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From Oglethorpe to the Overthrow of the Confederacy: Habeas Corpus in Georgia, 1733-1865

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FROM OGLETHORPE TO THE OVERTHROW OF THE CONFEDERACY: HABEAS CORPUS IN GEORGIA, 1733–1865

*Donald E. Wilkes, Jr.**

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So long as . . . *Habeas Corpus*, remain[s] unimpaired, life and liberty are safe from passion, prejudice, or oppression, no matter from what quarter they emanate.¹

I. INTRODUCTION

Because of the unique and noble office of the writ of habeas corpus—providing a legal remedy by which individuals unlawfully restrained of their liberty may obtain, by order of a court, discharge from custody—no other writ has ever been showered with so much praise.² The writ of habeas corpus is “the most celebrated writ in the English law,”³ the “great writ,”⁴ the “Great Writ of Liberty,”⁵ “the Writ of Liberty,”⁶ “the Great Writ of Freedom,”⁷ and “the Freedom Writ.”⁸ The writ of habeas corpus is a “palladium”⁹ and a “bulwark”¹⁰ of liberty and freedom. The writ of habeas corpus is “the precious safeguard of personal liberty”¹¹

¹ *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 206 (1848).

² *See, e.g., Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (“[The writ of habeas corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.”); *Ex parte Ford*, 116 P. 757, 759 (Cal. 1911) (stating that the writ of habeas corpus is “regarded as the greatest remedy known to the law whereby one unlawfully restrained of his liberty can secure his release”); 9 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 105 (3d ed. 1944) (“[T]he writ of habeas corpus is the most efficient protector of . . . liberty that any legal system has ever devised.”).

³ Robert G. Simmons, *The Writ of Habeas Corpus: The Most Celebrated Writ in the English Law*, 41 A.B.A. J. 413, 414 (1955) (quoting 3 WILLIAM BLACKSTONE, *COMMENTARIES* *129).

⁴ *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807).

⁵ ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* (2001).

⁶ ROBERT S. WALKER, *THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY* (1960).

⁷ ADVISORY COMM. ON SENTENCING AND REVIEW, AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO POST-CONVICTION REMEDIES 24 (Tentative Draft 1967).

⁸ Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657, 657 (1948).

⁹ *In re Begerow*, 65 P. 828, 829 (Cal. 1901) (stating that the writ of habeas corpus has “been called . . . the palladium of our liberties”).

¹⁰ *St. Clair v. Hiatt*, 83 F. Supp. 585, 586 (N.D. Ga. 1949) (“[T]he writ of habeas corpus has been the greatest bulwark of freedom against tyranny, oppression and injustice.”).

¹¹ *Bowen v. Johnston*, 306 U.S. 19, 26 (1939).

and “the highest safeguard of liberty.”¹² The writ of habeas corpus is “the great ‘key of liberty to unlock the prison doors of tyranny’ ”¹³ and “the water of life to revive from the death of [unlawful] imprisonment.”¹⁴ The writ of habeas corpus is “the best and only sufficient defence of personal freedom”¹⁵ and “the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.”¹⁶ The right to habeas corpus is “the most valuable human right in the Constitution,”¹⁷ and, indeed, “the most fundamental legal right.”¹⁸ The writ of habeas corpus, therefore, everyone agrees,¹⁹ is “one of the precious heritages of Anglo-American civilization”;²⁰ it is “that noble badge of liberty”;²¹ and it is both “unquestionably the first security of civil liberty”²² and “the very corner stone of the liberty of the subject.”²³

¹² *Smith v. Bennett*, 365 U.S. 708, 712 (1961).

¹³ *State v. Thurman*, 88 So. 61, 62 (Ala. Ct. App. 1921).

¹⁴ ROLLIN C. HURD, *A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT* 271 (Albany, W.C. Little & Co. 1858).

¹⁵ *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1869).

¹⁶ *Harris v. Nelson*, 394 U.S. 286, 290–91 (1969).

¹⁷ ZECHARIAH CHAFEE, JR., *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787*, at 2 (1956).

¹⁸ DAVID CLARK & GERARD MCCOY, *THE MOST FUNDAMENTAL LEGAL RIGHT: HABEAS CORPUS IN THE COMMONWEALTH* (2000).

¹⁹ *But see O’Neal v. McAninch*, 513 U.S. 432, 447 (1995) (Thomas, J., dissenting) (“We have ample cause to be wary of the writ.”); *Linnet v. Coles*, [1987] Q.B. 555 at 561 (C.A. Eng. 1986) (Lawton, J.) (“A writ of habeas corpus is probably the most cherished sacred cow in the British constitution; but the law has never allowed it to graze in all legal pastures.”); AMBROSE BIERCE, *THE CYNIC’S WORD BOOK* 146 (1906) (defining habeas corpus as “[a] writ by which a man may be taken out of jail and asked how he likes it”); D.M. Gordon, *The Unruly Writ of Habeas Corpus*, 26 MOD. L. REV. 520, 520 (1963) (worrying that “prisoners could abuse the remedy by habeas corpus”); Charles Graddick, *Debunking the Ancient Writ: A Critical Analysis of the Law of Habeas Corpus*, 14 CUMB. L. REV. 1, 2 (1984) (severely criticizing federal courts’ alleged “readiness to overturn state judgments on tenuous grounds”).

²⁰ *Fay v. Noia*, 372 U.S. 391, 441 (1963).

²¹ HENRY ST. JOHN, *FIRST VISCOUNT BOLINGBROKE, POLITICAL WRITINGS* 107 (David Armitage ed., 1997).

²² 2 THOMAS ERSKINE MAY, *THE CONSTITUTIONAL HISTORY OF ENGLAND SINCE THE ACCESSION OF GEORGE THE THIRD* 262 (London, Longman, Green, Longman, Roberts & Green 1863).

²³ *Ping Shek v. Mother Superioress of the Daughters of Charity of the Canossian Inst.*, [1949] 33 H.K.L.R. 66, 74 (C.A.).

There are countless books and articles on the availability of the writ of habeas corpus in the United States. Most of this scholarly literature is concerned with the writ, past or present, as a postconviction remedy in the federal court system.

The scholarly pieces on the writ of habeas corpus at the state court level also usually emphasize use of the writ as a postconviction remedy.²⁴ In fact, outside the postconviction relief context, relatively few published works on the writ of habeas corpus in the state courts exist.²⁵ The majority of the scholarly

²⁴ The extent to which state habeas corpus may be used as a postconviction remedy in all fifty states is examined in DONALD E. WILKES, JR., *STATE POSTCONVICTION REMEDIES AND RELIEF HANDBOOK* (2010). The classic law review article exploring the use of state habeas corpus as a postconviction remedy in all the states is *State Post-Conviction Remedies and Federal Habeas Corpus*, 12 WM. & MARY L. REV. 149 (1970); see also Larry W. Yackle, *The Misadventures of State Postconviction Remedies*, 16 N.Y.U. REV. L. & SOC. CHANGE 359, 364–65 (1987) (surveying the development of habeas corpus as postconviction remedy in various states); Note, *State Post-Conviction Remedies*, 61 COLUM. L. REV. 681, 682–92 (1961) (surveying the use of writ of habeas corpus as postconviction remedy in numerous states). Books and articles on the availability of postconviction habeas corpus relief in a particular state include: ROBERT BATEY, *HABEAS CORPUS: THE LAW IN FLORIDA* (1980); Robert R. Granucci, *Review of Criminal Convictions by Habeas Corpus in California*, 15 HASTINGS L.J. 189 (1963); James C. Harrington & Anne More Burnham, *Texas's New Habeas Corpus Procedure for Death-Row Inmates: Kafkaesque—and Probably Unconstitutional*, 27 ST. MARY'S L.J. 69 (1995); Charles Markell, *Review of Criminal Cases in Maryland by Habeas Corpus and by Appeal*, 101 U. PA. L. REV. 1154 (1953); Donald E. Wilkes, Jr., *Postconviction Habeas Corpus Relief in Georgia: A Decade After the Habeas Corpus Act*, 12 GA. L. REV. 249 (1978); Robert Allen Sedler, Note, *Habeas Corpus in Pennsylvania After Conviction*, 20 U. PITT. L. REV. 652 (1959); William Shade & John G. Taussig, Jr., Comment, *Habeas Corpus in Colorado for the Convicted Criminal*, 30 ROCKY MTN. L. REV. 145 (1958); Albert J. Reeves, *The Louisiana Habeas Corpus Catechism*, 22 LA. B.J. 123 (1974).

Because of recent restrictions on federal habeas corpus imposed by congressional legislation and U.S. Supreme Court case law, today there is new interest in habeas corpus and other postconviction remedies available in state courts. See Charles F. Baird, *The Habeas Corpus Revolution: A New Role for State Courts?*, 27 ST. MARY'S L.J. 297, 340 (1996); Chris Hutton, *The "New" Federal Habeas: Implications for State Standards of Review*, 40 S.D. L. REV. 442, 477 (1995); Mary C. Hutton, *Retroactivity in the States: The Impact of Teague v. Lane on State Postconviction Remedies*, 44 ALA. L. REV. 421, 437–48 (1993).

²⁵ Over the past fifty years, the scholarly articles on habeas corpus, not primarily devoted to postconviction habeas, in individual states include: James D. Bell, *Habeas Corpus: The "Great Writ" in Mississippi State Courts*, 58 MISS. L.J. 25 (1988); Bonita Faye Collier, Note, *Habeas Corpus in Idaho*, 4 IDAHO L. REV. 45 (1967); Thomas A. Donnelly & William T. MacPherson, *Habeas Corpus in New Mexico*, 11 N.M. L. REV. 291 (1981); Fred L. Fox II, Note, *Habeas Corpus in West Virginia*, 69 W. VA. L. REV. 293 (1967); Samuel K. MacAllister

publications on habeas corpus in the Georgia courts concern postconviction habeas.²⁶ The amount of scholarly literature on the writ of habeas corpus in Georgia not primarily concerned with postconviction habeas is tiny.²⁷

This Article will provide, for the first time, a comprehensive account of the writ of habeas corpus in Georgia not primarily focused on use of the writ as a postconviction remedy. The Article covers the 132-year period stretching from 1733, when the Georgia colony was established, to 1865, when the Confederate States of America was finally defeated and the American Civil War came to a close.

Part II of this Article, which examines the writ of habeas corpus in colonial Georgia, begins by briefly summarizing the history and development of the writ in England, and then analyzes the reception and availability in the colony of the common law writ of habeas corpus and the English Habeas Corpus Act of 1679.²⁸ As Part II explains, both common law habeas corpus and the 1679 English statute were received into the colony on February 12, 1733, the day General James Oglethorpe, the colony's founder, first set foot in Georgia. Both common law habeas corpus and the 1679 statute remained in effect in Georgia during the entire colonial period.

& Robert I. Leech, Note, *Habeas Corpus in Iowa*, 3 DRAKE L. REV. 30 (1953); Donald E. Wilkes, Jr., *The Writ of Habeas Corpus in Georgia*, GA. B.J., Feb. 2007, at 20.

²⁶ The most important articles on postconviction habeas corpus in Georgia published since 1975 include: Wilkes, *supra* note 24; Jill Wasserman, Note, *Has Habeas Corpus Been Suspended in Georgia? Representing Indigent Prisoners on Georgia's Death Row*, 17 GA. ST. U. L. REV. 605 (2000); Jennifer N. Ide, Comment, *The Case of Exzavious Lee Gibson: A Georgia Court's (Constitutional?) Denial of a Federal Right*, 47 EMORY L.J. 1079 (1998); Wm. Garth Snider, *Non-Capital Habeas Corpus Relief in Georgia*, GA. B.J., Oct. 1997, at 20; John A. Creasy, Jr., *Legislative Review, Habeas Corpus: Amend Procedures for First Time Challenges to State Court Death Sentence Proceedings; General Provisions: Require Establishment of Uniform Court Rules Concerning Time Periods and Schedules*, 12 GA. ST. U. L. REV. 18 (1995); Donald E. Wilkes, Jr., *The Georgia Death Penalty Habeas Corpus Reform Act of 1995*, GA. DEFENDER, Nov. 1995, at 1.

²⁷ The only post-1900 articles on Georgia habeas corpus not focusing on postconviction relief are: Donald E. Wilkes, Jr., *Writ of Habeas Corpus*, NEW GA. ENCYCLOPEDIA (Oct. 29, 2009), <http://www.georgiaencyclopedia.org/nge/Article.jsp?id=h-3741>; Wilkes, *supra* note 25.

²⁸ 1679, 31 Car. 2, c. 2 (Eng.).

Part III explores habeas corpus in Georgia during the Antebellum Era, and demonstrates that both common law habeas corpus and the 1679 English habeas statute continued to be part of Georgia law throughout this period. Part III takes note of antebellum statutes regarding habeas corpus enacted by the Georgia state legislature. It also examines jurisdiction in habeas cases and appellate review of habeas decisions and surveys reported habeas corpus case law in the superior courts and in the Georgia Supreme Court during Antebellum times.

Part IV focuses on habeas corpus in Georgia during the Civil War and explores four major habeas corpus developments in wartime Georgia. The first was the taking effect of the habeas corpus provisions contained within the Georgia Code of 1861, and the consequent abolition of the state's common law writ of habeas corpus and repeal of the 1679 English statute. The second development was the enactment of an 1863 habeas corpus statute designed to assure that when properly applied for, the writ would not be denied. The third was Georgia's fiery resistance to Confederate suspension of habeas corpus. As part of this resistance, the state's wartime governor sent a message to the state legislature scathingly censuring a habeas suspension statute recently enacted by the Confederate Congress, and the legislature in turn passed a defiant resolution condemning the suspension statute as dangerous and unconstitutional and urging its prompt repeal. This resistance resulted in the habeas suspension statute being rendered nugatory in Georgia. The fourth development was the willingness of the Georgia Supreme Court, in case after case, to permit persons serving in or conscripted by the Confederate Army or the Georgia state militia to seek and, where appropriate, obtain state habeas relief from military service. During the Civil War the Georgia Supreme Court decided thirty-one habeas cases brought by individuals seeking to be relieved of military duty. In nine of these habeas decisions the court actually released persons from Confederate military service, and in two more it released persons from militia service.

Part V brings the Article to a close by summarizing the sound reasons supporting the view that during the period extending from

the founding of the colony until the end of the War Between the States, the writ of habeas corpus was the glory of Georgia law.

II. HABEAS CORPUS IN COLONIAL GEORGIA, 1733–1776

A. ENGLISH HISTORICAL BACKGROUND

The origins of the English common law writ of habeas corpus²⁹ are, it is said, “lost in history.”³⁰ There has been, therefore, “a lively debate among legal historians concerning the date and the exact circumstances of the origin of the writ of habeas corpus.”³¹ As a result, however, of extensive scholarly research by distinguished scholars,³² a consensus has emerged on the basics of

²⁹ “The writ of habeas corpus in England is a common law writ.” DONALD E. WILKES, JR., *FEDERAL POSTCONVICTION REMEDIES AND RELIEF* 60 (1996).

³⁰ David Pitkin & Ray Shollenbarger, Note, *Federal Procedure: Proposed Solutions to the Problem of Proliferation of Petition for the Writ of Habeas Corpus and 28 U.S.C. § 2255 Proceedings in the Federal Courts*, 2 *SAN DIEGO L. REV.* 67, 67 (1965); see also *Simmons v. Ga. Iron & Coal Co.*, 43 S.E. 780, 781 (Ga. 1903) (“The origin of the writ has been left in some obscurity.”); WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* 12 (1980) (referring to “the humble origins of the Great Writ”); Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 *CAL. L. REV.* 335, 336 (1952) (“The origin of the writ is obscure.”); Albert S. Glass, *Historical Aspects of Habeas Corpus*, 9 *ST. JOHN’S L. REV.* 55, 55 (1934) (“Many writers, in searching for the origin of this famous writ, have declared it to be lost in antiquity.”); M.G. Stambler, *Habeas Corpus—The Constitutional Problems of a Prerogative Writ*, 15 *U. TORONTO FAC. L. REV.* 42, 42 (1957) (stating that the writ of habeas corpus’s “origin is clothed in the obscurity of legal history”); Robert J. Sharpe, *Book Review*, 1982 *PUB. L.* 154, 154 (referring to “humble and obscure origins” of writ of habeas corpus).

³¹ WILKES, *supra* note 29, at 64.

³² For recent historical research on the origins of habeas corpus, see DUKER, *supra* note 30, at 12–27; PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 16–18, 47–48 (2010); R.J. SHARPE, *THE LAW OF HABEAS CORPUS* 1–3 (2d ed. 1989); Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 *N.Y.L. SCH. J. HUM. RTS.* 375, 377–79 (1998); see also WILKES, *supra* note 29, at 64–65 (discussing past and recent research on the origins of the writ of habeas corpus in England). For earlier but still helpful research, see HOLDSWORTH, *supra* note 2, at 108–12; Maxwell Cohen, *Habeas Corpus Cum Causa—The Emergence of the Modern Writ—I*, 18 *CAN. B. REV.* 10, 10–14 (1940); Maxwell Cohen, *Some Considerations on the Origins of Habeas Corpus*, 16 *CAN. B. REV.* 92, 92–112 (1938); John C. Fox, *Process of Imprisonment at Common Law*, 39 *LAW Q. REV.* 46, 47–59 (1923); Edward Jenks, *The Story of the Habeas Corpus*, 18 *LAW Q. REV.* 64, 66–72 (1902). For thoughtful historical articles based on secondary research, see Paul J. Buser, *Habeas Corpus Litigation in Child Custody Matters: An Historical Mine Field*, 11 *J. AM. ACAD. MATRIM. LAW.* 1, 6–9 (1993); Lloyd W.

the history and development of the common law writ in England. Succinctly stated, this consensus view is that:

the writ of habeas corpus undoubtedly originated in medieval England. In the 1200s and 1300s, writs using the term *habeas corpus* were regularly issued by English courts . . . to transfer prisoners from one prison to another or to order the arrest of persons not in custody whose presence in court was required. Around 1350, we have the earliest examples of prisoners filing habeas corpus petitions in court so they could challenge their imprisonment and of courts, in response to habeas corpus petitions, ordering jailors to produce those prisoners and to explain the cause of their imprisonment. . . . The earliest known habeas corpus proceedings in the common law courts, instituted by prisoners filing habeas corpus petitions, were in the Court of King's Bench during the period 1450 to 1500. By the early 1600s, the writ of habeas corpus was well known and well-established.³³

At the time the colony of Georgia was founded in 1733, therefore, the writ of habeas corpus had long been a firmly recognized part of English common law.³⁴ The writ was a long-standing common law right of Englishmen.³⁵ Furthermore, by

Davidson, *The Ancient Writ of Habeas Corpus*, 4 S. TEX. L.J. 201, 201–03 (1959); Glass, *supra* note 30, at 57–61.

³³ Donald E. Wilkes, Jr., *Writ of Habeas Corpus*, in 2 LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA 645, 645–46 (Herbert M. Kritzer ed., 2002).

³⁴ See also DUKER, *supra* note 30, at 98 (“The common-law writ of habeas corpus was a well-established judicial writ as early as the formulation of the first colonial charter [in 1606].”); John A. Sholar Jr., *Habeas Corpus and the War on Terror*, 45 DUQ. L. REV. 661, 670 (2007) (“At the time of the first colonial charter in Virginia [in 1606], Habeas Corpus was already well established in England . . .”).

³⁵ The amazingly high regard for the common law writ of habeas corpus among the English colonists in the Thirteen Colonies in North America is examined in BADSHAH K. MIAN, *AMERICAN HABEAS CORPUS: LAW, HISTORY, AND POLITICS* 39–43, 51–57, 60–61 (1984); 1 DONALD E. WILKES, JR., *STATE POSTCONVICTION REMEDIES AND RELIEF* 123 (2001); Milton Cantor, *The Writ of Habeas Corpus: Early American Origins and Development*, in *FREEDOM*

1733 the memorable English Habeas Corpus Act of 1679,³⁶ which, with respect to pretrial confinement on criminal charges,³⁷

AND REFORM: ESSAYS IN HONOR OF HENRY STEELE COMMAGER 55, 57–73 (Harold M. Hyman & Leonard W. Levy eds., 1967); A.H. Carpenter, *Habeas Corpus in the Colonies*, 8 AM. HIST. REV. 18, 18–23, 26–27 (1902); Donald E. Wilkes, Jr., *A New Role for an Ancient Writ: Postconviction Habeas Corpus Relief in Georgia (Part I)*, 8 GA. L. REV. 313, 331 (1974). See also DANIEL JOHN MEADOR, *HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY* 30 (1966) (“[T]he writ of habeas corpus was accepted as a part of the fundamental rights of Englishmen to which the colonists laid claim.”); Collings, *supra* note 30, at 338 (“The right to the use of the writ was always claimed by the American colonists.”).

