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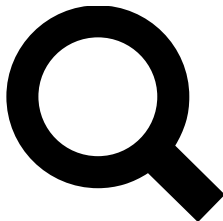
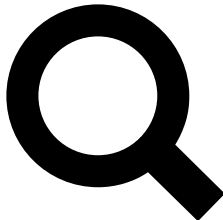
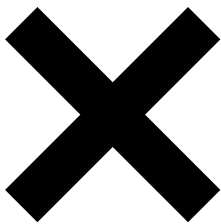
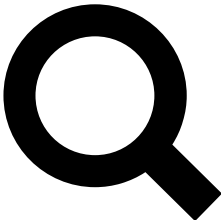
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*Habeas Corpus in Wartime* and Larger Lessons for Constitutional Law

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by [Amanda Tyler](#)

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This past year, I published the product of years of historical research in [Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay](#) (Oxford University Press 2017). In the months since, I have been asked two questions more than any others: first, why I wrote the book, and second, what, if anything, modern jurists and scholars should do with the historical evidence unearthed and presented therein. It turns out that one particular chapter of the book has much to say on both of these otherwise seemingly unrelated questions, and I therefore devote my discussion here to that chapter.

To begin, a quick overview of the book is in order. *Habeas Corpus in Wartime* seeks to provide an original and comprehensive historical account of how the privilege and suspension of habeas corpus have functioned in wartime in the Anglo-American tradition, drawing on a wealth of untapped material to tell that story. As with so many aspects of American law, we begin our study in England, where the privilege and suspension originated and where a great deal of history sheds light upon the relationship between the two. Indeed, in [Ex parte Watkins](#), Chief Justice Marshall wrote that these terms as used in [the Suspension Clause](#) (the Constitution's habeas provision) were "well understood" to the Founding generation, deriving as they did from English tradition.

But just how well understood were they, and how did the English tradition influence the development of American habeas jurisprudence? It is to these questions that much of the balance of the book is devoted, telling stories of prisoners taken during the Jacobite Rebellions, the American Revolution, the Whiskey Rebellion, Burr's Conspiracy, and the Civil War, just to highlight a few. The book also dissects the colonial and early statehood development of habeas jurisprudence as well as the Convention and Ratification debates, unearthing extensive evidence that the English suspension model—and particularly the English Habeas Corpus Act of 1679—wielded enormous (and far too underappreciated) influence on American habeas jurisprudence and the Suspension Clause in particular. Here again, Chief Justice Marshall's opinion in *Watkins* is instructive, having observed that in interpreting the Suspension Clause, the Court must look to "that law which is in a considerable degree incorporated into our own"—namely, "the celebrated *habeas corpus* act" of 1679. (During

Reconstruction, the Supreme Court similarly described the Act in [Ex parte Yerger](#) as “brought to America by the colonists, and claimed as among the immemorial rights descended to them from their ancestors” after which it was given “prominent sanction in the Constitution.”)

As the book chronicles, this story remained largely consistent well through Reconstruction. Indeed, but for some significant failings on the part of President Lincoln (who problematically got out too far ahead of Congress in suspending the privilege during the Civil War), the consistent political and legal understanding of the Suspension Clause was that it prohibited the government from detaining persons who could claim the protection of domestic law outside the criminal process, *even in wartime*, except under the auspices of a valid suspension. The so-called “citizen-enemy combatant” recognized in the Supreme Court’s 2004 decision in [Hamdi v. Rumsfeld](#), therefore, was a thing unknown to the law for most of American history. Knowing, moreover, that suspension is a dramatic emergency power, the Founding generation included strict limitations on when suspension could be declared in order to ensure that government actors would turn to this power only in the most dire of circumstances.

Given this history of the habeas privilege, how, one might ask, did the United States government detain some 120,000 Japanese Americans during World War II, including over 70,000 Japanese American citizens? (Notably, the number of citizens would have been higher had United States naturalization laws not discriminated based on race—a practice that did not end until the Immigration and Nationality Act of 1952.) One of the main reasons that I set out to write the book was to discover and tell that story. It turns out that it has a great deal to say about American constitutional law.

As with all things related to history, the story is complicated. But important facts emerge and with them, important lessons. First, key members of the Roosevelt Administration understood and advised members of Congress and the President that the detention of citizens in the absence of a suspension would violate the Suspension Clause. This group included Attorney General Francis Biddle and Secretary of War Henry Stimson. (For his part, Biddle wrote: “[U]nless the writ of habeas corpus is suspended, I do not know any way in which Japanese born in this country, and therefore American citizens, could be interned.”) It was also well known—and well documented—that the push for internment stemmed not from any actual factual basis, but instead from “race prejudice, war hysteria, and a failure of political leadership,” as [a Commission charged with studying the episode](#) concluded some years later. Even FBI Director J. Edgar Hoover—himself no stranger to robust surveillance—reportedly said that the push for internment was “based primarily upon public and political pressure rather than on factual data.”

