

2019

## Looking Backward and Forward at the Suspension Clause

G. Edward White

*University of Virginia School of Law*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Constitutional Law Commons](#), [Legal History Commons](#), and the [Military, War, and Peace Commons](#)

---

### Recommended Citation

G. E. White, *Looking Backward and Forward at the Suspension Clause*, 117 MICH. L. REV. 1313 (2019).

Available at: <https://repository.law.umich.edu/mlr/vol117/iss6/20>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

## LOOKING BACKWARD AND FORWARD AT THE SUSPENSION CLAUSE

G. Edward White\*

HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY. By Amanda L. Tyler. New York: Oxford University Press. 2017. Pp. xiii, 281. \$85.

For several years Amanda Tyler<sup>1</sup> has been writing on the writ of habeas corpus and the Suspension Clause, both with respect to their historical origins and their contemporary application to the current “war on terror.”<sup>2</sup> *Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay* is both a recapitulation and an integration of those earlier writings. In a publisher’s blurb on the back cover of the book, Jack Goldsmith describes it as “the definitive political and legal history of the writ of *habeas corpus* during war.” It seems likely to occupy that status for some time to come.

But an intriguing question about *Habeas Corpus in Wartime* remains. Is it a history of how the “Privilege of the Writ of Habeas Corpus”<sup>3</sup> to challenge the detention of individuals outside the existing criminal process of civilian courts has endured in America despite successive wars, and how the suspension of the writ has been undertaken grudgingly and with abundant caution? Or is it a history of how the privilege has had little practical effect in wartime—initially because persons detained in connection with wars could readily be placed into legal categories that precluded their having a privilege to challenge their detention, or more recently because “total war,” featuring the engagement of civilians as well as military personnel, has made it imperative that members of the population otherwise eligible to challenge their detention in the absence of suspension not be able to do so—resulting in the

---

\* David and Mary Harrison Distinguished Professor of Law, University of Virginia School of Law.

1. Professor of Law, University of California, Berkeley School of Law.

2. In order of their appearance, Tyler’s articles on the subjects are Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333 (2006); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600 (2009) [hereinafter Tyler, *Suspension as an Emergency Power*]; Amanda L. Tyler, *The Counterfactual That Came to Pass: What if the Founders Had Not Constitutionalized the Privilege of the Writ of Habeas Corpus?*, 45 IND. L. REV. 3 (2011); Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901 (2012); Amanda L. Tyler, *Habeas Corpus and the American Revolution*, 103 CALIF. L. REV. 635 (2015); and Amanda L. Tyler, *A “Second Magna Carta”: The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege*, 91 NOTRE DAME L. REV. 1949 (2016).

3. U.S. CONST. art. I, § 9, cl. 2.

Suspension Clause in effect being “forgotten”? Tyler’s book ends up being a history of both themes, requiring a sorting out of its implications.

### I. THE ENGLISH HISTORY OF HABEAS CORPUS AND SUSPENSION

The current understanding of the writ of habeas corpus in American constitutional jurisprudence emphasizes its status as an individual constitutional “right” designed to protect persons against arbitrary detention by the government. In that capacity, habeas can be said to represent a particularly cherished right, one that the framers of the Constitution valued sufficiently to put in that document’s original text<sup>4</sup> before adding other rights in the form of amendments. The framers were particularly concerned about corrupt or tyrannical officials detaining persons without their being given an opportunity to hear and refute the charges against them, and the elevation of the “Privilege of the Writ” to constitutional status was responsive to those concerns.<sup>5</sup> At the same time, the framers recognized that in some circumstances—“invasion” and “rebellion” were singled out—suspension of the writ might be necessary to protect “public safety” (pp. 125–29). The impression created by the text of the Suspension Clause is one of American citizens typically being able to force officials detaining them to either proffer charges against them or release them from custody, and only having that “Privilege of the Writ” suspended in dire emergencies.

The prefounding history of habeas corpus and suspension in England was only partially consistent with the understanding of those concepts that evolved in America. The habeas right had two sources in England: an inchoate “common law” basis and the Habeas Corpus Act of 1679 (p. 11). The emergence of common law habeas may have been an effort on the part of the King’s Bench courts to bring additional cases before them so that their power could be extended.<sup>6</sup> Habeas corpus petitions, although understood as an effort to invoke the Crown’s “mercy” when officials restrained the liberty of subjects of the Crown, were also opportunities for courts to investigate the legitimacy of detentions, many by officials of the Crown itself, and to justify them. And statutory habeas seems to have been an explicit effort on the part of Parliament to prevent Kings from arbitrarily imprisoning their enemies, often on ideological grounds. Thus, both versions of habeas in seventeenth- and eighteenth-century England seem to have been as much the products of institutional struggles as of an abiding concern with the liberties of English subjects.

The suspension of habeas came, in that period, in the form of parliamentary acts enacted in response to purported emergencies. Although there were several suspensions in the eighteenth century, they were understood as

---

4. *Id.* (“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.”).

5. See pp. 108, 123–40.

6. See PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 80–81 (2010).

existing for limited durations, and they were responses to “[e]xtreme [e]mergencies”—typically outbreaks of violence, sometimes religiously inspired.<sup>7</sup> Tyler suggests that, whatever the motivation may have been for creating the privilege of the writ of habeas corpus, once it was in place Parliament was reluctant to suspend it for any length of time (p. 53).

Even where the habeas privilege was available, it was constrained in wartime by two legal categories: “enemy aliens” and “prisoners of war.” No one suggested that enemy aliens were afforded the protection of habeas; the writ was designed for English subjects (p. 271). And the treatment of prisoners of war was governed by the laws of war, which accorded certain protections to belligerents detained by other nations, but certainly not the ability to challenge their detention. After the American colonies declared independence, the British struggled with how to classify Americans who had been captured by British ships and brought to England (pp. 66–67). The British government took the position that they were not prisoners of war but “rebels and traitors,” because it declined to recognize the United States as a sovereign government (p. 67). Consequently, they were eligible to be tried for treason. But none were, because the Americans had captured various British officials, were treating them as prisoners of war, and were offering to exchange them for American prisoners in England (pp. 67–69). The lesson Tyler draws from the treatment of American Revolutionary War prisoners by the British is that they would have been entitled to petition for habeas corpus, since they were in England, even though it was “wartime.”<sup>8</sup> But since the status designated for them by the British government turned on there being no official “war” between independent sovereigns, that conclusion is not self-evident.

