

# THE HISTORICAL SCOPE OF *HABEAS CORPUS* AND *INS v. ST. CYR*\*

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The Supreme Court's decision in *INS v. St. Cyr*<sup>1</sup> was unusual. Enrico St. Cyr was the first immigrant in a decade to prevail over the Immigration and Naturalization Service ("INS") at the Court.<sup>2</sup> He was also one of a very few

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\* Numerous people participated in researching and preparing the Brief of *Amici Curiae* Legal Historians, *INS v. St. Cyr*, 121 S. Ct. 2271 (2001) (No. 00-767). In addition to those listed on the Brief, Renee Rocque of the law firm of Fried, Frank, Harris, Shriver & Jacobson provided valuable help in researching the American materials and participated as *pro bono* co-counsel. Simon Steel, Esq. made indispensable editorial and research contributions. William E. Nelson also supplied essential research guidance and editorial comment. We were fortunate to have as a foundation for our work the excellent note by Jonathan Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509 (1998). Finally, we thank Barbara Kern for her generosity in making her research materials on the 1758 *habeas corpus* bill available to us.

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1. 121 S. Ct. 2271 (2001).

2. See *Nguyen v. INS*, 121 S. Ct. 2053 (2001) (rejecting challenge to gender discrimination in naturalization provision); *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999) (approving INS interpretation of "serious nonpolitical crime provision" of withholding of deportation statute); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (holding INS generally does not violate First Amendment when it engages in selective enforcement of immigration laws based on disfavored speech or associational activities of non-citizens); *Miller v. Albright*, 523 U.S. 420 (1998) (dismissing gender discrimination challenge to naturalization statute); *INS v. Yang*, 519 U.S. 26 (1996) (approving INS interpretation of "entry fraud" in considering Section 212(h) waiver application); *Stone v. INS*, 514 U.S. 386 (1995) (holding that timely filing of motion to reconsider does not toll ninety-day period for judicial review of deportation orders); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) (rejecting claims that statute and treaty preclude forced repatriation of Haitian refugees interdicted in international waters); *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43 (1993) (vacating injunctions against INS regulations implementing legalization program on ground that record was insufficient to establish jurisdictional ripeness requirement for judicial review); *Reno v. Flores*, 507 U.S. 292 (1993) (rejecting challenge by immigrant juvenile detainees to INS regulation and procedures); *INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (rejecting challenge to INS interpretation of political asylum statutory provision); *INS v. Doherty*, 502 U.S. 314 (1992) (rejecting challenge to refusal to reopen deportation proceedings); *INS v. Nat'l Ctr. for Immigrant Rights, Inc.*, 502 U.S. 183 (1991) (rejecting challenge to INS regulation concerning release on bond of excludable non-citizens); *Ardestani v. INS*, 502 U.S. 129 (1991) (holding immigrant who prevails on asylum application not eligible for award of attorneys' fees under Equal Access to Justice Act); see also *United States v. Balsys*, 524 U.S. 666 (1998) (holding concern with foreign prosecution beyond scope of Fifth Amendment privilege against self-incrimination applicable in proceeding to enforce administrative subpoena regarding possible misrepresentation in immigration application). The last Supreme Court victory for non-citizens over the INS was *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991) (upholding judicial review of class action alleging procedural due process violations in INS administration of Special Agricultural Worker legalization program).

*habeas* petitioners to win before the Court in recent years.<sup>3</sup> On an interpretive level, *INS v. St. Cyr* is also the rare immigration case in which history seemed to matter<sup>4</sup> and, as Daniel Kanstroom observes in this issue, immigration law's notorious "plenary power doctrine" did not.<sup>5</sup>

Although the Court avoided rendering a formal constitutional decision in holding that 1996 amendments to the immigration statutes had not divested the federal district courts of *habeas corpus* jurisdiction to review deportation orders pursuant to 28 U.S.C. § 2241,<sup>6</sup> there is little doubt that constitutional concerns were a compelling consideration for the Court<sup>7</sup> and that legal history played a role in the constitutional analysis of both the majority and dissenting opinions.<sup>8</sup> Somewhat remarkably, Mr. St. Cyr won on the threshold jurisdictional question despite the rejection (in dissent) by the Court's so-called "originalists" of the judgment of twenty-one legal historians that "the historical evidence indicates that the statutory interpretation claim raised by Respondent falls within the scope of *habeas corpus* at common law."<sup>9</sup> The extent to which the Court chooses to invoke history in future immigration or *habeas* cases, and whether inquiries into Founding-era materials will work to the benefit of immigrants or *habeas* petitioners, remains to be seen.

The Court's historical analysis of the *habeas* issues drew on the historians' amicus brief, which is reprinted above. In this Article, we present some of the historical material regarding *habeas corpus* review of non-criminal confinement that illuminates the exchange in *INS v. St. Cyr* majority and dissenting opinions but which, because of page limitations, we omitted from the brief.

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3. There have been many failed *habeas* petitioners in the past fifteen years. *See, e.g.*, *Herrera v. Collins*, 506 U.S. 390 (1993) (claim of actual innocence based on newly discovered evidence is not ground for relief on federal *habeas* petition); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting challenge on *habeas* to racially discriminatory application of capital punishment in Georgia). Mr. St. Cyr, however, was the second immigrant *habeas* petitioner in three years to win at the Court. *See Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998) (claim of Mexican *habeas* petitioner that he was incompetent to be executed not barred as "second or successive" petition).

4. Eighteenth-century legal history has not often mattered in the Supreme Court's immigration cases, perhaps because the Court has resolved so many cases on statutory grounds. *See Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (arguing that courts have incorporated basic constitutional principles into immigration law through statutory interpretation).

5. Daniel Kanstroom, *St. Cyr or Insincere: The Strange Quality of Supreme Court Victory*, 16 GEO. IMMIGR. L.J. 413, 416-17 (2002).

6. *INS v. St. Cyr*, 121 S. Ct. 2271, 2287 (2001). In its second holding, the Court also determined that Congress did not intend the 1996 amendments to apply retroactively to immigrants who pleaded guilty to criminal charges before the effective dates of the new provisions. *Id.* at 2293.

7. *Id.* at 2279 ("A construction of the [*habeas* jurisdiction] amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions.").

8. Compare *id.* at 2280, 2280 nn.14-23 with *id.* at 2299, 2301-02 (Scalia, J., dissenting). One other immigration case that featured some discussion of the history of the Founding era is *INS v. Chadha*, 462 U.S. 919, 949-51 (1983) (reviewing history of Constitution's presentment and bicameralism requirements before invalidating one-House veto).

9. Brief of *Amici Curiae* Legal Historians at 2-3, *INS v. St. Cyr*, 121 S. Ct. 2271 (2001) (No. 00-767) [hereinafter *Amici Curiae* Brief] (the Brief is reprinted in 16 GEO. IMMIGR. L.J. 465 (2002)).