Second, the voices that prevailed in the executive branch were unmoved by these constitutional arguments and the facts on the ground. Their mindset is best exemplified in a statement of one senior War Department official made during debates preceding President Roosevelt’s issuance of Executive Order 9066. As he viewed things, “if it a question of safety of the country, the Constitution of the United States, why the Constitution is just a scrap of paper to me.” Roosevelt appears to have subscribed to the same view, issuing 9066 and giving the military carte blanche to do what it wanted with the Japanese American population on the west coast.

Further, according to Biddle, Roosevelt thought it was for the judiciary—and not the President—to consider the constitutionality of the resulting policies. (In Biddle’s words, “the Constitution has never greatly bothered any wartime President. That was a question of law, which ultimately the Supreme Court must decide.”) On this score, the contrast between Roosevelt and his contemporary British counterpart, Prime Minister Winston Churchill, is quite stark. (I discuss this contrast below and in a forthcoming article with the *California Law Review* entitled *Courts and the Executive in Wartime: A Comparative Study of the American and British Approaches to the Internment of Citizens during World War II and Their Lessons for Today*.)

This brings us to the courts. We all know how this story unfolded, and the courts do not emerge as heroic. In the face of challenges to various military regulations issued under EO 9066, the Supreme Court deferred to the executive in a series of decisions that we now teach to our law students as the embarrassments that they are. (I am thinking here principally of [Korematsu](#) and [Hirabayashi](#).) The one exception is [Ex parte Endo](#), which effectively spurred the closing of the camps, but did so in a narrow holding that dodged all of the relevant constitutional questions surrounding the Japanese American internment and only came down after the Court tipped off the White House so that the latter could preempt the decision with a plan to close the camps.

Studying this episode in American history underscores in dramatic fashion the importance of government officials internalizing our constitutional traditions in charting the government’s course, even when doing so means standing against the tide of public opinion. As Churchill once said in the context of pushing to close down the domestic internment program that Britain established during the war, “[p]eople who are not prepared to do unpopular things and to defy clamour are not fit to be Ministers in times of stress.” As for the courts, their failures during this period were spectacular and call into question the common practice of deferring to the Executive on matters of national security. (On the failure point, consider [Professor Eugene Rostow’s observation](#) that “[i]t is hard to imagine what courts are for if not to protect people against unconstitutional arrest.”) The result: a historical precedent that sanctioned racial and ethnic discrimination, gutted the Suspension Clause, and, in the words of Morton Grodzins, gave constitutional sanction to “a policy of mass incarceration under military auspices.” It was, to put it mildly, not our government’s finest hour.

More generally, this episode in American history has something to contribute to the larger methodological debates in which the book’s historical materials are situated and the second question that I am often asked about the relevance of this history. As with any historical study, the book implicates debates over the significance that one should give to the historical origins and “liquidation” of particular constitutional text in interpreting the United States Constitution today. One’s particular interpretive methodology of course will influence significantly one’s view of this matter. It is, all the same, noteworthy that the historical evidence detailed in the book reveals that the suspension model known to the Founding generation and constitutionalized in the Suspension Clause offered greater protection of individual liberty than that known under modern caselaw, and particularly under [Hamdi v. Rumsfeld](#). Indeed, this likely explains in part why Justices Scalia and Stevens joined together in dissent in that case, arguing that the Constitution does not contemplate the “citizen enemy combatant.” Curiously, Justice Thomas, an avowed originalist, disagreed and lamented that Justice Scalia’s position “might . . . require one or both of the political branches to act unconstitutionally in order to protect the Nation.” As the wealth of historical evidence set forth in *Habeas Corpus in Wartime* makes clear, there is absolutely nothing originalist about Justice Thomas’s opinion in *Hamdi*. In this respect, the book tells a somewhat unconventional story of what historical exploration combined with an originalist perspective might unearth.

Importantly, though, one need not be an originalist to care about the history set forth in the pages of *Habeas Corpus in Wartime*. This is because (at the risk of stating the obvious) in law, we do not enjoy the luxury that our scientific colleagues have of running experiments in laboratories to test various hypotheses. But we do have the ability to study historical episodes that have come before, and mine from those experiences what light they may shed on the normative debates in which we are engaged today over the Constitution’s meaning.

Tying all of this together, the mass detention of Japanese Americans during World War II has much to teach us about the normative stakes at issue when we interpret the Suspension Clause. Specifically, if one of the core commitments of the Constitution is the protection of individual liberty—something that I believe to be true—then the Japanese American internment counsels that we should be wary of any system in which the government may detain persons who can claim the protection of domestic law without affording them the important safeguards inherent in the criminal process. This proposition, moreover, should hold true at least where such detentions are ordered in the absence of robust debate by Congress and in the absence of a genuine and dire threat to the nation (namely, a “Rebellion or Invasion”) that warrants such an extreme course. More generally, this episode in American history teaches that the executive branch is poorly-situated to police itself in the midst of war for compliance with that core commitment and that its failures on this score bring with them the all-too-real potential for enormously tragic consequences.

In other words, originalist or not, my hope is that readers of all stripes will find much of interest and contemporary relevance in *Habeas Corpus in Wartime*.

[Constitutional Law](#), [Executive Power](#), [Federal Courts](#)



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