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THE HISTORICAL DEVELOPMENT OF HABEAS CORPUS

by

Neil Douglas McFeeley*

I. THE ENGLISH DEVELOPMENT

A. *Early Origins of the Writ*

The origins of the Great Writ of habeas corpus lie in the dimly-lit corridors of English common law and perhaps in the Roman civil law as well. Tracing the early history of habeas corpus is, to a great extent, tracing the development of the right of personal liberty in Great Britain after the signing of the Magna Carta, a right protected by implication in the "Suspension Clause" of the Constitution and by statutory means in later years. In addition to the intrinsic interest of the Great Writ, the study of the historical development of habeas corpus is of value in recognition of the changing functions and roles which habeas corpus has performed in the legal system. "Essential in understanding of the modern writ of habeas corpus, now appropriated to the Great Writ *ad subjiciendum*, is a study of the various writs of habeas corpus."¹

The Great Writ *ad subjiciendum* is a predecessor of the modern writ which is the center of controversy with respect to the Warren Court's expansion of federal jurisdiction. Coincidentally, another conflict on jurisdiction centuries ago caused the ancestor of the modern writ to branch out into three distinct species: habeas corpus *ad respondendum*, used when "a man hath a cause of action against one who is confined by the process of some inferior court"; habeas corpus *ad subjiciendum*, used when a person was detained on a criminal charge; and habeas corpus *ad faciendum et recipiendum*, used when a defendant in a civil action wished to remove the action into a superior court.²

The precise origin of the writ³ which evolved into the modern writ is a subject of speculation.⁴ Some scholars feel that it may be traced back to Roman law.⁵ Even if habeas corpus did not evolve directly from Roman or Norman law, "the leading idea of it—deliverance by summary legal process from illegal confinement—may be traced in the laws of other countries

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1. Longsdorf, *Habeas Corpus: A Protean Writ and Remedy*, 8 F.R.D. 179 (1949).

2. 9 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 111 (3d ed. 1944).

3. "It may sound a little surprising to assert, at the present day, that there is no readily accessible book, nor, indeed, so far as the writer is aware, any book, which gives, in a succinct and intelligible form, an account of the origin of this famous bulwark of our liberties . . ." Jenks, *The Story of Habeas Corpus*, 18 L.Q. REV. 64 (1902).

4. "The date of the origin of the writ of habeas corpus is unknown. It is supposed to have been in use before the date of the Magna Carta." R. HURD, *A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT* 131 (1876).

5. See W. CHURCH, *A TREATISE ON THE WRIT OF HABEAS CORPUS* 2 (2d ed. 1893); Glass, *Historical Aspects of Habeas Corpus*, 9 ST. JOHNS L. REV. 55 (1934).

which derived none of their principles of jurisprudence or rules of procedure from English law."⁶ Robert Walker, who undertook an extensive and comprehensive study of the development of habeas corpus, believes that "the origin of the process lies in the structure of the legal language itself. Literally habeas corpus means 'have the body' and cast in the imperative mode by a court it is quite conceivable that natural usage could, in time, evolve into discrete process."⁷ Scholars agree that, at least in the early stages of development during the medieval phase, habeas corpus was "merely procedural" and an interlocutory mandate ordered during civil proceedings.⁸ Granted only by the king, habeas corpus, according to Blackstone, was a "high prerogative writ."⁹

B. *Development Through Jurisdictional Conflict*

Until the end of the fifteenth century the ancestor to the modern writ was merely a procedural order to "have the body" before a court for various reasons. The vague procedural writ, however, soon began to evolve into distinct forms with different functions. This change resulted from conflicts over jurisdiction arising from the common law courts' desire to extend their jurisdiction at the expense of rival courts.¹⁰ The first phase of this competition for jurisdiction was the contest between the central courts and the multitude of local and franchise courts. During this period the writ of habeas corpus was one of the means utilized by the central courts to assert superiority over their rivals. Frederick Pollock writes that "[o]ld and new forms of the writ of habeas corpus were, in part, the results of this evolving legal and social order, and, in part, instruments by which the restructuring was advanced."¹¹ By the early fifteenth century different forms of habeas corpus were used to curtail the authority of inferior jurisdictions. In this era the writ was still procedural but was utilized for substantive purposes. Yet, once a judgment was rendered, the writ could not release a prisoner from the custody of even an inferior court.

The second phase in the jurisdictional contest began in the latter part of the fifteenth century with skirmishes between the courts of common law and the Court of Chancery. The courts of common law began to utilize habeas

6. R. HURD, *supra* note 4, at 131.

7. R. WALKER, THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY 13 (Oklahoma State Pub. Vol. 57, No. 9, March 1960). Others agree with this or similar analyses. See W. HOLDSWORTH, *supra* note 2, at 108; Cohen, *Some Considerations on the Origins of Habeas Corpus*, 16 CANADIAN B. REV. 92, 104 (1938); and "Bracton's Notebook," quoted in Fox, *Process of Imprisonment at Common Law*, 39 L.Q. REV. 50, 53 (1923).

