

ORIGINALISM AND A FORGOTTEN CONFLICT OVER MARTIAL LAW

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ABSTRACT—This Symposium Essay asks what a largely forgotten conflict over habeas corpus and martial law in mid-eighteenth-century New York can tell us about originalist methods of constitutional interpretation. The episode, which involved Abraham Yates, Jr.—later a prominent Antifederalist—as well as Lord Loudoun, the commander of the British forces in America, and New York Acting Governor James De Lancey, furnishes insights into debates about martial law prior to the Founding and indicates that they may have bearing on originalist interpretations of the Suspension Clause. It also demonstrates how the British imperial context in which the American colonies were situated shaped discussions about rights in ways that originalism should address. In particular, colonists argued with colonial officials both explicitly and implicitly about the extent to which statutes as well as common law applied in the colonies. These contested statutory schemes should affect how we understand constitutional provisions: for example, they might suggest that statutes pertaining to martial law should be added to those treating habeas corpus as a backdrop against which to interpret the Suspension Clause. Furthermore, the conflict showed the significance to members of the Founding generation of the personnel applying law, whether military or civilian, rather than the substantive law applied; this emphasis could also be significant for how we interpret constitutional rights.

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INTRODUCTION

Ex parte Milligan made famous the notion that civilians should be tried by ordinary courts when those remained open, even when hostilities were ongoing.¹ There has been much discussion of this claim, from the perspective of the Civil War context² as well as from the vantage point of original meaning.³ It has implications for a number of interpretive debates about the inclusion—whether explicit or implicit—of emergency powers within the U.S. Constitution and the meaning of the Suspension Clause.⁴ This Symposium Essay takes a basically unknown controversy in 1750s New York as a window into the complexity of the relationship between habeas corpus and martial law in the colonial context as well as the divergent visions of common law already emerging between British imperial forces and local American interpreters.⁵ Through demonstrating the contested quality of common law both independently and as modified by English statutes within the British settler empire of eighteenth-century North America, this episode highlights the significance of the imperial setting for understanding the original meaning of the Constitution.

¹ 71 U.S. (4 Wall.) 2, 127 (1866).

² *Milligan* has alternately been viewed as a “bulwark[] of American liberty” and a political decision by Justice David Davis to undermine a use of military courts that was perceived as crucial for attaining the goals of Reconstruction. Martin S. Lederman, *The Law(?) of the Lincoln Assassination*, 118 COLUM. L. REV. 323, 443 (2018). For the purposes of this Essay, the petitioner’s claim that the source of the claimed presidential authority would rest in “the assumed power to declare what is called martial law” furnishes a crucial connection between the writ of habeas corpus and the scope of martial law. *Milligan*, 71 U.S. (4 Wall.) at 35.

³ See Andrew Kent, *The New Originalism and the Foreign Affairs Constitution*, 82 FORDHAM L. REV. 757, 762–63 (2013) (citing *Milligan* in treating the questions that originalism should be able to answer).

⁴ U.S. CONST. art. I, § 9, cl. 2 (“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.”).

⁵ I have found a couple of references to the dispute in passing, but no full account based upon Yates’s notes as well as Loudoun’s treatment and nothing that considers the stakes of the controversy in terms of its implications for constitutional meaning. The most thorough discussion of Yates’s interactions with Loudoun occurs in RUSSELL SHORTO, *REVOLUTION SONG: THE STORY OF AMERICA’S FOUNDING IN SIX REMARKABLE LIVES* 112–18 (2018).

In the late 1750s, Abraham Yates, who later became renowned as an Antifederalist, was serving as a sheriff in upstate New York.⁶ He was appointed by Acting Governor James De Lancey and seemed to be holding office without particular controversy until the 1756 arrival of John Campbell, the Scottish fourth earl of Loudoun, as commander of the British forces in America.⁷ Lord Loudoun (John Campbell)—who had enjoyed an extensive military career in Flanders as well as parts of Britain⁸—was viewed as a less than successful leader.⁹ He was, nevertheless, appointed to coordinate efforts in America against the French and the Indians during the Seven Years War.¹⁰ Loudoun’s prolific correspondence upon arriving in America demonstrates the skepticism with which he was met in many quarters and his varying efforts to overcome the reservations of people and legislatures in several colonies.¹¹

In 1757, Loudoun’s forces took up residence in Albany, where Yates was serving. Conflict quickly ensued when Loudoun’s troops broke into the jail, over which Yates presided, to imprison a local farmer accused of harassing members of the military.¹² Yates refused to relinquish the keys to

⁶ *Id.* at 110–11, 416–39. See generally STEFAN BIELINSKI, ABRAHAM YATES, JR. AND THE NEW POLITICAL ORDER IN REVOLUTIONARY NEW YORK (1975) (treating the story of Yates and his role during and after the American Revolution).

⁷ SHORTO, *supra* note 5, at 110–12.

⁸ STANLEY MCCRORY PARGELLIS, LORD LOUDOUN IN NORTH AMERICA 42–43 (1933).

⁹ Philip Yorke, Lord Chancellor Hardwicke, later “recall[ed] what was said of Loudoun at his appointment, that he ‘might be a very good Colonel, but was absolutely unfit for chief command.’” *Id.* at 338.

¹⁰ *Id.* at 42–43.

¹¹ *Id.* at 167–210 (recounting Loudoun’s difficulties with local assemblies and in quartering soldiers). One particularly challenging aspect of the military situation preexisting Loudoun pertained to the composition of the troops. Before Loudoun was chosen, British officials had debated what kind of armed force to implement in America and, in particular, the proportion of officers and troops to be imported from Britain as opposed to raised in America. *Id.* at 28–31, 41–42. When Loudoun arrived, a provincial army composed of forces from both New England and New York was operating under the authority of commissions granted to General John Winslow by the Massachusetts, Connecticut, and New York governors. *Id.* at 83. The separation of this body from coexisting British regiments carried significant legal importance. In 1754, the Mutiny Act, which governed military discipline, had been amended, in response to events in East India, to extend British military law to provincial troops serving alongside British ones. *Id.* at 85–86, n.5; see An Act for punishing Mutiny and Desertion of Officers and Soldiers in the Service of the United Company of Merchants of England trading to the East-Indies; and for the Punishment of Offences Committed in the East-Indies, or at the Island of Saint Helena, (1754) § 9, 7 THE STATUTES AT LARGE FROM MAGNA CHARTA, TO THE END OF THE LAST PARLIAMENT, 1761, at 549. The martial law punishments specified by the Mutiny Act would have far exceeded the severity of the common law. See PARGELLIS, *supra* note 8, at 86. This Symposium Essay focuses more on civilians’ status with regard to military jurisdiction than gradations of authority over the military, but the differentiation among even military personnel with respect to the law enforced is highly relevant. In both contexts, the question of what substantive legal principles and remedies applied to those accused of wrongdoing was bound up with the extent of authority of a commanding officer and his commission.

¹² See *infra* notes 104–106 and accompanying text.

the jail and got the courts in New York City to issue a writ of habeas corpus, at which point he sent the accused there to be heard.¹³ These acts of resistance ignited a firestorm. They incurred the immediate wrath of Lord Loudoun, who contended that his authority superseded the force of civilian law, claiming that he had frequently heard British Lord Chancellor Hardwicke declare that, when a military occupation proved necessary, military power trumped civilian control.¹⁴ On the other side, and in subsequent correspondence with Governor De Lancey and others, Yates adduced a string of authorities from English law to support the notion that habeas corpus could not be suspended under these circumstances.¹⁵

This conflict is a particularly fruitful one to study in order to gain access to the disparate perspectives of civil and military officers, and British and colonial personnel. Yates himself kept a detailed journal/copybook from 1754 to 1758,¹⁶ and Lord Loudoun's stint in America yielded more than one hundred boxes of materials, including memorandum books and many letters.¹⁷ The temporal scope of the New York Public Library's Yates collection makes it possible to follow the ideas generated during the 1750s through Yates's stance in the period of constitutional formation.

The episode detailed here represents the crystallization of a conflict over martial law and its status within colonial jurisdictions. It emerged from a largely forgotten moment in the genealogy of martial law. Writing in the aftermath of the American Civil War, Francis Lieber and his son, Norman Lieber, penned a treatise on martial law that was only recently rediscovered and has now been edited by Professors John Witt and Will Smiley.¹⁸ The Liebers' work articulates a normative vision of martial law while also surveying the relevant British and American history. The sequence of the book, however, omits the period treated in this Symposium Essay. Instead, the Liebers move from considering the role of martial law in domestic English contexts to the British colonial implementation of martial law in the late eighteenth century but neglect the formative period of the middle of the eighteenth century. By neglecting the formative mid-eighteenth-century period, the Liebers and other nineteenth-century commentators set the stage for later scholarship, leading to the view common today that, "[p]rior to

¹³ See *infra* notes 108–110 and accompanying text.

¹⁴ See *infra* notes 112–115 and accompanying text.

¹⁵ See *infra* notes 116–124 and accompanying text.

¹⁶ Abraham Yates, Jr., Journals/Copybook 1754–1758 (Abraham Yates, Jr. Papers, Box 4, Manuscripts and Archives Division, N.Y. Pub. Library).

¹⁷ John Campbell (Loudoun Papers: Americana, Manuscripts Department, Huntington Library, San Marino, CA).

¹⁸ FRANCIS LIEBER & G. NORMAN LIEBER, TO SAVE THE COUNTRY: A LOST TREATISE ON MARTIAL LAW (Will Smiley & John Fabian Witt eds., forthcoming July 2019).

1815, America followed the traditional English common-law conception of military authority, wherein ‘military jurisdiction extended only to members of the armed forces.’”¹⁹

Disregarding this earlier moment when martial law was already a point of contention has implications for constitutional interpretation, particularly of the Suspension Clause. Professor Amanda Tyler’s book *Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay*, which has become the standard text on the Anglo-American heritage of habeas corpus, only treats martial law in the period following the Civil War.²⁰ Her account of the English and American experiences in the seventeenth and eighteenth centuries instead focuses on the Habeas Corpus Act of 1679 and similar later laws on both sides of the Atlantic.²¹ Professor Tyler’s framing of the issue at once demonstrates the importance of English statutes as well as common law to the formulation of constitutional principles and also suggests the relevance of laws pertaining specifically to habeas corpus. Yet the laws which furnished frameworks for martial law, including the Mutiny Act of 1689 and its successors,²² as well as various Militia Acts, should, in conjunction with the aspects of martial law derived from prerogative powers, also be considered part of the background of the Suspension Clause.²³

One argument for cordoning off the Suspension Clause from the martial law context is textual: the Clause explicitly speaks of habeas corpus and never mentions martial law. At the same time, however, the language of rebellion or invasion echoes that of the Mutiny Act and Militia Acts, which indicates that perhaps they should be considered in conjunction with each other. Another argument for putting martial law to one side when interpreting the Suspension Clause derives from the sense that martial law was not of particular significance in the eighteenth century outside of England and therefore would not have furnished a material component of the original meaning of the Constitution. It is the latter claim that the remainder of this Essay aims to refute.

