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TYRANNY DENIED: CHARLES I, ATTORNEY GENERAL HEATH, AND THE FIVE KNIGHTS' CASE*

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ABSTRACT. *This article exonerates Charles I and Attorney General Sir Robert Heath from charges that they tampered with the records of the court of King's Bench in the Five Knights' Case. It refutes allegations made by John Selden in the parliament of 1628 and repeated by modern historians. Selden's attack on Heath and the king's government was based on a fundamental misunderstanding of the nature of King's Bench enrolments and a radical view of the crown's intentions in imprisoning loan resisters. The view that Charles was attempting to establish the prerogative right to imprison opponents without remedy at common law has no basis in either the arguments presented during the Five Knights' Case or the king's behaviour both before and during the parliament. By accepting the most radical critique of Caroline government at face value, historians have concluded that Charles was attempting to establish a 'legal tyranny'. This article rejects these views.*

It has rarely been necessary to descend to specifics in disparaging the government of Charles I. The king's personality, policies, and practices have been so long judged contemptible that the bill of particulars gathered in the Grand Remonstrance has served as a blueprint for historians of the reign whether they be biographers or critics. In the mildest version, Charles was ineffectual and incompetent. His self-proclaimed stutter symbolized character flaws of a like nature – indecisive, inadequate, ineffective. He was 'the shy man afraid of seeming shy' who receded in the presence of powerful personalities like Buckingham, Laud, and Strafford and was putty in the hands of his strong-willed wife with whom he was sentimentally in love.[1] He understood little of the art of government at which he remained an aesthete rather than a connoisseur despite a quarter century of rule. In the strongest version, Charles was a man of blood, a tyrant bent on subverting the constitution of his kingdom, destroying the liberties of his subjects and establishing a continental style absolutism. In this guise he was 'perfidious, not only from constitution and from habit, but also on principle'.[2] He was vindictive toward his opponents

* The author would like to thank Tom Cogswell, John Guy, Peter Lake, John Morrill, Kevin Sharpe, and David Smith for their comments on early drafts of this essay and Paul Halliday and Catherine Patterson for discussions on King's Bench procedure.

[1] J. P. Kenyon, *The Stuarts* (London, 1958), p. 64.

[2] T. B. Macaulay, *Critical, historical, and miscellaneous essays and poems* (London, 1885), III, p. 375.

and ruthless toward his enemies, 'a stubborn, imperious and dangerous man' who 'inspired fear'.[3]

In recent years historians have gravitated toward the second of these poles, seeing Charles as innovative rather than incompetent, determined to establish his power in church and state by deviating from the settled course followed by his predecessors. In these accounts he either oversteps his authority or abuses it, pushing to the edge of what is legal and occasionally beyond it. No single event is more indicative of Charles's attempts at tyranny than his effort to alter the records of the court of King's Bench in the famous case of the Five Knights. David Smith writes:

> the king took the extraordinary step of ordering the attorney general, Sir Robert Heath, to change the judges' ruling into a firm precedent. When Buckingham revealed this the following year, there was widespread consternation at Charles's authoritarian methods and his readiness to use royal powers to override the proceedings of the common law.[4]

Richard Cust, the historian of the so-called Forced Loan, believed that the case resulted in 'a decision which actually seemed to strengthen the prerogative and led Charles to tamper with the controlment roll in order to establish a precedent'.[5] 'Heath's attempt to pervert the legal record was a felony in English law', Michael Young charged. '[His] conduct contributed to the growing impression that Charles could not be trusted to rule within the established law of the land.'[6] John Reeve concluded that 'this shocking revelation … caused the Commons to seek to define the law of imprisonment by legislation'.[7] Glenn Burgess, who found it 'hard to express how shocking this must have appeared to contemporaries', assessed that Charles and Heath's actions created fear for the 'integrity' of the law itself.[8] John Morrill believed that the attempt to alter the record in King's Bench was 'a stunning exposure of the king's authoritarianism' and cited it as the most powerful example of Charles's attempt to create a 'legal tyranny'.[9] Even Kevin Sharpe accepted the validity of the charge, only defending Charles with the suggestion that 'it is not clear that Heath acted on royal instructions'.[10]

