

Maurice A. Deane School of Law at Hofstra University

## Scholarship @ Hofstra Law

---

Hofstra Law Faculty Scholarship

---

2018

### Making Habeas Work: A Legal History

Eric M. Freedman

*Maurice A. Deane School of Law at Hofstra University*

Follow this and additional works at: [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship](https://scholarlycommons.law.hofstra.edu/faculty_scholarship)



Part of the [Constitutional Law Commons](#)

---

#### Recommended Citation

Eric M. Freedman, *Making Habeas Work: A Legal History* (2018)

Available at: [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship/1154](https://scholarlycommons.law.hofstra.edu/faculty_scholarship/1154)

This Book Chapter is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarship @ Hofstra Law. For more information, please contact [lawscholarlycommons@hofstra.edu](mailto:lawscholarlycommons@hofstra.edu).

# Making Habeas Work

## *A Legal History*

Eric M. Freedman



NEW YORK UNIVERSITY PRESS

*New York*

## PART II

### Habeas Corpus as a Legal Remedy

Habeas corpus during the colonial and early national periods was one strand in an overarching web of public and private legal remedies restraining abuses of government power.

*Chapter 4.* To illustrate, I begin by telling the story of Captain Isaac Hodsdon of the US Army, who was accused of wrongfully imprisoning several men in Stewartstown, New Hampshire during the War of 1812. Their first resort was to obtain a writ of habeas corpus from a state court. Hodsdon's response, that he would not produce the men because one petitioner was a prisoner of war and so beyond the reach of civil authority and that the other was detained on federal charges and so not amenable to a state writ, was—quite appropriately—found contemptuous. He was prosecuted for criminal contempt by the state in an action controlled by the private parties concerned, and also held liable for damages in a false imprisonment action. In the midst of all this, the New Hampshire legislature (to whom Hodsdon apparently gave a misleading account of the events) passed a bill to enable him to mount a defense on the merits despite a missed deadline, and ultimately the US Congress (to which his counsel had been elected in the meantime) indemnified him.

The remaining chapters isolate the legal strands of Hodsdon's cat's cradle as they existed during the colonial and early national periods. (I mix the two periods freely because Independence did not change the law in America on the subjects covered by this part of the text.) Where Hodsdon saw a tangle of irritations, we should see a web of mutually reinforcing legal restraints on government misconduct. Each had its strengths and weaknesses. No one remedy worked perfectly all the time, and sometimes no combination of remedies was efficacious. But just as

part I showed that the first step toward getting an accurate view of habeas corpus is understanding it as only one of a variety of common law writs that might secure an individual's release from imprisonment, so this part will show that the second step is understanding it as only one of a variety of legal mechanisms that might curb abusive government actions. Habeas corpus was part of a structure made sturdy by a redundant design.

*Chapter 5.* Focusing primarily on some well-known cases arising during the War of 1812, this chapter illustrates both the power of the writ and the long-recognized limits of that power. Those limits are the reason that, then as now, one cannot assess a system for enforcing the rule of law by looking at mechanisms in isolation but rather must consider how well they work collectively.

*Chapter 6.* I next canvass private actions against public officials for money damages. Until the early nineteenth century, these actions provided remedies for a broad range of government misconduct. Whether or not to grant relief in any particular case depended critically on juries' determinations of how culpable the officials had been. Thereafter, the landscape changed radically, as the second half of chapter 9 describes.

*Chapter 7.* Another central strand in the web of restraints on power comprised criminal actions against officeholders, both ones commenced by private individuals and ones initiated by the government. The relationship between the two has been contested for centuries and still is, as the Supreme Court discovered in 2010 when it proved unable to decide whether private criminal prosecutions are constitutional. Public criminal prosecutions of wrongdoers are uncontroversial, of course, but public resources are limited. Yet filling that gap by clothing private parties with prosecutorial power opens many possibilities for abuse, as Captain Hodsdon complained.

*Chapter 8.* The strands discussed in chapters 5–7 were elements of an overall design. Parties who thought themselves abused by government could bring multiple legal actions to pursue their grievances, but their targets could use the same actions for self-protection. The system

was synergistic yet homeostatic. Few traces of it remain today, however, because of the developments described at the end of the next chapter.

*Chapter 9.* Although formal habeas corpus proceedings did not involve juries, all the other actions described in this part did. This fact is worth its own chapter because until the middle decades of the nineteenth century the powers of jurors were extensive, encompassing the right to decide the entire case, whether civil or criminal, in accordance with their views of justice. Juries might allow judges to determine the law, but could not be compelled to do so. More often than not, juries in this system functioned with the reasonableness one would desire. In routine cases involving technical legal issues, the jury would defer to the court. In cases that conspicuously involved civil liberties issues or in which the competing policy considerations were easily grasped (as in cases involving misconduct by sheriffs, constables, and similar officers), the jury would make its own decision.

Virtually none of this autonomy survives, having suffered three withering attacks: one early in the nineteenth century when the modern boundaries between the branches were delineated; one around the Civil War when congressional power to define the limits of official liability grew significantly; and one in the last few decades, as the Supreme Court has stepped in to create a series of legal barriers to protect officeholders from ever having to face juries.

*Chapter 10.* Case-specific adjudication by legislatures is a Janus-faced topic. Legislative action can sometimes achieve justice for individuals when the courts have not. But it poses the risk of undermining judicial independence and uniform application of the laws. As the Supreme Court showed in April 2016 when it divided sharply over the validity of legislation giving victims of terrorist attacks access to funds that the courts had denied them, both features of the topic deserve consideration. The discussion in this part focuses on the first, providing a number of historical examples and highlighting the potentially positive role of non-judicial actors in securing liberty. The negative aspects will be discussed in part III.