The episode discussed below suggests several modifications of extant originalist approaches to constitutional interpretation. First, it raises questions about the scope of the common law backdrop informing originalist

¹⁹ Stephen I. Vladeck, *The Field Theory: Martial Law, The Suspension Power, and the Insurrection Act*, 80 TEMP. L. REV. 391, 422 n.220 (2007) (quoting George M. Dennison, *Martial Law: The Development of a Theory of Emergency Powers, 1776–1861*, 18 AM. J. LEGAL HIST. 52, 55 (1974)).

²⁰ AMANDA L. TYLER, *HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY* 182–83, 211 (2017).

²¹ *See id.*; *see also* Habeas Corpus Act 1679, 31 Car. 2 c. 2.

²² *See infra* note 47.

²³ U.S. CONST. art. I, § 9, cl. 2.

interpretation, and, in particular, how broadly or narrowly to construe the relevant legal contexts. Second, it undermines the distinctions that originalists at times draw between common law and statutory frameworks as well as their relevance to constitutional interpretation.²⁴ Third, it suggests the existence of a distinction between British imperial common law and the interpretation of the common law by colonial subjects in America within the mid-seventeenth century.

Part I of this Symposium Essay furnishes a brief overview of the trajectory of debates about martial law from seventeenth-century England through nineteenth-century Britain and America. Part II details the unfolding of the controversy over the scope of martial law between Yates and Loudoun as well as others on the colonial scene and explores some of the arguments used by the various sides. In conclusion, this Essay furnishes an account of how this controversy should affect our assessment of the original meaning of constitutional provisions, especially in terms of the contrast between British imperial practices and domestic American understandings of rights.

I. FRAMING EIGHTEENTH-CENTURY MARTIAL LAW

Martial law has been notoriously difficult to define within England, the British Empire, and countries that, like the United States, at some point freed themselves from British dominion—in other words, the range of nations that inherited the common law. The corresponding principle within civil law countries is the *état de siège*, or “state of siege,” which originated during the French Revolution and involves the temporary replacement of civil by military authority.²⁵ Whereas the state of siege “is emphatically a legal institution, expressly authorized by the constitutions . . . and organized under this authority by a specific statute,” martial law draws on a murkier

²⁴ This distinction occurs most prominently in the Confrontation Clause context, where Justice Antonin Scalia’s distinction between common law and statutes in derogation of the common law shaped understanding of the original meaning of confrontation. *See generally* Crawford v. Washington, 541 U.S. 36 (2004) (construing the Marian statutes of bail and committal narrowly in interpreting the Fourth Amendment because these laws were viewed as in derogation of the common law); *see also* Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 563–65 (2006).

²⁵ *See* Max Radin, *Martial Law and the State of Siege*, 30 CALIF. L. REV. 634, 637–38 (1942); *see also* GIORGIO AGAMBEN, STATE OF EXCEPTION 4–5 (Kevin Attell trans., 2005) (2003); WILLIAM E. BIRKHMIR, MILITARY GOVERNMENT AND MARTIAL LAW 302 (1892) (“The state of siege corresponds to martial law in England and the United States. There is, however, this important distinction: what lawfully may be done under a state of siege is fixed by statute, while martial law—subject to individual responsibility for its enforcement, as before mentioned—is a rule unto itself.”). *See generally* THÉODORE REINACH, DE L’ÉTAT DE SIÈGE ET DES INSTITUTIONS DE SALUT PUBLIC À ROME, EN FRANCE ET DANS LES LÉGISLATIONS ÉTRANGÈRES (1885) (furnishing an account of the historical and conceptual genesis of the state of siege).

combination of legal sources and has been seen by some as simply permitting the abrogation of law in its entirety.²⁶

Before the mid-nineteenth century, common law precepts were often disregarded in governing the army, in certain exercises of prerogative power, and in times of crisis—especially within colonial contexts.²⁷ Yet it was only at that moment that commentators coalesced around the designation “martial law” and attempted to define the phrase more rigorously. Prior to that point, scattered remarks abound but legal and political actors did not consistently refer to martial law. The comprehensive treatises on the subject date from that time or later, which presents a historiographical problem. A crucial question that emerges is whether martial law in the way that these authors envisioned it even existed prior to the nineteenth century.²⁸ Likewise, their accounts of the history of martial law are inevitably shaped by the contexts in which they themselves were writing, whether that of the American Civil War and Reconstruction, the Morant Bay uprising and suppression in Jamaica, or American expansion beyond the territorial United States in the late nineteenth century.

The distinction between military law, or the law governing members of the armed forces, and martial law proper, which involved the imposition of some form of emergency rule, became crucial during the nineteenth century and represented perhaps the most widespread aspect of the definition of martial law.²⁹ However, as Professor John Collins has explained, this line was not drawn earlier.³⁰ It is important, therefore, to place this differentiation to one side in considering the eighteenth-century context, as this lens could obscure the lines that contemporary actors were actually drawing. With that in mind, this Part surveys the debates about martial law in England, the British Empire, and America prior to the late nineteenth century.

Professor Collins’s book *Martial Law and English Laws, c. 1500–c. 1700* furnishes a comprehensive account of the early history of martial law in England, a history that he finds much less murky than prior commentators.

²⁶ Radin, *supra* note 25, at 637. The petitioner’s argument in *Milligan*, asserting that “[w]hat is ordinarily called martial law is no law at all,” echoes this sentiment. *Ex parte Milligan*, 71 U.S. (4 Wall) 2, 36 (1866).

²⁷ See *infra* notes 31–60 and accompanying text.

²⁸ In the context of human rights, Professor Samuel Moyn has, for example, warned us not to delve too far back into history for genealogies of ideas that may have relatively recent origins. SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2012).

²⁹ JOHN M. COLLINS, *MARTIAL LAW AND ENGLISH LAWS, c. 1500–c. 1700*, at 5 (2016); R.W. KOSTAL, *A JURISPRUDENCE OF POWER: VICTORIAN EMPIRE AND THE RULE OF LAW* 221–37 (2005) (describing the use of the distinction in the context of the Jamaica Royal Committee’s inquiries as well as in William Francis Finlason’s 1866 work, *A Treatise on Martial Law*).

³⁰ COLLINS, *supra* note 29, at 5.

He explains the key differences between martial and common law procedure, particularly that the former “was allowed to operate by more informal complaints, complaints, or informations, and not by indictments.”³¹ This aspect of martial law rendered it appealing to the Tudor monarchs, who used martial law to discipline soldiers and “to punish commoners who had risen against them.”³² In the late sixteenth century, summary martial law commissions, “which allowed sheriffs, constables, mayors, loyal peers, provost marshals, and seneschals to execute vagrants, suspected felons of ill name, and traitors upon sight,” became widely used in Ireland.³³ Although broadly criticized, “[i]deas surrounding summary martial law circulated between England and Ireland, transforming martial law practices in both kingdoms in the process.”³⁴ In this and subsequent instances, developments in martial law took place within the context of England’s expanding empire.

Diverging from the approach under Roman law, which had removed jurisdiction over soldiers from civilian courts, England permitted some common law jurisdiction over members of the military.³⁵ Beginning in the sixteenth century, however, the monarchy cabined the authority of local magistrates over soldiers in garrison towns; although common law judges could adjudicate felony cases against soldiers, they could only hear misdemeanor cases if they received permission from the suspect’s commanding officer.³⁶ In the seventeenth century, local officials grew increasingly frustrated with their inability to control soldiers. The response of the Privy Council under King Charles I was to furnish mayors, deputy lieutenants, and other civilians with the power to implement martial law, while continuing to obstruct the efforts of officers of the common law, such as justices of the peace, to punish soldiers.³⁷ These issues of local governance underlay objections to martial law jurisdiction in the 1620s.

When Parliament took up the question of martial law in 1628, an engagement that left its record in the Petition of Right, the nature of the discussion did not reflect these jurisdictional questions.³⁸ Instead, “the focus of the debate swayed from the real problems that soldiers presented to county officers and the jurisdictional politics the jurists wanted to pursue.”³⁹ Both

³¹ *Id.* at 33.

³² *Id.* at 43.

³³ *Id.* at 53.

³⁴ *Id.* at 86.

³⁵ *Id.* at 150.

³⁶ *Id.*

³⁷ *Id.* at 138. See generally Lindsay Boynton, *Martial Law and the Petition of Right*, 79 ENG. HIST. REV. 255 (1964) (examining the use of martial law during the early years of King Charles I’s reign).

³⁸ COLLINS, *supra* note 29, at 156.

³⁹ *Id.*

Sir Edward Coke and Sir John Selden, two of the foremost jurists of the seventeenth century, weighed in with arguments against martial law.⁴⁰

The Petition of Right, presented to the ill-fated King Charles in 1628, expressed outrage against the Crown for encouraging procedures deviating from common law conceptions of due process. Several sections specifically took aim against martial law, objecting that “certain Persons have been assigned and appointed Commissioners with Power and Authority to proceed within the Land, according to the Justice of Martial Law, against such Soldiers or Mariners” who committed crimes ranging from misdemeanors to felony and murder and, in doing so, could employ the summary proceedings of martial law and put those condemned to death.⁴¹ However, even while expressing concern over the harshness of martial law, the Petition also lamented that “sundry grievous Offenders” had escaped punishment because of the claim that they could only be tried under martial law and not through the ordinary processes of common law.⁴²

The imposition of martial law was not the Petition of Right’s sole concern. It also took up, among other items, the inefficacy of writs of habeas corpus against royal detentions. As Section V recriminates King Charles:

[D]ivers of your Subjects have of late been imprisoned without any Cause shewed; and when for their Deliverance they were brought before your Justices by Your Majesty’s Writs of *Habeas Corpus*, there to undergo and receive as the Court should order, and their Keepers commanded to certify the Causes of their Detainer, no Cause was certified, but that they were detained by Your Majesty’s special Command, signified by the Lords of your Privy Council, and yet were returned back to several Prisons, without being charged with any Thing to which they might make Answer according to the Law.⁴³

Although the bodies were brought to court, they were not released and continued to be held based on secret justifications. Here we see the concomitance of concerns about martial law with worries about the inefficacy of habeas corpus.

As commonly interpreted, the Petition of Right, after it was agreed to by a reluctant King, barred martial law within England in times of peace. Sir Matthew Hale discusses the effect of the Petition briefly in his *The History of the Common Law of England*, which considers martial law among several alternatives to common law. As Hale explains, “the Exercise of Martial Law, whereby any Person should lose his Life or Member, or Liberty, may not be

⁴⁰ *Id.* at 154–63.

⁴¹ Petition of Right 1628, 3 Car. 1, § 7.

⁴² *Id.* § 9.