³⁶ 1679, 31 Car. 2, c. 2 (Eng.). This justly famous statute, one of the most momentous developments in the history of civil liberties, was described by Blackstone as “that second magna carta,” 1 WILLIAM BLACKSTONE, *COMMENTARIES* *133, and by Lord Macaulay as “the most stringent curb that ever legislation imposed on tyranny,” 2 LORD MACAULAY, *THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND* 663 (Charles Harding Firth ed., 1914). See also DUKER, *supra* note 30, at 115 (citing a 1774 letter from the Continental Congress to Great Britain that described the 1679 English Habeas Act as “that great bulwark and palladium of English liberty”); CHARLES JAMES FOX, *HISTORY OF THE EARLY PART OF THE REIGN OF JAMES THE SECOND* 24–25 (Philadelphia, Abraham Small 1808) (“[T]he Habeas Corpus Act [is] the most important barrier against tyranny, and best framed protection for the liberty of individuals, that has ever existed in any ancient or modern commonwealth.”); 3 HENRY HALLAM, *THE CONSTITUTIONAL HISTORY OF ENGLAND FROM THE ACCESSION OF HENRY VII TO THE DEATH OF GEORGE II*, at 12 (London, John Murray, 7th ed. 1854) (describing the 1679 Act as “a very beneficial enactment, and eminently remedial in many cases of illegal imprisonment”); HURD, *supra* note 14, at 99 (describing the 1679 Act as “the keystone of civil liberty, the statute which forces the secrets of every prison to be revealed”); MEADOR, *supra* note 35, at 25 (describing 1679 English habeas statute as “one of the celebrated developments in the history of the writ”); Maxwell Cohen, *Habeas Corpus Cum Causa—The Emergence of the Modern Writ—II*, 18 CAN. B. REV. 172, 185 (1940) (“Few, if any, Acts of Parliament have achieved the fame of this *Habeas Corpus Act of 1679*.”).

For the best account of the background and passage of the Act, see Helen A. Nutting, *The Most Wholesome Law—The Habeas Corpus Act of 1679*, 65 AM. HIST. REV. 527 (1960). See also CECIL PRICE, *COLD CALEB* 37–39 (1956) (examining the accuracy of the common belief that the 1679 Act passed in the House of Lords due to an error in the vote count); Godfrey Davies & Edith L. Klotz, *The Habeas Corpus Act of 1679 in the House of Lords*, 3 HUNTINGTON LIBR. Q. 469 (1940) (same).

³⁷ The English Habeas Corpus Act of 1679 was applicable only in cases of pretrial imprisonment on criminal charges. MEADOR, *supra* note 35, at 26 (“[T]he 1679 Act was concerned essentially with pretrial detention for persons accused of crime.”); SHARPE, *supra* note 32, at 20 (“The Act applied only to criminal cases.”); Wilkes, *supra* note 35, at 324 (stating that 1679 Act excluded from its coverage persons convicted of crime and persons imprisoned under civil process); see also WILKES, *supra* note 29, at 61 (“[W]ith respect to pretrial imprisonment on criminal charges, [the Act] reformed habeas corpus procedures, expanded and clarified the authority of the courts and judges empowered to issue the writ, guaranteed, under specified circumstances, the rights to pretrial bail and to a speedy trial, and prohibited transporting prisoners beyond the seas where the writ did not run . . .”);

expanded the reach of common law habeas corpus and reformed habeas corpus procedures, was another widely recognized right of Englishmen, albeit a statutory rather than a common law one.³⁸

B. COMMON LAW HABEAS IN THE COLONY

In the eighteenth century in England it was established public law that Englishmen carried the common law, including the rights secured by the common law, with them as their birthright when they founded a colony by occupation.³⁹ Thus, the common law writ of habeas corpus, regarded by the American colonists as a basic right of Englishmen,⁴⁰ was received into the colony of Georgia on the day James Oglethorpe arrived to settle the colony.⁴¹

Donald E. Wilkes, Jr., *The Great Writ: No Longer as Dear to the Tories as to the Whigs—A Critique of Senator Nunn’s Habeas Corpus Article*, 7 WOODROW WILSON J.L. 25, 29 (1985–1987) (“The 1679 Act was drafted to abolish certain abusive practices perpetrated by royal ministers or officers to postpone or prevent the bailing or the release or the trial of persons arrested and held on criminal or supposed criminal charges.”).

³⁸ For discussion of the veneration the American colonists felt for the English Habeas Corpus Act of 1679, see WILLIAM S. CHURCH, *A TREATISE ON THE WRIT OF HABEAS CORPUS* 31–35 (San Francisco, A.L. Bancroft & Co. 1884); DUKER, *supra* note 30, 100–15; HURD, *supra* note 14, at 109–14; Carpenter, *supra* note 35, at 20–27; Sholar, *supra* note 34, at 670–73.

³⁹ DUKER, *supra* note 30, at 95–98; A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 99–108 (1968); 1 WILKES, *supra* note 35, at 121–23; Carpenter, *supra* note 35, at 19–20; Richard C. Dale, *The Adoption of the Common Law by the American Colonies*, 30 AM. L. REG. 553, 553–54 (1882); Wilkes, *supra* note 35, at 326–31; see also B.H. MCPHERSON, *THE RECEPTION OF ENGLISH LAW ABROAD* 18 (2007) (“Precisely when and to what extent [the English common law] was first ‘received’ in the settlements in North America . . . is a matter of continuing conjecture and debate among historians, although recent studies of local records are tending to place it earlier rather than later in colonial history. By about 1700, or in the decade before it, the impression began to prevail that English law or the common law was carried abroad as a ‘birthright’ or inheritance by English subjects going to settle in the overseas dominions.” (footnote omitted)). *But see* Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke’s British Jurisprudence*, 21 LAW & HIST. REV. 439, 474 (2003) (stating that the view that English subjects who settled a colony brought English law with them as their birthright was “not supported by the common law or Privy Council tradition”).

⁴⁰ “In the colonies the writ of habeas corpus was regarded as one of the rights of the individual guaranteed by the . . . English common law.” SOURCES OF OUR LIBERTIES 194 (Richard L. Perry ed., 1959); see also MEADOR, *supra* note 35, at 30 (“[T]he writ of habeas corpus was accepted as a part of the fundamental rights of Englishmen to which the colonists laid claim.”); Carpenter, *supra* note 35, at 26 (“[T]he rights of the colonists as

The reception of common law habeas corpus into the colony was also effected by the 1732 Charter for establishing the Georgia colony. Under that Charter, persons born in the colony, together with their posterity, were entitled to all the rights of Englishmen.⁴² Unquestionably, these liberties would have included the right to the common law writ of habeas corpus, a basic right of Englishmen.⁴³

Although there were no reported habeas corpus proceedings in the Georgia colony, published colonial records demonstrate that as early as 1743, common law writs of habeas corpus could be issued in the colony.⁴⁴ Since Georgia's colonial legislature never enacted

regards the writ of habeas corpus rested upon the common law . . ."); Collings, *supra* note 30, at 338 ("The right to the use of the writ was always claimed by the American colonists."); Wilkes, *supra* note 35, at 331 (stating that the basic common law rights of Englishmen claimed by American colonists to be received into the colonies included due process of law, trial by jury, and habeas corpus).

⁴¹ 1 WILKES, *supra* note 35, at 122.

The actual landing site of Oglethorpe and his fellow settlers was "at the foot of Yamacraw Bluff seventeen miles up the Savannah [River] from its mouth." KENNETH COLEMAN, *COLONIAL GEORGIA: A HISTORY* 25 (1976). The site, in what is now the city of Savannah in Chatham County, is designated by a metal historical marker. *GEORGIA HISTORICAL MARKERS* 69 (2d ed. 1976). The marker, at Bay and Bull streets, is titled "Landing of Oglethorpe and the Colonists," and states in part: "James Edward Oglethorpe, the founder of Georgia, landed with the original colonists, about 114 in number, at the foot of this bluff on February 1 (February 12, new style), 1733." *Id.* A color photograph of this historical marker may be found at *Oglethorpe Landing State Historical Marker*, GEORGIAINFO, <http://georgiainfo.galileo.usg.edu/gahistmarkers/Oglethorpelandinghistmarker.htm> (last visited Jan. 30, 2011).

⁴² The Georgia Charter of 1732 provided in part that "all and every the persons which shall happen to be born within the said province, and every of their children and posterity, shall have and enjoy all liberties . . . of free denizens and natural born subjects . . . abiding and born within this our kingdom of Great Britain . . ." 1 *THE COLONIAL RECORDS OF THE STATE OF GEORGIA* 21 (Allen D. Candler ed., 1904).

All the royal charters for settling colonies in North America contained, like the Georgia Charter, a clause declaring that the rights of English subjects extended to the posterity of the settlers. MCPHERSON, *supra* note 39, at 209. These clauses were one of the ways in which "English liberties were transmitted to and received in the colonies . . ." *Id.* at 208.

⁴³ See *SOURCES OF OUR LIBERTIES*, *supra* note 40, at 194 (stating that the writ of habeas corpus was regarded by colonists as one of the individual rights guaranteed by the colonial charters); see also Wilkes, *supra* note 35, at 328 (stating that, in guaranteeing colonial settlers rights of Englishmen, colonial charters (including Georgia's) would have secured the writ of habeas corpus).

⁴⁴ On July 14, 1743, the Board of Trade and Plantations, the governing council for the American colonies, sent a letter to the Trustees of Georgia, inquiring about one William

a statute abolishing common law habeas corpus, the common law writ was in effect throughout the colonial era. There can be no question, therefore, that the common law writ of habeas corpus was available in colonial Georgia, as indeed it was in all the Thirteen Colonies in North America.⁴⁵

Sterling, a “Military Officer . . . detain’d and imprison’d in the Province of Georgia.” 1 THE COLONIAL RECORDS OF THE STATE OF GEORGIA, *supra* note 42, at 423. In response, on July 19, 1743, the Trustees sent a letter to William Stephens, President of the colony, ordering him and his assistants to look into the imprisonment of Sterling, and directing that if he is confin’d by Virtue of any Process issuing out of Any of the Courts of Justice in the Province for any Cause cognizable in those Courts, [t]he particular Court, where such Cause ought to be hired [sic], do proceed forthwith to hear and determine the same, [a]nd if he is kept in confinement in the said Province by force, that they do take care that the proper Magistrates do grant him an Habeas Corpus, and proceed thereupon according to Law.

Id. In a letter dated November 25, 1743, Stephens replied to the Trustees, informing them that Sterling had been detained on account of “an Action of Debt owing to the Trust [of Georgia],” and that Sterling had been promptly released on bail but died soon thereafter. 24 THE COLONIAL RECORDS OF THE STATE OF GEORGIA 182, 184–85 (photo. reprint 1970) (1910); *see also* 1 THE COLONIAL RECORDS OF THE STATE OF GEORGIA, *supra* note 42, at 451–52 (showing that the Trustees of Georgia on April 7, 1744 took into consideration the proceedings in the affair of William Sterling and directed that a copy of those proceedings be delivered to Oglethorpe); JAMES ROSS MCCAIN, GEORGIA AS A PROPRIETARY PROVINCE 206 (1917) (describing the matter of Sterling’s imprisonment as an example of how the Trustees “superintended even the smallest details of judicial business [in the colony]” by even “ordering the release of individual prisoners on habeas corpus proceedings”). Since Sterling was imprisoned under civil process, the Trustees’ letter of July 19, 1743 had to have involved issuance of a writ of habeas corpus under the common law rather than under the 1679 Habeas Corpus Act (which was restricted to pretrial confinement on criminal charges). *See Wilkes, supra* note 35, at 334 (“[T]he letter from the Trustees must have ordered the issuance of the common law writ . . .”).

⁴⁵ *See* DUKER, *supra* note 30, at 115 (“[T]he common-law writ of habeas corpus was in operation in all thirteen of the British colonies that rebelled in 1776.”); MCPHERSON, *supra* note 39, at 219 (“There is no reason to doubt that power to issue habeas corpus was transmitted to colonial courts, or at least to those that were invested with the jurisdiction of the common law courts at Westminster.”); Carpenter, *supra* note 35, at 20, 26 (stating “our forefathers brought the common law writ of habeas corpus to this Country” and “the rights of the colonists as regards the writ of habeas corpus rested upon the common law with the exception of South Carolina”); Clarke, *supra* note 32, at 391 (“All of the English colonies in North America enjoyed the benefits of the common law writ of habeas corpus.”); Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 672 (2008) (“The common law version of habeas corpus . . . [was] available in the American colonies. The most detailed study of habeas corpus in colonial British America has found evidence of judges issuing the writ on behalf of persons detained in custody in every one of the thirteen original colonies.”); Sholar, *supra*

C. ENGLISH HABEAS ACT IN THE COLONY

Georgia was one of at least four—and possibly nine—of the Thirteen Colonies where the English Habeas Corpus Act of 1679⁴⁶ was in operation.⁴⁷ In 1754, when Georgia became a royal colony, King George II issued Royal Instructions to the new colonial governor making the 1679 English Habeas Corpus Act applicable to Georgia.⁴⁸ But the reception of the 1679 English Habeas Act

note 34, at 671 (“By 1776, the common law Writ [of habeas corpus] was available in all thirteen colonies . . .”); Wilkes, *supra* note 35, at 326–34 (examining common law habeas corpus in colonial Georgia); Colin William Masters, Note, *On Proper Role of Federal Habeas Corpus in the War on Terrorism: An Argument from History*, 34 J. LEGIS. 190, 195 (2008) (“[I]n 1776, habeas corpus was available in various forms in all thirteen original colonies.”); *see also* Rasul v. Bush, 542 U.S. 466, 473–74 (2004) (“[H]abeas corpus became ‘an integral part of our common-law heritage’ by the time the Colonies achieved independence . . .” (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973))).

⁴⁶ 1679, 31 Car. 2, c. 2 (Eng.).

⁴⁷ During colonial times the 1679 English Habeas Corpus Act was, at one time or another, definitely operative in Georgia, North Carolina, South Carolina, and Virginia. DUKER, *supra* note 30, at 100–06; 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS 1670–1776, at 334–36 (Leonard Woods Labaree ed., 1935); 1 WILKES, *supra* note 35, at 123–24; Clarke, *supra* note 32, at 391; *see also* HURD, *supra* note 14, at 137 (stating that 1679 Act was adopted in Georgia and South Carolina before the American Revolution); Carpenter, *supra* note 35, at 24–25 (noting that in 1710 Alexander Spotswood, Virginia’s colonial governor, issued a proclamation extending the 1679 English Habeas Corpus Act to Virginia pursuant to Royal Instructions); Sholar, *supra* note 34, at 671 (stating that the 1679 Act was applied regularly in the Carolinas and Virginia). The 1679 Habeas Act additionally may have sometimes been in effect at various times in the colonies of Massachusetts, New Hampshire, New Jersey, New York, and Pennsylvania. 1 WILKES, *supra* note 35, at 123–24; *see also* Sholar, *supra* note 34, at 671 (stating that in New York colony, the 1679 Act “was applied regularly, either de facto or de jure, from very early on”).

⁴⁸ 7 THE COLONIAL RECORDS OF THE STATE OF GEORGIA, *supra* note 42, at 28–31; 3 FOUNDATIONS OF COLONIAL AMERICA 2042–43 (W. Keith Kavenagh ed., 1973); 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS, *supra* note 47, at 334–36.

At a meeting of John Reynolds, the new royal governor of the Georgia colony, and the colony’s newly sworn-in Council, held on November 8, 1754, the Royal Instructions were read aloud, and the twelve articles of the Royal Instructions relating to habeas corpus were entered in the minutes of the Council. 7 THE COLONIAL RECORDS OF THE STATE OF GEORGIA, *supra* note 42, at 28–31.

The twelve habeas corpus articles of the Royal Instructions for Georgia, it should be noted, reproduced the substance (but not always the exact language) of the 1679 Act. Like the 1679 Act, the habeas articles of the Royal Instructions were limited to imprisonment on criminal charges and included protections for the right to bail as well as the right to a speedy trial. *Id.*

Royal Instructions on habeas corpus similar to those for Georgia had previously been issued to the Royal Governor of Virginia in 1707, and to the Royal Governors of North and

into Georgia may be pushed back even further, to the date the colony was first settled. Like common law habeas corpus, the 1679 Act became effective in Georgia on February 12, 1733, the day Oglethorpe stepped onto Georgia soil for the first time as a settler.⁴⁹ For it was then another rule of English public law that an Act of Parliament enacted before the founding of a colony automatically applied to the colony unless it was unsuitable there.⁵⁰ Under this principle, the 1679 Habeas Act became part of the law of Georgia the moment the colony was settled, fifty-four years after passage of that statute.⁵¹

The 1679 English Habeas Corpus Act was also received into the colony under the provision of the Georgia Charter of 1732 guaranteeing all persons born in the colony, and their descendants, the liberties of Englishmen,⁵² for it can scarcely be doubted that the 1679 Habeas Act was then a basic right of Englishmen. Georgia's colonial legislature never having repealed the 1679 Act, it continued in effect throughout the colonial era. In

South Carolina in 1730. DUKER, *supra* note 30, at 103; *see also* Carpenter, *supra* note 35, at 24–25 (setting forth the text of the 1710 proclamation of Virginia's colonial governor, Alexander Spotswood, extending the 1679 English Habeas Corpus Act to Virginia pursuant to Royal Instructions).

⁴⁹ According to a leading nineteenth century authority, the 1679 English Habeas Corpus Act had been available in Georgia "from the time that general [sic] Oglethorpe first set his feet upon the soil of Georgia." WILLIAM SCHLEY, *A DIGEST OF THE ENGLISH STATUTES OF FORCE IN THE STATE OF GEORGIA*, at xvii (Philadelphia, J. Maxwell 1826). Schley later served as governor of Georgia from 1835 to 1837. JAMES F. COOK, *GOVERNORS OF GEORGIA* 125 (1979).

⁵⁰ 1 WILKES, *supra* note 35, at 123; St. George Leakin Sioussat, *The Theory of the Extension of English Statutes to the Plantations*, in 1 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 416, 420–21 (1907); Carpenter, *supra* note 35, at 19–20; Wilkes, *supra* note 35, at 326–30; *see also* SCHLEY, *supra* note 49, at xxiii ("[T]he colonists of America brought with them from England as their birthright all those laws of the mother country, which were capable of being so transferred, up to the period of the settlement of Georgia, . . . therefore all the English statutes of a general nature must be considered to have been in force anterior to the [American R]evolution." (emphasis omitted)).

⁵¹ *See* SCHLEY, *supra* note 49, at 262–81 (including the 1679 English Habeas Corpus Act as a statute which had been in effect in Georgia since the day Oglethorpe arrived in Georgia); Wilkes, *supra* note 35, at 335 (stating that because the Georgia colony was founded after 1679, the English Habeas Corpus Act applied to Georgia from the beginning of the colony).

⁵² *See supra* note 42 (quoting language in the 1732 Charter securing the rights of Englishmen to descendants of settlers).

colonial Georgia, therefore, “both the common-law writ of habeas corpus and its statutory safeguards extended.”⁵³

III. HABEAS CORPUS IN ANTEBELLUM GEORGIA, 1777–1860

A. COMMON LAW HABEAS

During the Antebellum era, the common law writ of habeas corpus was, as it had been during the colonial period, a recognized right in Georgia.⁵⁴ Having been part of the law of the colony,⁵⁵ common law habeas corpus was statutorily mandated in the state of Georgia during the Antebellum period by the provision of the state’s Adopting Act of 1784⁵⁶ declaring that the English common law would be in effect unless modified by the state legislature.⁵⁷

⁵³ DUKER, *supra* note 30, at 106.

Habeas corpus was so entrenched in the colony of Georgia that statutes enacted by the colonial legislature regulated fees that public officials could charge in connection with habeas corpus proceedings. *See, e.g.*, Act of Sept. 29, 1773, in 19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA, pt. 1, *supra* note 44, at 359 (fixing maximum fees chargeable by judges, court clerks, and provost marshal in regard to issuing, litigating, and executing habeas corpus writs).

⁵⁴ *See* Wilkes, *supra* note 35, at 335 (stating that from 1777 until 1863, common law habeas corpus remained law in Georgia).

⁵⁵ *See supra* notes 41–45 and accompanying text.

⁵⁶ Act of Feb. 25, 1784 § 1, in A DIGEST OF THE LAWS OF THE STATE OF GEORGIA 290 (photo. reprint 1981) (Robert Watkins & George Watkins eds., Philadelphia, R. Aiken 1800), provided in part:

That all and singular the several acts, clauses, and parts of acts that were in force, and binding on the inhabitants of the said province [of Georgia], on the fourteenth day of May in the year of our Lord one thousand seven hundred and seventy-six, so far as they are not contrary to the constitution, laws and form of government now established in this State, shall be, and are hereby declared to be in full force, virtue and effect, and binding on the inhabitants of this State . . . until the same shall be repealed, amended or otherwise altered by the legislature. And also the common laws of England, and such of the statute laws as were usually in force in the said province, except as before excepted.

See also Head v. Head, 2 Ga. 191, 202 (1847) (stating that under the Adopting Act, “the common law of England, and such of the statute laws as were usually in force in the Province of Georgia in 1776, so far as they were not contrary to the constitution, laws, and form of government of the State, as established in 1784, are declared to be in full force, virtue and effect, and binding on the inhabitants of the State until repealed, amended, or otherwise altered by the Legislature”).

