheldon S. Cohen, *William Hodgson: An English Merchant and Unsung Friend to American Revolutionary Captives*, 123 PA. MAG. HIST. & BIOGRAPHY 57, 68–72 (1999).

218. MASSACHUSETTS HISTORICAL SOCIETY REPORT, *supra* note 112, at 25. The parallel absence of compulsion to try so-called rebels for treason in America followed from the absence of the protections of the Habeas Corpus Act there.

219. Letter from Lord George Germain to Governor Haldimand (Mar. 17, 1780), TNA CO 43/8/191. Notably, Germain contrasted the situation in Canada, observing that in Nova Scotia, "the same objections to their detention will probably not occur." "[O]n that account," Germain counseled, "I should recommend your sending to Halifax such disaffected Persons of whose Guilt you have no doubt, but against whom you cannot support the Charge by sufficient Evidence to secure their Commitment in England & yet judge it proper to send out of the Province." *Id.*

Here, one finds evidence of a determination to address the wayward subjects within the constraints imposed by domestic criminal law. To make the point all the more clear, Germain continued:

The Revolted Provinces not being on the foot of a Foreign Enemy their Prisoners are not deemed Prisoners of War in England but are committed for High Treason upon proof of their having borne Arms against The King such proof therefore it will be necessary for you to transmit with any that you think proper to send to England, but as exchanges are more readily made from New York, I should recommend to you to avail yourself of such Conveyances as offer to send those You have thither.²²⁰

Once again, the basis for British policy was clear: the Americans were traitors. Treating the Americans as prisoners of war in the service “of a Foreign Enemy” would have conveyed an implicit recognition of American independence, something the British were unwilling to do at this stage of the war.

Germain’s advice that Governor Haldimand curtail sending more prisoners to England and instead exchange them in North America had little influence. By October of that same year, Haldimand was still sending ships of rebel prisoners to England. As he explained to Lord Germain, “every Post Capable of Lodging Prisoners was full, they consumed a Quantity of Provisions and employed many Troops to guard them, whom I wished to imploy on more useful Service.” One reason that the prisoner ranks had grown so significantly, Haldimand wrote, was because General Carlton “had refused to enter upon any cartel” with the enemy, a decision of which Haldimand approved.²²¹ The Governor was concerned that in the event of an exchange, rebel sailors would immediately return to service and disrupt the province’s trade. Haldimand, however, did comply with Germain’s request that he send prisoners with better proof, assuring Germain that a group was “accompanied with sworn Certificates of their being taken in Arms.”

One prisoner in particular who was dispatched from the Canadian coast to England during this period would warrant special attention upon his arrival in London.

220. Letter from Lord George Germain to Governor Haldimand (Mar. 17, 1780), TNA CO 43/8/192.

221. Letter from Governor Haldimand to Lord George Germain (Oct. 25, 1780), TNA CO 42/40/168 (“The many Inconveniences, we are daily exposed to, from the Number of Rebel Prisoners now in the Province, Where some of them have been confined these four Years, has induced me to send them by the present Fleet to England.”). Haldimand noted that some government buildings, including a prison, had been destroyed in battle and that there were so many prisoners, many were escaping with the help of “Ill disposed Inhabitants.” The Governor also requested that Germain send a vessel to pick up yet more prisoners. *See id.* at 168–69.

B. From President of Congress to the Tower of London: The Plight of Henry Laurens

By Lord Suffolk's direction, the Lords of Admiralty detained most American prisoners brought to England at either Mill or Forton Prisons. The administration detained a handful of more prominent American prisoners, however, in London. The administration lodged the most prominent of all, Henry Laurens, in England's most famous prison, the Tower of London. Laurens, who had served as President of the Continental Congress and been appointed ambassador to Holland, was captured in September of 1780 off the coast of Newfoundland en route to the Netherlands to negotiate a loan to support the war effort.²²² While under chase from the twenty-eight-gun British ship *Vestal*, Laurens burned or dumped overboard most of his papers in a desperate effort to destroy evidence of the purpose of his voyage. Nonetheless, his captors were able to recover sufficient papers, including a draft treaty, to discern his charge and condemn him as a traitor.²²³ Based in part on this discovery, the British soon declared war on Holland.²²⁴

Laurens was taken prisoner aboard the *Vestal* and transported to England.²²⁵ Upon his arrival there, Laurens protested to no avail that imprisoning him, an ambassador, violated the Law of Nations.²²⁶ Of course, the British did not view him as an ambassador, but as a traitor. Lords Stormont and Hillsborough, principal secretaries of state, issued a warrant on October 6, 1780, for Laurens's commitment to the Tower of London as a "close" prisoner. This meant that Laurens was to be kept under constant watch and denied pen and ink as well as visitors in the absence of prior approval. The warrant charged Laurens with high treason, "committed at Philadelphia in the Colony

222. See RAKOVE, *supra* note 79, at 236–38 (detailing events); Henry Laurens, *Journal and Narrative of Capture and Confinement in the Tower of London in 15 THE PAPERS OF HENRY LAURENS: DECEMBER 11, 1778–AUGUST 31, 1782*, at 332–34 (David R. Chestnut et al. eds., 2000) [hereinafter Laurens, Narrative] (same).

223. See Laurens, Narrative, *supra* note 222, at 334–35.

224. See *id.* at 333–34. Laurens had spent time in London in the years leading up to the beginning of the war, overseeing the European education of his children. See RAKOVE, *supra* note 79, at 198–241 (detailing Laurens's life). Incredibly, Laurens had practically predicted his fate in 1775, when he wrote his young son of the possible effects of the war that was then inevitable. Laurens speculated: "I may be a prisoner; in Chains & under Sentence of Death," on account of his role in "Striving to transmit that Liberty to my Children, which was mine by birthright & compact." RAKOVE, *supra* note 79, at 213–14 (quoting 10 THE PAPERS OF HENRY LAURENS: 1774–1776, *supra* note 222, at 139–41) (internal quotations omitted).

