CHAPTER 1

A Nation of Asylum

The evil of protecting malefactors of every dye is sensibly felt here as in other nations, but until a reformation of the criminal codes of most nations, to deliver fugitives to them would be to become their accomplice.

Thomas Jefferson, Secretary of State, September 6, 1793

On September 1, 1675, armed Indians swept down on the little settlement of Hadley, in western Massachusetts. "The people were in grave confusion," Governor Hutchison later wrote.[1]

> Suddenly, a grave, elderly person appeared in the midst of them. In his mien and dress he differed from the rest of the people. He not only encouraged them to defend themselves, but put himself at their head, rallied, instructed, and led them on to encounter the enemy, who by this means were repulsed. As suddenly the deliverer of Hadley disappeared. The people were left in consternation, utterly unable to account for this strange phenomenon. It is not probable that they were ever able to explain it.

The "Ghost of Hadley," as he later became known, was Colonel William Goffe, one of the "regicides" who had signed the death warrant of King Charles I. With the restoration of Charles II, Goffe had fled to New England with Colonel Edward Whalley, another regicide. Massachusetts and Connecticut received royal directives demanding their return, and royal messengers were sent out from Boston to track them down. Wherever the messengers went, however, they were frustrated by dilatory displays of cooperation. As the deputy governor of New Haven explained: "We honor his Majesty, but we have tender consciences."[2]

Regicides who had fled to the Netherlands were delivered up to the king's vengeance;[3] those who fled to the colonies were not. The most wanted men in the British empire were hidden from capture and supported for the rest of their lives. The New England Puritans had been divided on the wisdom of executing Charles I; some

would have surrendered the regicides, but those in positions of power did not. Why they did not is central to understanding the American approach to extradition.

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The political explanation is obvious. The New Englanders were Puritans and cared more for their coreligionists in England, whatever their excesses, than for Charles II and his bishops. A legal basis for their noncooperation could be found in a 1641 statute of the Bay Colony. It provided that "if any straingers, or People of other Nations, professing the true Christian religion, shall fly to us from the Tyranny or Oppression of their Persecutors . . . they shall be entertained and succourd amongst us according to that power and prudence God shall give us."[4] Colonists could not invoke this law against the king without causing his privy council to invalidate it, but they could obey it quietly.

The colonists' unwillingness to surrender the regicides not only reflected the law and politics of the moment; it was emblematic of a tidal shift then taking place in English political thought on both sides of the Atlantic. During the Middle Ages, the dominant political thought viewed insurrectionists with alarm. Most people were deemed subjects, not citizens, and therefore not entitled to take law into their own hands. Insurrection was both a crime against the person of the king, to whom his most likely rivals owed personal loyalty, and an offense against the society that the king personified. Insurrection was also an offense against God's holy ordinances, because kings traced some of their authority to the divinity and received frequent blessings from his priests. Thus, political offenders—especially religiously motivated regicides—were looked upon with special horror.

In England and her American colonies, this horror was diminished by the Puritan and Whig revolutions of the seventeenth century. The Puritan movement separated loyalty to God from loyalty to king and thus diminished the horror of crimes against the state. The Puritan Revolution hastened the transformation of subjects into citizens, after which Parliament won political supremacy and the sovereignty of the king became the sovereignty of the Crown—an abstract conception in which less emotional loyalty could be vested.[5]

In America, the doctrine of popular sovereignty arose early and naturally from the experience and necessity of self-government. The colonial officials who resisted the king's demand for return of the regicides asserted the de facto sovereignty of their own political systems. They did not think of themselves as agents of the English sovereign in the sense that the king's sheriffs did in England. They thought of themselves more as elected officials of their towns and colonies, in which congregations of freemen were the de facto sovereign. Accordingly, an attack on a public official could not be the same as an attack on a divinely ordained king. Public officials were more in the nature of public servants, which meant that an attack on them was not treason but an ordinary crime. In colonial America, power was not hereditary; it had to be earned through service to the community. Officials who earned the respect of other freemen could expect cooperation; those who did not, like Charles II, could expect little.

As long as the crowned heads of Europe created political alliances through intermarriage, they could not be indifferent to the presence of foreign political fugitives on their soil. But as the "family of princes" was gradually replaced by the "family of nations," and as commerce became the primary source of new wealth, the greater interest of maritime peoples like the English, the Dutch, and the American colonists was in maintaining neutrality during foreign civil wars. The Scottish philosopher Francis Hutcheson spoke for them all when he wrote in the 1750s:[6]

> As to state criminals; as frequently good men are on both sides of civil wars and state-factions, as well as in solemn wars, the general custom is very humane, that they should universally find protection in foreign states; and refusal to deliver them up . . . is never deemed a just cause of war, if while they reside abroad, they are forming no conspiracies or hostile attempts against the present governors of their country.