⁴³ *Id.* § 5.

permitted in Time of Peace, when the King's Courts are open for all Persons to receive Justice, according to the Laws of the Land. This is in Substance declared by the Petition of Right"⁴⁴

During the Restoration and the later part of the seventeenth century, martial law flourished within England's colonial dominions despite the Petition of Right, even when war was not taking place. The 1683 charter of the East India Company permitted the Company to "[e]xecute and use, within the said Plantations, Forts and Places, the Law, called the Martial Law, for the Defence of the said Forts, Places and Plantations, against any foreign Invasion, or domestic Insurrection or Rebellion"⁴⁵ Colonial governors, deriving their power from the King's prerogative, often had the authority to impose martial law, although debates about subjecting civilians to its jurisdiction even outside of England continued.⁴⁶

It was only after 1689, however, that martial law increased its influence both within England itself and throughout the empire. The crucial legal measure was the Mutiny Act of 1689, which permitted the deployment of martial law with regard to soldiers.⁴⁷ This law was passed the same year as the first statutory suspension of habeas and only ten years after passage of the Habeas Corpus Act of 1679, which is frequently viewed as a foundational measure for the Anglo-American understanding of habeas corpus.⁴⁸ Debate raged over whether the Mutiny Act had actually suspended the Petition of Right and permitted the use of martial law even outside of wartime. Professor Collins convincingly demonstrates that it did, arguing that "parliament suspended the Petition of Right for soldiers in the same way that it occasionally suspended Habeas Corpus for plotters."⁴⁹ Within the eighteenth century, as Professor Collins explains, "[t]he Mutiny Act went global" and, "[f]rom England to Minorca to Gibraltar and eventually to North America, British soldiers were disciplined through the successive passages of the statute," while colonies also enacted their own versions of the law.⁵⁰ At the

⁴⁴ SIR MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 39–40 (3d ed. 1739).

⁴⁵ *CHARTERS GRANTED TO THE EAST-INDIA COMPANY, FROM 1601*, at 121 (1773) (quoted in COLLINS, *supra* note 29, at 217).

⁴⁶ COLLINS, *supra* note 29, at 207–47.

⁴⁷ Act for punishing Officers and Soldiers who shall mutiny or desert their Majesties Service, to continue till *November* 1689, and no longer, (1689) § 5, 3 *THE STATUTES AT LARGE FROM MAGNA CHARTA, TO THE END OF THE LAST PARLIAMENT*, 1761, at 416.

⁴⁸ For extensive discussion of this and succeeding suspensions, see PAUL D. HALLIDAY, *HABEAS CORPUS FROM ENGLAND TO EMPIRE*, 247–52 (2010); *see also* Habeas Corpus Act 1679, 31 Car. 2 c. 2.

⁴⁹ COLLINS, *supra* note 29, at 249. For further discussion, see CHARLES M. CLODE, *THE ADMINISTRATION OF JUSTICE UNDER MILITARY AND MARTIAL LAW* 19–21 (2d ed. rev. 1874).

⁵⁰ COLLINS, *supra* note 29, at 281–82.

same time, prerogative-based versions of martial law coexisted with statutory varieties.⁵¹

The Mutiny Act was not the only statute to furnish a framework for martial law. Professor Collins points to the Riot Act of 1715⁵² and its successors.⁵³ Another law that became increasingly important during the eighteenth century was the Militia Act of 1661 and its subsequent revisions. The title of the first Militia Act affirmed royal power over the militia, reading in full, “An Act declaring the sole Right of the Militia to be in King and for the present ordering & disposing the same.” The act also indemnified all who had, commissioned by the King, “assaulted arrested detained or imprisoned” anyone who was “suspected to be Fanatick Sectary or Disturber of the Peace”⁵⁴ Almost a century later, the Militia Act of 1757 allowed for the selection by lottery of a substantial number of men for armed service and also provided that “in case of actual Invasion, or upon imminent Danger thereof, or in case of Rebellion,” the King could—with notice to Parliament, if it were sitting—draw out the militias, who would thereby become subject to military discipline for the duration of their service.⁵⁵

Notwithstanding these legal frameworks, some commentators articulated the view that martial law was simply not law. As Sir Matthew Hale explained, “in Truth and Reality it is not a Law, but something indulged rather than allowed as a Law; the necessity of Government, Order, and Discipline in an Army, is that only which can give those Laws a Countenance”⁵⁶ Sir William Blackstone took a similar position in the eighteenth century, citing Hale and claiming that martial law “is built upon no settled principles, but is entirely arbitrary in [its] decisions”⁵⁷ Others emphasized the subordination of military to civilian authority within England. Swiss-English jurist J.L. De Lolme, read by members of the Founding generation in America, foregrounded this point in his 1771 work *Constitution de l’Angleterre*. There he cited the Petition of Right and

⁵¹ *Id.* at 275.

⁵² The Riot Act (1715) § 5, 5 THE STATUTES AT LARGE FROM MAGNA CHARTA, TO THE END OF THE LAST PARLIAMENT, 1761, at 8.

⁵³ COLLINS, *supra* note 29, at 272–73.

⁵⁴ An Act declaring the sole Right of the Militia to be in King and for the present ordering & disposing the same (1661) § 6, 5 THE STATUTES OF THE REALM 308.

⁵⁵ An Act for the better ordering of the Militia Forces in the several Counties of that Part of *Great Britain* called *England* (1757) § 25, 8 THE STATUTES AT LARGE FROM MAGNA CHARTA, TO THE END OF THE LAST PARLIAMENT, 1761, at 80.

⁵⁶ HALE, *supra* note 44, at 39.

⁵⁷ 1 WILLIAM BLACKSTONE, COMMENTARIES 438 (12th ed. rev. 1794).

highlighted placement of the military under civilian authority within England, exaggerating the stability of this arrangement.⁵⁸

Despite the continued development of martial law within the British imperial context throughout the eighteenth century, the historiography on this subject is limited and somewhat dated, focusing primarily on the imposition of martial law during the American Revolution.⁵⁹ The most comprehensive work remains Frederick Bernays Wiener's 1967 *Civilians Under Military Justice: The British Practice Since 1689 Especially in North America*.⁶⁰ This scholarly gap is especially significant because it leaves the impression that the British imperial deployment of martial law gathered steam primarily in the nineteenth century when treatises on the subject burgeoned. In practice, however, theories and critiques of martial law were already circulating across colonial contexts, as illustrated by the episode described in Part II. Furthermore, emergence of greater awareness of the dynamics of imperial constitutionalism largely postdates the existing work, which displays little interest in the imperial context informing the development of martial law.⁶¹

One exception is Professor Daniel Hulsebosch's treatment of the only eighteenth-century treatise pertaining to martial law, Stephen Payne Adye's 1769 *A Treatise on Courts Martial*.⁶² Adye's work is particularly important because its claims run counter to those of Coke, Hale, and Blackstone. He discounts Coke and Hale's statements that someone imposing martial law during peacetime could be prosecuted for murder, citing to the Mutiny Act

⁵⁸ J.L. DE LOLME, CONSTITUTION DE L'ANGLETERRE 202–27 (1771); see also J.L. DE LOLME, THE CONSTITUTION OF ENGLAND 447–51, 486 (rev. 1796) (consulted for its English translation).

⁵⁹ See, e.g., DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830, at 157–69 (2005) (discussing the effects of martial law's migration across the Atlantic on New York); David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1, 16–28 (1971) (briefly rehearsing the English and American experience in the eighteenth century and suggesting a widespread condemnation of martial law). See generally Arthur N. Gilbert, *British Military Justice During the American Revolution*, 20 EIGHTEENTH CENTURY 24 (1979) (focusing primarily on courts martial during the American Revolution); Arthur N. Gilbert, *Military and Civilian Justice in Eighteenth-Century England: An Assessment*, 17 J. BRIT. STUD. 41 (1978) (comparing crimes and procedures between military and civilian tribunals).

⁶⁰ FREDERICK BERNAYS WIENER, CIVILIANS UNDER MILITARY JUSTICE: THE BRITISH PRACTICE SINCE 1689 ESPECIALLY IN NORTH AMERICA 32–85 (1967) (treating the use of military justice against civilians during the Seven Years War following through 1775). Surprisingly, the book has only three mentions of Loudoun and none of Yates. *Id.*

⁶¹ For sources treating the constitution of empire, see generally LAUREN BENTON, A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400–1900 (2010); LEGAL PLURALISM AND EMPIRES, 1500–1850 (Lauren Benton & Richard J. Ross eds., 2013); and HULSEBOSCH, *supra* note 59.

⁶² HULSEBOSCH, *supra* note 59, at 164–65; see also STEPHEN PAYNE ADYE, A TREATISE ON COURTS MARTIAL 1, 5–6 (1769).

as well as the opinion of Hawkins's *Pleas of the Crown*—which he emphasizes postdated Coke and Hale.⁶³ As Professor Hulsebosch notes, Adye, who was himself a member of the British army and served as a judge advocate in America, emphasizes the continuity between common and martial law, noting, among other aspects, that courts martial involve trial by jury.⁶⁴ While treating martial law as largely a creature of statutory rather than common law, Adye at the same time suggests that the statutory procedures should be supplemented by common law. As he writes:

Though Courts Martial proceed by Virtue of a Statute, which like all others was made to supply the defects of the common law, which had no authority to take cognizance of the crimes therein mentioned, yet as the method of proceeding against criminals had been long established, the Act for punishing Officers and Soldiers by Martial law has only laid down such rules for the proceedings of Courts Martial, as were intended to differ from the usual methods in the ordinary Courts of law; it is therefore natural to suppose that where the Act is silent, it should be understood that the manner of proceeding at Courts Martial be regulated by that of the other established Courts of Judicature.⁶⁵

Adye then proceeds to draw upon common law criminal procedure and substantive doctrines to flesh out the mechanisms for holding courts martial.

Although the beginning of Adye's text touches on other aspects of martial law, he largely focuses on judicial proceedings and courts martial. An early and suggestive footnote remarks on the deployment of courts martial for all cases in colonial outposts like Gibraltar and Minorca where civil judicature was not established.⁶⁶ On the same page, Adye cites Hale and unnamed additional authorities for the proposition that, although "[t]he Articles of War mention only Officers, Soldiers, and Persons serving with the Armies in the Field, being Subject to Martial Law . . . [a]lliens, who in a hostile Manner invade the Kingdom . . . must be dealt with by Martial Law."⁶⁷ These are, however, the only remarks that touch upon the scope of martial law jurisdiction, and dilemmas involving detention short of trial do not arise during the course of the treatise.

The nineteenth century witnessed the expansion of martial law within the British imperial context before, as Professor Thomas Poole has put it,

⁶³ ADYE, *supra* note 62, at 5 ("[Hawkins] is of the opinion that 'where Persons act by Virtue of a Commission, which, if it were strictly regular, would undoubtedly give them full Authority, but happens to be defective only in some Point of Form, that they are no Way criminal.'") (quoting WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* bk. 1 at 1, 86 (1716)).

⁶⁴ *Id.* at 18–19; HULSEBOSCH, *supra* note 59, at 165; *see also* WIENER, *supra* note 60, at 182–88 (treating Adye).

⁶⁵ ADYE, *supra* note 62, at 34–35.

⁶⁶ *Id.* at 7 n.†.

⁶⁷ *Id.* at 7.

“[the] Great War had brought martial law home” to England itself.⁶⁸ Concomitantly, martial law emerged as a subject of crucial importance during the American Civil War and Reconstruction. Although these periods postdate the controversy that forms the subject of Part II, a brief survey helps demonstrate how nineteenth-century treatise writers received the prior history of martial law, how their accounts emerged out of particular historical conflicts and crystallized positions useful to one side or the other in these struggles, and how those reflecting on martial law eventually came to define it.