225. Curiously, when ordered sent to England by Rear Admiral Edwards in Newfoundland, Laurens was called a "Prisoner of War." Letter from Rear Admiral Rich. Edwards to Captain Berkeley of His Majesty's Ship *Vestal* (Sept. 26, 1780), TNA CO 5/131/300. As discussed *infra*, however, once he arrived in England, the administration consistently treated him as a criminal.

226. 15 THE PAPERS OF HENRY LAURENS, *supra* note 222, at 436 (replicating *Examination of Henry Laurens*, printed in LONDON EVENING POST, Oct. 5–7, 1780) ("When he was told that he was to be committed to the Tower, he told them it was violating the law of nations to detain an Ambassador. . ."); see also DAVID DUNCAN WALLACE, *THE LIFE OF HENRY LAURENS* 358–63 (1915).

of Pennsylvania in America and on the High Seas.” As one archived copy of the document shows, Solicitor General James Mansfield personally approved the warrant.²²⁷

Laurens resided in a two-room apartment at the Tower of London for fifteen long months, during which his health deteriorated considerably.²²⁸ (His secretary, meanwhile, had been sent to Forton Prison, from which he managed to escape in early 1782.²²⁹) By December of 1781, encouraged by Benjamin Franklin, Edmund Burke initiated efforts to win Laurens’s exchange. Although Lord North was reportedly willing to consider an exchange for General Burgoyne, Lord Hillsborough contended that Laurens “could not be discharged & his condition changed from that of State prisoner to a prisoner of War without the intervention of a pardon.” Laurens steadfastly refused to seek a pardon and communicated through Burke his expectation that he be “treated as a prisoner of War.”²³⁰

Burke next took Laurens’s cause to Parliament as part of a broader effort to end what he called the “disgraceful and inconvenient” suspension legislation and substitute in its place a formal policy for the “exchange of prisoners of war” between the British and Americans.²³¹ Burke recognized that Laurens’s commitment followed from North’s Act, but he protested the harsh conditions under which Laurens had been detained (all at Laurens’s expense, no less)²³² along with the patchwork legal framework governing the detention of American prisoners.²³³ North’s Act, in his view, “made no distinctions, such as wisdom and justice required . . . but was confined solely to distinctions purely geographical.”²³⁴ Burke continued: “Thus it depended not on the enormity of each captive’s suspected guilt, but on the place where he was taken, and the

227. Warrant for the Commitment of Henry Laurens to the Tower of London, TNA WO 94/10/518; SP 44/96/91; CO 5/43/485 (copy with Mansfield’s approval and signature). For additional details of these events, consult Laurens, Narrative, *supra* note 222, at 340–43.

228. Laurens detailed the events of his time in the Tower in a journal he kept during his stay. He wrote the journal in pencil because he was denied the use of ink as part of the conditions of his confinement. Nonetheless, the narrative survives and includes many interesting stories of his imprisonment, including his avoidance of his fellow prisoner at the Tower, Lord George Gordon, who instigated London’s Gordon Riots in the summer of 1780. *See* Laurens, Narrative, *supra* note 222, at 349–50.

229. Letter from Moses Young to Benjamin Franklin (Feb. 5, 1782), in 36 PAPERS OF BENJAMIN FRANKLIN, available at <http://www.franklinpapers.org/franklin/framedVolumes.jsp>.

230. Laurens, Narrative, *supra* note 222, at 391 (replicating Burke’s letter recounting these events); *see also id.* at 421, 423, 424–25.

231. 22 COBBETT’S PARLIAMENTARY HISTORY 853 (London, T.C. Hansard 1814) (remarks of Edmund Burke given Dec. 17, 1781).

232. Burke stated that Laurens, who had to pay for his “lodgings” at the Tower, told him: “Friend, I believe I shall be obliged to quit my lodgings, for really they are too dear for me; I cannot afford to pay so high for them.” *Id.* at 853, 855 (remarks of Edmund Burke given Dec. 17, 1781).

233. “In the early part of the war,” Burke observed, “the conduct of administration was not so rigid towards the Americans who were brought prisoners into England, as to confine them, without ever admitting them to be exchanged or released.” *Id.* at 855.

234. *Id.* at 857.

place to which he was conveyed, whether he should be considered as a traitor, a pirate, or a mere prisoner of war.”²³⁵

“In America,” Burke observed, “the prisoners were exchanged upon an equal and a liberal principle.” But by reason of the suspension legislation, “when American prisoners were brought here, they were not suffered to be free as prisoners of war on parole, but were either sent to confinement under commitments as pirates, or on a charge of high-treason.” “It was to put justice on a more equal footing,” Burke said, that he intended to push a bill for equal treatment of all American prisoners and their designation as prisoners of war.²³⁶ When parliamentary discussions of Laurens’s case continued days later, Solicitor General James Mansfield did not dispute Burke’s description of the legal patchwork that governed the British treatment of American prisoners. To the contrary, he defended the commitment of Laurens as a “state prisoner” rather than as a “prisoner of war,” declaring that “[i]t was . . . not only lawful, but necessary, to confine him as a criminal” in England.²³⁷

The Laurens family knew all too well how these legal distinctions worked. Laurens’s own son John, a lieutenant colonel in the Continental Army, had been captured in May of 1780 after the fall of Charleston. Instead of facing prison like his father, the younger Laurens, because he remained on American soil, was quickly paroled. By November of 1780, he had been exchanged as part of the succession of informal exchanges between Generals Clinton and Washington.²³⁸ But while the son enjoyed his freedom, the father languished in the Tower of London. Because attempts to negotiate the senior Laurens’s exchange with General Burgoyne had stalled, Burke suggested that Laurens petition directly to Lord North and the House of Commons for his release, which Laurens did.²³⁹ The petition triggered renewed discussions of an

235. *Id.* To underscore his point, Burke invoked the detention of Ethan Allen, whom he noted “had been brought to England in irons; but he was sent back without irons, and exchanged in America.” Laurens, by contrast, had fallen victim to “a new project . . . for narrowing the scale, upon which the King’s pardon was to have been granted to those who had opposed his government.” *Id.* at 855.

236. *Id.* at 857; *see also* 25 THE ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE FOR THE YEAR 1782, at 147 (London, J. Dodsley 1783) (reporting on the same debates).