8. W. HOLDSWORTH, *supra* note 2, at 108-09.

9. 2 W. BLACKSTONE, COMMENTARIES *131. In any event, as early as 1220 A.D. there appear court orders directed to the sheriff commanding him to produce a party before the court. A specific entry in the Curia Regis Rolls for 1219-1220 reads: "Praeceptum Fuit vicecomiti quod haberet corpus Ricardi de Brom ad respondendum Radulfo Table . . ." quoted in R. WALKER, *supra* note 7, at 13.

10. W. HOLDSWORTH, *supra* note 2, at 109.

11. In 2 *Select Essays* 403, quoted in R. WALKER, *supra* note 7, at 17.

corpus to assert their jurisdiction¹² in such instances as the release of persons committed by the Courts of Requests, the Chancery, the Admiralty, and the Council, and by the Court of High Commission.¹³ By the end of the fifteenth century various forms of the writ and especially *ad subjiciendum* were being used by common lawyers to challenge the power of the royal prerogative courts. Employment of habeas corpus against these executive courts was just one step away from employing the writ to question prerogative commands of the Crown.¹⁴

During the last step in its development the Great Writ ceased to be merely procedural and gained some substantive elements because of its expanded application and its relationship to due process. That last step in the use of habeas corpus, to protect the liberty of the subject, is intertwined with the religious and political conflicts of the time. Both the Puritans and the parliamentary opponents of the Crown invoked the Magna Carta to prove that arrest without due process of law was illegal. The House of Commons interpreted due process to mean the due process of common law and attempted to use it to prevent arrest by order of the Crown. Although this attempt was unsuccessful during the Tudor period, the interpretation "commended itself to the common lawyers; for it magnified their jurisdiction" and gave some basis for resistance by judges to arbitrary acts which were contrary to principles of common law.¹⁵

This resistance was exemplified by a use of the writ of habeas corpus to question the legality of executive imprisonments. The 1560 decision in *Skrogges v. Coleshil*¹⁶ appears to be the first challenge to the acts of the prerogative by way of habeas corpus from the common law courts.¹⁷ Two cases heard in 1588, *Searches Case*¹⁸ and *Howels Case*,¹⁹ were examples of common law courts challenging executive tribunals and executive command through habeas corpus. The Court of Common Pleas held as insufficient returns by the marshal that stated the commitments were by order of the Privy Council or by royal letters patent. The Council could not acquiesce in the situation which resulted and tried unsuccessfully to settle the issue of the proper practice on the writ of habeas corpus by passing the Resolution of the Judges of 1591 which recognized the validity of commitments by the Council or by special royal command.²⁰

In addition to using habeas corpus against the royal prerogative, the courts continued to employ it to expand common law jurisdiction against ecclesiastical, conciliar, and local tribunals. The writ was enmeshed in the political

12. W. HOLDSWORTH, *supra* note 2, at 109.

13. "It was probably owing to its extensive use by the common law courts to defend their jurisdiction, that the writ had, at the close of the 16th century, become an independent writ . . . ; and that, as so used, it was branching out into three distinct species." *Id.* at 111.

14. R. WALKER, *supra* note 7, at 24.

15. W. HOLDSWORTH, *supra* note 2, at 112.

16. 73 Eng. Rep. 386 (K.B. 1560).

17. R. WALKER, *supra* note 7, at 35.

18. 74 Eng. Rep. 65 (C.P. 1588).

19. 74 Eng. Rep. 66 (C.P. 1588).

20. T. TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 347 (1946).

controversies which swept through the country especially during the reign of Charles I and consequently gained in usage as a weapon to battle against arbitrary executive orders. The infamous Forced Loan of 1626²¹ was the genesis of *Darnel's Case*²² of 1627 in which the return to the writ of habeas corpus *ad subjiciendum* stated that the prisoners were held *per speciale mandatum Domini Regis*. Although the King's Bench decided in favor of the prerogative, for the first time the issue had been clearly put forward for legal and public debate. The House of Commons initiated a resolution in response to the decision consisting of a strongly worded denial of the king's right to commit a person by executive command with no lawful cause expressed. However, the House of Lords was reluctant to agree to this stance, and the petition which emerged was a weaker supplication.²³ The petition did retain the point that no man should be detained without a stated cause, but excepted commitment occasioned *per speciale mandatum Domini Regis*.²⁴ The apparent effect of the petition was to reverse the decision in *Darnel's Case*.²⁵

Subsequent action sought legally, politically, and pragmatically to reverse *Darnel's Case* and to increase the efficacy of habeas corpus. Although the writ of habeas corpus was cherished and gradually superseded all other forms of common law writs devised to relieve illegal imprisonment, it became the subject of abuses such as delays frequently permitted by the issuing courts and removal of the prisoner.²⁶ Judicial decisions remedied some of these defects in the writ and the Star Chamber Act of 1641 strengthened the writ by utilizing habeas corpus to enforce the provisions of the Act.