In the Antebellum era, there were nine reported cases in the Georgia superior courts involving the common law writ of habeas corpus,⁵⁸ and there were seven additional reported cases involving common law habeas corpus decided by the Georgia Supreme Court.⁵⁹ The common law writ of habeas corpus remained available in Georgia throughout the Antebellum era.⁶⁰

B. ENGLISH HABEAS ACT

Having been part of the law of the colony of Georgia,⁶¹ the English Habeas Corpus Act of 1679⁶² remained in effect in Georgia after statehood, at first under the Rules and Regulations of 1776,⁶³

Georgia was not the only state to enact a reception statute such as the Adopting Act. “Apart from . . . [the] exception [of Connecticut], all of the original states of the union adopted English law reception statutes in one form or another either at or within a few years of declaring independence.” MCPHERSON, *supra* note 39, at 287. For a survey of reception statutes enacted by the original thirteen states and by other states, see Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 798–805 (1951).

⁵⁷ The Adopting Act of 1784 was not the first Georgia law to adopt English statutory and common law for the state. Eight years previously, Georgia’s temporary state constitution, the Rules and Regulations of 1776, which “became operational on 1 May 1776,” A HISTORY OF GEORGIA 74 (Kenneth Coleman ed., 1977), had provided that “all the laws, whether common or statute . . . which have formerly been acknowledged to be of force in this Province . . . shall be of full force, validity, and effect until otherwise ordered.” RONALD G. KILLION & CHARLES T. WALLER, *GEORGIA AND THE REVOLUTION* 173 (1975).

⁵⁸ These nine cases, decided between 1805 and 1842, are cited *infra* notes 87–92.

⁵⁹ These seven cases, decided between 1846 and 1860, are cited *infra* notes 96–99.

⁶⁰ The common law writ of habeas corpus was not abolished in Georgia until January 1, 1863, when the Georgia Code of 1861 took effect. The 1861 Code included a comprehensive habeas corpus code consisting of twenty-three consecutive sections. GA. CODE §§ 3909–3931 (1861). These sections constituted Chapter 1 (“Proceedings on Application for *Habeas Corpus*”) of Title 16 (“Proceedings on Application for *Habeas Corpus*”) of Part 3 (“The Code of Practice”) of the 1861 Code. *Id.* These sections, together with other habeas corpus statutory provisions sprinkled throughout other portions of the 1861 Code, governed all habeas corpus proceedings in Georgia, replacing the common law writ of habeas corpus and the 1679 English Habeas Act in the state.

⁶¹ See *supra* notes 47–53 and accompanying text.

⁶² 1679, 31 Car. 2, c. 2 (Eng.).

⁶³ See *supra* note 57 (quoting language in the Rules and Regulations stating that statutory law formerly acknowledged to be in force in Georgia would be of full force and validity until otherwise ordered).

and later under the portion of the state's Adopting Act of 1784⁶⁴ which declared that statutes which had been in force in the colony would continue to be binding in Georgia.⁶⁵

Antebellum Georgia case law confirms the existence of the 1679 Habeas Corpus Act in the state in pre-Civil War Georgia. In a reported 1805 case, a Georgia superior court granted pretrial habeas relief to an imprisoned criminal defendant based on a violation of the speedy trial provisions of the 1679 Habeas Act,⁶⁶ and two other reported superior court habeas cases, one in 1842⁶⁷ and the other in 1808,⁶⁸ must have arisen under the 1679 Act because they involved pretrial imprisonment on criminal charges. Between 1850 and 1859 the Georgia Supreme Court decided three habeas cases which, because they were habeas attacks on pretrial criminal confinement, also must have been instituted under the

⁶⁴ See *supra* note 56 (quoting language in Adopting Act providing that statutes in force in colony of Georgia would, unless repealed or amended, continue in effect in State of Georgia).

⁶⁵ See *Wilkes*, *supra* note 35, at 335 (stating that from 1777 until 1863 the statutory form of the writ of habeas corpus remained law in Georgia).

It is noteworthy that the English Habeas Corpus Act of 1679 was included in its entirety as an English statute still in force in Antebellum Georgia in three contemporary digests of Georgia law: A DIGEST OF THE STATUTE LAWS OF THE STATE OF GEORGIA 1131-34 (T.R.R. Cobb ed., Athens, Christy, Kelsea & Burke 1851); A CODIFICATION OF THE STATUTE LAW OF GEORGIA 300-08 (Augusta, Charles E. Grenville, 2d ed. 1848); and A DIGEST OF THE LAWS OF THE STATE OF GEORGIA, *supra* note 56, at 18-24.

Interestingly, a fourth digest of Georgia laws published during this era, which also reproduces the 1679 English Habeas Act in full, contains the first scholarly writing on the writ of habeas corpus by a Georgian. This learned essay, "Habeas Corpus," by Oliver H. Prince, appeared in his A DIGEST OF THE LAWS OF THE STATE OF GEORGIA 566-71 (Oliver H. Prince ed., Milledgeville, Grantland & Orme 1822), and reappeared in A DIGEST OF THE LAWS OF THE STATE OF GEORGIA 919-23 (Oliver H. Prince ed., Athens, published by the Author, 2d ed. 1837). Prince's essay is limited to the writ in England and does not discuss habeas corpus in Georgia.

⁶⁶ *State v. Marco De Las Maurignos*, 1 Ga. Ann. (T.U.P. Charlton 24) 12, 12-13 (Super. Ct. Chatham County 1805) (discharging from imprisonment habeas petitioners, indicted for robbery but not tried during the second term of court following their commitment, under the speedy trial provisions of the English Habeas Corpus Act of 1679).

⁶⁷ *State v. Bandy*, 1 Ga. Ann. 602, 602-03 (2 Ga. Dec. 40) (Super. Ct. Chatham County 1842) (granting pretrial habeas relief to a person charged with theft offense because the warrant of commitment was manifestly illegal).

⁶⁸ *State v. Asselin*, 1 Ga. Ann. (T.U.P. Charlton 184) 66, 66-68 (Super. Ct. Liberty County 1808) (admitting to pretrial bail a habeas petitioner arrested under a warrant charging a capital crime).

1679 Act.⁶⁹ In another case, decided in 1847, that court referred to “British statutes, such as the . . . *habeas corpus* Act[] [sic], [which] have been adopted by our own legislation.”⁷⁰

The third section of the 1679 English Habeas Corpus Act required that habeas writs issued pursuant to the Act be marked “*Per statutum tricesimo primo Caroli secundi Regis* [By the authority of the thirty-first of King Charles the Second],”⁷¹ and during the Antebellum era when pretrial confinement on criminal charges was challenged by habeas corpus, “it was customary to endorse these words on the writ when issued in Georgia.”⁷²

During the early years of statehood—from 1777 to 1789—the 1679 Act was not only a Georgia statutory right, secured by the Adopting Act, but also a Georgia constitutional right.⁷³ Like

⁶⁹ *Bethune v. Hughes*, 28 Ga. 560, 560, 565 (1859) (granting habeas relief to a criminal defendant detained under a warrant charging violation of a municipal ordinance); *Lancton v. State*, 14 Ga. 426, 426, 428 (1854) (denying habeas relief to a criminal defendant awaiting retrial following a mistrial); *Brady v. Davis*, 9 Ga. 73, 73–74, 77 (1850) (denying habeas relief to a criminal defendant charged with peddling without a license).

⁷⁰ *Ezekiel v. Dixon*, 3 Ga. 146, 152 (1847).

That the English Habeas Corpus Act was in effect in Antebellum Georgia is further demonstrated by the court’s decision ten years later in *McKenzie, Cadow & Co. v. A.N. Hargrove & Co.*, 22 Ga. 119, 121 (1857), where it held: “The *habeas corpus* Act, does not extend to persons confined under civil process.” The context of this sentence of the court’s opinion makes it certain that the habeas statute referred to is the 1679 English Habeas Act and that the court believed that the 1679 Act still governed habeas proceedings in the Georgia courts.

⁷¹ 1679, 31 Car. 2, c. 2, § 3 (Eng.).

⁷² L.F. Garrard, *Habeas Corpus*, in REPORT OF THE FIRST ANNUAL MEETING OF THE GEORGIA BAR ASSOCIATION 119, 120 (Macon, J.W. Burke & Co. 1884).

⁷³ GA. CONST. of 1777, art. LX provided: “The principles of the *habeas-corporis* act shall be a part of this constitution.” See also *State v. Marco De Las Maurignos*, 1 Ga. Ann. (T.U.P. Charlton 24) 12, 13 (Super. Ct. Chatham County 1805) (stating that the 1679 English Habeas Act is adopted by Georgia state constitution and laws).

The Georgia Constitution of 1777 was the only state constitution in American history to make the 1679 Act a constitutional right. No other state constitution mentions the 1679 Act.

The Georgia Constitution of 1777 was the first state constitution to guarantee the writ of habeas corpus by name, but arguably not the first state to constitutionally protect habeas corpus. The North Carolina Constitution of 1776 guaranteed that “every freeman, restrained of his liberty, is entitled to a remedy, to inquire into the lawfulness thereof, and to remove the same, if unlawful.” N.C. CONST. of 1776, DECLARATION OF RIGHTS § 13. Although the North Carolina provision undoubtedly referenced habeas corpus, it never mentioned the writ by name.

common law habeas corpus, the English Habeas Act of 1679 remained in effect in Georgia until the end of the Antebellum era.⁷⁴

Thus, as they had been in colonial times, both common law habeas corpus and the English Habeas Corpus Act were in effect in Antebellum Georgia.

C. LEGISLATION

Apart from statutory provisions which either conferred habeas jurisdiction on specified Georgia state judges⁷⁵ or set the fees that

The Georgia Constitution of 1789 contained a habeas corpus clause which provided: "All persons shall be entitled to the benefit of the writ of *habeas corpus*." GA. CONST. of 1789, art. IV, § 4. The Georgia Constitutions of 1798 and 1861 each had a habeas corpus clause. GA. CONST. of 1798, art. 4, § 9 ("The writ of *habeas corpus* shall not be suspended, unless when in case of rebellion, or invasion, the public safety may require it."); GA. CONST. of 1861, art. 1, § 5 (same).

Thus, every Georgia state constitution in effect during the period covered by this Article included a provision protecting the writ of habeas corpus. At all times from 1777 to 1865, habeas corpus was a Georgia constitutional right.

⁷⁴ Both the 1679 Habeas Act and the common law writ of habeas corpus were abrogated in Georgia on January 1, 1863, when they were supplanted by the habeas corpus provisions of the Georgia Code of 1861, which thereupon exclusively governed practice and procedure in habeas corpus proceedings. *See supra* note 60.

⁷⁵ *See, e.g.*, Act of Dec. 17, 1859, § 1, 1859 Ga. Laws 55 ("Judges of the City Court of Savannah, shall have power to issue writs of Habeas Corpus . . ."); Act of Feb. 15, 1856, § 5, 1856 Ga. Laws 246-47 (providing that the judge of the City Court of Augusta shall have power to issue writs of habeas corpus whether the judge of the superior court is present or absent); Act of Dec. 23, 1833, § 6, 1833 Ga. Laws 58 (providing that the judge of the Court of Common Pleas of the City of Macon shall, in absence of the superior court judge, "have concurrent jurisdiction with the justices of the inferior court in all matters of Habeas Corpus"); Act of Dec. 21, 1829, § 2, 1829 Ga. Laws 34 (providing that the judge of the Court of Common Pleas of the City of Augusta, in the absence of the judge of the superior court, shall have concurrent jurisdiction with the justices of the inferior court in all matters of habeas corpus); Act of Dec. 20, 1823, § 7, *in A DIGEST OF THE STATUTE LAWS OF THE STATE OF GEORGIA*, *supra* note 65, at 544 ("[I]t shall not be lawful for any one or more of the Justices of the Inferior Courts . . . to discharge or admit to bail any person under a writ of habeas corpus, unless a majority of the Justices of said Court shall concur in opinion."); Act of Feb. 16, 1799, § 7, *in A DIGEST OF THE LAWS OF THE STATE OF GEORGIA*, *supra* note 56, at 691-92 (providing that judges of the superior courts shall have power to issue writs of habeas corpus, and that in the absence of judges of the superior court, justices of the inferior court shall have power to issue writs of habeas corpus, provided that "in all cases of capital nature where a writ of *habeas corpus* shall be issued by a justice of the inferior court, it shall be necessary that one or more of the justices of such inferior court shall associate with the justice granting the same, at the return thereof, and a majority of such

could be charged by court officials or law enforcement officers in regard to the issuance of writs of habeas corpus,⁷⁶ in Antebellum Georgia the state legislature enacted only four statutes regulating habeas corpus. The first, in 1808, prohibited, in a habeas corpus proceeding, the release or admission to bail of any criminal suspect detained under a defective warrant of commitment if the defect was only technical.⁷⁷ The second, enacted in 1845, abolished the common law rule vesting custody of minor children always in the father and permitted courts in habeas corpus cases to award custody to the mother if that was in the best interests of the

justices shall concur in opinion on any decision or order aforesaid; And that it shall be the duty of such justices to attend on one day's notice being given of the time and place of the return of such writ"); Act of Feb. 9, 1797, § 65, *in id.* at 638 (providing that justices of the peace "may, in the absence of judges of the superior court, grant a writ of *habeas corpus*, . . . but in all cases of a capital nature it shall be necessary that one or more justices of the said county court do associate with such justice granting the writ of *habeas corpus* at the return thereof, and that a majority of said justices do concur in opinion"); Act of Dec. 18, 1792, § 26, *in id.* at 486 (providing that justices of the inferior court "may, in the absence of the judges of the superior court, grant a writ of *habeas corpus*, . . . but in all cases of a capital nature, it shall be necessary that one or more justices of the said county court do associate with such justice granting the writ of *habeas corpus* at the return thereof, and that a majority of the said justices do concur in opinion"); Act of Dec. 9, 1790, § 1, *in id.* at 422 (providing that justices of the inferior court "may, in the absence of the judges of the superior court, grant a writ of *habeas corpus*, . . . but, in all cases of a capital nature, it shall be necessary that two other justices of the said county court do associate with the justice granting such writ of *habeas corpus*, at the return thereof, and that two of the three do concur in opinion before any prisoner shall be discharged or admitted to bail").

⁷⁶ See, e.g., Act of Dec. 18, 1792, in A DIGEST OF THE LAWS OF THE STATE OF GEORGIA, *supra* note 56, at 471–80 (fixing maximum fees chargeable by court clerks, sheriffs, and jailers in regard to issuing, litigating, and executing habeas corpus writs); Act of Feb. 25, 1784, in 19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA, pt. 2, *supra* note 42, at 312 (fixing maximum fees chargeable by judges, court clerks, and sheriffs in regard to issuing, litigating, and executing habeas corpus writs).

It might be mentioned here that under a fee schedule adopted by the Richmond County bar association on July 2, 1852, the standard fee lawyers charged their clients for "Habeas Corpus" was ten dollars. WARREN GRICE, 1 THE GEORGIA BENCH AND BAR 399 (1931).

⁷⁷ The 1808 statute stated in part that:

[W]hen a felon or other person, charged with the commission of a crime, shall have been committed to jail, and shall be brought up before a Judge of the Superior Court, or Justice or Justices of the Inferior Court, by writ of *habeas corpus*, he, she, or they, shall not be admitted to bail, or discharged from prison, merely by reason of such defect of legal precision, or want of technical form in the [warrant of commitment] . . .

Act of Dec. 22, 1808, in A DIGEST OF THE STATUTE LAWS OF THE STATE OF GEORGIA, *supra* note 65, at 856.

child.⁷⁸ The third statute, enacted two years later, in 1847, provided that a defendant imprisoned for debt could be released on

⁷⁸ The 1845 statute provided in part that:

[I]n all cases where a controversy may arise, on the return to a habeas corpus, in relation to the custody of the persons of minor children, the common law rule vesting said custody always in the father, shall be abolished; and it shall be within the discretion of the Judge . . . to award the custody of said minor or minors, either in the father or mother, as may appear most beneficial to the interest of said children.

Act of Dec. 27, 1845, § 2, 1845 Ga. Laws 43.

Traditionally, a habeas corpus proceeding was an appropriate procedure for deciding issues of child custody in English courts and in courts in the United States. *See generally* Lehman v. Lycoming Cnty. Children's Servs. Agency, 458 U.S. 502, 514 (1982) ("[H]abeas has been used in child-custody cases in England and in many of the States."); Jones v. Cunningham, 371 U.S. 236, 240 (1963) ("[I]n the state courts, as in England, habeas corpus has been widely used by parents disputing over which is the fit and proper person to have custody of their child . . ." (footnote omitted)); Wales v. Whitney, 114 U.S. 564, 571 (1885) ("[C]hildren withheld from the proper parent or guardian . . . may all become proper subjects of relief by the writ of *habeas corpus*"); Roberts v. Walker, 18 Ga. 5, 6–7 (1855) (citing English case law holding that habeas corpus may be used to determine the proper custody of children); WILLIAM S. CHURCH, A TREATISE OF THE WRIT OF HABEAS CORPUS 555–57 (San Francisco, A.L. Bancroft & Co. 1884) (discussing the use of habeas corpus in child custody cases and explaining that improper detention of a child from a person entitled to its possession is sufficient ground to maintain the writ of habeas corpus); HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 792 (2d ed. 1988) (stating that in the eighteenth century habeas corpus was first put to the use of releasing infants from the custody of private persons and that the use of habeas corpus in custody matters became a part of American practice and by the late nineteenth century had become well established); LEWIS HOCHHEIMER, THE LAW RELATING TO THE CUSTODY OF INFANTS 36–75 (Baltimore, Harold B. Scrimger, 3d ed. 1899) (surveying English and American case law on use of habeas corpus—usually the only appropriate remedy—to settle questions of custody of infants); ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS 449–548 (Albany, W.C. Little & Co., 2d ed. 1876) (examining the use of habeas corpus petitions filed by a husband, parent, or guardian for the purpose of inquiring into allegedly illegal restraint of a child or ward); SHARPE, *supra* note 32, at 174 ("Habeas corpus has long been used to gain the custody of infants."); RONALD P. SOKOL, FEDERAL HABEAS CORPUS 73 (1969) (stating that for over 150 years habeas corpus has been available to a parent to obtain the release of a child being illegally detained, and that no showing of force or restraint was necessary); 2 THOMAS CARL SPELLING, A TREATISE ON INJUNCTIONS AND OTHER EXTRAORDINARY REMEDIES 1070–77 (2d ed. 1901) (summarizing case law on the use of habeas corpus to determine the right of an adult to custody of a child); Gideon D. Bantz, *Habeas Corpus—Custody of Infant*, 15 CENT. L.J. 281, 282 (1882) (examining English and American case law on the use of habeas corpus to inquire into the restraint of a child, and noting that the detention of the child need not be forcible and that the writ may be maintained by one who is entitled to custody, without the consent and even against the express wishes of the child); Dallin H. Oaks, *Habeas Corpus in the States—1776–1865*, 32 U. CHI. L. REV. 243, 270–74 (1965) (examining use in state courts of the writ

a writ of habeas corpus if the plaintiff did not pay the defendant's jail costs at the end of each week.⁷⁹ The fourth, enacted in 1852, required criminal defendants petitioning for a writ of habeas corpus to give the prosecutor timely advance notice of the time and place of the court hearing on the writ.⁸⁰

D. JURISDICTION

In Antebellum Georgia, power to issue writs of habeas corpus was vested under statutory law (1) in the judges of the superior courts,⁸¹ (2) in the absence of the judges of the superior court, the

of habeas corpus to resolve issues of child custody). See generally J.F. Riley, Annotation, *Child Custody Provisions of Divorce or Separation Decree as Subject to Modification on Habeas Corpus*, 4 A.L.R.3d 1277, 1283 (1965) (stating that habeas corpus is the proper remedy for determining controversies concerning the right to custody of an infant, and this is true even if child is not held in actual physical restraint but remains with the respondent out of natural inclination); Paul J. Buser, *Habeas Corpus Litigation in Child Custody Matters: An Historical Mine Field*, 11 J. AM. ACAD. MATRIM. LAW. 1 (1993) (exploring the declining use of the writ of habeas corpus in federal and state courts to resolve child custody disputes); W.L. Hand, *Habeas Corpus Proceedings for the Release of Infants*, 56 CENT. L.J. 385 (1903) (surveying American case law when habeas corpus is invoked on behalf of infants who are the subject of controversy between conflicting claimants to their custody).

⁷⁹ The 1847 statute provided in part that:

[I]f any person or persons be imprisoned in the common jail of any county in this State, on a mesne or final process for debt, if the plaintiff in suit or execution, his agent or attorney, does not pay up, at the end of each and every week, the jail fees which have accrued, then and in that case the Inferior Court may, and they are hereby authorized to discharge the defendant or defendants by writ of habeas corpus.

Act of Dec. 29, 1847, § 2, 1847 Ga. Laws 196–97.

In *Chamblee v. Holcomb*, the court held that a sheriff could not be held civilly liable for having complied with a court order discharging a debtor in a habeas proceeding instituted pursuant to the 1847 statute, even if the discharge order was erroneous because the jail fees had in fact been paid in full before the discharge order was rendered. 7 Ga. 419, 420–21 (1849).

