‘THIS DESPOTIC AND ARBITRARY POWER’: BRITISH DIPLOMACY AND RESISTANCE IN THE HABEAS CORPUS CONTROVERSY OF THE AMERICAN CIVIL WAR

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ABSTRACT

The following dissertation explores the impact of President Abraham Lincoln’s suspensions of the writ of habeas corpus on British nationals living in the Union and Anglo-American diplomacy during the American Civil War. By drawing primarily upon State Department records and private British diplomatic correspondence, as well as Union military records, the dissertation argues that the British habeas experience in the Union reveals the broader scope of the habeas corpus problem under Lincoln. During the American Civil War, the military arrests of Britons under Lincoln’s habeas policy presented both governments with a persistent foreign policy problem. Between 1861 and 1865, diplomats at the British Legation prioritized the protection of Britons living in the Union against various forms of military injustice, and devoted considerable energy toward relieving Britons wrongfully arrested or tried by Union military courts. Although Lincoln’s habeas policy placed a serious strain on Anglo-American relations during the latter part of 1861, and even pushed Lincoln to publicly embrace an unconstrained constitutional view of executive habeas suspension far earlier than scholars have recognized, the U.S. State Department and British Legation in Washington ultimately handled the problem successfully at the diplomatic level through a policy of cautious cooperation. Protecting Britons tried by military courts between 1862 and 1865 proved more difficult, however, as both governments struggled to negotiate the contentious boundary between citizenship and nationality inherent in such cases and as the Union military did not always accommodate British requests for cooperation or leniency. Across
the Atlantic, many Britons inside and outside of the London government consistently
condemned Lincoln’s suspension of habeas corpus as a dangerous blow to civil liberty,
and the president’s policy contributed significantly to widespread anti-Union sentiment in
England during the war. In analyzing the broader British habeas corpus experience under
Lincoln, this dissertation will contribute to our understanding of Civil War Anglo-
American relations, habeas corpus and civil liberties on the Northern homefront,
Lincoln’s constitutionalism, and the conflicting and amorphous nature of “citizenship”
and “liberty” within the crucible of Civil War America.
DEDICATION

To the memory of Nathan Patrick Montler (1991-2014)
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CHAPTER I
INTRODUCTION

On April 27, 1861, President Abraham Lincoln authorized his General-in-Chief, Winfield Scott, to suspend the privilege of the writ of habeas corpus along the “military line” between Washington, D.C. and Philadelphia in response to violent protests in Baltimore which, if left unchecked, might threaten the safety of the Union capital.¹ In the context of the American Civil War, Lincoln’s habeas corpus suspension policy—which eventually encompassed the entire North by the fall of 1862—essentially allowed military officials on the ground to arrest civilians suspected of broadly defined disloyal activities and hold them without charges for an indefinite period of time. Those arrested under Lincoln’s habeas suspension therefore could not count on the courts for legal redress, so long as the military power was willing to suppress the power of the civil courts to enforce due process of habeas procedures. Throughout the Civil War, the attitudes of Lincoln and his supporters toward executive suspension reflected a willingness to subordinate individual liberties to the paramount goal of national preservation in time of war, while those of his critics reflected a fear that his example would lead to a permanent contraction of American civil liberties. Before Lincoln, no President of the United States had unilaterally suspended the writ of habeas corpus. With this fateful step, Lincoln’s suspension of the writ set in motion a widespread repression of

civil liberties that led to the arrests of well over ten thousand civilians and to this day remains one of the most controversial legacies of the Lincoln presidency.²

For generations after the Civil War and into the twenty-first century, historians, political scientists, and legal scholars continue to ask many important questions arising from Lincoln’s suspension of habeas corpus. Did Lincoln, as President, possess the legal power under the United States Constitution to suspend the writ? Was there truly a “public necessity” for executive habeas suspension in the first place, as Lincoln himself steadfastly maintained?³ Was Lincoln a forward-looking pragmatist in suspending the writ to preserve the Union, or a tyrant who mercilessly trampled civil liberties in the North? How did Lincoln’s suspension policy affect civilians on the Northern homefront? Was the suspension of habeas corpus instrumental or tangential to ultimate Union victory? How has Lincoln’s example influenced the modern legal discourse over habeas corpus and wartime civil liberties throughout the twentieth and twenty-first century United States? Such questions surrounding Lincoln’s suspension of habeas corpus remain a perennial source of scholarly debate and do not admit of easy answers.⁴

² The most recent quantitative estimate of the number of military arrests of civilians during the war is found in Mark E. Neely, Jr., The Fate of Liberty: Abraham Lincoln and Civil Liberties (New York: Barnes & Noble, 2007).


⁴ While most modern historical assessments of Lincoln’s record on civil liberties reflect an application of gentle standards of criticism to the president’s executive habeas suspension, some range from unqualified approval to harsh condemnation. For examples of the former, see, for example, Brian McGinty, The Body of John Merryman: Abraham Lincoln and the Suspension of Habeas Corpus (Cambridge: Harvard University Press, 2011). A similar, unapologetic defense of Lincoln’s record on civil liberties may be found in Thomas L. Krannawitter, Vindicating Lincoln: Defending the Politics of Our Greatest President (Lanham: Rowman & Littlefield, 2010). On the other side, unflattering assessments of Lincoln’s restrictions on civil liberties may be found in Jeffrey Rogers Hummel, Emancipating Slaves, Enslaving Free Men: A History of the American Civil War (Peru, Illinois: Open Court, 1996); and William Marvel, Lincoln’s Autocrat: The Life of Edwin Stanton (Chapel Hill: The University of North Carolina Press, 2015).
And yet, new analytical perspectives may yield new insights into a topic as old as civil liberties under Lincoln. Americans of the Civil War era were not the only ones concerned with Lincoln’s suspension of the writ of habeas corpus. In fact, many British observers in the United States and across the Atlantic developed a keen interest in, if not a direct personal experience with, Lincoln’s habeas policy during the war. Over 2.5 million transplanted Britons lived in the United States by 1861, most of whom resided in the Union states. When Lincoln suspended the writ, at least some of these Britons were bound to find themselves in Union prisons, from where they would often petition their home government for official British protection. Although it will probably never be known exactly how many bona fide Britons were arrested under Lincoln, a precise number is unnecessary in order to answer the broader questions that this dissertation seeks to answer: What were the actual consequences and implications of Lincoln’s suspension policy for British citizens—then the most numerous category of foreign nationals—living in the North during the Civil War? How did the British Government react and respond to the military arrests of Her Majesty’s subjects under Lincoln, and how did this issue affect broader British attitudes toward the Lincoln government and the Union war effort? To what extent did the British habeas corpus experience influence Lincoln’s constitutional thinking regarding executive habeas suspension? And, finally, how does the British habeas corpus experience figure into the larger story of civil liberties and citizenship during the Civil War, as well as Lincoln’s record on habeas corpus and the Constitution?

This dissertation will argue that the British habeas experience in the Union reveals the broader scope of the habeas corpus problem under Lincoln. In the first place, military
arrests of Britons under Lincoln’s habeas suspension policy presented both governments with a persistent foreign policy problem during the Civil War. Although Lincoln’s suspension of the writ placed a serious strain on Anglo-American relations during the latter part of 1861, diplomats at the U.S. State Department and British Legation in Washington handled the problem successfully through a policy of cautious cooperation. And while civil liberties violations of Britons ultimately did not bring both nations to the brink of war (as did, for example, Union violations of British neutrality on the high seas), diplomats at the British Legation prioritized the protection of Britons living in the Union against various forms of military injustice between 1861 and 1865, and devoted considerable energy toward relieving Britons wrongfully arrested or tried by Union military courts on virtually a daily basis.

Despite its absence from an enormous body of historical literature on civil liberties under Lincoln, the British habeas experience in the Union also played an early configurative role in expanding Lincoln’s constitutional thinking regarding executive habeas suspension. A relative lack in documentary evidence has long constrained historical analysis of the intellectual development of Lincoln’s habeas corpus policy, often beginning with Lincoln’s early defense of executive suspension before the special session of Congress on July 4, 1861, and ending with his Corning Letter of June 12, 1863. In this standard narrative, Lincoln initially suspended the writ in the spring of 1861 only in specific geographic areas and with great reluctance, but ultimately embraced an unconstrained conception of executive habeas suspension in the name of securing national preservation as the war dragged on and assumed a harder turn. While historians have devoted considerable attention to these well-known policy statements and a handful
of high-profile Civil War habeas cases in tracing the intellectual development of Lincoln’s habeas policy, the military arrests of Britons in the Union between the spring and fall of 1861—and the Palmerston government’s subsequent response to such arrests—pushed the beleaguered president to publicly defend an expansive executive habeas policy as early as the fall of 1861. In October 1861, Lincoln asserted his right, as commander-in-chief, to authorize the unrestricted military arrests of both American and British citizens under the suspension of habeas corpus as an indispensable means of subduing the Confederacy. An important historiographic intervention is thus revealed here, as Lincoln’s response to the British habeas experience reveals an embrace of widespread military arrests almost an entire year before he suspended habeas nationwide, and nearly two years before his definitive policy defense in the famous Corning letter.

The British habeas experience under Lincoln also reveals how the military trials of Britons served as a unique battleground on which the amorphous boundary between citizenship and nationality was contested during the American Civil War. In a proclamation of September 24, 1862, Lincoln suspended the writ of habeas corpus and established martial law throughout the entire Union, sanctioning the trial of civilians by military commission. This important development in Lincoln’s habeas policy meant that Britons arrested by the Union military—including British Union soldiers subjected to trial by courts-martial—might now face harsher penalties than a mere prison term, but the American administration had to balance internal security and foreign policy considerations in negotiating this problem with the British government. As they did for other Britons who were only arrested under Lincoln’s habeas policy, British diplomats and representatives in the Union devoted considerable energy to shielding Britons tried
by the military from injustice. Unlike documentation regarding the former class of British prisoners, however, the relatively more extensive trial records of the latter offer an original, if imperfect, window into how dozens of alleged Britons—including some Irishmen—attempted to use their British citizenship as a trump card against military punishment. While recent scholars have rightly pointed to conflicts over Union conscription of foreign nationals as an important milepost in the struggle to define the meaning of citizenship during the Civil War, this chapter suggests that another important episode in that struggle may be recovered in the diplomatic conflicts surrounding the Union military trials of Britons. 5

Despite the success of both governments in diffusing conflicts over the military arrests of Britons at the diplomatic level, many Britons inside and outside of the London government consistently condemned Lincoln’s suspension of habeas corpus as a dangerous blow to civil liberty, and the president’s policy contributed significantly to widespread anti-Union sentiment in England during the war. To be sure, although a lively public debate over the constitutionality and practical consequences of executive

5 In recent years, historians have begun to recognize the broader importance of issues relating to citizenship and national identity within Civil War historiography. In the main, historians have shown that ambiguity, rather than clarity, characterized the nature of citizenship in the Civil War Era. See, for example, James H. Kettner, The Development of American Citizenship, 1608–1870 (Chapel Hill: The University of North Carolina Press, 1978), 248–86; Susannah Ural Bruce, The Harp and the Eagle: Irish-American Volunteers and the Union Army, 1861-1865 (New York: New York University Press, 2006); Christian G. Samito, Becoming American under Fire: Irish Americans, African Americans, and the Politics of Citizenship During the Civil War Era (Ithaca: Cornell University Press, 2009), 217-220; Alison Clark Efford, German Immigrants, Race, and Citizenship in the Civil War Era (Washington, D.C.: Cambridge University Press, 2013). More recently, Andre Fleche convincingly demonstrates that European political ideas shaped American immigrants’ ideas about national identity and citizenship. See Andre Fleche The Revolution of 1861: The American Civil War in the Age of Nationalist Conflict (University of North Carolina Press, 2014). In his study of British subjects who sought exemption from service under Union and Confederate conscription policies, Paul Quigley reinforces the idea that there were “many shades of gray within and between the opposing categories of “citizen” and “alien”’ and that the Civil War transformed American citizenship generally by helping to define “concepts such as domicile and residence.” Paul Quigley, “Civil War Conscription and the International Boundaries of Citizenship.” The Journal of the Civil War Era 4:3 (Sept., 2014), 373-397. (Quotes from pages 373 and 389.)
suspension emerged within the Union states following *Ex parte Merryman*, there was nothing like a transatlantic discourse surrounding Lincoln’s habeas policy during the American Civil War. Most Britons across the Atlantic were deeply skeptical of the Union’s justifications for waging a war against the Confederacy in the first place, while most already Anglophobic Northerners condemned Britain for refusing to intervene on behalf of the Union and recognizing Confederate belligerency. Still, many Britons were avidly interested in, and closely followed, the debates surrounding executive habeas suspension in the Union, and the failure of most historians to recognize this transatlantic dimension to Lincoln’s habeas policy certainly cannot be attributed to a want of easily accessible primary sources. The correspondence between state-side British diplomats and consuls and British officials in London between 1861-65 supplies ample evidence of official British condemnation of Lincoln’s habeas policy, as does the first-hand accounts of Britons who visited the Union and emphasized the apparently fragile state of civil liberty under Lincoln. As a result, popular British publications reflected the critical views of the London government toward Lincoln’s suspension of habeas corpus, and provided British readers with further evidence with which to criticize an apparently illiberal Union government for much of the war. This is not to suggest, however, that British criticism of Lincoln’s habeas policy superseded that of the President’s emancipation policy; only that the former finally deserves to be recognized alongside the latter as a major contributing factor to widespread anti-Union attitudes in England.

A fifth and overarching historiographical contribution emerges from the preceding four: that the diplomatic history of the American Civil War can enhance our understanding of the constitutional history of the American Civil War, at least with
respect to civil liberties and Lincoln’s suspension of the writ of habeas corpus. In recent years, historians have increasingly shown how much of the constitutional conflicts during the Civil War era occurred outside of the courtrooms and the bench rulings of judges—long the traditional source domains for constitutional historians of the twentieth century. Instead, as scholars have recently argued, many constitutional battles of the Civil War—including those surrounding Lincoln’s habeas policy—were fought in the realms of politics and public intellectual discourse, as well as on the ground by Union soldiers and military officials tasked with winning a war. While these analytical frameworks have produced new insights into the habeas corpus problem under Lincoln, their continued oversight of the diplomatic conflicts surrounding habeas corpus in Anglo-American relations has led to a lack of understanding of the broader importance of the habeas controversy in the historical literature. To be sure, no serious study of the constitutional history of Civil War habeas corpus is complete without careful analyses of Lincoln’s own policy statements, relevant federal and state court decisions, political pamphlets, military orders, and American newspapers. Yet, the habeas corpus problem was never confined to American citizens. The constitutional history of civil liberties and habeas corpus under Lincoln was also made in Anglo-American diplomatic correspondence, in private official dispatches to London, in the letters of British detainees and their anxious loved ones to diplomats and consuls, in the testimony of Britons tried before military courts, and in popular British publications.

Habeas Corpus: Transatlantic Origins and Transformations of the “Great Writ of Liberty”

As a deeply engrained mechanism for the protection of individual rights within the Western legal tradition, habeas corpus has a long history that to some extent remains
shrouded in mystery. The earliest habeas writs found by scholars date to the thirteenth century, and from its earliest linguistic usage in medieval England to the present day, the Latin term “habeas corpus” literally means “you shall have the body to undergo and receive.” While its intellectual origins are often mistakenly identified with the Magna Carta, habeas corpus does resonate with one of the most important libertarian principles of that momentous charter. Imposed upon King John by the Barons of Runnymede in 1215, who sought to restrain the King’s power and protect their property against arbitrary confiscation, the Magna Carta first codified the principle of just cause for imprisonment in the Western legal tradition with its guarantee that no man shall be “taken or imprisoned or dispossessed, or outlawed, or banished...except by the legal judgement of his peers or by the law of the land.” Similarly, the idea that one cannot suffer arbitrary government arrest and detention without due process of law is one of the most important principles underlying the historical efficacy of the writ of habeas corpus as a constitutional instrument for liberty.

Much like the gradual development of the English common law, however, the modern meaning and usage of habeas corpus developed over the course of many centuries. Despite its current stature as an important safeguard against arbitrary government detention, habeas corpus did not originate as a bulwark of individual liberty in England. On the contrary, government power, rather than liberty, served as the central impetus driving habeas development in England between the thirteenth and nineteenth centuries. As currently enshrined in English and American constitutional law, a writ of

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6 Anthony Gregory, The Power of Habeas Corpus in America: From the King’s Prerogative to the War on Terror (New York: Cambridge University Press, 2013), 16.

7 Gregory, 4, 13, 18.
habeas corpus is generally used as a judicial order issued by a judge to inquire into the lawfulness of one’s detention. At first, however, twelfth-century English judges of the king’s court initially employed writs of habeas corpus to put people in jail and collect revenue for the Crown. In other words, habeas corpus originally operated in the opposite direction to its later Anglo-American usage. Before long, however, the king’s courts ironically began employing habeas corpus as a check on the power of the monarch, setting in motion the slow, spontaneous transformation of habeas corpus as a weapon in service to individual liberty. One recent scholar attributes to this reversal in habeas usage against the king a coincidental convergence of the “jurisdictional opportunism [of courts] and domineering judges,” both of which reflected the struggle for power that characterized the historical development of habeas corpus. Even after habeas eventually emerged in English law as a legal remedy for unjust imprisonment during the fifteenth century—what Blackstone famously referred to as “the great and efficacious writ in all manner of illegal confinement”—this development owed more to the jurisdictional battles between courts than the deliberate intentions of elites to ensure the liberty of the

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8 Although beyond the scope of this study, it is important to note that judges used many distinct writs of habeas corpus to command the presence of a subject before a court. The most famous writ associated with habeas corpus as commonly understood today is the writ of habeas corpus ad subjiciendum et recipiendum, which literally means: “you shall have the body to undergo and receive.” For an extensive discussion of other, arcane habeas writs used in early England, see Paul D. Halliday, Habeas Corpus: From England to Empire (Cambridge: The Belknap Press of Harvard University Press, 2010). For a brief discussion, see Gregory, 11-27.

9 Gregory, 11; Halliday, 16-17. At the turn of the twentieth century, Edward Jenks identified what he regarded as “the most embarrassing discovery” in the historical development of habeas corpus: “[T]he more one studies the ancient writs of habeas corpus (for there were many varieties of the article) the more grows clear the conviction, that, whatever may have been its ultimate use, the writ of Habeas Corpus was originally intended not to get people out of prison, but to put them in it” (emphasis in original). Edward Jenks, “The Story of Habeas Corpus,” Law Quarterly Review, Vol. XVIII (1902), 64.
individual and preempt government injustice. As the Scottish philosopher Adam Smith once conceptualized an “invisible hand” unintentionally directing the development and operation of a market economy, so, too, may it be said that the modern application of habeas corpus evolved over time in response to the “invisible hand” of constitutional law.

Given its centuries of development in England, habeas corpus was not a new concept to British North American colonists. In the late eighteenth century, habeas corpus played an important intellectual role in cultivating the revolutionary ideology within the American colonies, while the Crown employed habeas suspension against its rebellious subjects. It is perhaps not surprising, then, that one of the core intellectual features of the American Declaration of Independence—its condemnation of arbitrary government power—was inspired in no small part by a popular veneration of the Great Writ and the British common law. As Anthony Gregory writes, habeas corpus “was not just one of the niceties demanded by the colonists. It was a key feature of English common law that had

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10 William Blackstone, as quoted in Gregory, 3; Gregory, 13, 18, 21.

11 As William Duker explains the analogy with respect to habeas corpus, “the various departments of English government, by attempting to extend and secure the bounds of their own jurisdiction, enhanced the value of habeas corpus to the subject’s liberty.” William Duker, A Constitutional History of Habeas Corpus (Westport, CT: Greenwood Press, 1980), 8. Still, power continued to guide subsequent habeas development in England. When habeas corpus became a proxy in the struggles over political power between the Crown and Parliament beginning in the seventeenth century, and although members of Parliament had long decried the king’s authoritarian use of habeas corpus, that governing body proved just as willing to suspend the writ of habeas corpus in the name of political expediency, doing so in 1641 and 1679. In 1649, Parliament suspended habeas corpus and certiorari for persons accused of violating price controls, and further abuses of civil liberties followed in the proceeding decades. As would become clear in the coming centuries, the legacy of the Parliamentary suspensions of the writ would reach across the Atlantic and extend well into the nineteenth century United States by tying the suspension of habeas corpus to legislative statute. See Gregory, 32-33. Paul Halliday has found that a majority of King’s Bench habeas cases (2,757) between 1502 and 1798 involved imprisonment for various crimes against the state (including high treason, libel, etc.). Halliday, 322-9.

12 By the time America declared independence in 1776, habeas corpus had been suspended for hundreds of American sailors detained in British prisons and aboard British ships. Gregory, 42.
warmed up the colonists to the common law system in the first place.” Regarding the protection of individual liberty as an essential weapon against government tyranny, these former British subjects adopted the writ as part of their new American national identity and claimed for it a more radical, libertarian meaning.\(^\text{13}\)

Despite the ubiquitous importance of habeas corpus among the Founding Generation, the writ emerged as a subject of serious debate during the Constitutional Convention.\(^\text{14}\) Some delegates to the convention insisted upon an explicit constitutional protection of habeas corpus, while others thought such codification unnecessary.\(^\text{15}\) In his 1787 “Draught of a Federal Government,” Charles Pinckney of South Carolina, keenly aware of the delicate nature of the writ in the hands of centralized authority, argued that a habeas provision in the Constitution should read: “The privilege and benefit of the writ of habeas corpus shall be enjoyed in this government in the most expeditious and ample manner: and shall not be suspended by the legislature except upon the most urgent and pressing occasion and for a time period not exceeding ___ months.” According to the notes of James Madison, John Rutledge of South Carolina “was for declaring the Habeas Corpus inviolable—He did not conceive that a suspension could ever be necessary.” Alexander Hamilton sought to assure Americans wary of the dangers of centralized governmental authority that a new Federal Constitution did not need a bill of rights by

\(^{13}\) Gregory, 44, 53-54.


\(^{15}\) Gregory, 59.
arguing, in *The Federalist No. 84*, that the habeas clause itself was sufficient to prevent the government from resorting to arbitrary arrest and detention.\(^{16}\)

When the dust settled, the ratification of the United States Constitution in 1787 placed habeas on a path to becoming an important instrument for government power over the individual in the new United States.\(^{17}\) In its final form, habeas corpus is mentioned only once in the United States Constitution, and is found in the second clause of Article I, Section 9: “The 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.”\(^{18}\) Thus, according to the textual language of the clause, only two specific conditions may legally permit suspension of the writ—rebellion or invasion. While the placement of the habeas clause in Article I (which largely concerns the powers of the legislature) would suggest an intention that only Congress could suspend the writ, the ambiguity of the clause admitted the possibility of future executive suspension. Whatever the case, as enshrined in the Constitution, the suspension clause placed federal habeas corpus in the hands of a centralized authority which—like its historical British counterpart—could arbitrarily...
employ habeas suspension as an “engine of repression.”\footnote{As Anthony Gregory writes, the suspension clause “qualifies as a counterrevolution against the radicalism of colonial habeas corpus,” for it “came about as a nationalization of power and as a usurpation of the states’ authority to protect citizens against the central state.” Gregory (containing the quote from Luther Martin), 58.}

Although the United States government never formally suspended the writ of habeas corpus in the antebellum period, its potential as a vital safeguard against arbitrary government power would be severely tested with the onset of civil war during the presidency of Abraham Lincoln.\footnote{The paradoxical use of habeas as an instrument in service of power over liberty continued in the years leading up to the Civil War, however. During the antebellum period, habeas corpus was frequently used by slave owners to recapture runaway slaves who escaped to the anti-slave northern states. In 1859, the Supreme Court, in the case of \textit{Ableman v. Booth}, further restricted habeas protection at the state level by ruling that state habeas corpus could not thwart federal habeas corpus (the latter, in this particular case, used for the benefit of slaveholders). This opinion was written by none other than Chief Justice Roger B. Taney, who a mere two years later would make the precise opposite ruling in the first year of the Civil War. Justin J. Wert, \textit{Habeas Corpus in America: The Politics of Individual Rights} (Lawrence: University Press of Kansas, 2011), 27-28, 30, 51-70.}

**Historiography**

Given its focus on the British habeas experience under Lincoln, this dissertation engages and bridges two longstanding traditions of Civil War historiography: the constitutional history of habeas corpus and civil liberties under Lincoln, and Anglo-American relations during the American Civil War. Since the early twentieth century, scholars in the former tradition have mostly concerned themselves with analyzing the constitutionality and practical consequences of Lincoln’s habeas policy on American citizens, while ignoring or minimizing the policy’s impact on British and other foreign nationals. Similarly, few historians broadly interested in Britain and the American Civil War have recognized the British habeas corpus experience under Lincoln, instead emphasizing the general British attitudes toward and opinions of the Union and the Confederacy and the diplomatic context of British neutrality. Moreover, it is worth noting...
here that virtually every historian who has ever written about British relations with the Union (including myriad general histories of the conflict) necessarily devotes considerable discussion to the greatest diplomatic crisis of the war: the maritime Trent crisis of December 1861-January 1862, when the Union Navy stopped the British mail vessel Trent and seized two Confederate diplomats en route to Britain and France to secure Confederate recognition from those European powers. While no diplomatic history of the American Civil War is complete without an analysis of Trent, the following discussion intentionally focuses on other, broader themes and topics within the historiography of Anglo-American relations.

Habeas Corpus and Civil Liberties under Lincoln

Since the early twentieth century, scholarly treatment of habeas corpus and civil liberties under Lincoln has generally fallen under the purview of constitutional historians, political scientists, and legal scholars. The first book-length treatment of the topic did not appear until historian James G. Randall’s groundbreaking 1926 work, Constitutional Problems under Lincoln. As his title suggests, Randall fundamentally viewed the U.S. Constitution as a problem for many of Lincoln’s war policies during the Civil War. In addition to providing a general discussion of civil liberties, the impressive sweep of Randall’s study covered many other vexing constitutional problems that emerged from the Civil War, including secession, emancipation, and conscription. With respect to Lincoln’s suspension of habeas corpus and general record on civil liberties, Randall did

21 All of the works broadly dealing with Britain and the American Civil War discussed below treat the Trent crisis to a greater or lesser extent. For an excellent, classic treatment of the topic, however, see Norman B. Ferris, The Trent Affair: A Diplomatic Crisis (Knoxville: University of Tennessee Press, 1977). For a more concise, yet accessible treatment of Trent, see Amanda Foreman, A World on Fire: Britain’s Crucial Role in the American Civil War (New York: Random House, 2011), 173-96.
little to advance our empirical understanding of who and how many persons were
arrested during the Civil War, and overlooked the consequences of Lincoln’s habeas
policy for British subjects living in the United States. Still, Randall ultimately defended
Lincoln by emphasizing the president’s sincere intentions to maintain “a democratic
regard for human feeling and a wholesome respect for individual liberty.” The events of
Randall’s own lifetime, which included two world wars and the rise of totalitarianism in
Europe, were obviously reflected in his own analysis of the sixteenth president. If
Lincoln was a dictator, Randall famously argued, “it must be admitted that he was a
benevolent dictator.”

In the middle decades of the twentieth century, subsequent scholars did little to
advance Randall’s thesis beyond vague assertions that Lincoln could have done far worse
in the realm of civil liberty. In his famous 1948 comparative study of Western crisis
governments, for example, political scientist Clinton Rossiter approvingly characterized
Lincoln’s extraordinary use of executive power during the Civil War as a “constitutional
dictatorship.” After almost entirely dismissing Lincoln’s nationwide habeas suspension

22 James G. Randall, Constitutional Problems under Lincoln (New York: Appleton, 1926), 47.
Randall repeats this “benevolent dictator” theme in his other writings on the topic, as well. See, for
example, James G. Randall, “Lincoln in the Role of Dictator,” South Atlantic Quarterly, 28 (July 1929),
236-52; and Randall, Lincoln the President: Midstream (New York: Dodd, Mead & Company, 1952).
Randall was not the first scholar to express interest in Lincoln’s habeas policy, or to exonerate the president
from charges of tyranny. In an 1888 article, for example, political scientist Sydney George Fisher reviewed
the development of Lincoln’s habeas policy during the Civil War and concluded that Lincoln “had no taste
for tyranny” and “was the most humane man that ever wielded such authority.” Sydney George Fisher,
“The Suspension of Habeas Corpus during the War of the Rebellion,” Political Science Quarterly, 3
(September 1888), 454-85. For an excellent historiographical discussion of the “Lincoln as dictator”
scholarly convention, see Herman Belz, “Lincoln and the Constitution: The Dictatorship Question
Reconsidered” in Abraham Lincoln, Constitutionalism, and Equal Rights in the Civil War Era (New York:

23 Clinton L. Rossiter, Constitutional Dictatorship: Crisis Government in the Modern
in the fall of 1862, Sherrill Halbert maintained that Lincoln suspended the writ of habeas corpus “reluctantly and sparingly.” “As the result of the experiences which we have had with dictators in the Twentieth Century,” Halbert concluded his 1958 article in a similar vein to Randall, “we, better than the people of his time, can appreciate how fortunate it was that a humble man like Abraham Lincoln was the Chief Executive of the United States in 1861.”24 Relying almost exclusively on a narrow source base of published war records and contemporary newspapers, Dean Sprague, in his 1965 *Freedom under Lincoln: Federal Power and Personal Liberty Under the Strain of Civil War*, condemned the damages to civil liberty wrought by Lincoln’s habeas policy during the first year of the war, but uncharitably painted William H. Seward (who controlled the system of military arrests until February 1862) as the scapegoat for any and all excesses committed under Lincoln.25

The “benevolent dictatorship” thesis popularized by Randall did not go unchallenged during the twentieth century, although scholars continued to use later historical examples to exonerate Lincoln from charges of tyranny. In *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution*, Harold Hyman rejected the dictatorship convention but insisted that Lincoln’s suspension of habeas corpus was justified. Unlike Randall, Hyman fundamentally viewed the U.S. Constitution as an asset, rather than a hindrance, to Lincoln’s war policies—including executive habeas suspension. In large part, Hyman uncritically accepted contemporary


Republican assertions that Lincoln’s habeas policy saved the Union by keeping a tight grip on the Border States, and that the president’s crackdown on Northern civil liberties was mild compared to later episodes in American history, anyway.\textsuperscript{26} Although Hyman made far greater use of archival sources than previous scholars on the topic, his watershed study on the constitutional history of the Civil War and Reconstruction deliberately minimized analysis of civil liberties under Lincoln, yet nevertheless reflected the traditional scholarly deference to Lincoln’s justification for suspending habeas corpus.

Constitutional historian Herman Belz also took strong exception to applying the dictatorship convention to Lincoln’s record on civil liberties. Maintaining Lincoln’s habeas suspensions as constitutional, Belz finds that “Lincoln was neither a revolutionary nor a dictator, but a constitutionalist who used the executive power to preserve and extend the liberty of the American founding.” The charge of dictatorship, Belz argued, “distorts our constitutional history in general, and…it is especially misleading and inaccurate as a description of Lincoln’s presidency.” Moreover, “[t]he dictatorship theme is particularly inapposite…with reference to Lincoln’s exercise of power during the Civil War, which was constantly subjected to the restraints of congressional initiative and reaction, political party competition, and the correcting pressures of public opinion.” For historians such as Belz and William Blair, the “most impressive evidence” contravening the dictatorship charge was “the continuation of party competition in the [presidential]

election of 1864,” but such an analysis overlooks or dismisses the fact that such “restraints”—Congress, the loyal political opposition, and public opinion—were also subjected to the over-riding power of Lincoln’s executive authority.27 With respect to habeas corpus and the role of federalism, for example, these historians seem to overlook or minimize the fact that Lincoln flagrantly ignored congressional legislation designed to restore the power of the civil courts over civilian prisoners in early 1863. Even after Congress finally acted to constrain executive habeas suspension, it is not at all clear that Lincoln was willing to respect those constraints on his power.

The most important work to date on Lincoln and civil liberties is found in Mark E. Neely Jr.’s 1991 The Fate of Liberty: Abraham Lincoln and Civil Liberties. To a far greater extent than any historian before or since, Neely provides a thorough, quantitative basis on which to evaluate the practical consequences of Lincoln’s suspension of habeas corpus. After an exhaustive examination of thousands of wartime arrest and military trial records located in the U.S. National Archives, Neely persuasively argues that, while

27 Herman Belz, “The Dictatorship Question Reconsidered”, in Abraham Lincoln, Constitutionalism, and Equal Rights in the Civil War Era. 28, 33, 43. Elsewhere, Belz writes that Lincoln adopted a “two-track constitutional justification” in order to validate his war measures (including habeas suspension): “legalistic arguments from the text of the Constitution,” and “more broadly political arguments concerning the relationship between the Union, the Constitution, and the nature of republican government.” Belz, “Lincoln’s View of the Constitution”, in Abraham Lincoln, Constitutionalism, and Equal Rights in the Civil War Era, 35. More recently, William Blair also points to the existence of the Election of 1864 as proof that Lincoln was no dictator, despite admitting a fair amount of Republican tampering (through the use of military intimidation) with that national election as well as others . Blair does, however, rescue the importance of the military to the constitutional history of the Civil War in his excellent recent study of treason. During the Civil War, Blair argues, the Union military “was an active agent of social, moral, and legal influence during the war. Officers making decisions on the ground left their imprint on popular constitutional ideals and sometimes forced civilian leaders to construct new policy.” With respect to Lincoln’s executive actions during the war, Blair is much more ambivalent. Lincoln did not ignore the Constitution, Blair argues, although the president did “allow policies and procedures of questionable constitutionalism—and even questionable need.” Still, Blair concludes that in the end, Lincoln “prevented the ship of state from sailing too far into unconstitutional waters.” See William A. Blair, With Malice toward Some: Treason and Loyalty in the Civil War Era (Chapel Hill: The University of North Carolina Press, 2014), 10, 60-61, 306-7.
abuses were certainly committed by overzealous military officials charged with enforcing the Union internal security system, a majority of military arrests under Lincoln “would have occurred whether the writ was suspended or not,” for they “were caused by the mere incidents or friction of war…”

Lincoln’s initial suspension of the writ in the spring of 1861 was designed to keep Maryland in the Union, and from the fall of 1862 onward, the president’s habeas policy was designed primarily to enforce federal conscription. Well over 14,000 persons were arrested by the Union military during the Civil War, but the overwhelming majority of these cases involved Confederate refugees from the Southern and Border States who found themselves in prison as a result of the natural frictions and abrasions of war. Moreover, contrary to the charges of Lincoln’s critics, then and now, military arrests in the North under Lincoln were never primarily driven by political considerations; in fact, relatively few were arrested for speaking out against the administration or exercising various other forms of peaceful dissent.

With respect to the

28 Neely, *Fate of Liberty*, 233.

29 Neely also decisively shows how previous historians, such as Dean Sprague, greatly exaggerated the “excesses” of the Union internal security system under Seward’s control. Of the more than 14,000 military arrests made during Lincoln’s presidency, Neely credits Seward with the responsibility for 864. The remaining arrests occurred under the direct control of Secretary of War Edwin M. Stanton, after February 15, 1862.

habeas experience of Britons in the Union, however, Neely only offers a brief discussion of those few British subjects who were arrested and subjected to torture under Union military authority.\textsuperscript{31}

In his most recent study, \textit{Lincoln and the Triumph of the Nation: Constitutional Conflict in the American Civil War}, Neely provides a broader understanding of the Civil War habeas corpus issue than his previous work by placing Lincoln’s habeas suspensions within the intellectual and political context of mid-nineteenth century American constitutionalism. To do this, he analyzes the constitutional discourse surrounding the war stimulated by contemporary legal pamphleteers such as Horace Binney, Joel Parker, and Benjamin R. Curtis.\textsuperscript{32} Moreover, Neely shows how American nationalism proved to be both an essential component of Lincoln’s expansion of executive power and an irresistible force that sustained public support for even his most controversial infringements on civil liberties: “Nationalism, though a powerful force in the Civil War,…did not lead to one-man rule or even to any long-run strengthening of the

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\item Neely, \textit{Fate of Liberty}, 110-111.
\item Mark Neely, Jr., \textit{Lincoln and the Triumph of the Nation: Constitutional Conflict in the American Civil War} (Chapel Hill: The University of North Carolina Press, 2011). During the Civil War, many American legal experts and commentators of all political stripes weighed in on the constitutionality and practical consequences of Lincoln’s suspension of habeas corpus, but did not include foreign nationals in their commentary. Given the highly contentious political atmosphere surrounding issues of executive power that arose during the war, it is perhaps not surprising that these pamphleteers expended most of their ammunition on the Constitutional questions, which in turn later drew the most attention from scholars. In his famous 1862 pamphlet that enjoyed more public circulation and debate than any other, \textit{The Privilege of the Writ of Habeas Corpus under the Constitution}, Horace Binney, a prominent Philadelphia lawyer and early defender of Lincoln, penned a highly-technical analysis of the power of the Executive to suspend the writ of habeas corpus that focused solely on this issue, concluding that Lincoln had acted Constitutionally in suspending the writ. See Horace Binney, \textit{The Privilege of the Writ of Habeas Corpus under the Constitution} (Philadelphia, 1862). Indeed, most of the pamphlet literature written in response to Lincoln’s habeas corpus policy remained at the Constitutional plane without veering into the practical or foreign policy consequences of habeas suspension—for American citizens or foreign nationals.
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executive branch under the Constitution.” According to Neely, Lincoln was a great Constitutional thinker of his time, and his actions “remind us of the necessity of applying force or vigorous leadership in creating or maintaining nation-states even amid generally supportive national sentiment.” In short, Lincoln was “not about to let the writ of habeas corpus stand in the way of the life of the nation.”

Subsequent scholars have largely deferred to the empirical findings and conclusions of Neely, but recent assessments of Lincoln and civil liberties have also been influenced by global events in the early twenty-first century. In particular, controversial questions surrounding civil liberties for enemy combatants of the U.S. government in the Global War on Terror have reignited historical debate over the legacy of Lincoln’s habeas policy. John Yoo, constitutional scholar and former Deputy Assistant Attorney General under President George W. Bush, exonerates Lincoln’s suspensions of the writ as “part of a systematic mobilization to win the most dangerous war in our nation’s history,” and a justified policy that helped save the nation without establishing a “permanent diminution of individual liberties.” “To demand that Lincoln should have been more

33 Neely, Lincoln and the Triumph of the Nation, 109.

34 Neely, Lincoln and the Triumph of the Nation, 64-65, 109, 197.

35 The lenient standards applied to Lincoln and civil liberties are also reflected in the works of the most prominent, mainstream Civil War historians. James M. McPherson, in comparing Lincoln’s record on civil liberties during the Civil War with those of recent major wars and political developments of the twentieth century inimical to individual rights, maintains that Lincoln’s “infringement of civil liberties from 1861 to 1865 seems mild indeed.” James McPherson, Tried by War: Abraham Lincoln as Commander in Chief (New York: The Penguin Press, 2008), 270. In his recent history of the Civil War and Reconstruction, Allen C. Guelzo even minimizes the sensational arrest and military trial of the most famous Copperhead of all, Clement L. Vallandigham. “When measured against the far vaster civil liberties violations levied on German Americans and Japanese Americans in America’s twentieth century world wars,” Guelzo writes, “Lincoln’s casual treatment of Vallandigham appears almost dismissive.” Allen C. Guelzo, Fateful Lightning: A New History of the American Civil War and Reconstruction (New York: Oxford University Press, 2012), 230.
sensitive to civil liberties,” writes Yoo, “is to impose the ex post facto standards of peacetime on decisions made under the pressures of war-time.” Yoo’s interpretation of Lincoln’s example clearly reflects his parallel value judgements on, and deep personal role in crafting, modern executive policies on civil liberties for enemy combatants under President Bush, and thus one must approach his work with caution.

Still, many distinguished political scientists and constitutional scholars who have not themselves been involved in crafting recent public policy on enemy combatants continue to advance qualified approvals of Lincoln’s suspension of habeas corpus while acknowledging the theoretical dangers of expansive executive power. Drawing much inspiration from Randall in his broad-ranging *Lincoln’s Constitution*, political scientist Daniel Farber argues that Lincoln’s suspensions of the writ, in retrospect, have “reasonably good constitutional justifications under the war power. Other leaders…would have gone much farther than Lincoln did.” In much the same deferential vein as Randall’s classic work, Farber concludes that “given the extremity of the country’s situation, Lincoln’s record on civil liberties was not at all bad.”

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36 John Yoo, *President Lincoln, Civil Liberties, and the Constitution* (New York: Kaplan, 2010), 40. Yoo’s interpretation is similar to those of other recent political scientists. Interpreting Lincoln’s suspension through a Lockean perspective, Thomas L. Krannawitter argues that Lincoln’s conduct regarding civil liberties constitute a prudential exposition of the malleability of natural rights and, when viewing Lincoln’s actions through a nationalist prism, his policies restricting civil liberties becomes “eminently reasonable.” Thomas L. Krannawitter, *Vindicating Lincoln: Defending the Politics of Our Greatest President* (Lanham: Rowman & Littlefield, 2010), 324-25, 332. See also Benjamin Kleinerman, *The Discretionary President: The Promise and Peril of Executive Power* (Lawrence: The University Press of Kansas, 2009).

37 Daniel Farber, *Lincoln’s Constitution* (Chicago: University of Chicago Press, 2003), 146, 175. Similar, qualified defenses of the constitutionality of Lincoln’s habeas corpus suspensions are offered by James F. Simon, *Lincoln and Chief Justice Taney: Slavery, Secession, and the President’s War Powers* (New York: Simon & Schuster, 2006); and James A. Dueholm, “Lincoln’s Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis.” *Journal of the Abraham Lincoln Association* 29, no. 2 (Summer 2008): 47-66; Dennis K. Boman, in his recent study of civil liberties in Civil War Missouri, defends Lincoln’s pragmatism in suspending the writ while carefully acknowledging instances of abuse. Lincoln’s “practical perspective” on military questions, Boman argues, “occasionally allowed for the unnecessary violation of civil liberties, for in focusing upon the practical, the rights of the individual were
on the military arrest of Clement Vallandigham and Lincoln’s fullest defense of executive habeas suspension in the Corning Letter of June 12, 1863, Geoffrey R. Stone similarly recognizes the dangers of restricting freedom of speech in wartime, but nevertheless conflates the president’s admittedly eloquent rhetoric on harmonizing civil liberty and government power in wartime with careful thinking on the topic. “Whatever the arguable deficiencies of Lincoln’s analysis,” Stone argues, “they demonstrate a serious effort to think through hard First Amendment questions at a level of detail and with a degree of scrutiny that was unprecedented at this time.” Lincoln’s response to his critics reached an exceptional level of “analytical rigor,” and shows him “not only as a brilliant politician and rhetorician but as an effective constitutional lawyer as well.”

During the Civil War, legal and practical distinctions between a suspension of habeas corpus and an imposition of martial law were not always clear. In his *Justice in Blue and Gray: A Legal History of the Civil War*, Stephen C. Neff usefully clarifies the enormously complex relationship between habeas suspension and martial law better than any other scholar to date, but does little to assess the extent to which the Lincoln administration restricted civil liberty for American citizens and foreign nationals. Martial law, Neff points out, might entail a suspension of habeas corpus, or may function as an alternative mechanism for restricting habeas corpus independent of the suspension clause. Of the two conditions, martial law is by far the more powerful government instrument,

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sometimes forgotten, or at least subordinated in importance, a circumstance which might have been avoided more often if specific guidelines had been established earlier.” Still, Boman assures readers that Lincoln did the best he could, distracted as he was by innumerable other wartime issues. Dennis K. Boman, *Lincoln and Citizens’ Rights in Civil War Missouri: Balancing Freedom and Security* (Baton Rouge: Louisiana State University Press, 2011), 18. For a recent study on the history of the habeas corpus development in American politics, see Wert, *Habeas Corpus in America: The Politics of Individual Rights*.

entailing potentially a complete substitution of military law for the civil law in areas actually threatened by invasion or rebellion. Suspension of habeas corpus, on the other hand, is more limited in nature as “the suppression of one particular remedial pathway for the contesting of one particular wrong (unlawful detention)” on a potentially nation-wide scope. Although the weight of legal opinion regarding the constitutionality of executive suspension favored Lincoln’s critics, there was much confusion regarding just what habeas suspension actually meant. Yet if precision regarding the meaning of habeas suspension was lacking, Neff correctly notes, “the practical effect was clear: the executive could imprison persons suspected of disloyalty without the effective constraint of habeas corpus proceedings.” Habeas relief from state courts was theoretically possible, as state courts were not covered by federal suspensions, but the federal government largely succeeded in obstructing state habeas writs for federal prisoners during the war. Although habeas corpus proceedings “represent the presumption in favor of liberty in its most robust and effective form,” habeas suspension is merely “the withholding of a remedy and not an alteration of the law itself. It does not affect other Due-process rights to which accused persons are entitled when tried.”39 While Neff’s point is technically correct from a legal standpoint, he fails to point out that, in practice, the Lincoln administration consistently used suspension of the writ as a convenient pretext for

39 Stephen C. Neff, Justice in Blue and Gray: A Legal History of the Civil War (Cambridge, Mass.: Harvard University Press, 2010), 37-42, 153, 160. Citing the authority of the Supreme Court in Ableman v. Booth (1859), the Union government maintained that state courts had no authority to order the release of federal prisoners. Technically, state courts were not covered by federal suspension, but the Lincoln administration did not think they needed to be. In practice, the War Department instructed military officials that habeas writs from state courts should not be obeyed, and that officers should deny state jurisdiction and refuse to bring prisoners to court.
ignoring or obstructing all other Due-process rights for civilian prisoners during the Civil War.\footnote{Robert O. Faith, “Public Necessity or Military Convenience? Reevaluating Lincoln’s Suspensions of the Writ of Habeas Corpus during the Civil War,” \textit{Civil War History} 62 (Sept. 2016): 298-302.}

Finally, scholars have also reexamined Lincoln’s suspension of habeas corpus through focused studies on the most famous Civil War habeas case of all, \textit{Ex parte Merryman} (1861). Taking a fresh look at the original manuscript sources in his \textit{Abraham Lincoln and Treason: The Trials of John Merryman}, Jonathan W. White argues that “[t]he various legal proceedings involving John Merryman…reveal the magnitude of the disloyalty problem that faced Lincoln and the Union during the Civil War,” as well as “how courts were yet another front on which Lincoln had to fight the Civil War.” With respect to the immediate significance of \textit{Merryman} in the context of the early days of the Civil War, White restates the conventional historical analysis. In ignoring Chief Justice Taney’s ruling in \textit{Merryman} that the President did not have the constitutional authority to suspend habeas corpus, Lincoln “gutted \textit{Ex parte Merryman} of any legal significance and determined that as long as the war lasted \textit{Merryman} would have no practical effect.”

White improves upon previous scholarship, however, by demonstrating how cases such as \textit{Merryman} represented merely one side of the habeas corpus coin. On the other side, the Lincoln administration and Republican Congressmen had to provide indemnity for those Union military officers who were being sued for making arrest, which they did in part with the Habeas Corpus Act of March 3, 1863.\footnote{Jonathan W. White, \textit{Abraham Lincoln and Treason: The Trials of John Merryman} (Baton Rouge: Louisiana State University Press, 2011), 8, 38, 120-21. White has also extended the analysis of civil liberties during the Civil War to soldiers within the Union army ranks in Jonathan W. White, \textit{Emancipation, The Union Army, and the Reelection of Abraham Lincoln} (Baton Rouge: Louisiana State University Press, 2014), especially chapters 2, 3, and 4. Brian McGinty, in his own recent book on}
to the story of John Merryman and the many battles over habeas corpus in the federal
courts, White’s work offers a broader lesson in demonstrating the value of approaching
an old topic from a fresh perspective. While scholars interested in civil liberties have long
analyzed habeas corpus under Lincoln as a domestic and constitutional problem, they
have yet to adequately recognize Lincoln’s suspension of the writ as a problem in Anglo-
American relations.

Great Britain and the American Civil War

The first major work on Great Britain and the American Civil War saw
publication at about the same time as Randall’s Constitutional Problems under Lincoln,
and emphasized British attitudes toward the war instead of Anglo-American diplomacy.
In his 1925 Great Britain and the American Civil War, Ephraim Douglas Adams argued
that despite initial British public pressure for intervention, cooler heads ultimately
prevailed in the Palmerston government, and Union emancipation eventually lent
credibility to Britain’s policy of neutrality. Adams helped establish the traditional
interpretation of British attitudes toward and opinions of the American Civil War, which
posits a pro-Confederate coalition comprised of the British aristocracy, upper-middle
class and political conservatives, and a pro-Union coalition comprised of British radicals
and the working classes. The latter groups, far more anti-slavery than their social

Merryman, uses the famous case as something akin to a lawyer’s brief which uncritically justifies Lincoln’s
broader habeas suspensions throughout the war, while praising the president’s intellectual defenders and
quickly dismissing his critics. In his sixth chapter, for example, McGinty pours lavish praise on the
pamphlets of Horace Binney and Joel Parker for eleven pages, while devoting a single paragraph to
contemporary intellectual critics of Lincoln’s habeas policy. See Brian McGinty, The Body of John
Merryman: Abraham Lincoln and the Suspension of Habeas Corpus (Cambridge: Harvard University
Press, 2011). For an incisive analysis of why the Supreme Court did not weigh in on executive habeas
suspension during the Civil War, see Jonathan W. White, “The Strangely Insignificant Role of the Supreme
Court in the Civil War,” The Journal of the Civil War Era v.3, no. 2, (June 2013), 211-238.
superiors and emboldened by Lincoln’s Emancipation Proclamation of January 1, 1863, interpreted the conflict as not only a war for emancipation but a crucial global test for the survival of democracy. The aristocratic, upper-class conservatives in Britain, on the other hand, initially hoped that a Confederate victory would both damage Britain’s American rival and symbolically discredit British domestic reform movements for democracy and republican government. Following the collapse of the Confederacy, however, these former British opponents of the Union belatedly recognized the humanitarian achievement of Lincoln’s emancipation policy, and the passage of the 1867 Reform Act in Britain—which greatly expanded voting rights for males—allegedly occurred in no small part thanks to ultimate Union victory. Despite his scholarly achievement, Adams’s work overlooked many of the “lesser” diplomatic conflicts overshadowed by the Trent crisis—such as that dealing with civil liberties for Britons in the Union—which emerged between the Union and Britain during the war, and his analysis of British opinion is disappointingly confined to the narrow view from London.

Although British society during the American Civil War remains a subject of scholarly interest, historians did not improve upon Adams’s work on Civil War Anglo-

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42 Ephraim Douglas Adams, Great Britain and the American Civil War (New York: Russell & Russell, 1958). The traditional model of British attitudes outlined here is also prominent in Donaldson Jordan and Edwin J. Pratt, Europe and the American Civil War (New York: Houghton Mifflin, 1931). It did not take long, however, for revisionist historians to challenge this traditional model of Anglo-American relations and British public opinion during the Civil War, although scholarship during the mid-twentieth century continued to focus on the views of British liberals and conservatives toward the war and ignored habeas corpus under Lincoln. The Southern historian and partisan Frank L. Owsley, in his 1931 King Cotton Diplomacy: Foreign Relations of the Confederate States of America, denied the impact of slavery on British views of the war as well as the existence of a pro-Union working class, and pointed to the profits of British merchants and industries as the principal explanation for British neutrality in the war. The middle and upper-classes in Britain may have been mostly pro-Confederate, but this was so, Owsley argued, not because these Britons decried democracy or republicanism but because they championed the right of self-determination. Frank L. Owsley, King Cotton Diplomacy: Foreign Relations of the Confederate States of America (Tuscaloosa: University of Alabama Press, 1931).
American relations until the 1970s. In his much broader examination of American relations with England and France during the war, David Paul Crook, in his 1973 *The North, the South and the Powers: 1861-1865*, emphasized the restraints which militated against European intervention in the American Civil War. In Crook’s view, “the distractions of European power politics helped to save the Union,” for the European powers “were unable to subdue their rivalries or find a mutually acceptable basis for intervention.” Contrary to the traditional model of British support for the Union and Confederacy, Crook finds much more ambiguity toward the war throughout British society, and that many upper and middle-class Britons actually supported the right of the Union to suppress the Southern rebellion with force. Concerned primarily with maintaining the territorial integrity of the British Empire, these groups were not willing to support the Confederacy’s alleged right of self-determination, despite assertions by contemporary northerners and subsequent historians that Britain desired nothing more than the breakup of the Union and extension of British hegemony into the Western hemisphere.