The unwillingness of nations to surrender political fugitives grew as feudalism and its structure of personal obligations disintegrated and as the criminal law became less politicized. This occurred in Great Britain during the seventeenth and eighteenth centuries with the abolition of torture, elimination of the Star Chamber and the Court of High Commission, reduction in the severity of punishment for treason and sedition (in fact if not in law), and the extension to accused traitors of procedural rights routinely accorded criminal suspects.[7] It also grew with freedom of the press, the decline of revealed wisdom, the rise of scientific (and relativistic) thinking, the proliferation of Protestant sects, and the religious toleration that gradually arose out of the privatization and diversification of Christian faith.

Simultaneously with these developments, Great Britain ceased to negotiate extradition treaties with European states, even as they intensified their efforts to extradite ordinary criminals.[8] In part this may have been due to Britain's loss of frontiers on the Continent,[9] but it may also be attributed to a growing commitment to the principles of limited executive authority, guaranteed liberties, and due process of law.

Resistance to exclusive executive control over many powers, including the extradition of British *subjects*, began early in the seventeenth century. Parliament led the way in 1606 when it exempted Englishmen from extradition to Scotland, even though the two kingdoms had been united. The reason given was concern over the treatment British subjects might receive at the hands of Scottish law,[10] but behind that concern was a growing conviction, as Holdsworth reports, "that a subject could not be compelled to leave the realm except by virtue of an Act of Parliament."[11]

In support of this view, Sir Edward Coke invoked chapter 29 of Magna Carta. Chapter 29 provided that "No freeman shall be taken or imprisoned or disseised [dispossessed] of his freehold or otherwise destroyed, nor will we pass upon him nor condemn him, but by lawful judgment of peers or the law of the land." In his comments on that chapter, Coke wrote: "by the law of the land no man can be exiled, or banished out of his native country, but either by authority of Parliament, or in case of abjuration for felony by the common law."[12] At this point in British history, executive

control over extradition might have been established had not common law judges like Coke and the proponents of Parliamentary supremacy fought to bring the Stuart kings within the rule of law.

More generally, Coke opposed the surrender of fugitives from foreign lands: "It is holden, and so it hath been resolved, that divided kingdoms under several kings, in league with one another, are sanctuaries for servants or subjects flying for safety from one kingdom to another; and upon demand made by them, are not, by the laws and liberties of kingdoms, to be delivered; and this, some say, is grounded upon the law in Deuteronomy, 'Thou shalt not deliver unto his master the servant which is escaped from his master unto thee.'"[13]

Parliamentary supremacy over the making of laws affecting individual liberties triumphed with the passage of the Habeas Corpus Act of 1679. In addition to abolishing executive detention of persons without trial, that act provided that no *"inhabitant"* or *"resident"* could legally be sent prisoner "beyond the seas." Any who were so treated were granted the right to sue those who transported them.[14] Whether Parliament intended to protect *aliens* as well as subjects from executive surrender is not clear,[15] but this broad language can be seen as the beginning of both a solicitude for the human rights of aliens and the modern Anglo-American practice of treating aliens and citizens alike for extradition purposes.

The Habeas Corpus Act had two other effects. One was to destroy the assertion that Great Britain had a duty under natural law to extradite accused felons in the absence of treaties—an assertion that tended to enhance claims of inherent executive power over extradition.[16] The second was to make the crucial decision regarding extraditability a *legal* decision to be made by the *courts*.

This was the legal legacy that Britain bestowed upon her American colonies well before their revolution. It was a legacy that the Americans would take to heart as they struggled to allocate authority between their executive and their courts, to establish due process, and to develop fundamental rights.

But British law and Deuteronomy were not the only sources of colonial thought. The emerging American people were also children of the Enlightenment who recognized a moral right of revolution against despotic regimes. During the seventeenth and eighteenth centuries, the right was supported by the most influential philosophers, including Locke, Montesquieu, Hutcheson, Voltaire, Diderot, Helvetius, Condorcet, and Beccaria.[17] Even conservatives who had doubts about the legitimacy of that right (or when it should be exercised) came to recognize a need to shelter refugees from liberal revolutions. For conservatives, the most convincing event was the Reign of Terror during the French Revolution.

Enlightenment thinkers also placed high value on the rights of man, arguing, among other things, that it was morally wrong for a nation to send an accused back to a foreign legal system that was manifestly arbitrary, inequitable, unnecessarily severe, or highly politicized. The leading spokesman for this view was the Marquis de Beccaria, an eighteenth-century *philosophe* and one of the founders of modern penology. Asked whether he favored extradition, Beccaria replied:[18]

> Although the certainty of there being no part of the earth where crimes are not punished may be a means of preventing them, I shall not pretend to determine this question, until laws more conformable to the necessities and rights of humanity, and until milder punishments, and the abolition of the arbitrary power of opinion, shall afford security to virtue and innocence when oppressed; and until tyranny shall be confined to the plains of Asia, and Europe acknowledges the universal empire of reason, by which the interests of sovereigns, and subjects, are best united.