The last stage of the writ's development as a protector of individual liberty culminated in the Habeas Corpus Act of 1679, "An Act for better securing the liberty of the subject and for prevention of imprisonments beyond the Seas."²⁷ This Act dealt with the problems of a writ of habeas corpus *ad subjiciendum* issued to test the validity of non-judicial criminal commitments. Holdsworth noted that Parliament had been trying since 1668 to produce a solution to the problems of habeas corpus, but only in 1679, under suspicious circumstances, was a compromise reached and the Act passed.²⁸

21. C. STEPHENSON & F. MARCHAM, *SOURCES OF ENGLISH CONSTITUTIONAL HISTORY* 457 (1937).

22. 3 Howell's State Trials 1 (K.B. 1627).

23. The resolution, in modified form, came to be known as the Petition of Right. This document declared executive confinement without a showing of cause and the insufficient return to habeas corpus to be violative of due process. 3 Car. 1, c.1 (1627).

24. D. MEADOR, *HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY* 20 (1966).

25. R. WALKER, *supra* note 7, at 70.

26. R. HURD, *supra* note 4, at 81.

27. 31 Car. 2, c. 2.

28. W. HOLDSWORTH, *supra* note 2, at 117. The bill was decided at a final conference which was only agreed to by a slight majority of the House of Lords (57 to 55). Yet a report on the assembly records only 107 peers entered as present on that day, and also notes that, in a previous decision only 101 peers took part. Holdsworth notes that this "lends some colour" to Burnet's tale that the majority was arrived at by a miscount:

Lord Grey and Lord Norris were named to be the tellers: Lord Norris, being a man subject to vapours, was not at all times attentive to what he was doing. So a very fat Lord coming in Lord Grey counted him for ten,

C. *The Writ After the Act of 1679*

As a result of this Act, the writ of habeas corpus *ad subjiciendum* became the most effective weapon yet devised for the protection of the liberty of the subject. It provided for a speedy judicial inquiry into the validity of any imprisonment on a criminal charge and for a speedy trial of prisoners incarcerated while awaiting trial.²⁹ As celebrated as the Act was, no new principles were introduced nor was any right conferred upon the subject.³⁰ Instead, the use of the writ was clarified and some of the abuses and evasions were remedied, especially the problem of delay in returns. Since Parliament was primarily interested in criminal procedure, the Act dealt only with criminal commitment.³¹ The habeas corpus *ad subjiciendum* appeared to be the only form of the writ used for the purposes of protecting liberty. The other forms of the writ remained in existence but were subordinated to the Great Writ, for, in Blackstone's phrase, "the great and efficacious writ, in all manner of illegal confinement, is that of *Habeas Corpus ad subjiciendum*, directed to the person detaining another, . . . with the day and cause of his caption and detention"³²

Even within the area of criminal commitment, the Act allowed substantial exceptions for "persons convict or in execution by legal process," and those detained upon a legal process, order, or warrant issued by a court having jurisdiction over criminal matters, or where the warrant stated that the detention was for treason or the commission of a felony.³³ This fact has great importance for the standing of the claims advanced for the writ in America in recent years. Of course, those detained by a court without jurisdiction over criminal matters could proceed under the Act, but the main thrust of Parliament was to provide a remedy for arbitrary, non-judicial commitment by the executive.³⁴

The writ of habeas corpus *ad subjiciendum* was finally being transformed into what Seldon in *Darnel's Case* had asserted it to be at the time: "the highest remedy in the law for any man that is imprisoned" as well as the "only remedy for him that is imprisoned by the special command of the king . . . without shewing cause of the commitment."³⁵ Although defects still remained,³⁶ the Habeas Corpus Act did make many reforms. Other legisla-

as a jest at first: But seeing Lord Norris has not observed it, he went on with this misrekening of ten: So it was reported to the House, and declared that they who were for the bill were the majority, Tho' indeed it went on the other side: And by this means the bill past.

Id. at 118, quoting BURNET'S HISTORY OF MY OWN TIMES 485 (folio ed.).

29. W. HOLDSWORTH, *supra* note 2, at 118.

30. W. CHURCH, *supra* note 5, at 25, quoting 4 HALLAM'S CONSTITUTIONAL HISTORY OF ENGLAND 500 (1827).

31. W. HOLDSWORTH, *supra* note 2, at 118-19.

32. 2 W. BLACKSTONE, *supra* note 9, at *131.