237. 22 COBBETT’S PARLIAMENTARY HISTORY, *supra* note 231, at 877 (remarks of Mr. Mansfield). Lord North made similar observations. *See id.* 876–77 (Remarks of Lord North).

238. WALLACE, *supra* note 226, at 357–58; MASSACHUSETTS HISTORICAL SOCIETY REPORT, *supra* note 112, at 22. For extensive discussion of the life of John Laurens, consult RAKOVE, *supra* note 79, at 212–41, 276.

239. *See* 22 COBBETT’S PARLIAMENTARY HISTORY *supra* note 231, at 874–75 (Dec. 20, 1781) (remarks of Lord North); *id.* at 877–78 (replicating petition to House of Commons from Henry Laurens). This petition followed an earlier one directed to Hillsborough, Stormont, and Germain. *See* WALLACE, *supra* note 226, at 374–80 (replicating petition). Earlier attempts to sway Laurens to throw off his support of the American cause failed, as did efforts by his supporters to convince him to seek a pardon. *See id.* at 369–72, 383–84. In conjunction with his petition to the House of Commons, Laurens also directed a renewed appeal for his exchange to Congress. *See* 15 PAPERS OF HENRY LAURENS, *supra* note 222, at 458–59.

exchange, but by then the administration had someone else in mind—namely, the constable of the Tower where Laurens was being held prisoner, Lord Cornwallis. This was the very same Cornwallis whose defeat at Yorktown just a few weeks earlier had turned the tide of the war decisively in favor of the Americans and triggered the commencement of peace negotiations.

The actual process by which Laurens obtained his release from the Tower underscored the administration's determination to treat Laurens as a criminal and not as a prisoner of war, even as the tide of the war had turned dramatically against Britain. Specifically, instead of being paroled as Cornwallis had been by the Americans, Laurens was made to go before Lord Mansfield for a bail hearing on December 31, 1781. This followed after Lord Hillsborough, now concerned with Laurens's deteriorating health, had sought advice from Attorney General Wallace as to whether Laurens might be amenable to bailing. Wallace responded that Laurens "may be legally admitted to Bail, by one of the Judges of His Majesty's Court of King's Bench during vacation time under an Order from His Majesty's most Honourable Privy Council."²⁴⁰ In short, by the terms of North's Act, Laurens could not be bailed from the Tower without the consent of the Privy Council. He therefore sought the Council's approval of his discharge.

By his own account of the proceedings before Lord Mansfield, once bail was settled, "when the words of the Recognizance 'Our sovereign Lord the King' were repeated," Laurens declared, "not my sovereign lord."²⁴¹ As part of the proceedings or "farce"—Laurens's term—he was ordered to put up a sizeable bond and agree to appear at Easter Term of the Court of King's Bench for his trial on the charge of high treason.²⁴² By the spring of 1782, with the North administration having fallen and peace negotiations well underway, the British finally dropped any pretense of trying Laurens, discharged his obligation to appear before King's Bench, and ultimately agreed to his exchange for General Cornwallis.²⁴³ In what can only be described as an incredibly ironic conclusion to Laurens's story, he reported that Lord

240. Letter from James Wallace to Earl of Hillsborough (Dec. 24, 1781), TNA SP 37/15, and quoted in Laurens, Narrative, *supra* note 222, at 395 n.138.

241. Laurens, Narrative, *supra* note 222, at 397.

242. See WALLACE, *supra* note 226, at 388; DANIEL J. McDONOUGH, CHRISTOPHER GADSDEN AND HENRY LAURENS: THE PARALLEL LIVES OF TWO AMERICAN PATRIOTS 259 (2000). A copy of the Record of Bail taken may be found at 10 STEVENS'S FACSIMILES 295 (No. 988). As an indication of how close the ties remained between the two countries, Laurens's British friend Richard Oswald reportedly posted his bond. Oswald soon represented Lord Shelburne in early negotiations with the American commissioners in Paris over a possible peace. For details, see RAKOVE, *supra* note 79, at 273.

243. WALLACE, *supra* note 226, at 393–95. A copy of the entry of the Order of Discharge of Laurens's recognizance may be found at 10 STEVENS'S FACSIMILES 303 (No. 990). While bailed, Laurens traveled to Bath to recover his health and later visited Mill Prison, where he worked with Franklin for the exchange of American prisoners.

Shelburne (with whom he had begun discussions in the spring of 1782 over a possible peace) told him:

Well Mr Laurens if we must acknowledge your Independence I shall be grieved as I have already said for your own sakes, you will lose the benefit of the Habeas Corpus Act.²⁴⁴

Never mind that Laurens had never enjoyed the Act's benefits, having first been denied its application in the colonies and subsequently confined without trial in the Tower of London during the Act's suspension in England.

Coinciding with Laurens's October 1780 commitment to the Tower, the administration, under Lord Stormont's signature, issued a warrant similar to those issued in March of 1777 with respect to Mill and Forton Prisons, in which it:

order[ed] & appoint[ed] the Tower of London to be a Place of Confinement for the Custody of all & every Person or Persons who have been or shall hereafter be seized or taken in the Act of High Treason committed in any of His Majesty's Colonies or Plantations in America or on the High Seas, or of Pyracry, & who shall be liable to be committed to any Prison for any of the said Crimes.²⁴⁵

The warrant issued "[i]n Pursuance of" North's Act.²⁴⁶ It does not appear that any other American prisoners were sent to the Tower, but the order suggests that Laurens's capture gave the administration some optimism that other high-profile prisoners might soon join him.

One of those who might have joined Laurens, but ultimately chose not to do so on grounds of fiscal prudence, was John Trumbull, son of Connecticut's governor. Trumbull had left his post as personal aide to General Washington at the start of the war and taken up the study of art. Determined to study under Benjamin West in London, he traveled there by way of France in 1780. His timing was regrettable. American Loyalists met his arrival in July with protest and reported his presence, already known, to the authorities. Initially, the authorities left Trumbull alone, but that changed when news of the hanging of British Major John André by the Americans reached London in November. Soon the administration issued warrants for the arrest of both Trumbull and another American officer of similar rank, Major John Steel Tyler. Tyler escaped, so "Trumbull was taken up for high Treason" in his place and committed to prison.²⁴⁷

244. Laurens, Narrative, *supra* note 222, at 400 (reporting Shelburne's remarks).

245. 10 STEVENS'S FACSIMILES NO. 920, *supra* note 63, at 5.