Becarria's views were widely shared by liberal statesmen and penal reformers during the eighteenth and nineteenth centuries.[19]

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The American colonists did not derive all their ideas from European sources. Some they developed for themselves through the daily business of governing their own affairs, which they did for a century and a half before they broke from England. During the colonial period, there was no extradition with foreign nations at all. Some extradition agreements existed with Indian tribes, but these were not reciprocal.[20] Like Englishmen everywhere, the colonists preferred to be tried at home, by their own kind. This became a major issue at the time of independence, when Jefferson's Declaration complained that the Crown had wrongly transported colonists "beyond the seas to be tried for pretended offenses." In that instance, the foreign courts were British admiralty courts sitting in Nova Scotia without juries; the "pretended offenses" were violations of the Navigation and Stamp Acts by colonial shipowners. Technically speaking, no extradition was involved. The shipowners were still British subjects, and they did not have to go to Halifax if they were willing to lose their ships and cargoes by default, but the principle was similar. To colonists accustomed to being tried in their own common law courts before sympathetic juries drawn from their local communities, trial in Nova Scotia before a prerogative court by a judge paid from the forfeitures he levied was to "subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws."[21] The practice heightened colonial feelings that Great Britain was becoming a foreign country from which independence would have to be won by force.[22]

The first call for a national policy on extradition occurred in 1784 when the Virginia legislature sought to prod the national government to improve relations with Spain, which had repeatedly threatened to close trade down the Mississippi River.[23] One impediment to improved relations along the western border involved American frontiersmen who murdered Indians and committed other crimes in Spanish territory while using American states as places of refuge. To combat this filibustering, the Virginia legislature enacted what was probably the first extradition statute in modern history.[24] It was a modest effort that had no tangible consequences, but it revealed the early outlines of American thinking about extradition.

The bill, sponsored by James Madison, had two main parts. The first authorized Virginia's governor to cooperate with the federal government, should the federal government seek (by treaty or statute) to surrender "any citizen or inhabitant of this

commonwealth" who "within the acknowledged jurisdiction of any civilized nation in amity with the United States, shall . . . commit any crime." The second part authorized the Virginia courts to prosecute "any citizen of this commonwealth" who "shall [go] into the territory of any christian nation or Indian tribe, in amity with the United States, and shall there commit murder, house-burning, robbery, theft, trespass, or other crime, which, if committed within this commonwealth, would be punishable by the laws thereof."[25]

Madison's bill was nothing more than a prod to the federal government—a promise of assistance should extradition be arranged with Spain. It was highly controversial and passed by only one vote. Among those voting for it was John Marshall, the future Chief Justice of the United States.[26]

To Virginia's more radical whigs, the extradition bill was an assault on section 8 of the Virginia Bill of Rights. Section 8 guaranteed a right to trial "by an impartial jury of [the] vicinage" and provided, in the tradition of Magna Carta, that no man shall be deprived of his liberty "except by the law of the land or the judgment of his peers."[27]

To the bill's opponents, the rights to a trial by jury and to due process of law were not just rights derived from a specific governmental system, but natural rights of all men to fundamental fairness. Accordingly, they recoiled at the thought that their governor might collaborate with the national government to surrender Americans to any foreign regime. To surrender Americans to a Spanish regime in Florida or Louisiana was even worse because it revived their Protestant contempt for his Catholic Majesty's infamous Inquisition.

The more conservative whigs who supported the bill refused to accept such a broad theory of rights. In their view, the constitutional rights of criminal suspects were not rights of personhood derived from a respect for all members of the human race. They were not even rights of citizenship derived from a theory of social compact. They were positive rights—rights bestowed by the governing authorities to assure fair trials in American courts. From that perspective, the surrender of a Virginian or American to Spanish justice did not violate the Virginia Bill of Rights because it only specified the kind of justice people could expect from Virginia courts. The conservatives were also reassured by a provision in the bill that conditioned Virginia's cooperation on the expectation that the national government would only engage in extradition with "civilized nations in amity with the United States."

Madison had tried to assuage the critics' fears with a provision that, he later informed Jefferson, "provides . . . for a domestic trial in cases where a surrender may not be justified."[28] This vague "extradite or punish" provision may well constitute the earliest legislative effort to avoid American complicity with foreign injustice. It did not single out political offenders for protection; it applied to all cases in which the capacity or willingness of the foreign regime to do justice might be in doubt.

In a letter to Jefferson, Madison concluded from his reading of Grotius, Pufendorf, and Vattel that extradition was an inherent power of all nations.[29] This may suggest that Madison was willing to entrust specific extradition decisions to the executive. However, he did not say that; he said that if the power was ever to be exercised,