## Captain Hodsdon's Legal Entanglements

The War of 1812 was highly controversial domestically, especially in federalist New England and particularly prior to April 1814—the period during which the British blockade of the Atlantic Coast exempted ports from Boston northward. One result was widespread smuggling between New England and Canada.<sup>1</sup>

On December 29, 1813, General Thomas H. Cushing of the US Army wrote from his headquarters in Boston to Captain Isaac Hodsdon:<sup>2</sup>

Sir,

So soon as your company shall have been completed . . . you will march . . . for Stewartstown, [N.H.]. . . . The object to be attained by an establishment at Stewartstown . . . is effectually to prevent any intercourse with the enemy. . . . It is believed that by interesting the citizens, friendly to the General Government, to watch and report to you, the movements of the inhabitants on both sides of the line, and by sending out small parties by day and by night to the principal roads leading to the enemys country, from [the] Connecticut River to the settlements along the northern boundary of New Hampshire, an effectual stop may be put to all unlawful intercourse in that quarter. . . . The act, laying an Embargo<sup>3</sup> will justify you in stopping every person or thing which you may find in motion for the enemys country and you will not fail to make every exertion for carrying it into full and complete effect.<sup>4</sup>

Events from this point forward can be followed through two sources that tell similar but not identical stories: legal filings of varying degrees of plausibility and newspaper pieces in which the participants exchanged sharply worded volleys.<sup>5</sup>

Hodsdon and a party of troops arrived at Stewartstown, in the northern part of New Hampshire and close to its borders with Canada and Vermont, on January 10, 1814. Thereupon, as he wrote to a newspaper several months later, he "posted sentinels at the forks and angles of roads for the purpose of detecting citizens who were in the nefarious practice of smuggling."<sup>6</sup> Hodsdon continued:

At the time of my arrival here, I was informed that Austin Bissel of Colebrook, had recently conveyed a horse and sleigh into the province of Lower Canada, and that he declared openly, that he would in defiance of the laws of the United States, pass to and fro from Canada when he pleased. . . . I thought it my duty to apprise him of the impropriety of his behaviour and to state to him the consequences which would probably attend a repetition of the same offence. I therefore on the 11th January directed a sergeant and file of men to conduct him to the garrison. On his arrival at the garrison I conversed with him on the subject of his having made these assertions, &c in the presence of his father and Joseph Loomis, Esq. . . . and after receiving . . . their joint assurance that . . . Bissel would do nothing inconsistent with the laws of the United States he returned to his home, not having been detained more than one hour at the garrison, and that without any restraint.

On the 10th of Feb having obtained evidence that that Charles Hanson of Canaan, Vt. was aiding and assisting in running property into Lower Canada, I arrested him forthwith and transmitted to the District Attorney the evidence against him, together with his situation.

And having obtained abundant respectable information which proved that Sanders Welch Cooper in the employment of Herman Beach of Canaan [had been] running property across the lines to the enemy's territory for five or six months past . . . I thought it proper to apprehend him before he could pilot the enemy's forces into our territory . . . His offences were immediately reported to Titus Hutchinson, Esq. District Attorney for the District of Vermont; and the said Cooper has been taken into custody by the civil authority on a warrant predicated by the said Attorney.

On or about the 10th of February, Charles Hall of Hereford, Lower Canada, came to Stewartstown in the night [evading our patrols by taking a] circuitous route through the snow where there was no road . . . and took up his residence at [a] house [that] has been a common receptacle for Canadians and smugglers.<sup>7</sup> Being apprised of Hall's situation, I have secured him as a proper prisoner of war to the United States.<sup>8</sup>

On February 24, 1814, Herman Beech, Esq., presented to Justice Arthur Livermore of the New Hampshire Supreme Court an application for a writ of habeas corpus on behalf of Charles Hanson, Sanders Welch Cooper, and Charles Hall, "all citizens of the United States" who had "been arrested by persons claiming to act under the authority of the President of the United States," and were being confined by Hodsdon "without colour of authority." The application sought a court order for production of the petitioners "together with the time and causes of their imprisonment on said writ returned before your honor that they be dealt with as to law and justice appertains."<sup>9</sup>

In order to show that the three applicants were being held by Hodsdon, counsel filed several supporting affidavits. The affidavit of Joseph Loomis, a local judge, reported that he had been at the fort in January "and there saw imprisoned Austin Bissell a private citizen of the United States who has since been discharged."<sup>10</sup> Loomis continued:

At that time I remonstrated with said Hodsdon against such unreasonable arrests. Said Hodsdon observed that he was acting under the authority of the United States and that he should continue to arrest all such persons as said or did anything disrespectful to the army or the laws.

. . . [T]he conduct of those now commanding the military post at that place is such as to make the civil wholly subservient to the military law and unless suitable measures are taken to remedy the grievances of the inhabitants of that part of the country many of the peaceable inhabitants will be driven from their homes and be compelled to abandon their property to a lawless military force.<sup>11</sup>

In response to the application, Justice Livermore on February 28 issued an order requiring Hodsdon to produce the prisoners by March 24 at the home of Colonel William Webster in Plymouth.<sup>12</sup> On the night of March 3, Hodsdon moved Hall and Cooper to an army barracks in Canaan, Vermont under the command of his subordinate, Lieutenant Thomas Buckminster.<sup>13</sup>

Hanson seems not to have been in Hodsdon's custody at the time.<sup>14</sup>

Justice Livermore's order was served upon Hodsdon on March 4. In the words of a witness:

[O]n the fourth day of March AD 1814 I called at Captain Isaac Hodsdons quarters and asked him to take bonds for Charles Hall and Sanders Welch Coopers appearance to any amount. He said no I cannot for I have had a Writ of Habeas Corpus today ordering me to take them to Plymouth. . . . He then said that he should not take any council on the subject but consult his own feelings and make such returns as he thought proper.<sup>15</sup>

After considering the matter for some days, Hodsdon endorsed on the writ:

Stewartstown NH March the 14th 1814

I hereby certify that the within named Charles Hanson, Charles Hall, and Sanders Welch Cooper are not imprisoned or detained in my Custody in the State of New Hampshire nor were they on the receipt of the within Writ.