We share as well a few reflections on the debate between Justices Stevens and Scalia about the relevant legal history and explain why the additional historical material included below undermines the historical analysis of the dissent.

## I. ADDITIONAL HISTORICAL MATERIALS

### A. *The Habeas Corpus Bill of 1758*<sup>10</sup>

The difficulties with impressment practices that precipitated Pratt's 1758 *habeas corpus* bill<sup>11</sup> were explained in newspaper accounts at the time the bill was proposed. As to who the "commissioners" (the commissioned impressing officers) captured, *The London Chronicle* for March 18-21, 1758 observed:

These commissioners do not always confine themselves so strictly to persons within the description of the act made for that purpose, but that sometimes, thro' pique or other partial motives, persons of property have been returned by them to the officers of the crown, who for security usually commit to the Savoy prison persons so returned, till opportunity offers to march them to the respective corps in which they are to serve.<sup>12</sup>

And even though such men "have an undoubted right to their *habeas corpus*, and many of them have claimed that right, . . . it has been said that a rule of court directed to the commissioners who made the return, and to the keeper of the Savoy prison, who had the men in custody, to shew cause, was the readiest way to procure such men their discharge."<sup>13</sup> Yet "during the operation of this new process, the man remains in prison . . . ; whereas by the old law the man's body is immediately to be brought before the court . . . ; and if no legal cause of detainer appears against him, he is to be discharged, and has his remedy for false imprisonment."<sup>14</sup> Worse still, if the man happened to be taken up in vacation time,<sup>15</sup> he could sue out a writ of *habeas corpus*, "but that cannot be returnable till the next Sitting of the Court, which may not, very probably, be till some Weeks after; and, in such Case, how can he enforce Obedience to the Writ? So that, however contrary to the Directions of the Act, or however unjustly he may be impressed, he may be sent

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10. See generally Barbara W. Kern, *The English High Judiciary & the Politics of the Habeas Corpus Bill of 1758*, in *LAW AS CULTURE & CULTURE AS LAW* 147 (Hendrik Hartog et al. eds., 2000).

11. *Amici Curiae* Brief, *supra* note 9, at 474.

12. *THE LONDON CHRONICLE*, Mar. 18-21, 1758, at 273.

13. *Id.*

14. *Id.*

15. That is, when the central courts were not sitting. See *Amici Curiae* Brief, *supra* note 9, at 473 n.12.

abroad as a Marine before the Writ is returnable.”<sup>16</sup>

The influential opposition to the bill in the House of Lords by Hardwicke and Mansfield is mentioned in the brief, but without elaboration.<sup>17</sup> Horace Walpole wrote in his memoirs that Mansfield’s speech against the bill was perhaps “the only speech which in my time at least, had real effect; that is, convinced many persons.”<sup>18</sup>

Ten questions were put by the Lords to the common law judges, and in response the views of the judges on some points were unanimous or nearly so; on other points there were divisions.<sup>19</sup> The judges said that, in non-criminal cases, *habeas corpus* did not issue as a matter of course, but only on a showing by affidavit of probable cause; further, such writs could issue during vacation from a judge of the Court of King’s Bench, returnable before himself (that is, returnable before the single judge, prior to the commencement of the next term when the full court would be sitting).<sup>20</sup> Most of the judges thought that issuance of writs in vacation time, even on a probable cause showing, was discretionary.<sup>21</sup> Most thought that the petitioner had no remedy against the judge if the judge refused to issue the writ. If the writ issued in vacation and was not obeyed, the judges were unanimous that obedience to the writ could not be enforced until the following term, when a writ of attachment might issue. They uniformly agreed that the 1679 statute had no application to non-criminal matters.<sup>22</sup>

Only the tenth question was controversial among the judges: whether the judges were bound by the facts as stated in the return of the writ.<sup>23</sup> This disagreement related to a provision in the 1758 Bill that a judge who was considering a *habeas corpus* writ in a non-criminal matter that had been returned in vacation time “may and shall . . . examine into the facts contained in such return.”<sup>24</sup>

The extensive views of Justice John Eardley Wilmot of the Court of King’s Bench on this provision were printed by his son in 1802 after the judge’s death in *Notes of Opinions and Judgments*.<sup>25</sup> Justice Wilmot personally researched *habeas corpus* precedents and practices<sup>26</sup> and argued that there

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16. Letter to the Author, THE LONDON EVENING-POST, Apr. 29-May 2, 1758, at 1.

17. *Amici Curiae* Brief, *supra* note 9, at 474.

18. H. WALPOLE, 3 MEMOIRS OF THE REIGN OF KING GEORGE THE SECOND 120 (1846). For the reported debate in the House of Lords, see T. C. HANSARD, 15 PARLIAMENTARY HISTORY OF ENGLAND 871-926 (1813) [hereinafter PARLIAMENTARY HISTORY].

19. PARLIAMENTARY HISTORY, *supra* note 18, at 898-903.

20. *Id.* at 900-26.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 872.

25. J.E. WILMOT, JR., NOTES OF OPINIONS AND JUDGMENTS DELIVERED IN DIFFERENT COURTS 105-29 (1802).

26. He even searched for affidavits from Queen Anne’s time but discovered that “[t]he Affidavits were stolen many years ago out of the Office.” *Id.* at 127.

was no authoritative basis to permit the judges to inquire into the facts by means of affidavits.<sup>27</sup> This, he wrote, would be “confounding the offices of Judge and Jury”; further, it would deprive the parties of “the benefit of a ‘viva voce’ Examination, where the looks, the manner, and deportment of the witness, are extremely material to confirm or discredit his testimony.”<sup>28</sup>

Relying on Wilmot’s *Notes and Opinions*, Holdsworth concluded that the common law judges were in substantial agreement with Wilmot’s views on the tenth question.<sup>29</sup> Yet Holdsworth also noted, without comment on the apparent inconsistency, that the judges were instructed to draw up a bill which would clarify the *habeas corpus* powers of the common law judges during vacation time and which would, if possible, “give the court power to inquire into the truth of the return,” that the judges prepared such a bill, that the judges’ bill became the foundation of the 1816 Act, and that the 1816 Act did contain a provision empowering the judge “to inquire into the truth of a return to the writ.”<sup>30</sup> Why would the judges endorse this provision if they were in substantial agreement with Wilmot on the tenth question?

