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Habeas and the Accumulation of Judicial Power

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Abstract

This article situates Chapter 3 of Nasser Hussain's *The Jurisprudence of Emergency* within the broader reassessment in recent years of the history of habeas corpus in England during the seventeenth, eighteenth, and nineteenth centuries. As it demonstrates, not only was Hussain ahead of his time in highlighting the means by which habeas became a tool not for the promotion of individual rights, but for the accumulation of judicial power and the concomitant normalization of emergencies; one can also see clear reflections of his analysis in the jurisprudence of U.S. courts arising out of the detention of non-citizens at Guantánamo.

Keywords

emergencies, emergency power, Federal courts, Guantánamo, habeas corpus, judicial power, judiciary, Supreme Court, Suspension Clause, terrorism

Throughout Chapter 3 of *The Jurisprudence of Emergency*,[1] Nasser Hussain documented how the "Great Writ" of habeas corpus had such a "peculiarly nonlibertory history"[2] in colonial India, focusing on both the legislative capture of the common-law writ and the extent to which judicial power came to be an end unto itself – as opposed to a means by which greater freedom was (or could be) achieved. To that end, the chapter closes by identifying a pair of thematic elements of the "disjunctive doctrinal history"[3] that it had surveyed:

1. Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* 69–97 (2003).
2. *Id*. at 95.
3. *Id*. at 33.

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> The first is that while habeas certainly sometimes functions in colonial India to "free" people from either governmental or private confinement, to try to inscribe it within some quantum increase in freedom would be difficult. . . . The second feature that must be kept in mind is that the process is an "irregular" one, brought with contestations within the spheres or branches of the emerging state form.[4]

So conceived, habeas in the period Nasser examined dovetails perfectly with the monograph's broader focus on how questions of law and emergency shaped colonial rule, which in turn affected the place of colonialism in modern law – with the colonies as agents in the interpretation and delineation of British ideas and practices, and not merely the passive recipients thereof. But whereas the animating thrust of Nasser's study of habeas corpus during the colonial era was, understandably, elsewhere, his book came at the front end of a subtle but significant movement in the historiography of habeas – what I've elsewhere described as "The New Habeas Revisionism."[5] Thanks to Nasser and other legal historians, especially University of Virginia Professor Paul Halliday,[6] we have come to appreciate the glaring inadequacies of many conventional histories of habeas corpus in England in the seventeenth, eighteenth, and nineteenth centuries – "Whig" histories, to borrow Herbert Butterfield's terminology.[7] These earlier commentators, including no less a figure than William Blackstone,[8] repeatedly attempted to "draw lines through certain events . . . to modern liberty," "forget[ting] that this line is merely a mental trick."[9]

Thus, as Halliday explained, the typical narrative of habeas in England prior to the American Revolution

> proclaims [habeas as] the result of an inescapable process, begun in a misty past, carried through Magna Carta, past a tyrannical king or two, and finally to its triumph: the realization of all that the writ portended with the help of democratic impulses working through statute-making bodies, whether British Parliaments, colonial assemblies, or American Congresses.[10]

But as Halliday concluded in his 2010 book, such a story, however and whenever told, is too convenient by half. To begin with, "[i]t is not a little ironic . . . that [habeas's] original purpose was not to release people from prison but to secure their presence in custody,"[11]

4. *Id*. at 95.
5. Stephen I. Vladeck, "The New Habeas Revisionism," 124 *Harv. L. Rev.* 941 (2011) (book review).
6. Paul D. Halliday, *Habeas Corpus: From England to Empire* (2010).
7. See H. Butterfield, *The Whig Interpretation of History* 1–8 (1931); see also Michael E. Parrish, "Friedman's Law," 112 *Yale L.J.* 925, 954–5 (2003) (book review) (summarizing Butterfield's work, and how legal historians are particularly susceptible to writing "Whig" history).
8. See Paul D. Halliday and G. Edward White, "The Suspension Clause: English Text, Imperial Contexts, and American Implications," 94 *Va. L. Rev.* 575, 589 & nn.28–30 (2008).
9. Butterfield, supra note 7, at 12.
10. Halliday, supra note 6, at 2.
11. J.H. Baker, *An Introduction to English Legal History* 146 (4th edn, 2002).

a point Nasser also emphasizes in *The Jurisprudence of Emergency*.[12] And yet, classical narratives of habeas fail to explain the virtual absence of meaningful developments between 1215 and the early seventeenth century, when the writ began to evolve. Nor do they provide any explanation for why it was then, in particular, that the writ started to shape into the form it holds today, especially if meaningful statutory advancement did not take place until later. "So much awkward silence separates [the thirteenth century from the seventeenth]," Halliday wrote in 2010, "that some authors have thrown up their hands."[13] And even for those who have not, none can make up for the fact that "[n]o single line runs through the Middle Ages to the writ that was newly invigorated in the decades around 1605."[14] Finally, conventional histories are useless when it comes to explaining how, if habeas evolved linearly to become the "great writ of liberty," it proved so feeble a constraint on the British Parliament in the eighteenth century (as Halliday shows) and on colonial assemblies in the nineteenth (as Nasser demonstrates).[15]

Thus, Nasser's study – published seven years before Halliday's – helps to confirm the latter's conclusion that the story of habeas corpus in England "has been written less as a history than as an exercise in legal narcissism."[16] And as Butterfield warned, such scholarship "is bound to lead to an over-simplification of the relations between events and a complete misapprehension of the relations between past and present."[17]

The result is that we have ended up with a narrative of habeas that may be normatively attractive, but that is historically misleading. Because of our modern preoccupation with the rights that individuals hold against their governments, scholars have long understood habeas corpus incorrectly as part of a framework of individual liberties, belying the extent to which the importance of the writ in pre-revolutionary England – and, as Nasser demonstrates, in colonial India – was about the courts much more than it was about the litigants. As much as anything, habeas has *always* been a tool for the consolidation of judicial power, power that *may* lead to the better protection of individual rights, but only as an incident to the assertion and solidification of judicial power as an end unto itself.