R.W. Kostal’s magisterial work *A Jurisprudence of Power* illustrates nineteenth-century British imperial developments through its comprehensive account of the Morant Bay uprising in 1865 Jamaica and its aftermath, including the imposition of martial law, the atrocities committed under it, and the operations of the Jamaica Committee, a group that lobbied for investigation of what took place in Jamaica.⁶⁹ One of the principal nineteenth-century treatments of martial law, W.F. Finlason’s *A Treatise on Martial Law*, explicitly responds to the circumstances in Jamaica, defending both the deployment of martial law there and a broad immunity for those who had implemented it.⁷⁰

Finlason embraces a broad view of martial law, insisting that common law itself permits a response in cases of actual rebellion and invasion, and that the utility of martial law consists in its capacity to deal more broadly with situations of potential discord. As he insists, “It is the state of hostility [] which leads to actual insurrection with which martial law deals, and with which it deals, in order to prevent actual insurrection, by means of summary severity of military rule.”⁷¹ The crucial role of the imperial and colonial context in this definition is revealed by looking at the footnote to this sentence. It first highlights the language of the Irish Rebellion Act of 1798 and then turns to racist contemplation of what would happen in the colonies if “the native population . . . are allowed to rise *en masse*” before concluding that “the stern and summary severity of martial law” represents the only

⁶⁸ THOMAS POOLE, REASON OF STATE: LAW, PREROGATIVE AND EMPIRE 206 (2015). The dynamic here is similar to what Professor Binyamin Blum has described with respect to the imperial development of the law of evidence. See generally Binyamin Blum, *The Hounds of Empire: Forensic Dog Tracking in Britain and Its Colonies, 1888–1953*, 35 L. & HIST. REV. 621 (2017) (exploring colonialism’s role in shaping modern forensic culture).

⁶⁹ See generally KOSTAL, *supra* note 29.

⁷⁰ W.F. FINLASON, A TREATISE ON MARTIAL LAW (1866).

⁷¹ *Id.* at 21.

answer.⁷² This is but one example; the specter of colonial unrest pervades the entire treatise.⁷³

In this work, Finlason also restricts the scope of the Petition of Right to England itself. He construes its protections narrowly within the territory of England but also insists that,

as the Petition of Right does not extend to the foreign dominions of the Crown, the exercise of the prerogative by Governors, representatives of the Crown in colonies or dependencies where the English law prevails, is still less limited, and fully exists as at common law, apart from any statutable law.⁷⁴

Meanwhile, across the Atlantic, the American Civil War occasioned its own set of debates about martial law, which continued into Reconstruction. One of the most important Supreme Court cases on the subject, *Ex parte Milligan*, was decided in 1866, the same year Finlason's treatise appeared.⁷⁵ Lambdin Milligan, an Indiana resident who was involved with the Sons of Liberty, a group of northern Confederate sympathizers, was arrested in 1864, tried by a military commission, and sentenced to death. He brought a writ of habeas corpus to challenge the legality of this proceeding, which the Supreme Court granted despite an apparent suspension of the writ. In doing so, the Court determined that a civilian could not be tried by military commission in a state where the courts remained open and where active

⁷² FINLASON, *supra* note 70, at 21 n.(b). In Finlason's Table of Authorities, he notes that the Irish Rebellion Act, 43 Geo. III, c. 117, "expressly reserv[ed] the power of the Crown to declare martial law in time of rebellion." *Id.* at xlvi.

⁷³ For example, Finlason's argument for not holding officials legally responsible in the aftermath of declarations of martial law relies in part on the notion that "it would be perilous to the defence of our distant colonies and dependencies, in case of rebellion, if it were understood that Governors and Generals who declared, and acted on, martial law, were to be deemed guilty of wholesale murder, and entirely dependent on the indulgence of a bill of indemnity." *Id.* at xxviii.

⁷⁴ *Id.* at 46.

⁷⁵ 71 U.S. (4 Wall.) 2 (1866). Much ink has been spilled on the interpretation of *Milligan* as well as its relation to other cases involving military tribunals and the suspension of habeas corpus, including *Ex parte Merryman*, 17 F. Cas. 144 (Taney, Circuit Justice, C.C.D. Md. 1861), and *Ex parte Quirin*, 317 U.S. 1 (1942). See, e.g., Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 387–89 (2010) (contrasting *Milligan* and *Quirin* in discussion of *Rumsfeld v. Padilla*, 542 U.S. 426 (2004)); Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 917, 995–96, 1004–17 (2012) (considering *Milligan* and *Quirin* in the context of the history of the Suspension Clause). See generally JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 311 (2012) (explaining the significance of *Milligan* for the use of military commissions and martial law during Reconstruction); Vladeck, *supra* note 19 (treating the typologies of military jurisdiction from Chief Justice Salmon Chase's separate opinion in *Milligan* in relation to his arguments about martial law's effect on the suspension of habeas corpus); John Yoo, *Lincoln and Habeas: Or Merryman and Milligan and McCardle*, 12 CHAP. L. REV. 505 (2009) (discussing how Civil War-era habeas cases demonstrate the deferential attitude of the Supreme Court to other branches of government during wartime).

hostilities were not ongoing.⁷⁶ Justice Davis's opinion for the majority rejected the broad, Finlason view, deeming the threat of an invasion insufficient to justify employment of martial law.⁷⁷ Even though "[t]he necessities of the service, during the late Rebellion, required that the loyal states should be placed within the limits of certain military districts and commanders appointed in them," this in and of itself did not "constitute[] them the theatre of military operations."⁷⁸

Although concurring in the judgment, Chief Justice Chase wrote separately, along with three other Justices, and stated that Congress had the power under the Constitution to set up military commissions as well as to suspend habeas corpus, but had not done so in this instance.⁷⁹ Toward the conclusion of his opinion, Chase proceeded to define martial law and distinguish it from two concepts in the same family:

There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under military law . . . ; the second may be distinguished as military government, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated martial law proper, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.⁸⁰

According to this interpretation, "martial law proper" takes over only in the absence of the protections of ordinary law during times of war or rebellion. On the other side, military law involves only regulation of the army both in times of peace and those of war. Military government represents an intriguing intermediate category, permitting a military commander to take control over a territory.

⁷⁶ *Milligan*, 71 U.S. (4 Wall.) at 121–27.

⁷⁷ *Id.* at 124–25.

⁷⁸ *Id.* at 126.

⁷⁹ *Id.* at 140–41 (Chase, C.J., concurring).

⁸⁰ *Id.* at 141–42.

It was in response to the turmoil of the Civil War and the efforts of Reconstruction that Francis Lieber, who penned the code that President Lincoln used to guide the Union Army, and his son, Norman Lieber, composed a treatise on martial law that has heretofore remained in manuscript.⁸¹ The Liebers' treatise remarks on the relative recentness of what they deem martial law proper, a condition of necessity in which the nation's natural right to collective self-defense allowed for the suspension of ordinary law.⁸² They date the emergence of this understanding to the Irish Rebellion of 1798, thus cordoning off most of the eighteenth century.⁸³ They likewise distinguish martial law not only from military law but also from military or martial rule, writing that whereas martial law covers a country's own citizens and subjects,⁸⁴ martial rule pertains to foreign enemies or occupations.⁸⁵ Nevertheless, they admit some limited cases between domestic and foreign exercises of martial law, particularly with respect to civil war, when a country splits into two groups of citizens.⁸⁶

Under the Liebers' account, martial law derived its authority from prerogative powers as well as statutes. Martial law as they conceived it did not, they believed, violate the Constitution. Instead, the Liebers read a background principle of necessity into the Constitution, insisting that "the Constitution, in some of its provisions, recognizes the law of necessity as qualifying those of otherwise general application."⁸⁷

They also resurrected an earlier, multifaceted definition of martial law from the 1863 "Instructions for the Government of Armies of the United States in the Field," a code that Francis Lieber composed, which did not

⁸¹ Professor John Witt revealed Lieber's extraordinary role in creating this code and its importance in establishing a law of war in *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* (2012). WITT, *supra* note 75. Professor Witt and Professor Will Smiley have edited the Liebers' treatise in a forthcoming book. See LIEBER & LIEBER, *supra* note 18. All citations are taken with permission from their edition.

⁸² Professors Smiley and Witt discuss the Liebers' justifying principle comprehensively in their Introduction. LIEBER & LIEBER, *supra* note 18, at 34–35.

⁸³ *Id.* at 175.

⁸⁴ *Id.* at 90 ("Martial Rule, or Military Government, relates to the occupied territory of an enemy; Martial Law Proper, strictly speaking, to the inhabitants of a district, belonging, and maintaining allegiance to, the country by whose military authority it is enforced.")

⁸⁵ *Id.* at 98 ("Martial Law Proper then is an enforcement by a country of the law of war with reference to its own subjects. It is the law of necessity applied at home in a time of war. It is an exercise of military authority, over persons, property, or rights, not ordinarily subject to such jurisdiction. It for the time being suspends the administration of the ordinary law whenever, and in so far as, it is necessary to the national defence. And it extends to all parts of the country, not treated as belligerent, (to which the martial law of hostile occupation would apply) where such necessity exists.")

⁸⁶ *Id.* at 90.

⁸⁷ *Id.* at 94.

explicitly cover the case of domestic imposition of martial law. The “Instructions” specified:

1. A place, district, or country occupied by an enemy stands, in consequence of the occupation, under the Martial Law of the invading or occupying army

2. Martial Law does not cease during the hostile occupation, except by special proclamation, ordered by the commander-in-chief

3. Martial Law in a hostile country consists in the suspension, by the occupying military authority, of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution or dictation.

The commander of the forces may proclaim that the administration of all civil and penal law shall continue, either wholly or in part, as in times of peace, unless otherwise ordered by the military authority.

4. Martial Law is simply military authority exercised in accordance with the laws and usages of war. . . .

5. Martial Law should be less stringent in places and countries fully occupied and fairly conquered. Much greater severity may be exercised in places or regions where actual hostilities exist, or are expected and must be prepared for. Its most complete sway is allowed—even in the commander’s own country—when face to face with the enemy, because of the absolute necessities of the case, and of the paramount duty to defend the country against invasion.⁸⁸

Several aspects of the “Instructions” are noteworthy here. First, they specify that military commanders could permit the continued administration of civil laws. Second, they differentiate between the kind of martial law that should be applied in “places and countries fully occupied and fairly conquered” and that appropriate for “places or regions where actual hostilities exist.” Both of these distinctions are pertinent to colonial settings as well as to civil war.

Finally, William Birkhimer, who had served in the Union Army, became a general, and also acted in a judicial capacity within the army, composed the treatise *Military Government and Martial Law*, first published in 1892.⁸⁹ The text went through several editions; the 1914 version reflects Birkhimer’s experience with American expansion in the Philippines—where

⁸⁸ LIEBER & LIEBER, *supra* note 18, at 78–79.