There are two responses. First is simply that Holdsworth’s conclusion that there was a consensus among the judges on the tenth question was incorrect. In fact, on this question, the judges split, six to six.<sup>31</sup> Justice Foster, who was much respected by his brother judges, was strongly in favor of giving the judges the power to inquire into the facts of the return if circumstances called for it. In a letter to Chief Baron Parker, he acknowledged the general rule “that a return to a writ of *habeas corpus* is conclusive in point of fact,” but he viewed impressment cases as special, and “as they come not within the general reason of the law, are not within the general rule.”<sup>32</sup> He thought that if a man who was pressed into service could not controvert the truth of the facts claimed in the return, “he is absolutely without remedy” as “[a]n ineffectual remedy is no remedy; it is a rope thrown to a drowning man, which cannot reach him, or will not bear his weight.”<sup>33</sup> The impressed man

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27. Affidavits would have been the only method available to the central court judges to inquire into the facts without empaneling a jury.

28. WILMOT, *supra* note 25, at 108-09.

29. W.S. HOLDSWORTH, 9 A HISTORY OF ENGLISH LAW 120 (reprint 1966) (1903-1972).

30. *Id.* at 121-22.

31. In the Parliamentary History, only nine judges’ responses are given; five thought the return could be controverted, and Foster in his letters agreed. R.J. Sharpe suggested that Mansfield was on the same side because Mansfield thought that existing practice allowed what was provided for in the bill. R.J. SHARPE, THE LAW OF *HABEAS CORPUS* 66 n.16 (2d ed. 1989). In fact, however, Mansfield in his private notes squarely states that the judge would be bound by the return. See discussion of this point *infra*, text accompanying notes 63-67.

32. M. DODSON, THE LIFE OF SIR MICHAEL FOSTER, Knt. 57-62 (1811) (letter dated May 24, 1758).

33. *Id.* at 60. Among those susceptible to unlawful impressment were apprentices, and there was another remedy available to them. The *Morning Chronicle* for May 1, 1779 reported a case of an application for *habeas corpus* to rescue two apprentices, and:

Lord Mansfield said, that instead of an *habeas corpus* he should go a shorter way to work, and grant his warrant for bringing them before him, being apprentices. That he knew not of any

is taken from the [Stock] Exchange, or from behind his counter, no matter whence, and thence to the Savoy [Prison], or aboard a tender; and if his friends happen to have time enough to procure a *habeas corpus*, a sufficient return to the writ is immediately made, . . . and the man is sent away, in due form of law, to take his chance, for some years perhaps, amidst the perils of the sea, and the disasters of war.<sup>34</sup>

The possibility that the impressed man might “have an action against a man perhaps not worth a groat [the impressing officer]” was of no practical value, Foster claimed, especially if in the meantime “plaintiff should be knocked upon the head in the service.”<sup>35</sup>

Chief Baron Parker responded sympathetically but was “afraid that parliament only can apply a quicker and more effectual remedy.”<sup>36</sup> Likewise, Justice Wilmot, responding to the “very hard case . . . that a man may be sent to the West Indies before the falsity of the Return is proved in an Action,” wrote: “Judges will construe the Law as liberally as possible in favour of Liberty, but they cannot make Laws; they are only to expound them: particular Cases must yield to the Law, and not the Law to particular Cases.”<sup>37</sup>

Despite the division among the judges, the bill printed by Foster’s biographer, Michael Dodson, as the judges’ bill (which was the model for the 1816 Act) provided that even when the return of the writ appears to be “good and sufficient in law,” the judge handling the matter “shall . . . proceed to examine into the truth of the facts set forth in such return, and into the cause of such confinement or restraint, by affidavit, or by affirmation (in cases where an affirmation is allowed by law), and shall do therein as to justice shall appertain,” and if it should appear doubtful that material facts in the return were true, the judge was authorized to release

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such authority till some years ago, reading some old law books; that he went to Lord Hardwicke and consulted him on it, who agreed that it was in their power to grant their warrant in such a case for an apprentice; that Lord Chief Justice Holt was of the same opinion, and that there were several precedents for it. His Lordship ordered the regular steps to be taken to obtain the warrant.

MORNING CHRONICLE, May 1, 1779, at 3. This practice is also noted in the diary of Mansfield’s predecessor as Chief Justice of the Court of King’s Bench, Sir Dudley Ryder, where it was said to be “the constant practice” and “not by any statute but by common law.” See J. OLDHAM, 1 THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 78 n.86 (1992). For a sample of such a warrant, captioned “Judge’s Warrant for an Impressed Apprentice” and issued on April 11, 1811, see R. GUDE, 2 THE PRACTICE OF THE CROWN SIDE OF THE COURT OF KING’S BENCH 371 (1828).

34. DODSON, *supra* note 32, at 61.

35. *Id.*

36. *Id.* at 62-63 (letter dated May 27, 1758).

37. WILMOT, *supra* note 25, at 121-22.

the petitioner on bail.<sup>38</sup> This invites the second response to the question of how the bill came to include the provision. It is likely that the bill was among Foster's personal papers at his death, inviting in turn the speculation that Foster was the draftsman. If so, given Foster's strong concern about the impressment cases, he would surely have included the provision. The judges who disagreed may have let Foster have his way, taking a "wait and see" attitude, resting secure in the knowledge that if the bill came forward in the House of Lords, Hardwicke and Mansfield would be there to straighten it out. By the time the bill surfaced in 1815, of course, Hardwicke and Mansfield were long gone.

Apart from the question of inquiry into the facts of the return, there were practical difficulties with the Pratt Bill. The third question posed by the House of Lords to the judges asked them to explain what effect the proposed bill would have in practice. This question was withdrawn at the request of the judges,<sup>39</sup> but before it was withdrawn, Lord Hardwicke wrote out some of his thoughts. He first tried to sort out the structure of the bill, which partly related back to the 1679 statute and partly set out new provisions "so mixed together that I have some little doubt about the extent of the bill."<sup>40</sup> He concluded that the bill applied not only to the single judge but also to the full court where the judge sat. For if the bill were only to apply to a single judge in vacation, that judge "would have a power of trying the facts contained in the return which the King's Supreme Courts of Justice could not do," and the subject seeking *habeas corpus* would be worse off when the courts were sitting than when they were not.<sup>41</sup> He then wondered what applicability the bill would have to soldiers and sailors accused of breaches of military duty, punishable by courts martial not known when the Act of 31 Car. 2 was passed.<sup>42</sup> Further, the bill would "oblige the person who applies for the writ to pay the charges," and "if he was so poor as not to be able to pay those charges he cannot have the benefit of the writ at all."<sup>43</sup>

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38. DODSON, *supra* note 32, at 70. The 1816 Act contains identical language in Section III. 56 Geo. III, cap. 99, sec. III.

39. PARLIAMENTARY HISTORY, *supra* note 18, at 903. In a letter to the Duke of Newcastle on May 22, 1758, Lord Hardwicke relayed "the difficulty made by some of the judges as to answering our third question," and he laid out various options of how to proceed if the House of Lords, or some of the judges, were to insist on answers to it. Letter from Lord Hardwicke, to Duke of Newcastle, Add. MSS 32,880, fols. 192-95 (May 22, 1758) (copy on file with authors).