Tyler’s conclusion that the privilege of the writ of habeas, and the requirements for its suspension, applied in times of war is, of course, crucial to the organization of her book. Her narrative, after it turns from England to America, consists of a series of episodes, most of them in “wartime”—when suspension of the writ was considered, enacted, or ignored—and her argument that the Suspension Clause has been “forgotten” since World War II rests on the assumption that a suspension of the writ needed to be enacted to justify the detention of American citizens even in wartime. Thus, it seems important to take a closer look at the basis for her conclusion.

Given the importance Tyler attaches to the proposition that both the privilege of the writ of habeas and the necessity for its suspension to justify the indefinite detention of individuals were intended to apply to wartime as well as to peacetime, the evidence she presents in support of that proposition is somewhat thin. She presents two sorts of evidence. One is textual: the fact that the Habeas Corpus Act of 1679 contained no limitation to the applica-

---

7. See chapter 2.

8. She bases this on the passage by Parliament of a bill, in 1777, suspending the privilege of habeas corpus for persons arrested for the commission of acts in America or on the high seas and detained in England. The bill assumed that habeas corpus would have been otherwise available to such persons. Pp. 82–83.

bility of habeas in times of war. The other is an extrapolation from the enactment of suspensions themselves. Tyler argues that when Parliament passed suspensions in 1696, 1708, 1715, 1722, 1744, and 1745, all of them were in response to concerns about threats of war or took place when England was actually at war with France (pp. 47–51).

There is less weight to this evidence than might first appear. Tyler notes that “much of [the] legal framework” connected with the Habeas Corpus Act of 1679 was “not so much the result of a deep concern for civil liberties *per se*, but represented instead the product of a concerted effort by Parliament to protect its privileges and wrestle control of such matters from the monarch” (p. 30). If so, it would seem that the principal concern of those who passed the Habeas Corpus Act was with limiting the power of the Crown to detain persons indefinitely without advancing reasons, and the combination of a habeas privilege and suspension was a way in which Parliament, rather than the Crown, could decide when such detentions were appropriate. That would seem to be a concern primarily limited to domestic institutional disputes rather than to the protection of England against foreign enemies. As for the evidence that suspensions took place when England was at war, only the first and the last two of them did: England declared war on France in 1689, and England and France were again involved in hostilities in 1744.<sup>9</sup> The others were responses to rumors that groups in Scotland were intriguing against the Crown in an effort to return James II to the throne. James II had been displaced by a Dutch Protestant, William of Orange, and fled to France in 1688.<sup>10</sup>

Instead of an impression that the purpose of habeas corpus was to prevent the sorts of arbitrary detentions of citizens that were most likely to occur in wartime, one gets a different impression from the data: that the purpose of *suspending* habeas corpus was to give a threatened government the power to detain suspicious persons without fearing they would be released after habeas petitions. That perceived threats to the Crown were the basis of suspension legislation, and that in three instances England was actually at war with France, might be taken as evidence of an implicit understanding that the writ of habeas may have made sense in tranquil times, but not when domestic turbulence or war against a foreign power was taking place.

It is thus possible to look at the American episodes Tyler discusses through two rather different lenses. If one assumes that both at common law and under the Habeas Corpus Act of 1679 the writ was taken to be available at all times, not just tranquil times, then suspension, even in a perceived national emergency, becomes a grave matter and a deviation from the normal legal framework. If, however, one assumes that less than ten years after the passage of the Habeas Corpus Act, in response to the first “emergency” that England had experienced in that interval, suspension legislation was adopted, then the *suspension* of habeas corpus can be seen as something of a “war-

---

9. See pp. 40, 49–50.

10. See pp. 35, 47–49.

time” measure—a measure designed for perceived serious national emergencies. Thus, the installation of the privilege of the writ of habeas corpus can be seen as designed to keep the Crown from abusing its power in times of peace, and suspension legislation can be seen as a way of signaling that “peace” is no longer with us, and thus indefinite detentions may be necessary to preserve “public safety.”

## II. HABEAS AND SUSPENSION AT THE FRAMING

Tyler produces abundant evidence that the framers of the Constitution introduced the Suspension Clause with an awareness of English history, which for them included the perceived excesses of colonial administrators in detaining persons and depriving them of the right to jury trials (pp. 119–36). She suggests, rightly in my view, that by the time the Suspension Clause was enacted, the “Privilege of the Writ of Habeas Corpus” had evolved from its original role in England as a device by which Parliament could check arbitrary detentions by the Crown, to a symbol of American liberties, associated with freedom from bills of attainder, protections against prosecutions for treason, and the right of trial by jury. The limited scope given to suspensions of habeas in the Suspension Clause—it was to be invoked only in “Cases of Rebellion and Invasion” and then only when “public Safety may require it”—suggests the framers had invested a good deal in the privilege of the writ of habeas corpus.<sup>11</sup>

Although Tyler’s conclusions about the Suspension Clause from the framing era may seem unexceptionable, during the Civil War President Abraham Lincoln himself opposed the finding that the institution expected to enact suspension was Congress, not the Executive. Lincoln, without authorization from Congress, took it upon himself to order Union army generals to suspend habeas corpus. Once the legality of that action was challenged by an alleged Confederate supporter in a habeas petition and declared to be constitutionally invalid by Chief Justice Roger Taney, Lincoln declined to grant a trial to the petitioner, essentially defying Taney’s order (pp. 160–63).

---

11. U.S. CONST. art. I, § 9, cl. 2. Two issues that later surfaced in interpretation of the Supremacy Clause seem resolved rather easily by an examination of the historical context in which it was enacted. The first is what institutions of government may suspend the privilege. The answer to that, based on English practice and the placement of the clause in Article I in the Constitution, seems plain: the legislature. There is, however, a subsidiary question: if one assumes that the judiciary has the power to determine whether a legislative suspension is valid, that presupposes that a legislative determination that an “Invasion” or “Rebellion” affecting “public Safety” would not be conclusive, but open to judicial scrutiny.

The other issue, which was not actually decided until the 2008 Supreme Court case *Boumediene v. Bush*, was whether the Suspension Clause implicitly created a constitutional right in persons detained in custody to secure judicial review of the basis of their detention. The language of the clause, although referring to “The Privilege of the Writ of Habeas Corpus,” is only directed at the terms under which the writ may be suspended. Does it presuppose an underlying constitutional “right” to petition a court for habeas relief? The *Boumediene* majority, citing founding-era sources, concluded that it did. *Boumediene v. Bush*, 553 U.S. 723, 745 (2008).

We next turn to Tyler's analysis of the state of habeas corpus during the Civil War.

