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Talk for Princeton Historical Society on Habeas Corpus Suspension during the Civil War[1]

I'm delighted to be part of this program, whose topic is important not only for its own historical sake, but also for what it might tell us about the dilemmas that "we the people" face today. As the law professor of the group, what I'd like to do in my brief remarks is shed some light on the legal history of habeas corpus and suggest some ways we might view its suspension during the Civil War from the perspective of constitutional law and the story of American citizenship.

The writ of habeas corpus is an order issued by a court which commands someone who holds a person in their custody to come before a judge and explain the legal grounds of their detention. If the grounds offered are legally insufficient, then the prisoner is released on the judge's order. The person detaining the prisoner often is an executive official, such as the warden of a state prison, or in the case of the Civil War, the commanding officer of a federal military base having authority over individuals captured during hostilities, such as spies or refugees, or those drafted into military service. Under the doctrine of habeas corpus, even if it clearly would serve the public interest if certain persons were detained—and this is very often the case, in times of peace as much as in times of war—executive officers can't justify the detention simply by arguing that they know best (though they well might). Instead, the detention has to be grounded in a law enacted by a legislature, or arising from some other democratic authority, and it has to have taken place according to its required procedures, for instance that grand jury indictment precede arrest or that the court hearing the detainee's case have proper jurisdiction. Habeas corpus thus is a powerful tool of individual liberty against officious state encroachment, and its force comes from requiring agents of government to follow the tangled niceties of law rather than the efficient path of their own discretion. We might think of it as a legal instrument by which the judiciary advances individual liberty by making it more difficult for another state actor to do its job by requiring it to be punctilious—the underlying idea being that most state actors, especially in the executive branch, have great incentives to overreach their authority. In this regard, the ultimate specter against which habeas guards, the worst-case scenario from the viewpoint of democratic government, is that of an executive officer, whether Sheriff, General, or President, rounding up lawful political opponents and holding them in detention indefinitely.

Given its contemporary significance, the history of the writ of habeas corpus is an ironic one. Most notably, this bulwark of individual liberty actually began as an instrument through which the state exercised the power of compulsion over individuals. The story begins in the wake of a much earlier war which marked a turning point for a nation, namely the Battle of Hastings in 1066, when Duke William of Normandy defeated Harold Godwinson, conquered Anglo-Saxon England, and captured the title of King that had been in dispute since the death of Edward the Confessor. The Normans were a tough bunch of characters—they were military aristocrats (think of all the castles which dot the English landscape)—and they're known to history as having a special genius for administration, in part because they were eager to exploit the wealth

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of the realms they seized as efficiently as possible. Royal courts of law were one of the great agencies of this efficient Norman rule, and during the eleventh and twelfth centuries, the descendants of Duke William created an extraordinary system of new, often itinerant courts to resolve the disputes of their subjects, in the process giving birth to the common law (the disputes, by the way, often were about property ownership, as William rewarded his loyal military officers with appropriated English land).

The writ was an administrative tool developed to serve these efficient new Norman courts. Writs were small pieces of paper, affixed with a government seal, which in boilerplate language ordered someone to do something. For instance: "November 29. The King to John: Give back Bill his land or else come into my court in two weeks and explain the legal grounds for your refusal." There were many different kinds of writs, all with weighty Latin names indicating the nature of the actions they ordered—the hypothetical writ I just offered might be called the "writ of give back," from the words "Give back his land"—and the majority were kept in the equivalent of a modern filing cabinet in the bureaucratic office of the Chancery, which would issue them to litigants for a fee. Some of these writs, issued not by Chancery but by courts themselves and issued under their own direction, contained or began with the words *habeas corpus*, or, in the imperative, "have the body." These writs were used by courts to order sheriffs to take people into custody, as for instance in the writ *habeas corpus juratorum*, which compelled those who essentially were skipping out on jury duty to come into court so the court could get on with its business (even in Middle Ages, people tried to avoid jury duty). "The King to the Sheriff: Have the body of juror Bill, *habeas corpus juratorum*, brought into my court so that we can proceed with trial." That's the upshot of the *original* writs of habeas corpus.

Our notion of habeas corpus today, so protective of liberty, still bears the traces of the old Norman system. When we speak of habeas corpus in 2006, or 1861, we're referring to a judicial command, or writ (that little piece of paper, originally issued by powerful Norman courts), that requires someone holding an individual against their will to have the body of that person (*habeas corpus*) brought before the court, not so that the court can proceed with its business, but rather to explain by what lawful basis the detention is justified. "King to John: Bring Bill into court and tell us under what authority you're holding him." There are ironies, too, in the development of this modern form of habeas which it may be helpful to bear in mind in considering its suspension under President Lincoln. The first glimmers of the modern writ appear in the fourteenth century in the context of an institutional power struggle between different types of courts for control of certain legal cases (that is, over the "body" of the litigants: "bring the case to my court; no, bring it to mine"). From these beginnings, modern habeas then emerges in the sixteenth century in the midst of another institutional struggle for power between two branches of the state, the Executive and the Legislative, or rather the King and Parliament (a struggle taking place during the first decades of the British settlement of North America). The contemporary view that *habeas* is an ancient writ of individual liberty comes from the partisan rhetoric of judges and parliamentarians of these years who sought to ground their authority against the executive in ancient English tradition. Since its inception, in other words, the modern writ has been a field on which different parts of government have waged larger battles against each other for ultimate authority (that's been the case in recent times in the United States as well: in the latter half of the twentieth century, the writ was at the center of a battle between national and state government, or federal and state courts, through death penalty cases involving race).