33. Habeas Corpus Act of 1679, 31 Car. 2, c. 2.

34. "From the exceptions mentioned above, it can be seen that the 1679 Act was concerned essentially with pretrial detention for persons accused of crime. And the detention aimed at was detention not pursuant to judicial process, which is to say that the Act was addressed primarily to executive commitment." D. MEADOR, *supra* note 24, at 26.

35. W. HOLDSWORTH, *supra* note 2, at 115.

36. The court had no power to examine the truth of any return made to the writ and the Act did not apply to non-criminal detention.

tion and legal decisions further strengthened the writ as the protector of individual liberty. Implemented in 1689, the Bill of Rights provided more protection for liberty by specially protecting habeas corpus and the Habeas Corpus Act of 1679. Blackstone wrote that "lest this act should be evaded by demanding unreasonable bail, or sureties for the prisoner's appearance, it is declared by 1 W & M, st. 2, c. 2, that excessive bail ought not to be required."³⁷

From a cloudy past, the writ of habeas corpus finally emerged as a significant part of the English legal system. The history of its development is intermixed with religious conflict, jurisdictional disputes, and political battles between Parliament and Crown. As a result of that history, habeas corpus came to occupy an important place in the common law—a common law which was the heritage of Englishmen and of the English colonies in the New World. Thus, at the gestation of the legal system of the United States, the writ of habeas corpus came to be regarded as "the most efficacious safeguard of personal liberty ever devised."³⁸

That safeguard was protection from illegal detention; that is, detention without recourse to the judicial process. The writ was developed to protect against executive detention; its function was to block imprisonment by royal fiat without a judicial hearing. The writ was not an appeal device after conviction by a "legal," competent tribunal, but rather an extraordinary remedy against executive detention.

II. THE HISTORY OF HABEAS CORPUS IN THE UNITED STATES

A. *The Writ in the Colonies*

Justice Holmes warned of the "pitfall of antiquarianism" and stated that "for our purposes our only interest in the past is for the light it throws upon the present."³⁹ The history of the Great Writ of habeas corpus in America, as is true of the history of much of our legal system, must be seen against the background of the English legal system. The colonists considered the common law tradition their heritage and their right, and their legal concepts and institutions reflected that belief. In 1833 Justice Story noted that the "whole structure of our present jurisprudence stands upon the original foundations of the common law."⁴⁰ More specifically, Chief Justice Marshall wrote that "for the meaning of the term habeas corpus, resort may unquestionably be had to the common law."⁴¹ Habeas corpus, as an integral part of that common law tradition, occupied an important place in the developing legal system of the American nation.

One commentator has argued that "[o]ur rights at the present day therefore depend upon those acquired by our English forefathers as transmit-

37. 1 W. BLACKSTONE, *supra* note 9, at *135.

38. R. WALKER, *supra* note 7, at 85.

39. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 474 (1897).

40. 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 157 (1833).

41. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807).

ted to the colonies, which are the connecting link in the process. Hence, it is essential that we should know what rights the colonists possessed."⁴² Story, in his *Commentaries on the Constitution of the United States*, stated that the uniform doctrine in America since the settlement of the colonies has been that Englishmen moving into the colonies must be regarded as carrying with them all the rights and privileges which belonged to them in their native country. "The universal principle (and the practice has conformed to it) has been, that the common law is our birthright and inheritance, and that our ancestors brought hither with them upon their emigration all of it, which was applicable to their situation."⁴³ Hurd echoes this in his statement that the American colonists "always claimed to possess 'all the rights, liberties and immunities of free and natural-born subjects within the realm of England.'" This claim was not founded so much upon their charters as upon the fact that they were Englishmen, and as such inherited the laws of their country."⁴⁴

This claim of inheritance was supported by guarantees written in the charters of all colonies but one. The charters contained royal assurances that the colonists' common law rights would be extended to the new settlements.⁴⁵ Notwithstanding these arguments and guarantees Chalmers pointed out that in the history of colonial jurisprudence the Habeas Corpus Act was not extended to the plantations until the reign of Anne.⁴⁶ These two apparently contradictory positions are, in fact, reconcilable. While the common law was always in effect in the English colonies, statutory law per se, passed after the settlement date, did not automatically take effect. This point is illustrated by opinions from English law officers and judges in the early eighteenth century. In 1720 Mr. West ruled:

The Common Law of England is the Common Law of the Plantations, and all statutes in affirmance of the Common Law passed in England antecedent to the settlement of the colony, are in force in that colony, unless there is some private Act to the contrary; tho no statutes made since those settlements are there in force unless the colonists are particularly mentioned. Let an Englishman go where he will, he carries as much of the law and liberty with him, as the nature of things will bear.⁴⁷

Commenting on the applicability of statutory law, Attorney-General Yorke wrote: "I am of the opinion that such general statutes as have been made since the settlement of Maryland . . . are not in force there, unless they

42. Carpenter, *Habeas Corpus in the Colonies*, 8 AM. HIST. LEGAL REV. 18 (1903).

43. J. STORY, *supra* note 40, § 157.

44. R. HURD, *supra* note 4, at 102.

45. The one exception was in the charter of William Penn. Commenting on this singular omission, Story reports that "there is no provision, that the inhabitants and their children shall be deemed British subjects, and entitled to all the liberties and immunities thereof, such a clause being found in every other charter. Chalmers has observed, that the clause was wholly unnecessary, as . . . the common law thence inferred that all the inhabitants were subjects, and of course were entitled to all the privileges of Englishmen." J. STORY, *supra* note 40, § 122.