Isaac Hodsdon Captain 33d Regt. US Infantry<sup>16</sup>

Perhaps realizing the vulnerability of this literally true but fundamentally evasive response,<sup>17</sup> Hodsdon also wrote an accompanying letter to Justice Livermore:

Sir, Enclosed is a writ commanding me to have before you on the twenty fourth instant Charles Hanson Charles Hall and Sanders Welch Co-

per prisoners in my custody together with the time and cause of their imprisonment alias confinement.

Charles Hanson of Canaan Vt. and the only person whom I ever knew by that name is not a prisoner in the custody of any person. But is about his ordinary business at home and elsewhere.

Charles Hall, of Hereford Lower Canada, now a prisoner of War in the United States barracks at Canaan Vt. under command of Lieutenant Thomas Buckminster, will probably remain at that post until the pleasure of the President of the United States is made known touching that point.<sup>18</sup>

As the civil authority takes no cognizance of prisoners situate[d] like him, I deem it inconsistent with my duty to deliver him into the hands of a civil officer.

Sanders Welch Cooper of Canaan Vt. having been arrested and being in confinement in a Guard house in said Canaan in possession of U.S. troops under command of Lieutenant Buckminster under a charge of furnishing provisions to the enemy. Supported by respectable testimony [sic] and a statement of his crimes having been transmitted to Titus Hutchinson District Attorney for the District of Vermont he has sent his complaint and warrant to take him into custody. Your Honor will therefore readily excuse me for not producing the prisoner agreeable to the directions of the enclosed writ.<sup>19</sup>

At this point, counsel for the petitioners sought and obtained from the court an order requiring Hodsdon to show cause in Cheshire at the beginning of May why he should not be held in contempt for having failed to make “any legal and sufficient return” to the writ.<sup>20</sup> Hodsdon responded by providing an affidavit stating

that being under necessity of repairing to Boston from Stewartstown on public business he left said Stewartstown [and] on his journey . . . received . . . a copy of an order of the Honorable Supreme Judicial Court to appear before said Court at Cheshire on the first Tuesday of May next

to shew cause why an attachment should not be awarded against him for a contempt of and neglecting to make a legal return on a certain writ of Habeas Corpus to him previously directed by the Honorable Arthur Livermore one of the Justices of said Court. That he has no time or opportunity to obtain evidence to appear at said court. But that he has important and necessary testimony that he shall be able to procure by the next term of the said Honorable Court and that he could not safely go to trial without said testimony and writings, and that such is the great necessity of the business which calls him to Boston, having commenced the journey he is altogether unable to appear agreeably to the order of the Honorable Court aforesaid and shew cause as aforesaid.<sup>21</sup>

What had so far been private civil contempt proceedings now became private criminal contempt proceedings initiated by petitioners' attorneys and captioned *State v. Isaac Hodsdon*. At the lawyers' request, the court issued an order for Hodsdon's arrest. Directed to any sheriff or deputy sheriff in the state, this order, known as a *capias*, recited the procedural history and commanded the recipient to "apprehend the body of the said Isaac Hodsdon . . . and him safely keep . . . to answer for said Contempt."<sup>22</sup> Hodsdon was in fact taken into custody and, accompanied by counsel, appeared in August before a Justice of the Peace who took his recognizance for an appearance at the September term of court in the amount of \$500 as well as that of a surety, Jacob M. Currier, in the same amount.<sup>23</sup>

In Hodsdon's account, he duly appeared as required along with his lawyer, John Holmes, who demanded a trial.<sup>24</sup> Hodsdon continued that the Attorney General had responded that

"although he was unapprized of the nature of the transaction out of which the prosecution originated and although it was commenced by some private person, if the Court should be of an opinion that it was his duty, he would pursue the prosecution." And the answer from Judge Smith (who was the only Judge on the bench) was that he did not consider that the States Attorney was holden to pursue the prosecution.<sup>25</sup>

The case was, Hodsdon thought, then adjourned until February on the same security. The clerk, however, recorded his appearance as being due in November.<sup>26</sup> Hodsdon did not appear then, resulting in an order forfeiting his and Currier's bonds. When Hodsdon got back to the court to explain all this, it responded with an order to the effect that if he paid costs and notified the private prosecutor, he would have his day in court and a trial on the original cause of action as fully as if there had been no default. However, Hodsdon maintained, being ignorant of the identities of the private prosecutors he could not fulfill this condition, and execution was issued against him and Currier for the \$500 bonds.

Hodsdon sought relief from the New Hampshire legislature. Two aspects of the long petition that he filed there are of particular interest: (a) his questionable report of the relevant facts and (b) his attack on the public-private enforcement framework in which he found himself.

(a) Hodsdon's letter to Justice Livermore replying to the writ of habeas corpus had reported with respect to Cooper that "a statement of his crimes having been transmitted to Titus Hutchinson District Attorney for the District of Vermont he has sent his complaint and warrant to take him into custody." The transcription of this letter contained in Hodsdon's petition to the legislature, however, rendered the last few words as "complaint and warrant & taken him into custody." This is a difference of some significance because if in fact Cooper had already been taken into federal civil custody, Hodsdon would have had a much stronger excuse for not producing him than simply the circumstance of his being wanted for an appearance in federal court in Vermont, whether a warrant had arrived or not.<sup>27</sup>

(b) In addition to explaining his non-appearance as resulting from confusion over court dates, Hodsdon in his petition to the legislature denounced the structure of the legal proceedings against him. The State, he said, had accused him of an "offence of a public nature," and brought him into court, where the State's attorney had declined to prosecute. But, he continued, the court had stated that it could not dismiss the charges because it "had not authority [nor was] at liberty to proceed, either to

acquit or condemn the accused, until he himself should (if possible) procure some private citizen to prosecute him," and pursue or settle the private contempt action.