40. Lord Hardwicke, Hardwicke's Opinion – *Habeas Corpus* Bill, Add. MSS 35,878, fols. 91 (undated) (unpublished manuscript, copy on file with authors) [hereinafter Hardwicke's Opinion].

41. *Id.* at fols. 91-95.

42. *Id.*

43. The author of *An Account of the Writ of Habeas Corpus*, printed in the London Magazine for March 1758, made much of the fact that the 1679 Act was of little use to a poor person who could neither afford the costs of the writ nor, if in the country, the expense of traveling to London. He argued that "the liberty even of a poor man" is not "one of those trifles that the law ought to pay no regard to," and he hoped that Parliament would pass an act enabling the poor to petition "for a *Habeas*

Still further, the bill requires an oath of *actual* confinement, which “will take away from every father, husband and guardian that right which by the present practice they now enjoy of compelling the production of a wife[,] child or ward tho’ such child, wife or ward is not actually confined but lives with any other person by his or her free will and consent.”<sup>44</sup> And under existing practice, writs “are awarded for wives under some circumstances upon letters and slight evidence,” whereas under the bill an oath is required, which “will take away this practice.”<sup>45</sup>

Hardwicke listed numerous additional problems, one of which was the question of the truth of the facts averred in the return. According to Hardwicke, “As the practice now stands, the facts averred in a return must be taken to be true, till they are disproved by a verdict in an action for a false return.”<sup>46</sup> But under the bill, “every fact which can be alleged as a justification of the confinement or restraint must be tried by the judge before whom such writs are returnable,” yet “he will have no power to convene persons to be witnesses or to make affidavits,” “he can give no costs,” “and if he is mistaken either in law or fact his judgment cannot be controlled by any Writ of Error, Review, or new trial, but contrary determination upon the same questions may be made by any of the other judges.”<sup>47</sup> Indeed, even if all twelve judges and the Chancellor were to think the facts given in the return as justification for the confinement were true, the person imprisoned could bring an action for false imprisonment and take a jury verdict on the same facts, and if that person won the verdict, the judges and the jurors would be in flat contradiction “upon the same facts.”<sup>48</sup>

As noted, the other powerful voice opposing the bill was Mansfield, whose influential speech in the House of Lords was only briefly summarized in the *Parliamentary History* and whose answers to the questions to the judges were never printed. Among surviving manuscripts at Scone Palace, however, are notes Mansfield made for his speech and in response to the questions.<sup>49</sup> Like Lord Hardwicke, Mansfield wrote that “the Writ of *Habeas corpus* issues upon the return supposing the facts alleged to be true” and “the merits of the cause can never be tried upon the Writ.”

Mansfield characterized the bill as principally consisting of three propositions: “That the writ shall peremptorily issue upon the precise grounds stated, that it shall be governed by a general reference to the provisions in the Act of

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*corpus in forma pauperis.*” *An Account of the Writ of Habeas Corpus*, LONDON MAG., Mar. 1758, at 111, 113.

44. Hardwicke’s Opinion, *supra* note 40, at Add. MSS 35,878, fols. 91-95.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Scone Palace MSS, Bundle 1352 (unpublished manuscript, copy on file with authors). All subsequent Mansfield quotations are from this source.

31 of Car. 2, and that a single judge privately at his chambers shall examine the cause without regard to the return.” As to the first of these, Mansfield observed, “The ground upon which it is peremptorily to issue is too straight and too wide. It is too straight and excludes many cases where the party is now entitled to a remedy by writ of *Habeas corpus*.”

Take, for instance, the writ as applied to family disputes. Mansfield noted that the use of the writ in such situations did not become frequent until after the Restoration, but that at the time he wrote, probable cause in the case of a lady denied to her relations could be established as simply as by a letter of complaint from the relatives denied, and even if she sent an affidavit that she was free, this might be supposed to have been coerced. Yet under the proposed bill, an affidavit of actual confinement would be required, and the lady would have to pay the charges for the journey, and she must give bond, if returned, not to escape. But since a court could not take a wife from her husband upon a writ of *habeas corpus*, however ill used she might be by her husband (all the court can do is to “oblige the husband to give sureties of the peace”), the “most effectual relief which wives barbarously used by their husbands get is by escaping.”

Under existing practice, Mansfield wrote, a husband whose wife has left him or a father or guardian whose child or ward is seduced away from him could get a *habeas corpus* writ. But under the proposed bill, “he can’t conscientiously make the affidavit required because they are not restrained but stay away with their own consent.”

The ground described by the proposed bill was “too wide,” according to Mansfield, because it “compels the writ peremptorily to issue in many cases where it ought not, a wife, child, apprentice, articed mariner in the merchant service, innocently and lawfully restrained, or any person in their behalf with bad views may obtain the writ and put the party to whom it is directed to great vexation and expense for which there is no power to give any satisfaction.” Mansfield went on in his notes to describe additional “inconveniences and absurdities” that could flow from the bill. And, finally, he observed that criminal matters were already effectively provided for by the 1679 Act, and the proposed bill attempted “no alteration . . . with regard to the Writ of *Habeas corpus* in this respect”; thus, “the now Bill ha[d] no relation to constitutional liberty.” Yet “the whole cry is as if it had, and as if it was giving a further scarcity to that liberty which is confirmed by Magna Carta.”

On the first question put to the judges by the House of Lords (whether the writ should be issuable as a matter “of course, or on probable cause verified by affidavit”), Mansfield expanded his apprehensions about the bill as follows:

If the writ issued of course it might be used to bring up infants in the custody of their guardians, or at the schools where they had placed them

and poor persons in workhouses or hospitals or in custody of Parish officers going to be removed to their places of settlement, Soldiers in prisons, barracks, or Garrisons, Sailors in ships in harbours within any port of the King's dominions for all these may be considered as under restraint and confinement. All persons in custody in civil suits, at the suit of the King, or subject either on mesne process or in execution or imprisoned by courts of conscience for not paying debts, persons committed on the Excise Laws for not paying duties. As none of these can be delivered, there can be no use of bringing them by habeas corpus but to give them a possibility of escaping.

Mansfield answered the second question (whether in civil cases under existing law a judge could issue a writ during vacation, returnable before himself) affirmatively as “the vacation is always considered as part of the preceding term and it has been the usage from time immemorial to issue all sorts of writs for commencing suits in the vacation teste<sup>50</sup> the last day of the preceding term.” He added, “In cases of custom or prescription (which must be time out of mind), the usage of the present time and as far back as persons living can remember is evidence of what the usage has been time out of mind.”