46. R. HURD, *supra* note 4, at 95, quoting George Chalmers in 1 ANNALS 74.

47. Carpenter, *supra* note 42, at 19, quoting CHALMERS' OPINIONS.

have been introduced and declared to be the laws by some Acts of Assembly of the Province, or have been received there by long uninterrupted usage or practice."⁴⁸

The Habeas Corpus Act of 1679 made no mention of the colonies and, therefore, did not extend to the established colonies. Research by Carpenter and others has demonstrated, however, that the benefits of the writ were enjoyed by the colonists through usage, precedent, and practice, and even by reenactment of the English statute. In 1692 Massachusetts passed an act, almost identical to the English Habeas Corpus Act, which was in force for three years before being disallowed by the Privy Council on the grounds that the "privilege has not as yet been granted to any of His Majestys Plantations"⁴⁹ The diary of a colonial judge relates the issuance of a writ of habeas corpus in 1705, which "is especially interesting, for it was issued after the Massachusetts act was repealed and shows that the writ did not depend upon any statute law."⁵⁰ Church reports that in 1689

application for such a writ was made to Judge Dudley by Mr. Wise, but the application was arbitrarily refused. In 1706, an application was made to Chief Justice Sewall for a writ of habeas corpus, and, although it was refused for satisfactory reasons, there is nothing to indicate that the court regarded it as a novel application [T]he refusal of Judge Dudley to grant [the writ] was made the ground of a suit for damages . . . which shows that the right to this writ was regarded as one of the existing privileges of the colonists.⁵¹

Hurd, Church, and Carpenter report numerous instances of use of the writ against imprisonment by governors and proprietors in the various colonies.⁵²

Another instance in which the English statute was reenacted was legislation enacted in 1692 by South Carolina. The act empowered magistrates "to execute and put in force an Act made in the Kingdom of England, Anno 31, Caroli 2, Regis, commonly called the Habeas Corpus Act." Despite the act's disallowance by the proprietors on the ground that the laws of England already applied to the colony, the act apparently was enforced.⁵³ In a proclamation of 1710 Governor Spotswood of Virginia declared that Queen Anne had bestowed upon the provincials the "invaluable benefit of the Habeas Corpus Act."⁵⁴ Whether this "extension" of the writ of habeas

48. *Id.*

49. Carpenter, *supra* note 42, at 21.

50. *Id.* at 22.

51. W. CHURCH, *supra* note 5, at 35, quoting WASHBURN'S JUDICIAL HISTORY OF MASSACHUSETTS 195.

52. Hurd concluded that a "search among the judicial records of the colonies would doubtless be rewarded . . . with the discovery of many cases in which the writ of habeas corpus was employed as a familiar remedy." R. HURD, *supra* note 4, at 101.

53. Carpenter, *supra* note 42, at 23.

54. The proclamation reads:

Whereas We are above all things desirous that all our Subjects may enjoy their legal Rights and Properties, You are to take especial care that if any person be committed for any Criminal matters (unless for Treason or felony plainly and especially expressed in the Warrant of Commitment) he have free liberty to petition by himself or otherwise the chief Barron or any one of the Judges of the common pleas for writ of Habeas Corpus

Id. at 24.

corpus really gave the Virginians much more than they already possessed is doubtful.⁵⁵

The common law was widely understood to be in effect in the American colonies. By practice, precedent, proclamation, or enactment the common law privilege of the writ of habeas corpus was also enjoyed by the colonists at the time of the Revolution. The provincials were very cognizant of the value of this privilege and regarded any impairment of it with great alarm.⁵⁶ In fact, the denial of that benefit to the colony of Quebec by the English Parliament was a cause for denunciation throughout the American colonies and in the Continental Congress of 1774. In an address to the people of Quebec, the Congress attempted to persuade the French colonists to join them by including the provision that "[i]f a subject is seized and imprisoned, tho' by the order of Government, he may, by virtue of this right, immediately obtain a writ, termed a Habeas Corpus, from a Judge, whose sworn duty it is to grant it, and thereupon procure any illegal restraint to be quickly enquired into and redressed."⁵⁷

The situation concerning habeas corpus stood thus throughout the years of the American Revolution and those immediately following. In the Articles of Confederation there was no provision relating to the writ, but, nonetheless, it was still highly valued. The Ordinance of 1787 for the government of the North-west Territory included the provision that guaranteed the benefits of the writ of habeas corpus.⁵⁸ In Massachusetts, beginning in 1778, conventions were called to frame a state constitution. The document which was finally accepted contained alterations proposed by the city of Boston concerning a more accurate definition and a more liberal grant of the privilege of the writ of habeas corpus.⁵⁹

55. *Id.* at 18.