246. *Id.*; see also TNA SP 44/96/90.

247. Letter from Thomas Digges to John Adams (Nov. 22, 1780), in 10 THE PAPERS OF JOHN ADAMS 365 (Gregg L. Lint et al. eds., 1996). Digges wrote of the events at the time: "Since the news of Adjut. Genl. Andre's Execution in the Rebel Washingtons Camp nothing has been talkd of here but 'making Examples,' acts of retaliation, &ca. &ca. A person of the name of Trumbull was taken up for high Treason on Sunday night and committed Irond to Prison. A search has been made after a Companion of His a Mr. Tyler who I am told got away some days ago." *Id.* The original warrant for

The administration did not charge Trumbull with spying in England, but instead committed him on the charge of bearing arms against the King “within His Majesty’s Colonies and Plantations in America.”²⁴⁸ These grounds, accordingly, brought his detention within the terms of North’s Act. Trumbull wrote of this period that he was set on “forc[ing] myself to a legal trial,” believing that by this point in England, “no jury could be found, who would enforce the penalty of the law.” Accordingly, Trumbull consulted, in his words, “an eminent lawyer,” John Lee, who was King’s counsel and would eventually serve as both solicitor and attorney general. As Trumbull relates their meeting, Lee told him “that the suspension of the act of the habeas corpus, rendered such a measure impossible, and that my only hope was, by impressing the minds of ministers . . . and thus inducing them to release me.”²⁴⁹ It followed that Trumbull could not force a trial; instead, he remained imprisoned for almost eight months before the intervention of Edmund Burke resulted in an order by the King in Council to bail Trumbull on the condition that he leave England.²⁵⁰

C. *The Significance of Geography to the Legal Calculus*

One final story of American prisoners taken during the war and brought to England for detention drives home the central role that the Habeas Corpus Act and its suspension played in the British legal framework during this period. In February of 1781, the British captured the Dutch island of St. Eustatius in the Caribbean, a crucial source of arms and ammunition for the Americans, with American ships filling its harbor.²⁵¹ (Notably, St. Eustatius had also been the first foreign entity to recognize American independence in November of 1776.) In the wake of the quick surrender of the island to the British, the search of a ship bound for Holland turned up correspondence from two men on the island to the American ambassador in Holland, John Adams. Admiral George Rodney

Trumbull ordered only that his papers and person be secured, but with Tyler’s escape, he was charged with treason. Trumbull details his ordeal at length in his autobiography. *THE AUTOBIOGRAPHY OF COLONEL JOHN TRUMBULL* 58–72 (Theodore Sizer ed., 1953) [hereinafter *TRUMBULL AUTOBIOGRAPHY*]. Trumbull later designed the casket within which Andre’s remains were placed when removed from the site of his hanging to Westminster Abbey. *See id.* at xvi.

248. *TRUMBULL AUTOBIOGRAPHY*, *supra* note 247, at 67 n.32 (noting that the writ of commitment was dated Nov. 20, 1780). Trumbull was given a choice of prisons, although as he notes in his autobiography, many had recently been destroyed in the Gordon Riots. He decided against the Tower of London “as I should have to pay dearly for the honor, in the exorbitance of fees” and he instead chose to remain at Tothill-fields Bridewell. *Id.* at 68.

249. *Id.* at 70–71.

250. *Id.* at 71–72; Letter from William Hodgson to Benjamin Franklin (Sept. 4, 1781), in 35 *FRANKLIN PAPERS* 439 (Barbara B. Oberg et al. eds., 1999).

251. As testament to the island’s importance in the war, Lord Stormont reportedly declared before Parliament in 1778 that “if St. Eustatius had been sunk to the bottom of the ocean, American independence would have been crushed in an instant.” CHARLES BOTTA, *HISTORY OF THE UNITED STATES OF AMERICA: WAR OF INDEPENDENCE* 482 (A. Fullarton & Co. 4th ed. 1834).

ordered the two men, Samuel Curson and Isaac Gouverneur, arrested and transported to England as “prisoners of state.”²⁵²

By July, the prisoners had arrived in Portsmouth, causing Lord Germain to write Attorney General James Wallace and Solicitor General James Mansfield for advice on the matter. In his letter, Germain noted that Rodney had discovered prior correspondence between the two prisoners and, as Germain called him, “John Adams the Rebel Agent in Holland.”²⁵³ Likewise, he noted that it appeared that the two prisoners had sent considerable supplies from the island to the American “Rebels.” Germain inquired of his legal officials their “[o]pinion of the nature of the Crime [the prisoners] are liable to be charged with and in what manner they ought to be proceeded against in order to their Conviction & Punishment.”²⁵⁴

In response, Wallace and Mansfield informed Germain that they had learned that the two prisoners were “natural born Subjects of His Majesty.” Specifically, Curson and Gouverneur were Americans who had been stationed in the Caribbean as agents of the Continental Congress to arrange for shipments of supplies to America. Continuing, Wallace and Mansfield wrote: “the extracts from the Copy Book of Letters referred to, by Sir George Rodney, if that Book can be properly authenticated contains direct proof of treasonable Acts committed by them in supplying His Majesty’s Rebellious Subjects in America with Arms and Military Stores.”²⁵⁵ “[B]ut,” they added, it was not entirely clear that the papers *could* be authenticated in England, a fact that obviously posed a significant problem if the goal was to prosecute the two for treason. Indeed, Wallace and Mansfield noted that because “the Acts charged upon them were done in the Island of St. Eustatius a Dutch Settlement,” exposing them “to a prosecution for High Treason committed out of the Realm,” the prisoners “will be intitled to force on their Tryal, probably before sufficient evidence to support the prosecution may be collected, or their being bailed or discharged.”²⁵⁶

