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## The Suspension Clause: English Text, Imperial Contexts, and American Implications

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### Abstract:

Since 1996, the Supreme Court of the United States has signaled that the jurisprudence of the writ of habeas corpus, and its possible suspension, should be informed by an understanding of the writ and of the Habeas Suspension Clause in the U.S. Constitution "as it existed in 1789." This article recovers the historical basis of the Suspension Clause. It begins by exploring, in the English context, previously unexamined court archives and other manuscript sources. It then traces the path of the writ across the British Empire in the years before 1789. Finally, it analyzes early American uses of the writ, including its treatment in the Judiciary Act of 1789 and Chief Justice John Marshall's decision in *Ex Parte Bollman*. The article concludes that the writ's peculiar force was the product of judicial rather than statutory innovation; that judicial authority was premised on the idea that judges enacted powers peculiar to the king - his prerogative - when they used the writ; that this meant that judges focused more on the behavior of jailers rather than the rights of prisoners; that this focus gave the writ its surprisingly wide coverage as to persons and places; and that the implications of this history for current cases involving the claims of Guantanamo Bay detainees are significant.

Keywords: Habeas Corpus, Suspension Clause, Judiciary Act, *Bollman*, *Boumediene*, *Hamdan*, *Hamdi*, *Rasul*, *St. Cyr*, *Felker*, *King's Bench*, empire, imperial, India, Hale

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