56. This awareness of questions of law and their impact was commented on by Burke in his celebrated "Speech on Taxation of America in 1774" presented to the House of Commons in March 1775:

Permit me, Sir, to add another circumstance in our colonies, which contributes no mean part towards the growth and effect of this untractable spirit. I mean their education. In no country perhaps in the world is the law so general a study. The profession itself is numerous and powerful; and in most provinces it takes the lead. The greater number of the deputies sent to the congress were lawyers. But all who read, and most do read, endeavor to obtain some smattering of that science. I have been told by an eminent bookseller, that in no branch of his business, after tracts of popular devotion, were so many books as those on the law exported to the plantations. The colonies have now fallen into the way of printing them for their own use. I hear they have sold nearly as many of Blackstone's Commentaries in America as in England. General Gage marks out this disposition very particularly in a letter on your table. He states that all the people in his government are lawyers, or smatterers in law

Quoted in R. HURD, *supra* note 4, at 102.

57. JOURNALS OF THE CONTINENTAL CONGRESS, 1774-89, at 108 (1904), reprinted in Z. CHAFEE, DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS 168-69 (1951); see Chafee, *The Most Important Human Rights in the Constitution*, 32 BOSTON L. REV. 143, 145 (1952).

58. *Id.*

59. The final draft included this guarantee in chapter 9, article 7: "The privilege and benefit of the Writ of Habeas Corpus shall be enjoyed in this Commonwealth in the most free, easy, cheap, expeditious, and ample manner: and shall not be suspended by the Legislature except upon the most urgent and pressing occasion, and for a limited

Two scholarly contributions from English law also had an impact on the American concept of habeas corpus. The first, Sir Edward Coke's *Institutes on the Law of England* was published in 1642.⁶⁰ The other contribution from English scholarship which affected the development of the writ of habeas corpus in the colonies and later in the United States was the publication in the 1760's of Blackstone's *Commentaries on the Laws of England*. This work was more influential on American law and lawyers in the formative decade than Coke's *Institutes*. A thousand copies of *Blackstone* had crossed the Atlantic within a few years of its publication.⁶¹ At a time when law books were not readily accessible, the *Commentaries* provided a "comprehensive exposition of the entire body of English law which could fit into a man's saddlebags" and, therefore, became the basic legal source in America in the late eighteenth century.⁶² Blackstone discussed the writ of habeas corpus, listed the several varieties of the writ, and explained how "the great writ: *habeas corpus ad subjiciendum*" was shaped by the Habeas Corpus Act of 1679, which was "frequently considered as another magna carta of the kingdom."⁶³

B. *The Writ in the Constitution*

Those delegates who met in Philadelphia in the early summer of 1787 were fully aware of the common law and of the colonial experience with habeas corpus. They had in mind the history of royal imprisonment in Great Britain and the legacy of executive imprisonment in the colonies. Colonial governors and councils had attempted to enforce obedience by detaining persons without judicial proceedings, and the delegates remembered the efficacy of the common law writ in resisting these illegal detentions. The Constitution which resulted from these deliberations reflects this awareness and the desire to preserve and expand civil liberty. Among the provisions relating to the right of personal liberty is article I, section 9, clause 2 of the United States Constitution which states: "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."

The habeas corpus clause, one of a number of congressional powers and limitations considered today to be of bedrock importance, entered the

time, not exceeding twelve months." J. JOHNSTON, *THE SUSPENDING POWER AND THE WRIT OF HABEAS CORPUS* 22 (Pamphlet, John Campbell, Bookseller, Philadelphia, 1862). The only event which was of sufficient urgency to occasion the suspension of the writ was Shay's Rebellion in 1786, after which the privilege was suspended for eight months. R. HURD, *supra* note 4, at 118.

60. Coke's treatment of the writ of habeas corpus as an aspect of the Magna Carta's guaranty occasioned criticism of his scholarship. D. MEADOR, *supra* note 24, at 22. Nevertheless, the *Institutes* were a significant legal work whose influence spread to America. It was read in the colonies by virtually everyone who studied law. John Rutledge of South Carolina wrote that "Coke's *Institutes* seem to be almost the foundation of our law . . ." D. MEADOR, *supra* note 24, at 23, quoting C. BOWEN, *THE LION AND THE THRONE* 472-504 (1956). And John Adams was told as a beginning law student, "You must conquer the *Institutes*." D. MEADOR, *supra* note 24, at 23.