[3] Michael Young, *Charles I* (Basingstoke, 1997), pp. 49–50.
[4] D. L. Smith, *A history of the modern British Isles* (London, 1998), pp. 71–2.
[5] R. P. Cust, *The forced loan and English politics* (Oxford, 1987), p. 238.
[6] Young, *Charles I*, p. 53.
[7] L. J. Reeve, *Charles I and the road to Personal Rule* (Cambridge, 1989), p. 19.
[8] Glenn Burgess, *The politics of the Ancient Constitution* (Basingstoke, 1992), pp. 194, 199.
[9] J. S. Morrill, *The nature of the English Revolution* (London, 1993), p. 289. See also Brian Quintrell, *Charles I, 1625–1640* (London, 1993), p. 37. 'One major issue was the way in which the Attorney general, Heath, and behind him the King, had sought to tamper with the records of the court of King's Bench after it had refused bail to five of the knights held in custody.'
[10] Kevin Sharpe, *The Personal Rule of Charles I* (New Haven, 1992), p. 662. Sharpe draws this suggestion from Roger Lockyer who reasoned that since Charles was no lawyer, these complicated machinations would have escaped him. However, Lockyer also argued that Charles might not understand 'the details of Heath's devious manoeuvres, but he would have undoubtedly approved' of them. Roger Lockyer, *The early Stuarts* (London, 1989), p. 225.

All of these accounts derive from a single source, John Guy's 'The origins of the Petition of Right reconsidered'.[11] Guy laid out a detailed account of the history of the Five Knights' Case, the actions of the judges, and the technicalities of the recording of the case and its resolution. He then shifted scene to the parliament of 1628 where there was immediate complaint against the judges' refusal to grant bail on the return of a writ which specified that the plaintiffs were committed to prison by 'special command of the king'. These concerns were heightened by the report of John Selden, a lawyer who had represented one of the five knights, that the king's attorney general had attempted to alter the records in the case to establish a binding precedent so that men imprisoned by special command of the king could be held indefinitely. Guy argued that Heath's actions amounted to 'an act of archival perversion', and a 'felonious act'.[12] 'Charles and Heath were the innovators', and the effect of the revelation by Selden 'was to galvanize the House of Commons into unanimously deciding to commit itself to formal denials of Charles I's right either to imprison subjects for unknown causes or to raise forced loans'.[13] In Guy's estimation, Selden's discovery both of the actual entry on the controlment roll and of 'the crown's felonious attempt to pervert the record of the Five Knights' case' was the starting point for the resolutions, bill, and ultimately the Petition of Right which sought to specify the liberties of freeborn subjects.[14] In a powerful summary of his argument Guy concluded 'Charles I had abused the legal procedures of King's Bench in order to defy the spirit of English "due process" legislation... The revelation of Heath's attempt to pervert the King's Bench records had sown fears that Charles's government had repudiated its commitment to the rule of law.'[15] The incident was therefore doubly important; it established the king's willingness to manipulate the courts for his own purposes and it gave a justifying motive to the ruthless tactics used by the parliamentary leaders during the struggle over the Petition of Right. If the king was willing to order his attorney general to commit a felony and pervert the records of courts, then the leaders of the Commons might be excused for fighting fire with fire.

Guy's essay was based on impeccable scholarship and an unrivalled mastery of the records of the court of King's Bench which, as he pointed out, 'no previous writer has looked at'. He found the writs in a disused munitions factory and the rolls and order book in Chancery Lane. Guy also had to piece together the events in the House of Lords from a disparate set of manuscripts only some of which had yet been printed.[16] Examination of the King's Bench

[11] J. A. Guy, 'The origins of the Petition of Right reconsidered', *Historical Journal*, 25 (1982), pp. 289–312. Many of the details of these events were first uncovered by Frances Relf, *The Petition of Right*, University of Minnesota Studies in the Social Sciences, 8 (Minneapolis, 1917).

[12] Guy, 'Origins', pp. 296, 297. Guy used the word 'pervert' ten times and the word 'felony' or 'felonious' five times to describe Heath's actions.

[13] Ibid., pp. 298, 311.

[14] Ibid., p. 310.

[15] Ibid., pp. 311–12.

[16] Ibid., pp. 289–90 and esp. n. 5 where sources are discussed. The records of the upper house

records enabled him to confirm claims made by John Selden in the House of Commons and predisposed him to accepting Selden's account of the events surrounding the Five Knights' Case. Selden was, after all, one of the great common lawyers of the day, deeply learned, the likeliest member of the younger generation to inherit the mantle of Sir Edward Coke.[17] He was particularly versed in the issues, having served as one of the plaintiffs' lawyers, and he performed the elementary task of viewing the actual records that had been ignored by the king's own solicitor general. Guy followed Selden to the documents and discovered that there was no entry for the case at all on the *Coram Rege* roll and that the only entry on the controlment roll was '*remittitur*', followed by a blank membrane that was ultimately removed. The King's Bench order book, which was not, like the *Coram Rege* and controlment rolls, an official record of the court, contained a somewhat fuller version of the decision.

