The Habeas Privilege and Enemy Combatants

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The appearance of Amanda Tyler’s long-awaited book, Habeas Corpus in Wartime, From the Tower of London to Guantanamo Bay, demands that we reconsider our assumptions about the operation of habeas corpus in wartime. In a learned and judicious history of the great writ from its English roots to its deployment at Guantanamo Bay, Tyler takes us inside the events that shaped the codification of the writ, the debates over its lawful suspension, and the incorporation of eighteenth century British experience into the suspension clause of the United States Constitution. Drawing on that history to interrogate our evolving law of national security, Tyler offers fresh accounts and telling criticisms of such familiar episodes as President Abraham Lincoln’s Civil War suspensions and President Franklin Delano Roosevelt’s internment of American citizens of Japanese ancestry during World War II. Tyler concludes with a closely reasoned and historically inflected assessment of the Supreme Court’s decisions in Hamdi v. Rumsfeld (2004) (allowing detention of a U.S. citizen as an enemy combatant) and in Boumediene v. Bush (2008) (extending habeas protection to aliens detained as enemy combatants at Guantanamo Bay). Tyler writes exceptionally well, with a talent for gripping narration and telling detail; one finishes the book wanting more.

Even history buffs have much to learn from Tyler’s account of the episodes that shaped the privilege of the writ and the constitutional provision foreclosing its suspension except when, “in cases of rebellion or invasion the public safety may require it.” We begin in England, appropriately enough, with the events that led Parliament to enact the Habeas Corpus Act of 1679, codifying and extending the common law writ as a guarantee of due process. Many of the act’s guarantees later showed up in the Constitution’s first ten amendments (due process, bail, speedy trial). But the centerpiece was the act’s assurance that individuals, upon arrest and imprisonment, were either to be charged with a crime (based on legally sufficient evidence) or to be released from custody. The Crown could no longer justify detention of its political opponents by fiat,
even when the individual in question was suspected of plotting to overthrow the king. Since a treason conviction required two witnesses, and the preliminary hearing into evidentiary sufficiency had teeth, suspicion would no longer suffice as the basis for trip to the Tower. Tyler allows us to see how central the 1679 act was to founding-era conceptions of what the privilege entailed.

Why would Parliament, having just enshrined habeas in hard-won legislation, turn right around and suspend the privilege? Tyler describes formative suspensions during the early years of the eighteenth century, as the Crown put down a series of Jacobite uprisings. We learn that with these suspensions Parliament granted the Crown a temporary reprieve from the rigors of criminal process, thereby allowing the Crown to get control of a fraught security situation and to build a case for treason convictions, perhaps by questioning detainees or by offering them incentives to cooperate. Often, Tyler shows, the Crown would prosecute defendants for treason in the midst of an ongoing suspension, once the case had been built. (On occasion, Parliament short-circuited due process with bills of attainder.) Tyler also shows that the privilege of the writ and its suspension applied only to those in allegiance with the Crown (subjects and aliens with substantial ties to the realm). Unlike British subjects, foreign nationals fighting against the king might die in battle but would face no treason prosecution. When captured, alien enemies (like the French nationals who joined the Jacobite rebellion in Britain) were subject to detention as prisoners of war and were later swapped for prisoners on the other side. Because they were outside the domestic criminal justice regime, prisoners of war could not claim the habeas privilege to speed their release or to contest their confinement.

The varying treatment of subjects in allegiance and alien enemies posed a challenge for British legal thinkers as they tried to manage the rebellious colonies in North America in the latter half of the eighteenth century. Early in the war for independence, British forces captured American rebels in land and naval encounters. Americans, of course, returned the favor. The British took the view that as subjects owing allegiance to the Crown, all American soldiers and sailors were subject to treason prosecutions; American privateers, holding what were viewed as invalid commissions under their state governments to disrupt British shipping, were deemed mere pirates. But this characterization of captured Americans presented a problem: All individuals brought to England for detention were entitled to habeas and it was quite difficult, both politically and legally, to mount treason prosecutions. (The higher-ups also recognized that Gen. George Washington would likely order the execution of captured British soldiers in reprisal for any treason executions). So the British temporized; Parliament suspended the privilege as it applied to the Yankees in England but treated the Yanks held in America as prisoners subject to exchange. Tyler traces the travails of a colorful cast of American POWs, including Ethan Allen (of Green Mountain fame) and Henry Laurens, the former president of the Continental Congress.