61. D. MEADOR, *supra* note 24, at 28.

62. *Id.*

63. W. BLACKSTONE, *supra* note 9, at *129, *135.

Constitution with little or no debate or dissent.⁶⁴ The first mention of the writ was in a draft plan of a federal constitution presented to the Convention on the 29th of May by Charles Pinckney, a delegate from South Carolina. The Pinckney Plan, presented after Edmund Randolph had offered the Convention his "Virginia Plan," provided in article VI that "[t]he legislature of the United States shall pass no law on the subject of religion, . . . nor shall the privilege of the writ of *habeas corpus* ever be suspended, except in case of rebellion or invasion."⁶⁵ On August 6th the Committee of Detail reported a draft of a constitution which contained no mention of *habeas corpus*. Two weeks later Pinckney submitted various proposals to the Convention, including one which was taken almost word for word from the Massachusetts Constitution. This proposal stated that "[t]he privileges and benefit of the writ of *habeas corpus* shall be enjoyed in this government in the most expeditious and ample manner: and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding ___ months."⁶⁶ Madison reports that these "propositions were referred to the Committee of Detail without debate or consideration of them by the House."⁶⁷

A report by Mr. Sherman from the drafting committee was delivered on August 28th and debate followed. Madison reports the debate on the topic of *habeas corpus*:

Mr. Pinckney, urging the propriety of securing the benefit of the Habeas Corpus in the most ample manner, moved, that it should not be suspended but on the most urgent occasions, and then only for a limited time not exceeding twelve months.

Mr. Rutledge was for declaring the Habeas Corpus inviolate. He did not conceive that a suspension could ever be necessary, at the same time, through all the States.

Mr. Gouverneur Morris moved, that 'The privilege of the writ of Habeas Corpus shall not be suspended, unless where, in cases of rebellion or invasion, the public safety may require it.'

Mr. Wilson doubted whether in any case a suspension could be necessary, as the discretion now exists with Judges, in most important cases to keep in gaol or admit to Bail.

The first part of Mr. Gouverneur Morris's motion, to the word 'unless' was agreed to, *nem. con.* On the remaining part,—New Hampshire, Massachusetts, Connecticut, Pennsylvania, Delaware, Maryland, and Virginia, aye—7; North Carolina, South Carolina, Georgia, no—3.⁶⁸

The amendment was submitted to the Committee of Style and became, with a few stylistic changes, the *habeas corpus* clause as found today.⁶⁹

64. S. PADOVER, *TO SECURE THESE BLESSINGS* 238-39 (1962).

65. 1 J. ELLIOT, *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 148 (2d ed. 1901).

66. 2 *THE RECORDS OF THE FEDERAL CONVENTION 1787*, at 334 (M. Farrand ed. 1937).

67. 2 J. MADISON, *JOURNAL OF THE FEDERAL CONVENTION* 560 (E. Scott ed. 1893).

68. *Id.* at 619. Those three states apparently objected to the clause on the grounds that the writ ought never to be suspended. Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243, 248 (1964).

69. The Committee changed its position within the document from art. XI to art.

In a speech concerning the interpretation of the Constitution James Madison told Congress in 1796 that if "we were to look, therefore, for the meaning of the instrument beyond the face of [the] instrument, we must look for it, not in the General Convention which proposed the Constitution, but in the State Conventions which accepted and ratified the Constitution."⁷⁰ In order to fully understand the habeas corpus clause one must look at those portions of the state ratifying debates which deal with the clause. "It has been observed, that in the Federal Convention, this Habeas Corpus clause was adopted with very little debate. This is true, also, of the State Convention; for example, in that of New York, it is recorded that 'the Committee (of the Whole) then proceeded through sections 8, nine, and 10 with little or no debate.'⁷¹ Alexander Hamilton may have aided this easy passage by his comments in *The Federalist, Number 84* which attempted to answer the objections of the State of New York concerning the lack of a bill of rights by pointing out those protections of "various privileges and rights" which are contained within the body of the Constitution.⁷²

In other state conventions the clause received general approval. James McHenry addressed the Maryland House of Delegates and commented that "Public Safety may require a suspension of the Habeas Corpus in cases of necessity: when those cases do not exist, the virtuous Citizen will ever be protected in his opposition to power" Charles Pinckney made favorable observations on the Constitution and the habeas corpus clause before the South Carolina convention: "The next Article provides for the privilege of the Writ of Habeas Corpus—the Trial by Jury in all cases . . . the Freedom of Press The three first essential in Free Governments"⁷³

In a few instances the passage was more difficult. On January 26, 1788, the Massachusetts Convention considered the Habeas Corpus Clause.