252. Letter from Lord George Germain to the Attorney & Solicitor General (July 5, 1781), TNA CO 5/160/149. Rodney also ordered sent with them another prisoner, Dr. John Witherspoon, Jr., an American whose father was the President of the College of New Jersey, member of the Continental Congress, and signatory to the Declaration of Independence. Witherspoon’s treatment was reportedly harsh but his detention in England was brief, his release having been quickly negotiated by Benjamin Franklin. See Letter from James Lovell for the Committee of Foreign Affairs to Benjamin Franklin (May 9, 1781), in 35 FRANKLIN PAPERS, supra note 250, at 48 (requesting Franklin to give “particular Attention to the Exchange of these Persons”); Letter from Samuel Curson and Isaac Gouverneur to John Adams (Sept. 1, 1781), in 11 THE PAPERS OF JOHN ADAMS 475 (Gregg L. Lint et al. eds, 2003); DAVID WALKER WOODS, JR., JOHN WITHERSPOON 253–54 (1906).

253. Letter from Lord George Germain to the Attorney & Solicitor General (July 5, 1781), TNA CO 5/160/149.

254. *Id.*

255. Report of the Attorney & Solicitor General (July 21, 1781), TNA CO 5/160/153.

256. *Id.*

They further explained: “It appears however to us, that altho’ there may not be at present legal Evidence to convict them of the Crime of High Treason, yet that the circumstances of the Case furnish sufficient ground to committ them to Prison.”²⁵⁷ What circumstances might those be? In a passage underscoring the vital role that the suspension legislation had played in setting aside the obligation derived from the Habeas Corpus Act to furnish a timely trial in cases of suspected treason, they advised:

But as some of the Supplies sent by them to America, no doubt arrived safe at the place of Destination, we think Curson and Gouverneur may be deemed to have committed Treason in His Majesty’s Rebellious Colonies in America, and that it will be expedient to committ them as being suspected of High Treason committed by them in one of the Colonies to which they sent supplies for the use of the Rebels.²⁵⁸

In other words, Wallace and Mansfield offered Germain a means to buy time in order to build a case against the prisoners. Given that existing evidence against them could not be presently authenticated and that their allegedly treasonous acts had been committed in St. Eustatius (a place falling beyond the reach of North’s Act), the prisoners were well situated to win their freedom by invoking the Habeas Corpus Act’s protections. But, as his legal advisers instructed Germain, if instead he saw to it that the charges against Curson and Gouverneur were formally predicated upon treasonous acts committed in the American colonies, then the two could be held without trial under the auspices of North’s Act and the lack of proper evidence to convict would no longer pose any problem.

The administration followed this advice and detained Curson and Gouverneur under the authority of North’s Act, never affording them a trial. To win their freedom, like Platt, Laurens, and Trumbull before them, the two would turn to the diplomatic efforts of Edmund Burke and William Hodgson, the latter a London merchant who worked closely with Benjamin Franklin throughout the war to lend aid to the American prisoners held in England.²⁵⁹ Hodgson reported to Franklin in December of 1781 that he had effected the “removal” of Gouverneur specifically by following the advice of Lord Mansfield. As he wrote, “alltho ministers were willing [Gouverneur] should be removed they knew not how to do it & it was by suggestions of Lord Mansfield I obtained the Sign Manual for a Habeas where the Law actually forbids one to Issue.”²⁶⁰

257. *Id.*

258. *Id.*

259. See SHELDON S. COHEN, BRITISH SUPPORTERS OF THE AMERICAN REVOLUTION: 1775–1783, at 22–50 (2004).

260. Letter from William Hodgson to Benjamin Franklin (Dec. 21, 1781), in 36 FRANKLIN PAPERS 277 (Ellen R. Cohn et al. eds., Yale University Press 2001).

Only seven years later, Isaac Gouverneur's cousin—a delegate to the Constitutional Convention by the name of Gouverneur Morris—would craft the U.S. Constitution's language strictly limiting the circumstances when the new federal government could suspend “the privilege of the writ of habeas corpus.”²⁶¹ One is left to ponder whether and to what extent the experience of his cousin may have influenced Morris's actions.

IV.

PRISONERS OF WAR: THE ALTERED STATUS OF AMERICAN PRISONERS ONCE INDEPENDENCE BECAME INEVITABLE

As already noted, in the wake of the British defeat at Yorktown in October 1781, the tide of the war had turned decisively in favor of the Americans. (Indeed, it is reported that Lord North met the news of Cornwallis's surrender by crying: “Oh God! It is all over!”). By the following March, Lord North's government had fallen and in its place Lord Rockingham's administration had taken over. The latter was not disposed to continue in pursuit of a losing cause²⁶² and as part of its march toward a negotiated end to the war and recognition of American independence, the administration threw its support behind the legislation that Edmund Burke had proposed the prior December designed to alter the status of American prisoners held in England.

This significant shift in British policy came in March of 1782. Instead of extending North's Act, which based on its most recent extension was set to expire on January 1, 1783, Parliament addressed the legality of the continuing detention of the “*American Prisoners brought into Great Britain*” during the “present Hostilities” by adopting an approach that better coincided with the direction of peace negotiations. Specifically, Parliament passed “An Act for the better detaining, and more easy Exchange, of *American Prisoners brought into Great Britain.*”²⁶³ The Act noted that “Exchanges of Prisoners taken in *America*, or conveyed to *America*, have been there regularly made.” In keeping with that practice, Burke's Exchange Act posited that “it may be likewise convenient . . . that *American prisoners brought into Great Britain* should be detained, and exchanged, in the same manner.” Toward that end, the statute declared that “it may and shall be lawful for his Majesty, during the Continuance of the present Hostilities, to hold and detain . . . as *Prisoners of War*, all Natives or other Inhabitants of the Thirteen revolted Colonies not at His Majesty's Peace.” The Act likewise authorized the discharge or exchange

261. JAMES J. KIRSCHKE, *GOUVERNEUR MORRIS: AUTHOR, STATESMAN, AND MAN OF THE WORLD* 38, 249–50 (2005); see also Tyler, *supra* note 3, at 969–71 (surveying the debates over various habeas proposals at the Constitutional Convention).