Hodsdon called this "unprecedented in the Jurisprudence of every other court, but that of New Hampshire for 1814 and 1815. . . . [Y]our petitioner is ignorant who the private prosecutor is, and if he could ascertain who he is, your petitioner would be compelled by the said decree to pay him whatever sum his corrupt inclination might lead him to extort from your petitioner, or not obtain the discharge aforesaid."<sup>28</sup>

Simultaneous with the filing of his petition, Hodsdon had one of his lawyers, William Merchant Richardson (who had by now become Chief Justice), write a letter to State Representative (later Congressman) Josiah Butler, who had formerly clerked in Richardson's office.<sup>29</sup> Richardson recounted in his letter that the habeas "application was made to Judge Livermore . . . not by the men arrested but by certain characters who thought it not for their interest to have the intercourse with Canada checked"; that he had suspected one Curtis Coe, an active Federalist, as the private prosecutor in the criminal contempt action but had discovered this not to be the case; and that he still did not know the prosecutor's identity "but have understood it was one of Coe's associates in the upper part of the state." In any event, Richardson continued, "I have never doubted that [Hodsdon] intended to act honestly and justly, but his situation was a difficult one. I was his counsel, but was so well convinced that his conduct was correct and his case was a hard one that I have taken no fees nor do I ever intend to take any. I hope you will look into his case and exert your self in his behalf as far as is proper."<sup>30</sup>

On June 26, 1817, both Houses of the New Hampshire legislature passed, and the governor signed, "An Act Granting Relief to Isaac Hodsdon in Certain Proceedings had Before the Supreme Judicial Court."<sup>31</sup> After a recitation of the procedural history, this enactment provided that if Hodsdon appeared at the September term of Strafford Superior Court and tendered security acceptable to the state's attorney for his continued appearance "to answer for any contempt towards the late Supreme

Judicial Court,”<sup>32</sup> the state’s attorney was authorized to discharge Hodsdon and Currier from their prior recognizances. No detailed account of these proceedings has yet surfaced,<sup>33</sup> but the two recognizances were in fact discharged.<sup>34</sup>

On January 31, 1822, Hodsdon signed a petition to Congress seeking compensation for his expenses in connection with his various legal entanglements.<sup>35</sup> In this document Hodsdon recounted that, in conformity with his orders, he had

detected sundry persons who were furnishing the Enemy with Provisions . . . some of whom being citizens of the United States were found crossing into the Province of Lower Canada. These your petitioner caused to be conducted from Lower Canada into the United States. . . . [Y]our petitioner has been prosecuted in three separate actions for falsely imprisoning those citizens who were found within the Province of Canada, and were brought into the United States and were restrained of their liberty no longer than was necessary for that purpose.<sup>36</sup> [Y]our petitioner has been compelled to appear and answer from Court to Court . . . for doing what he was ordered to do by his superior officer, and which if he had omitted the doing of, would have rendered him obnoxious to martial law.

As to the three prisoners sought by the writ of habeas corpus, Hodsdon wrote, one had been at liberty, one “was a prisoner of war and not entitled to any benefit of such a writ,”<sup>37</sup> and “one was in the Custody of the Civil Authority of Vermont at the instance of the District Attorney on a charge for furnishing the enemy with provisions.”<sup>38</sup> None of the three, he said, “were subjects of New Hampshire nor imprisoned within the State.” Hodsdon accordingly sought reimbursement from “the Government of the United States, the orders of whose officers he has strictly obeyed,” for his expenses “in defending himself in prosecutions brought against him for doing a duty, which he was bound as a subordinate officer to do.”

This petition in due course resulted in a report from the House Claims Committee.<sup>39</sup> In addition to the legal proceedings already noted, this

document reported that Cooper had recovered a verdict against Hodsdon in Vermont for \$24.50 in damages and \$35.84 in costs for causing Cooper's arrest in the federal criminal proceedings,<sup>40</sup> which were ultimately dropped.<sup>41</sup> The committee also reported that on May 24, 1815, the New Hampshire Supreme Court had ordered Hodsdon to pay Bissel a fine of \$50 and court costs of \$18.92.<sup>42</sup> The committee noted that it had obtained confirmation of the facts from "the Honorable John Holmes, now of the Senate."<sup>43</sup> It continued:

The committee deem it unnecessary to enter into an argument to prove that, where an officer of the Government, acting under its orders, in good faith, has been subjected to the payment of money [the officer] has a just claim for indemnity; as this principle has been frequently recognized by different committees, and in several acts of Congress.

The committee accordingly recommended that Congress pass a bill compensating Hodsdon for the amounts assessed against him and the costs of his defense in the various proceedings.

The committee's report sparked a fair amount of newspaper comment.<sup>44</sup> A letter to the editor of the *Concord Statesman & Register* attacked the committee's conclusion that Hodsdon was entitled to be paid both on principle and precedent, demanding to know why "the injured and insulted people of the United States" should refund the penalties imposed upon "this upstart tyrant" who considered "his epaulette and sword to contain a charm of irresistible power over the civil law" and "shut up republican citizens with . . . as little ceremony as he would pen his pigs."<sup>45</sup> The *New-Hampshire Patriot* responded that Hodsdon had done "his duty in stopping and arresting traitors that were aiding the public enemy," and had been "illegally arrested and fined for executing the orders of his superior officer, . . . which orders were in conformity to law and right."<sup>46</sup>

In accordance with the committee's recommendation, Congress passed a statute granting Hodsdon indemnification, which was paid.<sup>47</sup>

## The Habeas Corpus Strand of Restraints on Government

### A. The Power of the Writ

In response to the writ of habeas corpus that the New Hampshire court had issued, Hodsdon should have appeared with his prisoners, asserted whatever grounds he had to retain them in custody, allowed Justice Livermore to conduct a factual investigation, and honored the resulting judicial decision.