### III. SUSPENDING HABEAS DURING THE CIVIL WAR

When the war broke out in the spring of 1861, it was apparent to the Lincoln Administration that some areas in states that had not seceded from the Union were nonetheless populated by supporters of the Confederacy. Baltimore was one such area, and its importance to the Union military effort was accentuated by its being a stop on a railroad line extending from Boston to Washington that was expected to serve as a basis for sending Union Army troops to defend the capitol.<sup>12</sup> Although the Maryland legislature had voted against secession, the mayor of Baltimore protested against Union troops moving through the state and allegedly ordered the destruction of some bridges on the railroad line in order to prevent troop movements (p. 160). In response, Lincoln authorized General Winfield Scott to suspend habeas corpus at any point along the railroad line from Philadelphia to Washington (p. 160).

A Maryland farmer, John Merryman, was arrested and detained in Fort McHenry near Baltimore on May 25, 1861, allegedly for participating in the blowing up of railroad bridges along the Philadelphia-Washington line (pp. 160-61). No warrant was served on Merryman nor were any formal charges brought against him (p. 161). Merryman's lawyer challenged his detention, filing a habeas petition before Taney, who was the circuit judge for a federal circuit that included Baltimore (p. 161). On receiving the petition, Taney ordered the Union military commander, George Cadwalader, to produce Merryman at a hearing on the petition in his chambers in Baltimore.<sup>13</sup> Cadwalader neither attended the meeting nor produced Merryman; his representative asked Taney for a postponement so that Cadwalader could consult with Lincoln (p. 161). Taney refused, held Cadwalader in contempt, and ruled on the petition the next day (p. 161). He found that Lincoln had no power to suspend habeas or to delegate that authority to a military officer, and that the military could not detain a civilian without filing criminal charges against him (p. 161).

A few days later, Taney issued a written opinion supporting his ruling (p. 161). He discussed the Habeas Corpus Act of 1679, maintaining that its principal purpose was to prevent officials from detaining persons without precise charges against them and to prevent judges from excessively delaying in granting their discharges.<sup>14</sup> He concluded that the Act embodied two principles of American constitutional law: that only the legislature could suspend habeas and that, in the absence of a valid suspension, the govern-

---

12. See p. 160.

13. See p. 161.

14. *Ex parte Merryman*, 17 F. Cas. 144, 150 (Taney, Circuit Justice, C.C.D. Md. 1861) (No. 9487).

ment had to either specify criminal charges against persons it detained or release them (p. 162–63). He asked that a copy of his opinion be delivered to Lincoln “to determine what measures he will take to cause the civil process of the United States to be respected and enforced.”<sup>15</sup> In response, the Lincoln Administration indicted Merryman on a number of charges, including treason, but never brought him to trial (p. 163).

Meanwhile Lincoln proceeded as if Taney’s opinion was incorrect, continuing to issue suspensions in 1861 and 1862 (p. 163), culminating in a September 24, 1862 proclamation in which he suspended habeas “in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority.”<sup>16</sup> In a July 4, 1861 message to Congress, Lincoln declared that “it was not believed that any law was violated,”<sup>17</sup> and the next day his Attorney General, Edward Bates, wrote a letter to Congress indicating that Lincoln had the power to issue suspensions during wartime under his authority as commander in chief, and that he had the discretion to ignore a habeas writ once he had proclaimed a suspension because the matter was “political and not judicial.”<sup>18</sup>

Tyler demonstrates that Taney clearly had the better of the dispute: all of the authorities, both in England and America, agreed that suspension was a legislative power (pp. 164–66). But there were some factors complicating Lincoln’s suspensions in the first two years of the war. First, even if one assumes that the wording of the Suspension Clause suggests that the framers intended suspensions to be issued only in extreme emergencies, such an emergency was arguably present once the Civil War broke out. A clearer case of “Invasion” and “Rebellion” could hardly be imagined once the Confederate states seceded and Confederate troops entered territory that remained in the United States. Lincoln argued, in his July 4, 1861 message to Congress, that he need not wait for Congress to assemble before issuing suspensions. “Are all the laws, *but one*,” he maintained, “to go unexecuted, and the government itself go to pieces, lest that one be violated?”<sup>19</sup> He added that:

[a]s the [Suspension Clause] was plainly made for a dangerous emergency it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion.<sup>20</sup>

---

15. *Id.* at 153.

16. Proclamation No. 1, 13 Stat. 730 (1862).

17. Abraham Lincoln, *Message to Congress in Special Session, reprinted in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN* 421, 430 (Roy P. Basler ed., 1953).

18. H.R. EXEC. DOC. NO. 37-5, at 6, 8 (1861).

19. Lincoln, *supra* note 17, at 430.

20. *Id.* at 430–31 (footnotes omitted).

Eventually, in March 1863, Congress passed legislation authorizing Lincoln to suspend habeas corpus.<sup>21</sup> It had debated doing so since the outbreak of the war, indicating that some of its members remained concerned about abuses of executive power, even in a wartime setting. Tyler suggests that the principal reason Congress resolved to give Lincoln authority to suspend habeas was the growing number of lawsuits against federal officials by persons being detained, most of which cited Taney's opinion in *Ex parte Merryman* that executive suspensions were unconstitutional (p. 169). She presents evidence that some members of Congress viewed executive suspensions as an "emergency" power, becoming necessary because there were numerous acts through which rebels could undermine the Union war effort without exposing themselves to treason prosecutions.<sup>22</sup> Congress's authorization to Lincoln was carefully worded: he was "authorized to suspend the privilege"<sup>23</sup> of habeas corpus rather than "hereby authorized," leaving open the question whether he had the power in the first place.<sup>24</sup> In the wake of that authorization, Lincoln issued sweeping suspensions for the remainder of the war, and although Congress required lists of all detained prisoners to be provided in states where courts remained open, few lists were ever provided, and Lincoln's suspensions remained in effect a year after the Confederates surrendered (pp. 170–71).

Let us consider the effect of the information Tyler presents about Lincoln's suspensions of habeas in the Civil War in light of her argument that the habeas privilege was expected to remain intact in wartime. There is evidence from the Congressional debates over the 1863 Habeas Corpus Act that some members of Congress thought that suspension was necessary because otherwise "rebellious" activities that did not amount to treason could not be made a basis for detaining persons. For those persons, suspension seems to have been regarded as an "emergency" power made imperative by the exigencies of war and rebellion. But that view of suspension can be seen as having contradictory implications for Tyler's thesis. On the one hand the privilege of habeas might be seen as remaining intact in wartime, creating a dilemma for officials who might want to detain persons they suspected of committing acts inimical to a war effort, but whose acts had not yet risen to the level of treason or other crimes. On the other hand—this seems to have been Lincoln's reasoning—the fact of war, by definition, created a rationale for suspending the privilege: a war (especially the Civil War) was unquestionably an "Invasion" and a "Rebellion" imperiling "public Safety." Thus, as

---

21. Act of March 3, 1863, ch. 81, 12 Stat. 755 (amended 1866, 1867).

22. P. 170 n.50 (referring to statements made in debates over the 1863 Act (citing CONG. GLOBE, 37th Cong., 3d Sess. 1092, 1194, 1206 (1863))). For more detail, see Tyler, *Suspension as an Emergency Power*, *supra* note 2, at 637–55.