⁸⁰ The 1852 statute provided in part that:

[N]o Court shall sit upon and determine any application for a writ of *habeas corpus ad subjiciendum*, in any case, unless the applicant for said writ, or his attorney at law, shall have previously given timely notice to the prosecutor, or his attorney, of the time and place of the meeting of the Court to determine upon said application

Act of Jan. 22, 1852, § 1, 1851–52 Ga. Laws 236.

⁸¹ See, e.g., Act of Feb. 16, 1799, § 7, in A DIGEST OF THE LAWS OF THE STATE OF GEORGIA, *supra* note 56, at 691 (granting judges of the superior courts the power to issue writs of habeas corpus).

justices of the inferior courts,⁸² and (3) in some counties, certain other judges.⁸³

Superior courts were created by GA. CONST. of 1777, art. XXXVI. See ERWIN C. SURRENCY, *THE CREATION OF A JUDICIAL SYSTEM: THE HISTORY OF GEORGIA COURTS, 1733 TO PRESENT* 62 (2001) (“The Superior Court was established and given this title by the Constitution of 1777.”).

⁸² See, e.g., Act of Dec. 20, 1823, in *A DIGEST OF THE STATUTE LAWS OF THE STATE OF GEORGIA*, *supra* note 65, at 544 (“[I]t shall not be lawful for any one or more of the Justices of the Inferior Courts . . . to discharge or admit to bail any person under writ of habeas corpus, unless a majority of the Justices of said Court shall concur in opinion.”); Act of Feb. 16, 1799, § 7, in *DIGEST OF THE LAWS OF THE STATE OF GEORGIA*, *supra* note 56, at 691–92 (“[J]ustices of the inferior courts . . . in the absence of the judges of the superior courts, shall have power to issue writs of *habeas corpus* . . . *Provided*, That in all cases of a capital nature where writ of *habeas corpus* shall be issued by a justice of the inferior court, it shall be necessary that one or more of the justices of such inferior court shall associate with the justice granting the same, at the return thereof, and a majority of such justices shall concur in opinion on any decision or order aforesaid; And it shall be the duty of such justices to attend on one day’s notice being given of the time and place of the return of such writ.”); Act of Dec. 18, 1792, § 26, *in id.* at 486 (“[J]ustices of the inferior court . . . may, in the absence of the judges of the superior court, grant a writ of *habeas corpus* . . . but in all cases of a capital nature, it shall be necessary that one or more justices of the said county court do associate with such justice granting the writ of *habeas corpus* at the return thereof, and that majority of the said justices do concur in opinion.”); Act of Dec. 9, 1790, § 1, *in id.* at 422 (“[J]ustices of the inferior court . . . may, in the absence of judges of the superior court, grant a writ of *habeas corpus* . . . but, in all cases of a capital nature, it shall be necessary that two other justices of the said county court do associate with the justice granting such writ of *habeas corpus*, at the return thereof, and that two of the three do concur in opinion before any prisoner shall be discharged or admitted to bail.”).

Inferior courts, presided over by justices of peace, were first statutorily authorized in 1789. Act of Dec. 23, 1789, § 36, *in id.* at 396 (stating that court shall be held once every three months in every county, “[w]hich courts shall be called the inferior county courts, and shall be held and administered by the first five justices mentioned in the commission of the peace, or any three of them”); see also Act of Feb. 9, 1797, § 59, *in id.* at 636 (stating that in every county there shall be court which shall be held once every six months and shall be called inferior county courts, and that these courts “shall be held and administered by the first five justices named in the commission of the peace, or any three of them”); Act of Dec. 18, 1792, § 39, *in id.* at 489 (stating that in every county there shall be an inferior county court “held and administered by the first five justices mentioned in the commission of the peace, or any three of them”).

The habeas corpus decisions of the inferior courts were not reported and today are almost entirely forgotten. But it is established fact that one of these decisions is among the most memorable habeas adjudications in Georgia history. This was an 1818 habeas corpus proceeding in which three justices sitting in the inferior court of Baldwin County astoundingly released from imprisonment a Georgia militia officer, Obed Wright, who was in the custody of the U.S. Army and who had been arrested by order of none other than Andrew Jackson, then a U.S. Army general. The actual order of discharge from custody may be found in Warren Grice, *The Old Inferior Court*, 5 GA. B.J. 5, 13 (Aug. 1942).

E. APPELLATE REVIEW

During the Antebellum era in Georgia, habeas corpus decisions of judges of the superior courts and justices of the inferior courts were subject to appellate review. Final habeas judgments were, in the case of habeas petitions filed with justices of the inferior courts, reviewable in the superior courts via the writ of certiorari,⁸⁴ and (beginning in 1846), in the case of habeas

Immediately after quoting that order in full, the astonished Grice could not restrain himself from exclaiming: “Verily a scene for a Raphael! A prisoner arrested under the orders of Major General Andrew Jackson, of the army of the United States, set free by three Justices of the Inferior Court of Baldwin County, Georgia!” *Id.* For concise recitals of the events leading to and the circumstances surrounding this remarkable habeas decision, see DAVID S. HEIDLER & JEANNE T. HEIDLER, *OLD HICKORY’S WAR: ANDREW JACKSON AND THE QUEST FOR EMPIRE 162–69, 186–88* (1996); ROBERT V. REMINI, *ANDREW JACKSON & HIS INDIAN WARS 158–59* (2001); E. Merton Coulter, *The Chehaw Affair*, 49 GA. HIST. Q. 369, 369–86 (1965); see also MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, TRANSMITTING CORRESPONDENCE BETWEEN THE GOVERNOR OF GEORGIA AND MAJ. GEN. JACKSON ON THE SUBJECT OF THE ARREST OF CAPTAIN OBED WRIGHT (Dec. 14, 1818) (providing the text of Jackson’s arrest order, Wright’s habeas corpus petition, the writ of habeas corpus issued by one of the Baldwin county justices, and the return to the writ, filed by Major John D. Davis, Jackson’s assistant adjutant general, who personally brought Wright before the justices of the inferior court).

Inferior courts were abolished by GA. CONST. of 1868, art. V, § 14. For an historical overview of Georgia’s inferior courts from 1789 to 1868, see SURRENCY, *supra* note 81, at 83–93; Grice, *supra*, at 5–12.

⁸³ See, e.g., Act of Dec. 17, 1859, § 1, 1859 Ga. Laws 55 (“Judges of the City Court of Savannah, shall have power to issue writs of Habeas Corpus . . .”); Act of Feb. 15, 1856, § 5, 1855–56 Ga. Laws 246–47 (granting the judge of the City Court of Augusta power to issue writs of habeas corpus whether the judge of the superior court is present or absent); Act of Dec. 23, 1833, § 6, 1833 Ga. Laws 58 (“[T]he judge of the . . . court of common pleas [of the City of Macon], shall, in the absence of the judge of the superior court, have concurrent jurisdiction with the justices of the inferior court in all matters of Habeas Corpus . . .”); Act of Dec. 21, 1829, § 2, 1829 Ga. Laws 34 (“[T]he Judge of the . . . court of Common Pleas [of the City of Augusta], shall in the absence of the Judge of the Superior court, have concurrent jurisdiction with the justices of the Inferior Court, in all matter of Habeas Corpus.”).

⁸⁴ *Livingston v. Livingston*, 24 Ga. 379, 382 (1858) (showing that certiorari to superior court lies for error committed in a habeas corpus proceeding before justices of the inferior courts); *Field v. Putnam*, 22 Ga. 93, 96 (1857) (holding that certiorari will lie to a superior court from a decision of an inferior court sitting as a habeas court); see also *McLaren v. Brown*, 34 Ga. 583, 584 (1866) (finding that certiorari may issue upon a petition to the superior court to correct an error committed by justices of the inferior court presiding on a trial of a habeas corpus case); *Chapman v. Woodruff*, 34 Ga. 91, 92 (1864) (finding that writs of certiorari sued out in superior court to correct errors by justices of the inferior court of any county, trying habeas corpus cases, are regulated by GA. CODE § 3960 (1861)).

proceedings heard by judges of the superior courts, reviewable in the Georgia Supreme Court on a writ of error.⁸⁵

F. CASE LAW

1. *Prior to 1846.* Before the formation of the Georgia Supreme Court in 1846, there were twelve reported habeas cases in Antebellum Georgia, all decided in the superior courts between 1805 and 1842. Three of these cases involved pretrial imprisonment on criminal charges,⁸⁶ three others involved imprisoned merchant seamen,⁸⁷ two were child custody cases,⁸⁸

⁸⁵ See, e.g., *Bethune v. Hughes*, 28 Ga. 560 (1859) (reversing, on writ of error, the order of the superior court judge denying habeas relief); *Brady v. Davis*, 9 Ga. 73 (1850) (affirming, on writ of error, the order of the superior court judge denying habeas relief); *Cooper v. Mayor of Savannah*, 4 Ga. 68 (1848) (reversing, on writ of error, the order of the superior court judge denying habeas relief).

The Georgia Supreme Court could, by writ of error, review habeas decisions of the superior court whether the habeas petition had been originally filed in the superior court, see, e.g., *Yancy v. Harris*, 9 Ga. 535 (1851), or the habeas petition had originally been filed in an inferior court and then reviewed in the superior court on a writ of certiorari, see, e.g., *Livingston*, 24 Ga. 379.

⁸⁶ *State v. Bandy*, 1 Ga. Ann. 602 (2 Ga. Dec. 40) (Super. Ct. Chatham County 1842) (granting pretrial habeas relief to a person charged with theft where the warrant of commitment for theft offense was manifestly illegal because it failed to state the time or place, when or where the offense was committed, or any property of any person upon which the offense was committed); *State v. Asselin*, 1 Ga. Ann. (T.U.P. Charlton 184) 66 (Super. Ct. Liberty County 1808) (admitting to bail a habeas petitioner detained under a warrant of commitment charging a capital crime); *State v. Marco De Las Maurignos*, 1 Ga. Ann. (T.U.P. Charlton 24) 12 (Super. Ct. Chatham County 1805) (recognizing that the 1679 English Habeas Act is adopted by the Georgia state constitution and laws, and discharging habeas petitioners, indicted for robbery but not tried during the second term of court following their commitment, from their imprisonment under the speedy trial provisions of the 1679 Act).

⁸⁷ *State v. Patterson*, 1 Ga. Ann. (T.U.P. Charlton 311) 108 (Super. Ct. Chatham County 1810) (granting habeas relief to articed seaman imprisoned for refusing to comply with his contract); *State v. Wederstrandt*, 1 Ga. Ann. (T.U.P. Charlton 213) 76, 76-77 (Super. Ct. Chatham County 1808) (denying habeas relief to seamen captured on board a ship at sea for the violation of embargo laws); *State v. Plime*, 1 Ga. Ann. (T.U.P. Charlton 142) 52, 52 (Super. Ct. Chatham County 1807) (denying habeas relief to merchant seamen imprisoned for deserting their ship after signing a contract).

⁸⁸ *In re Mitchell*, 1 Ga. Ann. (R.M. Charlton 489) 291, 292 (Super. Ct. Chatham County 1836) (holding that the fact that a child is detained improperly from custody of a person entitled to possession of that child is sufficient grounds to maintain a writ of habeas corpus, and that the court, on return to the writ of habeas corpus, has discretion to place the child into the hands of anyone by whom the child's interest and health would be best promoted);

one involved an imprisoned fraudulent debtor,⁸⁹ another involved a petitioner imprisoned for contempt of court,⁹⁰ one was an extradition case,⁹¹ and the twelfth case involved a jailed free woman of color whom the court released from imprisonment.⁹²

2. *1846–1860.* Between 1846 (when the Georgia Supreme Court began hearing cases⁹³) and 1860 (the year before the Civil War began), the Georgia Supreme Court decided ten reported habeas cases.⁹⁴ Three of these decisions involved pretrial imprisonment on criminal charges,⁹⁵ three were child custody

State v. Philpot, 1 Ga. Ann. (Dud. 46) 375, 376, 381 (Super. Ct. Richmond County 1831) (attaching the custodian of a male child for contempt in a child custody case because of his evasion and insufficient return to the writ of habeas corpus).

⁸⁹ *State v. Simpson*, 1 Ga. Ann. (R.M. Charlton 122) 160, 160–61 (Super. Ct. Chatham County 1822) (holding that under the 1801 statute for relief of insolvent debtors, a habeas petitioner imprisoned for debt and found to have been guilty of fraud would be entitled to habeas relief if the creditors failed to pay jail fees).

⁹⁰ *State v. White*, 1 Ga. Ann. (T.U.P. Charlton 123) 45, 50 (Super. Ct. Chatham County 1807) (denying habeas relief to a person imprisoned for contempt of court by a court of ordinary).

⁹¹ *State v. Loper*, 1 Ga. Ann. 600, 600–01 (2 Ga. Dec. 33) (Super. Ct. Chatham County 1842) (denying habeas relief to a fugitive from justice charged with a crime in the Territory of East Florida but arrested in Georgia).

⁹² *State v. Fraser*, 1 Ga. Ann. (Dud. 42) 373, 373, 375 (Super. Ct. Richmond County 1831) (granting habeas relief to a “free woman of color” imprisoned by the order of inferior court either at her own request or for her own safety).

⁹³ Establishment of the Georgia Supreme Court was first authorized by an 1835 state constitutional amendment, Act of Dec. 22, 1835, 1835 Ga. Laws 49–50, and the court was organized by the Act of Dec. 10, 1845, 1845 Ga. Laws 18–19. The first session of the court was held in January 1846. BRASWELL D. DEEN, JR. & WILLIAM SCOTT HENWOOD, *GEORGIA’S APPELLATE JUDICIARY* 2 (1987). For the background of the establishment of the court, see GRICE, *supra* note 76, at 267–72; SURRENCY, *supra* note 81, at 157–67; Bond Almand, *The Supreme Court of Georgia: An Account of Its Delayed Birth*, in *A HISTORY OF THE SUPREME COURT OF GEORGIA* 1–18 (John B. Harris & Grant Williams eds., 1948).

⁹⁴ These ten cases, like all the Georgia Supreme Court habeas decisions mentioned in this Article, involved appellate review of the habeas decision of a lower court. The constitutional amendment authorizing the Georgia Supreme Court provided that “[t]he said court shall have no original jurisdiction,” 1835 Ga. Laws 50, and therefore the court’s habeas corpus jurisdiction was entirely appellate. No habeas corpus petitions were permitted to be filed originally in the Georgia Supreme Court.

⁹⁵ *Bethune v. Hughes*, 28 Ga. 560 (1859) (holding that a municipality lacked the power to enact an ordinance making it penal to sell, at any other place, articles usually vended at public market, and granting habeas relief to a criminal defendant detained under a warrant charging a violation of this ordinance); *Lancton v. State*, 14 Ga. 426 (1854) (holding that where, at his first trial, the jury had been discharged and mistrial declared with the criminal defendant’s consent, the defendant could not obtain habeas relief based on a claim

cases,⁹⁶ one was a postconviction case,⁹⁷ two upheld the authority of a superior court, on a writ of certiorari, to review the habeas decisions of the justices of the inferior court,⁹⁸ and one—the very first habeas decision of the Georgia Supreme Court—directed the

that he could not again be legally placed on trial on same charges); *Brady v. Davis*, 9 Ga.73 (1850) (holding that a warrant to arrest a person accused of a crime before an indictment must specify both the offense and the authority under which it is issued, and a warrant of commitment issued before an indictment must describe the offense plainly and fully, and the time and place of its commission; however, warrants issued after an indictment or presentment stand upon different footing than warrants issued before indictment; bench warrants or warrants of commitment issued after indictment are sufficient if they recite the fact of indictment and describe the offense generally; denying habeas relief to a criminal defendant charged by special presentment of a grand jury with a misdemeanor offense of peddling without a license and detained for that offense under a bench warrant and warrant of commitment).

⁹⁶ *Waters v. McNabb*, 30 Ga. 672 (1860) (holding that where a writ of habeas corpus was sued out and returnable to justices of inferior court and by agreement of parties the matter was referred for disposition to a superior court judge, the court lacked appellate jurisdiction over the subsequent habeas decision of a superior court judge awarding custody of a minor to his parents, and dismissing the writ of error); *Rives v. Sneed*, 25 Ga. 612 (1858) (holding that the superior court in a habeas corpus proceeding erred in awarding custody of a minor to his guardian rather than his adopted parent); *Lindsey v. Lindsey*, 14 Ga. 657 (1854) (holding that in a habeas corpus proceeding instituted by one parent against the other parent for the purpose of obtaining custody of a minor child from that other parent, the determination as to whom custody shall be awarded is entrusted to the trial judge, and the court would not interfere with that judge's decision unless there has been flagrant abuse of discretion); see also *Massee v. Sneed*, 29 Ga. 51, 55 (1859) (finding that habeas corpus will fully serve purpose of asserting right to custody of child).

⁹⁷ *Yancy v. Harris*, 9 Ga. 535 (1851) (denying relief to a habeas petitioner who pled guilty in inferior court to violating laws requiring free persons of color seeking to remain in the state to register with the county clerk because the convicting court had jurisdiction of the subject matter and of the person of the petitioner).

⁹⁸ *Livingston v. Livingston*, 24 Ga. 379 (1858); *Field v. Putman*, 22 Ga. 93 (1857). In *Livingston*, after inferior court justices discharged on writ of habeas corpus a petitioner imprisoned for civil contempt, a certiorari petition was presented to the superior court, seeking to reverse the grant of habeas relief. After the superior court granted the writ of certiorari and then denied a motion to dismiss the writ of certiorari, the denial of dismissal motion was brought to the supreme court via a writ of error. The court held that certiorari to the superior court would lie for an error committed in the habeas corpus proceeding held before the justices of the inferior courts. In *Field*, the habeas petitioner, imprisoned for debt, applied for habeas corpus to the justices of an inferior court who, after hearing, discharged the petitioner. A certiorari petition was then filed in superior court, seeking to reverse the grant of habeas relief. The superior court sustained the writ of certiorari and reversed the decision of the inferior court. On a writ of error, the supreme court reasoned that because certiorari would lie to a superior court from the decision of the inferior court sitting as a habeas court, and because the superior court decision below was correct on the merits, that decision was to be affirmed.

release of two free persons of color imprisoned under a municipal ordinance that violated state statutes.⁹⁹

IV. HABEAS CORPUS IN GEORGIA DURING THE CIVIL WAR, 1861–1865

A. 1861 CODE

On January 1, 1863, while the Civil War raged, the Georgia Code of 1861 became effective.¹⁰⁰ The 1861 Code included a habeas corpus chapter consisting of twenty-three sections which comprehensively regulated habeas corpus proceedings at the trial court level.¹⁰¹ The 1861 Code also included miscellaneous additional habeas corpus sections scattered throughout other portions of the Code.¹⁰²

⁹⁹ *Cooper v. Mayor of Savannah*, 4 Ga. 68 (1848) (reversing an order of the superior court denying habeas relief because while free persons of color had no political rights, they did have personal rights, one of which was personal liberty, and here, habeas petitioners were imprisoned in city jail for nonpayment of a municipal tax required to be paid by free persons of color who relocated to that municipality; under state statutes, however, the municipality lacked authority to enforce collection of the tax by imprisonment, so that the ordinance was void to the extent that it declared that free persons of color shall be imprisoned for the nonpayment of tax).

¹⁰⁰ Wilkes, *supra* note 35, at 335 n.111.

For the background of the 1861 Code, sometimes called the 1863 Code because of its effective date, see generally Richard H. Clark, *The History of the First Georgia Code*, in REPORT OF THE SEVENTH ANNUAL MEETING OF THE GEORGIA BAR ASSOCIATION 144 (1890); Erwin C. Surrency, *The Georgia Code of 1863 and Its Place in the Codification Movement*, 11 J. S. LEGAL HIST. 81 (2003).

¹⁰¹ GA. CODE §§ 3909–3931 (1861). These twenty-three habeas provisions constituted Chapter 1 (“Proceedings on Application for *Habeas Corpus*”) of Title 16 (“Proceedings on Application for *Habeas Corpus*”) of Part 3 (“The Code of Practice”) of the 1861 Code.

Prior to 1861, only three other states, Alabama (1852), Tennessee (1858), and Virginia (1849), had adopted a comprehensive statutory code with a habeas corpus chapter consisting of codified habeas statutory provisions. For the habeas corpus provisions of these codes, see ALA. CODE §§ 3708–3747 (1852); TENN. CODE §§ 3720–3765 (1858); VA. CODE, ch. 156, §§ 1–13 (1849).