All of this would be interesting and important enough in its own right if the goal was simply to advance our understanding of mainland and colonial English legal history. But Nasser's work, like Halliday's, has enormous contemporary *legal* significance as well, thanks to the idiosyncratic text and structure of the U.S. Constitution's Suspension Clause,[18] which protects "the privilege of the writ of habeas corpus" *against* the kinds of legislative suspensions that dominated pre-revolutionary and colonial English practice ("except when in cases of rebellion or invasion the public safety may require it"), but does nothing to define what that privilege *is*.[19]

12. See Hussain, supra note 1, at 69.
13. Halliday, supra note 6, at 16.
14. *Id*. at 18.
15. See Vladeck, supra note 5, at 945.
16. Halliday, supra note 6, at 2.
17. Butterfield, supra note 7, at 14.
18. U.S. Const. art. I, § 9, cl. 2.
19. See, e.g., Eric M. Freedman, *Habeas Corpus: Rethinking the Great Writ of Liberty* 12 (2001) (noting that the drafting history of the clause at the 1787 Constitutional Convention was "sparse").

And although the U.S. Supreme Court has suggested that, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789,'"[20] the Court has steadfastly refused most efforts to give the Clause content – writing in the same 2001 case that it would interpret a jurisdiction-stripping statute to not actually take away the courts' habeas powers because "The fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely."[21]

The exception to that trend came, famously, in *Boumediene v. Bush*, in which the Supreme Court held that the Military Commissions Act of 2006[22] violated the Suspension Clause as applied to non-citizens detained at Guantánamo[23] – because the statute took away the habeas corpus jurisdiction of the lower federal courts and failed to provide an adequate substitute.[24] And unlike the seventeenth- and eighteenth-century English (and nineteenth-century colonial) "suspensions" of habeas, which preserved the courts' nominal habeas jurisdiction while precluding their ability to fashion appropriate relief, *Boumediene* was a case reaffirming the structural significance of the writ *absent* suspension – given that suspension under U.S. law is a far more politically fraught endeavor than it ever was under English and colonial authority.[25]

But even as the *Boumediene* decision was initially hailed as a landmark ruling vis-à-vis the rights of non-citizen detainees, the subsequent litigation in the lower federal courts has painted a rather different picture. Although just under half of the Guantánamo detainees whose habeas cases have been heard since *Boumediene* prevailed on the merits, those results came despite – and not because of – lower-court rulings taking a very stilted view on the rights possessed by non-citizens in military custody.[26] Indeed, it remains an open question today – 17 years after Guantánamo opened and a decade after *Boumediene* – whether and to what extent any part of the Constitution *other* than the Suspension Clause applies to the 41 remaining Guantánamo detainees *at all*.[27]

This article aims to tie these two threads together – and to suggest that the post-*Boumediene* Guantánamo jurisprudence is, for all of its many warts, deeply *consistent*

20. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (citation omitted).
21. *Id*. at 301 n.13.
22. Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2631–2 (codified at 28 U.S.C. § 2241(e)).
23. A subject Nasser returned to often in his shorter-form writings. See, e.g., Nasser Hussain, "Beyond Norm and Exception: Guantánamo," 33 *Critical Inquiry* 734 (2007).
24. 553 U.S. 723 (2008).
25. Indeed, the catalyst for the Suspension Clause – and its constraints on when "the privilege of the writ" *can* be suspended, was negative reaction *to* parliamentary suspensions of the writ in England, especially the notorious 1777 suspension act. See Vladeck, supra note 5, at 957–63; see also Halliday and White, supra note 8, at 644–51. To that end, the last formal suspension of habeas corpus in the United States came in 1871.
26. See, e.g., Stephen I. Vladeck, "The D.C. Circuit After *Boumediene*," 41 *Seton Hall L. Rev.* 1451 (2011).
27. Cf. *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 559 U.S. 131 (2010) (per curiam).

with Nasser's and Halliday's work – and their skepticism that habeas in the context of emergency has ever been more than an indirect vehicle, at best, for protecting individual rights. Indeed, as the Guantánamo cases illustrate, there are two separate reasons why, at the end of the day, the relationship between habeas and individual rights is so modest in these contexts: *First*, because of the exigent circumstances in which these cases arise, the government will often have strong arguments that the detainees in question lack some – if not all – of the individual rights that might otherwise stand in the way of their confinement. Unless the government generally lacks the power to detain during emergencies (a step courts are deeply skeptical of taking, much like the step of declaring the emergency over before the political branches do so[28]), then the merits of these cases will inevitably gravitate toward the scope of the government's affirmative detention authority, rather than toward enforcement of the detainee's rights against otherwise authorized detention.

Second, inasmuch as habeas is – and has been – principally an instrument for the accumulation of judicial power, that purpose can be served *without* ruling for detainees on the merits. This point helps to explain the Supreme Court's virtual silence vis-à-vis Guantánamo since *Boumediene*, even as it has received several dozen petitions from detainees arguing that the lower court's approach has wrongly constrained their right to obtain relief. If the question with which the Supreme Court is concerned is whether these detainees are lawfully held, then its post-*Boumediene* silence is difficult to understand. But if the question is whether the courts, in general, have the power to decide the merits, then the Justices may well think that their work is done.[29]

Either way, the end result is stronger courts, even – if not especially – during crises. It's worth stressing that, at least in contemporary terms, stronger courts almost certainly will have a salutary impact on military detention (since the alternative is a regime in which there is *no* specter of judicial review, and therefore no incentive for the government to comply with what it perceives to be the applicable legal rules). But such judicial review comes with little (if anything) in the way of formation or recognition of individual rights to be free from such detention. Instead, the new revisionism portrays (and portends) habeas as an indispensable feature of judicial independence – vis-à-vis Parliament in the British system, and vis-à-vis the political branches in the United States. And, perhaps counterintuitively, judicial review via habeas also tends to have the effect of legitimizing (and normalizing) the very government detention policies that might previously have been defensible solely on exceptionalist grounds.[30]

28. See *Ludecke v. Watkins*, 335 U.S. 160 (1948) (holding that, for purposes of detention under the Alien Enemy Act of 1798, the "war" with Germany had not ended because the political branches had not yet said that it had).
29. See Stephen I. Vladeck, "The Passive-Aggressive Virtues," 111 *Colum. L. Rev. Sidebar* 122 (2011).
30. As part of this phenomenon, consider the extent to which rules handed down in (and for) the unique context of Guantánamo cases have already seeped into more "ordinary" contexts, such as criminal extradition. See Stephen I. Vladeck, "Normalizing Guantánamo," 48 *Am. Crim. L. Rev.* 1547 (2011).