On the tenth question, Mansfield and Wilmot were of like minds. Mansfield's view was that “[t]he truth of the facts in the return will be properly determined by a jury, the only legal way I know of determining controverted facts.” He said that if the truth were to be controverted by affidavits, then surely “the person who makes the return must have an opportunity of answering them,” which could require much time and expense. Like Wilmot, he argued that “[t]he most probable means of discovering the truth is the viva voce evidence laid before a jury that by affidavits is very liable to perjury and misrepresentation.” Perhaps bowing to Foster, Mansfield acknowledged that pressed men stood “on a particular footing” since the “exigency of public affairs . . . makes the private liberty of individuals give way to the public safety.” But he “knew no principle of law upon which the facts in a return can be controverted in any manner than by action for a false return.”

Against the above background, it is useful to compare in summary form the statutory regulation of *habeas corpus* in key provisions of the failed Bill of 1758 to the bill subsequently drafted by the judges after the 1758 Bill was rejected and to compare the judges' bill, in turn, to the bill that ultimately became law in 1816. A comparison of the 1758 Bill with the judges' bill is as follows:

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50. I.e., dated, in the last clause of the writ.

TABLE 1: COMPARISON OF ESSENTIAL FEATURES

Subject	Failed 1758 Bill	Judges' Bill
Reasons for the bill	Avoiding delay in issuance of writs in non-criminal confinements and ensuring <i>habeas corpus</i> protection in non-criminal cases	Extending beneficial uses of <i>habeas corpus</i> ; avoiding delay
Method and scope	Act of 1679, in like manner to be extended to non-criminal cases; judge may be applied to in vacation and may examine into the facts contained in the return and into the cause of the confinement or restraint, and may discharge or bail as justice requires	On complaint made by or on behalf of any person confined or restrained in non-criminal situations, excepting persons imprisoned for debt or by process in any civil suit; writ can issue during vacation on probable cause shown by affidavit or by affirmation; truth of facts alleged in return can be examined by single judge in vacation or by court in term time
Penalty for refusing to make a return or to bring in the body	Contempt, £200 first time; £500 second time, payable to party aggrieved	Contempt, to be heard and determined by court
Procedure	Writs to be returned the same as under the 1679 Act; after general issue joined, special matter can be offered by defendant; if defendant prevails, can recover costs as in ordinary case	Writs issued in vacation to be returned the following term; writs issued during term can be returned in vacation if no time to do so before term ends

Little need be said in comparing the judges' bill to the 1816 Act as the two were almost identical. According to *Bacon's Abridgement*, the only differences lay "in the substitution of a power to arrest and hold to bail by the warrant of a judge, instead of granting of an attachment by a judge in case of disobedience; in the omission of powers to grant issues and award costs; in making no mention of the great seal; and in its extension to *Ireland*."<sup>51</sup>

51. M. BACON, 4 A NEW ABRIDGEMENT OF THE LAW 147 (7th ed. 1832).

## B. Habeas Review of Civil Confinement in the Colonies

There is widespread agreement that “the common-law writ of *habeas corpus* was in operation in all thirteen of the British colonies that rebelled in 1776,”<sup>52</sup> but there are almost no reported decisions from the period.<sup>53</sup> Nevertheless, there are some indications in materials not previously presented that the writ was available to non-citizens and to review non-criminal confinement.

In 1689, for example, residents of Ipswich, Massachusetts gathered and determined to resist a tax imposed by Governor Edmund Andros without the approval of the assembly. Reverend Mr. John Wise and “five others of the principal inhabitants of the town” were arrested and held in the Boston jail for “contempt and high misdemeanor.”<sup>54</sup> All six prisoners were “upon demand, denied the privilege of Habeas Corpus.”<sup>55</sup> After Chief Justice Joseph Dudley declared, “Mr. Wise, you have no more privileges left you than not to be sold as slaves,” and informed the jury that he “expected a good verdict from them, seeing the matter had been so sufficiently proved,”<sup>56</sup> Reverend Wise and his colleagues were duly found guilty, sentenced, and fined.<sup>57</sup> Revolutionary pamphleteers later listed the case as “one of the grievances of the people” against England,<sup>58</sup> thus demonstrating the popular view that the writ of *habeas corpus* should be available as a remedy for illegal imprisonment.

Another incident that reveals the power of *habeas corpus* in the colonies, and for non-citizens detained in non-criminal confinement, arose from the British removal of thousands of Acadians to the colonies beginning in 1755. The Acadians were French Catholic settlers in and around Nova Scotia who were made “subjects of the Kingdom of Great Britain” when France ceded sovereignty of the territory to Britain in the 1713 Treaty of Utrecht.<sup>59</sup> Though subject to British rule, the citizenship status of the Acadians was uncertain, particularly after the majority of the population refused to swear oaths of

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52. WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF *HABEAS CORPUS* 115 (1980).

53. This is because there were few printed case reports. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 102-03, 322-36 (2d ed. 1985). Also, incarceration was a rare form of post-conviction punishment in the colonies. Marc M. Arkin, *The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners*, 70 TUL. L. REV. 1, 11 (1995).

54. EMORY WASHBURN, SKETCHES OF THE JUDICIAL HISTORY OF MASSACHUSETTS, 1630-1775, at 105-06 (1840).

55. *Id.* at 106; see also *id.* at 116, 195-96; ROLLIN C. HURD, 1 A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF *HABEAS CORPUS* AND THE PRACTICE CONNECTED WITH IT 96-97 (reprint 1972) (2d ed. 1876); DUKER, *supra* note 52, at 101-02.

56. WASHBURN, *supra* note 54, at 106.

57. *Id.* at 107.

58. HURD, *supra* note 55, at 97.

59. NAOMI E.S. GRIFFITHS, THE CONTEXTS OF ACADIAN HISTORY, 1686-1784, at 35 (1992) (quoting Treaty of Utrecht) [hereinafter GRIFFITHS, HISTORY].

allegiance to Britain in 1729-30 and again in 1755.<sup>60</sup> British authorities and popular sentiment in the British North American colonies plainly deemed the Acadians foreigners, consistently referring to them as “French” or, cynically, as “French neutrals.”<sup>61</sup>

In the summer of 1755, during renewed fighting between French and British forces in the Maritime Provinces, the British determined forcibly to deport the Acadians from Nova Scotia and to scatter them throughout the American colonies so as to diminish resistance to British rule.<sup>62</sup> In a brutal campaign that eradicated communities and divided families, British authorities drove 5,000 to 7,000 Acadians off their lands, deported them to nine of the American colonies, and burned their former villages.<sup>63</sup> The arrival of thousands of Acadian refugees in the American colonies also precipitated numerous local controversies, including debates about restrictions on the freedom of movement of the Acadians and their dispersal throughout each colony, appropriate levels of local aid and support, and compulsory binding of Acadian children as servants and laborers.<sup>64</sup>

In some cases, colonial authorities physically detained the Acadians and contemplated expelling them,<sup>65</sup> which raised questions about the availability of the writ of *habeas corpus* to the refugees. In South Carolina, for instance, one of the two colonies to which the most rebellious and potentially dangerous Acadians were sent, refugees were detained on ships, confined to Charles Town, and sometimes jailed. In late 1755, after six hundred Acadians had arrived in Charles Town harbor, Governor James Glen and the Assembly