British ways of thinking left their mark on the Constitution’s habeas suspension clause and on the clause’s application in the early nineteenth century. The Constitution’s habeas suspension provision assumes the existence of the writ, either as a matter of state or federal law, and limits Congress’s authority to suspend its operation. This provision reflected several bedrock assumptions: citizens and others in allegiance have a right to be prosecuted only through due course of law (criminal procedure and jury trial) or to be released on habeas. The government cannot, for reasons of national
security or military necessity, detain citizens it has come to distrust; it must pursue criminal charges against them, or release them, or persuade Congress to suspend the privilege of the writ. Such a suspension, proper only during rebellion or invasion, temporarily legalizes detention without charge. But when the suspension ends, due process springs to life and detainees can contest custody and secure their release unless properly charged with a crime. Leading nineteenth century legal thinkers in the United States shared this view of the suspension clause. No less a figure than James Kent made habeas available to New Yorkers who were detained by the U.S. Army during the War of 1812 for playing footsie with the British. Members of Congress, meanwhile, had little patience for detention outside the due course of law and rejected President Thomas Jefferson’s request for a suspension that would have enabled him to hold the Burr conspirators without charges.

After describing the Supreme Court’s release of the Burr conspirators in *Ex parte Bollman* (1807) and the flurry of habeas proceedings during the War of 1812, Tyler traces a wartime writ in decline. President Abraham Lincoln, the great suspender in Tyler’s telling, took it upon himself to suspend the writ in the early days of the Civil War, early days that stretched on for nearly two years as Congress debated the issue. Eventually, Congress enacted legislation that clothed Lincoln with the power to suspend the writ and sought to legalize to some extent his past suspensions. Lincoln used this power aggressively, detaining Confederate soldiers and sympathizers to prevent them from taking action to undermine the Union war effort. Tyler agrees with Chief Justice Roger Taney’s circuit justice decision in *Ex parte Merryman* (1861) that the Constitution assigned the suspension power to Congress and did not vest any similar authority in the president. But Tyler nonetheless expresses some sympathy for the gravity of the situation and observes that, however misguided, Lincoln at least correctly understood that valid preventive detention required a suspension of the writ. In notable contributions to the literature, Tyler also explores Civil War suspension practices by the Confederate States of America, and the Reconstruction suspension administered by President Ulysses S. Grant to promote civil rights, as further evidence of mid-nineteenth century opinion.

The twentieth century was a disaster for the constitutional privilege against suspension of the writ. After tracing the imposition of martial law in Hawaii after Pearl Harbor, Tyler recounts the story of President Franklin Roosevelt’s Executive Order 9066 directing the mainland evacuation and internment of some 120,000 persons of Japanese ancestry, 70,000 of whom were U.S. citizens. Rightly viewing these as events that “gutted the suspension clause,” Tyler describes through gritted teeth the initial but ultimately ineffective opposition of Roosevelt’s lawyers (who argued that internment was unlawful absent suspension). Tyler also describes the government’s duplicitous litigation tactics, which resulted in representations of military necessity that were unwarranted by the record. Ultimately Tyler places responsibility for the order squarely at Roosevelt’s feet. But she also faults the Supreme Court’s failure to invalidate the order on suspension grounds, quoting with approval a contemporary commentator who wondered what the courts were for if not to protect the people against unconstitutional arrest. Similar judicial deference informed the Supreme Court’s response to Roosevelt’s decision to execute the Nazi saboteurs as war criminals in *Ex parte Quirin*. Tyler agrees with Justice Antonin Scalia, in deprecating *Quirin* as something less than the Supreme Court’s finest hour.

All of these times past serve as prologue to Tyler’s lively and informative account of
the war on terror and the Guantanamo Bay cases, *Hamdi* and *Boumediene*. For Tyler, the plurality opinion in *Hamdi*, upholding the government’s power to detain U.S. citizens as enemy combatants after conducting a due process-based evaluation to ensure the accuracy of their detention as such, represents a clear denial of the rights guaranteed in the suspension clause. True, Hamdi was captured in a foreign land in circumstances that suggested he had taken up arms against the United States. But he was later brought to Guantanamo Bay and then to the U.S. mainland. As a citizen, Hamdi was subject to prosecution as a traitor, but he was not subject to detention as an enemy combatant (or prisoner of war). Habeas should have been an available remedy for Hamdi, and should have led to his discharge from military custody, in keeping with the formal tradition-infused approach that Justice Scalia articulated in dissent. Absent a treason indictment or a habeas suspension, Hamdi should have gone free.

Tyler sees *Boumediene* as a tougher case for an assured right to habeas review. She draws an interesting parallel between Fort Jefferson, a military fortress in the Dry Tortugas (off the coast of Florida) where the Lincoln assassination conspirators were held, and Guantanamo Bay, where enemy combatants captured in the war on terror have been detained. But the Lincoln conspirators were citizens, and entitled to the privilege of the writ. Not so the aliens detained at Guantanamo Bay. Owing no allegiance to the United States, and falling outside the protection of the laws of the United States, Gitmo detainees cannot claim the privilege of the writ at least as historically understood. To the contrary, as foreign nationals captured in a shooting war, they more closely resemble prisoners of war than alien friends owing allegiance to the United States. Because prisoners of war have no privilege, Tyler concludes that, whatever one might say on the basis of theories of evolving rights, the *Boumediene* decision was indefensible from the perspective of originalist approaches to constitutional interpretation.