Part I of this article begins by introducing Nasser's discussion of habeas in colonial India in Chapter 3, and how his narrative dovetails with the broader reconceptualization offered by Halliday. As Part I suggests, Nasser's work was at the forefront of the systematic and sweeping revisionism of the historiography of habeas corpus that has marked the past decade – and at an especially auspicious time, at least from the perspective of U.S. constitutional law.

Part II turns to *Boumediene* and its aftermath, and demonstrates the extent to which the past decade has borne out the central contribution of the revisionist thesis – that habeas is, and always has been, a means for the accumulation of judicial power *as such*, with salutary consequences often, but not inevitably, flowing from such judicial authority. But although revisionism in academic contexts often has pejorative undertones, as Part II concludes, in this case, it may have been a necessary step – to reaffirm the role of habeas corpus not just as a font of judicial power, but as an important element of the separation of powers under the unique structure of the U.S. Constitution.

Finally, the Conclusion offers some reflections on the implications of the restoration of the classical understanding of habeas corpus – and the larger lessons it can provide for the construction of legal history, the interpretation of the Constitution, and, most significantly from the perspective of Nasser's magisterial work, our understanding of how legal systems respond to, incorporate, and absorb emergencies.

I. The "Writ of Liberty" in a Regime of Conquest

As Nasser suggested in the opening pages of Chapter 3, "whether in its origins as a facilitation of sovereign power or in its subsequent and modern guise as a check on the executive, whether used to intern or to free, habeas corpus is a mode of binding subjects to the law and to its economics of power."[31] Habeas in this regard is not chimerical, Nasser continued. Instead, "it is precisely the transformation in the seventeenth-century constitutional struggles, whereby the king's high prerogative writ becomes 'the great engine for defeating the King's own orders,' that is of import here."[32] This is so, he wrote, because "[t]he sovereignty of the king is not so much eclipsed as it is fractured and disseminated. And the new recipients of this dissemination are to be the juridical subject of the law, on the one hand, and the staging of that subject, the institutional structure of law and state, on the other."[33]

The puzzle around which Nasser frames his study of habeas in emergencies originates in pre-revolutionary England: "Why is it that if the act of 1679 enshrines habeas as a right of the subject, what follows in less than a decade in 1688 is the first of the so-called Suspension of Habeas Corpus Acts?"[34] For the answer, he turns to colonial India, and the "peculiarly regressive history" of habeas corpus therein:

31. Hussain, supra note 1, at 70.
32. *Id*. at 71 (quoting Edward Jenks, "The Story of the Habeas Corpus," 18 *Law Q. Rev.* 64 (1902)).
33. *Id*. at 72.
34. *Id*.

> Introduced into India in an almost incidental manner through the jurisdiction of the Crown court in Calcutta, the writ enjoys a limited but effective place in the early nineteenth century, issued against both executive officers and civilians, and eventually passes into the jurisdiction of the government of India's High Courts, as they inherit the combined powers of Crown and East India Company courts in 1861. In the late nineteenth century, however, through a series of judicial decisions and legislative enactments, the power of the High Courts to issue the writ against the executive is limited almost to the point of nonexistence.[35]

Thus, at the beginning of the history of habeas in colonial India in the 1770s, the writ was used to demarcate and delineate the power of the nascent – and overlapping – courts, and to extend their jurisdiction to encompass as broad a class of individuals as possible under the labyrinthine legal structure of early colonial India.[36] One such case, as Nasser recounts, led to a head-on conflict between the Supreme Court and the separate courts of the East India Company, prompting the Westminster Parliament to intercede and more clearly set out the relative lanes of authority.[37] And even as habeas practice in the colonial courts became more commonplace into the nineteenth century, the focus on using the writ to resolve disputes over the reach of judicial power only grew. As Nasser put it, "habeas corpus [thus] indicates both the structural and normative functions of a rule of law. Law is what constructs the state in the colony and in doing so inevitably introduces new norms that may be at odds with the social and political exigencies of colonialism."[38] And habeas, by providing a mechanism for courts to assert – and ascertain the limits of – their jurisdiction, was an integral part of the construction of the colonial state.

So it was that, in the aftermath of the Revolt of 1857, habeas was both further solidified by statute and further tested by circumstance. Thus, as Nasser concluded in discussing a particularly poignant post-1857 case, "[o]n the one hand, racial, cultural, and political factors are repeatedly invoked to insist that the right of habeas is neither feasible nor applicable to the extremis of colonialism. On the other hand, the colonial life of the writ of habeas cannot be summarily extinguished, for too much rests upon it on a number of levels."[39]

But perhaps the strongest exemplar of Nasser's thesis is the last case he studied in Chapter 3 – *In the Matter of Ameer Khan*. Although the advocate general in *Khan* argued that the court lacked jurisdiction because the prisoner's detention was an act of state immune from the process of a colonial tribunal, Justice Norman disagreed, concluding, in Nasser's words, that "[t]here was simply no question . . . that the court had the power to judge the issue. The governor-general of a colony could not claim for reasons of state that the courts had no jurisdiction over the matter."[40]

Then, however, the other shoe dropped. Although the court had the *power* to hear Khan's prayer for relief, it went on to conclude that the colonial government had the

35. *Id*. at 73–4.
36. See *id*. at 81.
37. See *id*. at 82–3.
38. *Id*. at 85.
39. *Id*. at 91–2.
40. *Id*. at 94.

power long exercised by Parliament to suspend the writ – not by divesting the court of jurisdiction, but by precluding it from issuing a remedy. And for Nasser, "this decision, with its particular form of reasoning, far from being an abrogation of the rule of law, is actually its logical completion." After all, "[t]o the extent that habeas is a protection from state power, the situation of emergency that allows for the suspension of that protection is deeply written into the logic of a rule of law."[41] Thus, even as colonial courts in nineteenth-century India used habeas to consolidate *their* power, the accumulation of such *judicial* power inexorably led to the normalization of *emergency* power – with the government receiving and exercising the power to suspend habeas on an ever-more-frequent basis.