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60. FRED ANDERSON, *CRUCIBLE OF WAR: THE SEVEN YEARS' WAR AND THE FATE OF THE EMPIRE IN BRITISH NORTH AMERICA, 1754-1766*, at 113 (2000); GRIFFITHS, *HISTORY*, *supra* note 59, at 113 (describing uncertainty of Acadian citizenship under law); STEPHEN PLANK, *AN UNSETTLED CONQUEST: THE BRITISH CAMPAIGN AGAINST THE PEOPLES OF ACADIA* 104, 145 (2001); *see also* Naomi E.S. Griffiths, *Petitions of Acadian Exiles, 1755-1785: A Neglected Source*, 11 *HISTOIRE SOCIALE-SOCIAL HISTORY* 215, 217 (May 1978) (American colonists “had no idea of whether to greet the new arrivals as prisoners-of-war, subjects of the British Crown temporarily removed from a battle zone, trustworthy if misunderstood neutrals, or ‘intestine Enemies’”) [hereinafter Griffiths, *Petitions*].

61. GRIFFITHS, *HISTORY*, *supra* note 59, at 36 (Acadians were considered “border people of the English empire” and viewed as “temporarily conquered people” or “prospective British subjects”); PLANK, *supra* note 60, at 104 (Acadians uniformly referred to as “French”).

62. *See* ANDERSON, *supra* note 60, at 113-14; PLANK, *supra* note 60, at 149.

63. ANDERSON, *supra* note 60, at 114; PLANK, *supra* note 60, at 149. The largest number of Acadian refugees were resettled in Massachusetts. PLANK, *supra* note 60, at 149.

64. *See generally* GRIFFITHS, *HISTORY*, *supra* note 59, at 95-127; PLANK, *supra* note 60, at 149-57.

65. The frequent resort to detention as a means to control the Acadians is revealed in the saga of Jacques Maurice Vigneau and his family, who were deported from Acadia to Georgia in fall 1755. The governor initially refused to allow the refugees to land, keeping them on board their ship at Savannah. Finally, in response to messages to the governor “warning him that the Acadians were ill and running out of food,” Vigneau and the others were allowed to land and invited to leave the colony with “passes” to South Carolina. As they struggled north, hoping to return to Nova Scotia, Vigneau and a group that grew to nearly 100 refugees were detained and eventually released from custody in North Carolina, New York, and Massachusetts. They finally secured permission to travel to the French territory of Miquelon in 1763. *See* PLANK, *supra* note 60, at 152-53, 156.

agreed that the refugees should not be received into the colony.<sup>66</sup> Upon investigation, a committee of the Assembly reported that these Acadians had “borne Arms against his Majesty’s Subjects,” were devout Catholics, “professed an inviolable attachment to the French Interest,” and “obstinately refused to take the Oath of Allegiance.”<sup>67</sup> The Assembly and Governor eventually resolved to allow the Acadians to land, but confined them to Charles Town under guard, with minimal support for their maintenance.<sup>68</sup>

The financial burden of incarcerating the Acadians, fears prompted by refugee attempts to escape confinement, and the arrival of still more Acadians prompted the Governor and Assembly to consider alternatives.<sup>69</sup> One proponent of deporting the refugees invoked *habeas corpus*, claiming that the confinement of a small number of dangerous Acadians in the public jail without warrant was itself unlawful.<sup>70</sup> Governor Glen initially determined to have at least the most dangerous of the Acadians detained in Charles Town “shipped off” from the colony, but then in early 1756, he reported to the Colonial Assembly that he had begun to have “some Doubts . . . with regard to my power, and the legality of doing such an Act.”<sup>71</sup> The Governor sought the advice of the colony’s Attorney General, James Wright, and its Chief Justice, Peter Leigh:

both concurred, & are most clearly of Opinion, that I could not: That it wou’d be illegal, & unwarrantable in acting not only contrary to one of my Instructions, which I shew’d them, but that it wou’d be a violation of Magna Charta, The Great Charter of the Land; [ & ] *might subject me to all the Pains & Penalties in the Habeas corpus Act*; Which it is not in the King’s power to pardon. This leaves me no room to doubt that I shou’d be very wrong, at least for the present, to think any more of such a dangerous Expedient.<sup>72</sup>

Rather, the Governor proposed inviting the Acadians to re-settle on islands off the South Carolina coast, “where little Huts may be put up for them” and cattle and rice provided, until the Crown directed otherwise “or some legal & effectual Method be thought of to get clear of them.”<sup>73</sup> The Assembly

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66. THE COLONIAL RECORDS OF SOUTH CAROLINA: JOURNAL OF THE COMMONS HOUSE OF ASSEMBLY, 1755-1757, at xii (Terry W. Lipscomb ed., 1989).

67. *Id.* at 10. The committee also registered its concern that the Acadians would “have an opportunity of sowing the seeds of discontent and rebellion among our Slaves” and gathering military intelligence for the French. *Id.* at 10-11.

68. *Id.* at 20-21. Those Acadians who were able were to be put to work, and those of a “turbulent or seditious Disposition” would be closely confined in the Work House. *Id.*

69. *Id.* at xiii-xvii.

70. *Id.* at xviii (describing argument of William Wragg of South Carolina Council).

71. Message of Royal Governor James Glen to the Commons House Assembly (Feb. 21, 1756), reprinted in THE COLONIAL RECORDS OF SOUTH CAROLINA: JOURNAL OF THE COMMONS HOUSE OF ASSEMBLY, 1755-1757, *supra* note 66, at 120.

72. *Id.* (emphasis added).

73. *Id.*

resolved instead to provide limited support to the Acadians, with instructions that after fourteen days “the Guards that are placed over them be discharged.”<sup>74</sup> Eventually Governor Glen acquiesced to efforts to send the most dangerous Acadians up the coast to North Carolina and Virginia, and in the summer of 1756, the newly-arrived Governor, William Lyttleton, agreed with the Assembly on legislation to indenture some Acadians and release others from Charles Town for resettlement throughout the colony.<sup>75</sup> The plain implication of the South Carolina debate on the fate of the Acadian refugees, however, is that the writ of *habeas corpus* was available to non-citizens in the colonies and to some extent restricted the power of the government to act against them.

## II. REFLECTIONS ON HISTORY IN THE *ST. CYR* OPINIONS

It is uncommon for either an immigration case or a *habeas* case to devote much attention to eighteenth-century English and American historical precedent and understandings as nearly all recent immigration and *habeas* cases before the Supreme Court have involved questions of statutory construction rather than constitutional history. But in this immigration *habeas* case, the Court’s review of the common law history of *habeas* appears to have aided it in addressing several questions important in *habeas corpus* jurisprudence.