⁸⁹ BIRKHIMER, *supra* note 25.

he had been an Associate Justice of the Supreme Court of the Philippines—as well as in Cuba and Puerto Rico, and internal conflict with the Shoshone.⁹⁰

Birkhimer is greatly indebted to Lieber, whose manuscript treatise he cites, and he adopts Lieber's view of martial law as justified only by necessity.⁹¹ He also invokes a proportionality principle, explaining that “neither enemy property nor life shall be sacrificed unless thereby the military interests of the belligerent are proportionately subserved.”⁹² It is worth dwelling on several aspects of Birkhimer's account of martial law, particularly his insistence on military over civil authority, his defense of Congress's capacity to institute martial law, and his conception of martial law as not entirely distinct from but instead an outgrowth of common law.

More than some other commentators, and perhaps partly because of his own military background and identity, Birkhimer emphasizes that military authorities assume command over civilian ones under martial law. Hence, although civil institutions may be retained, they operate under military control:

All military is in one sense martial rule, for in its essence it is the law of arms. Still, because of the unusual relation of the military to the civil power, when for the time being in friendly territory the latter gives way to the sway of the former, it is necessary to have some term by which military rule under these circumstances shall be designated, and that selected is martial law. This law is invoked as an extreme measure which pressing necessity alone can justify.

It is not asserted that both martial law and the municipal law *sub modo* may not be enforced over the same territory at the same time; for where martial law is instituted by legislative act there is nothing to prevent the civil administration from being retained, although the military is made predominant, the limits of each being defined. Similarly the executive officer who enforces martial law may bring the civil power to his assistance. The effect, however, of martial law

⁹⁰ As the Preface to the Second (Revised) Edition reads, “Since this work was published (1892) the military authorities of the United States, and those of Great Britain, have had occasion to inaugurate and enforce military government on an extensive scale and under varied circumstances. The first mentioned did this in Cuba, Porto Rico, and the Philippine Islands; the last mentioned in the South African republics During the twelve years last past there have been several conspicuous instances of enforcing martial law within the United States. In Idaho, in 1899, the Governor declared Shoshone County to be in a state of insurrection and rebellion, and instituted martial law therein.” WILLIAM E. BIRKHIMER, *MILITARY GOVERNMENT AND MARTIAL LAW*, at vii (Franklin Hudson Pub. Co. 3d ed. rev. 1914) (1892). For biographical details about Birkhimer, see generally *William Edward Birkhimer*, ARLINGTON CEMETERY, <http://arlingtoncemetery.net/wbirkhim.htm> [<https://perma.cc/D3VA-MEFP>].

⁹¹ BIRKHIMER, *supra* note 25, at 300–01.

⁹² *Id.* at 9.

is either to supersede the municipal law wholly or the latter is retained subordinate to the former.⁹³

According to Birkhimer's conception, two options are possible: either the military assumes complete control over the territory in which martial law is in force, or civil administration remains but is placed beneath the military authority.

Birkhimer also furnishes a lengthy defense of Congress's capacity to implement martial law, attempting to refute the claim that "martial law power is essentially executive in its nature."⁹⁴ In doing so, he invokes the War Powers Clause and cites to the precedent of statutes that Congress passed, including congressional acts of indemnity following exercise of martial law powers and the Reconstruction Acts of 1867.⁹⁵ Acknowledging that some might see a congressional power to impose martial law as incompatible with Justice Davis's opinion in *Ex parte Milligan*, he refrains from directly resolving the question but explains that the judicial consensus has, at least, altered since the date of that case.⁹⁶

Despite affirming Congress's authority to implement martial law, Birkhimer refrains from cordoning martial law off from common law and concomitantly suggests that Congress's power is not absolute. As he writes, "[m]artial law has its foundation in reason. It is but a development of the principles of the common law," which, due to its reliance on civil authority, "is not suited to the more trying and turbulent times either of invasion or rebellion."⁹⁷ This gloss on martial law also leads him to emphasize that martial law cannot suspend the operations of reason itself, particularly with respect to indemnifying governmental actors from the consequences of outrageous behavior. Hence he observes that "[i]t is contrary to reason and every principle of justice that, under color of law, officers shall be permitted to inflict punishment unrestrained, except as prompted by a depraved heart and then escape responsibility."⁹⁸ Under this account, a period of martial law does not remain outside of legality; instead, actions taken during that time can produce subsequent repercussions through the regular operations of the common law.

Several important themes emerge from these treatments of martial law. One involves the continuity or lack thereof between martial law and common law, as well as the extent to which martial law should be seen as a product

⁹³ *Id.* at 9–10.

⁹⁴ *Id.* at 14.

⁹⁵ *Id.* at 14–20.

⁹⁶ *Id.* at 18.

⁹⁷ *Id.* at 291.

⁹⁸ *Id.* at 16.

of statute or as derived from a combination of prerogative and statutory powers. Whereas in Tudor England, martial law furnished a mechanism for monarchs to circumvent common law, by the late seventeenth century, statutes were both setting restrictions on and giving contours to martial law. Statutes did not, however, entirely eclipse prerogative versions of martial law, particularly in the colonial context, where disputes over the force of English statutes were ongoing and colonial governors derived powers from the Crown. In the late eighteenth through the nineteenth centuries, from Stephen Payne Adye's *Treatise on Courts Martial* through William Birkhimer's *Military Government and Martial Law*, some commentators attempted to reconcile martial with common law.⁹⁹

Another commonality concerns the emerging distinction among the objects of the exercise of military authority, whether a country's own citizens, enemies, or residents of an occupied territory. Both Chief Justice Chase's opinion in *Milligan* and Francis Lieber's "Instructions" distinguished the imposition of martial law within an occupied region from other varieties of martial law.

A final issue involves the relative power of military and civilian personnel under martial law. Not only were the substantive or procedural issues raised by military tribunals in question, but also who was in charge of determining the legal framework to be used—a military officer or civil authority. Hence Birkhimer considers it possible that municipal legal frameworks could remain intact under martial law but subject to the supervision of military rather than civilian authorities.

While these themes could be found on the surface of nineteenth-century discussions of martial law, some cognate concerns manifest themselves within the eighteenth-century dispute in colonial New York that the following Part treats.

II. "IN EVERY COUNTRY, THAT REQUIRES AN ARMY TO DEFEND IT"

The relative dearth of contemporaneous accounts of martial law within the eighteenth century and subsequent treatises' neglect of the period give the impression that most significant contemplation of martial law postdates the Founding Era. The mid-eighteenth-century dispute considered in this Part not only calls that view into question but also indicates how assertions of one form of martial law—that associated with occupation—had implications for accessing the writ of habeas corpus.

The French and Indian War, which subsequently expanded into the global Seven Years' War, commenced in 1754. Both Britain and France sent

⁹⁹ See ADYE, *supra* note 62; BIRKHIMER, *supra* note 25.

military forces from the metropole to their colonies as part of the war, and each allied with different indigenous constituencies. The experience of the first British commander, General Edward Braddock, was disastrous, and he died in 1755.¹⁰⁰ As the British contemplated the nature and extent of support they would furnish to their American colonies, Lord Loudoun was chosen to command the forces.¹⁰¹ He arrived in America in 1756 and proceeded to travel, negotiate, and fight extensively until he was summarily recalled after only two years.¹⁰² During his stint, he spent some time in Albany, along with various troops of both local colonial and British origin.¹⁰³

On October 7, 1757, a number of soldiers escorted one Jacob Van Der Werken into the Albany City Hall with their bayonets fixed upon him.¹⁰⁴ Van Der Werken's farm had been plagued by oxen who belonged to "the New England people," part of the military forces stationed locally, but he had not been able to determine which ones. As a result, during one of the animals' nocturnal visits, in a move reminiscent of the *Decameron*, he cut several of their tails so that he could subsequently identify them and find their owners.¹⁰⁵

Once at City Hall, the soldiers demanded that the sheriff, Abraham Yates Junior, commit Van Der Werken to gaol. Yates refused, because the soldiers could produce no warrant for Van Der Werken's arrest—or, in technical terms, a *mittimus*. Upon receiving this response, they consulted with their leader, Captain Christy, who ordered them to break into the gaol and imprison Van Der Werken regardless of the sheriff's views.

Yates was not happy with this state of affairs and his papers indicate the vigor with which he pursued measures designed to contravene the soldiers' actions. He wrote immediately to the Acting Governor of New York, James De Lancey, articulating his view that it would be the "Intire Ruin of a Sheriff" not to keep his prisoner safe and that the "freedom" and "Liberty of the People In General" depends upon the capacity to retain control over prisoners. In later correspondence and memoranda, Yates elaborated upon his duty to maintain prisoners safely and mentioned having been fined fifty-

¹⁰⁰ PARGELLIS, *supra* note 8, at 30–39.

¹⁰¹ *Id.* at 42.

¹⁰² *Id.* at 346.

¹⁰³ *Id.* at 90.

¹⁰⁴ The description of this incident is derived, when not noted otherwise, from Abraham Yates's Journals/Copybook 1754–1758 in the Manuscripts and Archives Division of the New York Public Library, *supra* note 16.

¹⁰⁵ In the second story of the third day of the *Decameron*, the King attempts to identify a servant who has cuckolded him by cutting off a lock of his hair while he is asleep. The servant then promptly removes the same piece of all the other servants' hair so he cannot be identified. GIOVANNI BOCCACCIO, *DECAMERON* 165–69 (J. G. Nichols trans., Everyman's Library 2008) (1353).

nine pounds just the prior year when one of his charges escaped. Aside from Yates's personal experience, widespread colonial practice confirmed that he had reason to fear: many justice of the peace manuals outlined penalties that sheriffs would face for failing to preserve their prisoners.¹⁰⁶

Yet the core of Yates's objections seemed to stem not only from anxiety about any personal repercussions of failing to control his gaol but also from an ideological disagreement about the extent of military authority over civilian institutions. In this respect, it is possible to discern both what historians have often called "moves" and "mentalités," and conflicts over worldview as well as concrete resource constraints.¹⁰⁷ As the rhetoric of the controversy escalated and additional officials became involved, the legal stakes of the dispute became increasingly clear, crystallizing around one position espoused by Lord Loudoun and the other advocated by Yates.

Upon hearing of the gaol break, Yates sought an indictment against Captain Christy from the grand jury, which was sitting at the time.¹⁰⁸ Concerned that the soldiers would further appropriate the gaol, Yates then ordered his "gaoler not to commit any prisoner in gaol unless by a warrant of a magistrate" and "took the keys from him." An amusing exchange ensued between Yates and increasingly high-ranking military officials.¹⁰⁹ Yates had

¹⁰⁶ See, e.g., WILLIAM SIMPSON, THE PRACTICAL JUSTICE OF THE PEACE AND PARISH-OFFICER OF HIS MAJESTY'S PROVINCE OF SOUTH CAROLINA 99 (1761) ("Wherever a person is found guilty . . . of a negligent escape of a criminal actually in his custody, he is punishable by fine and imprisonment, according to the quality of the offence."). On the other side, Loudoun himself, in elaborating upon the custody arrangements for a prisoner in another case, explained that some sheriffs had allowed those subject to military justice to escape. As he writes:

On this principle I committed this baker to the Provost's. The Provost[']s prison[er] was kept in one of the rooms of the toan gaol where the sheriff keeps his prisoners. This happened from several causes. First there was no other place where the provost could keep his prisoners safe from escape. Secondly I could detain no military prisoners in any gaol in America if committed for military crimes as the keepers of them have constantly lett them out and I have never been able to get any redress. And the Sheriff of New York and his gaoler have been particularly guilty in this practice.