To be sure, Hodsdon might have found taking this course irksome.<sup>1</sup> But he would have been following the contemporaneous example of his superior officer, General Thomas H. Cushing, whose directives Hodsdon later claimed to have been obeying.<sup>2</sup> In March 1814, Cushing received a writ of habeas corpus from the Massachusetts Supreme Court ordering him to produce a soldier named William Bull, who had allegedly been enlisted in the army while underage.<sup>3</sup> General Cushing filed a return to the writ explaining that Bull was in custody pursuant to the sentence of a court martial that had convicted him of desertion, and personally brought Bull before the court. The court heard full argument from counsel and, construing the relevant federal recruitment statutes,<sup>4</sup> ordered his discharge. Cases like this were common<sup>5</sup> and regularly adjudicated by the state courts.<sup>6</sup>

In one well-known case during the War of 1812, General Morgan Lewis, the commander of a key American military post, arrested a citizen named Samuel Stacy on suspicion of spying for the British. Lewis ordered a subordinate to confine Stacy, planning to try him as a spy before a court-martial.<sup>7</sup> Lewis's response to a writ of habeas corpus from the New York courts was that Stacy "is not in my custody." Chief Justice Kent unsurprisingly considered this response "a contempt of the process," inasmuch as Lewis had not (and could not have) stated that Stacy

was not “in his possession custody or power.”<sup>8</sup> The case, Kent wrote, called for prompt initiation of contempt proceedings because a “military commander is here assuming criminal jurisdiction over a private citizen . . . and contemning the civil authority of the state.” The Chief Justice accordingly ordered that General Lewis be arrested for contempt unless he either released Stacy or produced him in court in obedience to the writ of habeas corpus. Stacy was thereupon released on the orders of the Secretary of War, who had already concluded that the detention was unjustifiable.<sup>9</sup>

## B. The Limits of the Writ

Notwithstanding the brightness of habeas corpus in the historical constellation, nineteenth-century observers knew that its rays were not strong enough by themselves to chase the shadow of unlawful imprisonments from Earth.

To take just one example, a nationally publicized episode originating during the War of 1812 re-taught the enduring lesson that habeas corpus, state or federal, was ultimately no stronger than the willingness of government officials to honor it.<sup>10</sup>

After arriving in New Orleans to take charge of its defense, General Andrew Jackson on December 16, 1814 put the city under military government. Following a series of engagements highlighted by the American victory at the Battle of New Orleans on January 8, 1815, the British withdrew on January 18. General Jackson’s proclamation of martial law, however, remained in effect week after week. The state militia remained in service, the populace became restless, and General Jackson grew increasingly irritable while treating the city as a military camp that he had the absolute power to control. He even issued an order to a local newspaper on February 21 requiring it to receive official approval of its reporting on the progress of peace negotiations.

Because foreign citizens were entitled to release from the militia, a number of militiamen claimed (with a greater or lesser degree of accu-

racy) to be French citizens and obtained certificates to that effect from the French counsel Louis de Tousard; Jackson responded by ordering Tousard (who had fought for the Americans in the Revolution) and the newly certified Frenchmen out of the city.

This measure led to an outraged letter to the editor of the *Louisiana Courier*:

[W]e do not know any law authorizing General Jackson to apply to *alien friends* a measure which the President of the United States himself has only the right to adopt against *alien enemies* . . . [I]t is time the citizens accused of any crime should be rendered to their natural judges, and cease to be brought before special or military tribunals, a kind of institution held in abhorrence, even in absolute governments.<sup>11</sup>

Jackson had his soldiers arrest the letter's author, a prominent legislator named Louis Louaillier. As Louaillier was being seized, he called on bystanders for support and one of them, a lawyer named Pierre L. Morel, agreed to help him.

Morel first applied to Justice Francois-Xavier Martin of the Louisiana Supreme Court for a writ of habeas corpus. Judge Martin, however, responded, according to his own account, that the court

had determined in the preceding year . . . that its jurisdiction being appellate *only*, it could not issue the writ of *habeas corpus*. Morel was, therefore, informed that the judge did not conceive he could interfere; especially as it was alleged the prisoner was arrested and confined for trial, before a court martial, under the authority of the United States.<sup>12</sup>

Morel then approached US District Judge Dominick A. Hall "and requested a writ of prohibition against Louaillier's court martial."<sup>13</sup> Judge Hall, however, declined.<sup>14</sup> Morel soon returned with an application for a writ of habeas corpus on his client's behalf, and Judge Hall ordered General Jackson to produce Louaillier the following morning.<sup>15</sup>

But Morel promised Judge Hall that prior to formal service of the order, he would inform General Jackson of it, and did so.<sup>16</sup>

Jackson exploded, arresting Judge Hall and confiscating the writ itself from the hands of the court clerk who tried to serve it on him. The US Attorney for the District of Louisiana, John Dick, then sought a writ of habeas corpus on Hall's behalf from a state trial judge, who issued it. Jackson refused to obey it and ordered the arrest of both the state judge and Dick. The judge was not actually arrested, but Dick was.<sup>17</sup> Once it became clear that a peace treaty had been signed, Jackson released all his prisoners and discharged the militiamen from service.

When celebrations in the city had died down, Dick moved before Judge Hall for an order requiring General Jackson to show cause why he should not be held in contempt. This was granted, and Jackson appeared in court. But the only defense forthcoming was a lengthy statement from his attorneys discussing the perceived necessity of his actions; Jackson himself refused to respond to a series of factual inquiries about his conduct. The upshot was that Judge Hall fined Jackson \$1,000, which he paid, and that the Madison administration sent him a letter expressing its concern. After that, the country's acclaim for the Hero of New Orleans led to the matter fading into the background.<sup>18</sup>

Some decades later, when Jackson's finances were poor and his heroism firmly established in the public mind, his allies in Congress began a movement to have his fine refunded; after an extended political debate as to the propriety of his actions, this was done in 1844.<sup>19</sup>

### C. The Place of the Writ in the Web

The events recounted in this chapter took place at a time when legal restraints on power formed a mutually reinforcing web. However storied the reputation of habeas corpus might be, the remedy was useful in some situations but not in others. The writ would not assist a prisoner who was not present at the moment it was served on the jailer and it might be defied or legislatively suspended.<sup>20</sup>

But habeas corpus did not exist in isolation. It was supplemented by, and often used in tandem with, many different sorts of legal actions. For example, in Hodsdon's case, prior to the service of the writ one of the prisoners had been released (Bissell) and another spirited away (Cooper). But both were able to recover money damages.<sup>21</sup>

Notwithstanding the allure of habeas corpus as a subject for legal and historical writing, it is only one strand of the mesh constraining government power by law.<sup>22</sup> Assessing the system at any one moment requires considering the entire lattice.

