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Excavating the Forgotten Suspension Clause

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Amanda Tyler, Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay (2017).

In *Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay*, Amanda Tyler undertakes "to lay out as comprehensively as possible the full story of the legal and political history of the constitutional privilege of the writ of habeas corpus." She does so with care and style.

In excavating what she calls the "forgotten" Anglo-American legal history of the writ of habeas corpus, Tyler begins, of course, at the beginning, in seventeenth-century England. Among the products of Parliament's longstanding battle for power with the crown, the original Habeas Corpus Act of 1679 provided that a person who could claim the protection of English law could be detained—that is, imprisoned by the king and his ministers—only through timely criminal prosecution and conviction. Absent timely prosecution, the Act required the prisoner's discharge. Period.

Because the Act made no allowance for wartime or other emergency detentions, however, ten years later Parliament scrambled to create an exception by inventing the concept of suspension—in which Parliament (but not the crown) could suspend the Act's protections during times of crisis. But once a suspension expired, the Act again put the government to a clear and simple choice: either prosecute the detainee or release him. Period.

A century later, England's view that the Habeas Corpus Act did not apply in America was among the colonists' major grievances: England denied that Americans were entitled to the rights of Englishmen, while Americans believed otherwise. After the Revolution, each of the newly united states quickly enacted statutory or constitutional habeas corpus protections (or both) of their own, such that a half-century later Joseph Story's *Commentaries* concluded that the Act had been "incorporated into the jurisprudence of every state in the Union."

The drafters of the new national government quickly followed suit. Those at the Philadelphia convention sought to improve on English protections of individual rights by expressly limiting the Constitution's suspension power to those times "when in Cases of Rebellion or Invasion the public Safety may require it." The early Congress took this limitation on its power to suspend seriously—so seriously that it rejected the first proposal for suspension, made by then-President Thomas Jefferson in response to Aaron Burr's military conspiracy.

Not until the Civil War did the United States see its first suspension of the writ, famously (or infamously) asserted by Lincoln as President. Tyler concludes that Chief Justice Taney had the better argument—certainly backed by history—when he concluded that suspension is a legislative and not an executive power (Congress eventually passed legislation that delegated the power to Lincoln). But everyone, including Lincoln, agreed that suspension was necessary before the government could detain persons outside the criminal process who, like Confederate sympathizers, could claim the protection of American law. And shortly after the War, during Reconstruction, Congress authorized President Grant to suspend the privilege to deal with rising Klan violence in the South.

Well into the 20th century, as Tyler painstakingly documents, the consensus understanding remained consistent: "[T]he origins and long-standing interpretation of the Suspension Clause understood it to prohibit the government, in the absence of a valid suspension, from detaining persons who can claim the protection of domestic law outside the criminal process, *even in wartime.*" Even in wartime. Especially in wartime.

But World War II brought the sea change in which this longstanding understanding was "forgotten." The United States

government forcibly relocated and detained 120,000 Japanese-Americans (70,000 of whom were American citizens) without criminal prosecution *and* without a suspension of habeas corpus. Initially, Attorney General Francis Biddle advised that no such detention could occur without a suspension of habeas corpus protections. He later backed down, recounting still later that "the Constitution has never greatly bothered any wartime President."

But the President was not alone. Not only did a majority of the Supreme Court infamously find that the federal government's action, concededly based on race and national origin, did not violate its equal protection obligations under the Due Process Clause, but it made no mention of habeas corpus protections, much less the conspicuous absence of any suspension.[1] (As a matter of equal protection, the contemporary Supreme Court only recently finally made clear that *Korematsu* "was gravely wrong the day it was decided."[2] But still no mention of habeas corpus.)

Fast forward to the contemporary war on terror. Tyler explains how the World War II experience paved the way for the federal response to 9/11, backed by the Supreme Court in *Hamdi v. Rumsfeld*,[3], which permits the detention of U.S. citizens on American soil as enemy combatants, outside of the criminal process and absent any suspension. As Tyler explains, that response is inconsistent with historical practice (prior to World War II), as well as the framers' understanding

And although the Court in Boumediene v. Bush,[4] concluded that Guantanamo detainees enjoyed habeas protections, it did not order "the traditional remedy of release from custody" even though Congress has not suspended the privilege, nor had they been criminally charged. The Court instead held that the detainees were entitled to greater opportunity to challenge their designation than Congress had offered them by statute. Tyler suggests that the Court has conflated, if not confused, Due Process Clause precedent with the habeas privilege in a way that undermines habeas protections. The historical understanding of the writ required prosecution, suspension, or release—one of those three things, and no other. Today's Court has instead devised a balancing test in which detention can last for the duration of the conflict—in other words, indefinitely and perhaps as long as the detainee's life—so long as a tribunal assesses the government's claims to support the detention. That's not the same.

To be sure, Tyler doesn't insist that reliance on historical tradition is the only or necessarily the best approach to constitutional interpretation (nor does she address the role of habeas outside the wartime context, and many may be eager to hear her views on its application in the immigration setting or in other criminal justice contexts). She instead emphasizes that history is relevant and valuable, and thus that it should be part of the discussion. There may be good reasons to depart from historical understandings and practices. But it's hard to see any good reason for failing to discuss that backdrop altogether, much less failing to explain when and why to abandon or alter longstanding and fundamental traditions.

1. Korematsu v. United States, 323 U.S. 214 (1944).
2. Trump v. Hawaii, 138 S. Ct. 2392 (2018).
3. 542 U.S. 507 (2004).
4. 553 U.S. 723 (2008).

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