The same pattern can be seen, albeit on a somewhat longer and larger scale, in Halliday's stunningly broad archival survey of seventeenth- and eighteenth-century English habeas practice. Although habeas practice throughout the seventeenth century was dominated by ever-more-creative uses of the writ to exercise jurisdiction in new contexts, Halliday also painstakingly documented the catalyst for – and consequences of – the 1679 Habeas Corpus Act, and why such legislative protection of the writ might not only have been unnecessary,[42] but affirmatively counterproductive.

As Halliday wrote in 2010, the problem with Parliament's newfound interest in codifying habeas was that it "hid[] the once vigorous common law writ behind its chimerical statutory twin."[43] As Halliday documents, every time Parliament discussed amending habeas corpus, those debates "occurred as Parliament extended its own use of imprisonment."[44] And although parliamentary imprisonment orders did not jeopardize the jurisdiction of King's Bench as such, they left the justices with decidedly little to do on the merits.

So it was that less than ten years after the Habeas Corpus Act, Parliament "suspended" habeas corpus for the first time, enacting a statute that empowered the Privy Council to imprison individuals alleged to have committed treason, or held on suspicion of treason, without "bail or mainprise."[45] The law provided for imprisonment "any law, statute, or usage to the contrary in any wise notwithstanding."[46] Thus, "[s]uspension operated not by suspending habeas corpus, but by expanding detention powers,"[47] mooting the immediate effect of the writ by suspending the relief it could provide, albeit for a finite (and very short) period of time. And although the initial suspension act applied only to

41. *Id*. at 95.
42. The 1679 act was unnecessary, Halliday concluded, because courts were already exercising all of the authorities that Parliament claimed it needed to confer by statute, including the power to issue writs of habeas corpus in vacation; and the ability to speed up returns. See Vladeck, supra note 5, at 953–5.
43. Halliday, supra note 6. at 258.
44. *Id*. at 225.
45. 1 W. & M., c. 2 (Eng.).
46. See *id*. For a full accounting of suspension acts between 1689 and 1783, see Halliday and White, supra note 8, at 617 nn.115–16.
47. Halliday, supra note 6, at 249. Put another way, it was not the writ that was suspended, but "bail or mainprise."

treason, subsequent suspension statutes extended the Privy Council's imprisonment power to anyone suspected of "treasonable practices,"[48] a far more amorphous category in which an individual could be imprisoned merely on "suspicion," i.e., without any evidence provided under oath.[49]

Of course, the Habeas Corpus Act of 1679 didn't *cause* the onset of suspension acts. But as Halliday explains, it is more than a coincidence that parliamentary suspensions followed not long on the heels of Parliament's most sweeping foray into the law governing judicial review of detention. Both statutes followed from Parliament's increasing capture of the royal prerogative.[50] The Habeas Corpus Act presupposed that Parliament – rather than the justices – could dictate the circumstances and means by which the prerogative writ of habeas corpus would issue; the suspension acts presupposed that Parliament could decide for itself cases in which judicial oversight would be unavailable, at least for the duration of the suspension (after which the Habeas Corpus Act itself assured the return to normalcy *qua* judicial review).[51] As a result, "the most marked feature of statutory suspension was not the fact of suspension but its limits,"[52] the unwritten but omnipresent requirements appearing in every suspension act up to 1777 that the suspension be justified by some specific "necessity," and that it be carefully limited in time.[53]

To 1777, then, the suspension acts simultaneously reinforced and undermined the significance of habeas corpus. "[T]he suspension statutes did not in fact prevent supervision of detention by judges. Rather, they constrained judges' authority to release prisoners who had been jailed in specified ways."[54] And yet, as much as the pre-1777 suspension acts left a vigorous writ largely undisturbed in (or, more to the point, *after*) the short term, they also left the unmistakable impression that such a reality was solely the result of legislative grace.

What changed in 1777 was, of course, our fault. With rebellion afoot in the North American colonies, Parliament faced growing numbers of American sailors in English captivity. Holding the captives as prisoners of war would lend legitimacy to American claims of independence. Instead, Parliament suspended habeas corpus, albeit in a manner that was unprecedented. *First*, there was no claim of emergency – no rebellion on the home island or threat of invasion that might provide the "necessity" that Parliament had previously relied upon as the basis for suspending the writ.[55] *Second*, the period of

48. See *id*. at 248–9.
49. See Halliday and White, supra note 8, at 619.
50. See Halliday, supra note 6, at 217 ("The logic of suspension followed in the wake of statutory extensions of the writ, consuming the judge's autonomy along the way.").
51. See *id*. at 249 ("More important than the common law writ's persistence during suspensions was the writ's revival when they ended.").
52. See Halliday and White, supra note 13, at 623.
53. See Halliday, supra note 8, at 250 (noting the four factors that informed suspension practice to 1777).
54. *Id*. at 249.
55. See Halliday and White, supra note 8, at 645–51 (summarizing the text of – and debates concerning – the 1777 suspension).

suspension would eventually last for six years – all the way through the beginning of 1783 – by far the longest of any suspension Parliament had enacted to date.[56] *Third*, the 1777 suspension distinguished among subjects for the first time, applying only to those arrested for treason in any colony, on the high seas, or for piracy, and exempting from its scope "any other prisoner or prisoners than such as shall have been out of the realm at the time or times of the offence or offences wherewith he or they shall be charged."[57]

Although the language of the 1777 suspension ironically "recognized the common law principles by which the writ had extended to precisely those places: not only to all dominions of the king outside England, but beyond, to the sovereignless sea,"[58] it nevertheless set a dangerous precedent for future suspensions in England, suggesting that Parliament could displace the writ based upon status, and without either of the constraints (necessity and duration) that had characterized every previous suspension.