Perhaps so. But Guantanamo Bay was an attempt to establish a new military-criminal paradigm, free from the federal criminal procedures that had long governed the prosecution of terrorists in the Article III courts. It was designed to facilitate interrogation, to allow criminal punishment and detention with fewer procedural safeguards, to elide such guarantees as the right to counsel and to freedom from self-incrimination. We still have much to learn about the constitutional legitimacy of this new paradigm as applied to a government counterterrorism role now fifteen years old and counting. But all recognize that the new paradigm represents a clear departure from the old model of detaining prisoners for the duration of a short-lived war. One might defend *Boumediene* as a measured response to the new paradigm, one that assures a continuing role for the federal judiciary in assessing the legality of what happens in the new military-criminal space. After all, the privilege of the writ no longer means automatic release from all forms of custody that cannot be justified by reference to criminal law norms. (In Tyler’s terms, the writ often operates as a guarantee of procedural due process, rather than as a substantive barrier to detention.) As Tyler acknowledges, the analogy to the prisoner of war in eighteenth century England (or in twentieth century America) may have less resolving power in modern debates over the writ’s application to Guantanamo Bay.

Indeed, we might want to reconsider *Boumediene* in light of the treatment of pirates. According to recent work by Nathan Chapman, 112 Nw. U.L. Rev. 377 (2017), the United States in the nineteenth century took the position that individuals captured on the high seas and charged with piracy were entitled to federal criminal trials and due process
with all the trimmings (following English law in this regard). The defendants in such proceedings were often aliens owing no allegiance to the United States and enjoying no prior connection to U.S. soil, aliens who could not claim any obvious right to the protection of the laws of the United States in Tyler's terms. But unlike those captured by the Spanish and quickly dispatched after a court-martial, pirates captured by U.S. forces were not triable before military commissions; they were brought to the United States to face criminal trial by jury in federal courts.

If Chapman's right that due process norms applied to pirates, it would seem to follow that, after they arrived and secured a lawyer, accused pirates could test the legality of their detention (or the unlawful denial of bail or speedy trial) by way of habeas corpus. Does our treatment of pirates raise questions about the controlling role of allegiance in determining an alien's right to the writ? True, allegiance was a key ingredient in making out a criminal charge of treason under domestic law, but piracy prosecutions went forward against those who owed no allegiance and due process still attached. Are the terrorists held at Guantanamo Bay more like the nineteenth-century pirates who preyed on shipping lanes in the Caribbean or more like the members of a foreign military force defeated on the battlefield and held as prisoners of war? What legal provision did the work of assuring that pirates were charged and tried before the federal courts subject to ultimate review by the Supreme Court? Was it Article III, the statutory definition of the crimes, the suspension clause, or due process? The framers did not have to choose since all the signposts pointed in the same direction.

Apart from productively questioning Boumediene's originalist credibility, Tyler has taught us great deal about the origins and application of habeas during war. We hear in the new world an echo of the old. The goals underlying the Bush administration's use of enhanced interrogation on enemy combatants at Guantanamo Bay and elsewhere bear some resemblance to those animating the interrogation of rebels captured during the Jacobite risings of the early eighteenth century and held under the terms of a parliamentary suspension. But Tyler has also shown us how constitutional meaning and practice evolve over time. However understandable as a response to Fort Sumter and the disruption of Union troop movements, Lincoln's presidential suspension set the stage for the aggressive actions of Presidents Roosevelt and Bush, presidents who exercised the power to suspend in effect but refused to follow Lincoln in acknowledging that their actions had the practical effect of suspending the writ. Tyler's history depicts a steady drift away from the sharp-edged and relatively formal doctrines of the early nineteenth century to the looser balancing tests of today. That drift corresponds with a trend toward greater executive branch control of all elements of the national security state. With so much else in flux, Tyler correctly recognizes that history alone may not resolve the question of Boumediene's wisdom, correctness, legality, and holding power.

Tyler's work deserves a place on the shelf of any serious student of the role of the federal judiciary during wartime. Apart from my admiration for the history she uncovers, I am sympathetic with many of her conclusions, particularly the criticism she levels at the Hamdi decision. We owe Tyler a considerable debt for clarifying the interaction of habeas, treason, allegiance, preventive detention, martial law and trial by military commission; her careful study illuminates much that was previously obscure. Modern legal scholars and federal judges will turn confidently to Tyler on Habeas in much the way nineteenth century jurists invoked Story on the Constitution. As with any progressive account of constitutional history, we're left to wonder how much
work history can do in answering the constitutional questions of today. But history gives us an entry point for our assessment, revealing practices and meanings that were both embedded in and layered upon constitutional texts. Having completed one extraordinary historical marathon, Tyler shows every sign of being able to tackle several more. We turn the last page of this magnificent book and find ourselves looking forward to Tyler’s next.

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