# *Introduction*

ON APRIL 15, 2013, two pressure-cooker bombs went off in close succession near the finish line of the Boston Marathon. The blasts killed three victims and severely injured hundreds of others, many of whom lost limbs. What had been a scene of triumph and celebration quickly turned into, as one victim described it, a "war zone."

After a four-day manhunt that saw nearby towns put into unprecedented lockdown, law enforcement finally captured alive one of the two suspects in nearby Watertown. Almost immediately, public debate began as to how to treat the suspect, Dzhokhar Tsarnaev. (The second suspect, his older brother, died in the police shootout leading to Tsarnaev's capture.) United States senators John McCain and Lindsey Graham, among others, believed that Tsarnaev should be labeled and treated as an "enemy combatant." As they viewed matters:

> It is clear the events we have seen over the past few days in Boston were an attempt to kill American citizens and terrorize a major American city. The accused perpetrators of these acts were not common criminals attempting to profit from a criminal enterprise, but terrorists trying to injure, maim, and kill innocent Americans. . . . Under the Law of War we can hold this suspect as a potential enemy combatant.[1]

Others, however, argued that the criminal justice system could, and *should*, be the forum for detaining and ultimately trying Tsarnaev. In the end, the latter voices largely prevailed,[2] and in time Tsarnaev stood trial on a host of federal criminal charges. Almost two years to the day after the bombings, a jury convicted Tsarnaev of all charges and weeks later recommended a death sentence.

But what if those voices that argued in favor of treating Tsarnaev as an "enemy combatant" had prevailed and the government had detained him in military custody without affording him a criminal trial? Was such a course a legally viable option for the government? Or was the government legally required to prosecute Tsarnaev, a naturalized U.S. citizen, in civilian courts in order to justify his detention?

Habeas Corpus in Wartime. Amanda L. Tyler.

Only a few years earlier, the Bush administration had faced similar questions and concluded that no such requirement existed with respect to hundreds of detainees—including two U.S. citizens—who had been captured after the devastating terrorist attacks of September 11, 2001. In one such case, President George W. Bush declared that José Padilla, a U.S. citizen arrested at Chicago's O'Hare International Airport, was an "enemy combatant" who should be detained in military custody, rather than charged criminally and prosecuted.

In making this declaration, the president wrote that he had "DETERMINE[D]" that Padilla "[was] closely associated with al Qaeda, an international terrorist organization with which the United States is at war"; had carried out "warlike acts, including conduct in preparation for acts of international terrorism" against the United States; "possesse[d] intelligence" that might assist the government in its counterterrorism efforts; and "represent[ed] a continuing, present and grave danger to the national security of the United States," such that his immediate detention "[was] necessary to prevent him from aiding al Qaeda in its efforts to attack the United States."[3]

Extensive litigation followed over the lawfulness of Padilla's detention. In a petition for a writ of habeas corpus, Padilla's lawyers argued that his detention violated the Suspension Clause of the U.S. Constitution. That provision declares that "[t]he 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."[4] Specifically, Padilla argued that because the government had not suspended the privilege of the writ of habeas corpus in the wake of the attacks of September 11—as, for example, President Abraham Lincoln had done during the Civil War—the government had no authority to hold him unless it charged him with a crime and prosecuted him in due course.

Padilla's case reached the Supreme Court only to be dismissed on jurisdictional grounds. Two years later, when Padilla again sought review in that court, the government rendered the case moot by indicting Padilla on various criminal charges and transferring him to the control of civilian authorities for prosecution. Accordingly, the Court declined to take up the case anew.[5] In the meantime, the government had detained Padilla in military custody without pending criminal charges for over three years.