So it was that the moment when the drafters of the U.S. Constitution set pen to paper to protect the habeas privilege against suspension absent carefully delineated circumstances may well have been the high-water mark of the scope of the privilege in England. Sprinkled throughout Halliday's book are a number of statements about the scope of the writ, with the caveat "[a]t least until the 1790s."[59] Nothing dramatic happened in 1790, but as Halliday explained, a series of developments in the years and decades thereafter, many of which were precipitated by the 1777 suspension, led to a significant decline in both the practical and legal significance of habeas corpus throughout the British Empire.[60]

For example, Parliament enacted a series of suspension statutes arising out of England's renewed wars with France between 1794–95[61] and 1798–1801,[62] with the 1799 suspension act including provisions for stricter confinement of individual prisoners and unrelated authority for detention arising out of the rebellion then underway in Ireland.[63] Thus, for the first time, Parliament used the pretext of suspension with regard to one emergency to justify detention arising out of another.

"Beginning in the 1790s," though, "suspension became just one part of wider statutory campaigns against political dissent in all forms."[64] In 1793, Parliament enacted the Aliens Act, which imposed a series of new sanctions – including detention without bail or deportation – on foreigners, especially Frenchmen, who failed to comply with a series of new regulations.[65] Parliament also enacted the Indemnity Act

56. See *id*. at 644 & n.204.
57. 17 Geo. 3, c. 9 (Eng.); see also Halliday, supra note 6, at 252.
58. Halliday, supra note 6, at 253.
59. See, e.g., *id*. at 133, 136.
60. See *id*. at 253–6.
61. See, e.g., 34 Geo. 3, c. 54 (Eng.), *renewed by* 35 Geo. 3, c. 3 (Eng.).
62. See, e.g., 38 Geo. 3, c. 36 (Eng.), *renewed by* 39 Geo. 3, c. 15 (Eng.), 39 Geo. 3, c. 44 (Eng.), 39/40 Geo. 3, c. 20 (Eng.), 41 Geo. 3, c. 26 (Eng.), and 41 Geo. 3, c. 32.
63. See 39 Geo. 3, c. 44, § 6.
64. Halliday, supra note 6, at 255.
65. 33 Geo. 3, c. 4, §§ 23–4 (Eng.). The Aliens Act "did permit review of such imprisonments . . ., but from the language of these sections, it is not clear this would carry the same procedural safeguards that a hearing of imprisonment on habeas corpus would provide." Halliday, supra note 6, at 432 n.170.

of 1801,[66] which appeared to take jailers off the hook for claims of false imprisonment or other abuse arising out of suspensions, even past ones.[67] In fine, "[t]he 1790s would mark the start of a legislative onslaught on liberties of every kind, a unified assault against which the writ proved almost powerless."[68] And even in the context of the writ's territorial scope, Parliament would eventually bar the justices from sending the writ into dominions with their own tribunals capable of issuing the writ.[69] It may not have mattered to colonists in Australia (or, per Nasser's work, India) that they could no longer seek relief from the justices in Whitehall, but it further reinforced Parliament's control of the writ.[70]

There's more to it,[71] but the short version is that the more Parliament intervened, the weaker the writ became in practice. The last example aside, it wasn't that Parliament was formally interfering with the power of King's Bench, but that it was vitiating the justices' ability to do anything meaningful *with* that power. As Halliday laments, "[t]he logic of detention expanded as more people, regardless of their having performed any wrong previously known to law, became subject to forms of detention that barred judicial supervision."[72] Just as Nasser documented in colonial India, the profound irony of the use of habeas corpus to consolidate judicial power in pre-revolutionary England was the uptick in the legitimization of emergency detention authorities – with the imprimatur of the very courts the conduct of which had provoked such a legislative reaction.

II. Habeas and Judicial Power after September 11

The use of habeas to centralize *American* judicial power is, in at least some respects, not a recent phenomenon. After all, the veritable revolution in collateral post-conviction review through habeas in the 1950s and 1960s was, at its core, about the assertion of federal judicial power vis-à-vis state courts. But from a federal separation of powers perspective, habeas rarely figured prominently – until Congress in the 1990s began scaling back its availability for the first time in U.S. history, and until the Executive Branch in response to September 11 began exercising an arguably novel and controversial form of emergency detention authority vis-à-vis terrorism suspects.

Now, with 17 years of hindsight, virtually all of the Supreme Court's work in the post-September 11 detainee cases that followed might loosely be characterized as going first and foremost to jurisdictional questions and/or the preservation of the institutional role of the federal courts. And as Nasser showed with respect to colonial India, and as Halliday

66. 41 Geo. 3, c. 66 (Eng.).
67. See Halliday, supra note 6, at 431 n.167 (noting the statute's retroactive effect).
68. *Id*. at 315.
69. See Habeas Corpus Act, 1862, 25/26 Vict., c. 20 (Eng.).
70. See Halliday, supra note 6, at 301.
71. See, e.g., *id*. at 116 (noting how, beginning in the 1790s, Lord Chief Justice Kenyon – who replaced Mansfield upon the latter's 1788 retirement – began pushing for more vigorous adherence to the rule against controverting the return, refused to settle cases, and otherwise retreated from the expansive nature of habeas practice under his predecessors).
72. *Id*. at 310.

concluded with respect to pre-revolutionary England, the consolidation of judicial power came largely as an end unto itself.