¹⁰² See, e.g., GA. CODE § 4626 (1861) (“No prisoner shall be discharged on writ of *habeas corpus*, because of informality in the commitment”); *id.* § 3622 (fixing fees of jailors in habeas corpus cases); *id.* § 3621(2) (fixing fees of sheriffs in habeas corpus cases); *id.* § 3333 (stating that if a person is imprisoned for debt, and plaintiff fails to pay jail fees weekly, “then the Inferior Court may discharge the defendant by writ of *habeas corpus* on the application of the jailor”); *id.* § 287(1) (granting justices of inferior courts authority to issue

Although importantly it did substitute a statutory habeas corpus writ for both the common law writ of habeas corpus and the 1679 English Habeas Corpus Act, in most respects the 1861 Code left in place habeas practices and procedures long standard in Georgia. Under the 1861 Code, as in Antebellum times, power to grant writs of habeas corpus was vested in the superior court judges,¹⁰³ in the justices of the inferior courts (in the absence of the judges of the superior court),¹⁰⁴ and in certain other judges in some counties.¹⁰⁵ If the writ was issued by a justice of the inferior court, the return to the writ was required to be heard by a majority of the justices of that court.¹⁰⁶ The contents of a habeas petition were

writs of habeas corpus in the absence of a superior court judge); *id.* § 243(1) (granting judges of superior courts authority to grant writs of habeas corpus).

¹⁰³ *Id.* § 243(1).

¹⁰⁴ *Id.* § 287(1); see also *Chapman v. Woodruff*, 34 Ga. 91, 94 (1864) (“[§ 287] confers upon Justices of the Inferior Court . . . the power of issuing . . . writs of *habeas corpus*.”).

¹⁰⁵ The pre-1863 authority of the judge of the City Court of Savannah to issue habeas writs was preserved by GA. CODE appx. § 4811 (1861), which provided:

The Judge of said court shall have power to issue writs of *habeas corpus*, and to hear and dispose of the same, in all cases arising or occurring within the jurisdictional limits of Savannah, in the same way and with the same powers as the Judge of the Superior Court

The pre-1863 authority of the judge of the City Court of Augusta to issue writs of habeas corpus was preserved by GA. CODE § 13 (1861), which provided that where “there is a law in force at the time of the adoption of this Code, having entirely a local application, such local law is not repealed by this Code, unless so expressly declared.” For a case in which it appears that the City Court of Augusta issued a writ of habeas corpus after the 1861 Code took effect, see *Granade v. Wood*, 34 Ga. 120 (1864).

¹⁰⁶ GA. CODE § 3921 (1861). This provision derived from the Act of Dec. 9, 1790, § 1, in A DIGEST OF THE LAWS OF THE STATE OF GEORGIA, *supra* note 56, at 422; see *supra* notes 75, 82 (citing and summarizing the 1790 statute).

Since under GA. CODE § 281 (1861) not less than three justices could hold an inferior court and the concurrence of two of the three was required to make a judgment, a habeas judgment could not be rendered without at least two justices concurring in the judgment, as was pointed out by the Georgia Supreme Court in *Chapman v. Woodruff*, 34 Ga. 91, 94 (1864). In *Chapman*, the court held that “in the *issuing* of the writ, the Justice is not exercising the jurisdiction of that Court of which he is one of the commissioned Judges, but simply performs the duty of a magistrate, enjoined by statute.” *Id.* at 94. The court also held “that the Court designated in section 3921, is not the Inferior Court, proper, but a special judicatory, constituted for the particular class of [habeas] cases referred to.” *Id.* at 96.

Also under GA. CODE § 281 (1861), if more than three justices presided, the judgment had to be concurred in by three.

prescribed,¹⁰⁷ and it was required that the petition be verified under oath¹⁰⁸ and that the petition be signed by the habeas petitioner himself or by a person acting in his behalf.¹⁰⁹ If from the petition it did not appear that the restraint on liberty complained of was legal, issuance of the writ was mandatory.¹¹⁰ A model form of writ of habeas corpus was provided,¹¹¹ and disobedience of the writ was made a contempt of court punishable by imprisonment.¹¹² The return to the writ of habeas corpus had to be under oath¹¹³ and could be traversed.¹¹⁴ If the habeas petitioner was imprisoned on a criminal charge, the prosecutor had to be notified of any hearing on the habeas petition.¹¹⁵

Also under the 1861 Code, habeas relief had to be denied if any of eight specified circumstances set forth in the statute was applicable;¹¹⁶ and if there was probable cause for the detention, no person held on criminal charges was to be discharged because of a technical defect in the affidavit, warrant, or commitment.¹¹⁷ In habeas cases involving the detention of a wife or child, the court could exercise its discretion as to whom custody should be given and was vested with power to grant custody of a child to a third person.¹¹⁸ In all other cases, the habeas court was to “discharge,

¹⁰⁷ GA. CODE § 3910 (1861).

¹⁰⁸ *Id.* § 3911.

¹⁰⁹ *Id.* § 3910.

¹¹⁰ *Id.* § 3912.

¹¹¹ *Id.* § 3913.

¹¹² *Id.* § 3923.

¹¹³ *Id.* § 3918.

¹¹⁴ *Id.* § 3922.

¹¹⁵ *Id.* § 3931. This provision derived from the Act of Jan. 22, 1852, 1851–52 Ga. Laws 236. See *supra* note 80 and accompanying text.

¹¹⁶ GA. CODE § 3924 (1861). Under § 3924(1), for example, a prisoner could not be released if he was imprisoned under lawful process issued by a court of competent jurisdiction, except in cases where bail was allowed and properly tendered.

¹¹⁷ *Id.* § 3926. This provision derived from the Act of Dec. 22, 1808, in A DIGEST OF THE STATUTE LAWS OF THE STATE OF GEORGIA, *supra* note 65, at 856. See *supra* note 77 and accompanying text. GA. CODE § 4626 (1861), which provided that no prisoner was to be discharged on habeas corpus because of informality in the commitment, also derived from the 1808 statute.

¹¹⁸ GA. CODE § 3925 (1861).

In providing for use of habeas corpus in child custody cases, the 1861 Code did not make any change in Georgia habeas procedures. Resolving issues of child custody in

remand or admit the party to bail, or deliver him to the custody of the officer or person entitled thereto, as the principles of law and justice may require.”¹¹⁹ The award of court costs in habeas proceedings was authorized,¹²⁰ and proceedings in all habeas cases were to be returned to and recorded by the clerk of the superior or inferior court whose judge or justice had heard the case.¹²¹ The 1861 Code permitted but strictly circumscribed suspension of the writ of habeas corpus.¹²² From the date the 1861 Code took effect

Georgia habeas corpus proceedings was standard practice in Georgia before adoption of the 1861 Code. Prior to the creation of the Georgia Supreme Court in 1846, there had been habeas litigation involving child custody in the state’s superior courts. *See supra* note 88. After 1846 but before 1863 there had been four child custody habeas decisions in the Georgia Supreme Court. *See supra* note 96; *infra* note 151. In 1845 the Georgia legislature had enacted a statute abrogating the common law rule that in habeas corpus child custody cases the father was always entitled to custody of the child. *See supra* note 78 and accompanying text.

With respect to the 1861 Code’s authorization of habeas corpus to test the detention of a wife, it must be remembered that in the nineteenth century habeas corpus could be invoked by a wife detained by her husband. *See Wales v. Whitney*, 114 U.S. 564, 571 (1885) (“Wives restrained by husbands . . . may . . . become proper subjects of relief by the writ of *habeas corpus*.”). Habeas corpus was also appropriate when a husband sought to regain a wife who had involuntarily absented herself from her husband, but not when the wife’s absence was with her own consent. *See CHURCH, supra* note 38, at 659–60 (“[O]n a motion for this writ . . . to bring up the body of his wife, the affidavit must state that she is detained against her will. . . . The wife must be under restraint for the husband to secure the writ. If a wife is by her own desire living apart from her husband, and is under no restraint, the court will not grant a habeas corpus on the application of the husband, for the purpose of restoring her to his custody.” (footnotes omitted)); *HURD, supra* note 78, at 450–53 (examining the use of a habeas corpus petition filed by a husband to secure the person of his absent wife and noting that if the wife voluntarily leaves her husband and remains absent without any restraint or coercion, the husband is not entitled to a writ of habeas corpus). From 1733 to 1865, there do not appear to be any reported Georgia habeas cases in which the issue of the detention of a wife was actually decided by the court.

¹¹⁹ GA. CODE § 3927 (1861).

¹²⁰ *Id.* § 3929. This did not change previous practices. Prior to 1863, fees charged by government officials in regard to habeas corpus proceedings could be awarded as costs by the habeas court. *Ware v. State*, 33 Ga. 338, 340 (1862).

¹²¹ GA. CODE § 3930 (1861).

¹²² “And this right shall be suspended or denied only in times of existing war, and then only as to such persons as shall be in military confinement.” GA. CODE § 3909 (1861). This was the second sentence of section 3909. The first sentence authorized any person restrained of his liberty to sue out a writ of habeas corpus to inquire into the legality of the restraint. *Id.*

The Confederate Constitution laid fewer restrictions on habeas suspension than the 1861 Code, providing: “The privilege of the writ of habeas corpus shall not be suspended,

until the end of the Civil War, only one reported case construed any of the habeas provisions of the Code.¹²³

Under the 1861 Code, habeas decisions of justices of inferior courts continued to be reviewable in superior court via a writ of certiorari,¹²⁴ and habeas decisions of superior court judges continued to be reviewable in the Georgia Supreme Court on a writ of error.¹²⁵

B. 1863 HABEAS STATUTE

After the 1861 Code took effect, the Georgia legislature enacted only one habeas corpus statute prior to the end of the Civil War. This important 1863 statute was intended to encourage judges to

unless when in cases of rebellion or invasion the public safety may require it.” CONFED. CONST. art. I, § 9, cl. 2. The habeas clause of the Confederate Constitution was identical to the Habeas Corpus Clause of the U.S. Constitution. Compare CONFED. CONST. art. I, § 9, cl. 3, with U.S. CONST. art. I, § 9, cl. 2.

¹²³ The holding in that case, *Chapman v. Woodruff*, 34 Ga. 91 (1864), is summarized *supra* note 106. See also *infra* notes 124, 152 (setting out the procedural history of *Chapman v. Woodruff*).

¹²⁴ See, e.g., *Chapman*, 34 Ga. 91 (denying a motion to dismiss certiorari where, after justices of the inferior court rendered judgment discharging a habeas petitioner from Confederate military service, the habeas respondent, pursuant to the procedures set forth in GA. CODE § 3960 (1861), brought a writ of certiorari in superior court to review the decision of justices, and the habeas petitioner filed a motion to dismiss the certiorari writ on the grounds that it should have been sought pursuant to different procedures, set out in GA. CODE § 3958 (1861)); see also *Granade v. Wood*, 34 Ga. 120 (1864) (dismissing certiorari where, after a judge of the City Court of Augusta denied habeas relief, habeas petitioner sued out a writ of certiorari in superior court, alleging that relief should have been granted, whereupon the opposing party moved to dismiss the certiorari writ on the grounds that, in violation of GA. CODE § 3976 (1861), the habeas petitioner had failed to give ten days advance notice of granting of certiorari or of the time and place of its hearing in superior court).

¹²⁵ See, e.g., *White v. Sellars*, 34 Ga. 200 (1865) (reversing, on writ of error, the order of a superior court judge granting habeas relief to a Confederate soldier who claimed that he was exempt from military service because he had been elected constable); *Andrews v. Strong*, 33 Ga. Supp. 166 (1864) (affirming, on writ of error, the order of a superior court judge granting habeas relief to a Confederate soldier who had been elected justice of the peace); *Moncrief v. Jones*, 33 Ga. 450 (1863) (reversing, on writ of error, the order of a superior court judge denying habeas relief to a Confederate soldier whose enlistment was illegal because he was a minor); see also *Jeffers v. Fair*, 33 Ga. 347 (1862) (affirming, on writ of error, the order of a superior court judge denying habeas relief to a person conscripted into the Confederate Army who claimed that conscription statutes enacted by the Confederate Congress were unconstitutional).

hear habeas petitions—especially those filed by Confederate Army conscripts.¹²⁶ The statute provided that if any person applied for a writ of habeas corpus to a Georgia judge whose duty it was to grant the writ, then any judge refusing to grant the writ “shall forfeit to the party aggrieved, the sum of twenty-five hundred dollars, to be recovered in any Court of law in this State having jurisdiction of the same.”¹²⁷ There were no reported cases interpreting the 1863 habeas statute during the Civil War.

C. RESISTANCE OF GEORGIA’S EXECUTIVE AND LEGISLATIVE BRANCHES TO CONFEDERATE SUSPENSION OF HABEAS

The Confederate Congress temporarily suspended the writ of habeas corpus on three separate occasions.¹²⁸ These suspensions

¹²⁶ “Apparently the 1863 statute was passed out of concern that some Georgia courts were failing to award the writ in proceedings instituted by persons conscripted into the Confederate Army.” Donald E. Wilkes, Jr., *A New Role for an Ancient Writ: Postconviction Habeas Corpus Relief in Georgia (Part II)*, 9 GA. L. REV. 13, 54 n.194 (1974); see also Jones v. Hill, 87 S.E. 755, 756 (Ga. App. 1915) (“No doubt the exigencies arising from the conscript act caused its passage [in 1863].”).

¹²⁷ Act of Dec. 14, 1863, § 1, 1863 Ga. Laws 45. Enacted unanimously, T. CONN BRYAN, CONFEDERATE GEORGIA 95 (1953), this statute was patterned after a provision of the English Habeas Corpus Act of 1679, 1679, 31 Car. 2, ch. 2, § 10 (Eng.), under which any judge who refused to issue a writ of habeas corpus required to be granted by the Act would forfeit to the aggrieved prisoner the sum of five hundred pounds. See Jones, 87 S.E. at 756 (“[T]he [1863] statute was apparently modeled after section 10 . . . of [the 1679 English Habeas Act].”). As later codified at GA. CODE § 50-105 (1933), the 1863 statute was repealed by the Act of Apr. 18, 1967, § 4, 1967 Ga. Laws 835, 839.

¹²⁸ Three Confederate statutes suspended habeas corpus from February 27 to September 18, 1862; from October 13, 1862 to February 13, 1863; and from February 15 to August 1, 1864. FRANK LAWRENCE OWSLEY, STATE RIGHTS IN THE CONFEDERACY 150 (1925); Alexander C. Niven, *Joseph E. Brown: Confederate Obstructionist*, 42 GA. HIST. Q. 233, 236 (1958).

For the text of these suspension statutes, see Act of Feb. 15, 1864, Pub. Laws, 1st Cong., 4th Sess., ch. 37, in THE STATUTES AT LARGE OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA 187–89 (photo. reprint 1988) (James M. Mathews ed., Richmond, R.M. Smith 1864); Act of Oct. 13, 1862, Pub. Laws, 1st Cong., 2d Sess., ch. 51, in *id.* at 84; and Act of Feb. 27, 1862, Pub. Laws, 1st Cong., 1st Sess., ch. 2, in *id.* at 1, amended by Act of Apr. 19, 1862, Pub. Laws, 1st Cong., 1st Sess., ch. 44, in *id.* at 40. See generally OWSLEY, *supra*, at 150–202 (examining the Confederate suspension of habeas corpus and quarrels and controversies stemming from its suspension); Mark E. Neely, Jr., *Habeas Corpus*, in 2 ENCYCLOPEDIA OF THE CONFEDERACY 727–28 (Richard N. Current ed., 1993) (surveying the suspension of habeas corpus in the Confederacy); MARK E. NEELY, JR., CONFEDERATE BASTILLE: JEFFERSON DAVIS AND CIVIL LIBERTIES 3–16 (1993) (examining

provoked increasing opposition from the populace as well as the state governments of the Confederacy,¹²⁹ with the third suspension statute, in 1864, engendering heated and massive opposition.¹³⁰ In

the actions of Confederate President Jefferson Davis in regard to the Confederate suspension of habeas corpus); MARK E. NEELY, JR., *SOUTHERN RIGHTS: POLITICAL PRISONERS AND THE MYTH OF CONFEDERATE CONSTITUTIONALISM* 153–67 (1999) (same); WILLIAM M. ROBINSON, JR., *JUSTICE IN GREY: A HISTORY OF THE JUDICIAL SYSTEM OF THE CONFEDERATE STATES OF AMERICA* 383–419 (1941) (surveying the suspension of habeas corpus in the Confederacy); EMORY M. THOMAS, *THE CONFEDERACY AS A REVOLUTIONARY EXPERIENCE* 62–63 (1991) (examining martial law and habeas corpus suspension in Confederacy); Niven, *supra*, at 236–42 (surveying the Confederate suspension of habeas corpus and opposition to that suspension); John B. Robbins, *The Confederacy and the Writ of Habeas Corpus*, 55 GA. HIST. Q. 83, 83–97 (1971) (discussing the suspension of habeas corpus by Confederate Congress).

¹²⁹ OWSLEY, *supra* note 128, at 150–202; *see also* RICHARD E. BERINGER ET AL., *THE ELEMENTS OF CONFEDERATE DEFEAT: NATIONALISM, WAR AIMS, AND RELIGION* 23–24 (1988) (listing habeas corpus suspension as one of the measures about which Jefferson Davis's opponents so frequently complained); LOUISE BILES HILL, *JOSEPH E. BROWN AND THE CONFEDERACY* 194 (1939) (stating that suspension of the writ of habeas corpus “met with opposition in practically all the states of the Confederacy”); GEORGIA LEE TATUM, *DISLOYALTY IN THE CONFEDERACY* 20 (1934) (“The suspension of the writ of habeas corpus gave further cause for complaint and furnished another argument for . . . the disloyal to use in alienating the people from Jefferson Davis and the Confederate cause.”); CHARLES H. WESLEY, *THE COLLAPSE OF THE CONFEDERACY* 55 (1937) (noting that the Confederate habeas corpus suspension was a “source of popular irritation”); Sidney D. Brummer, *The Judicial Interpretation of the Confederate Constitution*, in *STUDIES IN SOUTHERN HISTORY AND POLITICS* 129 (1914) (stating that Confederate suspension of habeas corpus “produced hostile criticism in the South”); Robbins, *supra* note 128, at 83 (stating that during the course of the Civil War, “state governors questioned, and administration critics denounced, the suspension of the writ [of habeas corpus by the Confederate Congress]”); Niven, *supra* note 128, at 235–41 (explaining that suspension of habeas corpus by the Confederate Congress provoked strong protests throughout the Confederacy).

Some scholars assert that this opposition to habeas suspension was personal and political rather than principled. *See, e.g.*, ROBINSON, *supra* note 128, at 411 (stating that the critics of habeas suspension were “[d]isgruntled politicians hiding behind State’s rights, disappointed seekers of favor from the government, editors whose opinions had not been accepted by the Administration, cowards who evaded military service, and other contemptibles”); Robbins, *supra* note 128, at 95 (stating that “the bitterest opposition to [habeas corpus] suspension arose from personal political jealousies”).

¹³⁰ “[The 1864 habeas suspension] act precipitated one of the bitterest, and in some respects most disastrous, conflicts of the whole war between Confederate and state authorities.” OWSLEY, *supra* note 128, at 177; *see also* ROBINSON, *supra* note 128, at 411–15 (examining clamorous opposition to the 1864 suspension statute from one end of the Confederacy to the other).

The 1864 statute suspended habeas corpus “in the case of persons arrested by order of the President or the Secretary of War of the Confederate States of America and charged with any of a number of designated crimes, including treason, espionage, desertion, trading

no Southern state was the opposition to the 1864 suspension of habeas corpus more vehement than in Georgia.¹³¹

Shortly after its enactment, Joseph E. Brown, the wartime Governor of Georgia, backed by other major Georgia political figures such as Confederate Vice President Alexander H. Stephens, former Confederate Secretary of State Robert Toombs, and Linton A. Stephens, a former Georgia Supreme Court justice, publicly excoriated the 1864 suspension statute and campaigned furiously to reinstate the writ.¹³²

with or aiding the enemy, and inciting servile insurrection.” Wilkes, *supra* note 35, at 314–15 n.6. Temporary in nature, the statute expired on August 1, 1864. ROBINSON, *supra* note 128, at 409.

¹³¹ See I.W. AVERY, *THE HISTORY OF THE STATE OF GEORGIA FROM 1850 TO 1881*, at 271–73 (New York, Brown & Derby 1881) (detailing how Georgia led other Confederate states in opposing habeas corpus suspension); CARLETON BEALS, *WAR WITHIN A WAR: THE CONFEDERACY AGAINST ITSELF* 132 (1965) (“[T]here was strong popular and official opposition to the measure [suspending habeas corpus in 1864] in every Confederate state, but nowhere more than in North Carolina and Georgia.”); BERINGER ET AL., *supra* note 129, at 130 (1988) (stating that Georgia’s Governor Joseph E. Brown “objected violently to the suspension of the writ of habeas corpus”); BRYAN, *supra* note 127, at 95–99 (surveying opposition in Georgia to the Confederate suspension of habeas corpus and stating that Georgia’s opposition “was particularly bitter”); HILL, *supra* note 129, at 194 (“While the suspension of the writ met with opposition in practically all the states of the Confederacy it was in Georgia that the opposition was so well organized and so ruthlessly directed as to lead many . . . to question the loyalty of its leaders . . .” (footnote omitted)); OWSLEY, *supra* note 128, at 162–65 (explaining that, with respect to habeas corpus suspension, Georgia voiced the most vigorous opposition); JOSEPH H. PARKS, *JOSEPH E. BROWN OF GEORGIA* 269–71 (1977) (surveying how Joseph E. Brown, Georgia’s wartime governor, “focused his wrath” on the Confederate suspension of habeas corpus); ROBINSON, *supra* note 128, at 411–13 (explaining that Georgia led the parade against the habeas corpus suspension); NIVEN, *supra* note 128, at 236–39 (stating that the Confederate government’s suspension of habeas corpus and imposition of martial law led to strong protests from all states, but especially from Georgia); ROBBINS, *supra* note 128, at 91–93 (demonstrating that opposition to the 1864 Confederate suspension of habeas corpus centered in Georgia); Wilkes, *supra* note 35, at 315 n.6 (stating that the opposition within the Confederacy to the 1864 suspension of habeas corpus was “strongest and most organized” in Georgia).