23. Act of March 3, 1863 § 1, 12 Stat. at 755.

24. See the statement of Senator James Bayard in CONG. GLOBE, 37th Cong., 3d Sess. 1094 (1863), referring to the wording as "intentionally ambiguous."

a practical matter, the outbreak of war had the effect of justifying suspension of the privilege, and as a result the privilege really did not exist in wartime.

Some of the members of Congress who debated the Habeas Corpus Act of 1863 may well have had constitutional or other scruples about wholesale preventive detentions of persons suspected of undermining the Union war effort. But Lincoln does not seem to have had any such scruples: he began issuing suspensions almost immediately after the fall of Fort Sumter, continued to do so despite Taney's ruling in *Ex parte Merryman*, and by the end of the war had suspensions in place that applied to a great variety of persons (p. 159). Moreover, Congress did not seem to think there was anything inappropriate with Lincoln's issuing suspensions in 1861 and 1862, despite *Merryman*. Throughout the war,<sup>25</sup> there seems to have been an implicit understanding, on the part of the legislatures of both sides, that suspensions were a necessary component of allowing military officials to engage in preventive detention in order to foil plots and other activities designed to subvert the war effort, but that it was also necessary for public officials to regularly declare that the detention of citizens without any reasons being advanced for their incarceration was inconsistent with American ideals. One might describe that posture as honoring the privilege of the writ of habeas corpus in its breach.

#### IV. THE STATUS OF HABEAS DURING WORLD WAR II

Tyler argues that there was a rather sharp transition between understandings about the habeas privilege and suspension in the Civil War and the treatment of those doctrines during the Second World War. She calls the period of World War II one in which the Suspension Clause was "forgotten," meaning that persons suspected of hindering the war effort, including American citizens, were detained without habeas being suspended, and that when detentions were challenged in the courts the basis of the challenge was not the Suspension Clause (pp. 209, 229). It is, of course, important to Tyler's general thesis that suspension was widely understood, after the Civil War ended, "as a necessary predicate to detain persons who could claim the protection of domestic law outside the criminal process," and that "everyone at the time understood that with the lapsing of the suspension, those in custody had to be charged criminally or released" (p. 7). She maintains that "suspension finally became part of the American constitutional experience" during the Civil War, but that "the long-standing operation of the suspension model" assumed that, in times of war as well as times of peace, the privilege of the writ of habeas was invariably afforded to persons in custody, so that the only instance when they could be kept indefinitely in custody without being charged with a criminal offense was when habeas had been suspended (pp. 6-7). It was this "operation of the suspension model" that was "forgot-

---

25. President Jefferson Davis of the Confederacy issued three suspensions as well, although the Confederate Congress insisted that it authorize Davis's suspensions and often sought to limit their duration. For more detail, see pp. 187-92.

ten” in World War II, when American citizens, as well as aliens, were detained indefinitely without habeas being suspended.

Once again it matters whether one endorses Tyler’s thesis that the habeas privilege remained intact during wartime in assessing her claim that the Suspension Clause was “forgotten” during World War II. If, rather than “everyone” understanding that the privilege of the writ was a bedrock principle for all times and only failed to exist when it was affirmatively suspended, the understanding of the status of habeas in wartime periods such as the Civil War was more complicated, with the principle of the writ’s protection being rhetorically endorsed but recognized as being tacitly as well as explicitly suspended by the exigencies of war, the question whether the Suspension Clause was “forgotten” during World War II might need to be put differently. If, in times of war, the habeas privilege, when invoked on behalf of potential “enemies” opposing a war effort, is understood to be tacitly suspended because detaining such enemies potentially advances the course of the war, and forcing officials to charge each of them criminally or release them potentially undermines it, then the Suspension Clause is not “forgotten” during wartime; instead its broad applicability is “remembered.” Indefinite detentions of “suspicious” persons comes to be seen as a natural and necessary component of fighting a war against enemies.

One may believe, as Tyler does, that such a posture is inconsistent with the importance American law accords to civil liberties, and that when persons are detained without trial for indefinite periods the bedrock protection afforded Americans by the habeas privilege is undermined (p. 276). In her historical narrative of habeas Tyler presents the comments of several actors endorsing that belief, including Edward Coke, whom she quotes as saying that if a detention could be justified merely “for matter[s] of state,” then “we are gone, and we are in a worse case than ever,” for “we shall leave Magna Carta and . . . make [it] fruitless.”<sup>26</sup> But against such affirmations of the habeas privilege are Lincoln’s comments in an 1863 letter about the effect of suspension in the Civil War. “[A]rrests are made,” he noted, “not so much for what has been done, as for what probably would be done . . . for the preventive . . . Of how little value the [Suspension Clause] . . . will be rendered[] if arrests shall never be made until defined crimes shall have been committed . . .”<sup>27</sup>

Lincoln then gave an illustration of the potential effect of habeas during wartime. Suppose, he asked, the Union Army had arrested Confederate military leaders who were still in Union territory at the outset of the war and detained them. “Unquestionably,” he suggested, “if we had seized and held them, the insurgent cause would be much weaker. But no one of them had then committed any crime defined in the law. Every one of them if arrested

---

26. P. 18 (quoting 3 COMMON DEBATES 1628, at 95 (Robert C. Johnson et al. eds., 1977) (remarks of Sir Edward Coke in an April 26, 1628 debate in Parliament)).

27. Letter from Abraham Lincoln to Erastus Corning et al. (June 12, 1863), in 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 17, at 260, 265.

would have been discharged on Habeas Corpus, were the writ allowed to operate.”<sup>28</sup> “[T]he time [is] not unlikely to come,” Lincoln wrote, “when I shall be blamed for having made too few arrests rather than too many.”<sup>29</sup> Here, once again, the Suspension Clause seems to have been remembered rather than forgotten in wartime.