In much the same vein as Crook, Brian Jenkins argues, in his two-volume *Britain & the War for the Union*, that a strict British neutrality which benefited the North “was dictated by the need to keep relations with America quiescent in order to strengthen

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43 For example, Richard J. M. Blackett has recently explored how class and other social factors influenced British reactions to the Civil War. Blackett emphasizes how the British discourse over the American Civil War (and the vexing questions surrounding American slavery and racism, in particular) exerted a profound influence on British political, social, and economic life during the 1860s. Importantly, as Blackett acknowledges, “the complexity and subtlety of [British] reactions to the war are almost staggering.” Richard J. M. Blackett, *Divided Hearts: Britain and the American Civil War* (Baton Rouge: Louisiana State University Press, 2001), 35.

Britain’s diplomatic position in Europe.” Despite heavy public pressure to intervene in the war and destroy the Union, Jenkins maintains that Britain’s policy of neutrality owed more to foreign policy concerns—particularly the fear of Union annexation of Canada—than British public opinion. Ever the astute statesman, Seward recognized Britain’s apprehension regarding Canada, and thus his diplomacy “was carefully calculated to play upon British concern for the safety of their all too vulnerable empire in North America and their preoccupation with the balance of power in Europe.” Had Britain become embroiled in the American war, its European rivals, particularly France, might have been tempted to take advantage of potential British embarrassments. Moreover, once fears of a servile war in North America faded, the moral righteousness surrounding Union emancipation militated against British support of the Confederacy, although Jenkins cautions that this British moral sympathy should not be exaggerated.45

Jenkins also appears to have been the first historian to notice the impact of Lincoln’s habeas policy on British subjects. The military arrests of civilians following Lincoln’s initial suspension had convinced the British minister in Washington, Lord Lyons, that the rule of law no longer existed in the United States. When notified of cases involving British detainees by the British minister, a conciliatory Seward “always speedily ordered the release of British subjects” arrested by the Union military. Still, after encountering official British opposition to Lincoln’s habeas policy in the fall of 1861, Seward defended the administration’s authority to order military arrests in a widely-

published letter (albeit one seriously underappreciated by historians) which “summon[ed] all Anglophobes to the support of the administration’s abridgement of civil liberties.” In this, the Secretary correctly calculated that no “true American” could accept the Palmerston government’s contention that the power of habeas suspension belonged to Congress, rather than the President, and Seward’s “public rebuke of Lord Lyons over habeas corpus had been perfectly consistent with his policy of never tolerating any European interference in American affairs…” While Jenkins reasonably situates the military arrests of Britons under Lincoln’s habeas policy within Seward’s broader policy of European non-intervention, he fails to consider Lincoln’s role in the dilemma and confines his brief analysis to 1861.

More recently, Howard Jones has improved upon the works of Crook and Jenkins by focusing on the British cabinet under Prime Minister Palmerston during the war. In his two books on the topic, Union in Peril: The Crisis over British Intervention in the American Civil War and Blue & Gray Diplomacy: A History of Union and Confederate Foreign Relations, Jones argues that most Britons could never fully grasp the magnitude of the Civil War or understand the inseparability of Union and slavery, while the Lincoln administration wrongly assumed they would do so. Since neither side avowed slavery as a war issue from the outset, many inside and out of the British government saw the Union as waging a war of vengeance upon the wayward Southern states, and the Palmerston cabinet ultimately decided to allow events on the battlefield to determine whether Britain should intervene. As a result of this confusion, the specter of British intervention loomed

\[46\] Jenkins, Britain & the War for the Union, I (Montreal: McGill-Queen’s University Press, 1975) 182-6.
large until late 1862, and in the end, Britain’s policy of neutrality alienated both the Union and Confederacy.47 “Though the Palmerston ministry had repeatedly threatened to deviate from its course [of neutrality],” Jones concludes, “it remained true to its initial decision not to intervene until the North had learned on the battlefield that subjugation of the South was impossible.”48 Contrary to the traditional model of British public opinion, Jones also shows how Lincoln’s turn toward military emancipation actually stimulated talk of intervention because of widespread British fears that slave revolts and a bloody race war would follow in North America.49

As the principal figure in Union foreign policy-making, Secretary of State William H. Seward’s diplomacy has also received substantial scholarly attention. In his 1976 Desperate Diplomacy: William H. Seward’s Foreign Policy, 1861, Norman B. Ferris analyzes the crucial first year of Seward’s relationship with Britain, and gives the embattled Secretary high marks for his aggressive diplomatic style. Although the maritime Trent crisis of November-December 1861 serves as the focal point of his analysis, Ferris does note the military arrests of Britons in the summer of 1861 as an emergent problem in Anglo-American relations. “[O]ne of the major causes of Anglo-American diplomatic tension during 1861,” Ferris argues, was that British policies in response to changing events in the fractured Union were “invariably based on narrow


48 Jones, Union in Peril, 227; Jones, Blue & Gray Diplomacy, 207.

49 Jones, Union in Peril, 8, 16-17, 139, 225-26; Jones, Blue & Gray Diplomacy, 120, 148, 182, 203.
(and often archaic) legalistic considerations rather than on those of either political realities or humanitarian concern.” One of those political realities, Lincoln’s suspension of habeas corpus, “seemed in England to confirm the existence of a pervasive militarism in the United States” and, during the Trent affair, “there was great indignation, and not a little bellicosity, over the imprisonment in the United States of British subjects accused of sedition…” In this, and in other diplomatic conflicts, Ferris finds British indignation both exaggerated and unwarranted, for the British Minister’s “requests for leniency toward imprisoned British subjects were almost invariably honored, and ultimately the persons involved, including some very shady characters, were released from custody.”

Although Ferris’s study is confined to 1861 and naturally does not pursue the issue throughout the rest of the war, his analysis still leaves one with the mistaken impression that the military arrests of Britons was no longer an issue after the first year of the war.

While European diplomats in Washington recognized Seward as the figure in Union foreign policy, at least one historian emphasizes President Lincoln’s oversight of the diplomacy of his sometimes volatile Secretary of State. In One War at a Time: The International Dimensions of the American Civil War, Dean B. Mahin argues that the president himself played a substantial role in guiding Union foreign policy during the American Civil War, and that together with Seward he “successfully used the threat of a war with England and/or France to restrain those nations from active intervention in the

50 Norman Ferris, Desperate Diplomacy: William H. Seward’s Foreign Policy, 1861 (Knoxville: University of Tennessee Press, 1976), 124, 197, 201, 203. In contrast to Ferris, the most recent biography of William H. Seward fails to grasp the significance of the civil liberties problems involving habeas corpus and British nationals. In his recent and otherwise judicious biography of Seward, Walter Stahr vaguely notes that the arrests of British subjects by Union military authorities was “a source of tension between Seward and the British,” without further elaboration on the subject. Walter Stahr, Seward: Lincoln’s Indispensable Man (New York: Simon & Schuster, 2012), 305.
American conflict.” Despite suggestions to the contrary by most historians and biographers, Mahin insists that “Lincoln was too intelligent and perceptive and too aware of his constitutional responsibilities” to leave matters of foreign relations entirely to Seward, and points to the latter’s habit of implicating Lincoln’s personal views in his correspondence to Lord Lyons and other foreign ministers.\(^{51}\) Although Mahin does not specifically mention it, this was also the case with Seward’s diplomatic correspondence regarding Britons arrested by the Union military, as will be seen in Chapter II. Unlike many other historians, Mahin is harshly critical of Lord Lyons for underestimating Lincoln and Seward.\(^{52}\) As a result, “Neither the British nor the U.S. government realized that Lyons was providing inadequate information and warped judgements on American affairs.” While it is reasonable to suspect that Lyons initially overestimated Seward’s “desperate diplomacy” and underestimated Lincoln, Mahin perhaps gives Lincoln and Seward too much credit for keeping Britain at bay, while failing to appreciate the ways in which Lincoln’s domestic policies—including his suspension of habeas corpus—negatively affected Anglo-American relations and British perceptions of the Union.

Such is not the case, however, with Duncan Andrew Campbell’s *English Public Opinion and the American Civil War*. While nearly every historian of Anglo-American relations since E. D. Adams has ignored the role of Lincoln’s habeas policy in shaping British attitudes of the war from across the Atlantic, Campbell rightly notes that

\(^{51}\) Dean B. Mahin, *One War at a Time: The International Dimensions of the American Civil War* (Dulles, Va: Brassey’s, 1999), ix, 2-3.

\(^{52}\) Mahin, *One War at a Time*, 40-43, 127. More generally, Mahin accepts the conclusion of Howard Jones that the Palmerston government “never understood Lincoln’s unswerving determination to restore the Union,” and uncritically accepts the traditional interpretation of radical and working-class British support for the Union. Mahin, *One War at a Time*, 127.
Lincoln’s suspensions of habeas corpus had “a profound impact upon English interpretations of the American Civil War.” The “hard war” tactics eventually adopted by the Union military for the purposes of conquering the Confederacy “flew in the face of mid-nineteenth century ideals of progress and freedom” in Britain, and historians have almost entirely ignored “this vital aspect of English thinking about the American Civil War…” Many British journals regularly condemned Lincoln’s repressions of civil liberty, extensively covered sensational habeas corpus cases such as Merryman and Vallandigham, and—alongside widespread British skepticism of the humanitarian motivations behind Union emancipation—portrayed the Union as an illiberal society. For many concerned Britons, writes Campbell, “the ultimate blow was the suspension of the writ of habeas corpus and the introduction of martial law in areas loyal to the Union,” for these policies “simply smacked of despotism” and violated mainstream British conceptions of what constituted a liberal state.\(^5^3\) Despite his thorough research in English media sources, however, Campbell does not recognize the importance of Lincoln’s habeas policy in Anglo-Union diplomacy or sufficiently press the point that broader English attitudes toward Lincoln’s habeas policy reflected those of British diplomats in America and government officials in London.

\(^{53}\) Duncan Andrew Campbell, *English Public Opinion and the American Civil War* (Woodbridge: The Royal Historical Society, 2003), 104-5, 108-10. In many ways, Campbell’s work offers a refreshing challenge to many current, historical conventions surrounding Anglo-American relations during the American Civil War. Contrary to the prominent conclusion of Howard Jones, for example, Campbell argues that it is too simplistic to assert that the English never truly understood the complex nature of the war: “While it is certainly true to say that the English never grasped the North’s devotion to the Union, it is also true that they recognised the South’s determination to form a separate nation before the North did…the English saw the war through their own perspective—a perspective very different from that of the North or the South—and one which has never been fully appreciated or acknowledged.” Campbell, 244. For further discussion on Union “hard war” tactics, see Mark Grimsley, *The Hard Hand of War: Union Military Policy toward Southern Civilians, 1861-1865* (Cambridge: Cambridge University Press, 1995).
Two recent studies on Lord Lyons at least recognize the arrests of Britons under Lincoln as a problem encountered frequently by the British minister, although they only briefly touch on the issue. In his 2004 dissertation on Lyons’s diplomacy during the American Civil War, Scott Thomas Cairns correctly identifies Lincoln’s suspension of habeas corpus as one of “several burning issues” seen as “a great obstacle to the fostering of better Anglo-American relations” throughout the war, but does not pursue the issue in further depth.  

Similarly, in his otherwise excellent biography of Lord Lyons, Brian Jenkins points out that the arrests of British subjects “became a chronic problem” between Lyons and Seward, and that the former deplored Lincoln’s extraordinary use of executive power to restrict civil liberties. By patiently handling such cases individually and “sidestepping questions of principle,” writes Jenkins, “Lyons avoided a serious confrontation” over Britons arrested under Lincoln’s habeas policy. Lincoln’s suspension of the writ “shocked British liberals” and, Lyons feared, would bring about a complete change of government in the Union.  

For all of their emphatic statements that Lincoln’s habeas policy presented a serious foreign policy problem, both Cairns’ and Jenkins’ analyses of the issue are disappointingly brief and lacking in primary documentation.  

To date, the best discussion of Lincoln’s habeas policy and British nationals is found in a chapter of Eugene H. Berwanger’s 1994 *The British Foreign Service and the American Civil War*. Although Berwanger acknowledges Lincoln’s suspension policy as a problem for Anglo-American diplomacy, his discussion serves as a general survey of

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the issue rather than a nuanced, critical analysis. The arrests of Britons emerged as a serious diplomatic dispute during 1861, and engaged the energies of British consuls scattered throughout the Union, the British legation in Washington, and the British Foreign Office in London. Like their American counterparts, many Britons were arrested for various acts of “disloyal activity” and suffered prison terms ranging from a few days to five months. Berwanger argues that while many Britons were arrested under Lincoln for dubious reasons, Seward’s willingness to order speedy releases reflected “the leniency of his policy.” Such cases involving the arrests of British subjects, Berwanger concludes, “were most numerous during the first year of the war,” and they “were settled with relative ease.”

Berwanger may be correct that most British arrests occurred during 1861, but as the following pages will make clear, the issue remained a persistent Anglo-American problem for the rest of the war, and not all cases were easily settled.

In an important sense, the conclusions arrived at in this dissertation converge with the broader thesis of Phillip E. Myers, although he does not consider the British habeas experience under Lincoln. In his Caution and Cooperation: The American Civil War in British-American Relations, Myers emphasizes the contexts of antebellum and post-war Anglo-American relations for understanding why Britain refused to intervene in the American Civil War. For one thing, the “scrambled nature” of British public opinion on the war encouraged the perpetuation of peaceful relations. Given their philosophical support of European national independence movements, many Britons were baffled by

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Lincoln’s refusal to accept southern independence peacefully. Nevertheless, for both economic and political reasons, Britain could not afford a third war with the United States, and in the end, Myers argues, the American Civil War “failed to dictate a change, or water-shed, in the traditional tendencies of caution and cooperation that had anchored relations in peace.”57 As will be seen in the pages that follow, on the whole, the Union and British governments handled the problem of Britons arrested under Lincoln’s habeas policy in a spirit of cautious cooperation. On the one hand, the Lincoln administration could not afford to harshly punish British nationals swept up in the dragnet of military arrests and risk needlessly endangering Anglo-American relations. On the other hand, British diplomats in Washington and officials in London could not afford to press unreasonably hard for the release of Britons strongly suspected of working to undermine the Union war effort, for they understood that the Lincoln government had an imperative to combat subversive elements which threatened to destroy the nation from within.

Independently of each other, these two historiographical traditions have revealed much nuance about civil liberties under Lincoln and general Anglo-American relations during the American Civil War. Still, the absence of scholarly attention to the international dimensions of Lincoln’s habeas corpus policy invites speculation. Why have historians generally failed to recognize the linkages between these topics? One immediately thinks of the sterling reputation of Abraham Lincoln, which alone is often enough to minimize or dismiss much criticism—then and now—of the sixteenth president’s controversial record on civil liberties. In the main, scholars view Lincoln’s habeas policy as pragmatically—if not constitutionally—justified. Historians have

57 Philip E. Myers, Caution and Cooperation: The American Civil War in British-American Relations (Kent: The Kent State University Press, 2008), 11-12, 15-16.
generally condemned the most vocal critics of Lincoln’s suspension of habeas corpus during the war, the Copperheads, as mere partisan opportunists who damaged the Union war effort. Perhaps, then, historians have similarly dismissed British critics of Lincoln’s habeas policy as nothing more than shameless anti-Union demagogues on the other side of the Atlantic. Such an interpretation would also neatly converge with historians’ traditional overemphasis on the pro-Union views of British elites such as John Bright—the most prominent Union propagandist in Parliament—who went to great lengths to disingenuously paint all British critics of the Union war effort as closet Confederate sympathizers. 58 Besides, it seems clear that the military arrests of Britons in the Union never rose to the level of the Trent crisis in bringing the two countries to the brink of war, and our empirical understanding of Lincoln’s restrictions on civil liberties might appear to render the British experience negligible at first glance. We know that the vast majority of the more than 14,000 civilians arrested by the Union military were American citizens, and (with one exception) there were no federal or state habeas court cases involving Britons analogous to Ex parte Merryman. 59

Another possible reason for the relative disinterest in the British habeas experience under Lincoln is perhaps found in the general trend of historical interest in the American Civil War since the 1960s. Although rightly a central focus of Civil War

58 On this point, Duncan Andrew Campbell maintains that historians have too easily conflated British anti-Union sentiment with Confederate sympathy, therefore oversimplifying the complex nature of British opinion on the American Civil War. British anti-slavery sentiment did not preclude anti-Union sentiment or British support for mediation in the conflict, and “it is clear that very few in England believed that the future of democracy was at stake in the conflict and that most wished to avoid becoming entangled in it at all.” Similarly, British criticism of Lincoln’s habeas policy should not be uncritically equated with pro-Confederate sentiment. Campbell, 160-62.

59 For the case of Ex. parte McQuillon, see Chapter II.
historiography, slavery has long overshadowed the importance of civil liberties in the conflict, and the same may hold true with regard to studies of Anglo-American relations during the war. Historians of the latter topic have traditionally emphasized the role of slavery and Union emancipation in shaping British attitudes toward the war and in maintaining British neutrality, as they should—slavery had a greater impact on British opinion of the war than any other issue. Yet while slavery should remain an important focal point for historical scholarship, it was not the only important issue surrounding liberty at stake in the conflict from the perspective of many Britons, and therefore we run the risk of oversimplifying the nature of British attitudes and diplomacy toward the Union if we ignore the impact of Lincoln’s habeas policy on Britons living on both sides of the Atlantic. The moral issues surrounding American slavery and Union emancipation did not exclusively determine British attitudes toward the conflict or Britain’s ultimate policy of neutrality. Most Britons were anti-slavery yet suspicious of northerners’ commitment to emancipation, and critical of Lincoln’s expansive use of executive power to curtail civil liberties for both American and British citizens—in other words, Britons condemned what they viewed as two aspects of the Union’s larger disregard for liberty. And while British officials seemed poised to take action against the Lincoln administration over this issue only during 1861, their ultimate decision to abstain from intervention does not minimize its importance in Anglo-American relations or its role in broadening our understanding of the scope of the habeas corpus problem under Lincoln. During the American Civil War, the military arrests of Britons in the Union remained a persistent foreign policy problem, played a configurative role in the development of

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60 Campbell, 11-12.
Lincoln’s habeas policy, contested the boundary between citizenship and nationality, and exerted a profound negative impact on British attitudes and observations toward the war.

**Methodology and Sources**

Although this dissertation seeks to broaden our analytical understanding of habeas corpus and civil liberties under Lincoln by recovering the British experience, it does not purport to yield an exhaustive empirical estimate of exactly how many bona fide Britons were arrested as a result of Lincoln’s suspension of habeas corpus. As Neely once observed, the uneven nature of the relevant historical records is such that a precise count of the number of American civilian arrests during the Civil War is impossible.\(^{61}\)

Similarly, the relevant historical records that pertain to British Union prisoners are scattered, fragmentary, and uniquely hindered by an additional salient factor: the inconsistent and imprecise record-keeping of nationality during the war. Many civilians who wrote to the British Legation and Northern consulates were able to prove their British nationality (at least to the satisfaction of British diplomats and consuls), but many American citizens also pretended to be British in a desperate attempt to get out of jail or avoid military service. Sorting through these cases became an enduring bureaucratic nightmare for British and American officials throughout the war, and poses a similar nightmare for the modern historian.

Moreover, the resolutions of cases are not always fully accounted for in the documentary record. Typically, Seward informed Lord Lyons or the acting British minister of the disposition of a particular Briton’s case, but the paper trail in the diplomatic correspondence often ends abruptly without disclosing what ultimately

\(^{61}\) Neely, *Fate of Liberty*, 127.
happened to the prisoner in question. An official British report late in the war detailing the claims of British citizens against the United States recorded no less than 76 cases of Britons arrested by Union authorities as of March 31, 1864. These Britons were arrested for a number of offences related to undermining the Union war effort, including blockade-running and various acts of disloyalty. Obviously, this total does not account for the number of Britons arrested between April 1, 1864 and the end of the war a year later. Nor does the report account for the additional dozens of arrests reported by the British Legation to the State Department throughout the war, as well as the dozens of British cases found in the courts-martial records for the Civil War. In other words, for reasons that remain unclear, official British reports from Washington significantly understated the number of Britons arrested under Lincoln, and officials in the Foreign Office in London knew it. Given these intrinsic difficulties, it is virtually impossible to know for certain how many bona fide Britons were arrested under Lincoln.

This dissertation draws upon archival and media sources from both the United States and Britain. For the most part, my analysis remains at the level of high diplomacy between both countries. On the U.S. side, letters exchanged between the British Legation and the Department of State (which, importantly, contain many unpublished letters to the British Legation from various British consuls throughout the Union) are as indispensable to this dissertation as any other study of Anglo-American relations during the American Civil War and represent my principal source base, for they reveal much of the British habeas experience under Lincoln. A selection of this correspondence has been published

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62 Return of Claims of British Subjects against the United States Government from the Commencement of the Civil War to the 31st of March, 1864, North America No. 11 (London: 1864). This report contains 451 claims on behalf of Britons against the United States government.
by the State Department in the *Foreign Relations of the United States* series, although one must systematically sift through the dozens of microfilm reels of this collection at the National Archives in order to glean a fuller understanding of the nature of British arrests and how both governments negotiated the problem. To a lesser extent, some of these records (as well as relevant War Department Records) are also selectively published in Series II, Volume II of *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*. The latter remains a basic primary source for documenting the system of military arrests in the Union, and does shed some light on how Lincoln’s suspension of habeas corpus affected Britons living in the Union and Border states during the Civil War. The courts-martial and military commission records regarding Britons which serve as the basis for Chapter IV, however, remain unpublished and can only be examined at the U.S. National Archives.

From the British side, I have drawn upon published letters written by British diplomats to the British Foreign Secretary in London, Lord John Russell. As the chief of the British Foreign Office within the Palmerston cabinet, Russell represented the focal point of contact between the British Minister in Washington and the Palmerston government. Throughout the American Civil War, Lord Lyons (and those who stood in for him as charge de affairs in his absence) wrote many and frequent dispatches to Russell, keeping the latter informed of events and developments in the war as well as the pulse of American public opinion toward England. These candid letters and reports are indispensable for outlining the ways in which the British government reacted to Lincoln’s

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habeas corpus policy, several of which been selectively edited and published by James J. Barnes and Patience P. Barnes in their three-volume *The American Civil War through British Eyes: Dispatches from British Diplomats*, and *Private and Confidential: Letters from British Ministers in Washington to London.*\(^\text{64}\) Other primary British diplomatic records relevant to this study have been drawn from published volumes such as *British Documents in Foreign Affairs* and *British Foreign and State Papers*. Like the *Foreign Relations of the United States* series, it should be noted that these British sources, though containing much crucial documentation from the perspective of British government officials, are selectively published and thus incomplete. Nevertheless, the available records invite further archival research on this topic at the British National Archives housed in Kew, London, and in the personal papers of Lord Lyons in the West Sussex Record Office in Chichester. Finally, this dissertation also makes use of several published accounts from first-hand British observers of Lincoln’s habeas policy, as well as British and American newspapers and public journals in order to assess, albeit imperfectly, broader British and American opinions of and attitudes toward Lincoln’s habeas corpus policy.

**Chapter Outline**

Organizationally, the first three chapters of this dissertation follow a chronological progression, while the final two chapters place a narrower focus on specific problems or perspectives related to the broader British habeas experience under Lincoln. Taken together, these chapters build upon one another and unfold to reveal the broader

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scope of the habeas corpus problem under Lincoln. Chapter I provides an overview of the
context of Anglo-American relations at the dawn of the American Civil War, as well as
the origins and early development of Lincoln’s habeas corpus policy in the spring of
1861. Despite relatively amicable relations between England and the United States by
1860, the former occupied a crucial position in the ensuing conflict between the Union
and Confederacy. As the most powerful nation in the world, ultimate victory of either
American belligerent would greatly depend on England’s participation in, or abstention
from, the American conflict. Although there was little chance of British intervention on
either side at the outset, this did not stop the Confederacy from vying for their official
recognition, and thus keeping Britain out of the war quickly became the foreign policy
priority of the Lincoln government. After suspending the writ of habeas corpus for the
first time in response to violent resistance in Maryland, however, the military arrests of
Britons living in the Union emerged as a serious Anglo-American issue by the fall of
1861.

Chapter II explores Britain’s official response to the military arrests of Britons
under Lincoln and the nature of such arrests through the end of 1861. During the summer
and fall of 1861, this chapter argues, the British habeas experience provoked British
diplomats and officials to sharply protest the use of military arrests under executive
authority, and pushed Lincoln to defend an unconstrained view of executive habeas
suspension far earlier than historians have recognized. When British nationals were
arrested by the Union military, they looked to their nearest British consuls or diplomats at
the British Legation in Washington for official protection and redress from “arbitrary”
arrest. As the chief representative for Her Majesty’s subjects living in the Union, the
British Minister in Washington, Lord Lyons, prioritized the protection of Britons from various forms of military injustice arising from Lincoln’s suspension of habeas corpus. Throughout the latter half of 1861, Lyons worked diligently to present such cases before Secretary of State Seward and the U.S. State Department for ultimate resolution. The British government had an obligation to protect the rights and liberties of Her Majesty’s subjects, while the Lincoln administration had an obligation to ensure that its domestic enemies—regardless of nationality—did not hinder the Union war effort. In October 1861, the British government officially condemned Lincoln’s habeas policy and the military arrests of Britons and U.S. citizens, and the president responded by maintaining his authority to suspend the writ and make unconstrained arrests of both citizens and foreign nationals in the name of preserving the Union. Despite initially placing a serious strain on Anglo-American relations, Lyons and Seward soon settled upon a policy of cautious cooperation on the issue, while the Palmerston cabinet waited to see how further developments in Lincoln’s suspension of habeas corpus might affect Britons in the Union.

Picking up where the preceding chapter ends, Chapter III explores Anglo-American diplomacy regarding the British habeas experience under Lincoln between 1862 and the end of the war in 1865. This chapter argues that, although the military arrests of Britons under Lincoln’s habeas corpus policy remained a persistent foreign policy concern, the Palmerston and Lincoln governments continued their policy of cautious cooperation on the issue for the remainder of the war. From 1862 onward, London officials were no longer inclined to intervene in the realm of civil liberties violations in the Union, instead entrusting the protection of Britons to Lord Lyons and the
British Legation. British diplomats continued to monitor the further developments of Lincoln’s habeas policy in order to anticipate potential difficulties for Britons in the Union, and in doing so found much to complain about in the realm of practical consequences and constitutional abstractions. Nevertheless, during the final three years of the war, both governments demonstrated a high level of mutual cooperation in settling individual cases as they emerged at the diplomatic level.

During the American Civil War, over 4,000 civilians were arrested and tried by a Union military commission for various offenses ranging from materially aiding the Confederacy, to verbally wishing death upon Abraham Lincoln in a crowded bar room. Chapter IV examines the dozens of Britons living in the North, South, and Border States who faced the hard hand of military justice during the war, as well as how the British government responded to this special problem incidental to Lincoln’s nationwide suspension of habeas corpus from late 1862 onward. This chapter argues that the Union military trials of Britons contested the amorphous boundary between citizenship and nationality during the Civil War. Claims of British nationality by British prisoners, in other words, posed a unique challenge to the Union system of military justice that required a delicate balancing of internal security and foreign policy considerations by the Lincoln administration. As they did for other British civilian prisoners arrested under suspension of habeas corpus, British diplomats and consuls prioritized the protection of British Union soldiers tried by courts-martial and civilians tried by military commissions, many of whom attempted to wield their claims to British citizenship as a trump card against military punishment. Whether due to the natural inefficiencies of an enormous military bureaucracy or a deliberate policy of military convenience, however, the Lincoln
administration did not always seem to cooperate with the British government on such cases, as many Britons tried by the Union military suffered unusually harsh punishments.

Finally, Chapter V steps back from the highest levels of Anglo-American diplomacy to explore how broader segments of British society reacted to, and interpreted, the constitutional and practical consequences of Lincoln’s habeas corpus policy. Despite the impression one gleans from much of the literature on British perceptions of the American Civil War, Britons did not limit their analysis of the war to issues surrounding slavery and emancipation, or even to questions surrounding the legitimacy of Confederate sovereignty. In fact, Lincoln’s suspension of the writ of habeas corpus in the Union also garnered a great deal of attention on the other side of the Atlantic. Based upon the published accounts of both firsthand and distant British observers, this chapter argues that broader attitudes toward, and observations of, Lincoln’s habeas policy in England largely reflected those of British diplomats and London officials during the American Civil War. On both constitutional and foreign policy grounds, British observers condemned Lincoln’s habeas policy as blatantly unconstitutional and inimical to the civil liberties of American citizens and British nationals living in the Union. Like Copperhead criticism of executive suspension in the Union, however, popular British censure did not deter Lincoln from gradually expanding the scope of executive habeas suspension after 1861. Nevertheless, habeas corpus under Lincoln represented a topic of lively discussion within the British public sphere for much of the American Civil War, and one which contributed significantly to widespread anti-Union attitudes in England.

For all of the ink spilled independently on habeas corpus and civil liberties under Lincoln and Anglo-American relations between 1861-1865, scholars have scarcely
sought to analyze the consequences of Lincoln’s habeas policy on British subjects living in the Union, Anglo-American relations, and broader British attitudes toward the American Civil War. Indeed, given the historical link between American habeas corpus and the English common law, it is perhaps surprising that historians have thus far expressed little interest in exploring just what British observers in the Union and across the Atlantic had to say about Lincoln’s habeas policy. However, as Howard Jones has recently written, the story of the American Civil War “cannot be complete without an exploration of its international dimensions,” and this is no less true with respect to civil liberties under Lincoln. If historians are serious about pursuing the “transnational turn” in Civil War scholarship, an exploration of the British habeas experience under Lincoln offers an excellent opportunity to extend the project of understanding the global dimensions of the American Civil War. In analyzing the broader British habeas corpus experience, this dissertation will contribute to our understanding of Civil War Anglo-American relations, habeas corpus and civil liberties on the Northern homefront, Lincoln’s constitutionalism, and the conflicting and amorphous nature of “citizenship” and “liberty” within the crucible of Civil War America.

65 Howard Jones, Blue & Gray Diplomacy, 321.

66 As scholars have recently shown, the American Civil War should be understood as affecting not only American citizens within the contiguous boundaries of the United States, but foreign nationals and nationalist development throughout the world, as well. Thomas Bender argues that, rather than an insular event, the American Civil War cannot be divorced from the broader context of global developments of liberal government and nationalist sentiment. See Thomas Bender, A Nation among Nations: America’s Place in World History (New York: Hill & Wang, 2006), 6, 123. For a recent, highly-accessible work highlighting the transnational importance of public diplomacy during the American Civil War, see Don H. Doyle, The Cause of All Nations: An International History of the American Civil War (New York: Basic Books, 2015). For an For recent scholarship emphasizing the importance and impact of international law on the Union war effort, see John Fabian Witt, Lincoln’s Code: The Laws of War in American History (New York: Free Press, 2012); and Blair, With Malice Toward Some.
Ultimate Union victory in the American Civil War greatly depended upon Great Britain’s abstention from intervening on behalf of the Confederacy. As the most powerful nation in the world at the time, Britain held the capability of recognizing the political independence of the Confederacy and thereby ensuring the bifurcation of the United States into two separate republics. Thus, with the outbreak of war in April 1861, U.S. Secretary of State William H. Seward’s foreign policy agenda prioritized maintaining amicable Anglo-American relations in order to prevent British intervention. This introductory chapter will examine the context of Anglo-American relations through the main foreign policy issues that guided diplomacy at the outset of the Civil War, as well as the establishment of Lincoln’s habeas corpus policy. Although these separate topics have been well-covered by generations of diplomatic and constitutional historians of the Civil War respectively, linking them together here is crucial for understanding the civil liberties experience of Britons under Lincoln’s habeas policy and its importance in Civil War Anglo-American relations. This chapter will show that, among other issues, diplomats at the British Legation in Washington—led by the British minister, Lord Lyons—prioritized the protection of British nationals living in the Union against the various hardships of war. By the summer of 1861, the British government recognized that President Abraham Lincoln’s unilateral suspension of habeas corpus might well imperil
the civil liberties of Her Majesty’s subjects in the Union states and thereby emerge as a serious wartime Anglo-American dispute.

The Context of Anglo-American Diplomacy at the Outset of the Civil War

Since the end of the American Revolution, foreign relations between the United States and Great Britain were marked by what one historian termed “caution and cooperation.” For Americans living in the first half of the nineteenth century, bitter tensions lingered over the practice of British impressment of U.S. sailors during the War of 1812, as well as the more recent efforts of British consuls to recruit Americans to fight for the British army during the Crimean War in 1855. On the other side of the Atlantic, Britons resented American attempts to expel the British from Canada and their influence from North America generally through unsuccessful invasions of Canada during the War of 1812. As the United States continued to expand its territories, British interests in North America became matters of constant concern to the London government. While British leaders sought to avoid a third war with the United States, they also viewed Anglo-American diplomacy as a mechanism for maintaining the balance of power in Europe.

After President James Monroe established his “Monroe Doctrine” in 1815, which declared to the rest of the world that European powers should avoid interference in the American continent, Britain helped enforce the Monroe Doctrine during the first half of the nineteenth century in order to prevent other European powers from gaining a foothold in America. Prior to the U.S. victory in the U.S.-Mexican War in 1848, which subsequently led to U.S. annexation of California and the present-day American Southwest, the U.S. and Great Britain signed the Oregon Treaty in 1846, which

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1 See Myers, Caution and Cooperation: The American Civil War in British American Relations.
transferred control over present-day Washington, Oregon, and Idaho to the United States. Yet if the “uneasy cousins” succeeded in peacefully negotiating land disputes in North America over the course of the first half of the nineteenth century, cultural antagonisms endured between both countries. In the United States, Anglophobia remained widespread among Americans, while Britons scoffed at what they perceived to be a nascent “American exceptionalism,” often portraying American society in popular literature as arrogant, vulgar, and violent.

From the outset of the Civil War, prevention of European intervention in the war and the extension of European influence—particularly that of Great Britain and France—within the Western hemisphere represented the principal foreign policy concerns of the Union government. Above all, the Lincoln administration worried about the threat of British recognition of the Confederacy, which would likely lead to broader European recognition of the Confederacy and virtually ensure the destruction of the Union. Moreover, the Lincoln administration also feared that French involvement in Mexico might serve as an early step toward broader European intervention in the Civil War. But while Confederate diplomats under the direction of President Jefferson Davis persistently pursued a foreign policy strategy of “King Cotton diplomacy” in order to gain European recognition and intervention, longstanding mutually beneficial trade relations between

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2 Foreman, 19-21, 22-23, 25; Berwanger, The British Foreign Service, 7; Adams, Great Britain and the American Civil War, I, 5-6, 10-11.


4 For classic works on Anglo-American diplomacy during the Civil War, see Adams, Great Britain and the American Civil War; Owsley, King Cotton Diplomacy; Crook, The North, the South and the Powers 1861-1865; and Jenkins, Britain and the War for the Union.

5 Jones, Blue & Gray Diplomacy, 75; Mahin, One War at a Time, 12.
Europe and the northern states rendered European intervention on the basis of cotton shortages unlikely. Although most Britons vehemently opposed slavery and saw themselves as paragons of abolition throughout the world, the British government strove to maintain commercial ties to a United States economy that depended on the productive output of Southern slavery and healthy northern commercial markets. If King Cotton was ultimately doomed to failure, then, the ability of the Confederate armies to win on the battlefield appeared to be a necessary prerequisite for European intervention. Despite much pro-Union sympathy in England, however, many British observers initially did not think that the Union could survive southern secession, believing that the many irreconcilable differences between the sections made reunion impossible.

Equally important, the stated war aims of the Lincoln administration baffled many living across the Atlantic. Throughout the war, most British statesmen did not fully understand the inseparability of Union and slavery in Lincoln’s vision of a fully restored Union. While the Confederate states seceded and went to war in order to maintain the institution of slavery, the ambivalent attitudes of many white northerners toward slavery

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6 In recent years, historians have offered compelling challenges to the exaggerated importance of cotton in dictating European intervention in the Civil War. For the classic interpretation, see Owsley, *King Cotton Diplomacy*. Although more than 70 percent of the raw material for cotton fiber used in the European textile industry came from the southern states, Niels Eichhorn has recently argued that healthy trade relations between Europe (particularly England) and the northern states represented a crucial factor for maintaining neutrality in the conflict. European trade with the northern states, Eichhorn argues, “was the monarch that the southern states failed to dethrone during the Civil War.” Niels Eichhorn, “North Atlantic Trade in the Mid-Nineteenth Century: A Case for Peace during the American Civil War”. *Civil War History*, Volume 61, No. 2 (June 2015), 139, 143, 158-59, 163. For an alternative emphasis on European debt as a factor militating against European intervention, see Jay Sexton, *Debtor Diplomacy: Finance and American Foreign Relations in the Civil War Era, 1837-1873* (Oxford: Clarendon, 2005).


9 Jones, *Union in Peril*, 16-17.
led many in Britain to believe that the Union government was waging a war of vengeance against a disgruntled section of the country seeking political independence. Confederate sympathizers in Britain opposed to slavery naively assumed that the Confederacy would abolish the detested institution once its economy was able to sustain free labor.\(^\text{10}\) If the Lincoln administration did not explicitly commit to waging a war to free the four million slaves of the rebellious southern states—and indeed, many Britons also resented what they viewed as an obstinate U.S. government’s half-hearted effort to stifle the African Slave Trade on the seas—why should Britons believe that the Union was waging a morally just war? Moreover, on the domestic front, British political elites who detested what they saw as a doomed experiment in American democracy worried that the Civil War would encourage conflict for political reform among the working classes in England.\(^\text{11}\)

The Confederate attack on Fort Sumter in April 1861 impelled the Lincoln administration to ensure British neutrality in the coming war. Thus, of all foreign offices in the United States at the time of the Civil War, the British legation was the largest and most important one in the Union capital. Appointed as the British minister in Washington in December 1858, Lord Richard Bickerton Pemmel Lyons was guardian over approximately 2.5 million British expatriates in the United States by 1861. He was not, however, responsible for the concerns of naturalized British subjects, who in becoming American citizens thereby forfeited the protection of Her Majesty’s government. Tactful

\(^{10}\) Jones, *Union in Peril*, 37; Foreman, 219.

and discreet, Lyons’s cautious approach to Anglo-American diplomacy largely aligned with those of the British Foreign Office in London, making him a dependable agent in the eyes of the British government. As England’s chief official source of information in America, writes Howard Jones, Lyons “provided well-reasoned and thorough dispatches that carried special weight in London.”  

Critical of the American formula of democracy yet privately supportive of the Union cause Lyons nevertheless hoped that England could refrain from intervening in the conflict. While the protection of transplanted Britons would soon cause much stress and anxiety for Lyons and other British representatives and diplomats in the Union, the Palmerston cabinet also worried that the Union government might seize upon the conflict as another irresistible opportunity to annex British North America.  

In line with the Union’s primary foreign policy directive, the State Department instructed its diplomats early on to inform heads of foreign governments that any diplomatic recognition of the Southern Confederacy by European countries was tantamount to gross interference in the domestic affairs of the United States, and would lead to another Euro-American war. From London, the British government settled on a policy of neutrality, issuing a Neutrality Proclamation on May 13, 1861, which recognized the belligerent rights of the Confederacy and the Union blockade of Southern ports, while eliding legal culpability in the likely instances in which British subjects

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14 Jenkins, *Britain and the War for the Union*, II, 1; Jones, *Union in Peril*, 16-17; Mahin, *One War at a Time*, 127; Blackett, *Divided Hearts*, 7.
might become entangled in the American conflict. From the point of view of the Lincoln administration, however, the Queen’s Neutrality Proclamation had the effect (however unintentional) of bolstering the morale of a nascent Confederacy, which could only embolden the wayward southern states to fight tenaciously for the cause of Confederate independence. The British government countered with the argument that their recognition of a de facto, rather than de jure, Confederate government signified adequate proof of “an honest neutrality.” Although Lincoln never officially recognized the Confederacy as a legitimate government – instead always referring to the “insurgents” of a “rebellious” South, or “the so-called Confederate States of America” – by the standards of international law, the institution of a blockade recognized the existence of two belligerent powers. In reality, British neutrality favored the Union government on balance. So long as Britain treated both belligerents equally, the Union would maintain its superior advantages over industry, population, resources, and maritime vessels. Additionally, neutrality also meant that Britain, as the world’s strongest maritime power, would lend respectability to the paper Union blockade of southern ports. Although the Confederate government would ultimately fail in pursuing foreign recognition by England and other major European powers through King Cotton Diplomacy, Lincoln

16 Cairns, 168; Foreman, 91; Jones, Blue & Gray Diplomacy, 52.

17 Cairns, 211; Jones, Union in Peril, 36.

18 Jones, Blue & Gray Diplomacy, 49, 53. Samuel Negus has recently summarized the weight of historical analysis on this point: “The most recent scholarship generally sees in British neutrality an ostensibly cold disinterest that had a benevolent effect on Union interests—intentionally or otherwise, and regardless of U.S. government perceptions.” Samuel Negus, “A Notorious Nest of Offence: Neutrals, Belligerents, and Union Jails in Civil War Blockade Running.” Civil War History 56, n.4, December 2010 (350-385), 360.
remained quite concerned about British recognition of the Confederate government. As a result, the U.S. government, through the diplomacy of Secretary of State William H. Seward, established a hard line policy against any form of European intervention.

In his approach toward Anglo-American diplomacy, Seward adopted a strategy of calculated bluster in order to discourage British intervention, as would soon become clear in his response to British complaints surrounding Lincoln’s habeas corpus policy. By the time of the Civil War, Seward’s anti-British record was well known to British observers. Taking advantage of a widespread Northern animus toward England, Seward did his best to drum up anti-British sentiment through the Republican press in order to shore up domestic support for Lincoln’s war policies. By May 1861, writes Amanda Foreman, “Seward’s propaganda campaign had succeeded in convincing the entire country that Britain had wronged the North” in declaring neutrality and giving Southerners hope for European recognition. For at least the first year of the war, Seward practiced a “desperate type of diplomacy” that “rested on war threats intended to convince the British that they should not even think about interfering in American affairs.” But although he was largely occupied with domestic issues involved with waging a successful war effort, and although European diplomats in Washington saw Seward as the key figure in U.S.

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19 The Lincoln administration also feared that European involvement in Mexico, led by an ambitious French Emperor Napoleon III who sought to stop U.S. expansion into Latin America and regain a French foothold in North America, would be a dangerous first step toward European intervention in the American war, as European control of the Mexican coast might undermine the Union blockade by providing a backdoor for Europeans to supply the Confederacy. Jones, Blue & Gray Diplomacy, 21, 75-76, 79.

20 Foreman, 102.

21 On Seward’s foreign policy during 1861 generally, see Ferris, Desperate Diplomacy; Jones, Blue & Gray Diplomacy, 24; Jenkins, Britain and the War for the Union, II, 2.
diplomacy, Lincoln did not surrender all control over foreign policy to Seward, as shown by numerous references to the president in Seward’s diplomatic correspondence.\textsuperscript{22}

Throughout the early years of the war, Lyons and Seward frequently argued over maritime issues that included the seizure of British ships, the fate of privateers, and the closure of Southern ports, as well as other issues such as British prisoners of war and military confiscation of the property of British subjects.\textsuperscript{23}

Although insufficiently recognized by diplomatic and constitutional historians of the Civil War, the plight of British subjects arrested by military authorities in the Union proved to be a persistent Anglo-American foreign policy issue from the outset.\textsuperscript{24} Before any cases of arrested Britons reached his desk, Lyons anticipated a major clash between Great Britain and the Union military authority on this issue. To his superior, the British Foreign Secretary Earl Russell in London, Lyons confided his fear that “British subjects may be wronged, and my remonstrances and demands for redress be neglected or treated

\textsuperscript{22} Jones, \textit{Union in Peril}, 7. As Jones writes, “numerous references to the president in Seward’s dispatches demonstrate that Lincoln never lost control over his secretary of state,” whom he permitted “to implement a threatening stance in foreign policy as an implied warning to London that intervention would lead to war.” For an additional emphasis on Lincoln’s personal role in directing foreign policy, see Mahin, \textit{One War at a Time}, ix, 3, 5; Berwanger, \textit{The British Foreign Service}, 45. Additionally, neither Lincoln nor Seward welcomed congressional intervention in foreign affairs during the war. See Mahin, \textit{One War at a Time}, 10.

\textsuperscript{23} Jones, \textit{Blue & Gray Diplomacy}, 39-41. These and other foreign policy issues throughout the war are amply discussed in the selectively published dispatches of Lord Lyons in James J. and Patience P. Barnes, \textit{The American Civil War Through British Eyes Dispatches from British Diplomats}, 3 vol. (Kent, Ohio: Kent State University Press, 2003-5). For a discussion of confiscation of the property of British subjects, see Berwanger, \textit{The British Foreign Service}, 54-66. With regard to British subjects who were made prisoners of war while serving in either army, Lyons instructed Her Majesty’s diplomatic and consular servants to abstain from intervention. See Barnes and Barnes, \textit{The American Civil War through British Eyes}, II, 36.

\textsuperscript{24} Discussion of the military arrests of Britons (let alone other foreign nationals) under Lincoln’s habeas corpus policy do not appear in James G. Randall’s classic \textit{Constitutional Problems Under Lincoln}, and elicit only brief mention in Neely, \textit{Fate of Liberty}, 21; Foreman, \textit{A World on Fire}, 153; Stahr, \textit{Seward}, 305; Cairns, 186; and Jenkins, \textit{Lord Lyons}, 228. Eugene H. Berwanger provides only a general survey of the problem in his \textit{The British Foreign Service and the American Civil War}, chapter 5.
discourteously” during the ensuing American conflict. As early as January 1861, Lyons considered the possibility of using habeas corpus as a legal remedy for British nationals conscripted into state militias, writing to Leonard Cox that “Any person unlawfully detained in the Militia when not subject to military service, would have the legal remedy by habeas corpus as in ordinary cases.” In particular, Lyons saw the belligerent attitude of Seward as a threat to Anglo-American relations and an obstacle to amicably settling these and other wartime issues between both countries. From the outset of the Lincoln administration Seward was, according to Lyons, “particularly desirous to make a personal display of energy and vigour in his own department.” Well aware of Seward’s distaste for the British, Lyons viewed Seward as “an excitable, unpredictable, political American.” To Russell, Lyons confided his well-founded concern that Seward “would not be very reluctant to provide excitement for the public mind by raising questions with foreign powers…[Seward] takes no other view of foreign relations than as safe levers to work with upon public opinion here.” The new president did not fare well in the foreign minister’s early impressions either, for Lyons believed that Lincoln was “wholly ignorant of foreign countries and of foreign affairs. Neither he nor his [cabinet] ministers have


26 Lyons to Leonard Cox, January 23 1861, as reprinted in Barnes and Barnes, The American Civil War Through British Eyes, I, 29.


28 Lyons to Russell, May 20, 1861, in Barnes and Barnes, The American Civil War through British Eyes, I, 84; Jenkins, Lord Lyons, 186.

proved themselves capable, even in the present dangers of the country, of directing their
course by any other rules than that of party politics.”30 In the context of his initial distrust
of the President and Secretary of State and a crisis emerging in the volatile city of
Baltimore, Maryland, Lyons soon found himself worrying about executive actions
surrounding habeas corpus that threatened the fate of liberty for British subjects
throughout the Union.

Actions without Precedent: Lincoln’s Early Suspensions of the Writ of Habeas Corpus

In the tumultuous weeks following the Confederate bombardment of Fort Sumter
on April 12, 1861, President Abraham Lincoln faced a dire situation in which the fate of
the Union was in peril. As one of his first actions as president in the wake of Sumter, on
April 15, Lincoln issued a proclamation calling for seventy-five thousand militia
throughout the states, as well as a special convention of Congress that would meet on
July 4 (Congress had recently adjourned in March). For many living in the Upper South,
Lincoln’s call for militia troops validated a widespread conviction that the new
Republican President sought a violent subjugation of the South. Two days later, on April
17, Virginia seceded from the Union, followed shortly thereafter by Arkansas, Tennessee,
and North Carolina. Having lost these Upper South states to the nascent Confederacy,
which now consisted of eleven states, Lincoln turned his full attention to the politically
delicate border states of Maryland, Delaware, Kentucky, and Missouri, anxious to keep
these states in the Union by all means necessary. If these states—particularly Maryland

30 Lyons to Russell, May 20, 1861, in The American Civil War through British Eyes, I, 84;
and Delaware—joined the Confederacy, it was not at all clear how the Union government in Washington could defend itself against a Confederate attack.\textsuperscript{31}

Lincoln’s fears of losing the Border States seemed well-founded in the spring of 1861. In Maryland, tensions between locals and military personnel bubbled dangerously close to the boiling point. A slave state brimming with southern sympathizers, Maryland’s geographic position ensured its strategic importance to the Union government and war effort. A crucial buffer between Confederate territory and the Union capital, Maryland was also important for supplying the only route by which northern troops could reach Washington by railway. “If Washington is to be held by the North,” Lord Lyons opined in a report to Lord Russell, “Maryland must either be persuaded to adhere to the Northern Union or be subdued by force.”\textsuperscript{32} Since the beginning of the secession crisis in November 1860, the embattled Maryland governor, Thomas H. Hicks, tirelessly fought to ensure that his state would remain within the Union. In the midst of strident secessionist agitation in Maryland following the events at Fort Sumter, Hicks was both vilified by angry secessionists and praised by Unionists for his efforts to keep Maryland in Union hands. But Lincoln’s call for troops presented the governor with a grave political problem, for complying with the president’s order might set the state ablaze with violence. Given this flammable political situation, Hicks informed Secretary of War


Simon Cameron that “I think it prudent to decline (for the present) acting upon the requisition made upon Maryland for four regiments.”  