If Georgia was in the vanguard of opposition to the suspension of habeas corpus in 1864, “North Carolina was not far behind and Mississippi and Alabama were within sight. In the other States the opposition was more restrained . . .” ROBINSON, *supra* note 128, at 413 (footnote omitted).

¹³² Wilkes, *supra* note 35, at 315 n.6; see also ALBERT BURTON MOORE, *CONSCRIPTION AND CONFLICT IN THE CONFEDERACY* 270 (1963) (stating that Governor Brown and Alexander H. Stephens were “aroused” by the 1864 suspension of habeas corpus, leading to Brown’s “astoundingly acrimonious reproach of the President [Jefferson Davis],” and to Stephens “boldly [taking up] the cudgels of opposition”).

On March 10, 1864, Governor Brown transmitted a message, sixty-nine printed pages long, to the state legislature,¹³³ ten pages of which were devoted to blisteringly berating “Suspension of the Habeas Corpus.”¹³⁴ Therein Brown expressed his great mortification that the 1864 suspension statute had ever been passed and blasted the statute as both a “most monstrous Act”¹³⁵ which “struck a fell blow at the liberties of the people of these

The fervent resistance of Governor Brown and other eminent Georgians to suspension of the writ of habeas corpus was known to the Confederate government not only because of press coverage (mentioned below in this footnote) but also through official correspondence. In a letter to the Confederate Secretary of War dated March 23, 1864, J.L.M. Curry, the Confederate Army officer appointed commissioner for carrying the 1864 suspension statute into effect in Georgia, observed that “execution of the act will be attended with some difficulty, owing to the opposition of Governor Brown, the Vice-President, and other prominent men in Georgia.” Letter from J.L.M. Curry to J.A. Seldon (Mar. 23, 1864), in 52 *THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES*, pt. 2, at 648 (photo. reprint 1985) (Washington, Gov’t Printing Office 1898).

Although “many prominent men [in Georgia] approved” of the opposition to habeas corpus suspension led by Governor Brown and Alexander H. Stephens, BRYAN, *supra* note 127, at 98, some important Georgia political leaders, including Howell Cobb, a former governor of Georgia, Benjamin H. Hill, one of Georgia’s senators in the Confederate Congress, and Charles Jenkins, a Georgia Supreme Court justice, defended the suspension statute. HILL, *supra* note 129, at 203–10; ROBINSON, *supra* note 128, at 411–12. Furthermore, “a majority of the [Georgia] newspapers condemned Brown and [his allies] for their opposition to suspending the writ.” BRYAN, *supra* note 127, at 98. Newspaper commentary on the controversy in Georgia over habeas suspension is examined in *id.* at 98–100; HILL, *supra* note 129, at 208–09; PARKS, *supra* note 131, at 283–84; ROBINSON, *supra* note 128, at 413; Robbins, *supra* note 128, at 92.

¹³³ The message is set forth in 2 *THE CONFEDERATE RECORDS OF THE STATE OF GEORGIA* 587–655 (Allen D. Candler ed., 1909).

¹³⁴ *Id.* at 610–19.

This was not the first time Governor Brown had bitterly complained about Confederate habeas corpus suspension in Georgia. Two years earlier, in 1862, shortly after Confederate Army General Braxton Bragg, acting on his own authority, issued an order declaring martial law in Atlanta, Brown, who regarded Bragg’s order as tantamount to a suspension of habeas corpus, sent another message to the Georgia legislature. *Id.* at 283. In one portion of this message, entitled “Martial Law and Habeas Corpus,” he angrily castigated Bragg’s actions as a “high-handed usurpation . . . tend[ing] to the subversion of . . . the individual rights of the citizen.” *Id.* at 305–06.

Five days after passage of the 1864 suspension statute, Brown wrote to Alexander H. Stephens: “The great wrong which you anticipated has been done by Congress and I confess I contemplate with horror the suspension of the habeas corpus. Every state in the Confederacy should denounce and condemn the wicked act.” HILL, *supra* note 129, at 202.

¹³⁵ 2 *THE CONFEDERATE RECORDS OF THE STATE OF GEORGIA*, *supra* note 133, at 617.

States”¹³⁶ and as a “most monstrous deed”¹³⁷ which authorized “*illegal and unconstitutional arrests.*”¹³⁸ He caustically questioned whether the statute “is intended to make the [Confederate] President as absolute in his power of arrest and imprisonment as the Czar of all the Russias?”¹³⁹ He urged the Confederate Congress to repeal the suspension statute and requested the Georgia legislature to “stamp the Act with the seal of their indignant rebuke.”¹⁴⁰ Six days later, on March 16, 1864, Governor Brown’s political ally Alexander H. Stephens delivered a lengthy speech¹⁴¹ to the state legislature in which he made it clear that he shared Brown’s dislike of habeas corpus suspension,¹⁴² describing the suspension act as “unwise, impolitic, unconstitutional, and dangerous to public liberty.”¹⁴³ The act, he stated, “attempt[s] to do just what cannot be done—to authorize illegal and unconstitutional arrests.”¹⁴⁴ Stephens urged the legislature to declare the suspension statute unconstitutional.¹⁴⁵

¹³⁶ *Id.* at 610.

¹³⁷ *Id.* at 618.

¹³⁸ *Id.* at 616.

¹³⁹ *Id.* at 618.

¹⁴⁰ *Id.* at 617–18.

In response to Governor Brown’s message, Robert Toombs wrote him a letter in which he expressed his “sincere thanks for the ability, firmness and success with which you have supported the cause of personal liberty” and praised Brown’s “noble defense of the most valuable of all human rights.” AVERY, *supra* note 131, at 272 (internal quotation marks omitted).

¹⁴¹ The speech went on “for three long hours,” according to one authority. PARKS, *supra* note 132, at 277; *see also* ROBINSON, *supra* note 128, at 412 (stating that Stephens’s speech lasted “nearly three hours”). One scholar uncharitably describes the Stephens oration as “a long tirade.” PAUL D. ESCOTT, *AFTER SECESSION: JEFFERSON DAVIS AND THE FAILURE OF CONFEDERATE NATIONALISM* 204 (1978).

The text of the speech may be found at Alexander H. Stephens, *The State of the Confederacy, Speech Before the Georgia Legislature (Mar. 16, 1864)*, in HENRY CLEVELAND, ALEXANDER H. STEPHENS, IN PUBLIC AND PRIVATE 761–86 (Philadelphia, Nat’l Publ’g Co. 1866).

¹⁴² Stephens, *supra* note 141, at 767–83.

¹⁴³ *Id.* at 783.

Criticism of Confederate suspension of habeas corpus was nothing new to Alexander Stephens, for he “had attacked the suspension of the writ as early as 1862.” OWSLEY, *supra* note 128, at 184–85.

¹⁴⁴ Stephens, *supra* note 141, at 770.

¹⁴⁵ *Id.* at 783.

On March 19, 1864, nine days after Brown's message and three days after Alexander H. Stephens's oration, the Georgia legislature approved a resolution denouncing the suspension statute and requesting its prompt repeal.¹⁴⁶ The resolution stated in part:

That the recent act of Congress to suspend the privilege of the writ of *habeas corpus* . . . is an attempt to . . . give validity to unconstitutional seizures of the persons of the people . . . and the whole act itself, in the judgment of this General Assembly, . . . [is] unconstitutional.

That, in the judgment of this General Assembly, the said act is a dangerous assault upon the constitutional power of the Courts, and upon the liberty of the people, and . . . our Senators and Representatives in Congress are earnestly urged to take the first possible opportunity to have it repealed¹⁴⁷

Georgia's vociferous resistance to the 1864 habeas suspension statute "render[ed] null the suspension of the writ of habeas corpus in Georgia."¹⁴⁸ It also motivated other Southern state legislatures to protest the suspension statute,¹⁴⁹ and helped induce

¹⁴⁶ 1863 Ga. Laws 152–54 (this extra March 1864 session is located in the 1863 volume).

The habeas corpus resolution was introduced by Linton A. Stephens, a brother of Alexander H. Stephens. BRYAN, *supra* note 127, at 96; ROBINSON, *supra* note 128, at 412. According to RUDOLPH VON ABELE, ALEXANDER H. STEPHENS 223–24 (1946), and CLEVELAND, *supra* note 141, at 189, Linton Stephens was author of the habeas resolution. However, another scholar, HILL, *supra* note 129, at 202–03, asserts that Linton Stephens and Alexander Stephens co-authored the resolution, while still another authority, PARKS, *supra* note 131, at 274–75, maintains that Alexander Stephens alone was the author.

After being amended, HILL, *supra* note 129, at 209 n.67, the habeas resolution passed the lower house by a vote of 71 to 69, and the upper house by 20 to 12. ROBINSON, *supra* note 128, at 412–13. Forty-three Georgia legislators entered a protest against the resolution. AVERY, *supra* note 131, at 272.

¹⁴⁷ 1863 Ga. Laws 153 (the extra March 1864 session is located in the 1863 volume).

¹⁴⁸ HILL, *supra* note 129, at 218–19; *see also* ESCOTT, *supra* note 141, at 205 (“[T]he agitation effectively nullified the suspension of the writ of *habeas corpus* in Georgia . . .”); Niven, *supra* note 128, at 241 (stating that the “general effect” of agitation concerning habeas corpus suspension was nullification in March 1864 of habeas suspension in Georgia).

¹⁴⁹ AVERY, *supra* note 131, at 272–73; HILL, *supra* note 129, at 218–19.

the Confederate Congress not to renew the statute when it expired on August 1, 1864.¹⁵⁰

¹⁵⁰ AVERY, *supra* note 131, at 272–73; HILL, *supra* note 129, at 218–19; OWSLEY, *supra* note 128, at 191–92.

There are scholars who assert that the vocal, widespread opposition to habeas corpus suspension, spearheaded by Georgia, significantly weakened the ability of the Confederacy to wage war against the Union. See, e.g., HILL, *supra* note 129, at 194 (stating that opposition to habeas suspension was “disastrous to the Confederate cause”). These scholars tend to argue that opposition to habeas corpus suspension damaged the Confederate war effort because it created internal strife and dissension, because it resulted in habeas suspension, a vitally necessary war measure, actually being in effect in the Confederacy for less than half the Civil War’s duration, or because of both. See, e.g., OWSLEY, *supra* note 128, at 192–202 (examining the adverse conditions which materially helped in overthrowing the Confederacy and which, had there not been militant public opposition to habeas corpus suspension, could have been alleviated by a Confederate government given a free hand to suspend the writ of habeas corpus); ROBINSON, *supra* note 128, at 415 (arguing that although the assertion that the refusal of the Confederate Congress—due to opposition to habeas suspension—to grant the executive branch more power to suspend habeas corpus led to the failure of Confederacy “may scarcely be accepted in full for the failure of the Confederate States, there can be no doubt that the efficiency of the executive branch of government was much lowered by the failure of the Congress to grant it a continuous right to suspend constitutional guarantees”); TATUM, *supra* note 129, at 21 (stating that criticism of Confederate habeas suspension “did much toward discrediting the administration and increasing the disloyalty and dissatisfaction among the people”); NIVEN, *supra* note 128, at 241 (stating that the inability, on account of opposition, of the Confederate government to pass habeas suspension statute in 1863 and after August 1, 1864, had a “damaging effect upon the entire Confederate war effort”).

Other scholars dispute the claim that opposition to habeas corpus suspension significantly affected the prospects of Confederate victory. See, e.g., BERINGER ET AL., *supra* note 129, at 191 (“[A]ttempts to obstruct the Confederate government by resisting . . . the suspension of habeas corpus . . . had a negligible effect.”); see also Robbins, *supra* note 128, at 96 (stating that while it is “undeniable” that—due to the opposition to habeas suspension—the Confederate Congress failed to grant Jefferson Davis the additional power he wanted to suspend habeas corpus, whether this failure “substantially altered the outcome of the war is open to considerable question”).

Because Georgia led the opposition to Confederate suspension of habeas corpus, the important issue of whether it is true (in whole or in part) that the South lost the Civil War because of that opposition warrants the following brief discussion.

“Historians evaluating the Confederacy’s failure to win independence have advanced a multiplicity of sophisticated and subtle arguments to explain the South’s defeat.” Robert L. Kerby, *Why the Confederacy Lost*, 35 REV. POL. 326, 326 (1973). Generally, however, most explanations for the defeat of the Confederate States of America fall into two broad categories. First, there are internal causes explanations, “focused primarily on what took place within the Confederacy,” Gabor S. Boritt, *Introduction, WHY THE CONFEDERACY LOST* 1, 7 (Gabor S. Boritt ed., 1992), and second, there are external causes explanations, “with emphasis on elements [outside the South or on the battlefield] that accounted for northern victory,” *id.* See also JAMES L. ROARK, *Behind the Lines: Confederate Economy and Society*,

in *WRITING THE CIVIL WAR* 201, 203 (James M. McPherson & William J. Cooper, Jr. eds., 1998) (“Confederate studies today enjoys a lively debate between the ‘internal’ school that emphasizes economic and social realities of the southern home front and the ‘external’ school that argues the centrality of what happened when Confederates met Yankees on the battlefields.”).

Many scholars who believe the causes for Confederate defeat were external tend to focus on the North’s military superiority and prowess. “Matters military, including what took place on the field of battle, played a decisive role in determining the history of the Civil War, and specifically why the Confederacy lost. . . . [U]ltimately, the battlefield gave birth to victory.” Boritt, *supra*, at 5, 8; *see also* GARY W. GALLAGHER, *THE CONFEDERATE WAR* 11 (1997) (“Contrary to what much recent literature proclaims, defeat in the military sphere, rather than dissolution behind the lines, brought the collapse of the Confederacy.”). *See generally* HERMAN HATTAWAY & ARCHER JONES, *HOW THE NORTH WON: A MILITARY HISTORY OF THE CIVIL WAR* (1983) (stressing the influence of purely military factors in delineating how the North won the Civil War). Other scholars who embrace the view that external causes explain the vanquishment of the Confederacy stress the North’s superior material and economic resources. *See, e.g.*, Richard N. Current, *God and the Strongest Battalions*, in *WHY THE NORTH WON THE CIVIL WAR* 15, 31 (David Donald ed., 1960) (“[E]conomic rather than strictly military superiority was the basic reason for the ultimate victory of the North.”).

Scholars who dispute the external-causes explanations do not deny that there were external causes contributing to the downfall of the Confederacy. They insist, however, that the primary elements of Confederate defeat were internal. *See, e.g.*, RICHARD E. BERINGER ET AL., *WHY THE SOUTH LOST THE CIVIL WAR* 439 (1986) (“[T]he Confederacy succumbed to internal rather than external causes.”); Frank Lawrence Owsley, *Local Defense and the Overthrow of the Confederacy: A Study in State Rights*, 11 *MISS. VALLEY HIST. REV.* 490, 490 (1925) (“[I]t is becoming more apparent to students of Confederate history that the Confederacy collapsed more from internal than from external causes.”).

Some supporters of internal-causes explanations, for example, suggest that economic weaknesses, fiscal irresponsibility, and financial woes were the decisive factors in the defeat of the Confederacy. *See, e.g.*, DOUGLAS B. BALL, *FINANCIAL FAILURE AND CONFEDERATE DEFEAT* 1 (1991) (noting that the South’s “defeat was, to a significant degree, attributable to the inadequate management of the Confederate finances and economy”); CHARLES W. RAMSDALL, *BEHIND THE LINES IN THE SOUTHERN CONFEDERACY* 85 (1944) (“If I were asked what was the greatest single weakness of the Confederacy, I should say, without much hesitation, that it was in this matter of finances.”).

Today the most influential proponents of internal-causes explanations are the scholars who embrace what is known as the “inner civil war” (or “internal conflict”) thesis. According to this approach, “The Confederacy lost because it was plagued by dissent and divisions that undercut the strong and united effort necessary to win the war.” Boritt, *supra*, at 23. *See, e.g.*, DAVID WILLIAMS, *BITTERLY DIVIDED: THE SOUTH’S INNER CIVIL WAR* 8 (2008) (“[The South’s] inner civil war made it increasingly difficult, and ultimately impossible, for the Confederacy to survive.”).

Under the inner-civil-war thesis, the basic elements of Confederate defeat include defeatism, disloyalty, disaffection, lack of unifying nationalism, corruption, class and sectional conflicts, acrimonious feuding within the Confederate government itself and between the Confederate government and the governments of the states of the Confederacy, and massive opposition to such unpopular Confederate war measures as habeas corpus

suspension, martial law, conscription, and impressment of private property. “The dominant picture,” under the internal conflict thesis,

is of a people only superficially united and of a southern movement for independence that shattered because of internal dissention [sic] and lack of will. The idea that nonmilitary problems laid the groundwork for Confederate defeat certainly is not new. . . . Scholarship of the past decade, however, has built upon previous work to create a more complex profile of a divided southern populace.

Gary W. Gallagher, *Home Front and Battlefield: Some Recent Literature Relating to Virginia and the Confederacy*, 98 VA. MAG. HIST. & BIOGRAPHY 135, 136 (1990).

The inner-civil-war thesis has measurably gained in stature over the past several decades as evidence supporting it has mounted. “Though traditional histories still tend to downplay the significance of internal southern conflict, that is becoming more difficult as new studies of southern dissent, mostly state and local examinations, have appeared.” WILLIAMS, *supra*, at 6.

The scores of books and articles defending or discussing aspects of the internal conflict thesis include CHARLES C. ANDERSON, *FIGHTING BY SOUTHERN FEDERALISTS* (1912); BEALS, *supra* note 131; BERINGER ET AL., *supra* note 129; BERINGER ET AL., *WHY THE SOUTH LOST THE CIVIL WAR*, *supra*; DAVID J. EICHER, *DIXIE BETRAYED: HOW THE SOUTH REALLY LOST THE CIVIL WAR* (2006); ESCOTT, *supra* note 141; DREW GILPIN FAUST, *THE CREATION OF CONFEDERATE NATIONALISM: IDEOLOGY AND IDENTITY IN THE CIVIL WAR SOUTH* (1988); WILLIAM W. FREEHLING, *The Divided South, the Causes of Confederate Defeat, and the Reintegration of Narrative History*, in *THE REINTEGRATION OF AMERICAN HISTORY: SLAVERY AND THE CIVIL WAR* 220 (1994); WILLIAM W. FREEHLING, *THE SOUTH VS. THE SOUTH: HOW ANTI-CONFEDERATE SOUTHERNERS SHAPED THE COURSE OF THE CIVIL WAR* (2001); MOORE, *supra* note 132; OWSLEY, *supra* note 128; TATUM, *supra* note 129; JON L. WAKELYN, *CONFEDERATES AGAINST THE CONFEDERACY: ESSAYS ON LEADERSHIP AND LOYALTY* (2002); WESLEY, *supra* note 129; WILLIAMS, *supra*; Gallagher, *supra*; Joseph T. Glatthaar, *The “New” Civil War History: An Overview*, 115 PA. MAG. HIST. & BIOGRAPHY 339 (1991); David Osher & Peter Wallenstein, *Why the Confederacy Lost: An Essay Review*, 88 MD. HIST. MAG. 95 (1993); Frank L. Owsley, *Defeatism in the Confederacy*, 3 N.C. HIST. REV. 446 (1926).

There are, of course, notable historians who challenge or deny the inner-civil-war thesis. See, e.g., James M. McPherson, *American Victory, American Defeat*, in *WHY THE CONFEDERACY LOST*, *supra*, at 15, 23–26 (discussing three flaws in the inner-civil-war thesis).