Many people are surprised to learn that the writ of habeas corpus isn't mentioned in the Bill of Rights. Instead, it appears in the Constitution in Article I, 9, in what's known as the Suspension Clause, which asserts 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." The evidence from the Constitutional Convention suggests that this clause was originally understood to protect the interests of states within the new federal system. The Framers believed that habeas would issue primarily from state courts, where it existed by virtue of common law or within state constitutions. If an individual were unlawfully held by federal authorities, it was state courts that would issue the writ to scrutinize their detention. In this state-centered context, the Suspension Clause was meant to prevent the national government from telling federal officers that they could lawfully ignore habeas writs issuing from state courts, the great fear being that the feds would be tempted to round up their opponents and lock them away. It's one of the great ironies of the constitutional history of habeas—relevant for thinking about its place in the Civil War—that this federalist principle animating the Suspension Clause was undermined in the antebellum years by the issue of slavery. Specifically, when slaves escaped north and were subsequently captured by federal marshals, anti-slavery activists tried to use habeas writs issued by state courts to spring the runaways from federal custody (under state law, the slaves might be freed). Slave owners resisted these habeas claims, and in 1859, in a case involving the Fugitive Slave Law of 1850 known as *Abelman v. Booth*, the Supreme Court obliged them by holding that state courts had no authority to use habeas to remove a person held in federal custody—a deeply nationalist decision that made slave owners more secure, but which in fact was precisely the opposite of what most of the Framers, so jealous of state prerogatives, actually intended.

The federal courts derive their power to issue habeas writs not from the Constitution, which doesn't affirmatively vest them with the authority to do so, but instead from Congressional statute, especially those defining the jurisdiction of the lower federal judiciary, which is entirely under legislative control. (Chief Justice Marshall believed Congress likely had a constitutional obligation to grant the federal courts habeas jurisdiction, but that's likely a partisan argument on behalf of national power by our great early nationalist on the Court.) Habeas jurisdiction statutes include the original Judiciary Act of 1789 and, at issue during the Civil War, the Habeas Corpus Act of 1863 (today, the issuing of habeas is governed by the 1996 Antiterrorism and Effective Death Penalty Act, which sweepingly revised the law of habeas developed earlier in the century under the Warren Court). The question of whether the President may suspend the writ—or, rather, lawfully authorize federal officers to ignore writs issued by federal courts—arises from another ambiguity in the Suspension Clause language about which I believe other panelists may speak more directly. The problem is that there is no indication in the clause of just who has the authority to declare habeas suspended—indeed, the clause is written entirely in the passive voice ("habeas corpus shall not be suspended"). The clause does appear in Article I of the Constitution, which defines the legislative power, and this indicates the Framers believed suspension to be within the ambit of Congress, that is under the narrowly defined conditions; but the placement of the clause in Article I doesn't indicate the Framers believed Congress held this power exclusive of the President, particularly given the ambiguity of the passive voice of the text. In favor of presidential suspension authority, one might argue that the President derives his capacity to suspend as Commander in Chief of the armed forces or through what's known as the

Vesting Clause, which gives the holder of the office broadly-worded "executive power" (precisely what this includes is an ongoing question).

On the narrow constitutional issue, my own belief is that the power to suspend the writ lies entirely with Congress, except that it is constitutionally appropriate for the President to suspend the writ when Congress is out of session and the emergency requires it (though Congress could then overturn the suspension, or confirm it, when it meets once more). A realistic view of how government works, though, tells us that in the absence of clear Congressional mandate to the contrary—and Congress has a real incentive to be unclear on the matter—Presidents always will seek to suspend the writ when they believe there is an existential domestic threat to the nation and their officers need to act quickly to ensure the public safety. In this regard, thinking still in a legal vein, I think the fact there was such great uncertainty and conflict about the President's suspension authority during the Civil War points up a weakness in our constitution that it would be wise to remedy. Unlike constitutions of most modern western nations, our constitution does not explicitly define the powers of government under states of emergency. The nature of its emergency powers, instead, has been left to be defined by the judiciary—and by the historical example, or political precedent, of men like President Lincoln. The confusion during the Civil War over such a basic question suggests the need for emergency powers to be defined in advance, either through statute or constitutional amendment, which could specify such issues as which branch of government is entitled to declare a state of emergency, what powers the federal government could then lawfully wield, and how long states of emergency could last. Addressing this weakness in our constitution may be especially important today, in the midst of a global conflict that may last some time and involve substantial future emergency conditions at home.

Let me add one last word, from the perspective of American civic belonging, to which I've devoted most of my scholarly work. Federal military custody during the Civil War was a harsh business, but this was a harsh time, and while there surely were many individuals whose detention was unfortunate and unnecessary, I wouldn't want to sentimentalize most of those detained—not only spies, Confederate agitators, or profiteers, but draft resistors, too. In a conflict that was, in one way or another, about the liberation of a people from slavery and the maintenance of the political entity that guarantees our freedom—namely, the federal Union—the President surely acted properly in taking the measures he did. Moreover, it's a fitting irony, in a history filled with ironies, that the suspension of the writ of habeas corpus helped win a war for the freedom of a people that slaveholders had helped maintain in bondage by denying them the benefits of that same legal instrument. In this, one might say that the President's assertion of authority to suspend the writ, and the various orders, supported by Congress, under which he actually did, helped vindicate the historically developing meaning of habeas corpus itself. Under circumstances of existential military conflict, it was a denial of peacetime liberties that made liberty possible when peace came again.