## The Damages Actions Strands of Restraints on Government

One important section of the web of legal restraints on government misconduct during the colonial and early national periods consisted of private civil actions for damages. Such lawsuits, whether denominated as false imprisonment, malicious prosecution, trespass,<sup>1</sup> negligence, or otherwise, were a pervasive feature of the common law world in the eighteenth and early nineteenth centuries.<sup>2</sup> The New Hampshire archives alone provide ample material to illustrate the point.

### A. The False Imprisonment Strand and Its Neighbors

A money damages action for false imprisonment might be the only remedy sought against the responsible officer. A straightforward instance that can be reconstructed from scattered New Hampshire court files is the lawsuit that Richard Sinkler brought against a J.P. named John Tasker.<sup>3</sup> In October 1785, one Jacob Daniels commenced a criminal prosecution against Sinkler for assault.<sup>4</sup> Tasker ordered Sinkler to find sureties for his good behavior until trial,<sup>5</sup> but Sinkler, according to Tasker, refused.<sup>6</sup> The upshot was that Tasker ordered the constable to arrest Sinkler, who remained jailed for five days until eventually getting bailed out.<sup>7</sup> Sinkler sued Tasker for £200 in damages occasioned by the five days of false imprisonment.

Tasker responded with a sham plea,<sup>8</sup> with the consequence that Sinkler was awarded the £200 plus costs.<sup>9</sup> On Tasker's appeal, where the action was tried for the first time, the jury awarded Sinkler £3 damages plus £13.9s.2d in costs; as far as the records reflect, he actually was able to collect £9.<sup>10</sup>

Similar simple lawsuits might be brought against other officers.<sup>11</sup> For example, during a clerical ordination service in South Hampton, New Hampshire in February 1763, David Ring was allegedly harassing women seated in their portion of a church—“hugging and squeezing them pushing his hand around their necks and under their cloaks,” according to one witness—and was accosted by constable Offin French on the orders of magistrate John Page.<sup>12</sup> An altercation ensued in which, depending on which account one believes, Ring either tendered sufficient money to pay any fine or declared vociferously that he would neither pay nor be placed in the stocks.<sup>13</sup> This led, Ring claimed, to his being placed briefly in the stocks and detained for several hours. It also led to a lawsuit by Ring against both officers.<sup>14</sup> When this was initially tried, it led to a jury verdict of £13.15s. against Page and nothing against French.<sup>15</sup> Page successfully appealed on procedural grounds and the case was remanded to the trial court.<sup>16</sup> There, Ring fixed the flaw and pushed ahead. This time he recovered nothing at trial or on appeal, and the defendants eventually collected court costs from him.<sup>17</sup>

Sometimes the damages remedy for false imprisonment supplemented the relief that the injured party had already obtained by securing his release through other legal proceedings. Thus, for example, we saw in chapter 2 (B) (i) that when J.P. Clement March secured the summary incarceration of Peter Pearse for calling him a blockhead and rogue during an encounter on a Portsmouth, New Hampshire street corner in late 1769, Pearse gained his release within eight hours through certiorari proceedings.<sup>18</sup> After the underlying contempt proceedings had been quashed without objection, Pearse brought a damages action against March. The latter’s initial defense on legal grounds succeeded below but was reversed on appeal.<sup>19</sup> On remand, the jury rendered a verdict for March, but Pearse prevailed on appeal in September 1771, recovering a jury verdict of £7 damages plus costs of £9.10s.<sup>20</sup>

In a similar case in 1770, a J.P. acting on the complaint of two townspeople of Chester, New Hampshire who were seeking to recover a statutory bounty<sup>21</sup> summarily incarcerated William Licht for harbor-

ing a potentially indigent stranger. After being released on bail, Licht succeeded in having the action terminated through certiorari proceedings.<sup>22</sup> The following year he sued all three men for damages and recovered £6.1s.<sup>23</sup>

## B. The Negligence Strand and Its Neighbors

Improper official behavior was not confined to false imprisonments and neither were damages actions.<sup>24</sup>

Thus, for example, in 1766 Nathaniel Woodman of Salem, New Hampshire found himself on the losing end of a lawsuit tried before a Justice of the Peace named John Ober.<sup>25</sup> Ordered to pay the plaintiff 20 shillings, Woodman requested an attested copy of the judgment in order to take an appeal. But, Woodman complained, Ober, “contrary to his . . . office, oath and duty,” refused to provide the document, thereby damaging Woodman to the tune of £10. Woodman recovered 5 shillings plus court costs at the trial level, a sum increased to 30 shillings plus costs when Ober appealed.

In a similar case in 1797, George Jaffrey had prevailed in a civil action against George Fowler, who was imprisoned for failure to pay the judgment and held in custody by the jailer, Thomas Footman.<sup>26</sup> But Footman, Jaffrey charged, “not regarding the duties of his said Office did not safely keep [Fowler] as by law he was required but suffered and permitted him to escape,” losing Jaffrey the benefit of the judgment. Claiming \$200 in damages, Jaffrey sued Theophilus Dame, the county sheriff, who “was and still is responsible” for Footman’s doings in office.<sup>27</sup> After a sham defensive plea, the action was tried for the first time on appeal. There, the issue was whether the release of Fowler had been with or without Jaffrey’s consent. The jury determined that issue in Jaffrey’s favor, and he was awarded \$148.76 plus costs.