From these facts Guy accepted Selden's ultimate deduction that there had been no binding precedent established in the case because there had been no final judgement enrolled. Selden argued that the entry *remittitur* was ambiguous because it could be used either to designate instances in which prisoners were temporarily remanded back into custody or instances in which they were remanded back into custody after the refusal of bail. Since the same entry appeared in both instances, it could never be used to prove that bail had been denied. This was a brilliant argument on Selden's part because, if it was true (which it was not), it destroyed at least some of the precedents the crown had produced in court to argue that prisoners committed by the special command of the king could not be bailed. Guy seized upon what Selden believed was a crucial distinction between the entry *remittitur*, which appeared on the controlment roll, and the entry *remittitur quousque*, which appeared in the order book, to argue that 'by a quirk of King's Bench book-keeping' Charles had been denied a binding precedent in the case.[18] This conclusion was based on the belief that only official records could be cited as evidence in cases. Because the rule book could not be used as an official record, 'it was impossible for the crown ever to prove in the aftermath of a rule of court that a prisoner's application for bail had been refused'. However, during the Five Knights' Case, both sides cited case books, letters, judges' notes and year book reports.[19] Nevertheless, Selden's argument led to Guy's central premise.

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as well as the materials concerning the issues of Heath's actions and Selden's accusations are now conveniently available in volumes v and vi of R. Johnson, M. Keeler, et al., eds., *Proceedings in parliament 1628* (6 vols., New Haven, 1977–83) (hereafter cited as *P in P 1628*).

[17] Stephen D. White, *Sir Edward Coke and 'the grievances of the commonwealth'* (Chapel Hill, 1979), pp. 224–5.

[18] Guy, 'Origins', p. 294. The essential difference between the entry on the controlment roll and the order book are the words *quousque etc.* which, as we shall see, meant different things to different people.

[19] Ibid., p. 295. Selden even cited Matthew Paris's *Chronicles*. T. B. Howell, ed., *A complete collection of state trials* (London, 1816), iii, p. 18. In the debate over precedents in the conference

As Heath soon realized, the Crown could not prove that its alleged right of discretionary imprisonment for a matter of state had been given judicial sanction on 27 November 1627. Only by feloniously perverting one of the 'final' entries on the controlment roll for this day to show that the substantive issue of discretionary imprisonment had been *adjudged* in its favour could the Crown do this. To the horror of both Lords and Commons in 1628, it was exactly such an act of archival perversion which Heath next attempted.[20]

By accepting Selden's version of events, Guy's conclusions followed logically. Selden not only believed that the records of the Five Knights' Case could not be used to demonstrate that his client had been denied bail, he also believed that there were no legal grounds for the king's right to commit by special command and that there were no precedents to demonstrate that petitioners so committed should be denied bail. He believed fervently that imprisonment without specific cause shown violated the fundamental laws of the kingdom beginning with Magna Carta and that if Englishmen so committed could not be bailed then they would suffer a perpetual imprisonment. To demonstrate the impossibility of so large a loophole existing in the common law, he and his co-counsel had produced numerous precedents of bail being granted to petitioners committed by special commandment of the king. Selden was able to accuse the king's attorney general of attempting to enter a judgement to confirm the crown's right to imprison perpetually without showing cause, not because this was what the attorney general had done, but because Selden feared it was what the crown wished to do. By adopting Selden's point of view, Guy recreates even more powerfully a case against the crown that was based on a fundamental factual error, a case that few (if any) but Selden believed at the time, and a case that will not bear scrutiny.[21] The portrait of a tyrant king and a criminal attorney general once existed only in the mind of John Selden. Now it has become one of the most common illustrations of the reign of Charles I.

In the following pages an effort will be made to examine Selden's accusations and to provide an alternative account of these events and an alternative interpretation of their impact in parliament. It will be argued that from the beginning the crown's only motive was to keep the loan refusers in custody during the period in which the loan was being collected. The crown allowed the

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between representatives of the Commons and Attorney General Heath, Selden complained of the use of 'a paper in a clerk's trunk'. *P in P 1628*, II, p. 502. Moreover, in debating Heath on 17 April, Selden attempted to explain an ambiguity in one of his precedents by arguing from 'a rule of the court which was cited out of the rule book of the Court of King's Bench'. *P in P 1628*, II, p. 498.

[20] Guy, 'Origins', p. 296.