Of course, *Boumediene* is the most obvious manifestation of this theme, since the Court there held that the Suspension Clause "has full effect" for non-citizens detained at Guantánamo, and that Congress had violated that provision by taking away habeas jurisdiction without providing an adequate, alternative remedy.[73] Indeed, one need hardly look closely at Justice Kennedy's opinion for the *Boumediene* majority to see the central role that preservation of a meaningful judicial role had in the decision,[74] or the Court's concomitant disinclination to offer any guidance to lower courts about *other* rights the detainees might possess, or how the lower courts ought to proceed to reaching the merits on remand.[75] Thus, it may well be no surprise that the Justices have declined to intercede in any of the post-*Boumediene* cases arising out of the D.C. Circuit, even as lawyers, editorial pages, and even certain D.C. Circuit judges accused the court of appeals of intentionally subverting the Court's 2008 decision.[76]

Although less attention has been paid to the rest of the Court's work, it fits in with this larger theme just as well. Thus, the 2004 trilogy of *Padilla I, Hamdi*, and *Rasul* featured one case holding that the detainee had filed in the wrong court, but was free to refile in the proper forum;[77] one case holding that, by statute, the federal courts could entertain habeas petitions brought by Guantánamo detainees (with no view expressed as to the merits of such claims);[78] and one case holding that the federal courts had a meaningful role to play in reviewing the detention of U.S. citizen "enemy combatants," even if such detention had been authorized by Congress (and even if the Justices refused to explain just what that role should be).[79]

Much more could be (and has been) said about these three decisions, but the unifying theme appears to be the Court's simultaneous assertion of judicial power and reluctance to decide the cases before it on anything other than the narrowest grounds – even while

73. *Boumediene v. Bush*, 553 U.S. 723 (2008).
74. See Stephen I. Vladeck, "*Boumediene*'s Quiet Theory: Access to Courts and the Separation of Powers," 84 *Notre Dame L. Rev.* 2107, 2111 (2009).
75. See *Boumediene*, 553 U.S. at 796 ("These and the other remaining questions are within the expertise and competence of the District Court to address in the first instance.").
76. See, e.g., *Ali v. Obama*, 736 F.3d 542, 553–4 (D.C. Cir. 2013) (Edwards, J., concurring in the judgment) ("The troubling question in these detainee cases is whether the law of the circuit has stretched the meaning of the [government's detention authority] so far beyond the terms of these statutory authorizations that habeas corpus proceedings like the one afforded Ali are functionally useless."); see also Editorial, "A Right Without a Remedy," *N.Y. Times*, Mar. 1, 2011, at A26 ("The United States Court of Appeals for the District of Columbia Circuit . . . has dramatically restricted the *Boumediene* holding.").
77. See *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004).
78. See *Rasul v. Bush*, 542 U.S. 466, 485 (2004).
79. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (plurality opinion). Although the government quickly abandoned this argument, it's worth remembering that its *initial* claim in *Hamdi* was that his detention was categorically unreviewable. See *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002).

several of the Justices dropped hints as to their views on the merits.[80] Thus, when the government transferred Padilla to criminal detention just before his case returned to the Court in 2006, the Justices denied certiorari by a 6–3 vote. Notwithstanding the denial, Justice Kennedy emphasized for the unprecedented trio of himself, Chief Justice Roberts, and Justice Stevens, that Padilla would be entitled to a prompt judicial remedy if the government attempted to return him to military detention (thereby flouting the habeas authority of the federal courts), and that the Supreme Court remained available to remedy any mischief, but would otherwise not pronounce on the merits of Padilla's (now-terminated) military detention.[81]

The Supreme Court's 2006 decision in *Hamdan*,[82] invalidating the first round of Guantánamo military commissions, can also be seen as at least partly fitting within this theme, since the majority there devoted substantial energy to rejecting the government's argument that Congress, in the Detainee Treatment Act of 2005 (DTA),[83] had divested the Supreme Court of jurisdiction over Hamdan's appeal.[84] To be sure, the DTA was enacted *after* the Court granted certiorari,[85] and so *Hamdan* was impelled by – and ultimately turned on – questions sounding in the appropriateness of military jurisdiction (as opposed to efforts to constrain the power of the civilian courts). But as in both the 2004 trilogy and *Boumediene*, perhaps the most important feature of the Justices' intervention was that the Court preserved its ability to reach the merits, whether in the same case or at some future date – all while invalidating a system that transferred judicial power from the Article III judiciary to *ad hoc* military tribunals.

Ditto for the less-well-known *Munaf* and *Omar* cases, decided on the same day as *Boumediene* in 2008, in which the Justices unanimously confirmed the jurisdiction of the federal courts to hear habeas petitions from U.S. citizens in the custody of the "Multinational Force–Iraq" (MNF–I), even in cases in which that custody was in anticipation of Iraqi criminal proceedings.[86] Although the Court went out of its way to

80. See, e.g., *Rasul*, 542 U.S. at 483 n.15 ("Petitioners' allegations . . . unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'" (quoting 28 U.S.C. § 2241(c)(3) (2000))); *Padilla*, 542 U.S. at 464 n.8 (Stevens, J., dissenting) ("I believe that the Non-Detention Act prohibits – and the Authorization for Use of Military Force Joint Resolution . . . does not authorize – the protracted, incommunicado detention of American citizens arrested in the United States." (citations omitted)).
81. *Padilla v. Hanft*, 547 U.S. 1062, 1063–4 (2006) (Kennedy, J., concurring in denial of certiorari); see also *al-Marri v. Spagone*, 555 U.S. 1220, 1220 (2009) (mem.) (vacating Fourth Circuit's en banc decision upholding military detention of noncitizen arrested within territorial United States in light of his criminal indictment and transfer to civilian custody).
82. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).
83. Pub. L. No. 109-148, 119 Stat. 2680 (codified as amended in scattered sections of 10, 28, and 42 U.S.C. (2006)).
84. See *Hamdan*, 548 U.S. at 572–84.
85. Certiorari was granted in *Hamdan* on November 7, 2005. See *Hamdan v. Rumsfeld*, 546 U.S. 1002, 1002 (2005) (mem.). The DTA was signed into law on December 30, 2005.
86. *Munaf v. Geren*, 553 U.S. 674 (2008). The lower courts had split (incoherently) on the jurisdictional question based on misreadings of the Court's earlier ruling in *Hirota v. MacArthur*, 338 U.S. 197 (1948) (per curiam), as summarized in detail in Stephen I. Vladeck, "Deconstructing *Hirota*: Habeas Corpus, Citizenship, and Article III," 95 Geo. L.J. 1497 (2007).