Whether or not one is persuaded that the status of habeas in wartime might be more equivocal than Tyler’s account suggests, there can be no gain-saying that the incarceration of over 120,000 individuals of Japanese descent, over 70,000 of them American citizens (p. 209), in “Relocation Centers” in west coast states pursuant to a February 19, 1942 executive order issued by President Franklin Roosevelt,<sup>30</sup> was one of the most massive preventive detention efforts in history. The order directed individuals of Japanese descent to report immediately to Assembly Centers prior to being relocated to Relocation Centers, excluded them from designated “military areas” in west coast states, and imposed curfews on them without any investigation of their loyalty to the United States, their behavior in general, or whether they were citizens or aliens.<sup>31</sup>

Several U.S. officials involved in the process that eventually produced Executive Order 9066, including Francis Biddle, the Attorney General, believed that American citizens of Japanese descent could not be detained without a suspension of the habeas privilege. On January 24, 1942, Biddle wrote a letter to that effect to Leland Ford, a member of Congress from California.<sup>32</sup> And on February 2, 1942, James H. Rowe, Jr., an assistant to Biddle, wrote Roosevelt’s private secretary, Grace Tully, that any effort to move individuals of Japanese descent out of California, one of the options being considered, “would probably require suspension of the writ of habeas corpus—and my estimate of the country’s present feeling is that we would have another Supreme Court fight on our hands.”<sup>33</sup> There were other objections to mass detention of Japanese expressed within the Roosevelt Administration: the FBI had not found evidence of espionage or sabotage within Japanese communities;<sup>34</sup> a January, 1942 report from Naval Intelligence had concluded that “the most dangerous” Japanese were already in custody or had been

---

28. *Id.*

29. *Id.*

30. Exec. Order No. 9066, 3 C.F.R. 1092 (1942). A subsequent order, Exec. Order No. 9102, 3 C.F.R. 1123 (1942), established the War Relocation Authority to administer the relocation centers.

31. See pp. 227–28.

32. Letter from Francis Biddle to Leland Merritt Ford (Jan. 24, 1942), *microformed on DOCUMENTS OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS* 5739, 5740, reel 5, 417–18 (Univ. Publ’ns of Am.), *quoted in* p. 225.

33. P. 225 (quoting Memorandum from James H. Rowe, Jr., Assistant to the Attorney General, to Grace Tully, Private Secretary to the President (Feb. 2, 1942) (on file with the Franklin D. Roosevelt Presidential Library, Hyde Park, N.Y.)).

34. FBI Director J. Edgar Hoover sent a report to that effect to Attorney General Francis Biddle on February 9, 1942. See FRANCIS BIDDLE, *IN BRIEF AUTHORITY* 221–22 (1962).

identified by the Navy or the FBI;<sup>35</sup> and John J. McCloy, the Assistant Secretary of War, had indicated in a February 3, 1942 telephone conversation with General John L. Dewitt, Commander of the Western Defense Command, that mass detentions of individuals of Japanese descent might require “suspending writs of Habeas Corpus and . . . getting into very important legal complications.”<sup>36</sup>

On February 19, Roosevelt issued Order 9066.<sup>37</sup> Biddle, who had previously received a memorandum from Benjamin Cohen concluding that “[s]o long as a classification of persons or citizens is reasonably related to a genuine war need and does not under the guise of national defense discriminate . . . for a purpose unrelated to the national defense, no constitutional guaranty is infringed,”<sup>38</sup> would acquiesce in the decision to issue the order.<sup>39</sup> The order, justified on the ground that “the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities,” authorized the War Department to designate and regulate “military zones” on the west coast and to exclude persons from those areas.<sup>40</sup> Even though only about ten percent of the individuals of Japanese descent living on the west coast lived near areas connected to national defense, the overwhelming majority of the Japanese population residing in west coast states was brought within the order (p. 399 n.85). The order technically covered German and Italian populations as well, but no members of those populations were relocated.<sup>41</sup>

35. P. 226 (quoting Memorandum from Lieutenant Commander Kenneth D. Ringle to Chief of Naval Operations (Jan. 26, 1942) (on file with the National Archives, Washington, D.C.)).

36. Cf. p. 226 (quoting PETER IRONS, *JUSTICE AT WAR* 47 (1983) (reproducing a transcript of McCloy’s February 3, 1942 telephone conversation with DeWitt)).

37. Exec. Order No. 9066, 3 C.F.R. 1092 (1942).

38. Memorandum from Benjamin Cohen et al. to Francis Biddle, *quoted in* MORTON GRODZINS, *AMERICANS BETRAYED: POLITICS AND THE JAPANESE EVACUATION* 256–57 (1949).

39. James Rowe subsequently suggested that Biddle “just folded under” when a “military” solution to the problem of mass detention was proposed. Interview by Amelia Fry with James H. Rowe in Washington D.C. (Mar. 1, 1971), *in* THE EARL WARREN ORAL HISTORY PROJECT: JAPANESE-AMERICAN RELOCATION REVIEWED; VOLUME 2, DECISION AND EXODUS (1976), [http://content.cdlib.org/view?docId=ft667nb2x8&brand=calisphere&doc.view=entire\\_text](http://content.cdlib.org/view?docId=ft667nb2x8&brand=calisphere&doc.view=entire_text) [<https://perma.cc/56N8-44PG>], *quoted in* p. 227.

40. Exec. Order No. 9066, 3 C.F.R. 1092 (1942).

41. In his final recommendations to Roosevelt on “Japanese Evacuation from the West Coast,” delivered on February 13, 1942, DeWitt stated that “[t]he Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become ‘Americanized,’ the racial strains are undiluted.” J.L. DEWITT, U.S. ARMY, *FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST* 1942, at 34 (1943), *quoted in* p. 230. DeWitt subsequently testified before Congress that the Japanese were “a dangerous element. There is no way to determine their loyalty. . . . It makes no difference whether he is an American citizen, he is still a Japanese.” *Investigation of Congested Areas: Hearing on H. Res. 30 Before a Subcomm. of the H. Comm. on Naval Affairs*, 78th