Lord Loudoun, Memorandum Book VII (May 6, 1757) (Loudoun Papers: Americana, Box 10, Manuscripts Department, Huntington Library, San Marino, CA); see also 1 Memorandum Book Typescript. Although using Yates's gaol, Loudoun employed a military official to supervise military prisoners.

¹⁰⁷ For a discussion of the differences between moves and *mentalités* and disputes over their relative importance, see GLENN BURGESS, THE POLITICS OF THE ANCIENT CONSTITUTION: AN INTRODUCTION TO ENGLISH POLITICAL THOUGHT, 1603–1642, at 224 (1992).

¹⁰⁸ In the letter explaining this to Governor De Lancey, Yates uses an ambiguous pronoun, explaining that "as the Grand Jury was then sitting I applied to them who have indicted him," where "him" could refer back either to Captain Christy or to Jacob Van Der Werken. Subsequent arguments about the indictment that Yates recounts, however, pinpoints "him" as Captain Christy. See Abraham Yates's Journals/Copybook 1754–1758, *supra* note 16.

¹⁰⁹ The language of Yates's account here gives a flavor both of his own obstinacy and the concrete implications of the dispute:

previously cooperated with the military forces, permitting them to employ the gaol for their “regular prisoners”—presumably those working in a military capacity and being disciplined for an infraction. At this moment, Yates’s ideological differences with the British forces do not appear at the forefront, but rather his concern about the cost of repairing the broken lock and outrage at the soldiers’ insolence in interfering in such a manner with his gaol. One might therefore think that immediate conciliation on the part of the military would repair the breach and the prior arrangement could be reinstated.

Soon, however, more prominent figures were corralled into the dispute, and its consequences became more severe, while, at the same time, Yates and community members were working on Van Der Werken’s release. On October 11, the farmers whose oxen Van Der Werken had marked gave him a certificate stating they were satisfied with what he had done, and requesting his release. Van Der Werken also petitioned General Abercromby, asserting the circumstances of his actions and asking to be let go. In his response, Abercromby explained that he would be “very inclined to take compassion,” but would not budge unless the proceeding by indictment that the grand jury had commenced was cancelled. Apparently the indictment was not cancelled, because Van Der Werken “was kept in gaol until the 31 October with two sentries on him”; at that point, Yates received a writ of habeas corpus directing Van Der Werken to be brought “before our Trusty and well beloved John Chambers Esq. [and] our Second Judge [Daniel Horsmanden] to hold Pleas in our Suprean Court” in New York City. As soon as the writ of habeas corpus arrived, Yates sent Van Der Werken down to New York

The Next Morning a Corporal came to me and told me that he Wanted to take one of the prisoners out—and the Gaoler had told him he had Orders from me to the Contrary and that I had taken the Key from him. I told him it was very right and that for the future I not allow them the Liberty of the Gaol unless I had satisfaction for the breaking of the gaol the day before. A few minutes after the sergeant came he went with the same answer—about ten in the same morning, my gaoler came to my house. I was not in, a few minutes after I came, I found the gaoler at my door. [H]e told me the [Brigadier Major] was at the City Hall [and] had dem[ande]d him why he did not open the goal. [W]hen he told him I had the key he dem[ande]d them again and ordered him immediately to go for the sheriff to tell him the Brigadier Major was there. [A]s he was relating the story the Major came to my door and had with him four officers of the artillery. [H]e asked one whether I was the sheriff I told him I was—he told me I was very civil I answered I did not know what he meant, he told me he had sent me a message and never returned him an answer, I told him that I was busy receiving his message and by what I observed of it merited no answer—he asked me what I meant by not giving the key to open the gaol, I told him because I would not, he said he would make me, I told him that then I would do it immediately—and what I meant by it—I told him the day before the gaol was broke by the army when it was intire, which was [indecipherable] to that one might open it with two fingers—and if the army had authority to brake it the day before when whole sure they must have this day authority to open it when broke and were then is this ceremony of turning a key to a broken lock I told him I did not understand what he would be at, and thus he left me and was very angry. The same day I was spoke to by Capt Abercromby, he told me Gen Abercromby had desired him to speak to me concerning my refusing to commit the regular prisoners, as I had till then always done it

Id.

City with an emissary, and he was discharged on the order of Daniel Horsmanden on November 9, 1757.

In the meantime, Lord Loudoun, the commander of the British armed forces in America, stepped into the fray. Yates met with him (after noting that he had been obliged to wait “a considerable time”) on November 1, and the two entered into a heated exchange. According to Yates’s sworn memorandum on the subject, which shows care in hedging the relevant quotations with alternative language lest Yates’s recollection failed in the particulars, “His Lordship told me he had seen the Letter I wrote to Governor De Lancey that it (or the contents thereof) were Lies from beginning to the End (or ending).” After Yates replied that it was “truth from the beginning to the End and not one Word false,” Loudoun voiced his animosity toward legal procedures, explaining that “he would have nothing to do with these Pettyfogging lawyer[s] who for a couple (or few) shillings would obstruct (or trouble) Him in his [business] . . .” He further “insist[ed] upon my Keeping the Prisoner in Gaol notwithstanding the writ . . .”

That Loudoun had, in fact, seen the letter is revealed by his Memorandum Book entry for October 20, 1757, in which he explains that Governor De Lancey had shown him the letter and that “[t]he Lt Govr is to writ to the sheriff that if he be not quiet he will bring himself to a great dale of trouble . . .”¹¹⁰ Things went from bad to worse when Yates revealed that he had already released Van Der Werken pursuant to the writ. Loudoun ranted that Governor De Lancey had informed him that Yates was a “troublesome man” and that the Governor would independently communicate with Yates.¹¹¹ More significantly, Loudoun required Yates to “go nowhere . . . without his orders.” He also demanded that Yates “[t]end upon him every day” by seven in the morning, specifying that if Yates did not show up, he would have him “fitched by a file of Musquetiers with their Bayenets fixed.” He added a set of threats of retribution “if no end was made of the affair of Christie and [Yates] served a Writt on him on Account of the Inditement or Bill,” stating that he would take Yates’s own house as a hospital for the troops and turn the church into a store.

The next day, explaining that he had forgotten to record the episode the previous evening, Loudoun included his own account of this conversation in his Memorandum Books. As he explained,

¹¹⁰ Lord Loudoun, 9 Memorandum Books (Oct. 20, 1757) (Loudoun Papers: Americana, Box 10, Manuscripts Department, Huntington Library, San Marino, CA); *see also* 3 Memorandum Book Typescript.

¹¹¹ The remainder of this paragraph again relies on Yates Memorandum/Copybook, 1754–1758, *supra* note 16.

The sheriff came to acquaint me he had received a Habeas Corpus for the man that was committed by Capt Christie up by the post and that he had liberated him.

I showed him that if I was to have all the harassment from every little lawier that would take any cause, lett it be never so bad, I knew what I had a right to and I would take the whole.

He then records having speculated to Major General Abercromby that “this was a beginning in order to trie their power, sett on foot by the lawiers with the sheriff at their head, and that I thought it fitt for me to putt an end to it.”¹¹²

The following day, November 2, Loudoun proceeded to follow through on these menacing statements, telling the Mayor “to make ready to billit thirteen hundred men and the staff and to provide them necessaries as wood bedding and materials to dress their victuals with and if they did not do it he would burn their houses;” Loudoun likewise noted “that he wanted a store and would take the church for it and ordered the major to take the benches out,” and, finally, told Yates “to empty the gaol that he had prisoners under sentence of death . . . and the first that would oppose him he would break his head.”¹¹³ Loudoun had already expressed concerns in his Memorandum Books about quartering troops, so Pargellis may be correct that he simply took advantage of the dispute with Yates as an excuse to provide himself with necessary resources for the army.¹¹⁴

Loudoun himself recorded his commands about quartering, writing that he sent for the mayor and sheriff and

told them I had now been among them above a year, that I had given them every indulgence in my poer, that last year I had for the troops quartered here, demanded nothing but hooseroom, though by the Articles of War I was intituled to take good bedes, fier and candel, small beer, vinegar and salt. That since they were not satisfied with the indulgences I had given them and had now entered into a resolution to trie what was their rights and what was ours, and that in order to (do) this were giving every harassment in their power, and stiring up

¹¹² Lord Loudoun, 9 Memorandum Books (Nov. 2, 1757) (Loudoun Papers: Americana, Box 10, Manuscripts Department, Huntington Library, San Marino, CA); *see also* 3 Memorandum Book Typescript.

¹¹³ Abraham Yates, Jr., Journals/Copybook 1754–1758 (Abraham Yates, Jr. Papers, Box 4, Manuscripts and Archives Division, N.Y. Pub. Library).

¹¹⁴ PARGELLIS, *supra* note 8, at 45; Lord Loudoun, 9 Memorandum Books (Oct. 12, 1757) (Loudoun Papers: Americana, Box 10, Manuscripts Department, Huntington Library, San Marino, CA) (noting Loudoun’s discussion of quarters with Governor De Lancey); *see also* 3 Memorandum Book Typescript.

every little lawier to prosecut every publick officer, I was determined to change my method and insist upon what I had a right to¹¹⁵

He followed this declaration with an order for immediate quartering.¹¹⁶

While the details of the controversy demonstrate the extent to which it emanated from a personality conflict between two forceful and stubborn individuals, the November 1 conversation between Yates and Loudoun simultaneously crystallized a theoretical source for their differences, one that persists throughout subsequent materials documenting the episode. Lord Loudoun—as ventriloquized by Yates—opined that

my Lord Chancellor told him before he Left England that wherever there was a Necessity for an army to Maintain a Country that their the Law was not in force But that the army were to have the administration, and that those that would oppose it ought to be hanged and that Christy did Right in Breaking the Gaol when I would not open it For him

Loudoun’s attribution of his own position to Lord Chancellor Hardwicke—although unsupported by additional documentation—is significant because it suggests a British imperial policy in development rather than the anomalous interpretation of a rogue official. Yates, by contrast, insisted that this position was “against the Law of God, Law of England, and the Law of Nature,” adducing in support of his own view the Bible (particularly *Kings* 17), John Locke’s *Second Treatise of Government*, especially the first seven chapters, and various aspects of English law, including the “first section of the habeas corpus act”¹¹⁷ and the fifth section of the “petition of right.”¹¹⁸

Yates’s passing citation of the Habeas Corpus Act placed him on one side of an implicit fight about the force of English statutes within the American colonies.¹¹⁹ While it was generally acknowledged that any statutes in affirmance of the common law passed before 1691 applied in New York

¹¹⁵ Lord Loudoun, 9 Memorandum Books (Nov. 2, 1757) (Loudoun Papers: Americana, Box 10, Manuscripts Department, Huntington Library, San Marino, CA); *see also* 3 Memorandum Book Typescript.

¹¹⁶ Lord Loudoun, 9 Memorandum Books (Nov. 2, 1757) (Loudoun Papers: Americana, Box 10, Manuscripts Department, Huntington Library, San Marino, CA); *see also* 3 Memorandum Book Typescript.