Meanwhile, in 2004, the Supreme Court reached the merits in another case raising many of the same issues. *Hamdi v. Rumsfeld* involved a habeas petition filed on behalf of a U.S. citizen who had been captured by U.S. allies in Afghanistan where he was reportedly fighting with the Taliban against U.S. forces. Like Padilla, Hamdi argued that his detention as an enemy combatant on American soil violated the Constitution. A fractured Supreme Court disagreed, ultimately concluding that "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant."[6]

*Hamdi* was a case of first impression, but the foundations of its holding date back to World War II. In the months following the Japanese bombing of Pearl Harbor, the U.S. government ordered over 120,000 Japanese Americans living in the western United States—including over 70,000 citizens—to evacuate their homes and report to Relocation Centers for long-term detention. Under the auspices of Franklin Delano Roosevelt's infamous Presidential Order 9066, the military regulations that set these events in motion were predicated upon generalized suspicion that Japanese Americans—including those who were U.S. citizens—might spy on behalf of the enemy Japanese Empire. As one of its many legacies, this episode in American history established a precedent that the government may detain U.S. citizens for national security purposes outside the criminal process in the absence of a suspension.

These precedents suggest that the Constitution poses no bar to the detention of U.S. citizens outside the criminal process for national security purposes. It would seem to follow that detaining Dzhokhar Tsarnaev as an enemy combatant was a legal option for the government in the wake of the Boston Marathon bombings. But what if the Constitution dictates otherwise?

QUESTIONS LIKE THESE—regarding the scope of executive power to arrest and detain in times of war and the meaning of the Suspension Clause and the constitutional habeas privilege—implicate enormously important issues involving the role of the U.S. Constitution in wartime. Unfortunately, however, modern debates over these matters have taken place largely in a historical vacuum. But as these pages reveal, many of the questions implicated in modern debates have arisen before and, accordingly, there exists a wealth of Anglo-American legal and historical experience that can inform and enrich our understanding today.

This book sets out to recover that neglected history and recount it here. Specifically, the book identifies and explains the origins of the privilege of the writ of habeas corpus in English legal tradition, documents how those origins heavily influenced the development of early American law and the drafting of the U.S. Constitution, and then traces how both the privilege and the concept of suspension have been understood over the course of American history. Later chapters explore how the challenges posed by modern warfare have placed considerable strain on long-standing conceptions of the privilege and the role of suspension, resulting in what the book calls "the forgotten Suspension Clause."

This undertaking is the first of its kind to lay out as comprehensively as possible the full story of the legal and political history of the constitutional privilege of the writ of habeas corpus in wartime. The story begins in England

before American independence—where the origins of American law may be found—before crossing the Atlantic to take the story forward on American shores, first in the American colonies and then in the independent United States. To piece together its many parts, the book draws upon a wealth of original and, in many cases, heretofore untapped historical and archival resources to shed light on the purpose and role of the Suspension Clause in the U.S. Constitution.

As is revealed in these pages, this forgotten history has much to contribute to modern debates. The history detailed here provides insight on many important questions, including: What are the origins of the privilege of the writ of habeas corpus in the Anglo-American legal tradition? What protections does the privilege embody? Who may lay claim to the privilege? Is affirmative provision of that privilege guaranteed by the Constitution? How far does the privilege reach? Does it go beyond U.S. borders? What is the role of suspension and which branch of government may declare a suspension? Can the suspension power be delegated? Can the courts review exercises of the suspension authority, or are such decisions so political in nature as to be immune from judicial review? How does the suspension power relate to martial law? And finally, what do the protections long associated with the privilege tell us about the propriety of employing military tribunals to try individuals without affording them the safeguards of the criminal process and independent courts? Each of these questions is explored in the pages that follow in the course of recounting the story of the privilege and suspension throughout Anglo-American history.