The present Article is not the forum for making authoritative pronouncements about why the South lost the Civil War, but it does appear, based on recent trends in historical scholarship, that the Confederacy was bled white by a destructive inner civil war which significantly, perhaps mortally, weakened the war effort, and that ferocious, broad-based opposition to habeas corpus suspension was an important feature of this inner civil war. There does, therefore, seem to be merit in the assertion that opposition to habeas corpus suspension may have fatally injured the Confederacy. Yet on closer analysis we must not confuse cause with effect. The opposition to habeas corpus suspension was only the effect. The cause of the problem was the actual suspending of habeas corpus. Even granting that the inner-civil-war thesis is correct, therefore, and that opposition to habeas suspension was a major element of that inner civil war, it is nonetheless fallacious to arrive at the conclusion that opposition to habeas suspension may have doomed the Confederate States of America. It was habeas corpus suspension itself that did this. If cause and effect are put

D. THE GREAT WRIT IN THE GEORGIA SUPREME COURT IN TIME OF WAR

1. *Overview of Case Law.* During the Civil War the Georgia Supreme Court handed down thirty-four reported habeas decisions. Twenty-five involved persons seeking to be relieved from Confederate military service, and six involved persons seeking relief from service in the Georgia state militia. Only three of the Civil War habeas decisions did not involve endeavors to avoid military service.¹⁵¹ In all but three of the thirty-four Civil War decisions, the habeas petition was originally filed with a superior court judge,¹⁵² suggesting that by 1861 few Georgia

in their proper order it was suspension, the cause, not opposition to suspension, the effect, which may have been lethal to Confederate hopes. Under this revisionist approach to the inner-civil-war thesis, it is simplistic to blame Confederate defeat wholly or partially on opposition to habeas corpus suspension. Rather, it was the Confederacy's cataclysmically mistaken decision to suspend the writ of habeas corpus in the first place that may have helped condemn the Confederate States of America to death.

¹⁵¹ These three cases were *Cobb v. Black*, 34 Ga. 162 (1865), in which habeas relief was denied to a person imprisoned by a superior court for contempt; *Taylor v. Jeter*, 33 Ga. 195 (1862), a pre-Code child custody case; and *Granade v. Wood*, 34 Ga. 120 (1864), in which neither the basis of the custody nor the grounds for relief were disclosed.

¹⁵² In *Granade*, the habeas petition was filed with the judge of the City Court of Augusta. 34 Ga. at 120. After the judge denied relief, the habeas petitioner sued out a writ of certiorari in the superior court, alleging that relief should have been granted, whereupon the opposing party moved to dismiss the certiorari on the grounds that, in violation of GA. CODE § 3967 (1861), the petitioner had failed to give ten days advance notice of the granting of the certiorari or of the time and place of the hearing in superior court. *Id.* at 120, 122. The superior court dismissed the certiorari, and on writ of error the Georgia Supreme Court affirmed. *Id.* at 122–23.

In *Chapman v. Woodruff*, 34 Ga. 91 (1864), the habeas petition was filed with a justice of an inferior court. After the justices of that court rendered a habeas judgment discharging the petitioner from Confederate military service, the enrolling officer, pursuant to the procedures set forth in GA. CODE § 3960 (1861), brought a writ of certiorari in the superior court to review the decision of the justices. 34 Ga. at 91. The habeas petitioner filed a motion to dismiss the certiorari on the grounds it should have been sought pursuant to the different procedures set forth in GA. CODE § 3958 (1861). *Id.* When the superior court denied a motion to dismiss the certiorari, the habeas petitioner excepted and brought the case to the Georgia Supreme Court on a writ of error, which affirmed the superior court. *Id.* at 92, 99.

In *Scott v. Lazenby*, 33 Ga. Supp. 134 (1864), the habeas petition claiming that the petitioner was physically unable to serve as a Confederate soldier was filed with the justice of an inferior court. 33 Ga. Supp. at 135. After relief was denied, the superior court refused to sanction the habeas petitioner's request for a writ of certiorari, and on a writ of error the Georgia Supreme Court affirmed. *Id.* at 135–36.

habeas proceedings were instituted other than at the superior court level.

In the twenty-five decisions where judicial relief from Confederate Army service was requested,¹⁵³ the habeas petitioner in some cases was an enlistee serving in the army¹⁵⁴ or a conscript mustered into military service,¹⁵⁵ but usually the petitioner seems to have been a conscript, enrolled but not yet officially in the army, who had been arrested by Confederate military officers¹⁵⁶ or who alternatively or additionally had been militarily ordered to report to a camp of instruction (a military camp for processing and training conscripts)¹⁵⁷ or who was otherwise described as being in military custody.¹⁵⁸ In fifteen of the twenty-five decisions the habeas respondent was an enrolling officer—the Confederate

¹⁵³ These decisions were final and unreviewable by any higher court because, although it was provided for by the third article of the Confederate Constitution, no Confederate Supreme Court ever came into existence. See ROBINSON, *supra* note 128, at 420–36 (examining the refusal of the Confederate Congress to enact a statute organizing the Confederate Supreme Court).

¹⁵⁴ *E.g.*, Swindle v. Brooks, 34 Ga. 67, 70 (1864) (stating that, to avoid conscription, the petitioner voluntarily enlisted in the Confederate Army); Weems v. Farrell, 33 Ga. 413, 414 (1863) (stating that the petitioner volunteered and enlisted in the Confederate Army and then “furnished a substitute”); Moncrief v. Jones, 33 Ga. 450, 450 (1863) (stating that the petitioner volunteered and was “mustered into” Confederate military service).

¹⁵⁵ See, *e.g.*, Smith v. Harris, 34 Ga. 181, 182 (1865) (stating that the petitioner was a member of the Georgia Reserves, having entered as a conscript); Andrews v. Strong, 33 Ga. Supp. 166, 166 (1864) (stating that the petitioner was a conscripted Confederate soldier who had been enrolled and mustered into military service).

¹⁵⁶ See, *e.g.*, Scott, 33 Ga. Supp. at 135 (stating that the petitioner was taken into custody by the enrolling officer); Daly v. Harris, 33 Ga. Supp. 38, 39 (1864) (stating that the petitioner was taken into custody and held for military service); Camfield v. Patterson, 33 Ga. 561, 561 (1863) (stating that the petitioner was arrested by enrolling officer and held as conscript).

¹⁵⁷ *E.g.*, Mims v. Wimberly, 33 Ga. 587, 588 (1863) (stating that the petitioner had been enrolled for military service and ordered to repair to a camp of instruction); Callaway v. Hopkins, 33 Ga. 497, 497 (1863) (stating that the petitioner was arrested and ordered to repair to a camp of instruction).

¹⁵⁸ See, *e.g.*, Wing v. Starr, 34 Ga. 118, 119 (1864) (stating that the petitioner was held in custody by enrolling officer for deserting a camp of instruction); Gates v. McManus, 33 Ga. Supp. 67, 67 (1864) (stating that the enrolling officer ordered the petitioner to report for enrollment in the military service of the Confederate States as a conscript; petitioner reported accordingly, and was held by the enrolling officer in military custody as subject to such service); Connell v. Leonard, 33 Ga. Supp. 58, 58 (1864) (stating that the enrolling officer enrolled petitioner and held him for military service).

Army officer responsible for effecting the petitioner's conscription into military service.¹⁵⁹ In only one case was it certain that the petitioner was confined in a prison and that the respondent was a jailor.¹⁶⁰ Since more than once it entertained habeas petitions filed by soldiers who were restrained of their personal liberty only in the sense that they were serving in the army, as well as petitions filed by conscripts whose only restraint was that they had been ordered to report somewhere for military training, the Georgia Supreme Court evidently regarded military service itself, or coercive efforts to compel someone to enter military service, to amount to custody sufficient to warrant invocation of the writ of habeas corpus.

Of the twenty-five decisions in which habeas relief was sought from Confederate Army service, two stand out: *Jeffers v. Fair*¹⁶¹ and *Mims v. Wimberly*.¹⁶²

2. *Jeffers v. Fair*. *Jeffers v. Fair* raised the sole question of the constitutionality of two 1862 Confederate conscription statutes.¹⁶³ The habeas petitioner, a conscript, sought habeas relief from the respondent, a Confederate Army enrolling officer, on grounds the conscription statutes were unconstitutional. After the superior court judge denied relief, the conscript took the case to the Georgia Supreme Court via a writ of error. His basic claim was that “the

¹⁵⁹ See, e.g., *Cody v. Rhodes*, 34 Ga. 66, 66 (1864) (enrolling officer); *Scott*, 33 Ga. Supp. at 135 (sub-enrolling officer).

¹⁶⁰ *Dies v. Hurltel*, 34 Ga. 109, 109 (1864) (stating that a Confederate soldier filed his petition while incarcerated in military prison, naming the keeper of his prison as respondent).

¹⁶¹ 33 Ga. 347 (1862). This was the earliest Georgia Supreme Court decision involving a person seeking habeas corpus relief from having to serve in the Confederate Army.

¹⁶² 33 Ga. 587 (1863).

¹⁶³ 33 Ga. at 348. For the text of the conscription statutes, see Act of Sept. 27, 1862, Pub. Acts, 1st Cong., 2d Sess., ch. 15, in *THE STATUTES AT LARGE OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA*, *supra* note 128, at 61–62, and Act of Apr. 16, 1862, Pub. Acts, 1st Cong., 1st Sess., ch. 31, *in id.* at 29–32.

These two statutes

authorize[d] the President of the Confederate States to call out and to place in the military service of the Confederate States for three years, unless the war shall have sooner ended, all white men who are residents of the Confederate States, between certain ages, who are not legally exempt from military service.

Jeffers, 33 Ga. at 348.

Confederate Congress has no power to raise armies by compulsion, but is wholly dependent for military forces upon *the voluntary enlistment* of men¹⁶⁴ and that therefore the power of the Confederacy to raise armies was only “*a bare authority to raise armies by accepting’ volunteers.*”¹⁶⁵ In a lengthy decision in which it canvassed pertinent views of George Washington, James Madison, John Marshall, Alexander Hamilton, Oliver Ellsworth, Joseph Story, and George M. Troup, the court unanimously affirmed the denial of habeas relief. Focusing first¹⁶⁶ on the clause of the Confederate Constitution giving the Confederate Congress power to raise and support armies,¹⁶⁷ the court emphasized that “[w]e look in vain for the limitation to voluntary enlistment as a means [for raising armies].”¹⁶⁸ “Compulsory enrollment,” the court reasoned further, “is a proper incident of the power to raise armies.”¹⁶⁹ Even conceding, however, that the raise and support armies clause did not by itself authorize conscription, the court went on to conclude¹⁷⁰ that conscription was authorized by the necessary and proper clause of the Confederate Constitution,¹⁷¹ at least “whenever voluntary enlistment shall fail, or cease to promise necessary results.”¹⁷² This power to raise armies, the court thought, was so broad that it granted the Confederate Congress “unlimited power in the use of means to raise armies from their populations [i.e., of the Confederate states].”¹⁷³ This power was not, however, “unlimited *as to the subjects upon whom it may operate.*”¹⁷⁴ Thus, to preclude the Confederate government

¹⁶⁴ 33 Ga. at 350.

¹⁶⁵ *Id.* at 351.

¹⁶⁶ *Id.* at 348–51.

¹⁶⁷ CONFED. CONST. art. I, § 8, cl. 12. This clause is identical to U.S. CONST. art. I, § 8, cl. 12.

¹⁶⁸ 33 Ga. at 351.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 352–53.

¹⁷¹ CONFED. CONST. art. I, § 8, cl. 18. Except for replacing “United States” with “Confederate States,” this clause is identical to U.S. CONST. art. I, § 8, cl. 18.

¹⁷² 33 Ga. at 352.

¹⁷³ *Id.* at 366.

¹⁷⁴ *Id.* at 365.

from exercising “an arbitrary despotism and unlimited authority,”¹⁷⁵ the court made it clear

if ever that Government shall apply . . . those means to the enrollment of the officers and agents, by whom the State Governments are operated, and without whose agency their machinery must stop, it will manifestly transcend its limit by violating the intention of those [i.e., the various states of the Confederacy] who conferred the power.¹⁷⁶

In short, the court held that, despite its wide breadth, the conscription power could not be used to interfere with states acting “in the exercise of their proper functions,”¹⁷⁷ because “no suspension or obstruction by Confederate authorities of [the] reserved powers [of the states] should be permitted.”¹⁷⁸ Embedded within the *Jeffers* holding that the Confederate conscription statutes were constitutional was the unstated assumption that a restraint on liberty authorized by an unconstitutional statute may be successfully attacked via habeas corpus.¹⁷⁹

3. *Mims v. Wimberly*. In another milestone habeas corpus decision of the Civil War, *Mims v. Wimberly*,¹⁸⁰ the Georgia Supreme Court expressly and specifically announced that the state’s writ of habeas corpus could be used to obtain release from Confederate military service.¹⁸¹

The habeas petitioner in *Mims* had been enrolled for Confederate military service and ordered to report to a camp of instruction, and the habeas respondents were two Confederate

¹⁷⁵ *Id.* at 366.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 368.

¹⁷⁸ *Id.*

¹⁷⁹ That this assumption was well-founded was subsequently confirmed by *Collins v. Hall*, 17 S.E. 622 (Ga. 1893), where the court granted habeas relief to a prisoner convicted of violating a void municipal ordinance, and *Moore v. Wheeler*, 35 S.E. 116 (Ga. 1900), where the court granted habeas relief to a prisoner convicted of violating an unconstitutional criminal statute.

¹⁸⁰ 33 Ga. 587 (1863).

¹⁸¹ *Id.* at 596.

Army enrolling officers.¹⁸² The habeas petition raised the claim that the petitioner was exempt from military duty.¹⁸³ The respondents answered by asserting, first, that the petitioner was not exempt, and, second, that state judges had no authority to issue writs of habeas corpus in cases such as this.¹⁸⁴ They therefore requested that the habeas petition be dismissed for lack of jurisdiction.¹⁸⁵ When the superior court judge denied this plea to the jurisdiction, the respondents excepted and, on a writ of error, took the case to the Georgia Supreme Court solely on the question of jurisdiction.¹⁸⁶

The Georgia Supreme Court unanimously affirmed, holding that the superior court did have jurisdiction to entertain the habeas petition.¹⁸⁷ Any person unlawfully imprisoned in Georgia under Confederate authority (including Confederate military authority) could, the court said, apply for and if appropriate receive state habeas relief, with the sole exception of persons imprisoned pursuant to the order or process of a Confederate court.¹⁸⁸

The notion of a state habeas court releasing a person imprisoned by the central government is startling today, but it seemed perfectly reasonable back then. Until almost the onset of the Civil War there was in the United States a “well-settled rule applied by the courts and recognized by commentators . . . that a state, as well as a federal, court had authority to issue a writ of habeas corpus to inquire into the imprisonment of a federal

¹⁸² *Id.* at 588.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Where the power of imprisonment is exercised by one claiming authority, other than judicial, under an Act of [the Confederate] Congress, within the limits of the State, any magistrate of that State having authority to issue the writ of *habeas corpus* may inquire into its legality, and even military officers are not exempt from this jurisdiction, but owe obedience to the final judgment.

Id. at 596.

prisoner held within its jurisdiction.”¹⁸⁹ This authority seems to have been limited to extrajudicial detainees—prisoners held without judicial process.¹⁹⁰ During this period, therefore, state habeas judges usually would decline to inquire into the confinement of a federal prisoner only where the prisoner was held under the order or process of a federal court.¹⁹¹

Then, in 1859, two years before Fort Sumter was bombarded, the U.S. Supreme Court handed down its decision in *Ableman v. Booth*.¹⁹² This case involved a federal prisoner who, after

¹⁸⁹ DUKER, *supra* note 30, at 149 (footnotes omitted); *see also* FREEDMAN, *supra* note 5, at 159 & n.21 (noting that prior to controversial U.S. Supreme Court decisions in 1859 and 1871, the assumption that state habeas courts would be able to release federal prisoners was a sound one; for example, Massachusetts habeas courts would release enlistees from the U.S. Army); Annotation, *Authority of State Court on Habeas Corpus*, 37 AM. DECISIONS 200, 203 (1886) (noting that prior to 1859, the weight of authority was that state habeas judges could decide the legality of imprisonment of federal prisoners and discharge a federal prisoner if his imprisonment was illegal).

The leading pre-Civil War treatise on American habeas corpus stated:

It may be considered settled that state courts may grant the writ in all cases of illegal confinement under the authority of the United States.

And the weight of authority clearly is that they may decide as to the legality of the imprisonment; and discharge the prisoner if his detention be illegal

HURD, *supra* note 14, at 166.

¹⁹⁰ Todd E. Pettys, *State Habeas Relief for Federal Extrajudicial Detainees*, 92 MINN. L. REV. 265, 270–82 (2007). Typically, the federal prisoners who were released or whose detention was inquired into by state habeas courts were soldiers in the U.S. Army or sailors in the U.S. Navy who sought release from military service. *See id.* at 276–77 nn.59–68 (citing and summarizing some of these cases).

Occasionally, however, the federal prisoner seeking or obtaining state habeas relief was not a member of the U.S. military. In 1818, for example, a Georgia habeas court set free a state militia officer who was in federal military custody pursuant to the order of a U.S. Army General. *See supra* note 82.

¹⁹¹ Pettys, *supra* note 190, at 279 (“State judges did not believe . . . that their power to release federal prisoners was unlimited. In particular, the state courts in the early 1800s were reticent to try to free people from federal confinement when that confinement was backed by federal judicial process.”).

¹⁹² 62 U.S. (21 How.) 506 (1858).

For helpful articles with *Ableman v. Booth* as their focal point, *see generally* A.J. Beitzinger, *Federal Law Enforcement and the Booth Cases*, 41 MARQ. L. REV. 7 (1957) (focusing on *Booth* as a “law enforcement problem”); Earl M. Maltz, *Slavery, Federalism, and the Constitution: Ableman v. Booth and the Struggle over Fugitive Slaves*, 56 CLEV. ST. L. REV. 83 (2008) (locating *Booth* in the history of the dispute over fugitive slaves); Jeffrey Schmitt, Note, *Rethinking Ableman v. Booth and States’ Rights in Wisconsin*, 93 VA. L. REV. 1315 (2007) (discussing the Wisconsin Supreme Court decision that *Booth* overturned).

conviction and sentence in federal court for a federal crime, had secured state habeas relief from his federal custody.¹⁹³ Reversing the state court habeas judgment, the Court announced that state courts and judges would no longer be permitted to entertain habeas petitions filed by prisoners detained under the authority of the U.S. government.¹⁹⁴ Despite, however, the language in *Ableman v. Booth* apparently foreclosing any state habeas review whatsoever of persons imprisoned “under the authority of the United States,”¹⁹⁵ over the next dozen years various state court decisions narrowly construed *Ableman*, limiting it to situations where the federal custody was pursuant to the order or process of a federal court, thereby leaving themselves free to continue to grant habeas relief to federal prisoners detained solely on the authority of the Executive Branch of the federal government.¹⁹⁶ One of the rationales underlying these decisions was the argument that on its facts *Ableman* had involved detention under a federal court order—and that therefore any language in the *Ableman* opinion purporting to bar state habeas review of federal

¹⁹³ 62 U.S. (21 How.) at 507–08.

¹⁹⁴ We do not question the authority of [a] State court, or judge, who is authorized by the laws of the State to issue the writ of *habeas corpus*, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. . . . But, after the return is made, and the State judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further.

Id. at 523.

¹⁹⁵ The *Ableman* Court used this term three times in its opinion to describe the class of habeas cases that state courts were now forbidden to hear. *Id.* at 517, 523.

¹⁹⁶ DUKER, *supra* note 30, at 153, 179, 221; Pettys, *supra* note 190, at 285–88; see also Annotation, *supra* note 189, at 203 (noting that although after the *Ableman* decision state courts recognized they could not release a federal prisoner held under process issued by a federal court, it was not everywhere considered that state habeas courts were barred from releasing persons held under federal military authority).

For an example during this period of a state habeas decision releasing a seaman from the U.S. Navy, see the discussion of an unreported 1867 Maine case, *In re McCarey*, in *Summary of Events*, 2 AM. L. REV. 345, 347 (1868).

During this period, even some federal courts thought that notwithstanding *Ableman*, state habeas courts were still empowered to release soldiers held as deserters by the U.S. Army. See, e.g., *In re Reynolds*, 20 F. Cas. 592, 605 (N.D.N.Y. 1867) (No. 11,721) (rejecting the claim that *Ableman* deprived state courts of jurisdiction under such facts).

extrajudicial imprisonment was dicta.¹⁹⁷ The import of these state court holdings was that the pre-1859 rules regarding state habeas relief for federal prisoners were undisturbed by *Ableman*.

In 1871, however, in *Tarble's Case*,¹⁹⁸ the Supreme Court repudiated an attempt “to limit the decision of this court in *Ableman v. Booth*.”¹⁹⁹ The Court held that under *Ableman*, state habeas courts may not, irrespective of whether the imprisonment is judicial or nonjudicial, inquire into the custody of any federal prisoner if they know the prisoner is held “under the authority, or claim and color of the authority, of the United States, by an officer of that government.”²⁰⁰

This background makes *Mims v. Wimberly* understandable. *Mims* was decided against a legal backdrop which had for many

¹⁹⁷ Pettys, *supra* note 190, at 285–86; see, e.g., *In re McConologue's Case*, 107 Mass. 154, 167 (1871) (“[N]o question arose [in *Ableman*], of the effect, as against a writ of *habeas corpus* from a state court, of the detention of a citizen by a mere executive officer, civil or military, of the United States, [acting] without color of judicial process or proceeding of any kind.”); Commonwealth *ex rel.* M'Lain v. Wright, 3 Grant 437, 440 (Pa. 1863) (stating that *Ableman* decided “only that a prisoner cannot be taken out of the custody of the judicial department of the Federal government by means of a habeas corpus issued by a State court”; if the opinion in *Ableman* meant more than this, then it “meant more than the case called for, and all beyond is mere *obiter dictum*”).