Hon. Mr. ADAMS, in answer to an inquiry of the Hon. Mr. Taylor, said, that this power given to the general government to suspend this privilege [of habeas corpus] in cases of rebellion and invasion, did not take away the power of the several states to suspend it, if they shall see fit.

Dr. TAYLOR asked why this darling privilege was not expressed in the same manner as in the Constitution of Massachusetts. . . . He

I and from § 4 to § 8 to its final destination as art. I, § 9, cl. 2. Along with the rest of the Constitution it was adopted by the Convention and submitted to the states for ratification.

70. 6 ANNALS OF CONG. 776 (1796).

71. J. JOHNSTON, *supra* note 59, at 38.

72. It may well be a question whether these are not, upon the whole, of equal importance with any which are to be found in the constitution of this state. The establishment of the writ of *habeas corpus*, the prohibition of *ex post facto* laws, and of TITLES OF NOBILITY, . . . are perhaps greater securities to liberty than any it contains [T]he practice of arbitrary imprisonments have been, in all ages, [one of] the favorite and most formidable instruments of tyranny And as a remedy for this fatal evil [Blackstone] is everywhere peculiarly emphatical in his encomiums on the *habeas corpus* act, which in one place he calls 'the BULWARK of the British Constitution.'

THE FEDERALIST NO. 84, at 629 (J. Hamilton ed. 1880) (A. Hamilton).

73. 3 M. FARRAND, *supra* note 66, at 149, 122.

remarked on the difference of expression, and asked why the time was not limited.

Judge DANA said: The answer, in part, to the honorable gentleman, must be, that the same men did not make both Constitutions; that he did not see the necessity or great benefit of limiting the *time*.⁷⁴

Luther Martin, who had voted in the negative on the passage of the Constitution at Philadelphia, addressed the Maryland House of Representatives on November 29, 1787. He urged the delegates to defeat the document and gave as an example of the dangers of it the habeas corpus clause:

Nothing could add to the mischievous tendency of this system more than the power that is given to suspend the Act of Ha: Corpus—Those who could not approve of it urged that the power over the Ha: Corpus ought not to be under the influence of the General Government. It would give them a power over Citizens of particular States who should oppose their encroachments, and the inferior Jurisdictions of the respective States were fully competent to Judge on this important privilege; but the Almighty power of deciding by a call for the question, silenced all opposition to the measure as it too frequently did to many others.⁷⁵

Despite these warm debates and denunciations, both Massachusetts and Maryland, as well as the other eleven states, eventually ratified the Constitution and put into effect the writ of habeas corpus. As John Randolph noted in Congress, “[t]he Writ of Habeas Corpus is the only writ sanctioned by the Constitution.”⁷⁶

Although the Constitution established both the writ and the Supreme Court of the United States, it was still necessary that Congress should act to organize that court, and determine what should be its terms and its methods of business,⁷⁷ and what should be the procedure for issuance of the writ. In 1788 the states which had ratified the Constitution held elections for senators, representatives, and presidential electors. The House of Representatives convened for the first time in New York on April 1, 1789, and the Senate met five days later. A judicial system was one of the first necessities, and Congress began enacting legislation to establish it almost immediately.⁷⁸ A bill reported on April 7 was taken up by the Senate on August 24, and after a series of compromises with the House, was sent to the President as the twentieth enactment of the First Congress. The “Act to establish the Judicial Courts of the United States” was signed on September 24, 1789, and “was the beginning of an organic evolution.”⁷⁹ A portion of that porten-

74. 2 J. ELLIOT, *supra* note 65, at 108.

75. 3 M. FARRAND, *supra* note 66, at 157.

76. 16 ANNALS OF CONG. 375 (1806-07).

77. B. CURTIS, JURISDICTION, PRACTICE AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES 9 (2d ed. 1896).

78. To bring in a bill for organizing the judiciary, the Senate appointed on April 7 a committee consisting [of ten members]. The committee labored two months before reporting a bill to the Senate. A subcommittee, of which Oliver Ellsworth—properly entitled ‘the father of the judiciary system’—was the chief figure, prepared the bill.

D. HENDERSON, COURTS FOR A NEW NATION 20 (1971).

79. H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 37 (1953).

tious beginning was the section dealing with the writ of habeas corpus. Section 14 of the first Judiciary Act provided:

That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by the statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.⁸⁰

The court system of the new nation had been put into motion and the Great Writ of the common law was now provided for in the United States. However, as Henderson notes in his work on the early judicial system, “[t]he Judiciary Act of 1789 was neither widely denounced nor warmly received. Congress considered the act an experiment, and instructed the attorney general to report upon the shortcomings of the judiciary at the next session.”⁸¹ That experiment has been evolving since that time through statutory enactment and judicial decision.

80. Judiciary Act of 1789, 1 Stat. 73, c. 20, § 14.

81. D. HENDERSON, *supra* note 78, at 26.

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