All in all it was a notorious episode, made all the more so by the Supreme Court's sustaining the constitutionality of Executive Order 9066's being applied to individuals of Japanese descent but not to other "enemy" populations in *Hirabayashi v. United States*<sup>42</sup> and *Korematsu v. United States*.<sup>43</sup> But Tyler's principal interest in reviewing the mass detention of individuals of Japanese descent is to note that after the initial concern of Roosevelt Administration officials that a mass detention of people of Japanese descent might require the issuance of suspensions, the Suspension Clause implications of the relocation policy were "forgotten," (p. 209) not only by the officials authorizing the policy but by lawyers and judges in the courts where the policy was challenged on constitutional grounds. No Suspension Clause arguments on behalf of detainees were advanced in *Hirabayashi* or *Korematsu*, and when the lawyers for Mitsuye Endo, an American citizen of Japanese descent who was confined in two relocation centers during the war, filed a habeas petition for her release and argued that she could not be detained without a criminal charge absent a congressional suspension, the government did not engage with that argument (pp. 231, 234–36). Instead, the government conceded that Endo was a loyal citizen and that it was beyond the powers of the War Relocation Authority to "detain citizens against whom no charges of disloyalty or subversiveness have been made for a period longer than that necessary to separate the loyal from the disloyal."<sup>44</sup> Endo had been detained from 1942 on.<sup>45</sup> The government's concession about Endo's loyalty gave the Supreme Court an opportunity to avoid deciding Endo's case on constitutional grounds, which it took.<sup>46</sup>

Tyler suggests that even if one puts aside the obviously discriminatory features of the Japanese relocation policy, it was not justifiable. First, she suggests that the west coast was never under martial law at any time during the war: civilian courts were open and there were no active military operations in the United States (p. 238). Second, she believes that "any suspension declared during World War II [in the continental United States] would have been constitutionally problematic" (p. 238). There was no "factual support for the internment policy"—no evidence of espionage or sabotage by people of Japanese descent—and thus no basis for concluding that "Invasion" or "Rebellion" was taking place (p. 239). Consequently, she argues, the privilege

---

Cong., 739–40 (1943) (statement of Lt. Gen. John L. DeWitt, Commanding General of Western Defense Command).

42. 320 U.S. 81 (1943).

43. 323 U.S. 214 (1944), *abrogated by* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

44. *Ex parte Endo*, 323 U.S. 283, 294–95 (1944).

45. *Id.* at 285.

46. *Id.* at 297. As Justice William O. Douglas's opinion for a unanimous Court put it, "We are of the view that Mitsuye Endo should be given her liberty. In reaching that conclusion we do not come to the underlying constitutional issues which have been argued. For we conclude that, whatever power the War Relocation Authority may have to detain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedure." *Id.*

of habeas remained in effect, so any person detained in a relocation center and not charged with a criminal offense could have filed a habeas petition and should have been released unless the government could show evidence of criminal activity.<sup>47</sup> Instead, all of those issues were bypassed—“forgotten”—by the decision to justify Executive Order 9066 on the grounds of “military necessity,” without any actual showing that it was “necessary” to engage in mass detentions of individuals of Japanese descent in order to support the war effort.

Those arguments were surely on the minds of the officials who eventually resolved to have Roosevelt issue the order. Why, then, was that decision made? If the indefinite detention of citizens without criminal charges could be challenged through habeas petitions, and suspension of the habeas privilege was not feasible, and there was no compelling evidence of rampant disloyalty in the Japanese population, why engage in the massive roundup and relocation of individuals of Japanese descent in west coast states, which required the building and staffing of relocation centers and the housing of their residents, possibly for many years? Part of the reason may have been panic: after Pearl Harbor the Japanese navy appeared to have assumed control of the Pacific, and Japanese submarines had been observed off of the west coast of America.<sup>48</sup> Part of it was undoubtedly driven by racist stereotypes: perceptions that Japanese were “inscrutable” and thus their loyalty impossible to determine; resentment among some nativist west coast groups at the commercial success of Japanese-American farmers and businesses.

But another reason is captured in two comments made by persons involved in the process that led to Order 9066. One was by McCloy after a meeting with Roosevelt and officials of the War Department prior to the order being issued. McCloy subsequently noted that Roosevelt took winning the war to be his first priority, and concluded that since the military had the prime responsibility for achieving victory, they would have his full support. “We have *carte blanche* to do what we want to as far as the President is concerned,” Biddle recalled McCloy saying after the meeting.<sup>49</sup> The other comment was made by Biddle himself. “I do not think [Roosevelt] was much concerned with the gravity or implications [of issuing the order],”<sup>50</sup> Biddle wrote in his memoirs. “Nor do I think that the constitutional difficulty plagued him—the Constitution has never greatly bothered any wartime President.”<sup>51</sup>

Here, once again, one sees government officials with legal training, in a wartime setting, rhetorically invoking the constitutional difficulties that arise when American citizens are indefinitely detained without the habeas privilege being suspended (and possibly the difficulties in meeting the require-

---

47. See p. 242.

48. See p. 223.

49. BIDDLE, *supra* note 34, at 218 (statement of Assistant Secretary John J. McCloy).

50. *Id.* at 219.

51. *Id.*

ments of the Suspension Clause), while at the same time acknowledging that as a practical matter any provision of the Constitution, including the Suspension Clause, was not much of a “bother” in wartime. In making the decision to issue Executive Order 9066 and set the relocation policy in motion, Roosevelt and his advisors may not have “forgotten” the Suspension Clause; they may have remembered that it was of little effect when a war was going on.

There is another episode involving Roosevelt, Biddle, the Suspension Clause, and the Supreme Court which arguably supports that conclusion. The episode resulted in the 1942 decision of the Court in *Ex parte Quirin*,<sup>52</sup> which Tyler discusses, but in connection with that case’s standing as something of a precedent for the Court’s 2004 decision in *Hamdi v. Rumsfeld*<sup>53</sup> (pp. 253–60). I am interested in *Quirin* as a wartime Suspension Clause case.

In *Quirin*, eight agents of the Nazi government, two of whom were arguably American citizens,<sup>54</sup> were taken into custody by the FBI after landing boats on Long Island and the Florida coast and traveling inland, with the ostensible purpose of carrying out sabotage operations, such as blowing up bridges, in the United States.<sup>55</sup> As soon as they were arrested, many of the same Roosevelt Administration officials that had debated the issue of detaining Japanese-Americans on the west coast discussed what to do with the alleged saboteurs (p. 253). The difficulty, as it had been with the incidents that triggered Lincoln’s wartime suspensions, was that the agents had not actually committed any sabotage. They had entered the United States illegally, and removed and buried their German uniforms, but they had been arrested before doing anything else.<sup>56</sup> Biddle and Secretary of War Henry Stimson, who were involved in the discussion about the agents, both believed that nothing the agents had done would merit them criminal sentences of any particular duration in civilian courts (p. 254). Even the noncitizen agents would not be subject to lengthy sentences under existing federal statutes.<sup>57</sup>

Biddle eventually recommended trying all the agents before a military tribunal constituted by Roosevelt for that purpose. He made that recommendation in a memorandum to Roosevelt on June 30, 1942, and Roosevelt created a special military commission on July 2 (pp. 254 & 412 n.45). In his memorandum, Biddle had argued that a military commission could decide the agents’ fate far more quickly than a civilian court, that treating the epi-

---

52. 317 U.S. 1 (1942).