262. Lord Rockingham had earlier contributed to financial collections on behalf of American prisoners held in England. See COGLIANO, *supra* note 187, at 63.

263. An Act for the Better Detaining, and More Easy Exchange, of *American Prisoners Brought into Great Britain*, 1782, 22 Geo. 3, c. 10 (Gr. Brit.); see also 36 H.L. JOUR. (1782) 425–26 (Gr. Brit.) (noting royal assent given March 25, 1782).

of such prisoners “according to the Custom and Usage of War, and the Law of Nations . . . any Warrant of Commitment, or Cause therein expressed, or any Law, Custom, or Usage, to the contrary notwithstanding.” Finally, the Act permitted discharging prisoners “detained as Prisoners or Prisoners of War, either absolutely, or upon such Conditions, and with such Limitations, or for such a Time, as His Majesty shall deem proper.”²⁶⁴

Thus, as part of the shift toward recognition of American independence, Parliament allowed its suspension legislation to lapse and altered the status of American prisoners held on English soil from prisoners of state to “prisoners of war”—a concept that under the Law of Nations recognized the American prisoners to be in the service of a foreign enemy. For this very reason, in writing John Adams but one month later, Benjamin Franklin pointed to this legislation as “a renunciation of the British Pretensions to try our People as Subjects guilty of High Treason and to be a kind of tacit acknowledgement of our Independency.” “Having taken this step,” Franklin surmised, “it will be less difficult for them to acknowledge it expressly.”²⁶⁵

Immediately on the heels of passage of this Act, peace negotiations began in April in Paris. Also during that that month, the Crown offered indications that it was open to a general prisoner exchange, with Lord Shelburne conveying to Franklin through Hodgson that “the first official Act he did in his Department was to give directions that the Prisoners shou’d be exchanged.”²⁶⁶ Toward that end, as Franklin reported to Adams, the British were “now preparing transports to send the Prisoners home.”²⁶⁷ By summer, Lord Shelburne (who, by this point, had taken over the ministry in the wake of Rockingham’s death) acknowledged that Britain should recognize American independence.²⁶⁸ In November, the British and Americans agreed to preliminary articles of peace that formally recognized that independence and called for the freeing of “all prisoners on both sides.”²⁶⁹ (The group that

264. An Act for the Better Detaining, and More Easy Exchange, of *American Prisoners Brought into Great Britain*, *supra* note 263 (emphases added).

265. Letter from Benjamin Franklin to John Adams (Apr. 21, 1782), in 8 *THE WRITINGS OF BENJAMIN FRANKLIN* 430, 431 (Albert Henry Smyth ed., 1907); *see also* Prelinger, *supra* note 186, at 290 (“[I]n 1782, the official British posture respecting prisoners, as well as its attitude toward the war in general, changed fundamentally. Parliament enacted legislation that recognized captured Americans as prisoners of war rather than rebels.”).

266. Letter from William Hodgson to Benjamin Franklin (Apr. 9, 1782), in 37 *FRANKLIN PAPERS* 124, 125 (Ellen R. Cohn et al. eds., Yale Univ. Press 2003).

267. Letter from Benjamin Franklin to John Adams (Apr. 21, 1782), in 8 *THE WRITINGS OF BENJAMIN FRANKLIN*, *supra* note 265, at 430, 431.

268. *See* Harry T. Dickinson, *The Impact of the War on British Politics*, in *THE OXFORD HANDBOOK OF THE AMERICAN REVOLUTION* 355 (Edward G. Gray & Jane Kamensky eds., 2013). By September of 1782, moreover, Shelburne had directed his emissaries to acknowledge their counterparts as representatives “of the Thirteen United States of America.” *RAKOVE*, *supra* note 79, at 278.

269. 25 *ANNUAL REGISTER*, *supra* note 236, at 321–24 (replicating preliminary articles of peace, which provided in Article VII that “all prisoners on both sides shall be set at liberty”).

negotiated on behalf of the Americans included Henry Laurens and Benjamin Franklin, among others.) Exchanges increased considerably in the wake of passage of the 1782 legislation and, by March of 1783, the British had delivered all American prisoners remaining in England to France.²⁷⁰

Coinciding with the conversion of the Americans held in England to the status of prisoners of war, the Americans reportedly finally enjoyed full rations while awaiting their exchange. Thus, William Russell, detained at Mill Prison, recorded in his journal just one month after passage of the March 1782 Act that “Mr. Cowdry informed us that we are to have a full diet tomorrow. So we are no longer *Rebels* but *Prisoners of War*.”²⁷¹ Likewise, the reward offered for the capture of escaped American prisoners, which had been commensurate with their previous criminal status, was reduced to a much lesser amount typically offered for the return of escaped prisoners of war.²⁷² Nonetheless, British practice was not entirely consistent with respect to the new status of the American prisoners, for despite the legislation declaring that they were now prisoners of war, King George III still requested a list of American prisoners to pardon before they would be set at liberty.²⁷³

This latter point underscores the lingering tensions between formal British policy and practice. Unquestionably, however, the legal framework governing American prisoners held by the British shifted dramatically as the tide of the war changed in early 1782 and American victory appeared a foregone conclusion. Indeed, once the British recognized the inevitability that the lines of allegiance would be severed with the Americans, British law treated the wartime acts of the former colonists as acts of enemy soldiers in the service of a foreign sovereign, rather than treason. It followed that the relationship between the American “prisoners of war” and Great Britain was no longer governed by domestic law, including the English Habeas Corpus Act, but instead by the Law of Nations.

V.

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

Across the Atlantic, the Americans had already begun constructing their own independent legal frameworks, many of which imported the privilege that

270. See, e.g., COHEN, *supra* note 96, at 206; Alexander, *supra* note 209, at 387. By September of 1783, Great Britain formally recognized American independence in the Treaty of Paris, which also provided for the release of any remaining prisoners of war. See *Definitive Treaty of Peace, U.S.-Gr. Brit.*, art. 8, Sept. 3, 1783, 8 Stat. 80.