Because cases like this were common,<sup>28</sup> it is possible by looking at verdicts to infer some of the distinctions being made by juries.<sup>29</sup> Sometimes these seem to have been based on what we would now call issues

of fact (e.g., exercise of due care, causation). At other times, jury decisions on whether or not to impose liability seemingly turned on what we would now call issues of law (e.g., official immunity for actions taken in good faith, damages liability of superior officer for conduct of subordinate [“respondeat superior liability”]).<sup>30</sup> Until the developments of the early nineteenth century that will be detailed in chapter 14 (B) below, the difference between the two sorts of issues was of little practical significance. As more fully described in chapter 9 below, where the problem presented was straightforward the jury simply applied its sense of justice to the overall situation.

A trio of New Hampshire cases from the 1790s, for example, seems to have revolved around issues of due care. In *Larkin v. Reid*<sup>31</sup> and *Gile v. Hilton*,<sup>32</sup> a deputy sheriff apparently seized a wrong tract of land.<sup>33</sup> But in both cases it is plausible on the facts that he was unaware of the true ownership and in both cases the officer prevailed. On the other hand, in *Perley v. Webster*,<sup>34</sup> the plaintiff claimed that one of Sheriff Webster’s deputies had been ordered to make a pendente lite attachment and had filed a return detailing the goods seized. But when Perley was granted final judgment, the goods were nowhere to be found. Perhaps the deputy never seized them or perhaps he converted them. But either way, as Perley saw it, the deputy’s conduct was clearly culpable. The third jury to hear the case agreed and awarded \$150.00 in damages plus \$181.01 in costs.

Two case pairs, from before and after Independence, in lawsuits in which plaintiffs sought to establish respondeat superior liability presumably reflect the degree of relative fault that the jurors decided should be attributable to the superior and the subordinate under the circumstances.<sup>35</sup> The colonial pair couples the 1759 case of *Monson v. Greley*<sup>36</sup> with the 1771 case of *Packer v. Renkin*.<sup>37</sup> In both instances deputy sheriffs had executed judgments and pocketed the proceeds, resulting in lawsuits against the sheriff as the party responsible for the conduct of his subordinates.<sup>38</sup> The judgment creditor succeeded in the first lawsuit and failed in the second. In the early national pair of cases, George Reid, the

sheriff of New Hampshire's Rockingham County, was sued twice within a few months because his deputies had failed to serve writs of execution, thereby causing losses to the judgment creditors. On appeal, he won one of the actions in early 1797<sup>39</sup> and lost one in late 1798.<sup>40</sup>

Reid was also sued around the same time in an action demonstrating that the influence of statutes in routine damages cases against public officials was peripheral to the point of invisibility. In *Nason v. Reid*,<sup>41</sup> Shuah Nason alleged that Reid had permitted her judgment creditor, the father of her illegitimate child, to escape from the jail to which he had been confined for non-payment of his support obligations. The case is thus just like several we have already seen in this chapter. In contrast to the complaints in those cases, though, Nason's complaint cited a statute—a lineal successor to one that had been in force for some 80 years—declaring that jailers were liable to judgment creditors for negligently allowing incarcerated judgment debtors to escape.<sup>42</sup> None of the other plaintiffs had thought it worthwhile to cite the statute, although their lawyers were surely aware of it.<sup>43</sup> Nor did it seem to make the slightest difference to the progress of this lawsuit. After a sham plea below, the case went to a jury on appeal, which awarded Nason \$100.87 of the \$300 she had demanded, plus costs.

Statutes did, however, have a meaningful role to play in enabling plaintiffs to seek designated penalties by suing public officials for particular misconduct in office, e.g., charging higher than permissible fees for serving a warrant.<sup>44</sup>

The overall result was that until the early nineteenth century there was "little that one acting on behalf of the government could do without rendering himself liable to an action at law in the event that he wronged another."<sup>45</sup>

## The Criminal Prosecution Strands of Restraints on Government

As Hodsdon's saga in chapter 4 above illustrated, the legal restraints on public power during the colonial and early national periods included the liability of officeholders to criminal prosecutions, which could be pursued both by private citizens and by public prosecutors.

### A. Private Criminal Prosecutions

As will soon be evident, we do not yet have at hand any truly useful history of private prosecution in America. Hence, I make no claim that the particular procedures followed in Hodsdon's case were typical ones. But his story does illuminate the power of private prosecution as a potential check on government officials.

Hodsdon's predicament, quite apparent to all concerned, was that the private prosecutor, not the government, had the power to drop the action.<sup>1</sup> The judge in Hodsdon's case specifically told the state's lawyer that he was under no obligation to prosecute but told Hodsdon that he would not be off the hook until the private prosecutor was satisfied. This aspect of the matter was central to Hodsdon's complaint to the legislature. As he put it, "a Sovereign and Independent State had accused an individual with an offence of a public nature, and had prosecuted him for the alleged offence, and brought him before the highest Judiciary Court in the State, and . . . yet they had not authority, or were not at liberty to proceed, either to acquit, or condemn the accused, until he himself should (if possible) procure some private citizen to prosecute him."<sup>2</sup>

Indeed, at just the same moment that the New Hampshire legislature was lifting Hodsdon's default, the governor was asking it to reform the

system of private prosecutions, complaining that the ability of the private prosecutor to drop (or, more importantly, not drop) the action left the state in the position of having to pay costs:

Groundless, vexatious and trivial prosecutions, are sometimes commenced and carried on in the name of the State, which subject the county where they are prosecuted to the payment of large bills of cost. In some of these, the prosecutor makes use of the name of the State as an engine to gratify his revenge on the accused, more than for the purpose of convicting and punishing those who have violated the laws.<sup>3</sup>

Although Hodsdon's situation at the time of his travails in New Hampshire is clear enough, the story of the evolving relationship between public and private prosecution on this side of the Atlantic,<sup>4</sup> which varied in the past between jurisdictions<sup>5</sup> and which is still in transition,<sup>6</sup> has not been told in any comprehensive and well-documented way, notwithstanding some initial efforts by academics<sup>7</sup> and lawyers.<sup>8</sup>

This gap in historical scholarship may well have had contemporary consequences when the Supreme Court made its most recent foray into the area in *Robertson v. United States ex rel. Watson*.<sup>9</sup> John Robertson was convicted of criminal contempt arising out of his violation of an order of protection that had been obtained in the District of Columbia courts by his former girlfriend, Wykenna Watson, who initiated the contempt proceedings. Robertson had previously been prosecuted by the government on assault charges, which resulted in a plea bargain that he claimed precluded the prosecution brought by Watson. As the parties saw it, the question turned on whether the current criminal contempt prosecution was public (and therefore barred by Robertson's plea agreement with the government in the assault case) or private (and therefore not binding on Watson).<sup>10</sup> The Court re-wrote the question presented to address a broader issue, "Whether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the

name and pursuant to the power of the United States.” The Court then granted Robertson’s certiorari petition, with the apparent intention of answering the question “no.”