Part I begins by tracing the origins of the privilege in England. The story of habeas corpus begins hundreds of years ago, with the most important events in its evolution taking place in the seventeenth century. During the early decades of that century, John Selden and Sir Edward Coke argued against the king's power to detain persons *per mandatum domini regis*, or "for matter of state." In so doing, they set in motion a series of significant events, which culminated in the passage of the English Habeas Corpus Act of 1679.[7] This enormously important Act followed from Parliament's desire both to limit the authority of the king and his ministers to detain individuals outside the criminal process and to constrain the royal courts from countenancing such practices, and therefore accompanied the rise of parliamentary supremacy. To accomplish this end, the Act's seventh section provided that it was only through timely prosecution and conviction that a person who could claim the protection of domestic law could be detained for criminal or national security purposes. If a person detained on such a basis was not timely prosecuted, moreover, the Act promised the remedy of discharge and provided that judges

violated its mandates under threat of penalty. It is no wonder that decades later, in lectures that were read by virtually every early American studying law, Blackstone glorified the Habeas Corpus Act as a "bulwark" of "per[s]onal liberty" and declared it a "second *magna carta*."[8]

As Part I also shows, the English Habeas Corpus Act included no exception for times of war. Thus, it took little time for Parliament to invent the concept of suspension in the face of war and recurrent threats to the throne, enacting the first suspension in the wake of the Glorious Revolution just ten years after passage of the Habeas Corpus Act. As Part I concludes, this uneasy conceptual pairing of the Act's protections and their suspension in times of crisis created the model that came to govern on both sides of the Atlantic during the American Revolutionary War.

Following the story from England to American shores, Part II details how the Crown's position that the Act did not apply in the American colonies constituted a major complaint about British rule and contributed to the movement for independence. In 1774, for example, the Continental Congress decried the fact that colonists were "the subjects of an arbitrary government, deprived of trial by jury, and when imprisoned cannot claim the benefit of the habeas corpus Act, that great bulwark and palladium of English liberty."[9] The Americans wanted to enjoy the benefits and protections of this "second *magna carta*" too. Accordingly, the importation of the English Habeas Corpus Act into early American jurisprudence followed quickly in the wake of independence. Examples on this score abound. To take but one, Georgia included in its Constitution of 1777 express provision that "[t]he principles of the *habeas-corpus* act shall be a part of this constitution."[10] (To make all the more clear that the English Act proved the basis of its Constitution's habeas provision, Georgia's legislature annexed verbatim copies of the Act to the original distribution of the 1777 Constitution.[11]) And just three months before the Constitutional Convention convened in Philadelphia in 1787, New York passed a statute practically identical to the 1679 English Habeas Corpus Act.[12] By 1833, the English Act's influence was so pervasive that Justice Joseph Story wrote in his famous *Commentaries on the Constitution of the United States* that it "has been, in substance, incorporated into the jurisprudence of every state in the Union."[13]

This was the backdrop against which the Founding generation wrote the Constitution and adopted the Suspension Clause. As Part II reveals, references to the English Habeas Corpus Act pervaded the ratification debates and highlight how the Act and the English suspension model proved the foundation for the Clause's terms. Alexander Hamilton, for example, celebrated and promoted the draft Constitution in the *Federalist Papers* specifically because it

"provided . . . in the most ample manner" for "trial by jury in criminal cases, aided by the *habeas corpus* act."[14] Indeed, the protections of the Act were so important to the Founding generation that they called the habeas "privilege" nothing less than "essential to freedom."[15] At the same time, the Founding generation understood all too well the extraordinary nature of suspension, as Parliament had enacted a series of suspensions to legalize the detention of American "Rebels" in England during the war "like other prisoners of war."[16] Thus, the Constitution included strict limitations on when the power to suspend could be invoked—namely, only "when in Cases of Rebellion or Invasion the public Safety may require it." Part II describes how these same concerns regarding the potential abuse of the suspension power informed early debates and led Congress to reject the first proposed suspension under the new Constitution, which President Thomas Jefferson had requested to address the Burr Conspiracy.