(preemptively) reject the detainees' entitlement to injunctive relief on the merits,[87] it expressly *reserved* a ruling on their strongest claim – that their transfer to Iraqi custody would violate a federal statute.[88]

But perhaps the best testament to the judicial-power-as-such theme in the Court's post-September 11 jurisprudence is its most recent Guantánamo case – arising out of its maneuvering with respect to the Uighurs, a group of ethnically Turkic Chinese Muslims detained at Guantánamo. Shortly after *Boumediene*, the D.C. Circuit in an opinion by then-Judge Merrick Garland held that they could no longer be detained as enemy combatants.[89] But a separate D.C. Circuit panel subsequently held that they had no right to be released into the United States, notwithstanding the claim that at least some of them could not be resettled elsewhere.[90] Thus, the Supreme Court granted certiorari to decide "whether a federal court exercising habeas jurisdiction has the power to order the release of prisoners held at Guantánamo Bay 'where the Executive detention is indefinite and without authorization in law, and release into the continental United States is the only possible effective remedy.'"[91]

Because each of the detainees subsequently received an offer of resettlement to another country, the Justices sent the case back to the D.C. Circuit for reconsideration.[92] After the court of appeals adhered to its original analysis,[93] the Court *denied* certiorari, with Justice Breyer explaining for himself and Justices Kennedy, Ginsburg, and Sotomayor that:

> [T]hese offers, the lack of any meaningful challenge as to their appropriateness, and the Government's uncontested commitment to continue to work to resettle petitioners transform petitioners' claim. Under present circumstances, I see no Government-imposed obstacle to petitioners' timely release and appropriate resettlement. . . . Should circumstances materially change, however, petitioners may of course raise their original issue (or related issues) again in the lower courts and in this Court.[94]

In other words, because the Court was no longer faced with the threat to judicial power raised by the specter of individuals who could neither be detained nor released, review was no longer warranted. Taken together with *Hamdi, Padilla, Munaf*, and *Boumediene*, the maneuverings in *Kiyemba* provide further circumstantial evidence of the Court's apparent approach: The Supreme Court's principal focus in the detainee cases was on the protection of the authority of the federal courts, *in general*, to resolve habeas cases. Thus, so long as the power of the federal courts to act on the detainees' habeas claims was

87. See *Munaf*, 553 U.S. at 689–705.
88. See *id*. at 703 n.6; see also *id*. at 706 (Souter, J., concurring in the judgment) (noting the merits questions the Court left open).
89. See *Parhat v. Gates*, 532 F.3d 834, 836 (D.C. Cir. 2008).
90. See *Kiyemba v. Obama*, 555 F.3d 1022, 1028–9 (D.C. Cir. 2009).
91. See *Kiyemba v. Obama*, 559 U.S. 131, 131 (2010) (per curiam).
92. *Id.*
93. See *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam).
94. *Kiyemba v. Obama*, 563 U.S. 954, 954–5 (2011) (Breyer, J., respecting the denial of certiorari).

unthreatened, the merits did not require the Justices' attention, and could be left to the political branches – or, failing that, the lower courts. So understood, habeas is a means of protecting the courts – but not the detainees – from the political branches.

Thus, although the Justices repeatedly acted to assert and preserve the institutional role of the federal courts more generally, they have been decidedly unwilling to engage the substance of counterterrorism policies, especially in cases in which those policies relate to alleged abuses of individual civil liberties. For example, whereas the Court in *Rasul, Hamdan, Boumediene*, and *Kiyemba* ensured that the federal courts will play a central role in reviewing the detentions of noncitizens at Guantánamo, it has refused to take any case raising detention questions on the merits, including the substantive standard for detention,[95] the evidentiary burden on the government,[96] the relevance *vel non* of international law,[97] whether detainees are entitled to notice and a hearing prior to their transfer to a third-party country,[98] and various other key procedural issues.[99] So, too, the Court has refused to consider claims by *former* Guantánamo detainees that they were mistreated while detained, leaving intact a D.C. Circuit decision that held in the alternative that the defendants were entitled to qualified immunity and that the plaintiffs had failed to state a viable cause of action.[100] Taken together, these decisions have been widely read (including by judges on the D.C. Circuit)[101] as reflecting an unwillingness on the Justices' part to do anything with respect to Guantánamo other than assert their jurisdiction. Even when lower-court judges went out of their way to stress that they were "disquieted by [their colleagues'] jurisprudence,"[102] the Court stood idly by – with an oddly tangential solo opinion concurring in the denial of certiorari as the only public indicator of the Justices' thinking.[103]

In the process, the Court has left intact lower-court decisions that have been held up as reflecting affirmative hostility toward the larger judicial power project, with one D.C. Circuit judge going so far as to chastise the Supreme Court's "defiant – if only theoretical – assertion of judicial supremacy" in *Boumediene*.[104] Indeed, expanding out beyond the specific context of habeas cases, the *only* other cases implicating U.S. counterterrorism

95. See *Al-Bihani v. Obama*, 563 U.S. 929 (2011) (mem.).
96. See *Al Odah v. United States*, 563 U.S. 917 (2011) (mem.).
97. See *Al-Bihani*, 563 U.S. 929.
98. See *Khadr v. United States*, 563 U.S. 1016 (2011) (mem.); *Kiyemba v. Obama*, 559 U.S. 1005 (2010) (mem.).
99. See, e.g., *Rasul v. Myers*, 558 U.S. 1091 (2009) (mem.) (denying review of damages claim brought by former Guantánamo detainees).
100. See *Rasul v. Myers*, 563 F.3d 527, 528, 532 (D.C. Cir. 2009) (per curiam); cf. *Gul v. Obama*, 652 F.3d 12 (D.C. Cir. 2011) (holding former detainees could not continue to pursue their habeas petitions once released from Guantánamo).
101. See, e.g., Hon. A. Raymond Randolph, Remarks at the University of Oklahoma Institute for the American Constitutional Heritage (Mar. 25, 2011), http://fvbps-flash.ou.edu/videoplayer/videoplayer6.html?source=rtmp:/vod/IACH_Symposium/IACH_Sympsoium_Dinner.flv.
102. *Hussain v. Obama*, 718 F.3d 964, 973 (D.C. Cir. 2013) (Edwards, J., concurring in the judgment).
103. *Hussain v. Obama*, 134 S. Ct. 1621, 1622 (2014) (Breyer, J., respecting the denial of certiorari).
104. *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring).

policies that the Justices have taken in the past 15 years have been the eight instances in which the federal government – as opposed to a private party – sought Supreme Court review.[105] When anyone other than the government is asking, the Justices' principal focus appears to be on the accumulation – and preservation – of judicial power, as such, and little else.