After oral argument, however, the Court dismissed the writ of certiorari as improvidently granted, over a dissenting opinion by four Justices who did want to answer the question that way. Of course, the reasons for this disposition are purely speculative, but it may be that one Justice (perhaps Justice Thomas) who originally voted to grant certiorari concluded from the merits briefing that the original intent was not as clear on a second look as it had appeared at first glance. In any event, to the extent the majority perceived that the history of private criminal prosecutions remains obscure, its perception was correct.<sup>11</sup> Notwithstanding some Justices’ over-confident statements of the known history both on oral argument<sup>12</sup> and in the dissenting opinion,<sup>13</sup> “[a] lot of research remains to be done . . . and the story is on the whole rather murky.”<sup>14</sup>

But we can make at least one observation of use for present purposes. Doubtless the exercise of private control over a criminal prosecution sometimes appeared, as indeed it did to Hodsdon,<sup>15</sup> less like a remedy against oppression than an invitation to crush those against whom one bore a grudge.<sup>16</sup> In fact, viewed as one strand in the overall web in which it existed, it was not. As the next chapter discusses, the remedy of private prosecution was itself subject to a meaningful check in the form of an action for malicious prosecution by the wrongfully prosecuted defendant.<sup>17</sup>

## B. Public Criminal Prosecutions

Our situation with respect to the public criminal prosecutions of officeholders is the opposite of the one just described. All we know about Hodsdon’s particular case is that the state’s attorney declined to pursue it.<sup>18</sup> But the overall history of public criminal prosecutions of officeholders is well-known: the practice was common and well-accepted. Having

documented this point in detail elsewhere,<sup>19</sup> I simply present here a few examples involving conduct of varying degrees of culpability to illustrate the point.

In a well-known English case dating from 1588, two London sheriffs named Skynner and Catcher seized two respectable women on the street and without benefit of any legal proceedings summarily imprisoned and whipped them as prostitutes, with the result that one of the women miscarried. The sheriffs were prosecuted by the attorney general, imprisoned, fined, and ordered to pay compensation.<sup>20</sup>

Wyseman Claggett, a New Hampshire J.P.,<sup>21</sup> was indicted in the middle of 1762. The charge was that he had on December 3, 1761 signed a judicial order known as a mittimus bearing the date of November 3, 1761 that ordered the detention of one James Dwyer of Portsmouth and resulted in his imprisonment for 20 hours, after which, on December 4, 1761, Claggett did

wittingly, willingly, unlawfully and wickedly alter the said mittimus with regard to the date thereof as to the month by erasing the word November and interlining the word December in stead thereof and thereby made the said mittimus a new mittimus against the peace of our Lord the King.<sup>22</sup>

Claggett demurred to the indictment and the court quashed it, putting an end to the criminal case.<sup>23</sup> The disposition is unexplained but may have been based on the rationale that, on the pleaded facts, the change merely corrected a prior error.<sup>24</sup>

In an 1800 case from North Carolina, Secretary of State James Glasgow was indicted for fraudulently issuing a duplicate warrant for land that was allocated to military veterans. One of his defenses was "that no injury is stated to have ensued [from] the act of thus issuing the duplicate." Rejecting this, the court wrote:

[I]f a public officer, intrusted with definite powers to be exercised for the benefit of the community, wickedly abuses or fraudulently exceeds

them, he is punishable by indictment, although no injurious effect results to an individual from his misconduct. The crime consists in the public example, in perverting those powers to the purpose of fraud and wrong, which were committed to him as instruments of benefit to the citizens. . . . If to constitute an indictable misdemeanor a positive injury to an individual must be stated and proved, all those cases must be blotted out of the penal code where attempts and conspiracies have been so prosecuted.<sup>25</sup>

In a sensational case whose “legal proceedings . . . fill almost an entire volume of *State Trials*,”<sup>26</sup> General Thomas Picton, the first British governor of Trinidad after its acquisition from Spain, was tried and convicted in 1806 at King’s Bench in London for ordering a young native woman to be tortured to secure her confession to participation in a robbery plot. Following a successful motion for a new trial, he was tried again at King’s Bench in 1808. This trial resulted in a special verdict by the jury that because torture had been legal in Trinidad at the cession of the island to Britain, Picton had behaved without malice, even if illegally under the applicable British law. In an ordinary case, a court presented with such a verdict would probably have adjudged the defendant guilty while imposing only a nominal punishment. But to have followed that course in this case might have been seen as minimizing the seriousness of the offense. So the court, while remitting Picton’s recognizances, simply took no action on the special verdict. Picton resumed his military career and ultimately died at Waterloo.<sup>27</sup>

The control of officeholders’ conduct might take place through their prosecution not only for ordinary crimes<sup>28</sup> but also for flagrant non-feasance<sup>29</sup> and for breaching duties imposed by regulatory statutes. For example, a series of New Hampshire statutes dating back to the 1600s required the selectmen of towns of specified population to set up grammar schools under pain of monetary penalty. In 1771, a grand jury indicted the three selectmen of Chester for neglecting this duty,

“contrary to the Law of this Province in that case made and provided.” Two of the three selectmen appeared, went to a jury trial, were convicted, and fined £10.<sup>30</sup>

As headlines show on a daily basis, the strand of restraints on power comprising public criminal prosecutions against officeholders at all levels of government remains strong today.