While the political status of Maryland remained dangerously uncertain, other states above the Mason-Dixon Line responded to Lincoln’s call for troops with enthusiasm, and their transport to the national capital would inevitably test the volatility of Maryland and Hicks’s cautious position. After a tense episode in which five companies of Pennsylvania troops marched through Baltimore en route to Washington on April 16, Governor Hicks and Baltimore Mayor George William Brown implored Lincoln not to send any more northern troops through the city, and their request angered many Republicans. “A collision between the citizens & the Northern troops has taken place in Baltimore and the excitement is fearful,” Hicks and Brown wrote to Lincoln. “Send no more troops here. We will endeavor to prevent all bloodshed.” Next, the governor and mayor assured the president that they had called out “the troops of the State in the City…to preserve the peace. They will be enough.” Lincoln mistakenly interpreted this last part to mean that Maryland authorities were prepared to provide protection for subsequent troops moving through the city. The stage for violence was thus set, and the confrontation finally came on April 19, when the Sixth Massachusetts Regiment and one thousand unarmed Pennsylvania volunteers clashed with a mob of Marylanders in the streets of Baltimore. Frederic Bernal, the British consul in Baltimore, witnessed this


momentous clash and “mad spirit” pervading the city firsthand. Upon passing through the turbulent crowd on Pratt Street, Bernal wrote Lord Lyons in a detailed report,

I found them in a state of fury, many of them armed with revolvers, and one and all declaring that the Northerners should not pass…I had hardly got out of Pratts-street when the firing commenced. I was certain, in my own mind, from what I had seen, that the attack was commenced by the crowd, and my impression was confirmed by a captain the Federal army, who told me he saw the first shot fired by one of the mob. The crowd at the station was of the lowest order, but some most respectable men took part in the melee in Pratt-street. Some fourteen were killed on both sides; how many are wounded is not known. The excitement and rage of every one—of all classes, of all shades of opinion—was intense…Maryland is virtually out of the Union. The people are arming to a man, and I fear this city will be the scene of a bloody conflict…Application has been made to me by several British subjects, to know if I can afford them any protection in case of danger. No protection whatever exists, and we must all take our chance…In short, we were yesterday precipitated into an abyss, the depth and dangers of which none can tell.36

Bernal was not far off the mark. When the chaos dissipated, four Massachusetts soldiers and at least a dozen civilians lay dead, with dozens more injured in the fray.37 Much like the Confederate bombardment of Fort Sumter, both the violence in Baltimore and the precarious position of Washington galvanized northern support for suppressing rebellion in Maryland and throughout the fledgling Confederacy.38 In a meeting later that night at the home of Mayor George Brown, several Maryland leaders discussed ways in which they could prevent the passage of any more troops through Maryland in order to avert further bloodshed. While accounts of this meeting vary, all participants favored finding a way of impeding the passage of troops, even if it meant the obstruction of communications and burning of railroad lines to Washington.39

36 Consul Bernal to Lord Lyons, April 20, 1861, in BDFA, V, 5, 196-97.
37 White, Abraham Lincoln and Treason, 1, 12, 14.
39 White, Abraham Lincoln and Treason, 15-16.
Meanwhile, Governor Hicks had also called the Maryland legislature into special session to consider secession, a prospect that frightened many Republicans, military officials, and the Lincoln administration. Hicks initially had called the state legislature to convene at Annapolis on April 26 but then changed the location further west to Frederick, perhaps to avoid harassment by Union General Benjamin Butler’s troops in Annapolis and to ensure that the Unionist sentiment in Frederick would discourage the legislature from voting for secession.40 When General Scott asked Lincoln if it might be prudent to authorize the arrest of secession-sympathizing members of the state legislature, however, Lincoln advised caution and recognition of political constraints, while mentioning the writ of habeas corpus for the first time during the Civil War. In his response to Scott’s query, the president wrote:

The Maryland Legislature assembles to-morrow…and, not improbably, will take action to arm the people of that State against the United States. The question has been submitted to…me, whether it would not be justifiable…for you…to arrest, or disperse the members of that body. I think it would not be justifiable; nor, efficient for the desired object…

I therefore conclude that it is only left to the commanding General [Scott] to watch, and await their action, which, if it shall be to arm their people against the United States, he is to adopt the most prompt, and efficient means to counteract, even, if necessary, to the bombardment of their cities—and in the extremest necessity, the suspension of the writ of habeas corpus.41

This last sentence, in which Lincoln suggests that suspension of habeas corpus was a more extreme measure than physically bombarding a city, has long puzzled historians. Clearly, at the time, Lincoln anxiously awaited the arrival of more troops in Washington,


41 Lincoln to Scott, April 25, 1861, in CWL, IV, 344; Neely, *Fate of Liberty*, 6-7.
for the capital remained vulnerable to a Confederate attack. Lincoln probably did not actually believe that suspension of habeas corpus was more extreme than physically bombarding cities and potentially killing innocent civilians. If nothing else, Lincoln’s peculiar statement suggests the seriousness with which he considered the suspension of habeas corpus, which no president before him had done. Or, perhaps, Lincoln intended the wording in his letter regarding habeas suspension as something of a trial balloon to float by the judgement of his top general. Whatever his true intentions, Lincoln soon proved willing to take just such a drastic measure.

*Ex Parte Merryman to Ex Parte McQuillon*

Not long after the bloodshed in Baltimore and his curious letter to General Scott, Lincoln finally decided to take emergency measures in the name of protecting the national capital and preserving the Union government. Having adopted an initially conciliatory policy toward Maryland, the accumulating stress, exasperation, and danger of the situation appeared to convince Lincoln to adopt a more forceful policy that included suspension of the “Great Writ.” On April 27, Lincoln privately issued his first order for habeas suspension to General-in-Chief Winfield Scott, which authorized the General “personally or through an officer in command at the point where the resistance occurs” to suspend the writ anywhere along “the military line” between Philadelphia and Washington.

In other words, this historic order authorized Scott, or any military subordinate designated by him, to suspend the writ of habeas corpus along the route which Union

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42 Neely, *Fate of Liberty*, 7.

troops had to travel in order to reach the capital. The purpose of Lincoln’s first suspension order, as Mark Neely has written, was “to keep the military reinforcement route to the nation’s capital open,”; Neely goes so far as to claim that the political prospect of the Maryland legislature voting for state secession did not factor into Lincoln’s calculus, although the evidence for this claim is far from conclusive. Though limited in its geographic scope, Lincoln issued several subsequent suspension orders throughout the war that varied in stipulating geographic coverage and specific classes of individuals exempted from habeas corpus protection. Under habeas suspension, individuals arrested by military authority were unable to use court-ordered writs of habeas corpus as a remedy for release from unlawful detention, permitting military officials to ignore judicial inquiries into the detention of prisoners by merely citing presidential authority. (Although a suspension of the writ of habeas corpus does not in itself technically imply an abridgement of the constitutional guarantees of due process and trial by jury, during the Civil War, Lincoln’s suspension of habeas served as the key mechanism by which military authorities prevented detainees from enjoying these guarantees.) In the following weeks, Lincoln issued three additional habeas suspension orders, the last of which expanded upon the geographical boundaries designated in his first order from April 27. On May 10, Lincoln for the first time issued a public proclamation suspending the writ of habeas corpus in the Florida islands of Key West, the Tortugas, and Santa Rosa. On June 20, Lincoln ordered the suspension of habeas

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44 On this point, Neely further insists that suspending the writ of habeas corpus “was not originally a political measure, and it would never become primarily political.” Neely, *Fate of Liberty*, 9.


46 Neely, *Fate of Liberty*, 9-10.
corpus for one Major Chase. Less than two weeks later on July 2, Lincoln authorized General Scott “personally, or through the Officer in command, at the point where resistance occurs,” to suspend the writ “at any point, on or in the vicinity of any military line which is now, or which shall be used, between the City of New York and the City of Washington.”

Taken together, these suspension orders between April 27 and July 2, 1861 comprised four of the nine total suspension orders that Lincoln issued during the course of the Civil War. Given the unprecedented nature and constitutional uncertainty of executive suspension, Lincoln’s unilateral suspension of habeas corpus ensured that state and federal courtrooms would become yet another battlefield on which the Civil War would be fought by the Lincoln administration.

While Ex parte Merryman, which occurred in late May 1861, is commonly noted as the most sensational early clash between executive and judicial authority over habeas corpus and individual rights during the war, Lincoln’s suspension of habeas corpus and repressive policies toward the insurgent Border States precipitated a similar conflict more than two weeks before the events of Merryman. In Missouri – another Border State, like Maryland, rife with violent conflict between Unionist and Confederate sympathizers throughout the war – the judge of a federal district court tested the authority of Union military officials to detain suspicious individuals without recourse to habeas corpus proceedings. On May 10, 1861, Captain Emmett McDonald, whom Union military officials accused as “a messenger from the rebel army,” was captured at Camp Jackson,

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47 Neely, Fate of Liberty, 11; Proclamation Suspending Writ of Habeas Corpus in Florida, May 10, 1861, CWL, IV, 364; Seward to Winfield Scott, State Department, June 20, 1861, CWL, IV; Lincoln to Winfield Scott, July 2, 1861, CWL, IV, 419.

48 On this point generally, see Jonathan W. White, “The Strangely Insignificant Role of the U.S. Supreme Court during the Civil War,” Journal of the Civil War Era 3 (June 2013), 211-238.
Missouri, by Union forces commanded by Captain Nathaniel P. Lyon. McDonald was but one of many Missouri militiamen captured by Union forces in the spring of 1861 for allegedly plotting to capture the St. Louis arsenal for Confederate forces. In protest to the legality of his detention, McDonald petitioned Judge Samuel Treat of the U.S. Court in the eastern district of Missouri for a writ of habeas corpus. McDonald complained that he was unlawfully confined “by no order, judgement, decree, or committal of any judicial tribunal of the United States,” but rather under the vague authority of the U.S. government. Treat complied with the request, and ordered a writ to be served upon the commanding officer in charge of McDonald’s arrest four days later. The next day, on May 15, Brigadier-General William S. Harney, having been served notice of the writ for McDonald, sent Judge Treat a written reply to the writ. Although he expressed his “profound regret of the state of things existing in this community,” as well as his sincere wish to sustain the Constitution, Harney deferred “to what I am compelled to regard as the higher law, even by so doing my conduct shall have the appearance of coming in conflict with the forms of law.” Citing the authority of President Lincoln’s proclamations regarding military conditions in Missouri, and not wishing to contravene his commander-in-chief’s authority on the issue, Harney informed Judge Treat of his choice “to abstain from pursuing any course which, by implication, might throw a doubt upon the sufficiency of his authority.”


50 In re McDonald, Case No. 8,751, District Court, E.D. Missouri, 1861 U.S. Dist. LEXIS 69; 16 F. Cas.17.

Having thus halted the judicial proceedings for McDonald, the case could have ended there. Yet despite his inability to enforce the writ, Judge Treat decided to deliver an opinion on the case anyway and, in doing so, anticipated several arguments that Chief Justice Roger Taney would make in *Ex parte Merryman*. For Treat, the central issue of the case revolved around jurisdiction; did McDonald’s case properly fall under federal or state jurisdiction? As Taney would later do in *Merryman*, Judge Treat devoted considerable space in his opinion to historical inquiries regarding the duty of the courts to uphold the Constitution even in times of war, as well as the power of federal judges to issue habeas corpus writs derived from the organization of the courts as established by the Judiciary Act of 1789. “In no case known and accessible to this court,” Treat asserted, “has it ever been held that United States courts of original jurisdiction cannot issue the writ where a person is held in illegal restraint under or by color of the authority of the United States, whether there has been a technical ‘commitment’ or not.” Despite Harney’s refusal to comply with the writ, Treat proclaimed his court’s jurisdiction in McDonald’s case to be “clear, positive, and ample.” He then stated what would soon become the dilemma faced by many federal court judges throughout the Union during the Civil War when he concluded: “Every one who is illegally restrained of his liberty, under color of United States authority, has the fullest redress in the United States Courts. Not only has he a constitutional right to apply for deliverance from illegal restraint, but it is the duty of the court to exhaust all its power to enforce his application.”

Nothing more came of MacDonald’s case, perhaps because the attention of most northerners and newspaper editors—as well as Lord Lyons in Washington—was directed toward the

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52 *In re McDonald*
escalating tensions emerging from the state of Maryland, which gave rise to a dramatic
clash over habeas corpus between the President and Chief Justice of the United States.

Nearly one month after Lincoln’s initial April 27 suspension of habeas corpus, on
May 25, Pennsylvania militia General William High Keim and Colonel Samuel Yohe
facilitated the arrest of John Merryman, a first lieutenant in the Maryland Horse Guards
and outspoken Southern sympathizer, for “various acts of treason” including an “avowed
hostility to the Government” and an alleged willingness to cooperate in armed rebellion
against the United States by burning strategic railroad bridges and cutting telegraph wires
around Baltimore following the April 19 riot.53 Acting under orders from Governor
Hicks, Merryman had taken part in the latter two actions ostensibly to prevent further
bloodshed in Maryland.54 At about two o’clock in the morning on May 25, an armed
Union force entered Merryman’s house, pulled him out of bed, placed him in military
custody and conveyed him to Fort McHenry. Merryman’s attorney quickly applied for a
writ of habeas corpus to Chief Justice of the Supreme Court Roger B. Taney, then
residing in Baltimore in fulfillment of his duties as circuit court judge. Taney read
Merryman’s petition, and granted a writ of habeas corpus to be served on General George
Cadwalader, the commander in charge of Fort Henry where Merryman was then
detained.55 In the process, Taney initiated one of the greatest controversies in American

53 George Cadwalader to Roger Taney, May 28, 1861, as reprinted in O.R. II, vol. II, 576; White,
Abraham Lincoln and Treason, 1, 27. Still, as Jonathan W. White points out from his careful examination
of the Merryman case: “The military’s justifications for holding Merryman exhibited a surprising level of
ambiguity and lack of specificity as to what exactly John Merryman stood accused of having done.” See
White, Abraham Lincoln and Treason, 29.

54 White, Abraham Lincoln and Treason, 19, 128 n.27.

55 Ex Parte John Merryman, as reprinted in O.R. II, II, 577.
constitutional history, and the case of *Ex parte Merryman* remains, as historian Mark E. Neely writes, “critical to understanding President Abraham Lincoln’s record on civil liberties.” On this point Neely is correct, but as subsequent chapters will make clear, *Merryman* is also critical for understanding both the official British response to the military arrests of Her Majesty’s subjects under, and broader British attitudes toward, Lincoln’s habeas corpus policy.

When presented with Taney’s writ for Merryman, Cadwalader refused to obey the order but apparently felt obligated to explain his decision to the Chief Justice. In justifying Merryman’s arrest, Cadwalader respectfully informed Taney that he was officially authorized by the President to suspend the writ in such cases for issues of public safety (a circumstance of which Taney and most Northern citizens were unaware) and, anticipating similar clashes in the future as General Harney had in the case of Emmett McDonald, expressed his hope that the judiciary and military authorities would not interfere with each other in the present crisis:

> This is a high and delicate trust and it has been enjoined upon him [Cadwalader] that it should be executed with judgement and discretion but he nevertheless also instructed that in times of civil strife errors if any should be on the side of safety to the country…those who should co-operate in the present trying and painful position in which our country is placed should not by reason of any unnecessary want of confidence in each other increase our embarrassments. He therefore respectfully requests that you will postpone further action upon this case until he can receive instructions from the President of the United States when you shall hear further from him.  

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57 George Cadwalader to Roger Taney, May 26, 1861, in *O.R.* II, I, 576. In effect, Cadwalader was merely following the instructions given to him by E.D. Townsend, Assistant Adjutant-General, as handed down by General Winfield Scott: “In returns to writs of habeas corpus by whomsoever issued you will most respectfully decline for the time to produce the prisoners but will say that when the present
Although Cadwalader’s response was hardly combative, it was enough to provide Chief Justice Taney with an opening (and one that he likely hoped for) to directly challenge Lincoln’s executive authority to suspend the writ of habeas corpus and detain citizens without due process. As Jonathan White has recently argued, the legal proceedings against John Merryman (which extended far beyond the summer of 1861) “reveal the magnitude of the disloyalty problem that faced Lincoln and the Union during the Civil War.” With “the body” of Merryman absent from his court, Taney could not weigh in on the merits of his arrest, leaving the aging Chief Justice to only pronounce an opinion on the question of which governmental branch had the constitutional authority to suspend the writ of habeas corpus.

Beyond the question of Lincoln’s constitutional authority to suspend the writ, Taney was equally troubled by the notion of a president delegating authority for suspension to his military subordinates. “As the case comes before me,” he wrote, “I understand that the President not only claims the right to suspend the writ of habeas corpus himself at his discretion but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him.” The next paragraph of Taney’s opinion provided unhappy difficulties are at an end you will duly respond to the writs in question.” E. D. Townsend to George Cadwalader, May 28, 1861, in O.R., II., I., 577.

58 White, Abraham Lincoln and Treason, 8, 121. As White shows in his exhaustive study of the case, criminal indictments against John Merryman, as well as Merryman’s own civil suits against the commander in charge of his detention at Fort McHenry, lasted into 1867. See chapter 5 of his Abraham Lincoln and Treason.

the focus of much constitutional debate among Civil War legal pamphleteers and future generations of legal scholars:

No official notice has been given to the courts of justice or to the public by proclamation or otherwise that the President claimed this power and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion and that it was admitted on all hands that the privilege of the writ could not be suspended except by act of Congress.⁶⁰

If the President of the United States may properly suspend the writ of habeas corpus, Taney remarked, “then the Constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen than the people of England have thought safe to intrust to the Crown.” The only power therefore possessed by the President, Taney concluded, was his duty to execute the law as clearly stated in the Constitution. With regard to Lincoln’s assumption of the power to suspend habeas corpus, however, “He [Lincoln] certainly does not faithfully execute the laws if he takes upon himself legislative power by suspending the writ of habeas corpus—and the judicial power also by arresting and imprisoning a person without due process of law.” Thus, given that such provisions in the Constitution are “expressed in language too clear to be misunderstood by any one,” Taney argued that only Congress, and not the President, was properly entrusted with the constitutional power of habeas suspension and of judging if and when the conditions of rebellion or invasion held.⁶¹

Taney closed his opinion with another sharp rebuke of the Lincoln administration: “I can only say that if the authority which the Constitution has confided to the judiciary

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⁶⁰ O.R., II, II, 578.

⁶¹ O.R., II, II, 578-80, 583.
department and judicial officers may thus upon any pretext or under any circumstances be usurped by the military power at its discretion the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.” Despite carrying out his judicial duty, Taney wrote, his power as judge “has been resisted by a force too strong for me to overcome.” Taney ordered that his opinion and all proceedings in the case be filed and recorded in the circuit court for the district of Maryland, and that a copy be transmitted under seal to the President, whom Taney, in a parting shot, admonished to fulfill his constitutional obligations by “tak[ing] care that the laws be faithfully executed.”

In considering the motivations behind Taney’s opinion, one finds at least two primary factors. Undoubtedly, Taney sincerely saw himself as an arbiter for protecting the power of the judiciary against executive usurpation, as well as the constitutional liberties of American citizens. At the same time, however, the Chief Justice’s animus toward Lincoln and the “Black Republicans” was well known (due in no small part to Taney’s notoriety throughout the North as the author of the Supreme Court’s proslavery majority opinion in *Dred Scott v. Sanford*), and he likely relished the idea of striking a blow at the political opposition. In fact, Taney hoped that his opinion reached a wide circulation by ensuring that it was published in pamphlet form. At the same time, Taney confided to several of his contemporaries that he wished to avoid a direct clash with the

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executive and military authorities: “I certainly desire no conflict with the Executive Department of the Government; and would be glad, as you will readily suppose, to pass the brief remnant of life that may yet be vouchsafed to me in peace with all me, and in the quiet discharge of every-day judicial duties.” If Taney did not wish to bring about a conflict with Lincoln or the military, however, the aging Chief Justice feared that his own arrest was imminent. For the most part, historians have emphasized Taney’s political animus toward Republicans in their generally negative assessment of *Ex parte Merryman*. To historians Michael Burlingame and Mark Neely, Taney’s *Merryman* decision amounted to a “judicial stump speech,” while Harold M. Hyman insists that Taney’s “sermon on the Constitution” became “the single most important item of opposition literature” to arise during the Civil War. Predictably, Republican (and even some nonpartisan) newspapers derided Taney’s opinion, while Democratic newspapers celebrated it as an eloquent defense of civil liberty. Even the most powerful newspaper in Great Britain, *The Times*—which was soon to consistently condemn Lincoln’s

65 Taney to George W. Hughes, June 8, 1861, as quoted in White, *Abraham Lincoln and Treason*, 36.

66 For a thorough analysis of the evidence relating to Taney’s arrest by the Lincoln administration, as well as an excellent discussion of the historiography, see Phillip W. Magness, “An Imperfect Witness to Disunion: Marshal Lamon, the Secession Crisis, and the ‘Plot’ to Arrest Chief Justice Taney,” [www.philmagness.com](http://www.philmagness.com).


68 For extensive discussion on media reactions to *Ex parte Merryman*, see White, *Abraham Lincoln and Treason*, 32-35.
repression of civil liberties throughout the war—reported Merryman with a reasonable consideration of the military situation in Baltimore. If Cadwallader was in possession of real evidence of Merryman’s guilt and was for the moment keeping that evidence hidden for public expediency, “it is not easy to see why [Merryman] should not be arrested, and held as a prisoner of war, not subject to release by civil process.” Given the imperative of the Lincoln administration to keep the crucial border state of Maryland in the Union, *The Times* concluded: “In the time of such a rebellion as this, the act of the Military Department in a country which has just been subdued, which is still held by force, and which sympathizes actively with the rebels, ought not to be measured by the same criticism that would be applied to it in time of peace.”

If Lincoln responded directly to Taney’s judicial rebuke, such documentation is lost to historians, but the president certainly anticipated public concern over his unilateral suspension of habeas corpus and prepared his own defense accordingly. On May 30, Lincoln asked Attorney General Edward Bates to confer with prominent Maryland lawyer Reverdy Johnson in order to prepare an opinion supporting the president’s authority to suspend habeas corpus. Additionally, Lincoln responded indirectly to the Chief Justice in his message to an emergency session of Congress that first convened on July 4, 1861. By this point, habeas corpus had been suspended along the “military line” between Philadelphia and Washington for over two months, and Maryland remained safely in the Union while the capital was protected. In his message to Congress, Lincoln attempted to justify his emergency suspension of habeas corpus, aware that his

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69 *The Times* (London), June 18, 1861, pg. 28.

suspension policy loomed large over the assembled legislators of Congress. The limited suspension of habeas corpus, Lincoln argued in his message, was indispens­able for meeting the “dangerous emergency” prevailing since the Confederate attack on Fort Sumter. Nevertheless, he recognized that most people at the time doubted the constitutionality of executive suspension. Lincoln recited the habeas corpus clause found in the second paragraph of Article I, Section 9, of the United States Constitution: “The 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.” Because of its location in Article I, which is largely devoted to the powers of Congress, most nineteenth century legal authorities agreed with Taney that habeas suspension was a legislative function of Congress. Despite this consensus, Lincoln pointed to the literal ambiguity of the wording of the clause, and plausibly claimed that “the Constitution itself, is silent as to which, or who, is to exercise the power [of suspension].” But Lincoln did not believe he had violated the law, for at the time there was indeed a rebellion in the Southern states which threatened to boil over into the crucial Border States and leave Washington isolated before Congress could reassemble. Therefore, Lincoln maintained that “the public safety” required “the qualified suspension of the privilege of the writ,” and he would persistently adhere to this “public necessity” argument to justify executive suspension throughout the war. “The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of

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71 Lincoln’s Address to the Emergency Session of Congress, CWL, IV, 429-31.

72 Brian R. Dirck, Lincoln and the Constitution (Carbondale: Southern Illinois University Press, 2012), 74; Neely, Fate of Liberty, 4-5; Randall, Constitutional Problems, 134, 136; Rossiter, Constitutional Dictatorship, 227.
the States,” Lincoln pointed out. “Must they be allowed to finally fail of execution, even
had it been perfectly clear, that by the use of the means necessary to their execution,
some single law, made in such extreme tenderness of the citizen’s liberty, that practically,
it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated?” Infusing strong emotional force into his argument, the president then couched his defense in a powerful rhetorical question: “[A]re all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?”

Although indeed a cherished safeguard of individual liberty, the right of habeas corpus could not stand in the way of the life of the nation itself. Along with suspension of the writ of habeas corpus and other Congressional measures taken by Lincoln following Sumter—such as spending public funds, proclaiming a blockade, and increasing the size of the regular army—the President concluded that he had acted legally in sustaining the Union Government. “These measures”, argued Lincoln, “whether strictly legal or not, were ventured upon, under what appeared to be a popular demand, and a public necessity; trusting, then as now, that Congress would readily ratify them.”

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73 Lincoln’s Address to Congress in Special Session, CWL, IV, 430; White, Abraham Lincoln and Treason, 5. In a later letter to Albert G. Hodges of April 4, 1864, Lincoln reiterated his consistent belief that suspension of the writ was a public necessity at the outset of the war: “I did understand however, that my oath to preserve the constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government—that nation—of which that constitution was the organic law. Was it possible to lose the nation, and yet preserve the constitution?...I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.”

74 William Rehnquist, All the Laws but One: Civil Liberties in Wartime (New York: Knopf, 1998), 42. See also Randall, Lincoln the President: Midstream, 152-53; Farber, 194-95; Neely, Lincoln the President: Midstream, 64-65.

next chapter, although Lincoln placed the issue squarely before Congress, by the time the emergency session ended on August 6, 1861, Congress had declined to authorize the president to suspend the writ of habeas corpus. To this day, the constitutionality of Executive suspension remains unresolved.

Generations of scholars have interpreted Lincoln’s first defense of his habeas policy with much deference to the President’s sincere belief in the danger to the capital. In his classic work, *Constitutional Problems under Lincoln*, James G. Randall insisted that “few measures of the Lincoln administration were adopted with more reluctance than this suspension of the citizen’s safeguard against arbitrary arrest,” citing the limited scope of Lincoln’s initial suspension orders, the imperative of the military authorities to “use the power sparingly,” and the “early opportunity” for Congress to exert their constitutional authority on the issue. In his seminal *The Fate of Liberty*, Mark Neely maintains that “the well-known plight of the capital after the burning of Baltimore’s railroad bridges provided adequate proofs” of a “public necessity.” Given the “vividly threatening events around Baltimore” in late April and the questionable later suspensions in areas above Maryland that arguably did not conform to emergency conditions, Neely concludes that “Lincoln fashioned an able defense of the April suspension of the writ of habeas corpus but left the more recent expansion of the suspension unexplained.”


77 Randall, *Constitutional Problems*, 121.

78 Neely, *Fate of Liberty*, 13. Although finding Lincoln’s first suspension of habeas corpus justified, Neely is more critical of Lincoln’s congressional defense than Randall: “What is also apparent” in Lincoln’s defense, writes Neely, “is the work of a fledgling president, uncertain of his legal ground and his proper audience, nervous, and at once too candid and too unforthcoming. This was not the work of a
in asserting his right as president to suspend habeas corpus, as Jonathan White writes, Lincoln “asserted himself as a final arbiter on the meaning of the Constitution, independent of what Taney or any other member of the judiciary had to say. Lincoln, in effect, gutted Ex parte Merryman of any legal significance and determined that as long as the war lasted Merryman would have no practical effect.” Regardless of the validity of Lincoln’s early suspensions, however, the events of Merryman and Lincoln’s subsequent justification did not escape the notice of British diplomats and consuls stationed in the United States who were soon bombarded with frantic messages from Britons arrested by the Union military, foreshadowing what became a persistent problem in Anglo-American diplomacy throughout the Civil War.

With his message to Congress of July 4, 1861, Lincoln for the first time issued a public defense of executive habeas suspension, justifying his policy on the grounds of a public necessity that demanded the safety of the national government in Washington. From his post in the nation’s capital, Lyons could only wait to see how Lincoln’s suspension policy would affect British nationals. Citing the widespread public “dissatisfaction” with Taney’s Merryman decision in the North, Lyons found “very remarkable” the “complacency with which [Northerners] view infractions of the laws and the Constitution by the military authorities,” and worried that Lincoln’s suspension policy would lead to the arrests of British nationals in America and a fundamentally inimical change in the American system of government. How could Her Majesty’s subjects be statesman or of a sure politician. Lincoln would learn fast, but he had not mastered the job by July 1861.”

79 White, Abraham Lincoln and Treason, 38.

80 Lyons to Russell, June 4, 1861, in Barnes and Barnes, The American Civil War through British Eyes, I, 108; Jenkins, Lord Lyons, 228.
legally secure, Lyons wondered in a letter to Lord Russell, when Americans were “recklessly applauding [Lincoln’s] suspension”? By this early point in the war, however, Lyons and the British government had yet to find an answer to this question, which would have to wait until events unfolded on the battlefield between Union and Confederate armies.

Merryman was an American citizen and offered the first public test of Lincoln’s habeas policy, but Lyons did not have long to wait before the arrest of a British subject did the same. In late July 1861, Judge Samuel R. Betts of the Federal Southern District Court of New York issued a writ of habeas corpus for Purcell M. Quillan, a British subject imprisoned at Fort Lafayette. According to various reports from the Republican press, Quillan was being held on vague charges of “suspicion of being a spy in the interests of the rebels” and “some general charge of levying war” against the United States. It was even alleged that Quillan, a South Carolina warehouse clerk, was “a participant in the attack on Fort Sumter,” and had engaged in purchasing arms for the Confederacy in New York while plotting to do the same on a return trip to England.

Perhaps because the record of events surrounding Ex parte McQuillon (as the case came to be known) are fragmentary, the significance of this first public clash between the Lincoln administration and Her Majesty’s Government over habeas corpus has generally

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81 Lyons to Russell, August 23, 1861, in Barnes and Barnes, Private and Confidential, 262.


83 The Daily Dispatch (Richmond, VA), August 6, 1861; The National Republican (Washington, D.C.), June 29, 1861.
escaped scholarly attention.\textsuperscript{84} On June 28, 1861, Quillan—by direct order of Secretary of State William H. Seward, then in charge of the Union’s internal security system—was apprehended while applying to have his passport countersigned on his return home to Charleston. In a letter to General Scott explaining the arrest, Seward claimed that Quillan’s conduct had been “somewhat strange, leading to suspicion of his disloyalty,” and a further examination “tended to confirm this suspicion.”\textsuperscript{85} Because the principal witnesses against Quillan resided in New York, transfer of the prisoner to Fort Hamilton in that state was “deemed advisable.”\textsuperscript{86} The depositions of these witnesses (including a letter from the Chairman of the Union Defense Committee of New York) alleged that Quillan had been a conduit for facilitating treasonous correspondence between British consuls in the Southern states and Lord Lyons.\textsuperscript{87} Thereafter, Quillan was shuffled between military forts in Washington and New York in what appears to have been a deliberate attempt by the military authorities to evade habeas corpus trial proceedings for Quillan in local State courts.\textsuperscript{88}

\textsuperscript{84} Neely mentions the Quillan case in passing in \textit{Lincoln and the Triumph of the Nation}, 176. Cairns, in his dissertation, writes that Quillan’s case “was representative of the many that Lyons would successfully handle, not only at this early stage, but throughout the war.” Cairns, 185. See also Berwanger, \textit{The British Foreign Service}, 55.

\textsuperscript{85} Letter from Seward to Scott, 10 July 1861, Domestic Letters of the Department of State, 1784-1906, 274, RG 59, M40, NARA.

\textsuperscript{86} Letter from Seward to Brigadier Gen. Joseph H.F. Mansfield, 2 July 1861, Domestic Letters of the Department of State, 237-38, RG 59, M40, NARA.

\textsuperscript{87} Undated Depositions of Henry George Julian and Hiram Anderson in the case of United States vs. Purcell M. Quillan, Letters Received by the Office of the Adjutant General, Main Series, 1861-1870, RG 94, M619, National Archives; Lyons to Seward, June 29, 1861, Notes from the British Legation in the US to the Department of State, 1791-1906, RG 59, NARA.

Intervening in the case, Lord Lyons approached Seward with a view toward ensuring that “all legal forms will be observed, and that the investigation will be conducted fairly and speedily.” Lyons attested that Quillan had sought a passport from the British consul at Charleston, Robert Bunch, in order to visit his father in Baltimore, and was apprehended by Federal officials for allegedly smuggling foreign dispatches and arms while traveling home through Washington. For his part, Seward was suspicious of Consul Bunch and other foreign consuls in the South, believing they were “made the vehicles of the correspondence of traitors in the disloyal states, in many instances, giving advice, as to evading the blockade, and even the importation of goods, [and] contraband of war.” In addressing this issue with Seward just days before Quillan’s arrest, Lyons assured the Secretary that Consul Bunch was not only “remarkably correct in the observance of his official duties, but that his political sentiments were by no means such as to render it likely that he would have any desire to engage in the [treasonous] practices attributed to him.” Lyons’s assurances did nothing to assuage Seward’s suspicions. Not long after, in mid-August, Seward’s hostility toward the consul reached its peak when Bunch became implicated in a scandal involving Robert Mure, a private citizen of Charleston, South Carolina, who attempted to leave New York for London carrying

89 Lyons to Seward, June 29, 1861, Notes from the British Legation in the US to the Department of State, RG 59, NARA.

90 Barnes and Barnes, The American Civil War through British Eyes, I, 216 n.27; Letter from Seward to Welles, August 29, 1861, Domestic Letters of the Department of State, 564, RG 59, M40, NARA.

91 Letter from Seward to Secretary of the Navy Gideon Welles, August 29, 1861, Domestic Letters of the Department of State, 564, RG 59, M40, NARA.

92 Lyons to Russell, June 24, 1861, in Barnes and Barnes, The American Civil War through British Eyes, I, 126-27; Jenkins, Lord Lyons, 162.
documents from the Confederate government to the British Foreign Office that suggested forthcoming British recognition of the Confederacy.\textsuperscript{93}

When the writ issued by Judge Betts was served upon Martin Burke, the commander of Fort Lafayette, Burke declined to obey it, citing the authority of General Winfield Scott as grounds for doing so. A copy of Scott’s brief letter, which claimed no public necessity whatsoever for justifying Quillan’s arrest, was later produced in court. Quillan’s attorney insisted that the military authority had not made a proper return to the writ.\textsuperscript{94} More troubling from the perspective of the British government, perhaps, was the fact that Quillan’s military detention took place in a state far outside the closest theater of military operations in Virginia. Lyons noted the importance of this fact, and reminded Seward that he “should be very glad to have the means as soon as possible of anticipating any sensation which the cases might make on the other side of the Atlantic.”\textsuperscript{95}

In his ruling, Judge Betts sought to avoid a collision with the Union military, pointing out that “the military authorities declined to obey the writ as a matter of right, and the civil power was not sufficient to enforce it.” Quillan’s attorney protested that the return made on his client did not sufficiently establish Lincoln’s authority for suspending the writ of habeas corpus, but Betts denied a motion to execute the writ and force the issue. The question of the constitutionality of executive suspension “was a very grave one,” Betts cautioned. Noting that the constitutional issues in \textit{Merryman} had not been resolved, Betts declined to offer an opinion on executive suspension, as it would be

\textsuperscript{93} For a discussion of this incident, see Jones, \textit{Blue & Gray Diplomacy}, 64-68.

\textsuperscript{94} \textit{Ex. parte McQuillon}, 16 F. Cas. 347; 3 W.L. Monthly 440 (Accessed via LexisNexis Academic, 4/12/12); \textit{The New York Herald}, 30 July 1861, pg. 8.

\textsuperscript{95} Lyons, as quoted in Cairns, 185.
“indecorous” on his part “to oppose the chief justice.” Still, “[t]he constitutional law must be upheld,” and Betts “thought that the judicial and military arms of the Government should support each other instead of seeking occasion of conflict.”96 Although Quillan’s detention in this early case was apparently driven by considerations of military convenience rather than public necessity, Judge Betts expressed his hope that the public would “let the matter rest as it is, without throwing open the habeas corpus to be used by every one during the progress of the war.”97

The McQuillon case had clearly given Lyons sufficient cause for concern, and alerted government officials in London to the possibility that the military arrest of British subjects caught up in the American Civil War might evolve into a serious foreign policy dispute with the Lincoln government. In early August, Lyons reported to Foreign Secretary Lord John Russell in London that “the [Union] military authority already exercises an almost unlimited control over the liberty of citizens and foreigners.”98 “The proceedings in the Court at New York [in McQuillon] seem to be monstrous,” he went on, and “I am very anxious to know what I am to do about these and similar cases. Theoretically, I suppose the Americans have a right to put the whole country under martial law: if so, what practical means are left of saving foreigners from arbitrary ill treatment?” While he conceded that there were “reasonable grounds of suspicion” against

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96 Ex. parte McQuillon; Neely, Lincoln and the Triumph of the Nation, 176-77; New York Times, July 30, 1861.

97 Quillan was released on 7 August, 1861, upon the intervention of Lord Lyons. See New York Times, 7 October, 1861.

98 Lyons to Russell, August 2, 1861, in Barnes and Barnes, The American Civil War through British Eyes, I, 152.
Quillan, Lyons expressed concern at the fact that there had not even been a pretense of habeas suspension in New York at the time of Quillan’s arrest.99

As the war continued, Lyons’ concerns over Lincoln’s suspension of habeas corpus and subsequent military arrests of Britons would continue to mount. The preceding decades of anti-British sentiment in the United States, coupled with British distrust and suspicion of U.S. foreign policy designs for territorial expansion, ensured that negotiating problems involving British subjects living in the United States would arouse much drama in Anglo-American diplomacy during the American Civil War. While both governments actively sought to avoid instigating another Euro-American war, and despite the practical difficulties surrounding actual British intervention, there was nevertheless a limit to the transgressions that the British would tolerate before feeling compelled to intervene with military force.100 While British and American statesmen grappled over the ramifications of British neutrality in the spring of 1861, Lincoln, responding to an imminent threat to the Union capital, suspended the privilege of the writ of habeas corpus for the first time in limited areas along the east coast. As the McQuillon case illustrated the international implications of Lincoln’s habeas policy, the military arrests of British nationals without recourse to habeas protection had emerged by the late summer of 1861 as a legitimate foreign policy concern for the British Legation in Washington.

99 Lyons to Russell, August 5, 1861, in Barnes and Barnes, Private and Confidential, 259.

100 In particular, the Union’s closure of southern ports threatened British commerce, and raised the possibility of an Anglo-French concert to check further Union policies detrimental to European economic interests. Jones, Blue & Gray Diplomacy, 25.
CHAPTER III
GREAT BRITAIN’S RESPONSE TO LINCOLN’S HABEAS CORPUS POLICY, 1861

Despite Chief Justice Roger Taney’s challenge against unilateral executive suspension of the writ of habeas corpus in *Ex parte Merryman*, President Lincoln indicated through his message to Congress in early July that even the Great Writ could not be allowed to stand in the way of the life of the nation. In areas under habeas suspension, the Union military continued to arrest civilians suspected of treasonous or disloyal activities without due process of law, with little danger of meaningful interference from the state or federal courts. But American civilians were not the only ones subject to military arrest; foreign nationals, especially the numerous British nationals throughout the Union states, were no less exempt from discovering the inside of a military prison under Lincoln’s suspension of habeas corpus. Between the outbreak of war and the subsequent cases of John Merryman and Purcell Quillon, the British Minister in Washington, Lord Lyons, frequently worried that Britons living in the Union would be unable to shield themselves against arbitrary arrests by the Union military.

Lord Lyons’s early anxieties proved well-founded, as subsequent diplomatic conflicts over military arrests converged with one of the greatest constitutional crises of the American Civil War. As this chapter and the next will argue, by the fall of 1861, the military arrests of Britons under Lincoln’s habeas corpus policy emerged as a serious diplomatic conflict between the Palmerston and Lincoln governments and remained a persistent problem for the rest of the war. When Foreign Secretary Russell instructed his
ambassador in Washington to issue a formal British complaint in October 1861, the
Lincoln administration seized upon this foreign policy problem—with the aid of
widespread northern Anglophobia—as an opportunity to develop a matured public
defense of executive habeas suspension that has gone unappreciated by constitutional
historians. While the Lincoln administration consistently justified the arrest and detention
of British subjects on the same grounds as their American counterparts, the British
government vigorously condemned the arrests of both British and American civilians
under Lincoln’s suspension of habeas corpus. On the advice of the legal advisers to the
British Crown, Russell went even further by declaring that Lincoln’s assumption of
executive power to suspend habeas corpus was, as Taney claimed in Ex parte Merryman,
wholly unconstitutional. Undeterred by British criticism, however, the Lincoln
administration doubled down on its justification of military arrests by transforming the
issue into an Anglo-American dispute through the American press and developing a
broad conception of the limits of executive suspension, one which asserted the practical
necessity and constitutionality of arresting foreigners deemed threatening to the Union
cause. As the U.S. and Great Britain approached the brink of war at the close of 1861
over violations of British neutral rights on the high seas, the government in London
settled upon a cautious wait-and-see policy toward the continued arrests of Britons in the
Union states.

At best, the British habeas experience under Lincoln has garnered an occasional
brief mention in the historiography. Historians of civil liberties under Lincoln typically
devote considerable attention to the context of Lincoln’s initial suspension, emphasize the
subsequent constitutional discourse and public discussion surrounding Merryman, and
then jump ahead two years later to the Habeas Corpus Act of March 3, 1863.\textsuperscript{1} Despite offering the most thorough analysis of civil liberties under Lincoln to date, even Neely almost entirely overlooks the impact of Lincoln’s habeas policy on British nationals during the war. After noting that many British sailors were arrested for running the Union blockade and quickly released during 1861, Neely simply states that “the Lincoln administration wanted to avoid international incidents while its hands were full fighting the Confederacy.” Otherwise, aside from brief discussions of a handful of Britons who were arrested and subjected to torture by the Union military, Neely fails to consider how McQuillon and subsequent British cases influenced the broader development of Lincoln’s habeas policy during the Civil War.\textsuperscript{2}

In contrast, a few historians of Anglo-American relations have at least recognized that military arrests of Britons living in the Union occupied much of Lyons’s time during, if not beyond, the first year of the war.\textsuperscript{3} Norman B. Ferris notes that Lincoln’s suspension of habeas corpus “seemed in England to confirm the existence of a pervasive militarism in the United States” and, during the Trent affair in the winter of 1861-62, “there was great indignation, and not a little bellicosity, over the imprisonment in the United States of British subjects accused of sedition…” In this and other diplomatic conflicts, Ferris finds British indignation both exaggerated and unwarranted, for Lyons’s “requests for leniency toward imprisoned British subjects were almost invariably honored, and

\textsuperscript{1} See, for example, the classic works of Randall, \textit{Constitutional Problems under Lincoln}; and Hyman, \textit{A More Perfect Union}.

\textsuperscript{2} Neely, \textit{Fate of Liberty}, 25, 110-11; Neely, \textit{Lincoln and the Triumph of the Nation}, 163.

\textsuperscript{3} The impact of Lincoln’s habeas policy on British nationals in the Union does not figure into many of the standard works on Anglo-American relations during the American Civil War. These include Adams, \textit{Great Britain and the American Civil War}; Crook, \textit{The North, the South, and the Powers}; Jones, \textit{Union in Peril}; Jones, \textit{Blue & Gray Diplomacy}; and Myers, \textit{Caution and Cooperation}.
ultimately the persons involved, including some very shady characters, were released from custody." Acknowledging Lincoln’s suspension of habeas corpus as only an early problem for Anglo-American diplomacy, Eugene Berwanger argues that cases involving British prisoners “were most numerous during the first year of the war,” and they “were settled with relative ease” through the leniency of Secretary of State Seward. Scott Thomas Cairns views Lincoln’s suspension of habeas corpus as one of “several burning issues” seen as “a great obstacle to the fostering of better Anglo-American relations” throughout the war, although he does not pursue the issue in further depth. Similarly, Brian Jenkins points out that the arrests of British subjects “became a chronic problem” between Lyons and Seward during 1861. However, by patiently handling such cases individually and “sidestepping questions of principle,” writes Jenkins, “Lyons avoided a serious confrontation” over Britons arrested under Lincoln’s habeas policy. While these historians disagree somewhat over the severity and duration of the problem, a closer and more extensive analysis of British and American diplomatic sources reveals that Lincoln’s habeas policy concerned Britons on both sides of the Atlantic for the entire war, placed a serious strain on Anglo-American relations during the latter part of 1861,

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4 Ferris, *Desperate Diplomacy*, 124, 197, 201, 203. In contrast to Ferris, Walter Stahr, in his recent biography of Seward, vaguely notes that the arrests of British subjects by Union military authorities was “a source of tension between Seward and the British,” without further elaboration on the subject. Stahr, *Seward*, 305.


6 Cairns, 184-85.

7 Jenkins, *Lord Lyons*, 167-8, 190, 228; see also Jenkins, *Britain & the War for the Union*, I, 182-86.
and encouraged Lincoln himself to develop and publicly defend an expansive constitutional view of executive habeas suspension.

Further Developments Surrounding Lincoln’s Habeas Policy through British Eyes, 1861

As he and many British consuls frequently did throughout the war, Lord Lyons kept a close eye on the development of Lincoln’s habeas corpus policy in the aftermath of Merryman and McQuillon, awaiting further events and military edicts that might endanger the liberties of resident British subjects. Although still limited in scope, Lincoln’s suspension policy continued to develop throughout 1861—at least officially—according to evolving military necessities in the northern and Border States. With an executive order of October 14, 1861, Lincoln formally expanded the area of habeas suspension along the “military line” between Washington, D.C., and Bangor, Maine. Despite his frequent use of the phrase in suspension orders, writes Neely, the area encompassing the “military line” under suspension “was becoming expansive, if not a little deceptive,” for by the summer of 1861 it “referred to no particularly well-described ‘line’ between two places quite far apart on the map.” Meanwhile, in Missouri and other volatile border regions, the writ remained inoperative for the entire war.8 Most of the American citizens arrested by Union military authority until February 1862 (the month in which authority for military arrests transferred from the State to the War Department) came from the Border States, although dozens of Britons also found themselves in a military prison during the first year of the war. While Lincoln’s later suspension orders and proclamations would become increasingly hard to justify as a “public necessity” because of their expansive applications in areas of the North far removed from theaters of

8 Neely, Fate of Liberty, 11, 14.
actual war, the president’s early outlook on military arrests into the fall of 1861 reflected a sincere desire for restraint on the part of his military subordinates. Sometime around May 17, 1861, Lincoln made this desire clear in a memorandum issued to military commanders: “Unless the necessity for these arbitrary arrests is manifest, and urgent, I prefer they should cease.”

When informed of Britons arrested by the Union military, Lyons promptly informed the State Department of such cases and conducted his own investigations. On August 28, 1861, William Patrick, British subject and partner to the brokerage firm of Smith and Patrick in Mobile, Alabama, was arrested on charges of corresponding and transacting commercial business with persons in the Confederacy and confined to Fort Lafayette. In Seward’s eyes, both Smith and Patrick were “agents of an illegal and treasonable European correspondence,” which showed that their firm “has been made a channel for communication between insurgent citizens of the United States at home and their correspondents and agents who are in Europe engaged in procuring munitions of war for the overthrow of this Government.” Not long after, William’s brother, John Patrick—armed with petitions from several influential New York Republicans—travelled to Washington to petition for William’s release. Although the British consul in New York and Lord Lyons were at this point aware of the case, the brother pleaded with

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9 Memorandum: Military Arrests, c. May 17, 1861, in CWL, IV, 419.


11 Seward to Thurlow Weed, R.M. Blatchford, and Robert Murray, September 3, 1861, in O.R., II, II, 628; Seward to Lord Lyons, September 11, 1861, in O.R., II, II, 628. At the time that the Union military intercepted the correspondence, Patrick’s partner was in Europe, leaving the military to apprehend Patrick in Mobile.

12 Seward to Lord Lyons, October 14, 1861, in BDFA, V, 323.
Lyons to forestall official British involvement for the time being in order to see if private efforts to secure William’s release would succeed. Lyons consented to the request, confiding to Russell that he doubted his own ability to secure a release anyway. The petitions convinced the State Department that William Patrick “has not willingly consented to be implicated in this treasonable correspondence in which his partner Smith is so deeply compromitted,” and on Seward’s orders, he was released on September 13.\(^{13}\)

Five days after Patrick’s arrest, another British subject, J.C. Rahming, was arrested on September 2 in New York City on the charge of aiding the Confederacy by transporting canon to rebel forces in Wilmington, North Carolina. Seward ordered Rahming placed in Fort Lafayette, but after extensive inquiry into the case, on September 18, Rahming was released upon paying a bond of $2,500 and taking an oath of allegiance.\(^{14}\) Taken together, the arrests of Patrick and Rahming, combined with dozens of similar cases, led Lyons to confide his concerns to Russell in London and wonder how Britons could be protected from arbitrary imprisonment, especially given the evident impotence of federal and state courts. Lyons informed the Foreign Secretary that he was “seriously alarmed and distressed by the system of arbitrary arrest which appears to have been definitively adopted by this [Lincoln] Government. British subjects seem to be not less exposed to it than American citizens. I believe it to be entirely illegal; but the case of Quillan, among many others, proves that it is vain to resort to the Courts of law for


redress.” Just over a month later, the cases of Patrick and Rahming would in part lead the British government to formally protest Lincoln’s habeas corpus policy.¹⁵

From his desk in Washington, Lyons ensured that his direct superior in London, Foreign Secretary Russell, remained abreast of the ongoing public discussion and events surrounding Lincoln’s suspension policy. A few months after Merryman, he sent Russell copies of Taney’s opinion in the case, as well as legal pamphleteer Joel Parker’s critical review.¹⁶ During the emergency convention of Congress in the summer of 1861, Lyons informed Russell that he had closely followed the legislative debates in order to anticipate future “causes of difference growing up” between the U.S. and Great Britain, including the arrests of British nationals resulting from Lincoln’s suspension of habeas corpus.¹⁷ In fact, Lyons believed that Seward himself had been the primary force behind congressional attempts to ratify Lincoln’s suspension of habeas corpus. In a dispatch to Russell dated October 18, 1861, Lyons wrote that the failed Senate resolution designed to sanction executive suspension “was understood to have been drawn up by Mr. Seward himself,” although he failed to identify a source for this assertion.¹⁸ In September of 1861, Lyons reported to Russell on the events surrounding the military arrests of

¹⁵ Lord Lyons to Earl Russell, September 6, 1861, in BDFA, V, 307.

¹⁶ Lord Lyons to Earl Russell, October 18, 1861, in BDFA, V, 322.

¹⁷ Lord Lyons to Russell, as quoted in Jenkins, Lord Lyons, 165.

¹⁸ Lord Lyons to Earl Russell, October 18, 1861, in BDFA, V, 322. The British government may also have had another reason for assuming Seward’s controlling influence over Lincoln’s habeas policy. In a widely circulated anecdote from the Civil War era (and one which historians have yet to convincingly validate), Seward allegedly once boasted to Lord Lyons that he had the power to order the arrest of any citizen in the United States by merely ringing a bell on his desk. Could even the Queen of England do as much? Seward asked the British minister. Regardless of the anecdote’s veracity, the British government clearly recognized Seward’s authority over military arrests during the first year of the war. For a brief discussion of the “Little Bell” anecdote, see Neely, Fate of Liberty, 19.
members of the Maryland legislature, many of whom were suspected of strong secessionist sympathies.\textsuperscript{19}

The following month, Lyons informed Russell of a sensational habeas corpus case concerning an underage soldier in the District of Columbia. This case was of special concern to Lyons, who spent much of his time during 1861 trying to secure the release of over one hundred British minors from the Union Army (many of whom, probably, had voluntarily enlisted on the tide of martial enthusiasm that swept through the Union states during the early months of the war).\textsuperscript{20} In late October 1861, the Lincoln administration attracted substantial public attention in both the U.S. and Great Britain for taking extraordinary actions against Judge William Matthew Merrick of the Federal District of Columbia Circuit Court. Merrick had gained a reputation for issuing writs of habeas corpus for underage soldiers seeking to escape the army, and after issuing a writ for seventeen-year-old James Murphy on October 19, the Lincoln administration decided to punish the troublesome judge by placing him under military surveillance, unconstitutionally suspending his judicial pay, and obstructing the proceedings of the court.\textsuperscript{21} Lyons recognized the unfortunate implications of the \textit{Murphy} case for British minors who enlisted in the Union army without parental consent. Initially, he had cautiously hoped that such minors might find success escaping the army by using the traditional legal remedy of habeas corpus. But the events of \textit{Murphy}, Lyons told Russell,

\textsuperscript{19} Lord Lyons to Russell, September 16, 1861, in \textit{The American Civil War through British Eyes}, I, 165-66.

\textsuperscript{20} Neely, \textit{Lincoln and the Triumph of the Nation}, 163-74.