III. Conclusion: Judicial Power and/in Emergencies

All of this is not to say that the trend documented in Part II is to be condemned. By even the most skeptical accounts, it is impossible to downplay the soft but unmistakable impact that judicial review in detention cases (including its mere specter) has had on U.S. government policies over the past 17 years. Secret CIA "black sites" were closed because of the courts. The Guantánamo population was whittled down because of the courts. No domestic arrestee has been subjected to military detention since 2002 because of the courts. Military commissions have improved (however insufficiently) because of the courts. And, most directly, 30 different Guantánamo detainees have already been released by dint of a court order to that effect.

But in the process, courts became active players in normalizing the state of exception presented by the Guantánamo cases. As Nasser concluded in an incisive 2007 essay in *Critical Inquiry*, Guantánamo helped to demonstrate that "the exception as it has historically and theoretically been understood, as a suspension of regular law, even a space of nonlaw, no longer exists. . . . Today most emergency laws are neither temporary nor categorically distinct from a larger set of state practices."[106] In that narrative, *Boumediene* (and, as importantly, its aftermath) is simply the confirmation of Nasser's thesis – that habeas becomes an instrument not only for the accumulation of judicial power, but for the normalization of emergency power. Indeed, for as important as the trilogy of 2004 Supreme Court decisions were in demonstrating that the courts would not simply kowtow to the whims of the Executive Branch, *Hamdi*, in particular, was perhaps just as important in the other direction – as cementing and upholding the fundamental proposition at the heart of contemporary U.S. counterterrorism policy, i.e., that we are at "war," and that powers not usually available *except* in such circumstances (such as military detention and trial by military commission) are therefore available, even when directed against our own citizens.

The question Nasser never answered in writing – whether in *The Jurisprudence of Emergency*, the 2007 *Critical Inquiry* essay, or elsewhere – is whether this tradeoff is worth it. That is to say, the real question raised by his work on habeas – and by the past eight years of U.S. practice – is whether, insofar as judicial involvement will necessarily produce these predictable consequences, we as a legal culture might be better off without it. Put another way, although the detainees surely would *not* be better off, would our legal

105. In contrast, the Court has granted exactly zero petitions for certiorari from plaintiffs in civil cases challenging post-September 11 counterterrorism policies *other* than habeas challenges to military detention.

106. Hussain, supra note 23, at 735.

system and constitutional culture have actually benefitted from the courts simply staying out of all of these cases, and leaving assessment of the legality of the government's actions to the court of public opinion?

Reduced to its simplest, this was the central claim of Justice Jackson's enigmatic[107] dissent in the U.S. Supreme Court's infamous *Korematsu* decision,[108] i.e., that the federal courts – and the Supreme Court in particular – should avoid deciding wartime cases implicating claims of exigency.[109] In Justice Jackson's view, such disputes presented the judiciary with two equally unappealing alternatives: either uphold the government's conduct, and thereby risk the consequences of lending legal imprimatur to what might be an effectively unreviewable claim of military necessity (which is what ended up happening in *Korematsu* itself), or invalidate the contested act, and risk being ignored by the executive – perhaps at substantial expense to the Court's power and legitimacy going forward.[110] Given these options, Justice Jackson seems to have concluded that the only winning move was not to play.[111]

But Nasser's account of habeas in colonial India and my own assessment of habeas in post-September 11 America suggest a somewhat more circumspect takeaway – not that there isn't danger in judicial review of exceptional cases; there always will be. Instead, the upside may simply be that the specter of judicial power does have a utility unto itself in shaping government conduct during times of exception – both in creating soft disincentives for especially egregious conduct (even if the courts don't ever invalidate those actions), *and* in reminding the political branches that politically insulated judges, and not democratically accountable legislators, will have the last word as to the propriety of

107. Eugene Rostow called it "a fascinating and fantastic essay in nihilism." Eugene V. Rostow, "The Japanese American Cases – A Disaster, 54 Yale L.J. 489, 510 (1945).
108. *Korematsu v. United States*, 323 U.S. 214, 242–8 (1944) (Jackson, J., dissenting).
109. As Jackson famously put it, "A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. *Id*. at 246.
110. See, e.g., Dennis J. Hutchinson, "'The Achilles Heel' of the Constitution: Justice Jackson and the Japanese Exclusion Cases," 2002 *Sup. Ct. Rev.* 455, 489–90 (2002).
111. See Stephen I. Vladeck, "Justice Jackson, the Memory of Internment, and the Rule of Law After the Bush Administration," in *When Governments Break the Law: The Rule of Law and the Prosecution of the Bush Administration* 183, 185 (Austin Sarat and Nasser Hussain, eds, 2010). It seems more than a little appropriate that the final citation in this article should be to the chapter I wrote for Nasser as part of a volume that he and Austin Sarat assembled in 2010. It's no exaggeration to suggest that I agonized over the cited chapter more than anything else I'd written to that point in my career – or since. And not because of the sensitive subject matter, but because I couldn't stomach the thought of Nasser "tsk-ing" me (as, of course, he did) over all of the ways the chapter could – and should – have been better. I harbor no illusion whether it's the best thing I've ever written (it isn't). But it's far and away the most personally meaningful.

exceptional policies. Then, the question becomes whether those benefits are worth the price – the very real likelihood that such judicial review will end up legitimizing some, if not much, of what the government has done, and, in the process, normalizing at least some elements of the exception (if they weren't normalized already). With regard to the internment camps, Justice Jackson thought the cost too high. But on the far side of his tenure as lead U.S. prosecutor at Nuremberg, and his exposure to the complicit role of the German judiciary in propping up the Nazi state, he struck a more equivocal tone – concluding his celebrated concurring opinion in the *Steel Seizure* case with the observation that

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.

Ever the provocateur, I'm not sure Nasser would disagree.

Author's Note

This article is dedicated to the memory of Nasser Hussain, to whom I owe more than could ever be expressed in words.