[21] Though Guy understands that 'John Selden was not correct when he told the Commons on 28 March 1628 that *remittitur quousque*, *etc*. was substantively different from *remittitur* in King's Bench practice' he does not follow the implications of Selden's error. In particular, Attorney General Heath could not have been motivated to change the entry on the controlment role in search of a binding precedent since he, the judges, and every other knowledgeable observer would know that the entry did constitute a binding precedent. Ibid., p. 295 n. 24.

habeas corpus case to go forward on the certain knowledge that the return 'by special commandment of the king' would result in the refusal of bail as it had in the past. Though the tactic was reviled by the plaintiffs' lawyers, it was the most moderate of the alternatives open to the crown which included refusing to grant the writ at all or charging the prisoners with sedition and bringing them to trial.[22] At no point did the crown wish to have either its power to imprison for refusing to lend or its power to imprison by special command tested by the court. As a result of the Five Knights' Case, the plaintiffs were denied bail and remanded into custody as the crown wished them to be. It does not appear that Charles I, Heath, or Selden knew that the judges had decided to enter an interlocutory order rather than a final judgement.[23] The draft of a judgement that Heath wished to present to the judges after the case had been concluded was designed to make clear that only the narrow question of whether the plaintiffs had been bailed or remanded had been decided and was not intended to establish the principle that those imprisoned by special commandment of the king could have no remedy at law, a principle which the crown, through Attorney General Heath, had repudiated during the case. Further it will be shown that there is no evidence that Heath ever amended the records of the court of King's Bench or that he instructed anyone else to amend them, only that he requested a special judgement should be drawn and given to him. After much delay, a draft of such a judgement was drawn and sent to Heath, but he did nothing further with it. There is no evidence to suggest that Charles I demanded that the records of the court be perverted. Moreover, there is little evidence to suggest that the revelation of Heath's actions made much impression in either House of parliament or that it was a principal motive in the process which led to the Petition of Right. Although this essay will raise questions about the events and interpretations offered by Professor Guy, it will not raise any questions about the reliability and probity of his scholarship which is of the highest quality.

[22] It must be remembered that these plaintiffs desired a confrontation with the crown. Many refusers avoided imprisonment by delaying their response to the commissioners, pleading poverty or leaving their counties during the period of collections. Christopher Wandesford hid in what was probably a priest's hole whenever the collectors arrived at his door. J. P. Cooper, ed., *Wentworth papers, 1597–1628* (London, 1973), pp. 266–7. Others, like Sir George Radcliffe, refused to lend, but also refused to obstruct the service. He was treated leniently, even in prison. T. D. Whitaker, ed., *The life and original correspondence of Sir George Radcliffe* (London, 1810), pp. 138–9. Still others petitioned the privy council for release and pledged good conduct in return. This, apparently, was the course adopted by Sir Thomas Darnell himself. Only these four demanded a full legal process which might have resulted in trial and conviction.

[23] The judges decided to make an interlocutory order, that is a temporary order pending further action, for two reasons: they were worried about being called to account for any judgement in parliament and they were concerned about the issue of perpetual imprisonment without remedy. As they subsequently explained, by not making a final judgement they kept alive the possibility that further habeas corpus proceedings could take place.

I

After Charles I dissolved the parliament of 1626 rather than sequester the duke of Buckingham without trial, he consulted with his privy council on expedients to raise revenue to provide support for his uncle, Christian IV of Denmark, and his heirs, his sister Elizabeth and her husband the Elector Palatine, who had been deprived of his hereditary lands and titles.[24] They were engaged in mortal combat against the combined might of the Spanish and Austrian Habsburgs and Charles had pledged to aid them. After the battle of Lutter in September, when Christian's armies were defeated and his crown threatened, these pledges amounted to a lifeline. The subsidies that Charles lost at the dissolution of the parliament were not, in themselves, sufficient to meet these obligations and the king's advisers had been exploring a number of supplementary alternatives. Once it was clear that the subsidies would have to be replaced rather than supplemented, Charles ultimately decided to proceed by way of a loan from his subjects, an unpopular but by no means unprecedented form of finance. Privy councillors were sent throughout the country with instructions for explaining the rationale behind the loan, its terms both for payment and repayment, and the amounts that were necessary.[25] Immediately, prominent members of local society, including members of the recently dissolved parliament, refused to comply with the loan. As Charles regarded the situation he and his allies faced as an emergency, he had no hesitation in having outspoken resisters arrested and imprisoned. This was precisely the tack his father had followed in 1622 after the abrupt dissolution of the parliament of 1621.[26] Anything else would have ensured the failure of the loan. Charles believed that the fleet of ships he was preparing to send against Spain, the Scots and English troops which were embarked for Germany, and the direct cash payments he had pledged were vital to prevent a total defeat of the Protestant forces of Europe. He could not allow anything to interfere with this attempt to resolve the international crisis.