First, Justice Scalia’s dissenting opinion expressed the view that the Suspension Clause “does not guarantee any content to (or even the existence of) the writ of habeas corpus, but merely provides that the writ shall not (except in case of rebellion or invasion) be suspended.”<sup>76</sup> Whether the Constitution guarantees the existence of the writ in the absence of a positive legislative enactment had lurked as a question at least since *Ex parte Bollman*,<sup>77</sup> in which Chief Justice Marshall wrote that “the power to award the writ by any of the courts of the United States, must be given by written law.”<sup>78</sup> The *St. Cyr* majority expressly disagreed with Justice Scalia’s interpretation of the Suspension Clause and the *Bollman* decision,<sup>79</sup> however,

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74. Message from the Commons House of Assembly to the Governor (Feb. 21, 1756), reprinted in *THE COLONIAL RECORDS OF SOUTH CAROLINA: JOURNAL OF THE COMMONS HOUSE OF ASSEMBLY, 1755-1757*, *supra* note 66, at 121.

75. *THE COLONIAL RECORDS OF SOUTH CAROLINA: JOURNAL OF THE COMMONS HOUSE OF ASSEMBLY, 1755-1757*, *supra* note 66, at xviii-xxi.

76. *INS v. St. Cyr*, 121 S. Ct. 2271, 2299 (2001) (Scalia, J., dissenting).

77. 8 U.S. 75, 4 Cranch. 75 (1807).

78. *Id.* at 94; *see also id.* at 95 (stating First Congress “must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted”); *St. Cyr*, 121 S. Ct. at 2299-2301 (2001) (Scalia, J., dissenting) (discussing *Bollman*).

79. *St. Cyr*, 121 S. Ct. at 2281 n.24.

and even Justice O'Connor declined to join this portion of the dissent,<sup>80</sup> apparently settling the question.

Second, the majority rejected the argument of the INS, repeated in Justice Scalia's dissenting opinion, that at common law, "the writ would not issue where 'an official had statutory authorization to detain the individual.'" <sup>81</sup> The INS maintained unsuccessfully, therefore, that in a case like *St. Cyr*, so long as authorities proffered an explanation for the detention, the writ was unavailable.<sup>82</sup>

The Court's review in *St. Cyr* of the scope of the writ as of 1789 must have been disorienting to some criminal *habeas* scholars and practitioners, as general federal *habeas* jurisdiction to review the confinement of state prisoners was provided by statute only in 1867.<sup>83</sup> The *St. Cyr* Court was careful, however, to preserve a third question, "whether the protection of the Suspension Clause encompasses all cases covered by the 1867 Amendment,"<sup>84</sup> because the INS's interpretation of the 1996 immigration amendments was inconsistent even with "the writ 'as it existed in 1789.'" <sup>85</sup>

Justice Scalia's dismissal of the early history of *habeas corpus* is skillfully deceptive. His argument is built upon the premise that what was at stake was "the right to obtain discretionary release."<sup>86</sup> He notes the "apparent credulity" the majority gives to *St. Cyr*'s contention "that there is historical evidence of the writ issuing to redress the improper exercise of official discretion."<sup>87</sup> He then states that the only early cases "alluded to" by the majority for this proposition (*Ex Parte Boggin*<sup>88</sup> and *Chalacombe's Case*<sup>89</sup>) "establish no such thing."<sup>90</sup> An "exhaustive search of cases antedating the Suspension Clause discloses few instances in which courts even discussed the concept of executive discretion," but when they did, they simply confirmed "that courts understood executive discretion as lying entirely beyond the judicial ken."<sup>91</sup> This, Scalia claims, is what one would expect as "even the executive's evaluation of the facts . . . was not subject to review on *habeas*."<sup>92</sup> Thus, in sum, "there is no authority whatever for the proposition

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80. *Id.* at 2293 (O'Connor, J., dissenting).

81. *Id.* at 2286 (quoting Brief for INS); 2302 (Scalia, J., dissenting) ("And, of course, going beyond inquiry into the legal authority of the executive to detain would have been utterly incompatible with the well-established limitation upon *habeas* relief for a convicted prisoner.").

82. *Id.* at 2281 ("In this case, the INS points out, there is no dispute that the INS had authority in law to hold *St. Cyr*, as he is eligible for removal.").

83. Act of Feb. 5, 1867, ch. 27, 14 Stat. 385.

84. *St. Cyr*, 121 S. Ct. at 2279.

85. *Id.* (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)).

86. *Id.* at 2301.

87. *Id.*

88. 104 Eng. Rep. 484 (K.B. 1811).

89. *Id.* n.(a).

90. *St. Cyr*, 121 S. Ct. at 2301.

91. *Id.* at 2302 (citing only *Chalacombe's Case*).

92. *Id.*

that, at the time the Suspension Clause was ratified . . . habeas corpus relief was available to compel the Executive's allegedly wrongful refusal to exercise discretion."<sup>93</sup>

Missing entirely from Scalia's opinion is the fact that, as the majority noted, "[t]raditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand."<sup>94</sup> What *St. Cyr* sought was an order compelling the Attorney General to give him a Section 212(c) hearing, *not* an order to compel the Attorney General to exercise his discretion in *St. Cyr's* favor.<sup>95</sup> The Attorney General had refused to give *St. Cyr* a hearing because of a belief that Congressional amendments had "entirely withdrawn his § 212(c) authority to waive deportation for aliens previously convicted of aggravated felonies."<sup>96</sup>

As noted, Justice Scalia concluded that there was no authority for the proposition that *habeas* could issue "to compel the Executive's allegedly wrongful refusal to exercise discretion."<sup>97</sup> It is unclear whether this means that there is no authority to support the use of *habeas* to force the Executive to exercise his discretion regardless of the outcome, or whether it means that there is no authority for the use of *habeas* to force the Executive to exercise his discretion in the petitioner's favor. The latter version appears to have been the premise with which Justice Scalia began. Yet the "striking proof" that Justice Scalia offers is the absence of cited authority for the majority's holding in *United States ex rel. Accardi v. Shaughnessy*,<sup>98</sup> a 1954 Warren Court decision "that the Attorney General's alleged refusal to exercise his discretion under the Immigration Act of 1917 could be reviewed on habeas,"<sup>99</sup> issued over a dissent that would "leave the responsibility for suspension or execution of this deportation squarely on the Attorney General, where Congress has put it."<sup>100</sup> What petitioner complained of in *Accardi* was that he was "blackballed" in advance by having been put by the Attorney General on a list of "unsavory characters," a list that hearing officers allegedly had no realistic discretion to ignore.<sup>101</sup> Although petitioner did have a hearing, he argued that because of the blacklist, it was meaningless. The majority agreed that if *Accardi* could prove his hearing had been prejudged, then he would be entitled to a new, fair hearing, one that, nevertheless, might not convince the

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93. *Id.* at 2303.