¹¹⁷ Habeas Corpus Act 1679, 31 Car. 2, c.2, 3 STATUTES AT LARGE FROM MAGNA CHARTA, TO THE END OF THE LAST PARLIAMENT, 1761, at 397–410. The first section mandated that sheriffs bring the body of anyone who was the subject of a writ of habeas corpus before the court issuing the writ within three days. *Id.* at § 1.

¹¹⁸ Petition of Right 1628, 3 Car. 1, § 5.

¹¹⁹ *See* Tyler, *supra* note 20, at 64–65 (treating the debates over the applicability of the Habeas Corpus Act in America). *See generally* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980) (treating the reception of the Habeas Corpus Act of 1679 throughout the colonies); Herbert Alan Johnson, *English Statutes in Colonial New York*, 58 N.Y. HISTORY 277 (1977) (addressing how these battle lines were drawn in colonial New York).

as well, in 1764, Chief Justice Daniel Horsmanden—the same judge who had released Van Der Werken—would articulate the position widely held among colonial lawyers that all pre-1691 statutes in derogation of the common law were also in force.¹²⁰ New York lawyer William Smith had already expressed the same view in 1756.¹²¹ Yet some pre-1691 English statutes were not used in New York and some post-1691 laws were. Furthermore, the Privy Council’s Committee of Trade and Plantations had previously vetoed New York’s “Charter of Liberties and Privileges” on the grounds that the Habeas Corpus Act did not extend to America.¹²² Hence colonial lawyers did not voice a truism when representing habeas corpus in New York as protected by the Habeas Corpus Act as well as the common law writ, but instead adopted a contested position.

Loudoun’s spat with Yates was not the only instance in which Loudoun assumed control over a civilian offender. In May of 1757, Loudoun took issue with a New York baker, who deliberately used sour flour. He committed the baker to the provost marshal and kept in the latter’s room at the gaol.¹²³ Loudoun justified this procedure “by the principle that a power was seated in a commanding officer during war for the preservation of the troops, and that if the man had been confined in a civilian prison, he would have been permitted to escape.”¹²⁴

In elaborating on his own view of the underlying legal principles, Yates acknowledged that during a rebellion, “the army should have the Administration” and that “it would Be absurd to Insist on Liberty or Property,” explaining that in “Part of a Country Ready Unavoidably to fall In the hands of the enemy I think the army should have the administration to Burn and Destroy It for fear the spoil should fall In the hands of the

¹²⁰ Johnson, *supra* note 119, at 279–80; *see also* THE REPORT OF AN ACTION OF ASSAULT, BATTERY, AND WOUNDING, TRIED IN THE SUPREME COURT OF JUDICATURE FOR THE PROVINCE OF NEW-YORK, IN THE TERM OF OCTOBER 1764, BETWEEN THOMAS FORSEY, PLAINTIFF, AND WADDEL CUNNINGHAM, DEFENDANT 9 (1764) (“The Supreme Court here proceeds in the Main, according to the Practice of the Courts at Westminster; and the Common Law of England, with the Statutes affirming, or altering it, before a Legislature was established here, and those passed since such Establishment, expressly extended to us, with our legislative Acts (which are not to be repugnant to the Laws of England) constitute the Laws of this Colony.”).

¹²¹ DUKER, *supra* note 119, at 111.

¹²² *Id.* at 108; Johnson, *supra* note 119, at 281–82.

¹²³ PARGELLIS, *supra* note 8, at 294.

¹²⁴ *Id.* Pargellis’s account is based upon Loudoun’s Memorandum Books at the Huntington Library, although he incorrectly identifies the date as April rather than May. *Id.* at 295 n.21. The Memorandum Books demonstrate that Loudoun’s decision was not uncontested. In an entry from May 1, Loudoun details the baker’s crime and explains that “Mr. Santt the laier (lawyer) and his brother came to Sir Charles Hardy’s and debated the case.” Lord Loudoun, 7 Memorandum Books (May 1, 1757) (Loudoun Papers: Americana, Box 10, Manuscripts Department, Huntington Library, San Marino, CA); *see also* 1 Memorandum Book Typescript.

Enemy”¹²⁵ Yates considered these situations of “emergency” as appropriate for the exercise of prerogative powers. Yet they represent limited exceptions to the freedom of liberty and property extolled by Locke, to which Yates contrasted his conception of French kingship as an absolute power vested in the monarch. Under the British system, by contrast, Yates averred, the law controls the King and not vice versa. As he maintained:

The Law is both the measure and the Bond of Every Subjects Duty and Allegiance [~~crossed out twice then spelled again a third time~~] each man having a fixed fundamental Right Born with him as to freedom of his Person and Property in his estate which he cannot be Deprived of but either by his Consent or some Crime for which the Law has Imposed Such a Penalty or Forfeiture

A third perspective emerges from Acting Governor De Lancey’s letter to which Lord Loudoun had referred, a missive that reached Yates belatedly, although dated October 24.¹²⁶ In the 1720s, De Lancey, who was from a prominent New York family and solidified his landholdings by marriage, had studied in England at both Cambridge and Lincoln’s Inn prior to becoming chief justice in New York.¹²⁷ Lamenting in his letter that “[I] am sorry there Should any difference arise Between the civil and military,” De Lancey expressed the view that “the Kings Gaol must Be opened to secure delinquents against the Military Law.” At the same time, he distinguished between the recourse available to civilians and members of the military, explaining that, “if the officers send a Souldier to Gaol as he is subject to military Discipline no one can Complain” On the other hand, “[I]f they send a man not subject to their discipline the Law gives him a Remedy which he may take” Hence De Lancey viewed civil law as still applying to those in military custody. Nevertheless, he continued, addressing Yates, “in neither case are you answerable because they are not in your Custody or your prisoners.” According to this view, Van Der Werken would be on his own in seeking redress for his injuries and Yates would be deprived of authority over his case: “If this van Der Werken Has been injured by any body let him Take his remedy against those who did The injury.” The letter concludes with a treatment of other army business and instructions about improving the highways for the benefit of the troops. Here again the practical considerations entailed by the military presence in upstate New York are

¹²⁵ This paragraph relies on Abraham Yates’s Journals/Copybook, 1754–1758, *supra* note 16.

¹²⁶ *Id.*

¹²⁷ STANLEY NIDER KATZ, *NEWCASTLE’S NEW YORK: ANGLO-AMERICAN POLITICS, 1732–1753*, at 166 (1968).

intermingled with theoretical debates about the nature and extent of military authority.

Loudoun, Yates, and De Lancey thus adopted three disparate positions. Loudoun's view—attributed to Lord Chancellor Hardwicke—approved of the suspension of civil law as well as civil remedies like habeas corpus in areas requiring military occupation. Yates's perspective emphasized the distinction between two kinds of military necessity and the attendant exercise of the King's prerogative: the first called for during occupation of enemy territory or in cases of rebellion, would allow for civil authority to be superseded, whereas the second, which he deems applicable to the British forces in America, entails the presence of armed forces while civil order remains generally in force. Finally, De Lancey distinguished both between the objects of military discipline and between the initial exercise of authority and the availability of a remedy. Hence, he drew a stark contrast between military and civilian personnel yet suggested that even when a civilian is involved, military administration should supersede civilian, and that judicial remedies are the only recourse available.

Aspects of these positions would reemerge in later contexts, including, most prominently, those of the Civil War. At the same time, they show the marks of their peculiar origins at a moment when the expansion of the British Empire raised questions about whether British approaches to military authority domestically, such as encapsulated in the Petition of Right and subsequent legislation, would apply when British forces operated in colonial territories and when members of the colonies were beginning to formulate arguments—phrased in the terms of English law itself—against what they perceived as tyrannical treatment. Under this account, it was not incidental that Loudoun attributed the position he espoused to Lord Chancellor Hardwicke, nor was it a coincidence that Yates would later become a prominent Antifederalist. Instead, Loudoun's view represented a position being tried out by British officials developing their relation to prerogative powers, particularly in foreign territories, and Yates's experience conditioned his later suspicion of broad federal powers.

In 1756, the year before this controversy, Lord Chancellor Hardwicke had intervened in debate about a new version of the Militia Bill, one that wound up being defeated in the House of Lords.¹²⁸ In his remarks, Hardwicke expressed sympathy for having a domestic militia and dissociated himself from views critical of standing armies. At the same time, he opposed the bill as infringing on “the Prerogative of the Crown.”¹²⁹ After rehearsing the

¹²⁸ PHILLIP YORKE EARL OF HARDWICKE, TWO SPEECHES IN THE HOUSE OF LORDS. I. ON THE BILL, FOR ABOLISHING THE HERETABLE JURISDICTIONS IN SCOTLAND. II. ON THE MILITIA-BILL 43–77 (1758).

¹²⁹ *Id.* at 45–47.

events leading up to King Charles I's beheading, Hardwicke noted that even in the aftermath of the English Revolution, Parliament had affirmed the King's authority over the military upon the Restoration of King Charles II to the throne. This bill, by contrast, remained silent on the subject, a silence he construes as excluding royal prerogative over the militia. As he concluded, "by this Bill, the Power of the Militia is taken away from the Crown."¹³⁰

Hardwicke expressed particular concern about how emergencies that might arise would be addressed. The Militia Bill as drafted furnished authority to the King to address such circumstances only in a circumscribed fashion, specifying that "in case of actual Invasion, or imminent Danger thereof; or in case of Rebellion, it shall and may be lawful for his Majesty . . . to order and direct his Lieutenants, . . . to draw out and embody all the Regiments and Companies of Militia Men . . ."¹³¹ As Hardwicke pointed out, however, even this use of power would require a formal notice to Parliament and might vitiate the availability of emergency powers when Parliament happened to be out of session.¹³²

His further objection to the bill entailed its displacement of military discipline by the civil powers. As he lamented: "The whole Discipline of the Militia is by this Bill taken out of the Deputy Lieutenants, and the Officers of the Militia, and put into the Justices of the Peace, excepting only at the particular Times when they shall be marched out for actual Service."¹³³ Military personnel were not even barred from resorting to a writ of certiorari, leading Hardwicke to "congratulate my Friends, the Judges of the King's Bench, on their being made Inspectors General of this Army."¹³⁴

Hardwicke hence insisted on royal prerogative powers over the military domestically, but I have found few direct indications of his views about martial law in the colonies. He did, importantly, defend the principle of not extending the Habeas Corpus Act to Ireland in 1758. As Hardwicke explained: "It has been often attempted and has as often, in the best of times, been rejected on account of the state of Ireland, which made it not safe for

¹³⁰ *Id.* at 54.

¹³¹ *Id.* at 51.

¹³² *Id.* at 52–53.

¹³³ *Id.* at 59.