53. 542 U.S. 507 (2004) (plurality opinion in part).

54. The agents who arguably held American citizenship were Ernest Peter Burger and Herbert Hans Haupt. P. 253.

55. *Quirin*, 317 U.S. at 21.

56. *Id.*

57. In a 1997 article, Boris Bittker, who had been involved with the *Quirin* case as a government lawyer during World War II, recalled that the maximum sentence that could be imposed on the noncitizen agents was two years imprisonment. Boris I. Bittker, *The World War II German Saboteurs’ Case and Writs of Certiorari Before Judgment by the Court of Appeals: A Tale of Nunc Pro Tunc Jurisdiction*, 14 CONST. COMMENT. 431, 434 (1997).

sode as a violation of the laws of war by enemies would make it easier to dispose of, and that under the laws of war the government could ask for the death penalty.<sup>58</sup> When Roosevelt first learned of the agents' arrest, he proposed trying them for treason, but Biddle cautioned that in the case of the two agents who were reportedly American citizens, treason convictions might be difficult to obtain, given the constitutional requirement for that crime.<sup>59</sup> Biddle also noted that if the two citizen agents were tried for treason, that might suggest that they were entitled to bring habeas petitions arguing that they be tried in a civilian court.<sup>60</sup>

Roosevelt was convinced by Biddle's memorandum and issued not only an order creating a military commission to try the agents but also an additional proclamation designed to cover the agents' case (p. 254). It read that

all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States . . . and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the laws of war, shall be subject to the law of war and to the jurisdiction of military tribunals; and that such persons shall not be privileged to seek any remedy or maintain any proceeding [sic], directly or indirectly, or to have any such remedy or proceedings sought on their behalf, in the courts of the United States . . . .<sup>61</sup>

In short, the privilege of the writ of habeas corpus was not available to any of the agents. Roosevelt had already told Biddle that he would not release the agents "to any United States marshal armed with a writ of habeas corpus."<sup>62</sup>

After the presentation of evidence at the agents' trial before the military commission, their counsel sought leave to file habeas petitions on their behalf before a federal district court (p. 255). That court denied habeas relief, citing Roosevelt's proclamation.<sup>63</sup> Counsel for the agents next sought to bypass the U.S. Court of Appeals for the District of Columbia Circuit and petition the Supreme Court of the United States directly. The Court granted that petition and agreed to meet in special session while the agents' trial was ongoing (p. 255). One day after oral argument, the Court issued a per curiam opinion in which it found that it had jurisdiction to hear the agents' challenges to the commission; that the commission was "lawfully constituted";

58. Memorandum from Francis Biddle to Franklin D. Roosevelt (June 30, 1942) (on file with the Franklin D. Roosevelt Presidential Library, Hyde Park, N.Y.), *cited in* p. 254.

59. P. 254; U.S. CONST. art. III, § 3, cl. 1 ("No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.").

60. *See* p. 254.

61. Proclamation No. 2561, 3 C.F.R. 309 (1942), *reprinted in* 56 Stat. 1964 (1942).

62. BIDDLE, *supra* note 34, at 331 (statement of Franklin D. Roosevelt).

63. *Ex parte Quirin*, 47 F. Supp. 431 (D.D.C.), *aff'd* 317 U.S. 1 (1942).

that Roosevelt had the authority to bring charges against the agents before the commission; and that the agents were being lawfully detained.<sup>64</sup> The Court noted that it would produce a full opinion in the case after the opening of its October 1942 Term.<sup>65</sup>

Three days after the Court handed down a per curiam opinion, the military commission found all the agents guilty on all charges and sentenced them to death.<sup>66</sup> Three months later the Court issued an opinion seeking to justify its July disposition of *Quirin* (p. 256). The justices struggled mightily with that opinion (p. 256), eventually grounding it on two bases. One was that the agents were “enemy belligerents” not entitled to the protections of American civilians, so they could be tried by a military commission (p. 256). The other was that even if the Articles of War applied to their trial—which some justices believed, and which technically would have required the President, before acting on the judgment of the commission, to subject the record to the Judge Advocate General—that in itself did not provide a reason why the agents could get the benefit of habeas corpus.<sup>67</sup> The convoluted paragraph in which the *Quirin* court announced its rationale read as follows:

We need not inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents. For the Court is unanimous in its conclusion that the Articles [of War] in question could not at any stage of the proceedings afford any basis for issuing [a] writ [of habeas corpus to the agents].<sup>68</sup>

*Quirin* meant that Roosevelt’s proclamation had suspended habeas corpus for persons in the position of the saboteur agents. That might or might not have been, in 1942, a potentially large number of persons. But the Court had declared in *Quirin* that the agents were in “lawful custody” when detained by the commission; Roosevelt’s proclamation had precluded their obtaining habeas relief.<sup>69</sup> It was, in effect, a suspension, and one not undertaken by Congress. So whatever one might think of the reasoning supporting *Quirin*, it was another example of the Suspension Clause’s being “forgotten,” or remembered to its disadvantage, in wartime.

---

64. *Ex parte Quirin*, 317 U.S. 1, 18–19, 63 S. Ct. 1 (1942) (per curiam).

65. *Id.* at 18, 63 S. Ct. at 2.

66. P. 256. On hearing that sentence, Roosevelt commuted the sentences of Burger and George John Dasch, who, after unexpectedly encountering a member of the Coast Guard after landing their boat on a Long Island beach, sought to turn themselves in to the FBI and inform that agency about the remaining agents. See pp. 253, 256. The remaining saboteurs, including Haupt, were executed five days after the commission passed sentence on them. P. 256.

67. *Quirin*, 317 U.S. at 47–48.

68. *Id.* at 47.

69. *Id.* at 48.