With the Civil War, however, suspension finally became part of the American constitutional experience. As described in Part III, President Abraham Lincoln wasted little time in the face of what he viewed as a "clear, flagrant, and gigantic case of Rebellion"[17] to claim the suspension power for himself, soon provoking a confrontation with Chief Justice Roger B. Taney. Relying heavily on the English Habeas Corpus Act, Taney ruled in Ex parte *Merryman* that the president could not suspend in the absence of congressional action and that Lincoln's claim to the contrary asserted that "the constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown. . . ."[18] After two years of debating suspension, Congress finally passed legislation, delegating much of its administration to Lincoln. Although many members of Congress disagreed with the president's view that he could proclaim a suspension on his own, Congress's 1863 Act was fully consistent with Lincoln's belief that a suspension was necessary to hold both the disaffected and Confederate soldiers as prisoners outside the criminal process.[19] This position followed from the fact that the Union viewed the secession of the Confederate States as illegal, and considered those who supported the Confederacy to be traitors who needed to return to their proper allegiance.[20] As is also detailed in Part III, the Confederacy witnessed its own series of suspensions—three in total—and they provide a fascinating point of comparison to events unfolding in the North. For his part, Confederate president Jefferson Davis never once claimed the power to suspend on his own (and indeed criticized Lincoln for doing so). Further, late in the war, the Confederate Congress took the position that the suspension authority could never be delegated in any form to its president. Nonetheless, the North and

South alike viewed suspension as a necessary predicate to detain persons who could claim the protection of domestic law outside the criminal process.

Following the war, suspension returned to the national stage when Congress authorized President Ulysses S. Grant to suspend the privilege to combat the rise of Ku Klux Klan violence in the South.[21] President Grant referred to the legislation as conferring upon him "extraordinary powers" that he would invoke only "reluctant[ly]" as needed "for the purpose of securing to all citizens . . . enjoyment of the rights guaranteed to them by the Constitution and laws."[22] Under the suspension, military officers employed their expanded powers to infiltrate the Klan by arresting its members in droves. As things unfolded, consistent with the long-standing operation of the suspension model, everyone at the time understood that with the lapsing of the suspension, those in custody had to be charged criminally or released.

As Part IV reveals, however, in the twentieth and twenty-first centuries, this long-established understanding of the Suspension Clause fell by the wayside. During World War II, under the auspices of President Roosevelt's Order 9066,[23] the military forced over 120,000 Japanese Americans—including over 70,000 citizens—to leave their homes on the West Coast and report to barren camps called "Relocation Centers" that were surrounded by barbed wire and armed guards for detentions averaging three years in length. As noted above, these policies were predicated solely upon a generalized suspicion that such persons might spy on behalf of the enemy Japanese Empire. The policies also lacked any factual basis, a point recognized by many government officials at the time, including Federal Bureau of Investigation Director J. Edgar Hoover. Further, many government lawyers—including Attorney General Francis Biddle—argued during this period that such a policy, at least as applied to U.S. citizens, would violate the Suspension Clause. As Biddle put it, "unless 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."[24] When Ex parte *Endo*, a habeas case directly challenging the constitutionality of the camps, finally made its way to the Supreme Court, the Court delayed handing down its decision for political reasons and ultimately avoided wading into the constitutional issues in play, instead deciding the case in favor of the petitioner by narrowly interpreting the military's governing regulations.[25] In the meantime, the internment of Japanese Americans created a precedent that gave constitutional sanction to "a policy of mass incarceration under military auspices."[26]

As explained in Part IV, this precedent laid the groundwork for events that followed in the wake of the attacks of September 11, 2001. During this period, as noted above, the government detained two U.S. citizens as enemy

combatants on American soil, and in its 2004 decision in *Hamdi v. Rumsfeld*, the Supreme Court sanctioned the idea that the Constitution poses no bar to such detentions. But as the extensive history set forth in these pages demonstrates, *Hamdi*'s recognition of the concept of a citizen enemy combatant overlooks the enormously important influence of the English Habeas Corpus Act and suspension model on the development of Anglo-American habeas law and stands at odds with the Founding generation's expectations as to how the Constitution would operate in times of war. Indeed, as the history set forth in these pages reveals, well through the Reconstruction period, the dominant legal and political view of the habeas privilege constitutionalized in the Suspension Clause understood it to preclude the government, in the absence of a valid suspension, from detaining persons who could claim the protection of domestic law outside the criminal process.