¹⁹⁸ 80 U.S. (13 Wall.) 397 (1871). The state habeas petitioner seeking relief from federal custody in this case was a U.S. Army soldier who claimed his enlistment was illegal and was in confinement while awaiting a military trial on desertion charges. *Id.* at 398–99. Because no civilian court had authorized his imprisonment, he was an extrajudicial detainee. The Court, however, broadly framed the issue before it as

[w]hether any judicial officer of a State has jurisdiction to issue a writ of *habeas corpus*, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States, by an officer of that government.

Id. at 402.

The leading scholarly work on *Tarble* is Ann Woolhandler & Michael Collins, *The Story of Tarble's Case: State Habeas and Federal Detention*, in FEDERAL COURTS STORIES 141 (Vicki C. Jackson & Judith Resnik eds., 2010).

¹⁹⁹ *Tarble's Case*, 80 U.S. at 410.

²⁰⁰ *Id.* at 409. The Court said: “*Ableman v. Booth* . . . disposes alike of the claim of jurisdiction by a State court, or by a State judge, to interfere with the authority of the United States, whether that authority be exercised by a Federal officer or be exercised by a Federal tribunal.” *Id.* at 403–04.

Thus, *Ableman* and *Tarble* “together stand for the proposition that state courts cannot grant habeas relief to federal prisoners, regardless of whether those prisoners have been given the benefit of federal judicial proceedings.” Pettys, *supra* note 190, at 267–68.

years permitted state habeas courts to release the central government's extrajudicial prisoners. *Mims* was decided after *Ableman* but before *Tarble*. And the Georgia Supreme Court in *Mims* simply adopted the same narrow view of *Ableman*—that the case had not actually decided the issue of state habeas corpus relief for federal extrajudicial detainees²⁰¹—which various other state courts embraced prior to *Tarble*.

4. *Additional Case Law Where Relief from Confederate Army Service Was Sought.* The remaining twenty-three habeas decisions²⁰² in which Confederate Army service was assailed may be divided into three categories. First, there were nine decisions where relief was granted. In six of these cases the court ordered the discharge of a conscript because he had established a valid exemption from military service;²⁰³ in two cases a minor whose enlistment was illegal because of his age was ordered discharged;²⁰⁴ and in the ninth case a disabled soldier unable to perform active service in the field but assigned the allegedly onerous and exhausting task of baking bread was ordered released because the medical report pronouncing him capable of performing only light duties failed, in violation of a Confederate statute, to specify which such duties he was capable of performing.²⁰⁵

²⁰¹ *Mims v. Wimberly*, 33 Ga. 587, 596 (1863) (“[A]lthough the language [in *Ableman v. Booth*] . . . would seem to admit of extension to all cases of imprisonment by authority of the United States, it must be borne in mind that the question of imprisonment, by authority other than judicial, was not in that case. The distinction between the two classes of cases was not taken, and the opinion, in so far as it overleaps the case before the Court, is *obiter dictum*.”).

²⁰² Four of these decisions involved more than one habeas petitioner. *McCluskey v. Brock*, 34 Ga. 206 (1865); *Smith v. Harris*, 34 Ga. 181 (1865); *Parker v. Kaughman*, 34 Ga. 136 (1865); *Daly v. Harris*, 33 Ga. Supp. 38 (1864).

²⁰³ *Smith*, 34 Ga. 181 (applying a statutory exemption for persons over fifty years old); *Starr v. Barton*, 34 Ga. 99 (1864) (applying a statutory exemption for physicians); *Andrews v. Strong*, 33 Ga. Supp. 166 (1864) (interpreting a constitutional exemption for a conscript subsequently elected a justice of peace); *Gates v. McManus*, 33 Ga. Supp. 67 (1864) (applying a statutory exemption for skilled mechanics); *Mandeville v. Daniel*, 33 Ga. 599 (1863) (applying a statutory exemption for contractors for transportation of mail on routes more than ten miles in length); *Callaway v. Hopkins*, 33 Ga. 497 (1863) (applying a statutory exemption for medical reasons).

²⁰⁴ *Dies v. Hurtel*, 34 Ga. 109 (1864); *Moncrief v. Jones*, 33 Ga. 450 (1863).

²⁰⁵ *Parker*, 34 Ga. 136.

Second, there were thirteen cases in which habeas relief was denied, usually on the ground that the petitioner had not established a valid exemption from military service.²⁰⁶ Third, there was one final case, which was disposed of without deciding whether the habeas petitioner was entitled to discharge from the military.²⁰⁷

5. *Case Law Where Relief from Militia Service Was Sought.* In the six remaining Civil War habeas cases,²⁰⁸ the petitioner was seeking to avoid compulsory service in the Georgia state militia. In all six cases the petitioner had been arrested by order or

²⁰⁶ *McCluskey*, 34 Ga. 206 (holding that a person giving bond and security for appearance in court on felony or other charge was not exempt from military service); *White v. Sellars*, 34 Ga. 200 (1865) (finding that a petitioner who, while serving in the Confederate Army, was elected constable, was not entitled to exemption from military service); *Wing v. Starr*, 34 Ga. 118 (1864) (denying habeas relief to a petitioner who claimed he was above age for military service and also that he was medically unfit for field service assigning petitioner to light duty); *Ansley v. Starr*, 34 Ga. 85 (1864) (holding that the petitioner was not entitled to an exemption for artisans, mechanics, and employees of establishment under contract to furnish arms to the Confederate government); *Swindle v. Brooks*, 34 Ga. 67 (1864) (determining that the petitioner's voluntary enlistment was not made under any misapprehension of fact and was valid); *Cody v. Rhodes*, 34 Ga. 66 (1864) (holding that the petitioner was not entitled to an exemption by reasons of physical disability because the certificate of a single physician, as opposed to a medical board, was insufficient to establish a medical disability exemption); *Rogers v. Rhodes*, 34 Ga. 22 (1864) (finding that the petitioner was not entitled to an exemption by reasons of physical disability, and that a citizen may be reexamined for medical disability even though he has thrice before been determined by a medical board to be medically disabled); *Scott v. Lazenby*, 33 Ga. Supp. 134 (1864) (holding that where a medical board established by statute has examined petitioner and found him physically able for military duty in field, courts may not go behind this finding); *Hooks v. Harris*, 33 Ga. Supp. 81 (1864) (finding that the petitioner was not entitled to an exemption for overseers of slave plantations); *Connell v. Leonard*, 33 Ga. Supp. 58 (1864) (finding that the petitioner was not entitled to an exemption for blacksmiths); *Daly*, 33 Ga. Supp. 38 (holding that a recent Confederate statute providing that no person shall be exempted from military service by reason of furnishing substitute was constitutional); *Camfield v. Patterson*, 33 Ga. 561 (1863) (finding that the petitioner was no longer entitled to an exemption for overseers of slave plantations); *Weems v. Farrell*, 33 Ga. 413 (1863) (ruling that the petitioner was not entitled to an exemption for persons who provide substitutes, because the substitute he provided was now himself liable to military service).

²⁰⁷ *Chapman v. Woodruff*, 34 Ga. 91 (1864). This case dealt with the statutory procedural niceties applicable to certiorari review by the superior court of habeas decisions of inferior courts, and is discussed *supra* notes 106, 124, 152.

²⁰⁸ In half these cases there was more than one habeas petitioner.

proclamation of Governor Joseph E. Brown.²⁰⁹ In two cases relief was granted,²¹⁰ in three it was denied,²¹¹ and in one it was unnecessary for the court to decide the merits of the habeas claim.²¹²

V. CONCLUSION

This Article has undertaken the first-ever comprehensive examination of Georgia's writ of habeas corpus as it existed throughout the 132-year period that began with the settling of the colony, continued through statehood, and ended with a bloody Civil War in which the state was invaded and overrun by an enemy army, occasioning "the greatest catastrophe in Georgia's history."²¹³ During this momentous century and a third, the writ was continuously available in Georgia courts, and was deeply and steadfastly revered and protected.

Georgia was the only colony where both the common law writ of habeas corpus and the landmark 1679 English habeas statute were received into the colony at the time it was founded²¹⁴ and the

²⁰⁹ In fact, pursuant to a Brown directive, one petitioner had been arrested by the local sheriff and was in his custody. *Jackson v. Mayo*, 34 Ga. 105, 105 (1864). Another petitioner was under military arrest pursuant to an order of Brown directing that men who had unsuccessfully sought habeas relief from military service and were subject to militia duty should be sent to the front lines. *Irwin v. Jackson*, 34 Ga. 101, 101–02 (1864).

²¹⁰ *Jackson*, 34 Ga. 105 (holding that petitioner, subject to military service of the Confederate government and enrolled as a Confederate soldier, was not liable to compulsory militia service); *Cobb v. Stallings*, 34 Ga. 72 (1864) (holding that Confederate government tax collectors and tax assessors were not liable to compulsory militia duty).

²¹¹ *Jones v. Billingslea*, 34 Ga. 205 (1865) (holding that the petitioner, exempt from serving in the Confederate Army, was nonetheless liable to be called out for service in militia); *Barber v. Irwin*, 34 Ga. 27 (1864) (holding that the petitioner, exempt from serving in Confederate Army, was nonetheless liable to compulsory service in militia); *Alford v. Irwin*, 34 Ga. 25 (1864) (holding that the petitioner, at large but under bond to appear in court on murder charge, was not exempt from militia service and could be arrested pending removal to the front for militia duty).

²¹² *Irwin*, 34 Ga. 101 (stating that the filing of a bill of exceptions to an order denying habeas relief to a person claiming he was not liable to militia service did not act as supersedeas, and pending appellate review of denial of habeas relief, petitioner should remain in custody).

²¹³ F.N. BONEY, *REBEL GEORGIA* 33 (1997).

²¹⁴ Although common law habeas corpus was received into each of the Thirteen Colonies at the time it was settled, Georgia, as the only colony founded after 1679, was the only

only colony where both common law habeas corpus and the 1679 statute were continuously in effect from the founding of the colony until at least 1776.²¹⁵ Georgia was the only colony where the writ of habeas corpus was being issued within ten years of the colony's settlement.²¹⁶

Georgia's respect for the writ of habeas corpus was equally evident in the Antebellum era. During the period 1777 to 1863, Georgia was one of only two states where the renowned 1679 English Habeas Act remained continuously in effect.²¹⁷ Georgia was the first state to make the writ of habeas corpus by name a

colony where the 1679 English Habeas Act was received at the inception of the colony. In Massachusetts, for example, the English Habeas Act did not become effective until it was enacted into law by a 1692 statute passed by the colonial legislature, DONALD E. WILKES, JR., *STATE POSTCONVICTION REMEDIES AND RELIEF* 69–70 (1996), and in Virginia the English habeas statute did not take effect until it was extended to the colony by a 1710 proclamation of the colonial governor. Carpenter, *supra* note 35, at 24–25.

²¹⁵ Common law habeas corpus, it is true, was available in all the Thirteen Colonies during the entirety of the colonial period. It is also true that the 1679 Act was definitely available at various times in at least three colonies other than Georgia. However, as the only colony founded after 1679, Georgia was the single colony where the 1679 Act became part of the English law received into the colony at its inception. It was therefore impossible for the 1679 Act to have been in operation throughout the colonial period in any colony other than Georgia.

²¹⁶ The earliest known colonial habeas corpus decision, in Virginia, dates from 1682, seventy-five years after that colony was established. WILKES, *supra* note 214, at 68. However, according to a recent article, Melinde Lutz Sanborn, *The Case of the Headless Baby: Did Interracial Sex in the Massachusetts Bay Colony Lead to Infanticide and the Earliest Habeas Corpus Petition in America?*, 38 *HOFSTRA L. REV.* 255 (2009), “arguably the earliest habeas corpus petition in America,” *id.* at 256, was in Massachusetts in 1663. Massachusetts colony had been founded in 1620.

²¹⁷ The other state was South Carolina, which enacted the 1679 Act by a colonial statute passed in 1712, Act of Dec. 12, 1712, in 2 *THE STATUTES AT LARGE OF SOUTH CAROLINA* 399–401 (Columbia, A.S. Johnston 1837). The 1679 Act remained a statutory requirement in South Carolina until 1873, when it was replaced by the habeas provisions of the Revised Statutes of South Carolina, set forth at S.C. REV. STAT. ch. 118, §§ 1–19 (1873). For Antebellum case law in South Carolina on the 1679 Act as enacted into law there, see *State v. Fasket*, 39 S.C.L. (5 Rich.) 255 (Ct. App. Law 1852) (discharging a criminal defendant because he was denied a speedy trial as secured by the 1679 Act); *State v. Spergen*, 12 S.C.L. (1 McCord) 563 (Const. Ct. App. 1822) (denying discharge despite a demand for a speedy trial under the 1679 Act); *Ashe v. O'Driscoll*, 5 S.C.L. (3 Brev. 569) 517 (Const. Ct. App. 1815) (deciding an action for damages under the 1679 Act as enacted into law in South Carolina by the 1712 colonial statute still in effect); *Logan v. State*, 5 S.C.L. (2 Tread. 493) 415 (Const. Ct. App. 1814) (denying a habeas discharge after a demand for a speedy trial under the 1679 Act); *State v. Buyck*, 2 S.C.L. (2 Bay) 563 (Const. Ct. App. 1804) (same).

constitutional right,²¹⁸ and from 1777 through 1865 habeas corpus was a constitutional right in Georgia.²¹⁹ Georgia was the first (and only) state to constitutionally guarantee the 1679 English Habeas Act.²²⁰ Georgia was one of four states to make habeas corpus a constitutional right before there even was a U.S. Constitution.²²¹ In 1789, the year the U.S. Constitution with its Habeas Corpus Clause guaranteeing the writ went into operation, Georgia adopted its second constitution, thus becoming the first jurisdiction to guarantee habeas corpus in two constitutions.²²² When the Civil War ended in May 1865, Georgia was one of only three states where habeas corpus had been constitutionally guaranteed under at least three state constitutions.²²³

During the Civil War itself the three branches of Georgia government resolutely refused to overlook the pricelessness, the inestimable importance of the writ of habeas corpus.

The executive branch lambasted Confederate suspension of the writ and demanded an end to suspension.²²⁴

The legislative branch enacted the 1861 Code, making Georgia only the fourth state to codify its habeas corpus statutes.²²⁵ The legislature, without a dissenting vote, enacted the 1863 statute

²¹⁸ See *supra* note 73.

²¹⁹ See *supra* note 73.

²²⁰ See *supra* note 73 and accompanying text.

²²¹ WILKES, *supra* note 214, at 70. The three other states were Massachusetts, New Hampshire, and North Carolina. *Id.*

At the 1787 Philadelphia Convention which drew up the U.S. Constitution, Georgia's delegation was one of four state delegations that voted against the portion of that document's habeas corpus clause permitting suspension of the writ. Wilkes, *supra* note 35, at 313–14. The other states were Virginia, North Carolina, and South Carolina. *Id.* at 314 n.1.

²²² WILKES, *supra* note 214, at 70.

²²³ Between 1776 and 1865, the only states other than Georgia to include a habeas corpus clause in three state constitutions were Kentucky (KY. CONST. of 1792 art. XII, § 16; KY. CONST. of 1799 art. X, § 16; KY. CONST. of 1850 art. XIII, § 18) and Louisiana (LA. CONST. of 1812 art. VI, § 19; LA. CONST. of 1845 tit. VI, art. 108; LA. CONST. of 1852 tit. IV, art. 69). A fourth Louisiana constitution, adopted in 1864, LA. CONST. of 1864, tit. V, art. 73, also had a habeas corpus clause. However, the 1864 Louisiana state constitution "was not recognized by Congress." John H. Tucker, Jr., *Source Books of Louisiana Law*, 9 TUL. L. REV. 244, 246 (1935).

²²⁴ See *supra* notes 132–40 and accompanying text.

²²⁵ See *supra* note 101 and accompanying text.

intended to facilitate issuance of the writ.²²⁶ It also approved a resolution which stridently criticized the 1864 Confederate suspension statute, declared it to be unconstitutional, and urged its prompt repeal;²²⁷ and as a consequence of these actions by Georgia's executive and legislative branches the 1864 suspension statute became a dead letter in the state.²²⁸ The pro-habeas decision of the Confederate Congress not to renew the 1864 suspension statute, it is said, "was a signal triumph of the Georgia policy inspired by Governor Brown."²²⁹

Meanwhile the judicial branch courageously maintained that persons restrained of their liberty by the Confederate government, including Confederate Army conscripts or enlistees, were within the reach of the state's writ of habeas corpus, and in appropriate cases actually released individuals from Confederate military service.²³⁰

There is no reason to doubt that the citizens of Civil War Georgia agreed with the pro-habeas stances taken by their governor, their legislature, and their state judiciary.²³¹

²²⁶ See *supra* notes 126–27 and accompanying text.

²²⁷ See *supra* notes 146–47 and accompanying text.

²²⁸ See *supra* note 148 and accompanying text.

²²⁹ AVERY, *supra* note 131, at 273.

²³⁰ See *supra* notes 151–207 and accompanying text.

²³¹ Certainly Governor Brown, who seems to have struck a responsive chord among Georgians when he protested against habeas suspension, suffered no loss of popularity as a result of his crusade against the suspension. See, e.g., AVERY, *supra* note 131, at 253–54 (stating that Brown gained hold on the masses of the people, showing his perception of popular wishes and championing the people's wishes and interests); BONEY, *supra* note 213, at 33 (describing Brown, leader of opposition to habeas suspension, as "the people's choice"); ESCOTT, *supra* note 141, at 165–66 (stating that by his battles on behalf of ordinary Georgians, Brown won loyal support of many poorer citizens, and that Brown's argument that the Confederacy threatened people's freedom contributed to his great popularity); HERBERT FIELDER, *A SKETCH OF THE LIFE AND TIMES AND SPEECHES OF JOSEPH E. BROWN* 267 (Springfield, Press of Springfield Prtg. Co. 1883) (stating that in Georgia during the Civil War, "The people and the soldiers [of Georgia], and especially their families at home, loved and almost worshipped 'Joe Brown,' as he was called, while the Confederate authorities clamored for . . . supreme control."); Paul D. Escott, *Georgia, in THE CONFEDERATE GOVERNORS* 79, 80 (W. Buck Yearns ed., 1985) (stating that Brown's attacks on "the suspension of habeas corpus appealed to states' rightists, the common man, and the growing number of southerners who had lost their enthusiasm for the cause," and that Brown's "assault on the suspension of habeas corpus became an outlet for the people's anger at their [Confederate] government and its leaders"). *But see* HILL, *supra* note 129, at 217

The amazing story of how Georgians rallied in defense of the writ of habeas corpus is an important part of Civil War history. It is also one of the great stories about the Great Writ itself. There is perhaps no other example in American history of an entire state uniting in a time of crisis to thwart a legislative endeavor to curtail habeas corpus.

In 1863—amidst the thunderous clash of arms—a case came before the Georgia Supreme Court raising the issue of whether the state’s writ of habeas corpus could wrest Georgians from Confederate military service.²³² Answering this question in the affirmative,²³³ the court gravely reminded the parties of its responsibility to protect personal liberty as well as the writ of habeas corpus, which the court declared to be “the glory of the British law.”²³⁴

In Georgia, from the arrival of Oglethorpe to the overthrow of the Southern Confederacy, the writ of habeas corpus was the glory of Georgia law.

(stating that some units of Georgia soldiers reacted unfavorably to Brown’s attempt to weaken Confederate statutes); PARKS, *supra* note 131, at 281 (stating that some military units denounced Brown’s message to the legislature).

Alexander Stephens’s opposition to habeas suspension was received favorably by the public and he did not suffer a loss of popular support on account of his campaign against habeas suspension. See, e.g., CLEVELAND, *supra* note 141, at 190–91 (“Mr. Stephens’ speech against the suspension of *habeas corpus* received marked approbation from the press generally . . . and [was] cordially hailed by the great mass of the people . . .”); PARKS, *supra* note 131, at 277 (“A number of Stephens’ friends assured him that his [March 16, 1864] speech was the greatest effort of his life.”). At the conclusion of his March 16, 1864 speech to the Georgia state legislature Stephens received “[i]mmense cheers and applause.” CLEVELAND, *supra* note 141, at 786. After the Civil War, Stephens “was elected to Congress in 1872, served a decade, and then was elected governor.” JAMES F. COOK, GOVERNORS OF GEORGIA 183 (1979).

²³² Mims v. Wimberly, 33 Ga. 587, 588 (1863).

²³³ *Id.* at 598. Mims v. Wimberly is discussed *supra* notes 180–201 and accompanying text.

²³⁴ It is the indispensable duty of this Court, and one to which every inferior consideration must be sacrific[ed], to act as a faithful guardian of the personal liberty of the citizen, and to give ready and effectual aid to the means provided by law for its security. One of the most valuable of these means is the writ of *habeas corpus*, which has been justly deemed the glory of the British law.

Id. (quoting *In re Stacy*, 10 Johns. 328, 333 (N.Y. Sup. Ct. 1813)).