“confirmed my doubt” that habeas corpus could serve such a purpose, for the case implied that military officers did not have to obey habeas writs for underage soldiers regardless of nationality. Still, Lyons frequently pleaded with Seward on behalf of British minors in the army, more out of concern for their anxious family members than the young boys themselves. Seward appears to have generally cooperated with Lyons on this issue, ordering the discharge of British minors from the ranks if War Department investigations proved that they had enlisted without parental consent, but this trend would change once Secretary of War Edwin Stanton assumed control of military arrests in 1862.

The Nature of Military Arrests of Britons during 1861

In many ways, the habeas experience of Britons during 1861 mirrored that of their American counterparts. The Lincoln administration considered several variables in determining just who should be arrested, and, once arrested, who could be released. These variables applied to both American citizens and foreign nationals. Some innocent Britons were arrested on dubious charges, while others were clearly guilty of activities broadly construed as damaging the Union war effort. Most foreign nationals arrested before February 15, 1862 were British subjects, including British blockade-runners and minors who were detained by military authority, so not all were arrested on vague

22 Lyons to Russell, October 24, 1861, The American Civil War Through British Eyes, I, 188.

23 Lyons to Seward, Nov. 4, 1861, Notes from the British Legation, RG 59, M50, Roll 42, NARA; For a list of minors compiled by Lyons and sent to Seward, see Lyons to Seward, Dec. 9, 1861, Notes from the British Legation, RG 59, M50, Roll 43, NARA. Seward’s individual orders for the investigations of British minors in 1861 are found in Domestic Letters of the Department of State, Vol. 54 (May 1 – Dec. 9, 1861) and Vol. 55 (May 1 – Dec. 9, 1861), RG 59, M40, NARA.

24 Lyons to Seward, March 21, 1862, Notes from the British Legation, RG 59, M50, Roll 43, NARA. For further developments on the issue of underage Britons in the Union army, see Chapter III.
charges of disloyalty. When considering military arrests of foreign nationals under
Lincoln, however, it is worth noting the inconsistent accounting for nationality in the
arrest records generated by the Union government, and the records of military arrests
during the Civil War are themselves often fragmentary at best. 25 Put simply, tens of
thousands of civilians were arrested as a result of Lincoln’s habeas policy during the
Civil War and, rightly or wrongly, many British subjects residing in the northern and
Border States were bound to find themselves in a military prison. Nevertheless, Britons
arrested by the Union military often sought official protection from Her Majesty’s
Government, and the British consuls and minister in Washington were obligated to
ensure that their compatriots did not suffer injustices at the hands of a foreign
government embroiled in civil war.

As a result, Lyons spent much of his first year at the British Legation in
Washington reviewing and responding to countless reports relating to the civil liberties of
Britons in the Union states. Of course, not all of the complaints that crossed Lyons’s desk
emanated from bonafide British subjects. Sometimes, American citizens detained under
military authority simply claimed British nationality as a desperate ploy to avoid an
indefinite prison term. 26 At least some of these unfortunate prisoners claiming British
protection were probably Irish-Americans, who in times of peace might otherwise have
called for the overthrow of British rule in Ireland. 27 That foreign nationality could be a


26 Neely, Fate of Liberty, 19.

27 Later in the war, many Irish-American citizens relied on local British consuls for protection
against Union conscription. To Lord Russell in London, Edward M. Archibald, the British consul in New
York, reported that “The Irish, who at other times are only too ready to spurn British nationality, are now
amongst the most eager & obsequious applicants for my protection.” E. M. Archibald to Earl Russell,
significant advantage appeared to be well-known throughout the North, as one envious American prisoner at Fort Lafayette noted in his diary: “I suppose as he is a ‘British subject’ he will be released as soon as the British Consul hears of his imprisonment; lucky thing now-a-days to have been born in England, or anywhere outside the ‘Land of the Free and Home of the Brave!’” 28 For the most part, however, verifiable foreign nationality of prisoners was a factor that did not—and could not, from a diplomatic perspective—escape the notice of the Lincoln government, and often went a long way in ensuring one’s release.

In his role as the central British representative in the United States, Lord Lyons could not be faulted for lack of effort in securing the release of innocent British detainees. Typically, Lyons would receive a complaint either from a British consul, or directly from beleaguered Britons who were able to write the British minister from prison. From there, Lyons exercised his own discretion in making official British inquiries to the State Department, where Seward would often forward the case to the War Department for further investigation. If the evidence presented to him suggested guilt, Lyons deferred such cases to the judgement of Union military officials without further British intervention. But when the evidence allowed for the possibility of wrongful imprisonment, Lyons went to great lengths in finding creative ways to plead for the release of certain prisoners. 29 For example, in the case of George Shannon, an Irishman

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28 Quoted in Neely, Fate of Liberty, 25.

29 This general pattern of inquiry is abundantly documented in the records of the Department of State at the U.S. National Archives in Record Group 59.
arrested on no apparent charge and imprisoned at Camp Chase in Ohio during the fall of 1861, Lyons tried to use the prisoner’s well-known acquaintance with Seward and Secretary of the Treasury Salmon P. Chase as a lever for securing his release.\textsuperscript{30} As he did in the case of British minors, throughout the latter half of 1861 and beyond, Lyons occasionally presented Seward with compiled lists of alleged British subjects seeking release from military imprisonment who from Lyons’s perspective claimed reasonable grounds of innocence. In response, the Secretary of State routinely promised Lyons that official investigations would be made by the State and War Departments, and releases often followed.\textsuperscript{31}

In some cases, Seward seemed to go out of his way to appease the British ambassador by complying with Lyons’s requests for discharge, even if the individual in question was accused of engaging in actual military activity against the government.\textsuperscript{32} Most likely, Seward calculated that the British government might appreciate U.S. benevolence in such cases at such a delicate early stage in wartime Anglo-American relations (Seward’s diplomatic priority, after all, was to ensure that Britain stayed out of

\textsuperscript{30} George Shannon to Lord Lyons, October 24, 1861; and Lord Lyons to W.H. Seward, November 2, 1861, both in Notes from the British Legation, RG 59, M50, Roll 42, NARA.

\textsuperscript{31} See, for example, Memorandum regarding Political Prisoners alleged to be British Subjects, November 9, 1861, Notes from the British Legation, RG 59, M50, Roll 42, NARA.

\textsuperscript{32} Accusations alone did not guarantee one a visit by a provost marshal or other military officer tasked with executing arrests. In at least some cases involving British prisoners, the Union military also appears to have considered their local community reputation as a decisive factor determining the permissibility of release. When Lord Lyons inquired into the case of Patrick Crohan, imprisoned in Fort Columbus, Ohio, Major General John A. Dix assured Seward that the prisoner “is a person of no consequence and it would be well to discharge him.” Another British subject captured with twenty-three other men, Dennis Kelly, was found to be a laborer “of no social importance” and therefore worthy of release. Many “unimportant” foreigners such as Crohan were often discharged upon taking an oath of neutrality, and in such cases, it was just as well that their release would help mitigate a persistent foreign policy problem with Great Britain. Major-General John A. Dix to Seward, September 25, 1861, in \textit{O.R.}, II, II, 79; John A. Dix to Seward, September 30, 1861, in \textit{O.R.}, II, II, 84. See also the cases of George Shannon and Michael Reilly in \textit{O.R.}, II, II, 318.
the war.) One such Briton, John C. Brain, was arrested in Michigan City, Indiana, in early September 1861 on the charges of spying and recruiting for the rebels, and membership in the anti-Union group known as the Knights of the Golden Circle. He was sent to Fort Lafayette and then quickly transferred to Fort Warren. One attorney involved in the case, John B. Thomas, referred to Brain as “an unmitigated scoundrel and swindler.” At some point after his arrest and confinement, Brain claimed British nationality, insisting in a letter to the British Consul in New York, Edward Mortimer Archibald, that he was a London native and an unnaturalized American citizen. Brain appealed to Archibald “for protection and the restoration of my money and liberty.” Apparently unpersuaded by the evidence against Brain, Lyons tried to convince Seward of the prisoner’s harmlessness, telling the Secretary that Brain was “a man of so little education that I do not think he can be dangerous.” Seward complied and, after five months imprisonment, Brain was released after subscribing to an oath of neutrality on February 10, 1862.

While Lord Lyons and the British consuls in the Union went to great lengths to protect their countrymen from unjust military arrest and imprisonment, they did not press for releasing certain Britons whom they were convinced were guilty of disloyal activity, broadly defined. In Missouri, for example, British Consul John E. Wilkins refused to demand the release of Joseph M. P. Nolan once convinced of his “unquestioned disloyalty.” Nolan had apparently written a treasonous letter later intercepted by the Union military, and furthermore refused to subscribe to an oath of neutrality. Wilkins’s

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34 Lord Lyons to Seward, January 11, 1862, in *O.R.*, II, II, 716.

abstention from interfering in the case gained the admiration of Provost-Marshal George E. Leighton, who wrote Seward that “Mr. W[ilkins] is himself a warm friend of the Government and all his sympathies are with it in the efforts to put down rebellion.”

Sometimes, British subjects who had been arrested and successfully gained release on petition of Lord Lyons showed up in prison once again. One of them, Thomas C. Fitzpatrick, was arrested in July 1861 for alleged complicity in seizing the steamer Saint Nicholas, released, and arrested again in late January 1862 on charges of recruiting for the Confederacy. Such individuals did not win the sympathy of official British representatives, who were content to allow the prisoners to face punishment. Although Lyons and the British consuls prioritized the complaints of Britons legitimately wronged by the military in one way or another, their deference to military authorities in clear cases of disloyalty reflected a sincere cooperative attitude and general sympathy toward the Union cause.

Throughout the Civil War, the British government was just as concerned with the treatment of Britons inside jail cells as their free compatriots on the outside. At the ground level throughout the Union states, consuls frequently implored Lord Lyons to appeal to Seward for permission to visit British prisoners, and Seward often heartily complied with such requests. This must have been a relief to the British prisoners who claimed that their letters to the consuls had been intercepted by military authorities at the prisons. Such practices annoyed Lord Archibald in New York, who complained to Lyons

36 George E. Leighton to Seward, December 6, 1861, in O.R., II, II, 171. Wilkins did, however, attempt to secure Nolan’s release on the grounds of minority, but Nolan stubbornly refused to be released other than “as a right.” See O.R., II, II, 311.

in one such case that “If the Prisoner was entitled to claim my protection, such hindrance
should not have been opposed to his freely communicating with me.”

Archibald seems to have been especially active in such visits to New York prisons, and he frequently submitted detailed reports of his meetings with prisoners to Lyons. In addition to interviewing prisoners, the consuls would also evaluate and report to Lyons upon the actual state of prison conditions, and sometimes implored the British minister to lobby the U.S. government to improve the material conditions for British and American prisoners.

Despite Seward’s vigorous defense of military arrests under habeas suspension, as Secretary of State he was obligated to ensure that the arrests of foreign nationals did not grow into a major international incident. Given the natural frictions and abrasions of war and the necessity for maintaining cordial relations with the most powerful European power, the Lincoln government officially maintained that imprisoned British nationals did not suffer deliberate mistreatment by Union military authorities. When responding to complaints from the British minister, Seward frequently assured Lord Lyons that British subjects arrested by the military were subjected to no more harsh treatment or scrutiny than their American counterparts. Nor could harried military officials be condemned for failing to verify nationality in the heat of the moment, however regrettable or harsh such mistaken arrests might be for the prisoners and their loved ones. In the case of one Walsh, for example, Seward assured Lyons that the severities inflicted upon the Briton were “no

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38 Extract from Mr. Archibald to Lord Lyons, in Lyons to Seward, Nov. 12, 1861, Notes from the British Legation, RG 59, M50, Roll 42, NARA.

39 See, for example, Lord Lyons to John Russell, Feb. 12, 1864, in The American Civil War through British Eyes, III, 147-49.
greater in his case than those with which the disloyal Americans with whom he had combined were treated and which neither in his nor in theirs were carried beyond the necessities of the occasion.” Seward may have been correct that most British prisoners were not treated harshly in Union prisons, but in those relatively few cases in which deliberate mistreatment appeared manifest, Lyons did not hesitate to inform the Secretary of State that such incidents would not be tolerated by the British government. On October 28, 1861, Lyons complained to the Secretary about the “cruel treatment” to which British sailors had been subjected at Fort Lafayette, and notified him that Her Majesty’s Government demanded compensation for the prisoners. From the official perspective of the Palmerston government, the unfortunate and tragic realities of the American Civil War did not excuse all hardships unjustly imposed upon British subjects by the Lincoln administration.

The British Government’s Official Response to Lincoln’s Habeas Policy

If Lyons was initially willing to give the Lincoln administration the benefit of the doubt regarding the military arrests of Britons, his reports to London began to suggest otherwise by the fall of 1861. Having read almost daily reports of various civil liberties violations of Britons for several months, Lyons had become quite disturbed at the large volume of British subjects—real or alleged—who appealed to British consuls for relief from arbitrary imprisonment, coercion into military service, and military confiscation of their property. In late September, Lyons expressed his growing alarm over what he saw

40 Seward to Lord Lyons, September 24, 1861, in O.R., II, 77.

41 Lord Lyons to W.H. Seward, Oct. 28, 1861, in Notes from the British Legation, RG 59, M50, Roll 42, NARA.

42 Lord Lyons to Russell, September 9, 1861, in The American Civil War through British Eyes, I, 162-63.
as a Lincoln government becoming increasingly repressive toward civil liberties, and provided Russell with his own constitutional analysis regarding the emergency powers of the United States government. Lyons may not have had much legal training, but he often consulted American lawyers on various aspects of U.S. constitutional law.\footnote{See, for example, Lyons’s note to Seward on the topic of the legal status of minors in military service, Lyons to Seward, Nov. 4, 1861, Notes from the British Legation, RG 59, M50, Roll 42, NARA.} Citing the recent arrest of the mayor of Washington City, James G. Berrett, he complained to Russell that the Lincoln government and all military commanders “assume and exercise the right all over the [east] coast to arrest any persons, to keep them in confinement without assigning any cause, and to impose such terms as they please as conditions of release.” What was then occurring in the United States would surely shock the liberal sensibilities of many British citizens, and Lyons found that “The applause with which each successive stretch of power is received by the people is a very alarming symptom to the friends of liberty and law.”

But aside from the practical consequences of Lincoln’s habeas corpus policy, Lyons devoted much of his correspondence to Lord Russell in the fall to the abstract constitutional questions raised by Lincoln’s policy. In particular, Lyons seemed to place much weight upon the procedural remedy commonly raised by liberal critics of executive suspension and deeply implicated within the history of the habeas debates at the Constitutional Convention of 1787. The controversy surrounding Lincoln’s suspension of habeas corpus might have been mitigated, wrote Lyons, if Congress “had openly conferred upon the Executive Government certain defined extraordinary powers for a fixed time.” But this was, in Lyons’ view, arguably one of the greatest flaws of the
framers of the Constitution, who “were, perhaps, wrong in not conferring upon Congress authority to increase, temporarily, the powers of the Executive” in times of war. Although he acknowledged that the Constitution does explicitly authorize the suspension of the writ of habeas corpus in cases of rebellion or invasion, Lyons viewed as significant the fact that Congress had failed to expressly grant Lincoln the power of suspension during the recent summer emergency session. Had Congress done so, Lyons argued, “the arrests, at least, would have been legal: as it is, the writ is not even formally suspended by Proclamation of the President. The Government appears to assume what powers it pleases, the judicial authorities to be submissive or helpless, and the people to look on with singular complacency.”44 This “unhappy war,” Lyons concluded somberly, “appears then to be destroying the liberties of the people of the United States, as it is undoubtedly undermining their greatness and their prosperity.”45 Nearly a month later, this letter served an important role in prompting Russell to seek the formal advice of the Law Officers of the Crown on how the British government should respond to the military arrests of Her Majesty’s subjects under Lincoln’s “unconstitutional” habeas policy.

Though privately critical of Lincoln’s suspension of the writ, Lyons was not a temperamental man by nature and did not allow the issue to disrupt an otherwise cordial diplomatic relationship with Seward, who remained principally concerned with preventing official British recognition of the Confederacy. Yet despite Lyons’s assurance to his superiors in London that Seward was “anxious, in practice, to avoid arresting

44 Lord Lyons to Earl Russell, September 16, 1861, in B DFA, V, 311; Lord Lyons to Earl Russell, October 18, 1861, in B DFA, V, 322.

45 Lyons to Russell, September 16, 1861, in The American Civil War through British Eyes, I, 167-68.
British Subjects except by regular legal process,” a frustrated Russell accused Lyons of being “too tame about the arrest of British Subjects,” and instructed Lyons to indicate to Seward the British government’s willingness to test the detentions of Britons in court. Russell’s threat may have been a calculated ploy to cause public embarrassment for the Lincoln administration and, if so, such a tactic may well have damaged Anglo-American relations at a crucial early stage of the war.46 But Lyons was not the only one informing the British Foreign Secretary of the consequences of Lincoln’s habeas policy. For months, reports and stateside newspaper editorials sent overseas to England from Lord Archibald and other British consuls throughout the Northern states had fueled Russell’s discontent and aroused British public opinion to the issue. From Philadelphia, for example, Consul Charles Kortwright complained to Russell that the “mere suspicion of being engaged in treasonable intercourse with the South renders a person liable to arrest…and he is carried off to prison, or to some neighboring Fort.”47

The arrests of Patrick and Rahming appear to have exhausted what remained of Lord Russell’s patience on the issue, prompting him to construct an official British response to the arrests of Her Majesty’s subjects under the authority of the Lincoln government. Russell agreed with Lyons that Lincoln’s suspension of habeas corpus “requires the very serious consideration of Her Majesty’s Government,” calling the arrest of William Patrick “wanton and capricious.” His assessment of Lincoln’s habeas policy matched that of his British minister in Washington. “It appears,” wrote Russell, “that

46 Russell, as quoted in Berwanger, The British Foreign Service, 54; Ferris, Desperate Diplomacy, 120.

47 Kortwright, as quoted in Berwanger, The British Foreign Service, 56.
when British subjects as well as American citizens are arrested, they are immediately transferred to a military prison, and that the military authorities refuse to pay obedience to, or, indeed, to notice, a writ of *habeas corpus.*” For Russell and other British legal experts, such obstructionist practices on the part of Union military authorities clearly violated the Fifth Amendment due process rights of citizens and aliens, as they were “directly opposed to the maxim of the Constitution of the United States, ‘that no person should be deprived of life, liberty, or property, without due process of law.’” After reviewing the matter per Russell’s direction, the Law Officers of the Crown condemned Lincoln’s unilateral suspension of habeas corpus and the seemingly frivolous arrests that followed. They found that in cases of Britons detained by the military without recourse to habeas corpus, “there was so much illegality, coupled with so much harsh treatment, as fairly to entitle Her Majesty’s government to call upon the government of the United States for a full explanation if it should be deemed expedient to do so.”

Thus, following the legal advice of the Law Officers, Russell concurred with Chief Justice Taney that Lincoln’s suspension of habeas corpus was unconstitutional. Unlike Taney, however, Russell understood that the Lincoln administration faced the harsh realities of civil war. He conceded that the British government recognized and were willing “to make every allowance for the hard necessities of a time of internal trouble,” including temporary suspensions of civil liberties. Her Majesty’s Government also recognized that, given such considerations, even British subjects engaging in suspicious activity might rightly suffer the consequences of their actions at the hands of the policing military authority. But for Russell, Lyons, and the Law Officers (as for many critics of

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Lincoln’s unilateral suspensions of habeas corpus), the forms of law—as shown by the fact that Congress had recently adjourned without sanctioning executive suspension—mattered a great deal.

Although most scholars routinely downplay this fact by immediately jumping ahead to the belated Habeas Corpus Act of 1863, the failure of Congress to sanction Lincoln’s suspension power in July 1861 was hardly a “superfluous” issue to Lyons and British officials in London.49 Throughout the Civil War, the British government officially agreed with Chief Justice Taney’s insistence that the power of suspension lay with Congress, and not the president. For this reason, Russell wrote Lyons, the Law Officers “pronounced against the legality of the arbitrary arrests of British subjects.” From their perspective, Seward “exercises, upon the reports of spies and informers, the power of depriving British subjects of their liberty, of retaining them in prison, or liberating them, by his sole will and pleasure.” It was therefore obvious, Russell concluded, “that this despotic and arbitrary power is inconsistent with the Constitution of the United States, is at variance with the Treaties of Amity subsisting between the two nations, and must tend to prevent the resort of British subjects to the United States for purposes of trade and industry.” Russell instructed Lyons to officially protest against “such wanton proceedings,” and to convey to Seward the position of the British government that

49 Lyons to Russell, October 18, 1861, in The American Civil War through British Eyes, I, 180. Examples of this scholarly neglect of the period between the summer of 1861 (following Congressional inaction on the habeas issue) and the Habeas Corpus Act of March 1863, see Randall, Constitutional Problems; Farber, Lincoln’s Constitution; Krannawitter, Vindicating Lincoln; and McGinty, The Body of John Merryman.
congressional authority for executive habeas suspension was necessary “in order to justify the arbitrary arrest and imprisonment of British subjects.”

As Lincoln’s suspension of the writ of habeas corpus began to assume new importance as an Anglo-American foreign policy issue, Lyons gave Seward advance warning of Britain’s formal denunciation. On October 8, 1861, Lyons verbally informed Seward about Russell’s instructions, perhaps to allow the Lincoln administration more time to craft a conciliatory response. And although Seward was clearly the logical point of diplomatic contact for inquiring about foreign prisoners, British officials were also under the impression that the Secretary of State wielded a dominant influence over the general development of Lincoln’s habeas corpus policy, as Russell’s earlier dispatch indicated. This is not surprising, as many British observers—Lord Lyons included—initially viewed Abraham Lincoln as nothing more than a figurehead president, while the real executive power emanated from his Secretary of State. From this assumption, one can understand why the government in London may have believed that Seward, who also happened to be the most unpopular northern politician in England, represented the primary force behind Lincoln’s suspension of habeas corpus.

In any case, by the end of their meeting, Seward had left Lyons with the impression that the Lincoln administration would continue to work with the British government to alleviate the problems surrounding British prisoners. After hearing Lyons’s warning, Seward “said that he should probably reply that this [Union]

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50 Earl Russell to Lord Lyons, September 28, 1861, in BDF A, V, 310; Earl Russell to Lord Lyons, November 22, 1861, in O.R., II, II, 634.

51 Campbell, 110.
Government had arrested British subjects with the greatest reluctance, and not without
strong necessity; and that it had liberated them at the earliest possible moment compatible
with the public safety.”

The Secretary of State then asked Lyons if he would object to
Seward’s intention to publish the Lincoln administration’s official response, for he
“thought it would have a good effect upon public opinion at home and abroad, that the
position which the Government of the United States assumed should be made manifest to
the world.” Lyons “was inclined to think that the publication would tend to produce
embarrassment and unnecessary excitement,” but he left the meeting without insisting
against publication. On October 10, Lyons carried out his instructions by formally
delivering the British protest to the State Department. In substance, the letter reflected all
of the principal constitutional points raised by the Law Officers in Russell’s dispatches to
Lord Lyons. But although Lyons and Russell may not have realized it at the time, the
British government had unwittingly handed the Lincoln administration the ammunition it
needed to rally northern Anglophobes around the Union flag and overcome any
apprehensions over publicly defending executive habeas suspension.

The Lincoln Administration’s Rebuttal

On the surface, Seward’s official response to Lord Lyons appeared to be nothing
more than a bellicose rebuttal one would expect from the Secretary’s well-known animus
toward Britain and hardline stance against European interference in American affairs.

52 Lord Lyons to Earl Russell, October 14, 1861, in *BDFA*, V, 319.

53 Lord Lyons to Earl Russell, October 18, 1861, in *BDFA*, V, 322.

54 See Lord Lyons to Russell, October 14, 1861, in *American Civil War through British Eyes*, I,
178-79.

55 Jenkins, *Britain & the War for the Union*, I, 186.
However, although unnoticed among constitutional historians, this October 14 letter anticipates some of the principal constitutional arguments justifying executive suspension of habeas corpus that Lincoln would later enunciate in his Corning letter of May 13, 1863, in which the president offered his fullest habeas policy defense. Against British complaints over military arrests, the Lincoln administration defended a broad interpretation of the constitutional authority vested in the executive branch to combat insurrection through habeas suspension, reflecting Lincoln’s consistent constitutional position throughout the war. The President, wrote Seward,

is charged by the Constitution and laws with the absolute duty of suppressing insurrection, as well as of preventing and repelling invasion; and that, for these purposes, he constitutionally exercises the right of suspending the writ of habeas corpus, whenever and wheresoever, and in whatsoever extent, the public safety, endangered by treason or invasion in arms, in his judgement requires.

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56 For an excellent analysis of the Corning Letter, see Mark E. Neely, Jr., “The Constitution and Civil Liberties under Lincoln” in Eric Foner, ed., Our Lincoln (New York: Norton, 2008), 45-51. More recently, Neely characterizes the Corning Letter as “a blistering and uncompromising justification of the internal security measures of his administration, replete with the tough language presidents use in war when the enemy gets near the gates.” Neely, Lincoln and the Triumph of the Nation, 86. William A. Blair sees Lincoln’s Corning Letter as “a frightening missive,” one “that should still raise eyebrows.” Blair, With Malice toward Some, 178-79. For further discussion of the Corning Letter, see Chapter V.


58 Seward to Lyons, October 14, 1861, in British and Foreign State Papers, 1860-1861, 170 vols. (London, Foreign Office: William Ridgway, 169, Piccadilly, 1868), v.51, 245. In a letter to Lyons a week later on October 21, 1861, Seward reiterated this point: “The duty of the President is to save the Government from being overthrown, and were the writ of habeas corpus to remain in full force till Congress could act, he might be rendered utterly powerless....It may seem hard to imprison an individual, but it is harder for a nation to be destroyed. If foreigners come among us, they must share not only in our good fortune, but in the calamities which the rebellion has caused; and if they are found tampering with or encouraging it, they must be prepared to pay the penalty due to the gravest offenses against society.” Seward to Lyons, October 21, 1861, as quoted in Berwanger, The British Foreign Service, 57.
Such language parallels Lincoln’s later insistence in the Corning letter that preventive military arrests “are constitutional wherever the public safety does require them…equally constitutional at all places where they will conduce to the public Safety, as against the dangers of Rebellion or Invasion.”59 This was a significant leap from Lincoln’s apparent reluctance to suspend habeas corpus to “a very limited extent” in his earlier message to Congress of July 4, 1861. Nearly a year before nationalizing the suspension of habeas corpus on September 24, 1862, and almost two years before the Corning Letter, Lincoln seized upon the issue of Britons arrested by the Union military to publicly defend an unconstrained theory of executive habeas suspension based on military necessity.60

Apart from disagreeing over the proper scope of executive military authority, Seward’s letter also addressed Lyons’s specific complaints regarding the arrests of Patrick and Rahming, as Lincoln would later address Albany Democrats’ complaints regarding the arrest of Clement Vallandigham in the Corning Letter.61 The proceedings taken against these two Britons, Seward asserted, “were not instituted until after [Lincoln] had suspended the great writ of freedom in just the extent that, in view of the perils of the State, he deemed necessary.” Seemingly contradicting himself, Seward also noted that, to his knowledge, neither man had actually petitioned for a writ of habeas corpus, “although in a case not dissimilar the writ of habeas corpus was issued out in favor of another British subject and was disobeyed by direction of the President.” If Seward was here referring to the earlier case of Purcell Quillan, British officials were

59 Lincoln to Erastus Corning and Others, June 12, 1863, in CWL, VI, 265-66.

60 Lincoln’s Proclamation Suspending the Writ of Habeas Corpus, September 24, 1862, CWL, V, 436-37.

61 Neely, Lincoln and the Triumph of the Nation, 86-89. For further discussion on the Vallandigham case, see chapters IV and V.
unlikely to be persuaded by his suggestion that the cases of Patrick and Rahming might have turned out differently had they petitioned for habeas writs. Given the Lincoln administration’s willingness to obstruct habeas procedures in Quillan’s case, there is little reason to believe that the same process would not have played out in the case of any other British subject.

Nevertheless, Seward assured Lyons that “in every case subjects of her Majesty residing in the United States and under their protection are treated during the present troubles in the same manner and with no greater or less rigor than American citizens.” Treason represented a constant danger in the North, and Lincoln believed that preventative arrests under executive habeas suspension were therefore necessary to combat subversion: “Treason always operates, if possible, by surprise, and prudence and humanity therefore equally require that violence, concerted in secret, shall be prevented, if practicable, by unusual and vigorous precaution.” As Lincoln later assured Americans in the Corning letter, although mistaken arrests were bound to occur amidst the frictions and abrasions of war, the triumph of civil liberty would return with the end of the conflict. With ultimate Union victory, Seward assured Lyons, “all the other blessings which attach to it will speedily return with greater assurance of continuance than ever before.” The American people have accepted habeas suspension “as a stern necessity,” and even foreigners living in the United States could not be exempted from such measures. “So long as the danger shall exist,” wrote Seward, “all classes of society, equally the denizen and the citizen, cheerfully acquiesce in the measures which that law prescribes.”

Finally, Lincoln rejected the British Crown’s legal arguments regarding

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62 Seward to Lyons, October 14, 1861, in *British and Foreign State Papers, 1860-1861*, v.51, 246. In one of the memorable passages of his Corning letter, after admitting that “the time [is] not unlikely to
habeas suspension, as he later rejected the constitutional interpretations of Democratic and liberal critics in the Corning letter. Although the U.S. government “does not question the learning of the legal advisers of the British crown or the justice of the deference which Her Majesty’s government pays to them,” Seward conceded, “the British government will hardly expect that the President will accept their explanations of the Constitution of the United States.”

Through this letter to Lord Lyons (but intended as well for Russell’s consumption in London), Lincoln affirmed that his habeas policy would not be challenged or altered by lawyers or ministers of the British government. Indeed, Lincoln was signaling his willingness to embrace a bold theory of executive power, one that justified military arrests under suspension of habeas corpus even in areas far removed from the battlefield (although he would not find it necessary to do so by official policy edict until September 1862). In short, Lincoln’s defense of executive habeas suspension against British complaints skillfully masked the letter’s broad implications for civil liberty within a passionate appeal to Northerners’ patriotism and Anglophobia to rally around the Union flag and their president’s use of controversial war powers to save it. If the Corning Letter is, as the leading historian of civil liberties under Lincoln contends, “the strongest

come when I shall be blamed for having made too few arrests rather than too many,” Lincoln maintained that he could never “appreciate the danger…that the American people will, by means of military arrests during the rebellion, lose the right of public discussion, the liberty of speech and the press, the law of evidence, trial by jury, and Habeas Corpus, throughout the indefinite peaceful future…any more than I am able to believe that a man could contract so strong an appetite for emetics during temporary illness, as to persist in feeding upon them through the remainder of his healthful life.” Lincoln to Erastus Corning and Others, June 12, 1863, CWL, VI, 265, 267.

63 Lyons to Russel, October 18, 1861, in The American Civil War through British Eyes, I, 180; Jenkins, Lord Lyons, 167-68.

64 Berwanger, The British Foreign Service, 57.
statement ever made by any American president asserting the power of the government to restrict civil liberty,” the propositions contained therein were already evident in Lincoln’s mind almost two years earlier. Lincoln’s first public justification of unrestricted preventative military arrests occurred not in response to the arrest of Clement Vallandigham or any other American citizen, but rather in response to the Palmerston government’s protests against the arrests of British nationals in the Union. Thus, historians should recognize that the military arrests of Britons during 1861 played a configurative role in shaping Lincoln’s constitutional thought regarding executive suspension of habeas corpus.

Seward went to work ensuring wide publication of his exchange with Lyons in order to galvanize public opinion against Britain’s condemnation of Lincoln’s habeas corpus policy. On October 21, 1861, an article appeared in the New York Times that defended Seward’s forceful response to the British minister (and may have been written by Seward himself). The Secretary’s response to Lord Lyons, the Times reported, “is calculated to exert the most happy influence, not only over the public mind of this country, but in maintaining the existing harmony of our relations with all European powers.” In defending Lincoln’s habeas policy against British condemnation, Seward “places the action of our Government on grounds entirely unassailable” from “every foreign court.” Invoking the popular animus toward England, the article assured readers that “the great victory” of Seward’s letter “will tend to relieve any apprehension our people might entertain, in this emergency, of unwelcome interference on the part of Great Britain.” The complaints of Lord Lyons on behalf of imprisoned British subjects were

65 Neely, Lincoln and the Triumph of the Nation, 86.
entirely unwarranted, and the Lincoln administration had cooperated in securing their discharges upon investigations by the War Department. The Times then blasted the “gratuitous portion” of Lyons’s letter arguing against the constitutionality of executive suspension, and recounted Seward’s rebuttal almost word for word. The article concluded with a prediction that Seward’s “masterly presentation” of the habeas corpus problem “has touched a chord that will vibrate through the nation, assuring it of harmony at home, and of the respect and strict impartiality, if not the kind offices of other nations.” In the end, Seward’s decision to publish his correspondence with Lyons likely won the approval of many northerners resistant to any British interference in the war, although it is unclear whether the exchange brought many administration critics around to supporting Lincoln’s suspension of habeas corpus.

The Official British Outlook at the End of 1861

Whatever Russell hoped would come out of Lyons’s official protest, Seward’s public response did not give him much reason for optimism that Britons would find better protection under Lincoln’s habeas policy in the future. After reading the American administration’s position defending military arrests, Russell sarcastically wrote Lyons in early November: “Her Majesty’s Government did not before understand that the President was invested by the Constitution with powers so despotic and so arbitrary.” A week later, however, Russell decided that the intractability of the Lincoln administration suggested a temporary reprieve from pressing the issue further. After all, what good

66 “The Correspondence between Lord Lyons and Mr. Seward,” The New York Times, October 21, 1861.

67 Jenkins, Britain & the War for the Union, I, 185.

68 Earl Russell to Lord Lyons, November 2, 1861, in BDFA, V, 325.
would come from a foreign power demanding Lincoln to stop a practice that he clearly regarded as lawful? Russell also recognized that the federal courts—as well as the highest judicial officer in the land, Chief Justice Roger Taney—had thus far proven an ineffective check against an unusually powerful president, as decisions “unpalatable to the Executive” were simply ignored by military officers who cited Lincoln’s suspension of the writ of habeas corpus for doing so. Moreover, in extreme habeas cases such as *Murphy*, the administration had clearly demonstrated a willingness to take extraordinary physical actions against troublesome judges. Therefore, Russell informed Lyons, “Her Majesty’s Government are unwilling to enter into an irritating and useless [constitutional] controversy with the United States, and can only hope that the present exceptional state of things will not be of long continuance.”

Thus by November 1861, Britain had settled on a cautious wait-and-see policy regarding the military arrests of Britons under Lincoln. In the meantime, however, Russell sought to correct some of the misunderstandings implicated by Seward’s rebuttal to Lyons in a follow-up letter to the Secretary of State. Despite Seward’s public accusation to the contrary, wrote Russell, Her Majesty’s Government had not meant to assert a superior reading of the United States Constitution. Rather, “It is necessary in every case where a British subject complains to consult the law of the country in which the complaint arises”—in this case, Britons affected by the American Constitutional right to habeas corpus. Otherwise, such complaints “can only be directed against harshness of administration and excess of rigor.” Russell assured Seward that neither he nor the Law Officers of the Crown presumed to controvert the law of the United States regarding its

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69 Earl Russell to Lord Lyons, November 9, 1861, in *B DFA*, V, 330.
own citizens. What the British government doubted, however, “was the authority of the President to set aside the law and privilege of habeas corpus by his sole will and pleasure,” a doubt shared “by many of the most eminent lawyers of a country fertile in men of legal attainments and judicial fame.”70 Seward accepted Russell’s letter, but did not advance the debate with the Palmerston cabinet any further for the time being.71

While diplomatic historians of the American Civil War have long emphasized the importance of maritime conflicts surrounding British neutrality and Confederate recognition as the principal issues in Union foreign policy, few have recognized how Lincoln’s suspension of habeas corpus also placed a serious strain on Anglo-American relations during the first year of the war. When Seward and Lyons sat down to discuss the state of Anglo-American affairs on November 2, as reported by Lyons in a dispatch to Russell, the British ambassador reiterated the ongoing importance of Lincoln’s habeas policy in the eyes of Her Majesty’s Government. For his part, the Secretary of State opined that the reception of Confederate vessels in British ports represented the only present “difficulty” between the United States and Great Britain. Greeted by silence, Seward invited the British minister’s response. Seizing the opening, Lyons objected that the numerous military arrests of British subjects, as well as the harsh treatment to which some British detainees were subjected, “constituted in my eyes a grave danger to the cordial relations between the two countries.” Such grievances, Lyons assured Seward, “made a very painful impression upon Her Majesty’s Government,” and “would have a

70 Russell to Lyons, November 22, 1861, in O.R. II, II, 633-34.
71 Seward to Lyons, January 13, 1862, in British and Foreign State Papers, 1860-1861, v.51, 264-5.
great effect upon public opinion in England.” Britons “felt very strongly on the subject of the treatment of their fellow-countrymen abroad,” said the British minister, and “nothing inspired them with so strong or so lasting a resentment as injuries and indignities inflicted by foreign Governments on Her Majesty’s subjects.” Seward replied that the arrests of which Lyons complained had been made in view of securing the local Maryland elections, and once over, he “hoped then to be able to set at liberty all the British subjects now under military arrest.” Lyons likely took little comfort in Seward’s reply, but he had at least signaled to Seward that the Palmerston government would continue to monitor the civil liberties violations of Britons under Lincoln as the war unfolded.

The military arrests of British subjects during 1861 quickly emerged as a growing foreign policy concern among British representatives in the Union. By the fall of that year, after receiving numerous reports of arrests from Lord Lyons and the British consuls, the Palmerston government officially notified the Lincoln administration that the wrongful military arrests of Britons would not be tolerated by a foreign power striving to remain neutral. On the advice of the Law Officers of the Crown, Foreign Secretary Russell went even further by declaring Lincoln’s assumed power of executive habeas suspension unconstitutional. Once a purely domestic issue, the suspension of habeas corpus in the Union had transformed into a persistent Anglo-American problem, and the official complaints of the British government prompted the Lincoln administration to develop a matured public defense of executive suspension asserting the practical necessity and constitutionality of arresting foreigners on the same grounds as their American counterparts. In order to shore up public support for Lincoln’s suspension

policy and rally all northern Anglophobes around the Union flag, Seward ensured publication of his correspondence with Lord Lyons on the issue. By the close of 1861, the British government remained worried about the civil liberties of Britons in the Union, but settled upon a cautious wait-and-see policy as the second year of the war unfolded. Even as diplomats on both sides of the Atlantic desperately sought a peaceful resolution to the Trent crisis, it remained unclear how the British government would be able to protect Her Majesty’s subjects from the consequences of Lincoln’s habeas corpus policy in the future.  

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73 Even during the fallout over Trent, Lord Lyons reported to Russell that he continued to press the military arrests of Britons as a point of serious concern in his correspondence with Seward. See, for example, Lord Lyons to Russell, December 16, 1861, in The American Civil War through British Eyes, I, 248-49. Today, most historians—diplomatic and otherwise—of the American Civil War would likely point to Trent affair as bringing the U.S. and Great Britain to the brink of war, and discount the issue of Britons arrested by the Union military as a serious foreign policy concern. But it must be pointed out that the mere seizure of the ship bound for a neutral power in neutral waters did not constitute the sole issue of the affair; the British government also strongly protested the military detention of the Confederate emissaries, and demanded their release from Fort Warren as a necessary condition for resolving the crisis.
CHAPTER IV
THE BRITISH HABEAS EXPERIENCE UNDER LINCOLN, 1862-1865

While the military arrests of Britons under Lincoln’s habeas corpus policy represented one of several “causes of irritation” between the Union and British governments by the end of 1861, the issue did not seriously threaten a rupture between Britain and the Union in the same way that the Trent crisis had.\(^1\) When the Lincoln administration doubled down on its defense of military arrests in response to official British complaints in October and November 1861, the Palmerston cabinet in London adopted a policy of cautious cooperation to await the further development of Lincoln’s suspension of habeas corpus as it related to British subjects in the Union. And while tensions had finally cooled across the Atlantic with the resolution of Trent in January 1862, Lord Lyons feared that the “arbitrary” military arrests of British subjects would remain a serious foreign policy concern for the duration of the war. Throughout much of 1861, the British minister and northern British consuls had dealt with complaints of mistreatment and injustice from prisoners on virtually a daily basis, and Lyons did not expect that the Lincoln administration would become more conciliatory on this issue as the war unfolded.

\(^1\) Lincoln’s First Annual Message to Congress, December 3, 1861, \textit{CWZ}, V, 36. In a letter to his chief diplomat in London, Charles Francis Adams, Seward wrote that Lincoln “had never failed to forecast the dangers of alienation between Great Britain and the United States, hence his promptness in seeking to adjust the reasonable claims of British subjects, and meet the just expectations of her Majesty’s government.” Seward, as quoted in Mahin, \textit{One War at a Time}, 196.
Although historians have long recognized that Lincoln eventually expanded the geographic scope of executive habeas suspension to encompass the entire Union from September 1862 onward, the importance of the president’s habeas policy continued to transcend national boundaries for the duration of the war. Habeas suspension was not a purely domestic problem concerning only American citizens, but an Anglo-American problem concerning many transplanted Britons, as well. While the British Legation in Washington kept a close eye on further developments of Lincoln’s habeas corpus policy, military arrests of Britons in the Union remained a persistent Anglo-American problem between January 1862 and the end of the war in April 1865. Yet, much like the pattern for resolving this problem first established by Lyons and Seward during 1861, the British and Union governments were able to handle cases of arrested Britons as they emerged at the diplomatic level without provoking more forceful British intervention. In early 1862, Foreign Secretary Russell assured Parliament that the British government would never again officially challenge Lincoln’s executive authority to suspend habeas and arrest British subjects as long as the war in America continued. This did not mean, however, that Lyons or the British government became less insistent in demanding justice for wrongfully arrested Britons. Between 1862 and 1865, many bona fide Britons continued to find themselves in Union military prisons, and they frequently reached out to the British Legation or their nearest consuls for protection. While Britons continued to be arrested for running the blockade, Lyons was more inclined to intervene in cases involving arrests for various acts of disloyalty allegedly committed on land. Although eventually eclipsed in importance by military conscription of Britons from late 1862
onward, the British Legation continued to prioritize the protection of Britons from military arrests during the American Civil War.

Lincoln’s Habeas Policy and the British Parliament

Although matters concerning foreign policy were within the exclusive purview of Foreign Secretary Russell and the Palmerston cabinet, official discussion of Lincoln’s habeas corpus policy also emerged briefly in the British Parliament in early 1862. In general, most Members of Parliament focused on domestic issues within the British realm, having reached a consensus to remain neutral in the American conflict in early 1861. The most recent study of Parliament and the American Civil War finds that only 87 of well over 600 members in the House of Commons spoke out on issues related to the war between 1861 and 1865, and few Members of Parliament or the Palmerston cabinet vocally supported the Confederacy. Still, the arrest and detention of Britons in the Union under Lincoln’s suspension of habeas corpus arose in Parliamentary discussion on two occasions in February 1862, probably due to the Lincoln administration’s well-publicized response to British complaints on the issue from the previous October and the increasingly extensive coverage of habeas corpus in the Union by the London press during the latter half of 1861. When two Members of Parliament pressed Foreign Secretary Russell about the hardships suffered by Britons arrested under Lincoln’s habeas corpus policy, Russell seized upon this opportunity to reiterate the cabinet’s policy of cautious cooperation with the Lincoln administration on the issue.

In Parliamentary session on February 10, 1862, the Fourth Earl of Carnarvon, Henry Howard Molyneux Herbert, insisted that the arrests of Britons under Lincoln

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represented “an important point” which “neither the House [of Lords] nor the country could be indifferent to.” Perhaps relying on British press reports of the American conflict, Herbert reminded his peers about the large numbers of Americans and foreign nationals “who had been arrested, dragged from prison to prison, suffering every hardship” and “confined for an indefinite period” lasting as long as five months in the Union states. Moreover, Union prison conditions had apparently been personally described to him as “oppressive and intolerable” by an unnamed “authority” (here Herbert was probably referring to either Lord Lyons or a northern British consul). In a serious display of rhetorical exaggeration that perhaps alluded to Americans’ troubled historical commitment to liberty, Herbert assured his listeners that prisoners in Union forts suffered conditions “very little better than the middle passage” once experienced by Africans on slave ships destined for North America. While Britain could not, of course, rightfully dictate how the American government should treat its own citizens, Herbert doubted that Union military officials would treat British subjects any better than they would American citizens—particularly if the former refused to take the oath of allegiance to the United States. Like many British officials in London and representatives in the Union states, Herbert insisted that the Lincoln administration respect the ultimate constitutional safeguard of due process for prisoners of all nationalities. “If the persons thus arrested were guilty,” he proposed, “let them, after a fair trial, undergo the punishment the law awarded for their offence; but they should not be detained in prison for an indefinite period, and on secret charges.” Under such circumstances, Herbert concluded, the British government was obligated to protect Her Majesty’s subjects facing arbitrary military
justice under the Lincoln administration, and he asked Foreign Secretary Russell what steps he had thus far taken to address the issue.\(^3\)

Herbert was not the only MP to publicly condemn the consequences of Lincoln’s habeas policy on British nationals. The Conservative Earl of Derby also rose from his seat to rail against “the gross outrages thus inflicted upon British subjects” under the suspension of habeas corpus in the Union.\(^4\) Admitting that Lord Lyons had performed admirably in his duties to protect Britons against military injustice, Derby proclaimed that “the treatment of British subjects by the American Government has been such as highly to try the patience of this country.” He criticized Russell for “acquiesce[ing] contentedly” to Seward’s defiant letter of October 14, 1861, in which the Secretary of State vigorously defended the habeas policy of the Lincoln administration. Under a presumed executive authority to suspend the writ of habeas corpus—an authority neither found in the Constitution nor granted by Congress, Lord Derby argued—the American people were no better off than “those whose lot is cast under the old monarchies.” But even if the British government had no legal right to question the authority of the United States Constitution or the actions of the Lincoln administration, there was no “law or precedent by which a person may be called upon to forfeit his nationality and swear

\(^3\) Proceedings from the United Kingdom House of Commons and House of Lords, 10 February 1862, col. 102-105. United Kingdom Parliament, online (London: 1862) (hereafter cited as Hansard 1862). To bolster his case, Herbert cited the recent cases of three British detainees in Union prisons: Andrew Low, Charles Green, and a third, unnamed Briton who was likely Green’s sister, one Mrs. Low. Andrew Low, an alleged rebel agent working for the Confederacy out of Georgia, was arrested in Cincinnati on November 3, 1861, and confined in Fort Warren. Green, a resident of Savannah, Georgia, was arrested in Detroit for his financial connections to the Confederacy and sent to Fort Warren on November 9, 1861. His sister, Mrs. Low, was arrested on November 12, 1861 for serving as a conduit for conveying correspondence and information to the Confederacy, and released the next day after taking a modified oath. Documentation for these cases may be found in *O.R.*, II, II, 1031-40. See also Jenkins, *Lord Lyons*, 190.

\(^4\) Lord Derby’s full name and title: Edward George Geoffrey Smith Stanley, fourteenth earl of Derby.
allegiance to another country before he enjoys the privilege of being brought to trial.”\textsuperscript{5} Here, Lord Derby referred to the practice of Union military officials demanding Britons to swear an oath of allegiance before release from prison, which happened in some but not all cases. In substance, the complaints offered by Herbert and Lord Derby about the plight of Britons under Lincoln’s habeas policy were no different from those previously made by Russell throughout 1861.

Given Russell’s earlier hard line stance on Lincoln’s habeas policy, Members of Parliament might have expected the Foreign Secretary to sympathize with such critical remarks. Instead, Russell offered a cautious, yet qualified defense of the Lincoln administration’s habeas corpus policy that seemed directly contrary to his earlier position on executive suspension. He reminded the House of “the very critical circumstances in which the Government of the United States is placed,” recounting the events leading to the secession crisis and subsequent war mobilization campaign in the North. “In such circumstances as these,” Russell argued, “it is usual for all Governments to imprison on suspicion persons who they consider are taking part in the war against them.” England had done just that under a suspension of habeas corpus as recently as 1848 in order to suppress an uprising in Ireland, which resulted in the arrests of two American citizens who then-Foreign Secretary Palmerston had refused to give up to the U.S. government. Russell then reminded the House that he had already instructed Lord Lyons to officially protest against the imprisonment of British subjects and American citizens, and of the end result: Seward’s public assurance that the Lincoln administration would not temper its

\textsuperscript{5} Hansard 1862, 10 February 1862, col. 109-111; Donald Bellows, “A Study of British Conservative Reaction to the American Civil War,” \textit{The Journal of Southern History} 51, n.4 (Nov., 1985), 516.
habeas corpus policy in response to British complaints. Russell assured Members of Parliament that although he did not wish to “vindicate the act of the American government in any of these [previous] cases,” the power of habeas suspension “must belong to some person in the Government of the United States, if it believes that the parties are engaged in a treasonable conspiracy against it [or] in cases of great peril.”

This admission conceded the practical argument that Lincoln (and Seward) had been making all along: that in the midst of a national crisis or emergency, the person within the government tasked with executing the law—the President—was likely to be in the best position to quickly combat threats to the nation’s survival through such means as a suspension of habeas corpus.

If Russell continued to privately disagree with Lincoln’s theory of executive suspension in the abstract, the Foreign Secretary made it clear that the British government would never again officially contravene the President’s authority to suspend the writ as long as the war continued. After all, Congress appeared to have implicitly upheld Lincoln’s actions anyway; by not explicitly repudiating executive suspension of habeas corpus during the recent emergency summer session, Russell reasoned that Congress had given Lincoln “a virtual confirmation of the power” to suspend. Abuses of this power were, of course, to be expected. Yet on the whole, the Foreign Secretary reminded the House that the United States government had cooperated with British consuls in the Northern states by routinely granting them access to prisoners, giving their complaints a fair hearing, and ordering most prisoners released. Besides, on a more practical level,

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6 Hansard 1862, February 10, 1862, col. 111.

7 Hansard 1862, February 10, 1862, col. 111.
what could the British government do when such cases arose aside from allowing Lyons to work things out with Seward and the Union military authorities at the diplomatic level? As Russell assured the assembled MPs:

But in every case where a British subject is arrested and a reasonable case is made out for him I shall be ready to instruct Lord Lyons to bring the case under the consideration of the Government of the United States. Lord Lyons has never been wanting in this duty. [Hear, hear.] He has I think shown himself a vigilant British minister in that respect; and I trust your lordships will not think that these cases have been neglected by the Government of this country. [Hear]

In short, Russell reiterated the official British position of cautious cooperation on Lincoln’s habeas policy that would continue to characterize general Anglo-American relations during the remainder of the war. Russell repeated his position on Lincoln’s habeas policy in a subsequent House session eight days later, in response to demands for compensation in the case of a Briton recently arrested and detained for several months by the Union military. This time, Russell went even farther in defending Lincoln’s authority to suspend habeas corpus. While suspension of the writ of habeas corpus in England required an Act of Parliament, Russell pointed out that the ambiguity of the U.S. Constitution left open the question of whether suspension required congressional or executive action (or if both branches shared the power of suspension). Given the apparent acquiescence of the northern public toward Lincoln’s habeas policy, however, Russell opined that “all parties in America appear to have consented to the assumption, that this authority should reside in the

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8 Hansard 1862, February 10, 1862, col. 105-109.

9 Myers, Caution and Cooperation, 15; Jenkins, Lord Lyons, 189-90.

President and the Secretary of State acting under his orders.” Therefore, Russell continued, “I do not see that [the British Government] can contend” that Lincoln’s suspension “is not a lawful authority…though it may have been acted on to the injury of British subjects as well as of American citizens.” The Lincoln administration was embroiled in a great civil war, regrettable injustices were bound to occur in the realm of civil liberties, and Russell was “therefore disposed to view with some forbearance acts which in other Governments and under other circumstances would call for remonstrance.”