## V. HABEAS AND THE WAR ON TERROR

*Quirin* revived itself as a potential precedent in *Hamdi*, one of the Court's two principal "enemy combatant" cases arising out of the war against terrorism.<sup>70</sup> In *Hamdi* a U.S. citizen allegedly fighting for the Taliban in Afghanistan was captured and eventually brought to a military installation in South Carolina, where he was detained without criminal charges under the 2001 Authorization of the Use of Military Force (AUMF), passed by Congress in the wake of the September 11 terrorist attacks.<sup>71</sup> The AUMF authorized the President to use "all necessary and appropriate force" against nations and persons involved with or aiding the September 11 attacks;<sup>72</sup> under its auspices the U.S. government arrested and detained numerous "persons of interest" in connection with the attacks (p. 247). It designated some of those persons, including American citizens, as "enemy combatants," and held them in military custody without bringing charges.<sup>73</sup> It did not suspend habeas corpus.<sup>74</sup>

Yaser Hamdi was classified as an "enemy combatant," and his father filed a habeas petition on his behalf; before the Supreme Court, Hamdi's attorneys argued that his detention was unconstitutional in the absence of a habeas suspension (p. 249). The government countered that Hamdi's detention had been authorized by the AUMF and that he was not entitled to judicial review of the detention or of his classification as an "enemy combatant" (p. 249). When the case reached the Supreme Court, a plurality held that Hamdi could be detained under the AUMF as an "enemy combatant" but was entitled to a hearing on his status, which conceivably might be before a military tribunal, in which the liberty interest of the detainee could be weighed against the government's interest in preventing "enemies" captured in battle from returning to the battlefield.<sup>75</sup> The salient point of *Hamdi*, for present purposes, is the plurality's conclusion that a citizen could be detained as an "enemy combatant" even though habeas corpus had not been suspended.

Tyler argues that a "balancing test" for determining "enemy combatant" status "cannot be reconciled with the understanding of the suspension model that governed up to and during the American Revolution, Founding Era, Civil War, and Reconstruction periods" (p. 262). Under that model, the government, when it detained citizens on domestic soil, was forced to choose

---

70. The other case was *Boumediene v. Bush*, 553 U.S. 723 (2008), which Tyler discusses, but which I am not discussing because Tyler rightfully treats *Boumediene* as centering on the geographical reach of habeas corpus rather than any Suspension Clause issues. See pp. 255–56.

71. *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004) (plurality opinion).

72. Authorization for Use of Military Force, Pub. L. No. 107–40, § 2(a), 115 Stat. 224, 224 (2001) (codified in 50 U.S.C. § 1541 note (2012) (Authorization for Use of Military Force Against September 11 Terrorists)).

73. See p. 263.

74. See 115 Stat. 224.

75. *Hamdi*, 547 U.S. at 519, 529 (plurality opinion).

between criminally prosecuting them or suspending habeas. “[A] balancing test,” Tyler maintains, “ignores the specific trade-offs built into the very design of the suspension framework,” which

contemplates that it is only in the most dire of circumstances—those specified in the Suspension Clause—that the government interest in national security may enter the calculus *at all* in order to displace the core privilege long associated with the . . . English Habeas Corpus Act. . . . [T]he suspension framework . . . has already struck the relevant balance between individual liberty and national security, categorically favoring liberty in all but the most extreme circumstances. (pp. 274–75)

Historically, there is much to be said for Tyler’s position. But consider how, since World War II, Congress and the executive have approached the issue of suspending habeas in wartime. Instead of resorting to suspensions, they have made use of executive orders in which, with respect to allegedly limited categories of persons and offenses, habeas was in effect “suspended.” Illustrations are Executive Order 9066, authorizing the military to in effect detain Japanese residents of the west coast for the duration of a war; Roosevelt’s 1942 proclamation accompanying his creation of the military commission to try the German agents, which “suspended” the habeas privilege of a class of persons charged with committing a class of offenses; and the AUMF, which, in the wake of 9/11, authorized the Executive to, in effect, detain a variety of persons believed to be connected to terrorist activities. In none of those instances did Congress choose the alternative of formally suspending habeas itself. One can understand why. Habeas suspensions, although typically given some geographic ambit, expose *everyone*—American citizens of any conceivable stripe—to being detained without trial within the ambit of the suspension. Imagine if Congress had suspended habeas in west coast states after Pearl Harbor, or suspended habeas along the Atlantic coast in the wake of the German agents’ landing, or passed even limited suspensions of habeas after the September 11 attacks. The government would then have had the equivalent of a license to arrest and detain whomever it chose. Few members of Congress would have wanted to be associated with the conferral of such a power.

Moreover, the strategy of limited executive “suspensions” was legitimated by the courts. Executive Order 9066 was upheld in *Hirabayashi* and *Korematsu*. Roosevelt’s 1942 proclamation was upheld in *Quirin*, and *Quirin* was cited by the plurality in *Hamdi* as part of its justification for upholding the government’s power to detain American citizens as “enemy combatants” in the absence of a suspension. Collectively, those strategic decisions of the Executive, and their legitimation by the Court, suggest that, at least since World War II, the Suspension Clause has not so much been “forgotten” as deliberately bypassed.

#### CONCLUSION

Let us contrast the nature of “war” for much of the period which forms the basis of Tyler’s history with how it has come to be exercised since the

Civil War. Before that conflict, wars were largely fought by professional soldiers. It was not until the latter stages of the Civil War that civilian populations were directly targeted by opposing armies and an existing distinction between “military” and “civilian” personnel was obliterated. The legal categories of “prisoners of war” and “belligerents” were designed to apply to professional soldiers and nations employing them: neutral nations and civilians remained outside the laws of war. Sherman’s march southward from Atlanta and Stonewall Jackson’s forays through Virginia changed that, introducing “total war,” in which destruction of civilian property and the enlistment of civilian populations in a war effort became a norm.<sup>76</sup>

“Total war” was also the norm in World War II, with its bombing of cities housing civilian populations, and was the norm in the September 11 attacks, only one of which was directed at a military facility, the Pentagon. With “total war” comes the possibility not only that civilian populations will be exposed to military force but that civilians will be deeply engaged in the war effort. That was an assumption guiding Executive Order 9066: civilians in Japanese-American communities on the west coast might be poised to engage in espionage and sabotage.

When suspensions of habeas are considered in the context of “total war,” there seem no obvious limits to their scope. The suspension that precipitated *Merryman* was limited to a railroad line between Philadelphia and Washington on the assumption that sabotage by Confederate sympathizers would likely take place in that area. The potential areas of suspension after Pearl Harbor and the arrest of the German agents were far wider, and the area of suspension after 9/11 wide as well: some of the persons directly involved in that attack were trained in the American midwest and southwest. In addition, the “war on terror” seems to be one of indefinite duration: seventeen years after 9/11, arrests of international and domestic “terrorists” remain common. How can the “suspension model” of preventive detention be effectuated in such a setting? In the final analysis, it may not matter whether Tyler is correct in concluding that “the 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*” (p. 281). That may have been then, but war is different now, and the mechanism of suspension seems different as well.

---

76. Mark E. Neely, Jr., *Was the Civil War a Total War?*, 37 CIV. WAR HIST. 5, 7–8 (1991).