271. COGLIANO, *supra* note 187, at 55 (citing Russell Journal, 28 April 1782, 4:45). The Cowdry to whom Russell refers ran Mill Prison during this period. See *id.* at 50.

272. COHEN, *supra* note 96, at 181.

273. COGLIANO, *supra* note 187, at 133 (noting that Lord Shelburne wrote to Lords of Admiralty asking for a list of all remaining American prisoners, which Shelburne then forwarded to the King).

they associated with the English Habeas Corpus Act, and sometimes, though not always, the concept of suspension. Indeed, extensive evidence surrounding the development of state law during the colonial and early period of American independence suggests that the influence of the English Habeas Corpus Act on early American law was both profound and widespread.

As already noted, many colonies had tried, unsuccessfully, to adopt the English Act's protections as their own.²⁷⁴ Commensurate with the push toward independence, these same states moved quickly to import the Act's terms into their new legal frameworks. South Carolina provides one example. By March of 1776, when South Carolina inaugurated its new independent government (electing Henry Laurens vice president of the colony), the South Carolina General Assembly took up as one of its very first matters the adoption of an "Ordinance to vest the several Powers . . . formerly granted to the Council of Safety in the President and Privy Council to suspend the Habeas Corpus Act. . . ."²⁷⁵ Given that the newly formed United Colonies were now at war with Britain, it is hardly surprising that clarifying the source of the power to suspend drew the early attention of the assembly. As the Revolutionary War unfolded, South Carolina would become one of several states to enact suspensions of the protections associated with the Habeas Corpus Act in order to address the threatened invasion of the British.²⁷⁶

Georgia provides another example. That state included in its Constitution of 1777 express provision that "[t]he principles of the *habeas-corporis* act, shall be a part of this constitution."²⁷⁷ To underscore its wholesale adoption of the English Act, Georgia's legislature attached verbatim copies of the Act to the original distribution of its 1777 constitution.²⁷⁸ Massachusetts provides yet another example. As I have explored in other work, the well-documented debates leading up to the adoption of the Massachusetts Constitution of 1780, as well as that state's early suspensions, reflect a widespread equating of the English Act's protections with the privilege enshrined in the habeas clause of that state's constitution.²⁷⁹

274. More examples than those highlighted here are explored in TYLER, *HABEAS CORPUS GOES TO WAR*, *supra* note 19.

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

276. An Ordinance to Empower the President or Commander-in-Chief for the Time Being, with the Advice of the Privy Council, to Take Up and Confine All Persons Whose Going at Large May Endanger the Safety of this State, pmb., in 4 THE STATUTES AT LARGE OF SOUTH CAROLINA 458 (Thomas Cooper ed., Columbia, S.C., A.S. Johnston 1838). For details on this suspension, consult Tyler, *supra* note 3, at 960–61.

277. GA. CONST. OF 1777, art. LX.

278. JENKINS, *supra* note 14, at 109 ("[T]he House . . . ordered, that 500 copies be immediately struck off, with the Act of Distribution, made in the reign of Charles the Second, and the habeas corpus act annexed. . . .") (footnote omitted).

279. See Tyler, *supra* note 3, at 963–64 (citing extensively from THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780 (Oscar Handlin & Mary Handlin eds., 1966)); see also *id.* at 962–68 (detailing several Massachusetts

Additional examples of the Act's influence during this period abound. They include the enactment of suspensions in at least six states during the Revolutionary War, all of which were predicated heavily on the English suspension model, and some of which expressly displaced the protections associated with the "Habeas Corpus Act," as the suspensions adopted in Maryland and Pennsylvania did.²⁸⁰

With peace, moreover, came an additional wave of state statutes adopting the terms of the English Habeas Corpus Act. Arguably the most significant of these adoptions came just three months before the Constitutional Convention opened in Philadelphia in 1787, when New York passed a statute almost identical to the 1679 Act. The legislation, tracking section seven of its English predecessor, made express the requirement that any person "committed for treason or felony" who is not "indicted and tried [by] the second term [of the] sessions of oyer and terminer, or gaol delivery, after his commitment . . . shall be discharged from his imprisonment."²⁸¹ It had taken a little over one hundred years, but New Yorkers finally enjoyed the rights and protections associated with the English Habeas Corpus Act.

Highlighting the pervasive influence of the English Habeas Corpus Act on the development of early American law, the great New York jurist and legal scholar Chancellor James Kent observed in 1827 that "the statute of 31 Charles II. c. 2 . . . is the basis of all the American statutes on the subject."²⁸² Along

suspensions). The habeas clause in the Massachusetts Constitution of 1780 provides: "The privilege and benefit of the writ of *habeas corpus* shall be enjoyed in this commonwealth, in the most free, easy, cheap, expeditious, and ample manner, and shall not be suspended by the Legislature, except upon the most urgent and pressing occasions, and for a limited time, not exceeding twelve months." MASS. CONST. of 1780, pt. 2, ch. VI, art. VII.

280. See Tyler, *supra* note 3, at 958–68 (detailing these suspensions); see also An Act to Punish Certain Crimes and Misdemeanors, and to Prevent the Growth of Toryism, ch. 20, § 12, 1777 Md. Laws (Feb. 5, 1777) (providing that the Governor "shall have full Power and Authority to arrest . . . all Persons whose going at Large the Governor . . . shall have good Grounds to believe may be dangerous to the Safety of this State, and the same Persons to confine" and that "the *Habeas Corpus* Act shall be suspended, as to all such Persons"); JOURNAL AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA 88 (John Dunlap ed., 1777) (providing that the Pennsylvania Assembly passed the suspension in order "to restrain for some limited Time the Operation of the Habeas Corpus Act"). Not every early state embraced the concept of suspension and in fact some states prohibited suspension outright in fashioning their new legal frameworks. See, e.g., VT. CONST. art. XII (1836) (providing that "[t]he Writ of Habeas Corpus shall in no case be suspended" and declaring that "[i]t shall be a writ, issuable of right").