Russell’s commitment to holding the line against further British intervention regarding Lincoln’s habeas policy is also evident in his response to complaints regarding British prisoners coerced into taking loyalty oaths and thereby forfeiting their British nationality. Disingenuously, he denied any knowledge that the Lincoln government had intimidated bona fide Britons into taking the oath of allegiance to the United States, despite the many detailed reports of such cases he had received from Lord Lyons. If nothing else, Russell was certainly aware that J. C. Rahming had been released from military custody in the fall of 1861 only upon condition of subscribing to an oath of allegiance, for Rahming’s case had served as a partial impetus for Russell’s formal complaint against the Lincoln administration during the previous October. Nevertheless, Rahming’s case was the exception to the rule, even if this was not clear to British observers across the Atlantic at the time. In the vast majority of cases, British observers across the Atlantic at the time. In the vast majority of cases, British observers across the Atlantic at the time. In the vast majority of cases, British


12 Hansard 1862, February 10 1862, col. 112-113.

13 For further discussion on the Rahming case, see Chapter II.
prisoners were required by Union military authorities to swear a modified neutrality oath to never again visit the Confederacy or otherwise participate in the American conflict.\textsuperscript{14} Negotiating the amorphous boundary between citizenship and nationality in these myriad cases explains much of why military arrests under Lincoln remained a persistent problem for British diplomats and Union officials on the ground, but one that both governments worked diligently to settle. Although few MPs weighed in on the problems surrounding Lincoln’s habeas policy, Parliament provided Foreign Secretary Russell with an opportunity to publicly enunciate Britain’s policy of cautious cooperation with the Lincoln administration on British Union prisoners in early 1862. While the Palmerston cabinet would not begin to firmly retreat from intervention until the fall of 1862, further aggravation over the habeas corpus issue in the wake of British outrage over \textit{Trent} might needlessly endanger its policy of neutrality, and so neither Russell nor any other British official in the meantime would again challenge Lincoln’s authority to suspend habeas and arrest British subjects.\textsuperscript{15} Instead, the Foreign Office would direct the British Legation in Washington to continue to investigate emergent cases as long as the war in America continued. Additionally, Russell’s remarks suggest that he both recognized Lincoln’s resolve to restrict civil liberty in pursuit of ultimate Union victory and—like many other officials in the Palmerston cabinet—expected an imminent end to the war and

\textsuperscript{14} Neely, \textit{Fate of Liberty}, 26.

\textsuperscript{15} Doyle, \textit{The Cause of All Nations}, 234-37. While Lincoln’s Emancipation Proclamation certainly affected British views of the war and the Union, continued British neutrality probably owed more to revolutionary rumblings on the European Continent. On British public opinion regarding the Emancipation Proclamation, see Doyle, 240-2, 243-9. For a different view, see Campbell, 15, 51, 245-6. Although more recent, Doyle’s analysis does not engage with Campbell’s earlier work, and as a result, Doyle perhaps overstates British support for the EP and its role in perpetuating British neutrality.
Confederate independence.\textsuperscript{16} While either outcome remained far from clear in early 1862, suspension of habeas corpus in the Union continued to cause problems for British subjects and diplomats in the Union for the remainder of the war.

**Further Developments in Lincoln’s Habeas Policy through British Eyes, 1862-65**

Diplomats at the British Legation in Washington continued to closely monitor developments in Lincoln’s habeas corpus policy between 1862 and the end of the war in order to anticipate its potential implications for British subjects and Anglo-American relations. As the *Trent* crisis subsided in early 1862, Lincoln’s internal security system underwent a significant shift in administration. In February 1862, control over military arrests was transferred from the State Department to the War Department, now headed by Edwin M. Stanton and more suitable than the former as an enforcement apparatus for policing the Union. This change initially made Lord Lyons optimistic that the arrests of British subjects would diminish, for he had long seen Secretary of State Seward as an overzealous jailer of “disloyal” American citizens and foreign subjects throughout the first year of the war.\textsuperscript{17} In a February 21, 1862 dispatch to Foreign Secretary Russell in London, Lyons confided his relief that Seward would no longer maintain control of military arrests: “I think it is well that the arrests should be withdrawn from Mr. Seward. He certainly took delight in making them, and I may say playing with the whole matter. He is not at all a cruel or vindictive man, but he likes all things which make him feel that

\textsuperscript{16} Jones, *Blue & Gray Diplomacy*, 149; Stahr, *Seward*, 214.

\textsuperscript{17} Jenkins, *Lord Lyons*, 186-87.
he has power.” But there was reason to hope for positive change in this regard, the British minister continued:

I am inclined…to hope that the practical effects will be much greater than [a simple transfer of administrative power]... I trust that they are intended to do away with the system of making arrests on mere suspicion; of detaining the persons arrested in prison for an indefinite length of time without bringing any specific charge against them; [and] of imposing arbitrary conditions for their release. I shall be much disappointed if all the British subjects now imprisoned in the United States without legal process be not immediately set at liberty.19

Before long, however, Stanton’s administration of the system of military arrests would prove Lyons’s initial optimism unfounded. While the British minister (and subsequent generations of historians) magnified the severity of the system of arrests conducted under Seward’s watch during 1861, military arrests drastically increased under the direction of Stanton’s War Department.20 Between the outbreak of war and February 15, 1862, 864 persons were arrested under Seward’s control of the internal security system. After Stanton assumed control, well over 10,000 persons were arrested throughout the remainder of the war (although the precise number of arrests, as Neely notes, is impossible to ascertain).21 Like his commander-in-chief, the fiercely determined Secretary of War did not allow British complaints, much less those of other foreign

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18 Lyons to Russell, February 21, 1862, in Barnes and Barnes, *Private and Confidential*, 280.


20 This trend is especially evident in the work of Dean Sprague, *Freedom under Lincoln*, but also may be seen among the most prominent early biographers of Seward. See Frederic Bancroft, *Life of William H. Seward* (New York: Harper & Brothers, 1900), II, 280; Glyndon Van Deusen, *William Henry Seward* (New York: Oxford University Press, 1967), 290. More recently, however, Neely has shown decisively that such portrayals have exaggerated the number of military arrests under Seward. See Neely, *Fate of Liberty*, 19-24. Seward’s most recent biographer, Walter Stahr, has incorporated Neely’s corrective into his *Seward*. For a recent treatment on Stanton’s record on military arrests, see Marvel, *Lincoln’s Autocrat*, 220-21.

21 Neely, *Fate of Liberty*, 23, 113-38.
governments, to obstruct or temper Union policy toward military arrests. As the Union military increasingly turned toward a hard war policy against the Confederacy, Stanton and many officials in the Lincoln administration agreed that the laws of war provided the President with broad powers, under executive suspension of habeas corpus, to arrest and try civilian prisoners suspected of aiding the rebellion in any way.²²

While British diplomats in Washington did what they could to protect Britons from arbitrary military arrest and detention, their position in the Union capital also afforded them an opportunity to reflect upon subsequent major developments in Lincoln’s habeas corpus policy in their dispatches to London. Early in the summer of 1862, William Stuart stood in for Lord Lyons as the British charge de affairs at the Legation after the latter’s brief return to England.²³ Much more critical of the Union than his superior, Stuart believed—as many in the Palmerston cabinet did—that the Union would never defeat the Confederacy. Moreover, Stuart shared Lyons’s condemnation of the system of military arrests under Lincoln. During his time in Washington, Stuart was vocally critical of Britons arrested on vague charges of disloyalty in his correspondence with the State Department, admitting to Seward on one occasion that he would be more deferential to Lincoln’s habeas policy if the Union military arrested Britons on charges “of a more compromising nature” than mere speech construed as dangerous to the


²³ Jenkins, Lord Lyons, 196-97.
Union. Yet such “arbitrary” arrests of the kind Stuart and Lyons condemned were far from over.

Further Developments: Nationwide Habeas Suspension, August-September 1862

The scale of military arrests began to increase following the first major expansion of Lincoln’s suspension of habeas corpus in the late summer of 1862. When the Lincoln administration began to set in motion a system of federal conscription in order to meet the increasing manpower needs of the Union war effort, an expansion in the scope of habeas suspension seemed prudent to effectuate such a policy that was bound to incite hostile public opposition and evasion of military duty. Thus on August 8, 1862, Secretary of War Stanton issued orders relating to enforcement of the draft—as embodied in the recently passed Militia Act of July 17, 1862—which in part suspended the writ of habeas corpus “in respect to all prisoners [arrested for evading the draft]…and in respect to all persons arrested for disloyal practices.”

Although these orders did not literally emanate from Lincoln’s hand, Stanton later maintained that the President had read his draft of them beforehand and had given him verbal authorization for their issuance. As Neely has written, the period of “sweeping and uncoordinated arrests” in the North that followed Stanton’s August orders “constituted the lowest point for civil liberties in the North during the Civil War, the lowest point for civil liberties in U.S. history to that time, and one of the lowest for civil liberties in all of American history.”

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24 William Stuart to Seward, August 18, 1862; William Stuart to Seward, September 9, 1862; and William Stuart to Seward, September 16, 1862, all in Notes from the British Legation, RG 59, M50, Roll 45, NARA.

25 Quoted in Neely, *Fate of Liberty*, 52-53.

26 Neely, *Fate of Liberty*, 53. Altogether, Neely finds that at least 354 arrests between the period of August 8 and September 8, 1862 can be attributed to Stanton’s orders. Neely, *Fate of Liberty*, 62.
From Washington, Stuart expressed astonishment at this latest crackdown on civil liberties and its immediate consequences for British nationals in the Union. He reported to Russell that Stanton’s orders “were enforced with great severity, and hundreds of travelers were arrested on the trains going to New York, at Baltimore, and I believe also at Philadelphia. Many of these were British subjects, who intended to sail for Europe on the following day.” On Stuart’s request, Seward instructed Provost Marshals to avoid detaining British passengers who had already made travel arrangements to cross the Atlantic. As if the arrests themselves were not bad enough, Stuart, like Lyons before him, expressed astonishment at the apparent public approval of them by the American press. Stanton’s orders, Stuart lamented to Russell, were “received by the press with the usual approbation given to arbitrary acts during this war.” Among those Britons arrested was Arthur Drury, Stuart’s Foreign Service messenger, who had been “subjected to gross insults and brutal treatment at the hands of the subordinate official, who, without the smallest provocation, seized and forcibly ejected him from the railway car” on his way to New York City from Baltimore. Aside from this unfortunate incident in the wake of Stanton’s orders, Stuart informed the Secretary of State that he had received several “painful” letters from Britons complaining of their arrests after refusing coercion into the military. Among those Britons claiming to have suffered such a fate was Christopher Cleburne who, despite bearing a certificate of British nationality, was imprisoned at

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28 Stuart to Lord Russell, August 14, 1862, in Barnes and Barnes, The American Civil War through British Eyes, II, 153-54; Seward to Stuart, October 18, 1862, in Notes from the State Department to the British Legation, RG 59, M99, Roll 38, NARA.
Newport, Kentucky by the provost marshal for refusing to report for military duty, and threatened with death if he refused to fall into the ranks. Such letters suggested to Stuart “that a system of intimidation is being established in some places which may lead to most disagreeable results,” and he implored Seward to “take prompt and energetic measures for their protection.”

Six weeks after the War Department authorized the use of military arrests to enforce conscription, President Lincoln gave executive imprimatur to Stanton’s previous orders while greatly expanding the scope of habeas suspension throughout the Union. On September 24, 1862, Lincoln issued a proclamation suspending the writ of habeas corpus throughout the entire North. Unlike previous suspension orders, which specified certain geographical regions and/or classes of individuals subject to suspension, this proclamation was virtually unconstrained in scope. In sweeping language, Lincoln declared that it “has become necessary” to subject “all Rebels and Insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice” to martial law, and to suspend the writ of habeas corpus “in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority or by the sentence of any Court Martial or Military Commission.”

Although Lincoln’s proclamation, like the previous August 8 War Department orders, aimed primarily at enforcing conscription, its vague

29 William Stuart to Seward, September 6, 1862, in Notes from the British Legation, RG 59, M50, Roll 45, NARA; W. H. Seward to Stanton, September 9, 1862, in Domestic Letters, RG 59, p. 193, NARA.

language presented serious implications for civil liberty in the North by virtually placing all persons in the Union states—both foreigners and citizens alike—under martial law.

Given his previous alarm at the flurry of arrests following Stanton’s August orders, William Stuart was not surprisingly alarmed by this official expansion of executive habeas suspension. “It would be difficult to exaggerate the importance of this measure [Lincoln’s September 24 habeas suspension proclamation],” Stuart informed Russell, for he feared that “Personal liberty will now only exist by military sufferance.” Like many of Lincoln’s harshest American critics, Stuart doubted the “so-called necessity” upon which the president justified this latest proclamation. Nevertheless, Stuart feared that a Northern press, if disciplined by the Union military, could hardly be expected to produce harsh condemnation of administration policy. Echoing Lyons’s earlier observation of the Northern public’s apparently acquiescent reaction to Lincoln’s suspension policy during the summer of 1861, Stuart found that the Union “has shown itself so little jealous of its liberties during the past month that the Proclamation would probably be accepted with submission as an essential act of rigour for the successful prosecution of the war.”

But Stuart’s prediction that northerners would complacently acquiesce in Lincoln’s latest habeas expansion did not play out quite that way. In the midterm elections during the fall of 1862, Lincoln’s suspension proclamation and Preliminary Emancipation Proclamation (issued on September 22, 1862) proved politically damaging to the Republican Party in several northern states. Reporting to Lord Russell on his recent trip to New York in November following his return to the Union,

31 Stuart to Lord Russell, September 26, 1862, in Barnes and Barnes, The American Civil War through British Eyes, II, 189.
Lyons found New York Democrats in an exultant mood. The opposition party appeared to interpret their recent electoral victories as a vindication of northern attitudes toward protecting civil liberties in wartime, and the British minister seemed confident that Lincoln’s habeas policy would not be sustained in the Empire State once Democrat Horatio Seymour assumed the New York governorship the following January.32

Further Developments: Britons and the Habeas Corpus Act of 1863

As British diplomats in Washington paid close attention to Lincoln’s habeas policy expansions, so, too, did they closely follow parallel legislative developments on habeas corpus in the Republican-dominated Congress. On March 3, 1863, Congress finally passed legislation concerning executive suspension of the writ of habeas corpus. Nearly two years had passed since Lincoln’s first unilateral suspension in limited areas of the northeast, and critics of the administration in both the United States and Great Britain had consistently lambasted the Republican administration and Congress for not taking any legislative action on the various constitutional and practical questions surrounding executive suspension. Indeed, the absence of Congressional legislation on the subject had formed a significant part of the basis upon which the British Law Officers condemned Lincoln’s suspension policy during the fall of 1861. The Habeas Corpus Act finally addressed some of those outstanding issues, and scholars have generally interpreted this legislation as at least a partial attempt by Congress to sort out the various problems created by Lincoln’s habeas corpus policy.33

32 Lyons to Russell, November 17, 1862, in BDFA, VI, 113.

33 Wert, Habeas Corpus in America, 87-90; White, Abraham Lincoln and Treason, 69-73
Congress designed the Habeas Corpus Act to accomplish three principal objectives. Under the first section of this legislation, Congress granted Lincoln, as president, the constitutional authority to suspend the writ of habeas corpus for the duration of the rebellion. (The bill was deliberately ambiguous, however, as to whether all of Lincoln’s prior suspension orders and proclamations were retroactively constitutional). Arguably, this first section contained an implication that—as Taney had earlier argued in *Merryman*—executive suspension required congressional approval.

Second, the Act prescribed a legal remedy for the thousands of Northern civilians currently confined in Union prisons by requiring that the War and State Departments turn over the cases of such prisoners to the federal courts within twenty days of arrest. If the courts did not return an indictment, prisoners were to be released upon taking a loyalty oath. Ultimately, this crucial legislative remedy—which might have gone far toward restoring the role of the civil courts during the war—proved largely ineffective for civilian prisoners. Third, the Habeas Corpus Act provided a legal mechanism for indemnifying military officers being sued for wrongful arrests by removing suits against them from the state courts to the federal courts. The urgent necessity for this last function had become abundantly clear by early 1863, as the volume of lawsuits brought by civilian prisoners against military officers had grown significantly since the beginning of the war.

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While scholars have devoted considerable attention to these three core tenets of the Habeas Corpus Act, they have overlooked the potential implications of the Act for Britons in the Union from the perspective of the British Government. Section 2 of the Habeas Corpus Act—which prescribed the process by which the War and State Departments had to turn over procedures for civilian prisoners to the civil courts—stipulated that such prisoners could secure release from a military prison provided they first subscribe to an oath of allegiance to the United States. However, Union oaths of allegiance presented a substantial problem to British prisoners, for in taking the oath of allegiance, Britons thereby surrendered their legal claims to official protection by the Crown.36 Therefore, Lord Lyons saw in the Habeas Corpus Act a viable legal remedy for American prisoners, but not for British prisoners (not to mention other foreign nationals). Lyons believed that, if literally construed, the Act actually served as a further handicap for Britons caught up in the system of military arrests under Lincoln, for Britons under the Act were unlikely to secure a speedier release from prison than their American counterparts, who could easily subscribe to an oath of allegiance to the United States and take advantage of a speedy civil trial.

Indeed, Lyons was far from indifferent toward this key legislation, for he consistently demonstrated a keen awareness of American administration policies which might conceivably threaten Anglo-American relations. According to a long memorandum located in the correspondence of the British Legation to the State Department, in late

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36 In a letter dated March 18, 1863, Lyons informed Seward that it happened “not infrequently that the Oath is tendered to persons arrested on suspicion—Those who take it are at once set free, those who decline to do so are kept in prison, sometimes for a considerable period, little attention being paid to their representations that it is solely on account of Allegiance due to a Foreign Sovereign that they decline to take the Oath tendered to them.” Lyons to Seward, March 18, 1863, in Notes from the British Legation, RG 59, M50, Roll 49, NARA.
April 1863, the British Minister engaged Seward directly on the issue, explaining his concerns regarding the difficulties that the legislation seemed to place in the way of British prisoners. Lyons assured Seward of his conviction that such difficulties were purely unintentional on the part of the American legislators; surely, he told Seward, Congress had not deliberately sought to endanger the civil liberties of foreigners in the Union. But in order to prevent any unfortunate abuses which might occur as a result of the oath requirement in Section 2 of the Habeas Corpus Act, Lyons implored Seward to act fast in adding a qualifying proviso to the legislation which would provide a clear remedial path for British prisoners. Lincoln had not yet signed the bill into law, so there was still time for corrective action. Surely, Lyons opined, it would burden neither Congress nor the president to attach such a proviso to the bill?

Over the course of a long ensuing conversation—the precise details of which are not all well documented—Seward insisted that the bill need not undergo such a revision. If any abuses against Britons occurred as a result of the Act’s oath requirement, Seward assured the British Minister, the federal courts would see to it that existing treaties of amity between the United States and foreign countries would be controlling in such cases, “and that at any rate [Seward] would guarantee that Foreigners should suffer no wrong.” In other words, Britons had nothing to worry about; they were not citizens of the United States, and therefore could not suffer the same legal punishments as bona fide American citizens. Lyons seems not to have been comforted by the Secretary’s assurances, and continued to press Seward to modify the bill. If the clauses of the Act were construed literally, Lyons reiterated, “Foreigners would be excluded from the recourse to judicial proceedings which was open to citizens, and would have no appeal but to the Executive
Government itself.” In response, Seward repeated that no special proviso was necessary and “declined to take any steps toward obtaining one, but he respectfully assured Lord Lyons that his apprehensions were unfounded; that unnaturalized foreigners would have all the benefit of the Act without renouncing or compromising their Allegiance to their Sovereigns.”

Beyond this memorandum, neither the records of the State Department nor the British Legation contain further discussion of the implications of the Habeas Corpus Act for British nationals. Nor did the Habeas Corpus Act appear to wreak additional harm on British prisoners, or substantially increase the number of them languishing in Northern prisons. In subsequent diplomatic exchanges during the remainder of the war, Lyons apparently never broached the issue to Seward again. But aside from illustrating his consistent recognition of the diplomatic importance of Lincoln’s habeas policy in Anglo-American relations, Lyons’s concerns surrounding the Habeas Corpus Act nevertheless invite speculation as to why the British minister felt compelled to raise them in the first place. Thus far in the war, the Lincoln administration had generally cooperated with the British government in releasing Britons arrested by the Union military on various charges and pretenses, but perhaps Lyons saw in the Habeas Corpus Act a green light (albeit an unintentional one) for military officials on the ground to unjustly punish Britons who refused to take the oath. Additionally, perhaps, Lyons hoped that the Habeas Corpus Act—if properly modified—might provide British prisoners an alternative (and quicker) avenue for securing release outside of appeals to the British Legation, which sometimes

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37 Memorandum of a conversation between Lord Lyons and Mr. Seward touching the Second Section of the Act of Congress relating to Habeas Corpus and regulating judicial proceedings in certain cases, April 24, 1863, in Notes from the British Legation, RG 59, M50, Roll 50, NARA.
dragged on for months and resulted in unnecessarily long confinements. This would have been a logically practical concern, for by this point in 1863, British diplomats and consuls throughout the Union were spending an increasing amount of time dealing with cases involving Britons unlawfully conscripted into the Union military, and not having to deal with British prisoners arrested under habeas suspension would have allowed the Legation to devote more energy to the former. Regardless of the reason(s) for Lyons’s concerns, the diplomatic process for dealing with British prisoners after passage of the Habeas Corpus Act remained the same as before. Seward may not have acceded to Lyons’s request to modify the legislation, but the British Legation continued to work with the State Department to secure the release of bona fide Britons arrested by the Union military until the end of the war.

Further Developments: Lincoln’s Final Suspension Proclamation, September 1863

Not surprisingly, the final major development in Lincoln’s habeas corpus policy—his suspension proclamation of September 15, 1863—did not escape notice at the British Legation. In fact, an official British dispatch to London describing this last proclamation offers historians a unique insight into Lincoln’s decision-making regarding the suspension of habeas corpus. Once again in Washington during another one of Lyons’s absences, William Stuart witnessed the issuance of Lincoln’s habeas suspension proclamation of September 15, 1863, which was primarily designed to prevent judges from issuing habeas writs for Union conscripts.38 Writing to Russell, Stuart described how this latest proclamation emerged in a dinner conversation at the home of William H.

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Seward. Indeed, the language in which Stuart describes the conversation betrays his contempt for what he viewed as the apparent carelessness with which the Lincoln administration regarded the suspension of habeas corpus generally. Despite “the immense importance of the Act [suspending habeas corpus],” Seward spoke to his guests about how the proclamation had been drawn up “in a very complacent manner.” When an anxious Stanton pressed for drafting a new suspension order at a morning Cabinet meeting, President Lincoln gladly delegated the task to Seward, who spent a mere two or three hours on the draft. After adding one or two suggestions from Secretary of the Treasury Salmon Chase and Stanton (the latter insisting that the proclamation be issued that very day) in a follow-up Cabinet discussion, Lincoln signed the proclamation and ordered its immediate issuance. “Such appears,” an incredulous Stuart wrote Russell, “to have been all the deliberation thought necessary before suspending the Privilege of Habeas Corpus throughout the United States of America!”

Stuart’s exasperation is hardly surprising. During his time filling in for Lyons in Washington, Stuart never came around to accepting the necessity, much less the legality, of Lincoln’s habeas corpus policy, and this final major development was no different. True to form, Stuart condemned this “startling and sweeping” suspension proclamation, for it “appears to go far beyond the authority granted to the President by the Act of Congress [the Habeas Corpus Act of March 3, 1863].”


40 Stuart to Russell, September 18, 1863, in Private and Confidential, 333.
Russell as to why this was the case, but his perception was indeed correct. Essentially, the suspension proclamation of September 15, 1863 flouted the substance of Section 2 of the Habeas Corpus Act, which directed the transfer of civilian prisoners from the military to civil courts. Now, Lincoln’s newest proclamation permitted the suspension of the writ in cases in which military, naval, and civil officers of the United States hold persons under their command or in their custody either as prisoners of war, spies, or aiders or abettors of the enemy; or officers, soldiers or seamen enrolled or drafted or mustered or enlisted in or belonging to the land or naval forces of the United States or as deserters therefrom or otherwise amenable to military law, or the Rules and Articles of War or the rules or regulations prescribed for the military or naval services by authority of the President of the United States or for resisting a draft or for any other offence against the military or naval service.41

As was the case with previous suspension orders, “aiders or abettors of the enemy” represented a vague description that invited broad interpretation from military authorities, and persons arrested under such a charge were, according to this proclamation, barred from having their cases heard in a civil court. But beyond the measure’s violation of legal procedure, the British charge de affairs once again expressed astonishment at the apparent acquiescence of the northern public. “The most painful feature in the whole proceeding,” Stuart lamented to his superior in London, was “the apparent delight of a great portion of the Public, whose Liberties have as it were been blotted out by Mr. Lincoln’s pen.” “How much blood,” Stuart wondered in a melodramatic flourish, “may

41 “Proclamation Suspending Writ of Habeas Corpus,” September 15, 1863, in CWL, VI, 451. A follow-up order issued two days later directed military officers of the United States presented with habeas writs to “make known to the court or judge issuing such writ, by a proper return thereto, that he holds such person by the authority of the President of the United States...and that, thereupon he do not produce such person according to such writ, but that he deal with him according to the orders of his military superiors...” Military officers were further instructed to ignore judicial processes against them, and if the civil authorities attempted to remove civilians from military custody or arrest the military officers in charge of detentions, they were “to resist such attempt, calling to his aid any force that may be necessary to make such resistance effectual.” See “Draft of Order Concerning Writ of Habeas Corpus,” September 17, 1863, in CWL, VI, 460.
hereafter have to be shed to recover what is now being lightly and ruthlessly abandoned as valueless!”

**Habeas Corpus at War’s End**

By the end of his time in Washington as British Minister, Lyons’s final assessment of Lincoln’s habeas policy did not deviate from his initial assessment in the spring of 1861. From the beginning, Lyons had condemned the abrogation of due process of law inherent in Lincoln’s executive suspension of habeas corpus and its potential license for abuse by military officers on the ground. So long as Lincoln’s policy remained in effect, Lyons wrote Russell toward the end of the war, “the only security for personal liberty must be in the moderation or timidity of the Government and its military officers.” And like all of the men who stood in for him from time to time at the British Legation during the Civil War, Lyons saw little chance that a seemingly acquiescent northern public would pressure the administration to relax its curtailments on civil liberties. Although he “wish[ed] public indignation would put a stop to the system of arbitrary arrest,” Lyons informed Russell as late as July 1864, he had “very little hope” of such an outcome. In December of 1864, Lyons returned home to England due to poor health, leaving the business of foreign affairs to his successors at the British legation.

The acting British Minister in Washington at war’s end felt the same as Lyons with respect to Lincoln’s habeas corpus policy. Reporting on the state of things in

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42 Stuart to Russell, September 18, 1863; in *Private and Confidential*, 333-34.


America following Lee’s surrender to Russell on April 20, 1865, Sir Frederick Bruce wrote:

I ought to mention, that there is no relaxation of arbitrary Power in this country. The Government, acting through the military authority, arrests anyone it pleases, brings him to trial or not as suits it, and detains him as long as it pleases. Witnesses are kept in prison till required to give evidence, without being admitted to bail. And as the jurisdiction of the State Courts is overridden, there is no appeal except to the War Department at Washington. In fact personal liberty is at an end throughout the Northern states, and as long as the War [Republican] party, which is in the ascendant, professes to consider this power necessary to the national safety, there is no reason to suppose that it will terminate. It would appear, that individual rights have no foundation here, except in the Will of the Majority. It would not surprise me to see a ‘loi des suspects’ [law of suspects] enacted.\textsuperscript{45}

Even after the cessation of all military operations, some British subjects who had been arrested by the Union military remained in prison. Recognizing that such cases “require great delicacy in handling,” Bruce approached the issue in much the same way as Lord Lyons, petitioning the War Department on behalf of British prisoners “in the hopes that any favourable circumstances may be considered and lead to their release.” Bruce in particular expressed serious concern in the cases of Britons arrested for allegedly aiding the Confederacy, who had no chance at a fair trial.\textsuperscript{46} Throughout the entire war, diplomats at the British Legation in Washington remained consistently critical of Lincoln’s habeas corpus policy while anticipating its potential consequences on Britons living in the Union and Anglo-American relations generally. Britons arrested under Lincoln’s habeas policy after 1861 did not seriously threaten Anglo-American relations, but such cases continued to represent a persistent problem for British diplomats between 1862 and the end of the war in 1865.

\textsuperscript{45} Bruce to Russell, April 20, 1865, in \textit{Private and Confidential}, 355.

\textsuperscript{46} Bruce to Russell, April 27, 1865, in \textit{Private and Confidential}, 357-58.
The Nature of Military Arrests of Britons under Lincoln, 1862-65

If British diplomats in Washington lamented the expansion and increasing severity of Lincoln’s habeas corpus policy as the war continued, their reasonable concerns that Britons living in the Union would suffer proportionately higher levels of injustice proved largely unfounded. While the overall number of military arrests in the North rose to well over ten thousand between 1862 and 1865, the vast majority of those prisoners were American citizens, and the nature of military arrests of Britons during that period remained much the same as it had during 1861. British blockade runners continued to populate Union prisons without much intervention by the London government, while British diplomats and consuls investigated the cases of those Britons arrested for allegedly committing various acts of disloyalty. Even after Union conscription of Britons emerged as the most serious and persistent civil liberties issue affecting Anglo-American diplomacy from mid-1862 onward, Lincoln’s suspension of habeas corpus continued to cause problems for Britons in the Union states on a seemingly daily basis. Although Her Majesty’s government had decided against further intervention on the basis of Britons illegally detained under Lincoln’s habeas policy, the British Legation in Washington and northern consuls continued to intervene in cases in which substantial injustices against Britons were clearly (at least from the perspective of the British Government) evident.

Given the fragmentary and imprecise nature of Civil War recordkeeping regarding military arrests and nationality, it is unclear whether the rate at which Britons were arrested by the Union military increased as a result of Lincoln’s habeas policy expansions

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47 See Berwanger, *The British Foreign Service*, 125-144.
between 1862 and 1865. If anything, many Britons inside and out of the London
government may well have had the impression that British arrests in the Union declined
as the war went on. According to an official published British report regarding the claims
of British nationals against the U.S. government, 29 Britons were arrested by the Union
military during 1861; 18 during 1862; 20 during 1863; and 9 more the following year as
of March 31, 1864. Obviously, this report does not account for the number of Britons
arrested during the final year of the war, but the British government also correctly noted
that many cases went unreported from the British legation in Washington to London. Nor
does this report account for the dozens of Britons tried by military courts, as well as the
additional dozens of arrests reported by British diplomats to the State Department
throughout the war (and in all likelihood, there were probably many British cases handled
by consuls throughout the Union that went unreported to the legation). Still, although it is
impossible to determine exactly how many bona fide Britons were arrested during this
period, there is no documentation from either the State Department or the British legation
which suggests that the rate at which Britons were arrested under Lincoln increased
dramatically between 1862 and 1865. If it did, perhaps Lyons deliberately concealed the
fact from his superiors in London in order to avoid another public confrontation with the
Lincoln administration and needlessly stoking the fire for British intervention.\footnote{48}

Although Lyons continued to prioritize the protection of Britons arrested by the
Union military, he did not allow such arrests to endanger general Anglo-American

\footnote{48 Return of Claims of British Subjects against the United States Government from the
Commencement of the Civil War to the 31st of March, 1864, North America No. 11 (London: 1864). This
report contains 451 claims on behalf of Britons against the United States government. For further
discussion of Britons and Union military justice, see Chapter IV.}
relations and instead maintained the British policy of cautious cooperation on the issue with the State Department. Lyons and many British officials in London probably believed that the sooner hostilities between the Union and Confederacy ended, the sooner habeas corpus and civil liberties for Britons living in the Union would be restored. Until then, the British minister in Washington could only continue to ask Seward to investigate cases of British prisoners, and in this, Lyons was no less energetic during his remaining time in Washington than he had been during 1861. As he explained to Viscount Charles Monck, the Governor General of British North America, near the end of 1861: “While this question [of Lincoln’s authority to arrest Britons under habeas suspension] remains in its present state, I can do no more than use, to the best of my ability, for the purpose of procuring the release of individual British subjects, the influence with the Government of the United States which I derive from my position here.” In order to accomplish this, the British minister had to find reasons for releasing Britons that would be palatable to the Lincoln administration, without officially conceding “any acquiescence in the system of arresting Her Majesty’s subjects without legal process.” Lyons maintained this position throughout the remainder of the war.49

Not long after Stanton’s installation as Secretary of War, the Lincoln administration informed the British government of its intentions regarding future military arrests. On March 7, 1862, Seward notified Lyons and all other Foreign Ministers in Washington that the War Department would continue to arrest “persons who may

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49 Lord Lyons to Viscount Monck, November 14, 1861, in British and Foreign State Papers, v.55 (1864-1865), 710-11; Lyons to Russell, July 22, 1864, in Private and Confidential, 346.
reasonably be suspected of treason against the United States.”\textsuperscript{50} Apparently interpreting this statement as a positive development, Lyons maintained a sense of optimism when reporting on the issue to Foreign Secretary Russell: “I trust however that such arbitrary arrests will be much less frequent than formerly, and will be more carefully restricted to persons really engaged in practices hostile to the United States, and affecting the safety of the army, or the secrecy and success of military operations.”\textsuperscript{51} During 1861, Lyons had frequently criticized military arrests made on the basis of vague charges of disloyalty or treason, and he probably assumed that the new Secretary of War would finally enforce higher standards for military officers making arrests on the ground level. As it turned out, however, military arrests as a whole under Stanton’s watch proved much more frequent, and not always carefully targeted towards persons actually engaged in disloyal practices against the Union government.

Thus at the start of 1862, Lyons resumed his practice of petitioning the State Department for the release of British prisoners in any way he reasonably could. For Britons arrested in the contentious Border States who were accused of aiding the Confederacy, Lyons generally asked the United States government for a further investigation into their cases. As Union armies advanced further south, the British Minister also found himself investigating cases of Britons residing in areas now under Union occupation.\textsuperscript{52} Although Seward no longer exercised direct control over military

\textsuperscript{50} Seward to Lyons, March 7, 1862, in Notes from the State Department to the British Legation, RG 59, M99, Roll 38, NARA; Lyons to Russell, March 10, 1862, in Barnes and Barnes, \textit{The American Civil War through British Eyes}, I, 306.

\textsuperscript{51} Lyons to Russell, March 10, 1862, in \textit{The American Civil War through British Eyes}, I, 305-6.

\textsuperscript{52} Memorandum to accompany the \textit{Return of Claims of British Subjects in the United States since the Secession of the Southern States}, B DFA, VI, 275.
arrests, the State Department remained the logical point of contact for British complaints of military injustice. Throughout the remainder of the war, the British Legation maintained lists of alleged British prisoners jailed in various military forts throughout the Union, and, similar to the process established in the summer of 1861, Lyons would frequently send inquiries to the State Department regarding specific prisoners. The State Department then forwarded such cases—sometimes with Seward’s own specific recommendations—to the War Department for subsequent investigation and ultimate resolution.53

For the most part, Lyons devoted his energy toward securing the release of Britons against whom the U.S. government had little or no evidence of committing “disloyal” activities that actually threatened the army or Union government. Such cases were more likely to generate extensive documentation and emerge in the correspondence between the State Department and British Legation between 1862 and 1865. In the case of Briton George Mason, for example, Lyons found the vague charges against the man unacceptable. Originally confined to Old Capitol Prison and later transferred to Fort Warren, Mason had spent four months behind bars without any charges brought against him, although the context of the correspondence between Lyons and Seward suggests that Mason had been arrested for disloyal speech. When Seward finally delivered Judge Advocate Levi Turner’s report on the case to Lyons, the British minister strenuously rejected Turner’s vague characterization of Mason as a man “dangerous to the State.” Lyons demanded to be informed of the specific details of the charges against Mason, as well as all supporting evidence against him possessed by the U.S. government. The

53 Such lists may be found throughout the Notes from the British Legation to the Department of State, RG 59, M50, NARA.
British Minister admitted that while Mason was an irritable and intemperate man, he was hardly an enemy of the Union. Moreover, Lyons informed Seward that Mason’s wife was in great distress over her husband’s imprisonment, and he thought Mason to be mentally unstable, prone to violence, and sure to lash out against prison guards or other inmates under further detention. Neither the records of the State Department nor the British Legation indicate whether or not Mason obtained release.\textsuperscript{54} Similarly, Lyons condemned the arrest and three-month detention of one Mr. Lovell in Nashville, Tennessee, for speaking out against “the depra
dations committed by the Federal soldiery” as “an unnecessarily harsh measure” and “a very
great hardship.”\textsuperscript{55} Throughout the entire war, Lyons refused to accept the position of the Lincoln administration that persons could be arrested for merely speaking out against the Union army or government, and Britons detained under such charges often caught the British Minister’s attention.

As he had done in 1861, however, Lyons occasionally pressed for release in cases in which military detention seemed justified by the evidence, but in which the proceedings against British prisoners appeared arbitrary or inconsistent. In March of 1862, for example, Lyons asked Seward to release Briton Thomas C. Fitzpatrick, despite admitting that the suspicions which led to the man’s arrest “did not appear to me to be other than reasonable.” Nevertheless, Lyons informed Seward that Fitzpatrick had been imprisoned for more than a month, and the persons arrested with him on the same charge

\textsuperscript{54} Lyons to Seward, December 12, 1863; and Lyons to Seward, January 4, 1864, both in Notes from the British Legation, RG 59, M50, Rolls 57 and 58, respectively, NARA. See also the case of William Thompson in Lyons to Seward, January 30, 1864, Notes from the British Legation, RG 59, M50, Roll 59, NARA.

\textsuperscript{55} Lyons to Russell, February 16, 1863, in \textit{The American Civil War through British Eyes}, III, 4-5. See also the case of one Mr. Sherwin, Lyons to Seward, May 27, 1863, in \textit{FRUS 1863}, 619-20.
had since been released. Moreover, as Fitzpatrick’s arrest had been made “without legal
process,” Lyons “thought it right that he should either be released or brought to trial in
due form of law.” In such cases where the weight of the evidence worked
overwhelmingly against the individual, Lyons was inclined to petition the Lincoln
administration to either set specific British prisoners free or allow them the benefit of a
speedy civil or military trial. Although Lyons doubted the necessity for (much less the
legality of) military trials of civilians and British subjects, his willingness to acquiesce in
such trials so long as they could secure the release of Britons nevertheless demonstrated
his sincere desire for British cooperation with the Lincoln administration on military
arrests.

On occasion, however, the British government stridently demanded release and
financial compensation for Britons who were wrongfully imprisoned and suffered unduly
harsh punishment. One such British prisoner whose case even arose in Parliamentary
discussion in February 1862, John G. Shaver, had been arrested and held by the Union
military since October 1861 for seditious language and for allegedly smuggling arms and
dispatches to the rebels. An agent of the Grand Trunk Railroad in Canada, Shaver had
been apprehended in Detroit and thereafter sent to Fort Lafayette and, later, Fort Warren.
Offered release upon taking an oath of allegiance, Shaver declined, and his letters to

56 Lyons to Seward, March 15, 1862, in Notes from the British Legation, RG 59, M50, Roll 43,
NARA; Lyons to Russell, April 14, 1862, in Barnes and Barnes, The American Civil War through British
Eyes, II, 13-14.

57 Lyons to Seward, January 23, 1864, in Notes from the British Legation, RG 59, M50, Roll 58,
NARA.
Consul Archibald had apparently been confiscated by Union military officials. Fueled by Foreign Secretary Russell’s interest in the case, British inquiries into Shaver’s imprisonment dragged into January of 1862. Lyons maintained that Shaver’s British nationality and domicile in Canada were beyond doubt. Moreover, the British government protested that the flimsy evidence supporting the charges against Shaver would not survive scrutiny in a civil court. Even if this were not the case, Lyons told Seward, “the conduct of Mr. Shaver could hardly be regarded as an offence except under a rigid despotism; that it could be only under such a form of government that a free comment upon passing events to an acquaintance could be considered as a crime justifying imprisonment.” Thus, Her Majesty’s Government found Shaver’s arrest and imprisonment “wholly without excuse,” and his claims for compensation fully justified. After spending nearly three months in Union prisons, Shaver finally obtained an unconditional release on January 6, 1862.

Perhaps the most tragic fate to befall a British prisoner during the American Civil War also necessitated a strong rebuke from London, and one which demonstrated the British government’s unwavering commitment to ensure justice for Her Majesty’s subjects in the Union. On May 25, 1863, James Hardcastle, a British national detained at Old Capitol Prison in Washington, D.C., was shot and mortally wounded by a prison

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58 Extract from Mr. Archibald to Lord Lyons, in Lyons to Seward, November 12, 1861, Notes from the British Legation, RG 59, M50, Roll 42, NARA; Seward to Lyons, May 30, 1862, in Notes from the State Department to the British Legation, RG59, M99, Roll 38, NARA.

59 Lyons to Seward, January 3, 1862; and Lyons to Seward, April 23, 1862, both in in Notes from the British Legation, RG 59, M50, Rolls 48 and 49, NARA; “Fort Lafayette: Story of a Released Prisoner”, New York Times, January 18, 1862, pg. 2. The correspondence relating to Shaver’s case is well-documented in British Foreign and State Papers, v.55, 706-17.
guard while allegedly trying to escape. Hardcastle had been arrested after arriving at Port Conway carrying a flag of truce from the rebel army in Richmond, despite the fact that Union military officials had granted him full permission to enter Union lines. A pyrotechnist by trade, Hardcastle had allegedly boasted of his role in constructing torpedoes for Confederate forces defending Charleston harbor in South Carolina. While in prison, Hardcastle and another prisoner were found leaning over the screens which separated the windows from the adjacent street, in violation of prison rules barring inmates from communicating with outsiders. As his actions were thus “calculated to excite disorder on the street” and carried on against the guard’s admonitions to cease his conduct, the sentry accidentally fired on Hardcastle, who died within minutes.

Upon review of the case, the British government found the circumstances of Hardcastle’s death more than dubious on the part of the Union military, and instructed Lyons to issue a strong protest to the State Department. From the British perspective, the incident also seemed to justify the many reports from northern British consuls regarding unacceptable prison conditions generated since the early months of the war. Hardcastle’s case left “a very painful impression upon the minds of Her Majesty’s Government,” Lyons informed Seward:

The liberty of a British subject was (they conceive) interfered with without any serious cause and in apparent breach of good faith. The representations of Her Majesty’s legation in [Hardcastle’s] behalf did not procure his release, and in the end his life was carelessly sacrificed by the accidental result of a rough and unmerciful system of prison discipline, excused on the ground of the unsuitableness and the overcrowded state of the U.S. military prisons. 61

60 Hardcastle had been imprisoned since April 17, 1863. Lyons to Seward, April 23, 1863, FRUS 1863, 573; Lyons to Seward, May 28, 1863, FRUS 1863, 620; Seward to Lyons, June 18, 1863, in FRUS 1863, 652.

61 Lyons to Seward, August 13, 1863, in FRUS 1863, 690-91.
Pressed to investigate the case, the War Department reported that Hardcastle’s arrest and detention had been justified on the ground that he was a “dangerous and bitter enemy” of the United States, and his death, while regrettable, was not the result of malicious conduct on the part of the prison guards. Judge Advocate General Joseph Holt upheld the actions of the prison guards. The British government condemned the Union military’s disregard of Hardcastle’s safe-conduct pass as without any warrant in the laws of civilized warfare, and found “literally no other evidence…from which the faintest trace of guilty or improper conduct on the part of Hardcastle can be inferred.” The British government advanced a formal claim for financial compensation on behalf of Hardcastle’s family, which was later rejected by the U.S. government.

Hardcastle’s case, however, represented an extreme exception to the rule. The overwhelming majority of cases involving Britons arrested by the Union military between 1862 and 1865 neither ended in such tragedy nor provoked a forceful response from the British government. The British Legation and northern British consuls continued to do what they could to secure releases for Britons arrested on various pretenses, even in cases in which Lyons acknowledged reasonable grounds of suspicion. For its part, the State Department under Seward went to great lengths to accommodate British complaints, even after Lincoln significantly expanded the scope of habeas suspension throughout the Union beginning in the fall of 1862. Still, the problem of Britons arrested under Lincoln’s habeas policy persisted until the end of the war. In late April 1865, there


63 Lyons to Seward, June 13, 1864; Burnley to Seward, October 5, 1864, both in FRUS 1864, 634-35, 732-33; Burnley to Seward, January 10, 1865; Seward to Burnley, February 25, 1865, both in FRUS 1865, 44-45, 83-84.
were still apparently enough British prisoners for Sir Frederick Bruce, the British charge
de affairs in Washington at the time, to express his hope to Russell in London that a
general military measure would be adopted “for the release of foreigners who, on
different pretexts, have been arrested by military Authority, and are still detained in
prison without being brought to trial.”¹⁶⁴ Although the military arrests of Britons under
Lincoln’s habeas corpus policy remained a persistent foreign policy concern between
1862 and the end of the war in 1865, the Palmerston and Lincoln governments
maintained their policy of cautious cooperation on the issue without provoking further
British intervention. Having narrowly averted another Anglo-American war at the end of
1861, and recognizing the futility of their previous attempts to restrain Lincoln’s habeas
policy, the British were no longer inclined to officially protest against an American
administration all too willing to abrogate the civil liberties of Her Majesty’s subjects in
the name of subduing the Confederacy. Instead, London officials continued to entrust the
protection of Britons’ civil liberties in the Union to Lord Lyons and the British Legation.
In monitoring the further developments of Lincoln’s habeas policy in order to anticipate
potential difficulties for Britons in the Union, British diplomats in Washington found
much to complain about in the realm of practical consequences and constitutional
abstractions. At the diplomatic level, however, both governments demonstrated a high
level of cooperation in settling individual cases as they emerged for the remainder of the
war.

¹⁶⁴ Bruce to Russell, April 29, 1865, in The American Civil War through British Eyes, III, 294.
Bruce arrived for duty in Washington on March 1, 1865.
CHAPTER V
BRITISH NATIONALS AND MILITARY JUSTICE DURING THE AMERICAN CIVIL WAR

In early May of 1863, the military commission trial of Clement Vallandigham became a national sensation in both Republican and Democratic newspapers across the country, and the case did not escape the notice of interested British observers across the Atlantic. Perhaps the most well-known “Copperhead” during the Civil War, Vallandigham had been arrested and tried by the Union military for delivering critical speeches against the Lincoln administration and the Union war effort at a political rally in Ohio. Vallandigham had long condemned Lincoln’s suspension of habeas corpus as a clear sign of executive tyranny, and he openly favored a peaceful armistice with the Confederacy which included the protection of Southern slavery.

Although Democrats predictably expressed outrage at what they viewed as the logical outcome of an administration policy that blatantly disregarded civil liberties and suppressed free speech, Vallandigham’s arrest and trial even made otherwise staunch Republicans uneasy. Most of the members of Lincoln’s cabinet concluded that, although General Ambrose E. Burnside had acted rashly in arresting the former Ohio congressman, the administration could not completely condemn the general’s actions in the case. An Ohio federal district court, led by Judge Humphrey Leavitt, rejected Vallandigham’s petition for a writ of habeas corpus.¹ But on a writ of certiorari, the case eventually came

¹ William Marvel, The Great Task Remaining: The Third Year of Lincoln’s War (Boston: Houghton Mifflin Harcourt, 2010), 84. The Supreme Court would reverse itself on this issue just two years later in the postwar case involving the military trial of Lambdin P. Milligan.
before the Supreme Court and, in February 1864, the Court ruled that it had no jurisdiction to review the decision of a military commission.\(^2\) Lincoln eventually commuted Vallandigham’s sentence to banishment to the Confederacy, but the political damage had already been done; Democrats and British critics now had another rhetorical weapon with which to flog the “tyrannical” Lincoln administration.\(^3\) The arrest and trial of Vallandigham, Lord Lyons informed Foreign Secretary Russell on June 22, 1863, “caused considerable excitement throughout the country,” and disapproval of the proceedings “has been so general, and so loudly expressed,” that Lincoln had been prompted to publish his Corning letter as a final public defense of his habeas policy.\(^4\) Not surprisingly, *The Times* of London condemned “the arbitrary and foolish arrest of Mr. Vallandigham” by the “blundering dragoon” Burnside, and warned that it was “a grave mistake to make a martyr” of the Ohioan. The paper applauded the efforts of Vallandigham and his anti-war Democratic Congressional allies “to denounce in scathing language the blunders of the [Lincoln] Government, and its constant attempts to destroy the freedom and override the Constitution of the North in its blind endeavour to subdue or exterminate the South.”\(^5\)

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\(^2\) *Ex parte Vallandigham*, 1 Wall. 243 (1864).

\(^3\) Rehnquist, *All the Laws but One*, 68-69.

\(^4\) Lyons to Russell, June 22, 1863, in *The American Civil War through British Eyes*, III, 70-71. For further analysis on the Corning letter, see chapter III.

\(^5\) *The Times* (London), May 26, 1863. The Vallandigham incident inspired much heated commentary over civil liberties in subsequent editions of the *Times*, much of which emphasized Vallandigham’s peaceful opposition to the Lincoln administration: “Altogether, Mr. Vallandigham’s speech, as reported by the military authorities who gave evidence against him, was not only patriotic in purpose and logical in argument, but singularly free from any violence, or even impropriety of expression on which a sane man could found a charge either of treason or sedition; and if an American, who claims to be a Sovereign, not a subject, and who is justified in maintaining by the principles of the Constitution that the President is his servant and creature, to be made or unmade by his breath, cannot criticize his servant’s
Much like general military arrests under habeas suspension, Union trials by military commission concerned both American citizens and British nationals. Although historians have devoted considerable attention to Vallandigham—as well as the postwar landmark Supreme Court case *Ex parte Milligan* (1866)—in the story of civil liberties under Lincoln, much less is known about the military trials of Britons in the North during the Civil War. The two most recent works on the subject that make systematic use of the relevant records do not make comparative analytical distinctions between military trials for American citizens and British nationals, and this relative lack of scholarly attention leaves one with the impression that Union military justice represented a purely domestic problem concerning only American citizens. As was the case with military arrests of Britons under Lincoln’s habeas policy generally, however, the Union military trials of dozens of Britons during and after the American Civil War assumed dual importance as both a domestic and foreign policy problem, and present a further indication of the broader scope of the habeas corpus problem under Lincoln.

This chapter argues that the military trials of Britons within and outside the ranks that resulted as a consequence of Lincoln’s habeas corpus policy contested the amorphous boundary between nationality and citizenship during the most traumatic conduct or policy, his wisdom or foolishness, as the case may be, American liberty is a thing of the past, and the coming despot has but to appear and make an end of its name as well as its substance.” See the *Times* (London), May 27, 1863.

See *Ex. parte Milligan*, 4 Wallace 2 (1866). Like Merryman, most general histories of the American Civil War give at least cursory treatments of Vallandigham and Milligan. For an excellent discussion of Milligan and its significance, see Neely, *Fate of Liberty*, 160-184; and Rehnquist, *All the Laws but One*, 118-37.

See Neely, *Fate of Liberty*; and Blair, *With Malice toward Some*. 