Part IV concludes by discussing the most recent Supreme Court decision on the Suspension Clause, *Boumediene v. Bush*.[27] In a 5-4 ruling, the *Boumediene* Court concluded that alien detainees held at the U.S. military installation at Guantanamo Bay, Cuba, enjoyed "the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause." At the same time, however, the Court did not afford such detainees the traditional remedy of release from custody. Rather, the Court concluded that the detainees were entitled to greater opportunities to challenge their designation as enemy combatants in federal court than Congress had provided them in governing statutes. As Part IV explores, *Boumediene* presented the Court with a series of difficult questions that lacked any close historical analogies. Thus, the Court relied upon larger structural considerations and cited "the particular dangers of terrorism in the modern age" to support its holding. In so doing, the Court interpreted the Suspension Clause to promise access to a tribunal to contest the underlying lawfulness of detention, with the legality of the detention to be defined by law external to the Suspension Clause. (In other words, the Court never questioned the premise that some detainees could be held as enemy combatants; the holding instead promised detainees greater process to challenge that classification.) This aspect of *Boumediene* may have unnecessarily conflated the Court's Suspension Clause jurisprudence with its modern due process case law—a result that could in turn limit the relief available and pose conceptual problems in future Suspension Clause cases.

FINALLY, A WORD on the role of history in constitutional interpretation is in order. Although legal jurists and scholars argue over whether history should be the decisive factor in ascertaining the meaning and application

of the Constitution, no one seriously questions that history is deeply relevant to the debate. With respect to the Suspension Clause, moreover, the Supreme Court has repeatedly declared in recent years that " 'at the absolute minimum,' the Clause protects the writ as it existed when the Constitution was drafted and ratified."[28] This proposition necessarily invites reference to history when interpreting and applying the Suspension Clause, an idea that is hardly new. Chief Justice John Marshall wrote long ago that understanding the role of habeas corpus in the U.S. Constitution requires looking to the privilege's origins in English law. As he put it, the phrase "privilege of the writ of habeas corpus" was "used in the constitution, as one which was well understood." Thus, to interpret the Suspension Clause, Marshall counseled, one must look to "that law which is in a considerable degree incorporated into our own"—namely, "the celebrated *habeas corpus* act" of 1679.[29]

More generally, it is hard to imagine how one could even begin to understand the meaning of the Suspension Clause without turning to history. After all, the Clause itself adopts terms of art taken directly from English legal tradition and therefore surely invites inquiry into the English backdrop that informed its drafting, not unlike the text of the Seventh Amendment, which expressly does so.[30] At a minimum, therefore, any discussion of how to interpret the Suspension Clause should begin with that backdrop. To be sure, as many have recognized, the Founding generation may not have fully worked out every aspect of the Constitution's application at the time of its ratification. James Madison, for one, called the Constitution "nothing more than the draught of a plan . . . until life and validity were breathed into it,"[31] and he suggested that its meaning might be "considered as more or less obscure and equivocal, until . . . liquidated and ascertained by a series of particular discussions and adjudications."[32] On this view, then, the early history of the Suspension Clause and the periods when it first came to be tested during the Jefferson, Lincoln, and Grant administrations also have much to contribute to debates over the Clause's role in the constitutional framework.

In the end, this book largely—although not entirely—leaves it to others to decide how to employ the full historical account of the Suspension Clause set forth in its pages. Because the modern understanding of the role of habeas corpus in wartime has departed so dramatically from the model that had long governed in Anglo-American law and that which the Founding generation sought to achieve in adopting the Suspension Clause, the current state of habeas jurisprudence should trouble anyone who cares about the Constitution. It follows, the book argues, that the time has come to reconsider the proper role of the Suspension Clause in our constitutional framework going forward.