¹³⁴ *Id.* at 60–61. When Lord Loudoun was recalled to England, he made a tour of government to explain himself and redeem his reputation. During the course of this tour, he received conflicting advice about whether to attend debate on this Habeas Corpus Act and ultimately decided not to do so given the political sensitivity of the subject.

the King's Protestant subjects there."¹³⁵ A similar claim was subsequently made regarding Quebec.¹³⁶

This argument also bears some resemblance to the one Lord Loudoun attributed to Hardwicke, "that wherever there was a Necessity for an army to Maintain a Country that their the Law was not in force But that the army were to have the administration." The logic of this statement seems particularly applicable to colonial sites rather than the metropole itself. The reference itself to "an army to Maintain a Country" suggests an occupying force rather than domestic troops called up to put down an insurgency or respond to an invading enemy—circumstances that, in any event, Yates himself acknowledged might justify having civil authorities temporarily cede their power to the military forces. In particular, this argument raises the specter of a situation not otherwise specifically contemplated within discussions of martial law, the context of a country already conquered and subordinated as a colony but in which either domestic resistance or foreign conflict over possession produced an armed occupation.

A further issue pertaining to the respective roles of colonial governors and military commanders that was playing out in different colonial sites during this period also manifested itself during Lord Loudoun's stint in America. In a private letter dated October 17, 1757, Lord Loudoun complains about Massachusetts Governor Thomas Pownall. Although Loudoun claims to be "great friends" with Pownall, he insults him in the most opprobrious terms and details a discussion in which he "showed [Pownall] the Command was totally Military, that in no shape the Governor could have any Command over them, and that if [he] had the Command, it must descend in [his] Absence to the next Officer in Rank, and so on to the End."¹³⁷ He also recounts Pownall expressing the opposing view that "except in time of War the Military Power came in to support the Civil; where it could not execute its own Orders all Business must stand still and the Country be undone."¹³⁸ Much of the correspondence between Loudoun and Pownall demonstrates the substantial controversy between the two about the nature and limits of military and prerogative powers.¹³⁹

¹³⁵ Jean-Marie Fecteau & Douglas Hay, 'Government by Will and Pleasure Instead of Law': *Military Justice and the Legal System in Quebec, 1775–83*, in 1 CANADIAN STATE TRIALS: LAW, POLITICS, AND SECURITY MEASURES, 1608–1837, at 129, 146 (F. Murray Greenwood & Barry Wright eds., 1996).

¹³⁶ *Id.* at 159.

¹³⁷ Letter from Loudoun to Cumberland (Oct. 17, 1757), in MILITARY AFFAIRS IN NORTH AMERICA, 1748–1765: SELECTED DOCUMENTS FROM THE CUMBERLAND PAPERS IN WINDSOR CASTLE 399, 404, 406 (Stanley Pargellis ed., 1936).

¹³⁸ *Id.* at 406.

¹³⁹ See, e.g., Letter from Thomas Pownall to Lord Loudoun (Nov. 27, 1757) (Loudoun Papers: Americana, Box 104, Manuscripts Department, Huntington Library, San Marino, CA) (describing how

Turning back to Yates, the effects of the 1750s controversy appear in his writings around the Founding Era. In the interim, Yates had imbibed the writings of De Lolme, who, as mentioned above, vigorously contrasted the English mode of government with continental models, particularly insofar as it subordinated the military to the civil aspects of government.¹⁴⁰ In *The Rough Hewer*, directed at members of the New York state legislature, Yates—joined by his nephew, Robert Yates—expressed the necessity of a Bill of Rights, denying that “the Rulers ought to have the power to keep a standing army . . . command the Militia, and order them when and where they pleased.”¹⁴¹ In rehearsing various historical episodes involving a deprivation of liberty, Yates explicitly treated Lord Loudoun and summarized what he had taken away from the 1757 controversy. Yates wrote:

The Earl of Loudoun (a gentleman of imperious and arbitrary disposition), was said to have so extensive a commission as to be a sort of viceroy; and had, besides the command of the army, all the governors from North Carolina to New Hampshire, subordinate to him), arrived in 1756 and was for having the civil authority subordinate to the Military: He said (and often said) that it was the opinion of the Lord Chancellor that it ought to be the case in every Country, that required an army to defend it; and of a Piece with this was the order of George the 3d (George the 2nd died 5 October 1760) of the 17 December 1760 Directing the Commander of the troops to Rank above the governor of a colony.¹⁴²

While he had not forgotten the personal dimension of the quarrel, Yates had by this point distilled the ideological kernel of his objections.

From Yates’s encounter with Loudoun, we can see a different dimension of the debates over habeas corpus and martial law. At issue were not simply questions of what law would apply—military or civilian—or whether remedies might be available after the fact, but who precisely would be charged with overseeing the administration of justice. This concern with personnel has faded into the background of our understanding of the

he remains bound by laws accepted by his predecessors that cut into the prerogative powers of a governor).

¹⁴⁰ See De Lolme, *supra* note 58. In his 1786 notes on speeches to the delegates of Congress, Yates refers extensively to De Lolme. See Abraham Yates, Jr., “Speeches to the Delegates of Congress” (Abraham Yates, Jr. Papers, Box 5, Manuscripts and Archives Division, N.Y. Pub. Library).

¹⁴¹ Abraham Yates, Jr., “The Rough Hewer” (Dec. 4, 1788) (Abraham Yates, Jr. Papers, Box 5, Manuscripts and Archives Division, N.Y. Pub. Library).

¹⁴² *Id.*

Constitution, but it resonates with other Founding Era controversies, such as those over the administration of federal law.¹⁴³

A similar notion of martial law as changing *who* was applying the law rather than *what* law was applied would also manifest itself later in the history of the British Empire. Reflecting back on his service as a governor in India in 1799, the Duke of Wellington proclaimed both the superiority of military personnel over civilian during occupation and the lack of any necessary implication of that circumstance for the administration of law. As he recalled:

I have, in another country, carried out martial law; that is to say, I have governed a large proportion of the population of a country by my own will. But then, what did I do? I declared that the country should be governed according to its own national law, and I carried into execution that my so declared will The judges sat in the courts of law, conducting their judicial business, and administering the law under my direction.¹⁴⁴

The dissociation between the question of military or civilian control of government and the mode of carrying out justice that Wellington describes had already been suggested by the arguments made in the 1757 controversy in upstate New York between Lord Loudoun and Abraham Yates.

CONCLUSION: THE STAKES FOR ORIGINAL MEANING

So what, if any, are the implications of this 1757 controversy for originalist constitutional interpretation?

First, the dispute suggests that cordoning off the history of habeas corpus from martial law might be a mistake. As noted above, Professor Tyler's comprehensive book on habeas considers the implications of martial law only beginning with the American Civil War.¹⁴⁵ Others have insisted upon a strict demarcation between the historical treatment of habeas corpus and martial law.¹⁴⁶ On the other side, Professor Vladeck has most

¹⁴³ See generally Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104 (2013) (explaining the significance of whether local or federal forces would implement federal law to early debates about commandeering). Notably, Yates figures prominently in Campbell's account as resisting a large federal bureaucracy to implement taxes. *Id.* at 1120–21. This stance was probably influenced by his earlier encounter with Lord Loudoun. For a discussion of disputes over the relation between military and civil authority in the Northwest Territory that resonates with the concerns of the controversy between Yates and Loudoun, see generally Gregory Ablavsky, *Administrative Constitutionalism in the Northwest Territory*, U. PA. L. REV. (forthcoming) (draft on file with the author).

¹⁴⁴ April 1, 1851, in 2 THE SPEECHES OF THE DUKE OF WELLINGTON IN PARLIAMENT 723–24 (1854).

¹⁴⁵ TYLER, *supra* note 20.

¹⁴⁶ In *The Imbecilic Executive*, Professor Sai Prakash draws a bright line between the Crown's prerogative regarding martial law—which he acknowledges was an area of significant dispute—and the suspension of habeas corpus, writing that “whatever uncertainty existed about martial law, it was clear

comprehensively elaborated the martial law justification for suspension, examining an obscure opinion that investigated President Lincoln's power to suspend the writ.¹⁴⁷ In deciding the 1862 case of *Ex parte Field*, U.S. District Judge David A. Smalley claimed that, "so long as the President had authority to impose martial law, he had authority to suspend the privilege of the writ wherever martial law was in force."¹⁴⁸ This authority to impose martial law would have derived from early Militia Acts.¹⁴⁹ Professor Vladeck furnishes a strong historically based defense of Smalley's position but concludes by raising the possibility that a martial law-based suspension of habeas might be incompatible with the Suspension Clause.

Martial law itself, however, as this Essay indicates, furnished part of the context out of which the Suspension Clause emerged and, hence, provides a potential interpretive backdrop for understanding the meaning of the provision. Not only was the first suspension passed the same year as the Mutiny Act of 1689, but the dispute between Yates and Loudoun illuminates the various arguments that were made in the mid-eighteenth century about the relationship between civil law remedies like habeas corpus and martial law. Whereas Governor De Lancey believed that those held in military custody could still avail themselves of remedies through the courts of common law, Loudoun held that military jurisdiction entirely displaced "every little lawier's" arguments. Likewise, we see in these disputes a prefiguration of the arguments that the Duke of Wellington and William Birkhimer would later make that the courts could remain open even under martial law.

Second, originalists have, in other contexts, tended to draw a strong distinction between common law and statutes in derogation thereof, interpreting the Constitution in light of the former but distinguishing the latter.¹⁵⁰ The interplay of statutes with prerogative powers in relation to martial law—as well as habeas—suggests both the crucial importance of statutes as well as common law to the backdrop of the Constitution and the complexity of relying on English statutes as a given within the American colonies. In practice, colonists often invoked English laws even if British authorities rejected their applicability within the colonies.¹⁵¹ This raises interpretive questions about which understanding should be accepted and

that the Crown could not suspend habeas corpus." Saikrishna Bangalore Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361, 1381 (2013).

¹⁴⁷ See generally Vladeck, *supra* note 19.

¹⁴⁸ *Id.* at 395 (citing *Ex parte Field*, 9 F. Cas. 1 (C.C.D. Vt. 1862)).

¹⁴⁹ *Id.* at 395–96. See generally Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149 (2004).

¹⁵⁰ See *supra* note 25 and accompanying text.

¹⁵¹ See *supra* notes 124–127 and accompanying text.

whether local interpretations and practices in America should trump British conceptions; concluding that they should could further undermine originalists' reliance on late eighteenth-century British sources like William Blackstone's *Commentaries*, which largely encapsulate the British perspective.¹⁵² Furthermore, the relationship between prerogative and statutory deployments of martial law as well as the compatibility of martial law with common law was hotly contested within the British Empire.¹⁵³ In addition, once the door is opened to interpreting constitutional provisions against a set of British statutes, questions arise as to where the limits of that statutory framework might be. In particular, with regard to the Suspension Clause, it may not be advisable to restrict investigation to legislation pertaining specifically to habeas corpus but rather expand more broadly into the range of statutes furnishing guidance for the implementation of martial law.

Finally, this episode demonstrates the extent to which the legal framework of England represented not simply a static backdrop for the development of the Constitution but a contested and dynamic space in which military commanders' imperial justifications vied with the arguments of colonial subjects based on English law and the claims of colonial governors caught between their allegiance to the metropole and their attention to the domestic legal regimes developing in the colonies and the rights claimed by colonists. Within this system, common law and its alternatives did not furnish a fixed set of doctrines according to which provisions of the Constitution can be interpreted but instead a set of resources for argument in a fraught imperial dominion.

¹⁵² For originalists' tendency to rely on Blackstone, see generally Meyler, *supra* note 24.

¹⁵³ See *supra* Part I.