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conflict in American history. In many ways, the experience of British nationals tried by military courts under Lincoln mirrored the broader arc of military justice as it related to ordinary American citizens and soldiers. Britons serving in the Union Army were court-martialed for such common charges as desertion and drunkenness on duty, while British civilians were arrested and tried for running the blockade, spying, “disloyal activity,” and even treason. Military trials for Britons differed from those of their American counterparts, however, in one crucial way: their foreign nationality permitted official British intervention or, failing that, at least a compelling reason for leniency or release from the Union military. As a result, during the American Civil War, the British government prioritized the protection of Her Majesty’s subjects who were arrested and tried by the Union military. While British ministers and consuls in the North generally abstained from intervening in courts-martial trials of British Union soldiers, they did devote considerable energy toward ensuring that British civilians tried by military commissions who had not relinquished their rights to the Crown’s protection would not suffer harsh or unjust punishments. Whether due to the natural inefficiencies of a large military bureaucracy or to a policy of deliberate military convenience, however, the Union military did not always appear to cooperate with British officials, as many Britons tried by military courts suffered unusually long prison sentences or punitive financial penalties.

With respect to examining the experience of British subjects tried by the military during the Civil War, I add to Chris Bray’s general point that “The history of American military justice is inextricably the history of America...A court-martial can’t help but tell a rich story about culture and society.” Above all, writes Bray, military courts “tell us an important story about our shared human experience. The court-martial is a vivid record of the things people do in conflict and under pressure, and sometimes in the face of agony and horror.” Chris Bray, Court-Martial: How Military Justice has Shaped America from the Revolution to 9/11 and Beyond (New York: W.W. Norton, 2016), xi, xvi.
The Nature of Martial Law vs. Suspension of Habeas Corpus

As a general emergency war power broadly construed from the commander-in-chief clause of Article II, the President may impose martial law, even though there is no explicit statement in the Constitution granting such authority to the executive branch. This emergency power allows the executive to determine the imposition and duration of military justice over civilians, which may lead to the creation and prosecution of new offenses unknown to the civil law. By contrast, the writ of habeas corpus—whether suspended by Congress or the Executive—is, according to the strict wording of the habeas clause, only to be suspended under conditions limited to invasion or rebellion. Nevertheless, martial law may amount to a practical suspension of the writ of habeas corpus. Congress might, for example, exercise its power to suspend habeas, while the President (or subordinate military commanders designated by the executive) might practically suspend habeas by imposing martial law pursuant to the commander-in-chief power of Article II. Thus, technically speaking, suspension of habeas corpus and martial law are two separate legal conditions, even though martial law may include a de facto suspension of the writ for as long as the emergency lasts. Taken to its furthest potential utility, martial law is by far the more powerful instrument for waging war and suppressing dissent, possibly entailing a complete substitution of military law for the civil law (or, bluntly put, martial law may amount to a virtual military dictatorship).

Suspension of the writ of habeas corpus, on the other hand, is more limited in nature by

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9 Randall, Constitutional Problems, 142-43. Nevertheless, Article I of the United States Constitution explicitly empowers Congress as the dominant branch for creating and defining military courts, in the form of either courts-martial or military commissions. These grants of power are principally found in the congressional powers to declare war and raise armies. See Louis Fisher, Military Tribunals & Presidential Power: American Revolution to the War on Terrorism (Lawrence: University Press of Kansas, 2005), 37, 39, 253.
its suppression of habeas corpus as a singular remedy—albeit a crucial one—for contesting unlawful government detention. Geographically, martial law is typically much more restricted, often confined to areas actually threatened by invasion or rebellion, while habeas suspension is a limited suspension of the rule of law on a potentially nation-wide scale, as shown by Lincoln’s proclamation of September 24, 1862. In the Civil War North, martial law served as an alternative mechanism for restricting habeas corpus for the remainder of the war, and opened the door to the widespread use of military courts for trying civilians within and outside the spheres of actual military conflict.10

Habeas Corpus, Martial Law, and Military Trials during the American Civil War

The military trials of Vallandigham and thousands of other civilians in the North during the Civil War represented a significant evolution of Lincoln’s suspension of habeas corpus. By the fall of 1862, the suspension of habeas corpus had become a firmly

10 Neff, Justice in Blue and Gray, 40-41. Before the American Civil War, martial law held a limited presence in American jurisprudence and had been an infrequent experience for most Americans. Still, conventional thinking at the time held that martial law was an exceptional state of affairs that should be limited as much as possible. “That the military ought always be subject to the civil power,” wrote the prominent Harvard law professor and legal pamphleteer Joel Parker, “is a general truth applicable to times of peace, but applicable in its full extent only to times of peace.” In time of war, he concluded, a circumstantial martial law existed that need not be imposed by anyone and had no derivation in the Constitution. Similarly, Lincoln’s solicitor of the War Department, William Whiting, prescribed a broad interpretation of the proper scope of arrests made under martial law during the Civil War: “Whenever a person is helping the enemy, then he may be taken as an enemy; wherever such capture is made, there war is going on, there martial law is inaugurated, so far as that capture is concerned.” See Joel Parker, Habeas Corpus and Martial Law: A Review of the Opinion of Chief Justice Taney, in the Case of John Merryman, Second Edition (Philadelphia: J. Campbell, 1862), 17, 28; William Whiting, War Powers under the Constitution of the United States: Military Arrests, Reconstruction, and Military Government, 43 ed. (Boston: Lee and Shepard, 1871), 201-202. For further discussion of Parker’s and Whiting’s contributions to the constitutional history of the Civil War, see Neely’s excellent analysis in Triumph of the Nation, 66-71, 80-85. For an opposite contemporary view of martial law and executive power, see Benjamin R. Curtis, Executive Power (Boston: Little, Brown and Company, 1862). In his Merryman opinion, Taney had anticipated the use of military courts for trying civilians, but argued that even if Congress lawfully suspended the writ of habeas corpus, such military courts represented a violation of the Bill of Rights. White, Abraham Lincoln and Treason, 82. For an excellent history of martial law in the United States preceding the Civil War, see Fisher, Military Tribunals & Presidential Power, 1-40; as well as Randall, Constitutional Problems, 140-47.
established policy of the Lincoln administration. As noted earlier, on September 24, 1862, Lincoln for the first time issued a public proclamation suspending the writ of habeas corpus throughout the entire North.\(^\text{11}\) Now, in contrast to the geographically constrained habeas suspensions promulgated since the spring of 1861, all Northern citizens arrested for evading or encouraging resistance to the draft, as well as those arrested for unspecified classes of “disloyal practices” or for “affording aid and comfort to Rebels against the authority of the United States,” could no longer seek habeas corpus as a judicial remedy for military arrest and detention. In addition to this sweeping policy expansion, Lincoln’s September 1862 proclamation also declared that all such arrested persons “shall be subject to martial law and liable to trial and punishment by Courts Martial or Military Commission.”\(^\text{12}\) In other words, civilians arrested under military authority were to be tried (if there was to be a trial) by military, rather than civil courts, rendering state and federal habeas corpus writs for civilian prisoners ineffective.\(^\text{13}\)

\(^{11}\) See chapter III.

\(^{12}\) Lincoln’s Proclamation Suspending the Writ of Habeas Corpus, September 24, 1862, in CWL, V, 437.

\(^{13}\) From virtually the outset of the war, however, Union soldiers skeptical of the ability of the civil courts to combat treason—particularly in the Border States—made arrests under martial law long before Lincoln’s formal proclamation of September 24, 1862. Indeed, conditions in the tumultuous state of Missouri, in which guerilla warfare confronted the Union military authorities with a constant threat, prompted General Fremont to declare martial law in that state in 1861. See Blair, With Malice toward Some, 55–6. On December 2, 1861, Lincoln recognized the necessity for martial law in Missouri by issuing the following order to General Halleck: “As an insurrection exists in the United States and is in arms in the State of Missouri you are hereby authorized and empowered to suspend the writ of habeas corpus within the limits of the military division under your command and to exercise martial law as you find it necessary in your discretion to secure the public safety and the authority of the United States.” See Lincoln to Maj. Gen. Henry W. Halleck, December 2, 1861, in CWL, V, 35; and Fisher, 45–47. Thus at this early date, Lincoln was already combining authorizations for habeas suspensions and martial law. Many civilians tried by military commission in Missouri involved individuals accused of burning bridges or destroying railroad or telegraph lines, and the state would remain a nightmare for civil liberties throughout the entire war. Much the same conditions also prevailed in Kentucky, a crucial border state which frequently alternated between Union and Confederate control and was placed under martial law by proclamation of President Lincoln on July 5, 1864. Randall, Constitutional Problems, 171–72, 175; Neely, Fate of Liberty, 32–50. Military trials of civilians also arose early in the war in Washington, D.C., when General John Dix and
From the fall of 1862 onward, the Lincoln administration wielded suspension of habeas corpus and martial law as dual instruments by which the Union military punished disloyalty on the Northern home front. After Lincoln’s suspension proclamation of September 24, 1862, writes Neely, “military arrests and liability to trials by military commission went hand in hand in administration policy.” Predictably, the two components of Lincoln’s latest proclamation—nationwide habeas suspension and military trials conducted under martial law—aroused a new wave of bitter criticism and charges of executive dictatorship from Democrats and some British observers. Commenting on the consequences of martial law throughout the Union, one *Times* correspondent in London argued that by imposing martial law, Lincoln had appointed himself “a military despot” who sought “to establish a reign of terror, and act as if his sword were the sceptre of justice, and his brutal will not only the law but the source of law and right, and the only tenure by which men who but yesterday were free could hold either life, liberty, or property.”

Judge Edwards Pierrepont examined cases of prisoners arrested under authority of the State Department prior to February 1862, the month in which the War Department assumed responsibility for the internal security system of the Lincoln administration. The Dix-Pierrepont commission, as it came to be known, discharged most prisoners upon taking the oath of allegiance or on parole not to aid the rebels. Neff, *Justice in Blue and Gray*, 158; White, *Abraham Lincoln and Treason*, 77.

14 Neely, *Fate of Liberty*, 161; Neff, *Justice in Blue and Gray*, 42-43. Martial law under Lincoln received additional formal codification in April 1863. Francis Lieber, author of the famous Lieber Code—which stipulated the formal laws of war to be followed by the Union military—argued that martial law could extend courts-martial and military commission trials to civilians outside of formal military zones. This code, which was intended to balance humane standards of waging war with recognition of the necessity of flexibility needed by military commanders to win wars, was essentially an executive decree lacking statutory sanction. Lieber attempted to constrain the dangerous potentialities of martial law, which he defined as “simply military authority exercised in accordance with the laws and usages of war.” But the Lieber code remained ambiguous regarding the extent to which military courts could properly supplant civil courts. On the Lieber Code, see John Fabian Witt, *Lincoln’s Code: The Laws of War in American History* (New York: Simon and Schuster, 2012); Neely, *Fate of Liberty*, 160; Neff, *Justice in Blue & Gray*, 57; and Fisher, 74-77.

15 Neely, *Fate of Liberty*, 162-63; The *Times* (London), June 4, 1863.
While this Times article at least reflected contemporary Anglo-American fears of martial law, such rousing cynicism surrounding a despotic executive obscured the procedural regularities and safeguards for defendants’ rights present in the Union military justice system. Although the Lincoln administration employed military commissions as a device for disciplining civilians on the homefront, such trials also restrained the Union Army “mainly by imposing systematic record-keeping and an atmosphere of legality on the army’s dealings with a hostile populace.”\textsuperscript{16} To be sure, military commissions—which essentially operated procedurally as courts-martial for civilians from January 1862 onward—differed in substantial ways from civilian trials.\textsuperscript{17} Military commissions could only be established by the general in chief of the army or the commander of a military department, and such trials required the presence of at least three military officers.\textsuperscript{18} Unlike civilian trials, the basic legal safeguards of trial by jury and laws of evidence were either absent or significantly altered in military commissions, and those tried by military courts could not seek habeas relief from the civil courts.\textsuperscript{19} Charges against the defendant typically contained a declaration of his or her offense(s), followed by a specification of the time, place, and circumstances in which the act was allegedly committed. The accused were required to be present at their trial and permitted the use of counsel, although lawyers were not allowed to speak on behalf of their clients in the courtroom. Witnesses were required to confront defendants, while \textit{ex parte} evidence by affidavits

\textsuperscript{16} Neely, \textit{Fate of Liberty}, 41.

\textsuperscript{17} Fisher, 54-55; Neely, \textit{Fate of Liberty}, 162-63.

\textsuperscript{18} Blair, 56.

\textsuperscript{19} Neff, \textit{Justice in Blue and Gray}, 43, 159.
was impermissible. Sentences for the accused were sent to the departmental commander for review, and death sentences were automatically referred to the president for review and final approval.\textsuperscript{20} Although Britons who faced trial by courts-martial or military commission were permitted these standard procedural safeguards, they—as well as the British diplomats and consuls charged with their protection from injustice—often relied on their foreign nationality as a more salient safeguard against punishment from a Union military court.

Once firmly established in Union military policy, trials by court-martial and military commission were overseen by Kentuckian Joseph Holt, whom Lincoln appointed as Judge Advocate General on September 3, 1862. In such trials, the army required that all courts-martial transcripts be sent to Holt, whose bureaus maintained registers of all cases.\textsuperscript{21} Lincoln, as commander-in-chief, could ultimately overrule any decision by a department commander, judge advocate general, or general-in-chief in the Union army. Still, routine cases appealed to Lincoln were customarily sent to Holt for review, and the president generally followed Holt’s recommendations and judgements. Although historians have generally emphasized the quality of mercy in Lincoln’s character, it is nevertheless worth noting that in the vast majority of court-martial and military commission cases that crossed his desk, the president deferred final judgement to his Judge Advocate General, for whom mercy was an impediment to winning the war.\textsuperscript{22} As

\textsuperscript{20} Neely, \textit{Fate of Liberty}, 41, 163.

\textsuperscript{21} Neely, \textit{Fate of Liberty}, 162.

\textsuperscript{22} Neely, \textit{Fate of Liberty}, 163-64, 166. Historians have generally applauded Joseph Holt’s tenure as Judge Advocate General under Lincoln. According to Stephen C. Neff, “Holt was a brilliant legal mind, in whom rigor was considerably more apparent than mercy.” Neff, \textit{Justice in Blue and Gray}, 58. For a similar, positive assessment, see Elizabeth D. Leonard, \textit{Lincoln’s Forgotten Ally: Judge Advocate General Joseph Holt of Kentucky} (Chapel Hill: The University of North Carolina Press, 2011). For a more critical
will be seen, Holt proved just as willing to apply the hard hand of military justice to both American and British citizens alike.

During the Civil War, the Union army conducted at least 4,271 trials by military commission and courts-martial, most of which took place in the Border States of Missouri, Kentucky, and Maryland. Historian William Blair has found that, of these military commissions, only 106 involved explicit charges of treason against men and women. Most of these cases, 87, involved civilians, nearly half of whom were arrested on charges in the volatile state of Missouri alone. Blair also finds that a total of 65 soldiers and civilians were charged at least in part for “disloyalty,” and most of these cases—51—dealt with disloyal language. Prosecutions often resulted from language broadly construed to discourage enlistments or encourage desertion, claiming military service in the Confederate Army or participation in guerilla activity, or admitting secessionist sympathies. Military commission trials were also frequently conducted in Washington, D.C., largely as a focal point for weeding out corrupt businesses supplying the Union army. According to Neely’s exhaustive study of the records, five percent of trials by military commission occurred in Northern states above the District of Columbia and border regions, many of which involved Border State citizens or Confederate refugees. Despite their otherwise thorough analyses of the records, neither Neely nor Blair make

assessment of Holt in the role of Judge Advocate General (and of Secretary of War Stanton, as well), see Marvel, *Lincoln’s Autocrat*.

23 Neely, *Fate of Liberty*, 168.

24 After analyzing these Missouri trials, Blair concludes that: “These were not frivolous cases but dealt with violent resistance to the government, with the accused taking up arms against the United States or aiding in the destruction of railroad bridges and track. In effect, these may have been some of the most viable cases to prosecute during the entire war.” See Blair, 56-7.
comparative analytical distinctions between military trials for American citizens and British nationals, leaving one with the mistaken impression that Union military justice represented a purely domestic problem concerning only American citizens.\textsuperscript{25} British nationals were also subjected to Union military justice, and their military trials both demonstrated the broader scope of the habeas corpus problem under Lincoln and raised serious questions regarding citizenship, nationality, and loyalty during the Civil War.

Military Trials of British Nationals during the American Civil War

The Vallandigham and Milligan cases have cast a long shadow over the military trials of British (and other foreign) nationals during the American Civil War. To be sure, the total number of military trials of British nationals—and a precise total is difficult, if not impossible, to determine—did not come close to representing the total of 4,271 military trials documented by Neely. An extensive investigation of the courts-martial records at the U.S. National Archives reveals that the Union Army conducted no less than fifty-one courts-martial and twenty-four trials by military commission of British nationals, a total of seventy-five military trials.\textsuperscript{26} Taken together, most of these military trials occurred between 1863 and 1865 in northern and Border States, although some Britons were tried for offenses allegedly committed in the occupied Confederacy. Of the

\textsuperscript{25} See Neely, \textit{Fate of Liberty}; and Blair, \textit{With Malice toward Some}.

\textsuperscript{26} Records for the military trials of Britons during the American Civil War are found in RG 153: Records of the Office of the Judge Advocate General (Army), Court-Martial Case Files 1809-1894, NARA. Among the trials of British nationals by courts-martial examined for this study, one occurred in 1861; four in 1862; thirteen in 1863; nineteen in 1864; fourteen in 1865; and two in 1866. Most courts-martial trials—thirty-nine—can be identified as taking place in northern states; two, in the Border State of Missouri; and five in the Confederate states. Among the trials of British nationals by military commission examined for this study, two took place in 1863; eleven in 1864; and nine in 1865. Precise geographic locations of trials by military commission for British nationals are more difficult to identify, but among those that can be identified, two occurred in northern states; seven in the occupied Confederate states; five in the Border States (including Maryland and Missouri); and one in the District of Columbia.
seventy-five cases examined for this chapter, sixty-three—or eighty-four percent—resulted in guilty convictions, a fact suggesting that British nationality alone was not enough to incline Union officers toward leniency. Yet despite their relatively limited presence in the records, such cases offer historians unique insights about Civil War military trials, as well as the actions and responses of Britons tried by the Union military and British representatives, which might otherwise remain overshadowed by more prominent cases such as Vallandigham and Milligan. Unlike military trials of American citizens, the Lincoln government could not as easily afford to ignore British inquiries into the military trials of Britons, for such cases presented not merely a domestic problem, but a potential foreign policy problem, as well. Thus, Secretary of State Seward and Judge Advocate General Holt were more likely to attend to the complaints of British consuls and ministers on behalf of British subjects, yielding more documentation and insights into how this particular process of the Union military functioned, and how the Lincoln government responded to British inquiries about Her Majesty’s subjects.

Even though British nationals were classified as foreign subjects under American civil law, they were nevertheless liable to military arrest and trial under martial law during the Civil War. Aliens found guilty of engaging in active hostilities against the United States, or of aiding the Confederacy, thereby forfeited their rights as neutrals in the conflict and were subject to treatment as alien enemies under the law of nations. In the 1865 digest of the Judge Advocate General, an entry for “Alien” declares that a person’s identity as a British subject “can make no difference in his amenability to trial, by a military commission, for violation of the laws of war.” Additionally, under Union

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27 Whiting, War Powers under the Constitution, 337.
military policy, British subjects who were not—or had no intention of becoming—naturalized American citizens did not enjoy special privileges with respect to bringing lawsuits against the United States government over property claims: “An unnaturalized foreigner and British subject, who has been a permanent resident of one of the States of the Union, and has enjoyed the protection of our laws, is entitled to no more favorable consideration than a citizen in regard to the payment of a claim upon the government for property taken for the use and subsistence of our troops.”

It is worth noting that this entry specifies only British subjects, which is perhaps an index of the extent to which such cases during the war involved British nationals over other foreign nationalities. Additionally, Article 7 of the Lieber Code extended martial law to the property and persons of aliens, while Article 8 stipulated that the offices and persons of European Consuls were subjected to martial law “in cases of urgent necessity only: their property and businesses are not exempted. Any delinquency they commit against the established military rule may be punished as in the case of any other inhabitant, and such punishment furnishes no reasonable ground for international complaint.”

Thus, at least as a matter of Union military policy, British and other foreign nationals were liable to military arrest and trial under martial law.

If many civilian arrests under Lincoln occurred as a matter of routine military convenience rather than necessity, Union army officials occasionally may have also found convenient ways of obstructing British investigations into the military trials of Her

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Majesty’s subjects. To be sure, the Union military was a vast and complex bureaucracy in which intended policies were not always faithfully executed by incompetent or unwilling subordinates on the ground. A provost marshal at the community level might, for example, order the arrest of a local Democrat for purely political reasons, even though Lincoln never explicitly endorsed the use of military arrests to punish the political opposition. Yet, an emphasis on convenience may have actually been built into Union military policy with respect to military trials of foreign nationals. For the first two years of the war, British ministers in Washington and consuls throughout the North had been busy dealing with arrested Britons on an almost daily basis, but beginning in 1863, these British officials found themselves petitioning the Union government on behalf of Britons subjected to military trials. As discussed previously, however, unnaturalized Britons arrested during the Civil War faced a significant disadvantage over American citizens in that they could not take an oath of allegiance to the United States without surrendering their proper claims to British protection. This was a frequent dilemma that the British government recognized all too well, but one that the Lincoln administration could not always alleviate from the top-down: Britons might be able to get out of prison by taking an oath of allegiance to the Union, but in so doing, they would legally relinquish their claims to the protection of Her Majesty’s Government.

The Union military had appeared to recognize this problem by the summer of 1862, and in General Orders No. 82, promulgated on July 21, 1862, the War Department declared that aliens—although subject to the same restraints of the civil and military law demanded of American citizens—“can not be required to take an oath of allegiance to this Government, because it conflicts with the duty they owe to their own sovereigns.”
But although the order also directed that military commanders “will abstain from imposing similar obligations in future,” the War Department prescribed a solution to the oath problem by allowing commanders to “adopt such other restraints of the character indicated as they shall find necessary, convenient, and effectual for the public safety.” Furthermore, the order directed “that whenever any order shall be made affecting the personal liberty of an alien reports of the same and of the causes thereof shall be made to the War Department for the consideration of the Department of State.”\(^{30}\) In the case of British nationals subjected to the Union military justice system, neither of these regulations was consistently followed faithfully by commanders in the field. Britons arrested and tried by the military remained in detention for long periods of time without official justification, and British ministers and consuls often waited in vain to receive case reports.\(^{31}\) The fragmentary nature of the evidence only permits speculation, but if both Secretary of War Stanton and Judge Advocate General Holt directed their subordinates in the field to ignore the latter part of this order for the sake of convenience—that which required the transmission of reports on detained Britons to the State Department for the purpose of subsequent collaboration with the British government—such an evasive tactic would be consistent with their general policy of ignoring the provision of the Habeas Corpus Act requiring the War Department to submit


\(^{31}\) Memorandum calling attention to the General Order of the War Department, No. 82, of the 21\textsuperscript{st} July, 1862, Concerning the Administration of Oaths to Aliens, March 19, 1863, in Notes from the British Legation to the Department of State, 1791-1906, RG 59, M50, Roll 49, NARA. For further discussion on the problem of aliens submitting to oaths of allegiance, see Chapter III.
lists of civilian prisoners to federal judges.\footnote{32} Regardless of the reason(s) for why the Union military sometimes obstructed Anglo-American cooperation on prisoner reports, it is possible that at least some cases involving Britons tried by the military were deliberately kept away from the eyes of British representatives by incompetent or overzealous officers on the ground. Moreover, while the Habeas Corpus Act indicated a clear congressional intention that civilian prisoners should be tried in civil, rather than military courts, this legislation further hampered the ability of Britons to evade military trials with its provision that \textit{all} civilian prisoners, including foreigners, could \textit{only} obtain release upon taking an oath of allegiance.\footnote{33} While most Britons tried by the military staunchly refused to take an oath of allegiance and surrender their right to British protection, some—perhaps due to unbearable prison conditions, intimidation by military officials, or desire to return to needy families—felt compelled to do so. Thus, the difficulties faced by Britons negotiating the Union military justice system directly resulted from a combination of military practice and congressional legislation.

\textbf{The Courts-Martial Trials of British Union Soldiers}

The courts-martial trials of British nationals serving in the Union military were largely typical of the far greater number of courts-martial for American soldiers. Some of these Britons claimed to have made the journey to America specifically for participation


\footnote{33} Memorandum of a Conversation between Lord Lyons and Mr. Seward touching the Second Section of the Act of Congress relating to Habeas Corpus and regulating judicial proceedings in certain cases, April 24, 1863, in Notes from the British Legation to the Department of State, 1791-1906, RG 59, M50, Roll 49, NARA. For further discussion on the crucial problems facing British nationals with the passage of the Habeas Corpus Act of March 3, 1863, see Chapter III.
in the Union cause, while others claimed to have been coerced into the army against their will. Drunkenness on duty, desertion, and “conduct unbecoming” were no less prevalent among punished British soldiers than their American counterparts in blue. Of course, Britons who volunteered to serve in the Union or Confederate armies had officially forfeited their claims to British protection under the terms of Queen Victoria’s Proclamation of May 15, 1861, and for the most part, British ministers and consuls abstained from intervening in courts-martial cases involving British Union soldiers. British representatives did not bother defending British soldiers court-martialed for grave offences such as murder and rape, or even milder offenses relating to military discipline. Nor did they defend British Union soldiers court-martialed for simply expressing the wrong political sentiments. British Private Thomas Webb, for example, was charged with being drunk on duty and with “disrespect” in August 1863 for calling a colonel “A damned red-headed Irish Abolitionist sob” and a “damned Irish pig.” For these slurs, Webb was sentenced to a loss of up to five month’s pay, and sixty days of hard labor with a ball and chain.

If British representatives were content to leave British volunteers to their fates before military tribunals, those Britons facing military justice who were drafted or impressed into the Union army were another matter entirely. Following Congressional

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34 In the 53 courts-martial cases of British Union soldiers examined for this chapter, 20 involved alcohol-related charges, while 24 involved desertion.

35 Case of George W. O’Malley, case file MM 402, RG 153, NARA.

36 See the case of Thomas Webb, case files NN 446 and II 947, RG 153, NARA. For an excellent recent work that discusses the ways in which the Union Army policed dissent within the ranks, see Jonathan W. White, *Emancipation, the Union Army, and the Reelection of Abraham Lincoln* (Baton Rouge: Louisiana State University Press, 2014).
authorization of conscription in the summer of 1862, Seward had frequently assured wary British diplomats that “none but citizens are liable to [compulsory] military duty in this country.” Thereafter, however, the Lincoln administration frequently refused to grant discharges for foreign-born draftees who had either (1) declared their intention to become citizens or (2) for whom evidence could be found that they had voted in local, state, or national elections.\textsuperscript{37} Such a conception of volitional citizenship conflicted sharply with Britain’s conception of “perpetual allegiance,” which held that British citizenship “was ascribed at birth and could never be revoked or transferred.”\textsuperscript{38} Thus, in cases where British citizens were unlawfully forced into the Union army by recruiting officers and sought recourse to British protection from military justice, the British government proved quite willing to intervene on their behalf. One British resident of New York, William Dalton, was impressed into the Union army in early 1863. Writing to Lyons about his case from prison, Dalton claimed that he had never been naturalized or voted in any election since he arrived in the United States in 1849. On January 15, 1863, Dalton was wrongfully arrested as a deserter by the Provost Marshal of New York City and sent to a prison on Governor’s Island. Shortly thereafter, he was sent to New Orleans and forced to serve as a private in the 176\textsuperscript{th} Regiment of New York Volunteers. When Dalton refused

\textsuperscript{37} At first, the State Department adhered to this extra-legal criteria without explicit congressional approval. Seward’s position toward foreign draftees was later partially codified, however, with the Enrollment Act of March 3, 1863, which declared as liable for conscription “all able-bodied male citizens of the United States, and persons of foreign birth who shall have declared on oath their intention to become citizens…between the ages of twenty and forty-five…” Curiously, however, the Enrollment Act did not mention voting as establishing a liability to be drafted, even though the State Department had used and would continue to use voting as grounds for denying requests for the foreign-born to be exempted or discharged from service. “Aliens and the Draft,” \textit{The New York Times}, August 25, 1862; “An Act for enrolling and calling out the national Forces, and for other Purposes,” \textit{Congressional Record}. 37th Cong. 3d. Sess. Ch. 74, 75. 1863. March 3, 1863.

to muster, he was court-martialed and sentenced to nine months imprisonment at Fort Jefferson in Tortugas, Florida. Upon hearing of the case, Lyons launched an investigation into Dalton’s claims. “Strange things have been done in New York & Dalton’s story about impressment may be true,” Brig. General Daniel Woodbury admitted in a letter to an unknown recipient (probably Lord Lyons), and “If you can assure that I think you might obtain from the Sec[retar]y of War an order for his release.” The British minister had apparently succeeded in verifying Dalton’s nationality, for the remainder of Dalton’s sentence was remitted and he was ordered released from Fort Jefferson and transported back to New York on May 10, 1864.39

Not all British soldiers who appealed to Lord Lyons were successful in escaping the penalties of a court-martial and the Union army, however. On April 7, 1864, William Russell was court-martialed for deserting his company of New York Volunteers in early March of the same year. Bringing his case to Lord Lyons that August, Russell claimed that his real name was William Kennedy, and that he had never enlisted in the Union army. The implication was clear: Kennedy had been mistaken for someone else, and as a British subject who had not become a naturalized American citizen, he had a right to the protection of the Crown. But if Kennedy had never truly enlisted, his testimony before the military court was nothing short of baffling. He called no witnesses, identified himself as a soldier, pled guilty to the charge, and asked for mercy. Reviewing the case upon the intervention of Lord Lyons, an incredulous Judge Advocate General Holt found

it “scarcely within the bounds of possibility that there should have been a mistake of identity, and that the prisoner [Kennedy] should have been so deficient in intelligence or stupefied by the circumstances, that he should have failed to ask for the testimony of the persons in the army he had recently been visiting.” As a result, Kennedy suffered a stiff penalty; he was sentenced to forfeit all pay and allowances, have his head shaved and drummed through the division under guard wearing a “Deserter” sign, and confined at hard labor with no pay for five years.40

While a British soldier like Kennedy tried to use his nationality as a trump card for getting out of military service, at least one British soldier invoked his nationality as a badge of honor for returning to the Union army. On September 16, 1861, Briton George Lindsey was thrown into a guardhouse for insubordination on Riker’s Island in New York, where he then fatally stabbed a fellow soldier in the heart with a dirk knife. Afterwards, Lindsey was sent to a New York prison for two years before his formal court-martial on December 23, 1863. Lindsey claimed that he had killed the soldier in self-defense, but his testimony convinced neither the commission members nor Judge Advocate General Holt. In May 1864, Lindsey appealed his case directly to Lincoln, emphasizing his British nationality in his plea to return to the army as a noble Englishman who left his country “to join the Crusade for Liberty in the United States.” Lindsey lamented to the president that his detention was “keeping me from filling [sic] the mission for which I left my home and crossed 3000 miles of water[,] namely the liberation of men from the Passion of Domestic Quadrupeds.” He asked Lincoln to allow

40 Lord Lyons to William H. Seward, August 10, 1864; Joseph Holt to the Secretary of War, November 25, 1864, both in case file NN 1548, RG 153, NARA.
him to reenlist “for as long as I am able and the Rebellion lasts,” but the president apparently did not grant his request. Lindsey was sentenced to a dishonorable discharge and confinement at hard labor for five years at the Penitentiary at Albany.41

“English Bayonets in English Hands”: British Nationals Tried by Military Commission

On the other hand, British representatives in the Union states were much more concerned with protecting the lives and liberties of Britons who had not relinquished their claim to British protection by fighting in either the Union or Confederate armies. It was up to the prerogative of imprisoned Britons to bring their cases to the attention of Her Majesty’s government, and if they did, British representatives went to great lengths in order to secure their release, or at least to mitigate their sentences. (American military prisoners, on the other hand, did not have access to this potential path of intervention and had to rely on the procedural safeguards already in place for them.) At least twenty-four British nationals were tried by military commissions during the Civil War. As was the case with American civilians subjected to military trials, the charges against these Britons varied widely, including simple larceny; smuggling contraband through Confederate lines; spying for the Confederacy; writing “disloyal” letters; and even, in two cases, treason. Although the British government devoted considerable energy to intervening on behalf of British civilians, they typically did not seek relief for Britons found guilty of blatantly violating the laws of war by running the blockade. In April 1865, for example, a group of seven British nationals formerly employed as lithographers for the Confederate government were convicted by a military commission for running the blockade, and each

41 Joseph Holt to President Lincoln, June 30, 1864; and George Lindsey to Abraham Lincoln, May 2, 1864, both in case file MM 1239, RG 153, NARA.
man was sentenced to one year in prison and a $500 fine.\textsuperscript{42} For other alleged offenses of a disloyal character, however, Britons were subjected to a variety of sentences, ranging from imposition of fines, to confinement at hard labor, and even, in one case, death. Most military trials of British nationals took place in the Border States of Missouri and Maryland, although some were also conducted in the occupied South.

Although the Lincoln administration had readily released British prisoners arrested under habeas suspension since the first year of the war, Union officials did not prove as lenient with British prisoners once they were convicted by military commissions. In one particular case, Judge Advocate General Joseph Holt made it clear that Britons arrested and tried by the military for serious offenses would not be spared punishment merely on account of their nationality. In a seven-day trial that began on May 30, 1864, Richard M. Hall, a Canadian prisoner at Fort McHenry, was tried by military commission for violation of the laws of war in conducting illegal trade and correspondence with the Confederacy. Sometime between January 29 and March 8, 1864, Hall had unlawfully crossed Union lines into the Confederacy by running the Union blockade from Norfolk, Virginia, and he was apprehended by Union authorities shortly after returning to Baltimore in early March.\textsuperscript{43} In his testimony, Hall defended his running the blockade by maintaining that he was merely curious to see the state of conditions in the Confederacy, and had also intended to escort two Canadian women back to Canada from Charlottesville, Virginia. Union authorities doubted Hall’s testimony, suspecting

\textsuperscript{42} See the consolidated cases of Robert Archibald, Robert Pringle, Archibald McKay, George McFarland, Alexander McFarland, Archibald McFarland, and Thomas Cook, all in case file MM 1953, RG 153, NARA. For a general discussion of this problem, see Neely, \textit{Fate of Liberty}, 24-26.

\textsuperscript{43} Commission testimony in the Case of Richard M. Hall, case file LL 2067, folder #1, RG 153, NARA.
that he was really a Confederate spy. Hall had in his possession a certificate of British nationality and a pass from James Seddon, the Confederate Secretary of War, which allowed him to pass through Confederate lines. After a thorough examination of Hall’s trunks, an officer “succeeded in obtaining evidence most convincing” that Hall “intended by his visit to lay the foundation of large smuggling operations with the South.”

For weeks after Hall’s arrest, both Lord Lyons and Consul Bernal in Baltimore were unable to secure a report on the case from Union military officials. In his final statement before the commission, Hall played up his British nationality, and pled guilty to the charge but not the specification, admitting to running the blockade but stridently denying any intention of conducting illegal trade and correspondence with the Confederacy. Despite his testimony, the commission remained convinced of Hall’s intentions to establish commercial ties with Southern firms, finding Hall guilty of the charge and specifications and sentencing him to four months imprisonment and whatever additional time necessary to pay off a $6,000 fine. But this did not stop the British minister in Washington from trying to mitigate Hall’s sentence. On July 8, 1864, Lyons delivered to the State Department a petition on Hall’s behalf from the Mayor and other prominent citizens of Montreal, who pled that the Lincoln administration remit Hall’s oppressive fine on account of the long prison sentence that he had already served.

44 Maj. H. Hayner to Maj. Gen. Lew Wallace, March 21, 1864, in case file LL 2067, folder #1, RG 153, NARA.

45 Statement of Richard Hall in case file LL 2067, folder #1, RG 153, NARA.

46 F.W. Seward to Joseph Holt, July 8, 1864; Lyons to William H. Seward, June 27, 1864, both in case file LL 2067, folder #3, RG 153, NARA. The petition from Montreal citizens, dated June 30, 1864, may also be found in this file.
In the end, however, British intervention failed to save Hall from punishment. Reporting on the case to Lincoln, Holt confided his suspicion that Hall was simply hiding behind his British nationality, and argued against granting leniency in cases in which Britons were found guilty of serious charges. The Judge Advocate General defended Hall’s trial as “an appropriate one, inasmuch as the offence—violating the laws of war—was of a military character and properly triable by a military court.” Despite British requests that Hall’s punishment be mitigated, Holt told the president that the heavy fine levied against the Briton was perfectly justified, since Hall’s primary object in going south was to establish commercial ties there. The strength of evidence in favor of Hall’s guilt should satisfy Lord Lyons “of the justice of the judgement, and render obvious the vital importance of checking violations of the laws of war by penalties at least as severe as the one imposed in this case.” To Holt, Hall’s intention to engage in contraband trade in the Confederacy rendered “aid and comfort not less substantial than would be furnished by English bayonets in English hands.” Thus, Holt concluded, Britons such as Hall who “have been detected and convicted of a persistent participation in these unlawful and treacherous practices” had to suffer punishment, and “manifold, serious and obvious considerations call for the enforcement of the full measure of the penalty imposed” on him.47 Following Holt’s recommendation, Lincoln declined to commute Hall’s sentence, and the beleaguered Briton was forced to serve his prison term and pay the $6,000 fine.48

47 Joseph Holt to Abraham Lincoln, July 12, 1864, in case file LL 2067, folder #3, RG 153, NARA.

48 Endorsement in the Case of Richard Hall signed by A. Lincoln, July 9, 1864, in case file LL 2067, folder #3, RG 153, NARA.
The military trial of another British national, William Croft Heslop, suggests a pattern of military convenience on the part of the Union military in deliberately avoiding pressures from British officials to investigate the cases of Her Majesty’s subjects. A 28-year-old English merchant who had traveled to the United States in 1860 to raise a farming business in Virginia, Heslop was arrested in Baltimore on March 25, 1864, and tried by a military commission four months later for violation of the laws of war. The charges and specifications against Heslop consisted of “lurking as a spy” in Baltimore, where he allegedly obtained information intended for the aid and comfort of rebel forces, as well as passing through Union military lines without lawful authority.\textsuperscript{49} According to testimony under oath from a rebel prisoner and deserter procured by the assistant judge advocate, Levi C. Turner, Heslop “came to Richmond from Baltimore with a dispatch, in cipher, to Jeff Davis, and forgot the key to the dispatch, and was placed in ‘Castle Thunder,’ as a punishment. He afterwards remembered the key, and was liberated and commissioned as [a] blockade runner.” The dispatch carried by Heslop was allegedly meant to inform Jefferson Davis that two hundred young, armed men near Baltimore were ready to join the Confederate Army at that moment marching its way into Pennsylvania. Moreover, the witness continued, Heslop “has been largely engaged in Contraband trafficking, mostly in drugs, and is represented as an active rebel aider & abettor, and dangerous person.”\textsuperscript{50} During his trial, Heslop pled not guilty to all charges.\textsuperscript{51}

\textsuperscript{49} Case file NN 2700, RG 153, NARA. Documentation for Helop’s case may also be found in File number S890, M619 roll 304, Letters Received by the Office of the Adjutant General, Main Series, 1861-1870, RG 94, NARA.

\textsuperscript{50} (underline in original) Case file NN 2700, RG 153, NARA; File number S890, M619 roll 304, Letters Received by the Office of the Adjutant General, Main Series, 1861-1870, RG 94, NARA; case file number 3339, Turner Files, M797, RG 94, NARA.

\textsuperscript{51} Statement of W. C. Heslop, in case file NN 2700, RG 153, NARA.
While in prison, Heslop succeeded in bringing his case to the attention of Lord Lyons in Washington and Consul Bernal in Baltimore, both of whom became frustrated in their attempts to secure cooperation with the Union military. To Lyons, Heslop denied any allegation that he harbored pro-Confederate sentiments, maintaining that he was “strictly neutral” with regards to the war. Lyons thereafter asked Seward that Heslop not be detained indefinitely without trial. Heslop had denied the charges brought against him, and Lyons, as the chief British representative in the United States, informed the Secretary of State that he felt duty-bound to support the young man’s demand for a trial. Heslop’s case also prompted Consul Bernal to reflect upon what he perceived as a consistent failure of the Union military to observe the provision of General Orders No. 82 directing the transfer of foreign prisoner cases from the War to the State Department. For Bernal, “these orders would appear to have become a dead letter—As Heslop has now been confined, apparently forgotten, for three weeks, I think it my duty to report his case to your Lordship.” When Bernal went to the Baltimore jail to visit Heslop, he discovered that the prisoner had been whisked away to Fort Warren unannounced. Given that Holt had insisted on holding Heslop for further investigation, Bernal found it “very strange [that Heslop] should be suddenly transferred without such said trial, to so distant a point as Fort Warren.” But Bernal and Lord Lyons did not give up, and their intervention appears to have eventually paid off; the commission found Heslop not guilty.

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52 Statement of W. C. Heslop in case file NN 2700, RG 153, NARA.

53 Lord Lyons to William H. Seward, May 14, 1864, in Union Provost Marshals’ File of Papers Relating to Individual Civilians, M345 roll 126, RG 109, NARA.

54 Frederic Bernal to Lord Lyons, April 16, 1864, in Union Provost Marshals’ File of Papers Relating to Individual Civilians, M345 roll 126, RG 109, NARA.
(perhaps merely in deference to British protests), and he was acquitted of all charges and ordered released in November, 1864.55

At least one British subject suffered a long imprisonment and military trial in spite of being wrongfully accused, a possible victim of military convenience or bureaucratic incompetence. In December 1863, twenty-five-year-old Irishman David Boyle of Baltimore was arrested and tried by the military for spying for the Confederate Army and smuggling Rebel mail and merchandise into Maryland, Virginia, and the District of Columbia.56 A railroad laborer, Boyle stopped at a Maryland tavern one night on his way home, where he was arrested and then transported to Old Capitol Prison. Boyle pled his case to Levi C. Turner, informing the adjutant general that he had been arrested simultaneously with another man also named Boyle at the same tavern. As it turned out, Boyle was indeed wrongfully arrested; the other man to whom he referred was Robert Boyle, and the military authorities were really after the latter for the same charges.57 Recognizing the mistake, the commission found Boyle not guilty of the charges and specifications, and ordered his acquittal.58

55 Extract of a dispatch from H.M. Consul at Baltimore to Lord Lyons, dated May 7, 1864; Lord Lyons to William H. Seward, May 10, 1864, both in Union Provost Marshals’ File of Papers Relating to Individual Civilians, M345 roll 126, RG 109, NARA; Case file number 3339, Turner Files, RG 94, M797, NARA.

56 See J. Holt to the Adjutant General, November 21, 1864, and J. Hume Burnley to W. H. Seward, September 25, 1861, both in case file NN 2859, RG 153, NARA.

57 Robert Boyle was a citizen of Virginia who was arrested on the same charges as the British David Boyle. In the former’s military trial, the commission found him guilty of traveling without lawful authority between Richmond and Baltimore, as well as purchasing goods for the Confederacy. He was sentenced to confinement at hard labor for the duration of the war, and sent to the Penitentiary at Albany, New York. See the case of Robert Boyle, case file NN 2393, RG 153, NARA.

58 Testimony of David Boyle in case file NN 2859, RG 153, NARA.
Boyle’s case should have ended there but, inexplicably, he remained in prison without justification. Moreover, British representatives remained ignorant of the disposition of his case. Throughout the period of Boyle’s detention and trial, the British charge de affairs in Washington, J. Hume Burnley, made frequent appeals on Boyle’s behalf. On September 25, 1864, Burnley wrote Seward that neither he nor the British consul in Boston had yet heard of the commission’s decision, and requested “that there will be no further delay in the matter, and that I may speedily be informed of the result of the trial.”  

This “unfortunate man,” Burnley wrote Seward two weeks later, seemed to have “resulted mainly if not entirely, from his having been accidentally found in company with another man with the name of Boyle, whose trial has long since been concluded.” Therefore, Burnley felt “an imperative duty on my part most urgently” to renew his appeal to Seward, trusting that Boyle would soon be released, given his “weak state of health.”

By November 1864, however, Boyle remained imprisoned at Fort Warren, even though Holt seemed satisfied with the commission’s decision in his trial. After languishing in prison for an entire year, the War Department finally ordered Boyle’s discharge on December 1, 1864.

Prosecuting “the Gentler Sex”: Trials of British Women by Military Commission

While the vast majority of British nationals tried by military commissions during the Civil War were men, British women also faced military justice for various charges of disloyalty, cooperating with the Confederate government, and sending goods across

59 J. Hume Burnley to W. H. Seward, September 3, 1864, and J. Hume Burnley to W. H. Seward, September 25, 1864, both in case file NN 2859, RG 153, NARA.

60 J. Hume Burnley to W. H. Seward, October 7, 1864, in case file NN 2859, RG 153, NARA.

61 J. Holt to the Adjutant General, November 21, 1864, in case file NN 2859, RG 153, NARA.
Confederate lines. No fewer than three British women were tried by military commission during and immediately after the Civil War, all of whom lived in the South and held differing views toward, and involvement with, the Confederacy. Although scholars have demonstrated that southern women often used their gender as a shield in civilian-military encounters, they have not shown how British women also employed their foreign nationality as an additional protection against military justice.62 On May 26, 1864, Mary S. Hill, a native of Dublin, Ireland and resident of New Orleans, was arrested and tried by the Union military for writing treasonable correspondence with the enemy. In one letter which led directly to her incarceration in the Women Prison, Hill had written to Confederate General Thomas Taylor pledging material assistance to the Confederate Army.63 Hill sent another letter to her brother, Samuel William Hill, a captain of engineers in the Confederate Army, in which she described her recent arrest with bitter contempt, asking her brother to “imagine how my English blood boiled with indignation at being treated like a criminal.”64

Hill pled not guilty to the charge and specifications, denying authorship of the letters. Before and during her trial, Hill attempted to use her British nationality as a means for securing her release, but this tactic did not sit well with the members of the

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63 M. S. Hill to Thomas Taylor, May 20, 1864, in case file LL 2628 folder 2, RG 153, NARA.

64 Mary S. Hill to Samuel William Hill, May 20, 1864, in case file LL 2628 folder 2, RG 153, NARA.
commission. Hill’s file contains no evidence that she had sought protection from Lord Lyons or a local British consul, but this is not surprising. During the second half of the Civil War, British subjects living in the Confederacy faced considerably more difficulty than their Northern counterparts in certifying their nationality and communicating with British representatives for protection, since the Confederate government had expelled nearly all of the British consuls in the Confederacy during the summer and fall of 1863.

Interestingly, the strategy of Hill’s defense counsel was to shame her for wielding her British nationality as a trump card, while simultaneously emphasizing the “weakness” of her gender. Her counsel asked that the members of the commission not be influenced by “the abusive and unbecoming rhapsody of vituperative epithets” expressed in Hill’s letters. “How any Lady could, under any circumstances, make use of such language it is difficult to conceive; and when we learn that she is an English woman, who has never been naturalized in this country” and attempted to hide behind her British nationality, “our astonishment is increased.” There was only “one explanation of this singular conduct,” which was that Hill “is laboring under a politico-mono-mania, which prevail among certain persons in the Southern States, and to some extent even in the other States of the Union…this moral epidemic is found in the greatest intensity among some of the gentler sex. They are but too often led away by the impulse of their feelings, instead of being guided by the dictates of reason & propriety.” Her counsel argued that she had

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65 Mary S. Hill to Samuel William Hill, May 20, 1864, in case file LL 2628 folder 2, RG 153, NARA.


67 In the matter of the charge and specification preferred against Miss Hill, argument in behalf of accused (underline in original), case file LL 2628, folder 2, RG 153, NARA.
been tricked into writing to General Taylor by an agent of the U.S. military who sought to
tenrap her into committing a disloyal act. She may have been guilty of intending to enter
correspondence with the enemy, but intention alone was no crime.\textsuperscript{68} This defense
certainly would not have swayed President Lincoln, who defended preventive military
arrests of persons who might commit future crimes against the government.\textsuperscript{69} Hill’s
defense failed to convince the commission members, who found her guilty and sentenced
her to confinement for the duration of the war despite General William T. Sherman’s
recommendation that she instead be banished to the Confederacy.\textsuperscript{70}

Frustration could sometimes lead Union military officials to conveniently ignore
British protests on behalf of suspicious women. Elizabeth Mary Gilbee was arrested in
October 1863 for violation of the laws of war after crossing into Union lines bearing
goods and letters from the Confederacy. Union military officials suspected Gilbee—an
eighteen-year British resident of Georgia—as a conduit for facilitating correspondence
between persons on both sides of the war, and she had also violated the Union blockade
at Wilmington, North Carolina by sending goods valued at $3,000 (mostly women’s
apparel) to family members living in the Confederacy.\textsuperscript{71} General Benjamin Butler—who
had already enjoyed a dismal notoriety among the British for his harsh treatment of
Confederate women during his occupation of New Orleans—ordered Gilbee’s military

\textsuperscript{68} In the matter of the charge and specification preferred against Miss Hill, argument in behalf of
accused (underline in original), case file LL 2628 folder 2, RG 153, NARA.

\textsuperscript{69} See Lincoln’s Corning and Birchard letters.

\textsuperscript{70} Case of Mary S. Hill, and E.B. Hall to Capt. E.D. Benedict, August 23, 1864, both in case file
LL 2628 folder 2, RG 153, NARA.

\textsuperscript{71} Case file LL 2797, RG 153, NARA.
trial, and she was found to be “a bitter and violent secessionist” by her interrogator at Fortress Monroe on April 16, 1864.72 During her examination, Gilbee admitted to running the blockade at Wilmington on her return to Georgia, but denied carrying military information through Confederate lines. Her interrogator soon became irritated after asking Gilbee if she had carried any letters across military lines. Believing that her interrogator was “trying to get me hung,” she also refused to disclose the identities of the letters’ authors for fear of incriminating herself. The provost marshal scolded her for “laughing and trying to deceive me in all these matters,” and Gilbee probably gave him the impression that she was a Confederate sympathizer after disparaging him as a “Black Republican.”73

Finding Gilbee uncooperative, the military became frustrated once the British government attempted to intervene on her behalf. Although her military trial did not take place until five months after her arrest, Gilbee had at some point during her ordeal petitioned for official British protection. In June 1864, the British Vice Consul at Norfolk, Myer Myers, wrote to the army inquiring about Gilbee’s case, but the irritated provost marshal doubted Gilbee’s innocence and bitterly asserted that “this is none of the British Consul’s business.”74 Although Gilbee denied harboring any southern sympathies in her testimony, other of her friends in New York who petitioned the military on her

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72 John Camb to Capt. C. G. Thornton, June 24, 1864, in Union Provost Marshals’ File of Papers Relating to Individual Civilians, M345 roll 104, RG 109, NARA.

73 Examination of Miss E. M. Gilbee, Fortress Monroe, April 16, 1864, in case file LL 2797, RG 153, NARA.

74 See certificate of nationality in case file LL 2797, RG 153, NARA; Myer Myers to Brig. Gen. J. Vogdes, August 3, 1864, in Union Provost Marshals’ File of Papers Relating To Individual Civilians, M345 roll 104, RG 109, NARA.
behalf admitted that “Her mistaken sympathy with the Southern cause has probably led her into the grievous error which has caused her imprisonment.” Gilbee had even been introduced by a friend to Secretary of State William Henry Seward as a woman of “honor[,] character & integrity” when she sought a pass to cross military lines earlier in December 1863. Gilbee pled “Not Guilty” to the charge and specifications, but the commission found her guilty on all counts and fined her five hundred dollars, a “lenient” sentence on account of her five month imprisonment at Fortress Monroe.