281. An Act for the Better Securing the Liberty of the Citizens of this State, and for Prevention of Imprisonments (Feb. 21, 1787), in 1 LAWS OF THE STATE OF NEW YORK 369, 371–72 (New York, Thomas Greenleaf 1798). As Chancellor Kent noted in his *Commentaries*, "The substance of [New York's] statute provisions on the subject . . . closely followed" the terms of the English Act, and plainly required that "[p]ersons committed for treason or felony, are, upon their petition, to be indicted and tried by the second term after their commitment, or they will be discharged, unless satisfactory cause be shown for the delay." 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 24, 29 (New York, O. Halsted 1827).

282. 2 KENT, *supra* note 281, at 24.

the same lines, Justice Joseph Story wrote in his famous *Commentaries on the Constitution of the United States* that by 1833 the English statute “ha[d] been, in substance, incorporated into the jurisprudence of every state in the Union.”²⁸³ In short, the story of the development of early American habeas law is one that underscores the commitment of the Americans to adopt the English Habeas Corpus Act as their own. The delegates who met in Philadelphia, well versed in this story, would draw heavily on it in providing for the protection of a privilege similarly derived from the English Act while also providing for the suspension of that privilege on extraordinary occasions.

CONCLUSION

These pages have attempted to unearth and present a full account of the legal framework governing the detention of American prisoners during the Revolutionary War by their British adversaries. As the story told here highlights, during this important period in Anglo-American legal history, determinations regarding the reach and application of the English Habeas Corpus Act of 1679 were of tremendous consequence. As the material explored herein also reveals, suspension, geography, and allegiance all played major roles in determining the availability of the privilege of the writ of habeas corpus.

During this period, where the Habeas Corpus Act was in force and where prisoners could claim its protections, the legal framework demanded that such persons be charged criminally and tried in due course in order to justify their detention. By contrast, where the Act was not in force or where persons who had fallen out of allegiance could no longer claim its protections, the British government operated free of such constraints. These presumptions underlying the legal framework explain why the British Parliament adopted a suspension applicable solely to the detention of American rebels held in England, for it was only in England (and not in the revolting colonies) that the Crown deemed the Habeas Corpus Act to be in effect. Likewise, the animating principles of English law during this period explain why, once Parliament understood the Americans to have effectively forsaken their allegiance, it allowed the suspension legislation governing the detention of American prisoners in England to lapse and in its place declared that “the Custom and Usage of War, and the Law of Nations” would govern their exchange as prisoners of war.

The Revolutionary War backdrop to the drafting and ratification of the U.S. Constitution has much to contribute toward our understanding of what the Founding generation hoped to achieve when it included specific reference to the “privilege of the writ of habeas corpus” in the Suspension Clause. Significantly, it was the protections associated with the Habeas Corpus Act—

283. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1335, at 208 (Boston, Hilliard, Gray, & Co. 1833).

more so than anything associated with the common law writ of habeas corpus—that were central to the legal framework governing the detention of prisoners during the Revolutionary War. Further, as the experience of the American Revolution (building upon prior practices) confirmed, it was the protections associated with the English Act that were set aside in the event of a suspension. Within this legal framework, the Act’s protections, where in place, constrained government by recognizing as lawful only those detentions predicated upon timely trial on criminal charges. Thus, the protections associated with the Act promised more than simply process; in practice, they imposed an important limitation on the Crown’s ability to hold domestic prisoners during wartime.

The centrality of the Habeas Corpus Act to this story, as well as to the early development of American habeas law in the newly independent states, instructs that the Act’s influence on American law is far greater than jurists and scholars have previously recognized.²⁸⁴ Further, because there is considerable evidence to suggest that this influence carried through the adoption of the Suspension Clause,²⁸⁵ recovering this important period in American history has the potential to contribute significantly to modern debates over the meaning and reach of the Suspension Clause.

Among other things, the stories of Ethan Allen, the *Yankee*, and Henry Laurens teach that during this period, those who could claim the protection of domestic law and with it, the English Habeas Corpus Act, could not be detained outside the criminal process in the absence of a valid suspension.²⁸⁶ If indeed the Founding generation embraced this same understanding in adopting the Suspension Clause, then it is fair to say that some of the Supreme Court’s recent jurisprudence is at odds with this history. Most prominent in this regard is the Court’s 2004 holding in *Hamdi v. Rumsfeld* that the Constitution says nothing about the detention of so-called citizen-enemy combatants.²⁸⁷

Studying this period likewise has the potential to contribute to additional aspects of the ongoing debates over the meaning of the Suspension Clause, including questions about who may claim its protections, its geographic reach, and its relationship to the laws of war. Historically, as explored in part here, domestic law and the laws of war operated largely in different realms guided by the relationship between the state and the prisoner as well as the respective lines of allegiance. If the Founding generation predicated the Suspension

284. *But see* *Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting) (relying on the English Habeas Corpus Act in interpreting the protections of the Suspension Clause); Tyler, *supra* note 3, at 954–75 (exploring the influence of the English Habeas Corpus Act on early American law).

285. For discussion of how this framework appears to have influenced the Founding generation’s understanding of the Suspension Clause, consult Tyler, *supra* note 3, at 969–86.

286. Historically, Parliament also used its attainder power to circumvent the Act; by this period, however, the practice had largely ceased. *See* Tyler, *supra* note 3, at 933 n.199 (citing sources).

287. *See Hamdi*, 542 U.S. at 519 (2004) (O’Connor, J.) (plurality opinion) (“There is no bar to this Nation’s holding one of its own citizens as an enemy combatant.”).

Clause upon the understandings that controlled during this historical period, then a modern reading of the Suspension Clause arguably must account for these different realms, at least to identify where the domain of the Constitution ends and that of the law of nations begins. That said, exceptionally difficult questions exist about where the line between the two spheres falls today, whether there are areas of overlap, and whether the modern threat of terrorism poses questions not fully contemplated by this historical model. With respect to the geographic sweep of the Suspension Clause, moreover, similar translation questions abound. Although full exploration of these many important questions presents a host of difficult inquiries better left for exploration in future work, Chief Justice Marshall's admonition that the term habeas corpus was "used in the [C]onstitution, as one which was well understood"²⁸⁸ counsels that the stories told here should be part of that conversation.

288. *Ex parte Watkins*, 28 U.S. 193, 201 (1830).