94. *Id.* at 2283.

95. Discretion can be abused, of course, and a strong argument can be made that a claimed abuse of discretion could also be challenged in a *habeas* proceeding and that this would be within the scope of Justice Stevens' opinion. On the facts of *St. Cyr*, it was not necessary to reach this question.

96. *St. Cyr*, 121 S. Ct. at 2277-78.

97. *Id.* at 2303.

98. 347 U.S. 260 (1954).

99. *St. Cyr*, 121 S. Ct. at 2303 (Scalia, J., dissenting).

100. *Accardi*, 347 U.S. at 271.

101. *Id.* at 262.

Attorney General that deportation should be suspended.<sup>102</sup> Although for different reasons, this is exactly what *St. Cyr* sought.

A final word concerns the claim by Justice Scalia that the unavailability of *habeas* to review the exercise of discretion is logically supported by the principle that, historically, “the truth of the custodian’s return could not be controverted.”<sup>103</sup> As authority, Scalia cited one eighteenth century source and two modern American law review articles. The one original source was Wilmot’s opinion on the tenth question posed to the judges on the 1758 *habeas corpus* bill, discussed earlier in this Article.<sup>104</sup> As was earlier explained, six of the twelve common law judges disagreed with Wilmot’s views, and the bill drafted by the judges, as instructed by the House of Lords, expressly permitted judicial examination into the truth of the facts alleged in the return. Moreover, one of the two secondary sources states precisely the opposite of the proposition for which Justice Scalia offers it.<sup>105</sup>

### CONCLUSION

*St. Cyr* was an important, even landmark, decision in immigration law and *habeas corpus* jurisprudence. The INS insisted that no federal court could review the Executive Branch’s resolution of statutory questions relating to eligibility for discretionary relief, essentially claiming that it is the exclusive province of the INS to say what the law is.<sup>106</sup> The assertion would have been striking in any context but was all the more so because *St. Cyr* involved Executive Branch detention. Nevertheless, because the case also implicated discretionary decisions under federal immigration law, discretion exercised in the shadow of the plenary power doctrine, and because the case concerned the fate of a man who had pled guilty to a drug offense,<sup>107</sup> there was reason to believe the Court might find the government’s arguments attractive.

Precisely why Mr. *St. Cyr* prevailed on the jurisdictional question is unclear. Perhaps the Court perceived the Executive Branch’s argument for substantial immunity from judicial scrutiny as an encroachment on its own powers. Perhaps

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102. After remand by the Supreme Court, Accardi was ultimately unable to prevail on his claim that his hearing had been unlawfully prejudged. *Shaughnessy v. United States ex rel. Accardi*, 349 U.S. 280 (1955).

103. *St. Cyr*, 121 S. Ct. at 2303.

104. See *supra* text accompanying notes 49-50.

105. Compare Dallin H. Oaks, *Legal History in the High Court – Habeas Corpus*, 64 MICH. L. REV. 451, 454 n.20 (1966) (“With respect to imprisonment *other than for criminal matters*, however, the exceptions to the rule against controverting the return were ‘governed by a principle sufficiently comprehensive to include most . . . cases’ so that it was ‘impossible to specify those [non-criminal] cases in which it could not [be controverted]’ ”) (quoting HURD, *THE WRIT OF HABEAS CORPUS* 271 (2d ed. 1865) (emphasis added)), with *St. Cyr*, 121 S. Ct. at 2303 (Scalia, J., dissenting) (citing Oaks, *supra*, for proposition that truth of return could *not* be controverted at common law). Oaks specifically mentions military impressment cases as ones in which the truth of the return could be controverted at common law. Oaks, *supra*, at 454 n.20.

106. Cf. *Marbury v. Madison*, 5 U.S. 137 (1803).

107. *St. Cyr*, 121 S. Ct. at 2275.

the merits drove the jurisdictional outcome, and the INS overreached when it demanded the right to remove legal permanent residents from their homes and families based on a statutory misinterpretation and an old criminal conviction. Perhaps the international movements for “global constitutionalism” and the “rule of law” inclined members of the majority toward an outcome that makes it more difficult for bureaucrats to invade personal liberty based on an arbitrary or erroneous view of the law. Perhaps the majority simply believed that it is the job of judges to interpret the statutes Congress writes, and in this case, Congress did not make the manifestly clear statement necessary to effect a repeal of *habeas corpus* jurisdiction.

But history does appear to have played a role in the outcome. Apart from the prominence of legal history in the majority’s discussion of the constitutional *habeas* issues, it is telling that Justice Scalia’s dissent fails to join issue with the substantial evidence that statutory interpretation claims were within the scope of review of *habeas corpus* at common law. This evasion, however much camouflaged by the dissent’s discussion of the *Bollman* question<sup>108</sup> and its conflation of eligibility for discretionary relief with the exercise of discretion,<sup>109</sup> suggests that Justice Scalia had no answer to the historical evidence presented. Forced to pitch his historical arguments on other grounds, Justice Scalia in effect concedes he cannot rebut the “substantial evidence . . . that pure questions of law like the one raised by the respondent in this case could have been answered in 1789 by a common law judge with power to issue the writ of habeas corpus.”<sup>110</sup> Even Justice O’Connor declined to join Justice Scalia’s historical analysis.<sup>111</sup>

In rejecting the government’s analysis, the Court affirmed that the Suspension Clause of the Constitution requires “some ‘judicial intervention in deportation cases.’”<sup>112</sup> By concluding that statutory *habeas* jurisdiction survived, the Court avoided any need to define the outer boundaries of the scope of *habeas corpus* review guaranteed by the Constitution. The Court may not be able, however, to duck these constitutional *habeas* questions in future immigration cases.<sup>113</sup> Should the Court face them, its inquiry will be aided by the substantial historical evidence that at common law the Great Writ was available to non-citizens to review a wide range of legal questions regarding non-criminal confinement.

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108. See *supra* notes 77-80 and accompanying text.

109. *Id.*

110. *St. Cyr*, 121 S. Ct. at 2282.

111. *Id.* at 2293 (O’Connor, J., dissenting).

112. *Id.* at 2279 (quoting *Heikkila v. Barber*, 345 U.S. 229, 235 (1953)).

113. Congress appears well aware of the *St. Cyr* clear-statement rule regarding repeal of statutory *habeas corpus* jurisdiction to review immigration proceedings. See USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 412(b)(2)(A), 115 Stat. 272 (Enhanced Immigration Provisions) (to be codified as 8 U.S.C. § 1226a(b)(2)(A)) (“Notwithstanding any other provision of law, including section 2241(a) of title 28 of the United States Code, habeas corpus proceedings described in paragraph (1) may be initiated only by an application filed with . . .”).