“So Blatant an Enemy to Our Government”: British Nationals, Military Trials, and Treason

As dozens of American citizens were arrested and tried on charges of treason during the Civil War, so, too, were British subjects living in the Union. While allegiance to the Crown legally shielded Britons from suffering the punishments prescribed by U.S. treason law, this did not stop the Union military from punishing Britons charged with expressing language or engaging in actions broadly defined as treasonous. Of the three cases of British nationals arrested and explicitly charged with treason or disloyalty, all of them to some extent involved treasonous language. This was hardly an uncommon occurrence during the Civil War; one could easily languish in a military prison for months for simply expressing language, written or spoken, that might be construed to damage the efforts of the Union Army or disparage the Lincoln administration. The

75 See Gilbee’s statement in defense in case file LL 2797, RG 153, NARA; Petition on behalf of E. M. Gilbee to Chas. C. G. Thornton, June 4, 1864, in Union Provost Marshals’ File of Papers Relating To Individual Civilians, M345 roll 104, RG 109, NARA.

76 Richard S. Emmet to William H. Seward, December 30, 1863, in case file LL 2797, RG 153, NARA.

77 Whiting, War Powers Under the Constitution, 337.
concept of “constructive” or “implied” treason, rooted within the classic British tradition of treason, thrived as a mechanism for policing disloyalty in the Civil War North. As the arrest and trial of Clement Vallandigham made clear, the Union Army operated on a broad interpretation of language calculated to discourage enlistment or encourage desertion. Moreover, the military took seriously any acts committed by Northern citizens that suggested the possibility of materially aiding the Confederacy, such as trading with the enemy, and British nationals were sometimes found guilty of doing just that. While such convicted Britons faced severe punishments—including the ultimate penalty of death—the British government, when notified of such cases, devoted considerable energy to ensuring that they at least received a mitigated sentence, and their interference annoyed Union military officials determined to punish disloyal persons regardless of nationality.

In late August 1864, Briton Frank Russell Reading, a newspaper editor of the Constitutional Union and employee in the Government Printing Office, was charged with “Uttering disloyal and treasonable language in the District of Columbia, when it was threatened by the enemy.” According to the specification of the charge, Reading was alleged to have spoken language “calculated to give aid, comfort, and assistance to the enemy,” such as: “I am a rebel; I am proud of that title. I would like to go South if I could get there.” Moreover, Reading was accused of challenging the reliability of official reports in the newspapers from the Union army and navy, and of calling Union soldiers

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78 Blair, 39-40, 57. For further discussion on the concept of “constructive treason” and its roots within the British tradition, see Blair, 13-65; and Jonathan W. White, “‘To Aid Their Rebel Friend’: Politics and Treason in the Civil War North,” Ph.D. dissertation, University of Maryland, College Park, 2008.
cowardly “ragamuffins.” Another witness testified that Reading’s diatribes against the Union government were “universally disloyal.” According to John W. Jones, Reading was not a man to hide his Southern sympathies:

Last February I boarded in the same house with him [Reading]. In his conversation he was very abusive of the northern people and of the incoming administration of Mr. Lincoln. He was very intimate with Mrs. Page and Mrs. Gaunt, who were known to be outspoken secessionists. Reading frequently boasted that he was in the counsels and confidence of the National Volunteers, and said frequently in my presence that he was sorry that Lincoln did not have his damned throat cut when he came through Baltimore. On Sunday before the inauguration he said to me that Lincoln would never be inaugurated; that he was not and never would be President of the United States; that Jeff. Davis would drive him out of Washington in less than thirty days, and he hoped to God he would.

When Jones pointed out the irony that a man with such convictions happily received a paycheck from the federal government, Reading “replied that he was not a citizen of the United States; that he was a British subject; and if he was turned out, Lord Lyons would see that he was reinstated.” But there was at least some conflicting testimony in this case; one witness claimed to have heard Reading say that “he would like to see the Union preserved.” Nevertheless, the military authorities found enough evidence of treasonable sentiment from forthcoming witnesses, and an order for the Briton’s arrest was issued on July 7. Reading pled not guilty, but the commission found him guilty and sentenced him to imprisonment at hard labor for five years at Fort Delaware.

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79 L. C. Turner to William H. Seward, July 12, 1864, in case file NN 2277, RG 153, NARA. According to a clerk in the Attorney General’s Office, Reading had been arrested twice before July 1864, but was released on both accounts for a lack of sufficient proof of his disloyalty.

80 Fourteen prominent men from the District of Columbia, including the Mayor of Washington, Richard Wallach, even signed a petition pleading for Reading’s release. The petitioners asked Lincoln to grant Reading a “full and free pardon,” claiming that during his residency in Washington, Reading had deported himself “as a good and worthy citizen” despite his foolish utterances to the contrary, and that his vindictive public enemies were primarily responsible for securing his arrest and conviction in the first place. See Petition of Richard Wallach and others to Lincoln, January 30, 1865; and Joseph Holt to Lincoln, March 6, 1865, both in case file NN 2277, RG 153, NARA.

81 See commission testimony in case file NN 2277, RG 153, NARA.
From prison, Reading was able to inform Lord Lyons about his case and, in accord with witness testimony, seemed confident that he would be released by virtue of his British nationality. “Being a British subject in every sense of the word,” Reading wrote Lyons, “my case calls for immediate action on the part of Her Majesty’s Minister in Washington—I am prepared at once to deny every charge that can be brought against me.” Reading concluded his letter by claiming that his “bad state of health” rendered his confinement intolerable. As complaints of physical hardship on the part of imprisoned Britons often resonated with the British minister in Washington, Lyons asked Seward that Reading “be set at liberty if he is in fact a British subject, and there be no serious charges against him.”

The Union military seemed to ignore British inquiries on Reading’s behalf. Over the next few months, both Lord Lyons and J. Hume Burnley emphasized Reading’s poor health in their applications to the Lincoln administration for his release. Burnley even appealed to Lincoln’s humanity and well-known reputation for clemency, but the president apparently did not intervene in the case. The British minister conceded that although Reading had uttered “wild and foolish expressions” under the excitement of the times, he “does not appear to have been generally obnoxious to this [U.S.] Government.” Ultimately, Reading’s nationality and the frequent protests from the British government ensured a mitigated sentence but not a speedy release for the prisoner.

82 Extract from a letter from F. R. Reading to Lord Lyons, July 7, 1864, in case file NN 2277, RG 153, NARA.

83 Lord Lyons to W. H. Seward, July 12, 1864, in case file NN 2277, RG 153, NARA.

84 See Lord Lyons and J. Hume Burnley to William H. Seward, November 14, 1864, and J. Hume Burnley to W. H. Seward, March 23, 1865, both in case file NN 2277, RG 153, NARA.
In reviewing the case, Holt acknowledged that Reading was a British subject who had resided in the United States for twelve years without becoming a naturalized American citizen. But while the War Department continued to insist on Reading’s guilt, Holt recognized that maintaining amicable relations with the British government demanded a more flexible approach toward resolving his fate: “If however, in consequence of the foreign origin and want of citizenship of the prisoner, the Secretary [of War] should hesitate to carry out the sentence as imposed, it is recommended that Reading be sent either beyond our lines South or wholly outside the limits of the United States.” As Holt made clear in the earlier case of Richard Hall, British nationality alone was not enough to exonerate one from committing serious offenses against the Union government: “Certainly so blatant an enemy to our government and so open and despicable a champion of the enemy [as Reading] should be no longer suffered to enjoy the protection of our laws.”

Reading was ordered released on May 9 upon condition of subscribing to an oath of allegiance, but the records do not indicate whether he did so.

While Reading had successfully brought his case before Lord Lyons with the expectation of British protection, at least one Briton charged with treason may have chosen instead to rely on his local reputation for release. In March of 1864, Irishman and Baltimore wagon driver John Scally was tried by military commission and charged with treason for recruiting for the Rebel Army within Union territory. Scally’s arrest was ordered by Major Leopold Blumenberg, provost marshal in Baltimore, after the latter

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85 Joseph Holt to Edwin M. Stanton, August 16, 1864, in case file NN 2277, RG 153, NARA.

86 E. D. Townsend to Commanding Officer at Fort Delaware, May 9, 1865, in case file NN 2277, RG 153, NARA.

87 Case of John Scally, case file MM 1421, RG 153, NARA.
received a telegraph sent from his counterpart in Pittsburgh, who had stumbled upon treasonous correspondence between Scally and fellow Irishman John McVoy. In his most incriminating letter, Scally boasted defiantly that he would never pledge his allegiance to the United States government, and wrote: “I say in a Pig’s posterior I will—then the Sun will cease to rise in the East or shine when I become a Union man. I hope I will not live to see that day.” Scally proudly informed McVoy that he had done everything in his power to break up “that damned infernal Union,” claiming to have recruited 310 men for the Confederacy since the start of the war, and hoping to recruit many more. “I have swore [sic] to be true to the Confederate Government,” he continued, and “you may be sure that I should not aid the Yankee Government in any shape.” He detested Union citizens and “their damned poluted [sic] principles,” and closed his letter by expressing relief that “i [sic] am not a subject of this Yankee Government thank God, so Abe can kiss you know what.”

When later questioned by the military about this letter, Scally admitted authorship, but denied that he had actually recruited men for the Confederate army. That charge, the young Irishman provocatively asserted, would have to be proven by the military authorities, and Scally reminded his arresting officer that “he was not the only man who boasted of having done more than he actually did.”

Although Scally pled not guilty to the charges and specifications, the proceedings in his case demonstrate how seriously the Union military considered treasonous words and actions of foreign nationals, even in the face of overwhelming witness testimony to

88 In the Matter of the United States, against JOHN SCALLY, before Military Commission at Baltimore, Maryland, and John Scally to John McVoy, December 5, 1863 (underline in original), both in case file MM 1421, RG 153, NARA.

89 In the Matter of the United States, against JOHN SCALLY, before Military Commission at Baltimore, Maryland, in case file MM 1421, RG 153, NARA.
the contrary. The case also demonstrates the inadequacy of military courts for trying civilians because such courts were not bound by the same rules of evidence as civil courts.\textsuperscript{90} And although Scally’s status as an Irishmen was “conclusively shown” to the commission, for reasons which remain unknown, it does not appear that Scally sought official protection from Frederic Bernal in Baltimore or Lord Lyons in Washington. Perhaps, as in other cases, the Union military deliberately prevented Scally from contacting a British representative. Another explanation, however, is that Scally probably felt that he did not need British protection, as several witnesses—thirty-four in all—confirmed his alienage and testified to his innocence. Despite the bitter anti-Union sentiments expressed in his letter, some witnesses even believed that Scally was a true Unionist at heart. The testimony offered in Scally’s defense did not provide the commission with any additional evidence of guilt, as an official report on the case admitted that the government had “utterly failed to make a case” against him.\textsuperscript{91}

Efforts that would ultimately fail to acquit Scally continued in earnest outside of the commission proceedings, as several friends wrote to the Lincoln administration testifying to Scally’s innocence and insisting that he had not left Baltimore since the outbreak of war.\textsuperscript{92} Although the deluge of appeals apparently succeeded in prompting Lincoln to ask Holt to look into Scally’s case, the military did not alter its conviction.\textsuperscript{93}

\textsuperscript{90} White, Abraham Lincoln and Treason, 79.

\textsuperscript{91} In the Matter of the United States, against JOHN SCALLY, before Military Commission at Baltimore, Maryland, in case file MM 1421, RG 153, NARA.

\textsuperscript{92} Petition on behalf of John Scally to Brig. Gen. Lockwood, in Union Provost Marshal’s File of Papers Relating to Individual Civilians, M345 roll 239, RG 109, NARA.

\textsuperscript{93} A. Lincoln to Judge Advocate General [Holt], October 26, 1864, in case file MM 1421, RG 153, NARA.
Despite all protestations of Scally’s innocence, the commission simply could not look past the disloyal content of his letters, especially the suggestion that he had been involved in recruiting efforts for the rebels. In the end, the commission—perhaps entirely due to Scally’s British nationality, for the words “a citizen” were struck from the findings—found him guilty of recruiting, but not of treason. Scally was sentenced to two years of hard labor at the Penitentiary at Albany, New York, and was ordered released after the war upon taking the oath of allegiance on June 7, 1865.

The extent to which the Union military was willing to punish flagrantly disloyal speech from British nationals is perhaps best illustrated by the case of Irishman John O’Connell, whose trial resulted in a death sentence. O’Connell was arrested on September 8, 1863, and tried a month later before a military commission in Cincinnati, Ohio, on the charge of “disloyal practice,” rather than an actual charge of treason. As Jonathan W. White has written, O’Connell’s case “certainly reveals the problems Civil War-era Americans faced in demarcating the line between legitimate political dissent and outright treason,” and indeed one that invokes a parallel comparison to the earlier arrest and trial of Clement Vallandigham. O’Connell, in fact, was a strident British admirer of the fiery Ohio Copperhead. O’Connell had written a letter to Cornelius Hathaway, a soldier in the 74th Regiment of Ohio Volunteers, in which he defended his antiwar views as a passionate Copperhead. O’Connell had been boarding with Hathaway’s mother, to

94 W. L. Marshall to Major L. Wallace, March 29, 1864, in case file MM 1421, RG 153, NARA.

95 Note from Executive Office (illegible signature), September 18, 1865, in case file MM 1421, RG 153, NARA.

whom he expressed his opinions against the further prosecution of the war, which
prompted the soldier Hathaway to threaten “to drive a bullet through [O’Connell’s]
head.” Above all, O’Connell, like his idol Vallandigham, opposed the idea of fighting for
a Union maintained only through force. The Union could never defeat the Confederacy,
O’Connell believed, because of the “warlike” nature of Southerners, the tenacity of
Confederate armies, and because the North was “cursed…with so brainless a set of
statesmen and generals.” If these words were not inflammatory enough to enrage the
stauncest Unionist, the end of O’Connell’s letter certainly was: “In fine, let me assure
you that myself and all “Copperheads” will hold our own opinions in spite of Abe
Lincoln or any of his Minions…If you are really stark mad to shoot a “Copperhead” or
rebel, you had better petition cautious Molly Rosencrans [sic] to come out of ditches and
attack Bragg. You will yet see this affair quite differently from what [sic] you do now.
Vallandigham for Governer.”

Although O’Connell’s letter was likely intended as nothing more than an honest,
if animated, defense of Copperhead ideology, the military certainly did not see it as a
harmless political screed. As Burnside had interpreted Vallandigham’s Mount Vernon
speech as a calculated effort to discourage enlistment and encourage desertion within the
Union ranks, so, too, did the members of O’Connell’s military commission interpret his
letter to Hathaway as an attempt to encourage the boy to desert.

97 John O’Connell to Cornelius Hathaway, June 13, 1863 (emphasis in original), in case file MM 977, RG 153, NARA.

98 Case file MM 977, RG 153, NARA. According to the military commission, O’Connell had
written his letter
with the intention to produce dissatisfaction thereby in the mind of said Cornelius Hathaway; to
seduce the loyalty of an United States soldier; create discontent with his situation as said soldier,
and induce a want of confidence in the capacity and ability of his military superiors, which is
altogether subversive of military discipline, good order and effectiveness of the army; tending to
O’Connell pled guilty to writing the letter, but not guilty to the charge of “disloyal practice.” As he soon learned, however, freedom of speech during the Civil War generally operated freely only in one direction. A loyal Union soldier could get away with threatening to shoot a Copperhead, but a staunch Copperhead could not as easily get away with denouncing the Union war effort and its leadership. In his statement to the commission, O’Connell chose not to rely on a claim of British nationality, but instead on a principled defense of the First Amendment. O’Connell maintained that he had written the letter to Hathaway “because he made use of strong language in reference [sic] to me, and I did not know the letter would be looked upon in the light it has been, as some of the Public Journals make use of strong language, and we have been used to talk very freely.” But O’Connell’s attempt to defend himself by upholding constitutional liberties was not enough to sway the military commission, which found him guilty of the charge and sentenced him to hang.99

At this point, the Irishman perhaps could have reversed his sentence had he notified the commission of his British nationality, but he did not. Although not a public figure like Vallandigham, O’Connell nevertheless received a sentence far more punitive than the famous Copperhead agitator. Of course, executing a relatively unknown citizen was more politically feasible than executing a popular public figure, but the comparison is striking in that the military’s sentences for both men boiled down to a vague charge of producing disaffection in the army. As has been shown previously, the social status of breed dissension and cause demoralization in the army, weakening and crippling it in its efforts to crush the rebellion, and thus affording aid and comfort to rebels against the Authority of the United States.

99 See O’Connell’s statement in defense in case file MM 977, RG 153, NARA.
prisoners sometimes mattered—the prominent Vallandigham’s hours-long speech at Mount Vernon denouncing the war effort earned him a prison sentence eventually commuted to banishment beyond Union lines, while O’Connell’s short letter defending the loyal opposition earned him a death sentence. General Burnside, who had earlier approved the sentence of Vallandigham’s military commission, did so as well in O’Connell’s case, and Judge Advocate General Holt concurred with the punishment. As was customary with death sentences arising from military trials, O’Connell’s case was then forwarded to Washington for Lincoln’s approval.100

Now desperate to save himself from the gallows, O’Connell finally played the trump card of British nationality. Just over two weeks after his sentencing, O’Connell informed the military of his British nationality, although he struggled to offer a compelling reason for not raising this important point at his earlier trial. On November 16, 1863, O’Connell wrote a long letter to Brigadier General Nathaniel C. McLean, the provost marshal general of the Department of the Ohio, in which he represented himself as an Irishman who had lived in the United States for six years without becoming a naturalized American citizen. Although he believed that making his British citizenship known to his captors would have saved him the trouble, O’Connell had intentionally withheld his alienage during his trial, he wrote, supposing “whatever punishment I am to receive is fixed, and confirmed.” He confessed to lying about his citizenship, maintaining that “it is merely through carelessness that I am not naturalized.” Perhaps in an attempt to justify his Copperhead sympathies, O’Connell claimed to have “sprung from a genuine case of Irish rebels,” and as such “I never did, and never will acknowledge English Rule

100 Letter from J. Holt to unknown recipient, undated, in case file MM 977, RG 153, NARA.
in Ireland, and would not if it would save me from being burned alive.”  

There is no indication of what McLean thought of this letter, but in any event, O’Connell remained in prison for several more months awaiting execution. Throughout his confinement, he apparently did not try to reach out to the local British consul or Lord Lyons for official British protection. On April 27, 1864, President Lincoln commuted O’Connell’s sentence to confinement at the penitentiary in Columbus, Ohio at hard labor for five years, where he remained until the War Department ordered his discharge on August 2, 1865.  

Following President Abraham Lincoln’s nationalization of habeas suspension and martial law in the fall of 1862, dozens of British nationals were arrested and tried by military commissions for the remainder of the Civil War. Well-acquainted to investigating pleas for protection from Britons swept up in the internal security system of the Lincoln government since the spring of 1861, the British ministers in Washington and consuls throughout the Union worked diligently to protect Her Majesty’s subjects who were forced to endure trials by the Union military. While British representatives in the Union generally abstained from intervening in courts-martial trials of British Union soldiers, they did devote considerable energy toward ensuring that Britons (including Irish Britons) tried by military commissions who had not relinquished their rights to British protection would not suffer harsh or unjust sentences at the hands of a military apparatus determined to punish disloyalty on the home front. Frustrated by Britons who wielded their nationality as a trump card, however, Union military officials—among  


them Judge Advocate General Joseph Holt—did not always appear to cooperate with British officials, although it is far from clear that this resulted from a policy of deliberate military convenience. More likely, the perceived injustices suffered by some—perhaps most—of the Britons described in this chapter resulted from the disruptions and miscommunications natural to an unwieldy military bureaucracy principally concerned with winning a war on a scale unprecedented in the history of the United States. Nevertheless, the British government would go to great lengths to relieve the difficulties faced by Britons anxious to seek the protection of the Crown. Even if Britons tried by the military did not seek help from their home government, they often counted on their alienage to secure their release, and their cases offer an important new lens for understanding the tensions between nationality, citizenship, and loyalty in the Civil War North.

Situating the experience of Britons tried by the Union military within the broader context of civil liberties during the Civil War, this chapter shows how British nationality posed a unique challenge to the military justice system under Lincoln by contesting the amorphous boundary between citizenship and nationality for British prisoners. While many Britons were tried for the same offenses as their American counterparts, their claims to British citizenship forced the Lincoln administration to consider balancing internal security concerns with foreign policy concerns in its prosecution of military trials. Although Lincoln did not comment on the military trials of Britons specifically, there is little reason to conclude that he felt any differently toward trying them than he did toward trying ordinary U.S. citizens: persons arrested and tried by the military for allegedly committing—or intending to commit—disloyal offenses subversive to Union
authority, regardless of nationality, had to be punished. In the few cases that did cross his White House desk, Lincoln consistently deferred to the judgement of Holt and his military subordinates, although he did intervene to save one Briton from the gallows.

Still, Lincoln allowed the military justice system to flourish until the end of the war, and one might well question whether such a system was necessary to ultimate Union victory. In the fall of 1866, over a year following the formal end of hostilities, the Supreme Court would condemn the use of military courts for trying civilians in areas beyond the theater of actual war in the landmark case of *Ex parte Milligan*. Had the Court rendered its decision during the war while Britons remained at risk for military trial, it is likely that many liberals in England would have applauded such a judicial blow against the Lincoln government. But as the Court elected to decline dealing with such grave constitutional questions while the war raged, British representatives in the Union could only do their

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103 In the summer of 1863, Lincoln disingenuously defended military trials as a temporary, preventive measure that would end when the war did, maintaining that not one person subjected to arrest and military trial suffered “any punishment whatever, beyond what is purely incidental to the prevention.” However, as Neely concludes, Lincoln’s statement at least stretched the truth in the case of Vallandigham and was altogether untrue in respect to many others. Since the president repeatedly reviewed the results of trials by military commission in his White House office, the statement did not stem from ignorance either. Sentences to hard labor or prison terms fixed by years (and not the duration of the conflict) were punishments, pure and simple. Lincoln did not readily admit that such trials even existed…Lincoln did not want to admit that the alternative military-justice system for some civilians had been set up. He must have hoped its disappearance at war’s end would erase the military trials of civilians from national memory.

Given Lincoln’s demonstrated willingness to suspend habeas corpus and detain thousands of civilians for offenses that they might commit in the future, however, it is unlikely that Lincoln’s concern for the judgement of posterity factored into his decisions to allow military courts to punish disloyalty and publicly deny their existence. Like the suspension of habeas corpus generally, these military courts functioned as a convenient tool for suppressing dissent on the Northern home front, and Lincoln did not seem at all tormented by the injustices likely to occur from their proliferation. In the years following the Civil War, the military trials of civilians arguably dealt the most damage to the reputation of the Lincoln administration’s internal security system. Lincoln to Matthew Birchard and Others, June 29, 1863, *CWL*, VI, 303; Neely, *Fate of Liberty*, 161, 174-75. On the other side, the author has been unable to find evidence of commentary on the Union military trials of Britons from members of the Palmerston cabinet in London. Most likely, as was the case with general arrests of Britons under Lincoln, London officials trusted British diplomats and consuls in the Union to negotiate such cases with the American administration as they emerged.
best to deal with such cases as they arose, and hope that the alternative military justice system under Lincoln would end when the war did.
CHAPTER VI
POPULAR BRITISH OBSERVATIONS AND ATTITUDES SURROUNDING LINCOLN’S HABEAUS POLICY

Americans were not the only ones concerned with U.S. Constitutional interpretation and the fate of civil liberties during the Civil War, as Lord Lyons and many government officials in London were doing the same. Not surprisingly, other British observers outside of the London government also took notice of Lincoln’s habeas policy. After the President first suspended the writ of habeas corpus in April 1861, many Britons—regardless of their distance from the actual conflict—felt compelled to venture their own observations, opinions and constitutional interpretations of habeas suspension under Lincoln and its impact on Anglo-American diplomacy. In short, British observations and attitudes surrounding various issues integral to Lincoln’s habeas corpus policy extended across the Atlantic, and lasted well beyond the early public fallout from *Ex parte Merryman*.\(^1\) While most observers in England seemingly failed to grasp the full dimensions of the American Civil War—namely the eventual inseparability of Union and emancipation, many Britons thought they had a firmer grasp on the nature of executive habeas suspension and wartime civil liberties.\(^2\) In his recent study of English public

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\(^1\) In recent years, historians have begun to broaden our interpretive lens for understanding the constitutional history of the American Civil War. Neely’s *Lincoln and the Triumph of the Nation* emphasizes the role of public intellectuals and pamphleteers in contributing to the constitutional history of the war, while Blair’s *With Malice toward Some* stresses the contribution of the military.

\(^2\) That most Britons did not grasp the inseparability of Union and emancipation is the thrust of Howard Jones’s *Union in Peril* and *Blue & Gray Diplomacy*, 71; see also Mahin, *One War at a Time*, 127-28. For an alternative view, see Duncan Andrew Campbell, *English Public Opinion and the American Civil War*, 244. Though I use the terms broadly elsewhere, in this chapter, “British” and “Britons” refer strictly to Britons living in England proper and, unless noted otherwise, not those specifically from Ireland or
opinion and the American Civil War, Duncan Andrew Campbell rightly identifies “the most serious omission in studies of Anglo-American relations during the war” as “the failure to place British perspectives within their own political and social context;” despite a lack of scholarly recognition, the British conception of habeas corpus as a bulwark of individual liberty was certainly integral to that context. The writ of habeas corpus had, after all, first emerged in England as a weapon in the service of civil liberty within the liberal tradition only after centuries of conflict between an executive monarchy intent on centralizing the power of the writ, and a Parliamentary body which sought to decentralize the power of the writ. Thus perhaps thinking of habeas corpus as an English birthright, many British travelers, journalists, and intellectuals took advantage of their respective forums to publicly and privately weigh in on the issues and questions that arose under Lincoln’s habeas policy, and their published perspectives were widely read among the English public. Despite their own checkered past with habeas corpus and civil liberties, many Britons (particularly those in England, as opposed to those in Scotland and Ireland) felt justified in pontificating to their American cousins on the meaning and sanctity of the Great Writ of Liberty.

Although a large scholarly literature focuses on British observations and attitudes surrounding American racism and Lincoln’s shift toward emancipation during the Civil War, historians have largely failed to recognize how British observations and attitudes

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3 Campbell, 11.

surrounding Lincoln’s habeas policy reflected those of the London government and contributed to widespread anti-Union attitudes in England. Like their American counterparts, Britons contributed to a vibrant public discourse in England surrounding Lincoln’s habeas corpus policy by offering a sustained critique of executive suspension throughout the war. On the whole, the British critique of Lincoln’s habeas policy consistently condemned executive suspension and the system of military arrests without due process that thrived thereunder. In this, most British critics of executive suspension agreed with Chief Justice Roger Taney and Lincoln’s fiercest Copperhead critics. But, much like the public discussion surrounding executive suspension in the Union, British observers collectively offered a nuanced critique of Lincoln’s policy that has yet to be fully appreciated by historians and, unlike Taney or the Copperheads, their critique cannot be so easily dismissed as shameless political pandering. The anti-War Democrats

5 Neely does not consider the British critique of Lincoln’s habeas policy in his two seminal works touching upon the topic, The Fate of Liberty and Lincoln and the Triumph of the Nation. Similarly, discussions of the British critique are absent generally among the best recent histories of Anglo-American relations during the American Civil War, including Howard Jones’s Union in Peril and Blue & Gray Diplomacy; Myers, Caution and Cooperation; and Foreman, A World on Fire. R. J. M. Blackett does not discuss the issue in his excellent study of British society during the Civil War, Divided Hearts. On the contrary, most scholarly works on Anglo-American relations and public opinion in British society heavily emphasize British attitudes toward American slavery, racism, and southern political independence. The “traditional model” of British attitudes and opinions on the American Civil War posits a pro-Confederate coalition comprised of the British aristocracy, upper-middle class and political conservatives, and a pro-Union coalition comprised of British radicals and the lower-middle and working classes. See, for example, Adams, Great Britain and the American Civil War; Donaldson Jordan and Edwin J. Pratt, Europe and the American Civil War (London: 1931). Frank L. Owsley denies the impact of slavery on British views of the war in King Cotton Diplomacy. Revisionist works which challenge the traditional portrayal of a pro-Union working-class and radicals may be found in Crook, The North, the South and the Powers; and Blackett, Divided Hearts. In his recent biography of Lord Lyons, Brian Jenkins merely mentions British liberal opinion on Lincoln’s habeas policy in passing. See Jenkins, Lord Lyons, 198, 228. The only historian who has paid any attention to the negative impact of Lincoln’s habeas corpus policy on English opinions is Duncan Andrew Campbell, who rightly notes that Lincoln’s suspensions of habeas corpus had “a profound impact upon English interpretations of the American Civil War.” Campbell, 104-5, 108-10. Campbell does not, however, recognize the importance of Lincoln’s habeas policy in Anglo-Union relations—and the Seward-Lyons correspondence, in particular—or sufficiently press the point that broader English attitudes toward Lincoln’s habeas policy reflected those of British diplomats in America and government officials in London.
had a clear political stake in their opposition to Lincoln’s war policies, but the same was not true of Britons living thousands of miles away who swore allegiance to the Crown.⁶

Throughout their various travel writings, newspaper articles, diaries, letters, and pamphlets, some Britons focused on the purely constitutional dimensions underpinning executive suspension, while others directed their discussions toward the practical consequences or foreign policy implications of executive suspension.⁷ Despite strident British denunciation of executive suspension, British public opinion did nothing to temper the increasing severity of Lincoln’s habeas policy. As Lincoln refused to alter policy in response to official British complaints of military arrests in October 1861, so, too, did the President refuse to allow British public opinion to influence his decision to restrict civil liberty on the Union homefront. Nevertheless, taken together, these diverse British analyses figured into a broader British critique of an apparently illiberal Union government, and offer historians a unique opportunity to recognize a transatlantic dimension to the constitutional history of the American Civil War and Lincoln’s habeas policy.

First-hand British Observations: William Howard Russell

Lincoln’s habeas corpus policy and its effect on Anglo-American relations did not go unnoticed among non-diplomatic British observers who traveled to the Union and Confederate states and later published their first-hand accounts, although their observations on the topic have gone virtually unnoticed among historians. Indeed,

⁶ Neely, *Fate of Liberty*, 208-9.

⁷ It must be noted that although many of these sources enjoyed a wide readership in England, they should not be interpreted as definitively representative of “British public opinion” on habeas corpus, written as they were by editors or public officials who often sought to persuade others to their own biased view on the issue and the war in general.
Lincoln’s early suspension policy and military arrests caught the attention of one of the most important British observers of the period in the world-famous journalist, William Howard Russell, who arrived in New York before the outbreak of war on March 16, 1861. Russell had been assigned to the United States after the editor of the *Times of London*, John Delane, decided to increase news coverage in North America following the deepening of the secession crisis in early 1861. As special correspondent to the most important and popular paper in Britain, Russell occupied a unique position from which to influence the attitudes of mainland Britons. Russell was himself ideologically conservative, although in his various writings he supported the Union and refused to praise the South’s conduct in seceding from the Union or its unshakable commitment to defend slavery. Nevertheless, Russell’s influential account of his travels, *My Diary, North and South*, first published in 1863, ultimately managed to offend both northerners (with his unflattering account of their mannerisms and the Union defeat at the First Battle of Bull Run) and southerners (with his unmasked hatred of slavery).[^8]

Given Russell’s worldwide reputation and the importance of maintaining amiable Anglo-American relations, the British journalist met with Secretary of State Seward on several occasions during his stay in the Union. It was to Russell that Seward had allegedly asserted: “A contest between Great Britain and the United States would wrap the world in flames, and at the end it would not be the United States which would have to lament the results of the conflict.”[^9] Russell and Seward appeared to recognize each other


as an important point of contact to aid their respective agendas. Seward could exploit the famed correspondent’s ability to influence and take the pulse of English sentiment, while Russell could exploit Seward’s crucial position within the machinery of the Lincoln administration in his reports for the *Times.*\(^\text{10}\) This relationship would eventually dissolve following Russell’s damning coverage of the Union defeat at First Bull Run in the summer of 1861, but before his abrupt departure from the United States in April 1862, the British correspondent recorded and later published his own observations regarding Lincoln’s habeas policy.\(^\text{11}\)

Although Russell did not offer his personal opinion on the constitutional debate surrounding executive habeas suspension in his diary or personal letters, he was clearly aware of the vibrant public discussion surrounding the issue beginning in the late spring of 1861. At the time Chief Justice Taney delivered his *Merryman* opinion in late May 1861, Russell had been visiting Vicksburg, Mississippi where, he wrote, “[t]he villainy of Lincoln in suspending the writ of Habeas Corpus in the case of [John] Merryman was particularly rubbed into me” by a group of southern lawyers who insisted that Taney’s argument against executive suspension “was unanswerable.”\(^\text{12}\) Throughout his time in the Union states, Russell developed the conventional elitist British view that Lincoln’s habeas policy facilitated a significant chilling effect on freedom of speech, and suspected


\[11\] On Russell’s abrupt departure from the United States in April 1862, Walter Stahr writes: “Stanton’s appalling blunder of driving away the world’s most famous war correspondent would only become clear later on when the North had no foreign journalists reporting from its side.” Stahr, *Seward*, 236.

that many Unionists held the British correspondent in contempt “because I am not a great philosopher & don’t admire their republic in which opinion & life are not safe.”

Like Lord Lyons at the British Legation, Russell’s first-hand experience of the effects of Lincoln’s habeas policy appeared to validate his view of the inevitable failure of republican government in America, and he was astonished that such flagrant violations of civil liberty could pass without condemnation among so many patriotic Unionists. The arrests of the Maryland legislators in Baltimore in September 1861, Russell lamented, “have scarcely produced an effect here so easily do men become habituated to the exercise of the most arbitrary power when in the midst of a great political troubles & so rapidly do all constitutional guarantees for liberty disappear in a revolution above all in a republic.”

In October 1861, Russell witnessed the transformation of Lincoln’s habeas corpus policy into what appeared to be a serious Anglo-American dispute. On the same day in which Seward publicly released his exchanges with Lord Lyons over habeas corpus and the military arrests of British nationals, Russell informed Senator Charles Sumner that “there are some feeble mutterings about ‘Habeas Corpus’” at the British Legation. Russell did not indicate whether he ventured his own thoughts on the matter at the legation, but Seward’s forceful public response to Lord Lyons and the British government certainly left some impression on him. In his diary entry for October 19, 1861, Russell referred to the Seward-Lyons exchange, writing: “To-day, Mr. Seward is

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15 Russell, as quoted in Jenkins, *Lord Lyons*, 150.
engaged demolishing Lord Lyons, or at all events the British Government, in a dispatch, wherein he vindicates the proceedings of the United States Government in certain arrests of British subjects which had been complained of, and repudiates the doctrine that the United States Government can be bound by the opinion of the law officers of the Crown respecting the spirit and letter of the American Constitution.”

Consistent with the general British attitude toward the Secretary of State, Russell interpreted Seward’s fiery October 14 letter as yet another attempt to threaten war between the United States and Britain. But in November, after tensions had apparently cooled over the issue, Seward told Russell that he and Lord Lyons had agreed “not to kick up rows about British subjects” arrested under military authority: the State Department would continue to invite and investigate complaints by the British government regarding Britons arrested and detained under Lincoln’s habeas policy, rendering more forceful British intervention on the issue unnecessary.

Although the Palmerston government had settled on a cautious wait-and-see policy course with respect to the dispensation of arrested Britons under Lincoln, Russell continued to condemn subsequent developments in Lincoln’s habeas policy during his short time in America. That same October, Russell recorded and publicized his view of arguably the most sensational post-Merryman habeas clash between the executive and judicial authorities. Despite the fierce condemnation in the Republican press surrounding

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16 Russell, *My Diary, North and South*, 556.


18 Entry for Nov. 13, 1861, in Crawford, *William Howard Russell’s Civil War*, 173. For further discussion on this point, see Chapter II.
Judge William Merrick in the District of Columbia Circuit Court, Russell privately applauded the judge’s willingness to order the release of minors who were legally too young to serve in the army. Not surprisingly, then, Russell expressed astonishment at the military treatment of Judge Merrick by the Lincoln administration in the sensational Murphy case during late October 1861. The “military arrest and surveillance” of Merrick, in Russell’s opinion, represented the “heaviest blow which has yet to be inflicted on the administration of justice in the United States,” and Lincoln “is assuredly doing that terrible thing which is called putting his foot down on the judges…” Russell found the case extraordinary enough to submit his assessment (in which he included a long letter written by Judge Merrick detailing the judge’s harassment by the Lincoln administration) for publication in the Times, which declared Murphy “one of the most extraordinary exhibitions of the weakness of the civil power of the United States.” Despite his support of the Union, the most famous British journalist in the world could not help but publicly condemn Lincoln’s suspension of habeas corpus and its frightening implications for civil liberty and a seemingly impotent federal judiciary.

First-hand British Observations: Anthony Trollope

William Howard Russell was not the only British critic of Lincoln’s habeas policy with access to a large readership in England. Another famous British observer and novelist who commented on Lincoln’s habeas corpus policy, Anthony Trollope, toured the North during the fall of 1861 to write his own travel narrative, eventually published

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19 Entry for Oct. 8, 1861, in Crawford, William Howard Russell’s Civil War, 147.

20 William Howard Russell, entry for October 24, 1861, My Diary, North and South, 207-8.

21 Times (London), Nov. 12, 1861, pg.8.
the following year as *North America* and widely read in England.\(^{22}\) Although sympathetic to the Union cause and outright hostile toward the South, Trollope believed that the origins of the Civil War ultimately lay in the insatiable drive toward U.S. expansionism.\(^{23}\) Among the topics discussed by Trollope during his travels were the military arrests and suppression of opposition newspapers facilitated by Lincoln’s suspension of habeas corpus. Drawing upon his first-hand observations and discussions with northerners, Trollope wrote that both the people and government of the United States had been “very tyrannical,” as many individuals had been arrested on suspicion of nothing more than expressing southern sympathies. Many of these cases, to Trollope, “have been destitute even of any fair ground for suspicion.” Unlike William Howard Russell, Trollope ventured his own constitutional critique of executive suspension and Lincoln’s policy—albeit a somewhat inconsistent one—within his narrative of his time in North America.

Despite the frightening prospects for liberty implicated by Lincoln’s habeas policy, Trollope begins his discussion by reminding his readers that allowances for such military measures, while regrettable, must be made due to the grave conditions of civil war. “Military arrests are very dreadful,” Trollope conceded, “and the soul of a nation’s liberty is that personal freedom from arbitrary interference which is signified to the world by those two unintelligible Latin words [habeas corpus].” Nothing could be worse than placing “the liberty of every individual at the mercy of him who has the power to suspend it,” and a long-term suspension of civil liberties “will certainly make a nation weak, mean-spirited, and poor.” But the desperate demands of a civil war naturally altered the

\(^{22}\) Campbell, 121.

\(^{23}\) Donald Bellows, “A Study of British Conservative Reaction to the American Civil War”, 511.
conventional operation of the civil law. Trollope employed a vivid analogy to illustrate his point and seemingly justify Lincoln’s necessity-driven argument for executive habeas suspension: “A lady does not willingly get out of her bedroom-window with nothing on but her night-gown; but when her house is on fire she is very thankful for an opportunity of doing so.” Moreover, Britons would do well to remember that their own government had not long ago suspended the writ of habeas corpus during an uprising in Ireland, after which “absurd arrests were made almost daily.” There had been a necessity for the Crown’s suspension in Ireland in 1848, “and it is very grievous now that such necessity should be felt in the northern States” by the people and government of the Union.

While Trollope expressed his willingness to defend Lincoln’s practical justification for executive habeas suspension, he nevertheless went on to argue against the constitutionality of executive suspension, and stopped far short of defending the president’s broad conception of his constitutional authority. Referring to Seward’s fiery public letter to Lord Lyons of October 14, 1861, Trollope rejected Lincoln’s contention that he, as president, could suspend the writ “whenever it might seem good to him to do so.” If Lincoln’s unconstrained conception of executive habeas suspension “be in accordance with the law of the land, which I think must be doubted, the law of the land is not favourable to freedom…I conceive that Mr. Lincoln and Mr. Seward have been wrong in their [interpretation of the] law, and that no such right is given to the President by the Constitution of the United States.”

In this, Trollope’s constitutional analysis of

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24 Anthony Trollope, *North America* (New York: Harper & Brothers, 1862), 179-80. Like many other British observers and members of the Diplomatic corps in the Union, Trollope expressed astonishment at the apparent silence of Americans in the face of widespread suspension of civil liberties: “The habeas corpus has been suspended, the liberty of the press has been destroyed for a time, the telegraph wires have been taken up by the government into their own hands; but nevertheless the people have said nothing. There has been no rising of a mob, and not even an expression of an adverse opinion.” Trollope, *North America*, 444, 589.
the habeas corpus provision aligned with mainstream British opinion; even if a power of executive habeas suspension existed—which many British analysts of the U.S. Constitution, including Trollope, doubted—such power must still be kept within proper restraints in order to prevent tyranny. In fact, Trollope found it difficult to believe that Lincoln’s public defenders could argue otherwise, although he notably failed to consider the controversial manner in which the habeas clause arrived in Article I from the Constitutional Convention in the first place.\textsuperscript{25} “I cannot understand,” wrote Trollope, “how any man, familiar either with the wording or with the spirit of the constitution should hold such an argument. To me it appears manifest that the executive, in suspending the privilege of the writ without the authority of Congress, has committed a breach of the constitution.”

Still, the controversy surrounding executive habeas suspension and Lincoln’s policy went beyond the mere placement of the habeas clause in the U.S. Constitution and assignation of the suspension power to the proper federal branch. For Trollope, a complete constitutional analysis must also consider the actual conditions which allegedly justified the necessity of a suspension of habeas corpus. He maintained that legal pamphleteer Horace Binney’s popular argument supporting the power of executive suspension was flawed in both its premises and conclusion.\textsuperscript{26} Against Binney’s labored contention that the “matter of fact” existence of rebellion or invasion itself justified a suspension of the writ, Trollope argued that this was not necessarily the case; a rebellion

\textsuperscript{25} See Justin J. Wert, \textit{Habeas Corpus in America}, 26-37; and Anthony Gregory, \textit{The Power of Habeas Corpus in America}, 44-77.

\textsuperscript{26} See below for a brief discussion of Binney’s argument. For more extensive discussion of Binney, see Neely, \textit{Lincoln and the Triumph of the Nation}, 71-80.
or invasion might occur several times, and might even endanger the public safety, without justifying habeas suspension. Rather, Trollope argued, the mere existence of rebellion or invasion did not automatically necessitate a suspension of the writ; such a decision required much more deliberation than Binney (and presumably Lincoln himself) seemed to allow: “The public safety must require the suspension before the suspension can be justified, and such requirement must be a matter for judgement, and for the exercise of discretion.” Thus, Trollope conceded that the President could suspend habeas corpus in response to an actual necessity, but demanded a much more rigorous standard of deliberation in order to determine whether such a necessity existed behind Lincoln’s initial suspension. As the many abuses that had since arisen under Lincoln’s habeas policy suggested a lack of deliberation on this momentous issue, Trollope concluded that the “monstrous,” unconstrained theory of executive habeas suspension held by Lincoln and his intellectual supporters “has been very disastrous” for American civil liberty.27

Although Trollope provided an interesting constitutional analysis of executive habeas suspension long neglected by historians, the author did not offer an alternative legal standard for “public necessity” to that first posited by Lincoln in his July 4, 1861 message to Congress. Moreover, one could argue, as many historians have, that Lincoln did exercise much discretion in suspending the writ of habeas corpus, at least in April 1861. Neither the eventual secession of eleven Southern states nor the Confederate firing

27 Trollope, North America, 478-82. Like many other British diplomats in the Union, government officials, and journalists, Trollope magnified the power of Seward in facilitating “arbitrary” military arrests: “Mr. Lincoln, the President by whom this unconstitutional act [habeas suspension] has been done, apparently delegated his assumed authority to his minister, Mr. Seward. Mr. Seward has revelled in the privilege of unrestrained arrests, and has locked men up with reason and without. He has instituted passports and surveillance; and placed himself at the head of an omnipresent police system with all the gusto of a Fouche…The time will probably come when Mr. Seward must pay for this,—not with his life or liberty, but with his reputation and political name.” Trollope, North America, 482.
on Fort Sumter, both of which could have reasonably been considered clear signals of “rebellion,” prompted Lincoln to suspend the writ. Rather, Lincoln only moved to suspend the writ in response to a viable threat to the safety of Washington, D.C. In this way, Trollope’s analysis reflects the enduring difficulty of defining a precise legal standard for the “necessity” of habeas suspension, as well as those classes of persons subject to detention under a suspension—a standard which remains unclear in the present day. Trollope apparently wrote this part of his book in April 1862 before departing from the Union states, which permitted him to speak too soon in observing that military arrests under Lincoln’s habeas policy have “nearly died out.” Just five months later, Lincoln would suspend the writ of habeas corpus throughout the entire Union, and thousands of persons remained to be arrested by military authority.  

First-hand British Observations: Sir James Fergusson

Not all prominent first-hand British observers of Lincoln’s habeas policy supported the Union like Russell and Trollope. At least one sitting member of the British Parliament, Sir James Fergusson, visited the United States during the first year of the Civil War and commented on the consequences of Lincoln’s suspension of habeas corpus in the North. A Scottish native and Conservative representative of Ayrshire in the House of Commons, Fergusson departed for North America from Liverpool on August 10, 1861, with the goal of observing the American Civil War from the Union, Confederate, and western Border States, as well as Canada. Upon his return to England in November of the same year, Fergusson privately published his account as Notes of a Tour in North America in 1861 which, unlike William Howard Russell’s diary and articles and

28 Trollope, North America, 482.
Trollope’s travel narrative, was intended more to influence British policymakers than the general public. Comprised of both a journal and the correspondence he produced during his time in North America, Fergusson later sent his account to Lord Palmerston with the goal of moving the British government toward intervention on behalf of the Confederacy, although his efforts clearly had no demonstrable effect on British foreign policy.  

Although Fergusson’s published observations no doubt enjoyed far less circulation among the British public (not to mention far less analysis by modern historians) than Russell’s and Trollope’s, his account of habeas corpus in the North—despite his clear sympathy for the Confederacy—nevertheless had much in common with those of the latter two.  

Fergusson condemned the consequences of Lincoln’s habeas policy even before his arrival in the Union states, and continued to do so throughout his time in North America. In early September, Fergusson attributed the pervasive lack of Union sympathy among Canadians in part to the suppression of civil liberty in the North. In contrast, Canadians seemed “thankful for the real freedom and good government here.” The

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29 Ben Wynne, ed., Sir James Fergusson of Kilkerran, ‘The Personal Observations of a Man of Intelligence’: Notes of a Tour in North America in 1861 (Lambertville, NJ: The True Bill Press, 2009), 9-14, 35-49, 168-69. (Hereafter cited as Fergusson, Notes of a Tour) While his account provides a valuable, if underutilized, first-hand British account of the American Civil War, Fergusson’s strong Confederate sympathies are manifest throughout and should be noted. While consistently speaking favorably of white Southerners (as well as the so-called paternalistic virtues of chattel slavery), Fergusson frequently describes their Northern counterparts, for example, as “vulgar, pretentious, raffish Yankees…” Fergusson, Notes of a Tour, 71.

30 Much like W.H. Russell and Trollope, historians have almost completely neglected Fergusson’s observations on Lincoln’s habeas corpus policy. As far as I can tell, Fergusson’s account of his time in North America first caught the notice of Michael Hughes. See Michael F. Hughes, “‘The Personal Observations of a Man of Intelligence’: Sir James Fergusson’s visit to North America, 1861.” Civil War History 45 (September 1999), pp. 238-247. A truncated contemporary version of Fergusson’s account appeared in the December 1861 edition of Blackwood’s Edinburgh Magazine as “Some Account of Both Sides of the American War.”
accounts provided to him of the state of individual freedom in the North encouraged Fergusson to observe caution before entering the Union states:

In the North we hear that people are taken up on suspicion of having Secessionist sentiments. Newspapers which appear to disapprove of the war are seized and suppressed. No man dare speak against it. A strict passport system is established. Private letters are opened, and arrests are made if the contents are hostile to the powers that be. When we go to the [Northern] States, besides taking heed what I say, I shall be careful what I write to you. As long as we keep our own counsel I don’t believe there will be the least chance of annoyance to us, and that is easily done; but matters will soon come to a fearful state there, it is certain.\footnote{Entry for September 1, 1861, in Fergusson, \textit{Notes of a Tour}, 59.}

Like many of his British compatriots, Fergusson emphasized what he viewed as the greatest hypocrisy of the Union war effort: destroying the very ideals of freedom for which the United States had fought England less than a century before. In order to wage this civil war, Fergusson wrote, “the North is content to see extinguished that freedom which was her boast, and for which she claimed to be born.” Dissent against the “many-headed tyrant” in any form, Fergusson maintained, was not tolerated by the Lincoln government, and nightly military arrests without due process under habeas suspension were reported as commonplace.\footnote{Entry for Oct. 6, 1861, in Fergusson, \textit{Notes of a Tour}, 105-6.} Throughout his travels in the North, Fergusson met with the British consuls of New York City and Baltimore, both of whom informed him of the chronic problem of Britons arrested without due process by Union military authorities. In one entry, Fergusson writes of his conversation with a Baltimore lady, who “touchingly” recounted how her husband—and the husbands of several of her friends—had been arrested by the military in the middle of the night and confined to a miserable prison cell in Fort Lafayette.\footnote{See entries for Oct. 17 and Oct. 25, 1861, in Fergusson, \textit{Notes of a Tour}, 137-38, 144.}
As it later turned out, Fergusson himself failed to completely escape “annoyance” from the Lincoln administration over matters of internal security. During his visit to Washington, D.C. in October, Fergusson met with Lord Lyons, who would soon introduce the MP to Secretary of State Seward. Before doing so, however, Lyons expressed his dismay that Fergusson had agreed to deliver letters from Southerners to their relatives in Europe, merely on a verbal pledge that their letters contained no political or military information. In his meeting with Seward—whom Fergusson unflatteringly described as “thin, sharp-featured...with a cold and cunning expression”—the MP insisted that the letters were of a wholly private character and contained nothing inimical to the Union war effort. However, as Lyons had earlier promised Seward that British representatives could not serve as a conduit for any private correspondence from the Confederacy, Fergusson grudgingly handed the letters over to Seward. To the Englishman’s astonishment, the Secretary of State opened one letter and, with a penknife in hand, proceeded to cut out a “treasonable” passage which he insisted could not be sent overseas before returning the letter to Fergusson.\textsuperscript{34} For the pro-Confederate Fergusson, this personal incident at the very seat of power in Washington must have vindicated every account of Union tyranny that he had read or heard up to this point.

Moreover, from a foreign policy perspective, this incident, as well as publication of the Lyons-Seward correspondence from the previous day, convinced Fergusson that Seward had succeeded in turning the arrests of Britons under Lincoln’s habeas policy into a public relations coup. The transatlantic clash over habeas corpus “has excited much

\textsuperscript{34} Entry for Oct. 15, 1861, in Fergusson, \textit{Notes of a Tour}, 132.
comment,” Fergusson wrote, for even “the moderate, travelled men here abuse Lord Lyons for having presumed to interpret American law and point out the rights of Congress. One man said it was the only good Seward had done” as Secretary of State. Like many other British observers, Fergusson noted the apparent acquiescence of a great number of Northerners to Lincoln’s habeas policy. “The arbitrary acts of the executive,” Fergusson wrote in his final recorded journal entry, “excite little remark or objection here [in the North]. The arrests have been numerous, but they are taken as a matter of course.” Regardless of the veracity of his account, the way in which Fergusson writes of Lincoln’s habeas corpus policy—and of Seward’s central facilitating role—suggests that he was more concerned with using Lincoln’s habeas policy as one of several other reasons why the British government should sympathize with the Confederacy. Still, although both William Howard Russell and Anthony Trollope explicitly favored the Union, they shared many of Fergusson’s concerns regarding the fate of civil liberty in the North, and such bipartisan condemnations of Lincoln’s habeas policy were also reflected in the British press.

“The Tyrant’s Plea of Necessity”: The British Press, Lincoln’s Habeas Corpus Policy, and Anti-Unionism in England

Few Britons in England were as financially able to visit the United States to record their observations as Russell, Trollope, and Fergusson. The majority of mainland Britons fiercely interested in the American Civil War (mostly among the middle-and upper-classes) instead had to rely on their published accounts as well as those which appeared in the British press. Like their American counterparts, nineteenth-century

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35 Entry for Oct. 25, 1861, in Fergusson, Notes of a Tour, 144.
Britons were enthusiastic consumers of newspapers and public journals, and the British press of the period could be just as partisan as their American counterparts. Although many Britons resented Seward’s apparently belligerent diplomacy toward England, doubted the sincerity of anti-slavery sentiment in the North and viewed Lincoln as a reluctant emancipator, they could never bring themselves to fully side with the slave-holding Confederacy. In short, most Britons opposed intervening in the war but remained deeply suspicious of both sides, and for their part, many Americans in both the Union and the Confederacy came to despise England by the end of the war. While the war raged, however, issues such as military emancipation, confiscation of rebel property, and executive suspension of habeas corpus commanded a significant presence within the British press between 1861-65, as both British supporters and critics of the Lincoln administration weighed in on and debated these and other controversial issues wrought by the war. Like Russell, Trollope, and Fergusson, the British press harshly (and consistently) condemned Lincoln’s suspension of habeas corpus during the Civil War, and their editorials on the topic played a significant role in nurturing widespread anti-Union attitudes in England.

36 Campbell argues that historians have understated the consistently anti-British tone of the northern press, while unfairly condemning the British press (particularly the Times) for damaging Anglo-Union relations during the Civil War. See Campbell, 35-36, 39.

37 Campbell, 15, 51, 245-46. In both cases, Union and Confederate animus toward England largely turned upon Britain’s policy of neutrality. See Foreman, 102.

38 It is important to note, as Michael Turner has written, that British responses to the Civil War were “confused and shifting. There was no straightforward division of opinion based on social class, party allegiance, or economic interest.” Michael Turner, “Perceptions of America and British Reform,” 333-34. See also Campbell, 97.
While Republican newspapers in the Union perhaps unsurprisingly praised Lincoln’s habeas corpus policy, newspapers and journals across the political spectrum in England generally took precisely the opposite position, while largely ignoring similar civil liberties violations under President Jefferson Davis in the Confederacy. Indeed, although Duncan Andrew Campbell argues that British attitudes toward the Civil War often changed in response to major chronological events, such as the Trent affair in late 1861, British attitudes toward Lincoln’s suspension of habeas corpus and northern civil liberties—at least to the extent such attitudes were reflected in the British press—developed soon after the President’s initial suspension in April 1861 and remained consistently negative throughout the entire war. As was the case with Americans living in the North, however, Britons could support the Union in sentiment while criticizing Lincoln’s infringements on civil liberties or other specific war policies. Moreover, while Campbell points to American threats of Canadian annexation and Trent as “the primary

39 Alfred Grant, The American Civil War and the British Press (Jefferson, N.C.: McFarland & Company, Inc., 2000), 162; Campbell, 104-5, 108-10. On the point of civil liberties in the Confederacy, Campbell argues that “The Confederacy was, in fact, far more tolerant of dissent than the North. Davis’s government maintained the traditional liberal rights of freedom of speech, freedom of the press and freedom from arbitrary arrest.” Campbell bases this claim upon the classic thesis of historian David Donald that the Confederacy “died of democracy.” See David Herbert Donald, “Died of Democracy,” in David Herbert Donald, ed., Why the North Won the Civil War (Baton Rouge: Louisiana State University Press, 1960), 81-92. Donald’s thesis has since been decisively refuted by Mark E. Neely Jr., Southern Rights: Political Prisoners and the Myth of Confederate Constitutionalism (Charlottesville: University of Virginia Press, 1999). Neely shows how President Davis’s record on upholding civil liberties was hardly in sharp contrast to Lincoln’s, as the former’s suspension of habeas corpus in the Confederacy led to the military arrests without due process of thousands of southerners. It should be noted, however, that newspapers from the Confederacy were much less readily available to the British press than from the Union. Campbell acknowledges this point, but maintains that “neither misapprehension nor malice satisfactorily explains the deluge of criticism directed at the suppression of rights in the North.” Additionally, with the expulsion of British consuls from the Confederacy in the fall of 1863, England lost an important source of reporting on the region.

40 As late as December 1865, commenting on President Andrew Johnson’s recent restoration of habeas corpus, the Times of London claimed that the suspension of habeas corpus “was the cause of half the Northern opposition to Mr. Lincoln during his eventful administration.” The Times (London), December 15, 1865, pg.6.
cause of English hostility towards the Union,” Lincoln’s suspension of habeas corpus and the subsequent military arrests of Americans and Britons generated a not insubstantial amount of anti-Union hostility from the British media.41

The British press condemned Lincoln’s infringements on civil liberties even before the Seward-Lyons correspondence became public in mid-October 1861.42 The Saturday Review, one of the most prominent conservative weekly British journals, censured Lincoln’s “high-handed displays of power” as early as the summer of 1861.43 The Review saw Lincoln “assuming and actively exercising powers which might almost content the Executive of the most absolute European Monarchy,” such as censoring the telegraphs and presses and allowing his military subordinates to “arrest suspected traitors entirely at their own pleasure.” Against such overwhelming assertions of executive power, Congress—which had yet to convene following Lincoln’s post-Sumter war policies—was unlikely to challenge the president’s alleged lust for conquering the South. Worse yet, “a still bolder stroke of military usurpation” could be found in the sensational conflict between the military authorities and Chief Justice Taney over the arrest of John Merryman “in which law suffered total defeat.” Through mere executive fiat and in the absence of Congressional authority, the Merryman case illustrated how “the writ of

41 Campbell, 14, 244.

42 This statement does not deny, however, the existence of British journals which acted as propaganda outlets for both sides. See Lucy Brown, Victorian News and Newspapers (Oxford: Oxford University Press, 1985), 63, 179 and chapter 10.

43 See Campbell, 145, and fn. 39. Campbell notes that weekly journals such as the Saturday Review, as well as monthlies and quarterlies, had a wider audience than daily newspapers on account of their lower costs; were less likely to reflect interference from parliamentary political parties; “tended to offer a calmer appraisal of the state of Anglo-American affairs than did the dailies…[and] were generally more influential than the dailies on political issues.” Campbell, 14. Donald Bellows notes that throughout the war, the Saturday Review “became not so much sympathetic to the South as hostile to the North.” See Bellows, “A Study of British Conservative Reaction to the American Civil War,” 508, 511.
*habeas corpus* is treated as so much waste paper.” Similar to the views of Lord Lyons and many other first-hand British observers, the *Review* expressed astonishment “that this daring assumption of military despotism does not appear to excite the smallest objection in any quarter”—on the contrary, some northern newspapers were actively calling for the arrest of the Chief Justice of the United States. Reflecting widespread British skepticism of American democracy, the journal concluded that, whatever the ultimate result of the war, “the conditions of political life and action in the North will undergo changes which every friend of rational liberty on either side of the Atlantic will deeply deplore.”44

Even a politically neutral periodical such as the *Illustrated London News* condemned Lincoln’s habeas policy from an early date. An article of September 7, 1861 emphasized the shock expressed by many Britons at the loss of freedoms in a country supposedly founded upon principles of liberty: “Had anyone hinted some twelve months back at the possibility of the United States being the next arena for the display of the antiquated resources of martial law, [and] suspension of *habeas corpus*…he would have been met with a shout of derisive laughter. We have lived, however, to see these things as living, tangible facts.”45 A week later, *The Economist*, a liberal periodical whose editor, Walter Bagehot, strongly supported the Union, condemned what it viewed as the false promises of liberty at the heart of the American experiment: “Real liberty, as we understand it, -- liberty to act and think and speak as each man chooses, -- we have no scruple in saying, did not exist in the United States before the disruption [of civil war],

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44 “Civil War and Strong Government,” *Saturday Review*, XI (June 22, 1861), 626-27. In a later piece from October 5, 1861, the Review proclaimed that “the American Federation was passing through a crisis full of peril, not only to its territorial integrity and political strength, but to its constitutional liberties also…” “The Progress of Strong Government in America,” *Saturday Review*, XII (August 31, 1861), 208.

and does not exist there now.” For many liberal Britons living in a country which prided itself as an asylum for political dissent, a Lincoln regime that permitted the suppression of the political opposition under habeas suspension simply deserved no praise.

Not surprisingly, the Seward-Lyons correspondence also found its way into the most powerful newspaper in Britain. The Times of London—a paper consistently critical of the Lincoln administration—asserted in a November 6, 1861 article that Her Majesty’s government had been justified in holding the Lincoln administration accountable for its violation of civil liberties. The arrests of British subjects gave Great Britain “a substantial grievance against the Government of President Lincoln…Great interests are at stake, and matters of the highest consequence depend on the result of the correspondence.” As the head of “a friendly government,” the article continued, Lincoln “is thus the agent in imprisoning the subjects of a friendly Power, and is depriving them of the means which the law of the country points out for trying the validity of that imprisonment”—a not-so-subtle reference to Lincoln’s suspension of the writ of habeas corpus. Not impressed with Lincoln’s policy rationale contained in Seward’s public response to Lord Lyons, the Times declared that suspicion of disloyalty itself was “irrelevant to the question of legal right”—here again, one sees evidence of the typical British charge against Lincoln’s abrogation of constitutional proceduralism, an issue

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46 The Economist, September 14, 1861, pg.1012.

47 Campbell, 79.

48 The Seward-Lyons correspondence achieved wide circulation in the British realm, even appearing in papers as far away as Australia. See, for example, The Argus (Melbourne, Vic.), January 28, 1862, pg.7. Curiously, Campbell does not note the recognition of the Seward-Lyons exchange in the British press in his English Public Opinion and the American Civil War.
which Lord Lyons and the Law Officers of the Crown had emphasized in their respective critiques of Lincoln’s suspension of habeas corpus.\textsuperscript{49}

Beyond formal constitutional disputes, however, the \textit{Times} maintained that the British government had the legitimate right to force the issue upon the Lincoln administration. Even reports of mild mistreatment of imprisoned British subjects did not preclude the British Government from challenging the legality of such arrests as contrary to American law. Clearly, Seward had not convinced many Britons of Lincoln’s “public necessity” argument, for they saw this as little more than “the tyrant’s plea of necessity” that set aside the writ “by an appeal to the power of the sword.” Echoing Taney’s argument that the power of habeas suspension properly belonged to Congress, and not the President, the \textit{Times} condemned the acts of the Lincoln Government as “illegal as regards their own citizens, and a violation of the rights of nations as regards ours.”\textsuperscript{50} By late 1861, the \textit{Times} recognized Lincoln’s habeas corpus policy as not only a serious domestic civil liberties issue, but a serious foreign policy problem, as well.

While most British newspapers categorically condemned military arrests conducted under authority of executive suspension, at least one paper, the \textit{Glasgow Herald}, focused on the foreign policy context of the issue and suggested that the British government—speaking through Lord Lyons—had gone too far in criticizing the Lincoln administration. The \textit{Herald} agreed with Lyons and the official position of the British

\textsuperscript{49} The \textit{Times} also closely watched Congressional developments on Lincoln’s habeas policy. In late December 1862, the paper criticized Congressional legislation indemnifying government officials for restricting civil liberties. Such an indemnity “is so clearly unconstitutional that it will certainly be repealed by the new Congress if the Democratic party command the majority on which they reckon.” For the American people, the state constitutions, courts, and legislatures were crucial instruments “for the preservation of their fast-fading liberties.” The \textit{Times} (London), December 27, 1862, pg.8.

\textsuperscript{50} The \textit{Times} (London), 6 November 1861, pg.8.
government regarding the potential dangers of executive habeas suspension, arguing that to allow the President to unilaterally suspend the writ was essentially “to place in charge of the wolf the last safeguard of the lamb”—meaning the safeguard of individual citizens against arbitrary government detention. Reflecting the thrust of Chief Justice Taney’s *Merryman* decision, the *Herald* maintained that not one word of the U.S. Constitution “can be even remotely construed to give [Lincoln] the power of infringing the liberty of the subject at *his own* discretion, by abrogating the recognised right of the subject to bring every instance of an arbitrary imprisonment immediately under the cognisance of a judicial tribunal.” Moreover, Congress had significantly failed to sanction executive suspension during the late emergency session of Congress, a fact that mattered a great deal to Lord Lyons and the British government.

But while the *Herald* sympathized with the passionate remonstrance of Lord Lyons against Seward on behalf of beleaguered British prisoners in the Union, the article gently reprimanded the British minister in Washington for going too far in his condemnation of Lincoln’s habeas policy. Instead, the paper advocated pursuing a more cautious British approach toward the issue. Although “Lord Lyons was, we think, justified in pointing out the illegality, and entering a *caveat* against acts of substantial tyranny,…more than that we cannot think that he was justified in saying.” There was no doubt that Lincoln’s claim to executive suspension was illegal. Still, “the British subjects in question”—here referring specifically to the arrests of Britons William Patrick and J. C. Rahming—“were treated with no excessive tyranny,” and Seward had had reasonable grounds for ordering their arrests. In future Anglo-American negotiations on this problem, the British government would be wise to refrain from engaging in “a quarrel
with the United States upon a purely legal ground,” and instead intervene only “in cases of substantial injustice.” After all, the Lincoln administration was busy fighting a civil war, and excessive infringements of individual rights, however regrettable, were bound to occur. The paper did not elaborate on what specific conditions qualified as “substantial injustice, nor the degree of intervention to be undertaken in such cases.”

For the most part, however, the British press remained harshly critical of Lincoln’s suspension policy and restrictions on civil liberties far beyond Seward’s highly visible clash with Lyons and the London government in October 1861.52 While the Times may not have been precisely representative of the views of British society, the paper’s assertion in September 1862 that Lincoln’s habeas policy “shocks the feeling of every liberal man in England and America” was not far off the mark.53 The paper also expressed the astonishment common among Britons that Lincoln’s habeas policy apparently enjoyed wide acceptance among the Northern public. The writ had been suspended, “and there was neither riot in the streets nor organized public meetings to protest against it.” Despite wanton political arrests, this “abomination has been endured with a placidity and patience which if there were the germ of a Bonaparte or a Cromwell

51 “Lord Lyons and Mr. Seward,” The Glasgow Herald, Nov. 13, 1861, pg. 3 (emphases in original).

52 Grant, The American Civil War and the British Press, 162. As late as October 1864, for example, the British New Monthly Magazine could still blast Lincoln’s perceived assault on political dissent in the Union states: “we say advisedly that, except as one of the [Republican] majority, there was no country in which a man had less freedom of speech or action at any time than in the United States.” New Monthly Magazine, October 1864, 203-4.

in the country might well develop its growth, and show daring ambition how easy a conquest might be made of the liberties of such a people.”

Conservative British periodicals remained just as critical of Lincoln’s habeas policy as the liberal British press. The *Saturday Review*’s condemnation of Lincoln’s habeas policy only increased following the president’s September 22, 1862 proclamation suspending the writ nationwide. Lincoln had issued this proclamation without “any apparent necessity, in defiance of all intelligible policy, and without a shadow of constitutional right.” Under such a broad suspension, “every free citizen who may become obnoxious to the official rulers is liable to indefinite imprisonment for any act or word which may be supposed to discourage enlistment.” Civil discourse itself was under attack, and one could find himself imprisoned for merely criticizing the president or voicing disagreements over his interpretation of broad constitutional war powers. Lincoln, the journal asserted, “has not the smallest right to suspend the *Habeas Corpus* for a day, and the [northern] States which he deprives of this freedom are at present in the enjoyment of absolute internal tranquillity.” Thankfully for Lincoln, however, the population of the North “neither cares nor dares to resist any despotic aggression which covers inherent imbecility by a blustering display of vigour. After all, neither martial law nor arbitrary imprisonment will in the smallest degree facilitate the armaments which serve as an excuse for extravagant encroachments. Force is not increased by being ostentatiously displayed, and the violence of the Government only proves that it is thoroughly frightened.”

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54 The *Times* (London), August 18, 1862, pg.25.

55 “President Lincoln’s Coup D’Etat,” *Saturday Review*, XIV (October 11, 1862), 425. The Review expressed similar condemnation toward Lincoln’s unconstitutional assumption of power to unilaterally
the midterm 1862 elections as an optimistic sign that the terrible war would soon come to a peaceful end, with civil liberty restored throughout the North.56

Even after Lincoln’s Emancipation Proclamation took effect on January 1, 1863, the British press—which shifted most of its attention toward developments on the European continent from 1863 onward—did not want its readers to forget the administration’s ongoing curtailment of American civil liberties.57 Charles Mackay, writing for the Times from his post in New York City following the passage of the Habeas Corpus Act of March 3, 1863, denounced the President’s “assault” on civil liberties in the same tenor as his harshest Copperhead critics:

This week…has sealed the doom of the liberties of the North unless there shall occur in due time a counter revolution to restore Constitutional Government. Three extreme measures have been passed to make Mr. Lincoln Dictator, and have accomplished their purpose. By the first he is authorized to suspend the operation of the law of habeas corpus whensoever he shall deem fit, expedient, or necessary. He or his secretaries may cause to be imprisoned and kept in prison, without trial, for an indefinite length of time, any person, high or low, in any of the States of the Union. He may order a military force to seize the Governor of New York or Connecticut, or any other sovereign commonwealth. He may arrest and hold in Forts Lafayette, Warren, or McHenry, the members of any Legislature whose proceedings he may adjudge to be treasonable or dangerous. He may seize the judge upon the judgement-seat, and carry him off to prison….He may silence any tongue, or pen, or printing press in the country, and no judge or jury shall question the legality of the act….58

emancipate slaves, as he indicated in his Preliminary Emancipation Proclamation of September 22, 1862. Such criticisms of Lincoln’s emancipation policy were widely shared among both liberal and conservative Britons, and largely emanated from a fear that executive emancipation would lead to widespread violent slave revolts in the South.

56 Bellows, “A Study of British Conservative Reaction to the American Civil War,” 514.

57 See Jordan and Pratt, Europe and the American Civil War, 188-89; and Crook, The North, the South, and the Powers, chapters 10-12.

58 Quoted in Grant, 166. For an excellent, recent work on the Copperheads, see Jennifer L. Weber, Copperheads: The Rise and Fall of Lincoln’s Opponents in the North (New York: Oxford University Press, 2006).
By this point in the war, criticism of Lincoln’s habeas policy had become manifest in other parts of the British Empire, as well. In March of 1863, the press in New Zealand cited Lincoln’s suspension of habeas corpus (among other military and government policies) in denouncing “the petty tyranny which prevails in every department of his administration.”

Such strong British criticism came months before Lincoln delivered his fullest, and most memorable, public defense of executive habeas suspension.

The fierce public and Democratic outrage provoked by the arrest and military trial of Ohio Democrat Clement L. Vallandigham in May of 1863 impelled Lincoln to go on the record for a second time defending his habeas corpus policy, and once again, the British press took notice. In a public letter to Erastus Corning and several other Democrats who had written to him complaining of Vallandigham’s ordeal, Lincoln defended the same unconstrained policy of executive suspension which he had first offered in response to British complaints in October 1861. As President of the United States, Lincoln claimed the temporary authority, under the war powers of the Constitution, to suspend habeas corpus at any place or time which might conduce to the public safety. As a result, Lincoln maintained that preventive military arrests of persons who might commit treason at an indeterminate future date were justified, and even silence was tantamount to treason. “The man who stands by and says nothing,” Lincoln


60 For further discussion on the case of Clement Vallandigham, see Chapter V.

61 For further discussion on the Corning letter, especially in the context of Anglo-American relations, see Chapter II. The Corning letter was also widely circulated in the form of at least seven different pamphlet versions in 1863. See Mark Neely’s essay in Foner, ed., Our Lincoln, 48, 50; and Neely, Lincoln and the Triumph of the Nation, 86.
asserted, “when the peril of his government is discussed, can not be misunderstood. If not hindered, he is sure to help the enemy. Much more, if he talks ambiguously—talks for his country with ‘buts’ and ‘ifs’ and ‘ands.’” In short, the “brawling and pugnacious” Corning letter was, as Mark Neely aptly writes, “a hair-raising demand for enlisting heart and mind unreservedly in the cause of the nation,” and “threatened to unleash the full wrath of American patriotism on northern society itself.”62

The Corning letter did not escape the attention of the *Times*, which predictably portrayed Lincoln’s latest public policy defense as yet one more bald justification of executive tyranny. Despite Confederate General Robert E. Lee’s impending invasion of the North that would ultimately culminate in the crucial Battle of Gettysburg in early July, the London paper reminded its readers that “the question of Northern liberty in Mr. Lincoln’s hands is too important to be ignored.” The *Times* found much fault with the logic of Lincoln’s argument in the Corning letter, criticizing the president for carelessly dismissing the important distinction between those areas in actual rebellion, and those which were not. Since Vallandigham had been delivering “disloyal” speeches in a Union territory not under martial law, he should have been tried by the civil, not military, courts. More alarming still, Lincoln “has an imperfect conception of the circumstances and an inordinate idea of his own power and prerogative, and shows in every sentence of his voluminous letter that nature has gifted him with every qualification for the part of a despot except that of genius.” In particular, the paper mocked as absurd the passage of the Corning letter in which Lincoln essentially criminalized silence and threatened the loyal opposition:

If all the silent men in America are sure to help the enemy, and if all the men who talk ambiguously, or interlard their very qualified confidence in the President or his policy, with the cautious monosyllables which he so much dislikes, are to be considered the friends of the South, the best thing for Mr. Lincoln to do is pack up his portmanteau, abdicate his uneasy and perilous throne, and take his passage to England or Australia, for the life of the Union is to be counted by hours rather than by years, and his continued residence within its boundaries will be fatal to his liberty if not his life in that rapidly approaching day when Mr. Jefferson Davis shall be the master of his destiny.\textsuperscript{63}

For the \textit{Times} and many other British news organs throughout the American Civil War, Lincoln had simply gone too far in curtailing the civil liberties of both American citizens and British nationals, and no amount of the President’s famous rhetorical eloquence could save him from condemnation across the Atlantic. However mild the consequences of Lincoln’s suspension of the writ of habeas corpus might seem by modern twenty-first century standards, the president’s policy violated mainstream British conceptions of a liberal society and, as Campbell puts it, “simply smacked of despotism” to the typical Briton.\textsuperscript{64}

\textbf{A British Intellectual Critique of Lincoln’s Habeas Policy}

While wide segments of the American and British publics voraciously consumed newspapers and journals during the Civil War, a thriving pamphleteering literature in the Union states offered a unique intellectual battleground upon which American legal experts and public intellectuals debated the nature of the war and Lincoln’s war policies.\textsuperscript{65} Their British counterparts likely consumed these American pamphlets just as

\begin{footnotes}
  \item[63] The \textit{Times} (London), June 29, 1863.
  \item[64] Campbell, 104, 109.
  \item[65] Mark Neely has rightly pointed to the political pamphlet as a crucially important, yet underutilized, source for writing the constitutional history of the American Civil War. See Neely, \textit{Lincoln and the Triumph of the Nation}, 17-25. For a useful list of the pamphlet literature in the Union concerning executive suspension of habeas corpus, see Sidney George Fisher, “Suspension of Habeas Corpus during the War of the Rebellion,” \textit{Political Science Quarterly} 3 (1888): 454-88.
\end{footnotes}
eagerly, at least those prominent enough to make their way to England. And despite general condemnation of Lincoln’s habeas policy in the British press, even those papers most critical of the President were not always swayed by his most prominent American critics. For example, although the *Times* praised Benjamin Robbins Curtis as “one of the ablest of the able men” to publicly attack Lincoln’s war policies restricting civil liberty, the paper sharply criticized the former Supreme Court Justice for failing to recognize the inherent weakness of the Constitution’s protection of individual liberties in his widely circulated pamphlet, *Executive Power.*

While Lincoln’s habeas policy provoked a lively pamphleteering debate among American legal experts, at least one British scholar published an early, measured critique of American habeas corpus during the Civil War. On November 8, 1861—the same day in which Captain Wilkes captured two Confederate envoys aboard the British mailship *Trent*--Montague Bernard, an Oxford professor of international law and diplomacy, delivered a lecture on the American Civil War at All Soul’s College (later published in pamphlet form) in which he identified the military arrests of British subjects without recourse to habeas corpus as “[t]he only serious difference known to have arisen between the English Government and that of the United States.” While conceding a legal distinction between British nationals domiciled in the United States and those merely visiting temporarily, Bernard argued that both groups of British subjects were nevertheless entitled to the protection of the laws of the United States and, in the absence of such protection, they could rightfully appeal to the British government for redress.

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66 *The Times* (London), November 13, 1862, pg. 10.
Still, Bernard was also sensitive to the emergency nature of civil war in considering issues arising from any perceived illegality of Lincoln’s suspension of habeas corpus: “When the illegal act is excused by the plea of an overpowering necessity, all that a foreign Government can do is to satisfy itself that the plea is genuine, and to take care that its subjects do not suffer substantial injustice.” In this, Bernard seemed to acknowledge that both citizens and foreign nationals residing in a country afflicted by civil war were bound to suffer some degree of injustice resulting from the natural frictions of internecine strife.

Like many other British analyses of Lincoln’s suspension of habeas corpus, Bernard’s stressed the importance of following constitutional procedures. If the privilege of the writ of habeas corpus had been suspended under proper constitutional authority, Bernard admitted—meaning by authority of Congress, which by that early point had declined to both reclaim suspension power from Lincoln and validate his suspension in the first place—neither American citizens nor foreign nationals could bring just claims against the Union government. Although Bernard respected Horace Binney’s popular defense of unilateral executive suspension, he found such “amazing propositions” not only strange to the legal sensibilities of British lawyers, but inconsistent with the U.S. Constitution itself. For support, he cited Taney’s recent Merrymen opinion and previous opinions relating to habeas corpus from former United States Supreme Court Justices Joseph Story and John Marshall.68

67 Montague Bernard, *Two Lectures on the Present American War, etc* (London: J. H. and J. Parker, 1861), 55-56. Unfortunately, I have been unable to locate data on the circulation of Bernard’s pamphlet in the British realm.

68 Bernard, *Two Lectures*, 57-58.
As a professor of international diplomacy, Bernard naturally recognized a foreign policy dimension in his analysis of Lincoln’s habeas policy. Although he conceded the propriety of the recent and well-publicized military arrests of Patrick and Rahming, Bernard nevertheless asserted the right of the British government to determine for themselves whether such actions taken by the Union government against British nationals were illegal and, if so, to intervene accordingly. Thus, if the British government determined that Lincoln’s suspension was illegal—as it clearly had during the fall of 1861—Bernard insisted that even Lincoln’s necessity-driven argument did not trump the obligation of the Crown to protect her subjects overseas. As he summarized his argument:

If these acts are not illegal, the British Government has no right to interfere; if in the opinion of the British Government they are clearly illegal, it is warranted in interfering. Nor does the plea of necessity hold good, for the President (having now a stronger case than Jefferson had in 1807) might have obtained from Congress, under proper limitations, the power to do what he is now doing at his own arbitrary will. But interference where no substantial injustice appears to have been done, can have no other object than to guard against injustice in future; the prudence and propriety of it are to be tested by reference to that object; and, unless the illegality be reasonably clear, there should be no interference at all.  

As the Seward-Lyons correspondence made clear in the fall of 1861, however, the Lincoln administration would have rejected Bernard’s contention that the British government could (or should) challenge the legality of his suspension policy. (By the time of his lecture in early November, Bernard had perhaps not yet been made aware of the administration’s official response to British complaints over habeas corpus.) Nevertheless, Bernard concluded by cautioning his countrymen that, since Lincoln’s assumption of the power to unilaterally suspend habeas “is certainly considered an open question in the United States, we should perhaps have done wisely, if, whatever our own

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69 Bernard, Two Lectures, 56-57.
views of it might be, we had forborne (as we well might) to treat the acts whose character depends on it as clearly illegal.” Thus, as much as British observers may have insisted that Lincoln respect (ideal) constitutional safeguards of civil liberty, the existence of civil war perhaps led some, like Bernard, to recognize a tragic weakness of the Great Writ in times of national crisis.

Finally, British differences of opinion regarding Lincoln’s habeas policy may be found in the realm of the interpersonal with the transatlantic correspondence of the “most important defender” of Lincoln’s claim to executive suspension: Horace Binney. Constitutional historians of the American Civil War have long emphasized the crucial role played by Binney and his pamphlet, *The Privilege of the Writ of Habeas Corpus*, in bolstering public support for Lincoln’s habeas policy. A prominent octogenarian lawyer from Philadelphia, Binney penned an exhaustive theoretical defense of executive suspension following the publication of Roger Taney’s *Ex parte Merryman* opinion in the early summer of 1861. Offering a highly technical constitutional analysis which emphasized the conditions of invasion and rebellion specified in the suspension clause of Article I, section 9 of the U.S. Constitution, Binney argued that only the President had the constitutional authority to suspend the writ. Binney’s pamphlet, eventually published in

70 Bernard, *Two Lectures*, 57-58.


three subsequent revised editions and widely circulated, invited the most attention from public critics of executive suspension during the war.\textsuperscript{74}

Yet even Binney correctly realized that Lincoln’s suspension of habeas corpus would have a profound negative impact on British legal opinion, and that his own argument was unlikely to win over many English lawyers. Writing in February 1862 to one of his friends across the Atlantic, the distinguished British lawyer and former Chief Justice of England, John Duke Coleridge, Binney confided that he had offered his interpretation of the habeas clause “lest the best judges in the world should think” that Lincoln’s unilateral suspension “was an indefensible usurpation.” Nevertheless, just such an interpretation of the President’s actions, he acknowledged, “seems to have been to some extent the impression in England.” Despite their diametrically opposed interpretations of the habeas clause, Binney conceded the “learning and ability, and great subtlety” of Chief Justice Taney, whose \textit{Merryman} decision condemning Lincoln’s unilateral suspension power enjoyed wide praise among Britons. Yet Binney did not trust Taney’s judgement upon political questions. Indeed, the Philadelphia lawyer viewed Taney’s notorious \textit{Dred Scott} opinion as “the parent of this Rebellion,” and so his subsequent position in \textit{Merryman} could not be trusted and deserved rebuttal.\textsuperscript{75}

If Binney had hoped that his rationale was enough to win over his British friend, he was disappointed. In his response seven months later, Coleridge confirmed Binney’s assumptions about the opposition of mainstream British legal opinion toward Lincoln’s

\textsuperscript{74} Neely, \textit{Lincoln and the Triumph of the Nation}, 71.

habeas policy. In fact, the curtailment of civil liberties under Lincoln’s suspension of habeas corpus, Coleridge argued, represented “the only fair point of attack [upon the Lincoln administration] which the American people have presented” to British observers. Coleridge spoke for many Britons by concluding that, in the United States, “the love of real liberty seems to have gone to sleep and to have died out. The arrest of citizens on false pretexts, or none, the suspension of the Habeas Corpus, and the cry for ‘strong measures’ are indications to our minds here, that true freedom has ceased to be regarded as the first object either by the Governors or the people.”

Abraham Lincoln’s suspension of the writ of habeas corpus in the Union concerned more Britons than those tasked with conducting Anglo-American diplomacy on both sides of the Atlantic. Whether they felt insecure about their own checkered past with the “Great Writ,” or simply recognized habeas corpus as an English birthright, many in England thought they had a greater understanding of habeas suspension and its implications for civil liberty than their American counterparts. Through published diaries, letters, newspaper and journal articles, and pamphlets, broader British attitudes toward, and observations of, Lincoln’s habeas policy largely reflected those of British diplomats and London officials during the American Civil War. On both constitutional and foreign policy grounds (at least during 1861), British observers condemned Lincoln’s habeas policy as blatantly unconstitutional and inimical to the civil liberties of American citizens and British nationals living in the Union. Like Copperhead criticism of executive suspension in the Union, however, British censure did not deter Lincoln from gradually

76 John Duke Coleridge to Horace Binney (emphasis in original), Sept. 5, 1862, in Life & Correspondence of John Duke Lord Coleridge, 18.
expanding the scope of executive habeas suspension after 1861. Nevertheless, American habeas corpus under Lincoln represented a topic of lively discussion within the British public sphere for much of the Civil War, and one which contributed significantly to widespread anti-Union attitudes in England.
CHAPTER VII
CONCLUSION

In the years immediately following the end of the American Civil War, anti-British sentiment remained strong throughout the re-United States. While the U.S. government began turning its full attention toward reconstructing the defeated Southern states and granting citizenship rights for African Americans, Anglo-American tensions surrounding various wartime issues did not fully dissipate. To the British Minister in Washington, Sir Frederick Bruce, Americans in the victorious Northern states blamed the duration of the war on Britain’s early extension of belligerent status to the Confederacy, as well as the outfitting of Confederate war ships and blockade running carried out from English ports.\(^1\) And only a year after the end of the war, Anglo-American disputes surrounding habeas corpus and civil liberties resurfaced again—this time, in Great Britain. The increasing unrest in Ireland by nationalist revolutionaries impelled the British government to suspend the writ of habeas corpus there on February 17, 1866, and Bruce recognized that some Northerners, resentful of Britain’s allegedly pro-Confederate stance during the Civil War, were sympathetic to the Fenian cause.\(^2\) In the aftermath of a Fenian raid into Canada, the British Minister informed his new foreign secretary in

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\(^1\) Jenkins, *Britain & the War for the Union*, II, 385-88.

\(^2\) The Irish Revolutionary Brotherhood, founded in Dublin, Ireland in 1858, was created with the political goal of overthrowing British rule in Ireland. The Brotherhood also planted a branch in the United States, where it was better known as the Fenian movement (named after Fianna, the ancient Irish tribal militia). Hereward Senior, *The Last Invasion of Canada: The Fenian Raids, 1866-1870* (Toronto: Dundurn Press, 1991), 20-22.
London, Lord Stanley, that the political unrest emanating from Ireland might enable Republicans to exert pressure on England in the diplomatic sphere: “How far the discontent in Ireland would seriously affect our strength I do not know, but it does not admit of a doubt that the condition of that country, and the necessity of continuing the suspension of the Habeas Corpus Act, do operate powerfully in this United States in favour of the [Republican] War party, and give to the interference of this people a certain justification which in their eyes excuses in some degree the violation of their international obligations.”

While his diplomatic predecessors in Washington had consistently condemned the “necessity” for Lincoln’s wartime habeas policy, Bruce, perhaps now recognizing what he viewed as a viable political threat to the survival of his own government, apparently did not question Parliament’s necessity-driven justification for habeas suspension in Ireland.

Following Britain’s suspension of the writ, several American citizens and Irishmen naturalized in the U.S. were arrested in Ireland on suspicion of aiding the Fenian uprising. Near the end of February, the American vice-consul in Dublin, William B. West, opened up a channel of correspondence with Her Majesty’s attorney general for Ireland regarding those Americans who had been arrested and imprisoned on the basis of scant evidence. In reply, the British government promised West proper investigations into individual cases, provided that he furnish the British government with the names and facts relating to specific cases. Reciprocating the process recently carried out on nearly a daily basis by Seward and Lord Lyons for Britons arrested under Lincoln’s habeas policy, the British Secretary of the Lord Lieutenant assured West that such investigations would

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3 Bruce to Stanley, August 13, 1865, in *Private and Confidential*, 388-89.
commence with a view toward liberating American prisoners if the circumstances allowed. Within only a few days, however, West encountered problems visiting and establishing the nationality of certain American prisoners to the satisfaction of British authorities. The Lord Lieutenant informed West that, although the latter had a right to extend his protection to native-born American citizens, he had no such right to interfere (aside from written correspondence) on behalf of naturalized American citizens in Ireland.4

The situation facing American prisoners in Ireland in 1866 neatly paralleled that recently faced by British prisoners under Lincoln’s suspension of habeas corpus during the American Civil War. On March 5, 1866, the American Minister in London, Charles Francis Adams, met with the British Secretary of State for Foreign Affairs, Lord Clarendon, to discuss this latest Anglo-American habeas corpus problem. As Adams reported to Seward, the British government “claims the right of dealing as it pleases with native Irishmen, no regard whatever being paid to the fact of their naturalization in the United States.” Just what the British government intended to do with American prisoners remained unclear, but Adams insisted to Clarendon that such prisoners had been arrested without charges or justification. The American Minister had a duty to hear the complaints of American citizens who reached out to him, and if the British government could not give satisfactory reasons for their arrest, he had an obligation to request their release. It was “of the utmost importance to a good understanding between the countries,” Adams cautioned Clarendon, that such persons “should be promptly relieved.” “In this connection,” Adams wrote Seward, “I reminded him of the fact how freely Lord Lyons

4 Seward to Adams, March 22, 1866, in FRUS 1866-67, 86-88.
had exercised this right during the [American Civil War], and in how many very doubtful cases he had obtained a release.” As Lord Lyons had done before him with respect to British prisoners reasonably suspected of damaging the Union cause during the Civil War, Adams had no desire to provide diplomatic shelter for naturalized Americans who were reasonably suspected of seeking the destruction of the British government. In his view, both countries could avoid further potential conflicts over citizenship and civil liberties if American prisoners were released upon swearing to good behavior or promising to leave the country. Adams would, therefore, confine his efforts “to those cases in which there was mere suspicion, or at most feeble evidence, of actual evil intent,” and Clarendon assured him of the full cooperation of the British government.

For his part, Seward instructed Adams to continue the policy of cautious cooperation that both governments had maintained during the American Civil War for British Union prisoners. While the Union government had sought to balance national security and civil liberty in its war against the former Confederacy, the United States government recognized that their British allies now found themselves in a similar situation. Some American citizens, Seward acknowledged, were bound to suffer unjust arrest and imprisonment under Britain’s recent suspension of habeas corpus:

It may be expected that some of our Irish born naturalized citizens, who are now sojourning or travelling in Ireland, will be arrested upon complaints of complicity in seditious proceedings. It may also be expected that some who will be thus accused will be innocent, while others will be guilty. The situation will for a time necessarily become inconvenient and embarrassing. I know of no way in which you can meet it more properly than by pursuing the course which you have indicated. Americans, whether native-born or naturalized, owe submission to the same laws in Great Britain as British subjects, while residing there and enjoying the protection

5 Adams to Seward, March 8, 1866, in FRUS 1866-67, 76-77.
6 Adams to Seward, March 15, 1866, in FRUS 1866-67, 84.
of that government. We applied the converse of this principle to British subjects who were sojourning or travelling in the United States during the late rebellion. Give a careful examination to each complaint, dealing at all times frankly with the British government, and asking on their part strict justice in their proceedings where American citizens are concerned.  

On the question of nationality, however, Seward advised his American Minister that the United States government was “entirely unable to acquiesce” in Britain’s insistence that British-born but naturalized U.S. citizens were not entitled to the protection of the U.S. government.  

Here, Seward objected to the citizenship concept of “perpetual allegiance” long embraced by Britain: “the conviction that [British] allegiance was ascribed at birth and could never be revoked or transferred.” While mass migrations from the British Isles certainly placed great pressure on Britain to abandon perpetual allegiance for volitional citizenship by 1870, the diplomatic problems surrounding both the British habeas experience under Lincoln during the American Civil War, as well as the subsequent American habeas experience in Ireland, may well have contributed to Britain’s move toward restructuring its national allegiance.  

Although Britain’s habeas suspension in Ireland probably did not attract as much condemnation in the United States as had Lincoln’s in England, at least one first-hand American observer captured the views of many British critics of the late president’s habeas policy. Writing to Seward on May 8, 1866, about her husband’s arrest and imprisonment in Ireland, Mary Francis Gleeson implored the Secretary of State to demand her husband’s immediate release from British custody, “for there is no justice or

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7 Seward to Adams, March 10, 1866, in FRUS 1866-67, 77-79.

8 Seward to Adams, March 22, 1866, in FRUS 1866-67, 88.

mercy on this side of the Atlantic.” As Lord Lyons had once done for British Union prisoners, Seward worked diligently to find reasonable grounds for requesting the discharge of American prisoners in Ireland. In many cases, Seward emphasized the recent military service of naturalized Irishmen during the late Civil War, perhaps hoping that this would serve as a trump card for their speedy release. In one case, Seward had received a letter from the father of one of the prisoners in the Kilmainham jail in Dublin, twenty-eight year-old John A. Commerford. A native of Lowell, Massachusetts, the young Commerford had sailed with his father for Ireland to visit family in November 1865, and had intended to return to the U.S. the following February but was apprehended by the British authorities on February 17, 1866. According to his father and several witnesses, John Commerford had served in the Third Massachusetts Cavalry during the American Civil War, and had no intentions of involving himself with the Fenian resistance in either the U.S. or Ireland. Upon Seward’s intervention, Commerford was released by the middle of April 1866 on condition that he leave the United Kingdom.

Another Civil War Union veteran, Lieutenant Colonel Burke, was also arrested in Dublin on suspicion of advancing the Fenian cause. Burke had served with distinction in the war and, with his invalid wife, had traveled to Ireland in the hopes that the voyage would improve her health. Seward instructed Adams to press the British government for Burke’s immediate release if warranted by the evidence against him, and to “exercise

10 Mary Francis Gleeson to Seward, May 8, 1866, in FRUS 1866-67, 123.

11 See Seward to Adams, March 26, 1866, and accompanying correspondence, in FRUS 1866-67, 91-92. Seward also received reports of other American citizens who allegedly suffered unjust arrest and imprisonment in Ireland, which he then forwarded to Adams at the U.S. Legation in London.

12 Adams to Seward, April 14, 1866, in FRUS 1866-67, 104.
such unofficial good offices in favor of Colonel Burke as may in your judgement be warranted by the merits of the case.”

The British government refused to release Burke, believing him to be “deeply implicated in the Fenian plots of hostility to the government.” Still, Adams informed Seward that this was only the second case of refusal by the British and, as the grounds for holding Burke under detention “seem to be substantially the same with those taken by our government during the war” with respect to British prisoners, Adams felt it prudent to await further instruction from Seward. The American minister’s patience paid off, for a month later, vice-consul West reported to Adams that Burke and several other prisoners previously considered by the British government to be guilty had been released in early July “in a spirit of courtesy and cooperation” toward the United States.

Lord Lyons had also frequently petitioned Seward for special consideration of British Union prisoners suffering severe medical conditions, and Seward now found himself doing the same thing for American prisoners in Ireland. Cornelius Healy of New Hampshire had served for three years in the Eighth Regiment New Hampshire Volunteers. Having been “broken in health and still suffering from a disease contracted in the service,” Healy acted on the advice of his physician to sail to Ireland under the assumption that the voyage would improve his health. He was arrested and imprisoned shortly after his arrival. After hearing of Healy’s predicament, Frederick Smyth, the

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13 Seward to Adams, April 21, 1866, in FRUS 1866-67, 107-8.

14 Adams to Seward, May 25, 1866; Adams to Seward, June 1, 1866, both in FRUS 1866-67, 121-22, 124-25.

15 Adams to Seward, July 7, 1866; and Adams to Seward, July 14, 1866, both in FRUS 1866-67, 146-48.
governor of New Hampshire, implored Seward that Healy could not “endure even a brief period of imprisonment without the most imminent danger of serious and even fatal consequences,” and asked that the Secretary immediately petition the British government for his release. Healy was released upon condition of leaving the country on March 7, 1866, and the relatively easy resolution of the case prompted Adams to inform Seward of his belief “that little further difficulty is to be apprehended from the questions involved in the late suspension of the habeas corpus act in Ireland.”

Adams’ prediction proved prescient. On May 29, 1866, Clarendon informed Adams that British officials were prepared to remove all unnecessary distinctions between native-born and naturalized American prisoners in Ireland which had previously caused diplomatic difficulties. London officials were anxious to release American prisoners as quickly as possible in accordance with the public safety, just as President Lincoln and Seward had frequently assured Lord Lyons of the swift release of British prisoners when compatible with the public safety during the Civil War. By August 2, Adams reported to Seward that American prisoners were rapidly securing their releases from British custody, and by the end of that month, “no person proved to be a native or a naturalized citizen of the United States now remains in Dublin under the Act for suspending the habeas corpus.” The American habeas experience in Ireland had apparently ended by the fall of 1866, for on September 29, Adams reported: “There is

16 Frederick Smyth to Seward, March 20, 1866; and Seward to Adams, April 3, 1866, in FRUS 1866-67, 95-97. Healy’s case was also bolstered by a petition for his release by several residents of New Hampshire acquainted with Healy. See also the case of Michael Kirwan in Seward to Adams, April 28, 1866, in FRUS 1866-67, 109-10; and Seward to Adams, April 30, 1866, FRUS 1866-67, 113.

17 Adams to Seward, April 19, 1866; and Adams to Seward, May 10, 1866, both in FRUS 1866-67, 106, 119.
now no case before this Legation of a proved American citizen being concerned in treasonable practices” in Ireland.\textsuperscript{18}

The American habeas experience in Ireland in 1866 represented a continuation of Anglo-American diplomacy regarding the civil liberties of foreign nationals into the postwar period, and presents perhaps a final indication of the broader scope of the habeas corpus problem under Lincoln. During the American Civil War, the military arrests of Britons under Lincoln’s habeas suspension policy had presented both governments with a persistent foreign policy problem. Between 1861 and 1865, diplomats at the British Legation prioritized the protection of Britons living in the Union against various forms of military injustice, and devoted considerable energy toward relieving Britons wrongfully arrested or tried by Union military courts. Although Lincoln’s habeas policy placed a serious strain on Anglo-American relations during the latter part of 1861, and even pushed Lincoln to publicly embrace an unconstrained constitutional view of executive habeas suspension far earlier than scholars have recognized, the U.S. State Department and British Legation in Washington ultimately handled the problem successfully at the diplomatic level through a policy of cautious cooperation. Protecting Britons tried by military courts between 1862 and 1865 proved more difficult, however, as both governments struggled to negotiate the tenuous boundary between citizenship and nationality inherent in such cases and as the Union military could not (or perhaps would not) accommodate British requests for cooperation, if not leniency. Despite the success of

\textsuperscript{18} Report of the Royal Commissioners, for inquiring into the Laws of Naturalization and Allegiance; together with an Appendix containing An Account of British and Foreign Laws, and of the Diplomatic Correspondence which has passed on the subject, Reports from Foreign States, and other Papers (London: George Edward Eyre and William Spottiswoode, 1869), 48-49. Several arrests of native-born and naturalized Americans also occurred during the period of Fenian agitation in Canada.
both governments in resolving the British habeas corpus problem on the whole, many Britons inside and outside of the London government consistently condemned Lincoln’s suspension of habeas corpus as a dangerous blow to civil liberty, and the president’s policy contributed significantly to widespread anti-Union sentiment in England during the war.

During the American Civil War, British blockade runners could not expect much sympathy from Her Majesty’s Government for blatantly violating the laws of war, and likely would have wound up in a Union prison even if Lincoln had not suspended the writ of habeas corpus. However, unlawfully conscripted Britons seeking escape from the Union army and those arrested on vague charges of disloyalty or tried by a military court were a different story. In the latter cases, the British government demanded a satisfactory explanation from the Lincoln administration justifying its actions. When such explanations did not satisfy, Lord Lyons persistently, yet gently, encouraged Secretary of State Seward to find viable reasons for release, and the latter often obliged the British minister. Still, many Britons arrested under Lincoln’s habeas policy were understandably unhappy about their experience and, at their behest, the British government pressed for compensation from the United States government in at least twelve cases involving unjust arrest and imprisonment over the course of the war. None of these cases involved blockade-running or arose out of the Border or former Confederate states, and the ultimate results for the British complainants are unknown. Moreover, the British government acknowledged that not all cases of military arrests were reported from the
British Legation in Washington, and quantifying a precise number of cases involving British prisoners is, and will likely remain, impossible.\textsuperscript{19}

In the end, one can easily see how many British diplomats, government officials, and observers misunderstood the nature of the vast majority of military arrests under Lincoln, including those involving British nationals. Most of the bona fide Britons arrested under Lincoln’s suspension of habeas corpus during the American Civil War were not truly \textit{political} prisoners, even though after the war the British government used the term “political arrests” to classify British prisoners who fell victim to the Union’s “system of arbitrary arrest.”\textsuperscript{20} While further research into British archival sources will likely shed more light on the British habeas experience under Lincoln, it is likely that most Britons arrested over the course of the war were either blockade runners or worried Britons seeking to escape wrongful conscription and forced military service for a foreign country. Relatively few British arrests actually involved prison terms for political speech or various other “disloyal activities,” although many Britons condemned such “arbitrary” arrests as the natural result of a sweeping habeas suspension policy. Historians may be tempted to dismiss such exaggerated British criticism as merely an extension of Copperhead ideology across the Atlantic. Moreover, historians are wont to remind us that, by the standards of later twentieth century American presidents and totalitarian dictators, Lincoln’s record on civil liberties was mild.\textsuperscript{21} But unlike the Copperheads,

\textsuperscript{19} Memorandum to accompany the Return of Claims of British Subjects in the United States since the Secession of the Southern States, BDFA, VI, 273-83.

\textsuperscript{20} Memorandum to accompany the Return of Claims of British Subjects in the United States since the Secession of the Southern States, BDFA, VI, 273-74.

British critics were not motivated by political incentives, and such hyperbolic comparisons yield limited historical value anyway and say nothing of whether Lincoln’s expansive habeas policy was indeed justified by the historical evidence. Many Britons, drawing upon their own legal and historical understanding of habeas corpus in England as well as news of widespread military arrests, viewed Lincoln’s suspension of habeas corpus as a genuine policy failure, and one likely to destroy civil liberty and republican government in the United States. Fortunately, such claims did not prove true, but this is only obvious in hindsight, and was far from clear to British observers at the time.

Over the past decade, historians have increasingly begun to explore the global dimensions of the American Civil War, which continues to stimulate welcome re-examinations of even the most traditional topics from fresh and unique perspectives. The most traumatic national crisis in American history, scholars have shown, was much more than a sectional conflict confined to the contiguous Union and Confederate states of North America. This reconceptualization of the “global” Civil War has played no small part in shaping the pages above. Independently of each other, historians have certainly contributed much to our understanding of civil liberties under Lincoln and Britain’s role in the American Civil War. This is not to minimize traditional topics surrounding Lincoln’s extraordinary exercises of presidential power in the realm of habeas suspension, or the much more well-known flashpoints in Anglo-American diplomacy during his presidency. Timely issues surrounding the proper scope and constraints of executive power remain relevant into the early twenty-first century, and there is no doubt that the *Trent* affair at the end of 1861 represented the most important crisis in Anglo-American diplomacy during the Civil War. While these and other related topics remain
important, historians should continue to look for ways to approach, and perhaps merge, the constitutional and foreign policy histories of the American Civil War from new perspectives.

This dissertation has attempted to do just that by emphasizing the transatlantic importance of Lincoln’s suspension of habeas corpus, although further research in British and other European archives will likely yield a fuller study of the global impact of Lincoln’s habeas corpus policy. Personal experiences with, and public debates surrounding, the “Great Writ” in the wartime Union were not exclusive to American citizens. Many Britons on both sides of the Atlantic were keenly interested in, if not directly affected by, Lincoln’s suspension of habeas corpus. Beyond re-conceptualizing Lincoln’s habeas policy as both a domestic constitutional and foreign policy problem for the entire war, however, an analysis of the British habeas experience under Lincoln also demonstrates new ways in which both Americans and Britons of the Civil War era understood and contested concepts such as “liberty” and “citizenship”, as well as the extent to which governments should restrict individual freedom in times of great national crisis. Habeas corpus may have been a shared Anglo-American legal tradition, but that did not mean that Britons and Americans agreed on the role of the Great Writ in the midst of a terrible civil war.
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