Many of those who refused the loan were placed under house arrest, usually

[24] It is commonly believed that Charles dissolved this parliament to prevent the impeachment of Buckingham. On the contrary, he allowed the impeachment to proceed and only dissolved parliament after a remonstrance from the House of Commons demanded that Buckingham be sequestered whatever the result of his trial. W. B. Bidwell and M. Jannson, eds., *Proceedings in parliament 1626* (New Haven, 1992), III, pp. 440–1. John Rushworth, *Historical collections* (London, 1721), I, 397–8.

[25] The best account of the background to the loan and the role of privy councillors in advising the king about it is found in Cust, *Forced loan*.

[26] Viscount Saye and Sele was imprisoned for eight months in 1622 for criticizing the benevolence for the Palatinate. James also threatened to send refusers on military service: 'A merchant of London who had been a cheesemonger, but now rich, was sent for by the Council, and required to give the King £200 or to go into the Palatinate and serve the Army with cheese, being a man of eighty years of age.' Henry Ellis, ed., *Original letters, illustrative of English history*, second ser. (London, 1827), III, p. 240. Marc Schwarz, 'Lord Saye and Sele's objections to the Palatinate benevolence of 1622', *Albion*, 4 (1972), pp. 12, 14.

away from their locality where their influence was greatest.[27] But others were imprisoned in London and on 3 November 1627 the first of five gentry appealed to the court of King's Bench for a writ of habeas corpus which would deliver them from the custody of their jailers into the court so that their cases might be heard.[28] There could be no doubt that the king did not want the prisoners bailed while the loan was still being gathered. The calculation that the arrest of prominent resisters would advance collection was proving true and ultimately nearly the full sum of the loan was paid in. Nevertheless the king and council decided to allow the writ to be filed, but to forestall the possibility of bail, the return was made by eighteen members of the privy council that the knights had been imprisoned 'by his Majesty's special commandment'.[29] The plaintiffs had not been formally charged with any crime, much less with refusing to pay the loan, and the use of the formula 'by his Majesty's special commandment' was probably designed to buy time as well as to prevent a serious rupture between crown and subjects. Although Charles had been infuriated both by the conduct of the more radical members of the parliament of 1626 and the more vocal of the loan resisters, he had also followed the advice of his moderate councillors in organizing the loan and in responding to resistance against it.[30]

King and council were well aware of the fine line they walked in pressuring compliance with a loan, as were many of those who refused to give. Aids, benevolences, and loans were obligations of subjects toward their sovereign but they were obligations based upon a consensus over the necessity of the revenues required. In this subtle set of responsibilities it was necessary for the crown to avoid compulsion and for the citizen to avoid resistance.[31] There is

[27] Most resisters were initially summoned to London where they were either arrested or made to attend the privy council on a nearly continuous basis. In June 1627 it was decided to begin sending them into the country. Cust, *Forced loan*, pp. 58–60. It appears that four of the five knights refused to leave London for their places of confinement. Edmund Hampden may have been too ill to leave. *Acts of the privy council* (*APC*), 1627–8, p. 58. For Hampden, *Calendar of state papers*, *domestic* (*CSPD*), 1627–8, p. 205.

[28] Writs of habeas corpus were of grace rather than right in King's Bench and were granted by the crown to allow the judges to make determination as to whether the crimes alleged against the prisoners were offences for which bail might be granted or a speedy trial set. The fact that habeas corpus was not a right became a central issue in the parliament of 1628 and one of the encroachments upon the royal prerogative made by the Petition of Right. Had the crown refused the petition for writ of habeas corpus, as it was entitled to do, it would then have been open to the charge of arbitrary, perpetual imprisonment. By choosing to grant the writ on the return of 'special commandment' it was attempting – unsuccessfully as it turned out – to insulate itself from this charge.

[29] There was no 'prevarication' on the part of the privy council which returned answer to the wardens on 7 November. Burgess, *Politics of the Ancient Constitution*, p. 191. *APC*, 1627–8, p. 131. The delay in the case involved Darnell, not the privy council. *State trials*, III, p. 3.

[30] As Cust observed: '[Charles I] remained extremely respectful of the tradition whereby English monarchs took the advice of their Council before embarking on particular policies, often deferring to their judgement even where he had shown every sign of committing himself in another direction.' Cust, *The forced loan*, p. 42.

[31] See the sophisticated discussion of these issues in G. L. Harriss, 'Aids, loans and benevolences,' *Historical Journal*, 6 (1963), pp. 1–19.

every reason to believe that king and council intended to release all of the loan refusers after collection was complete and this is what happened on 2 January 1628.[32] It was only because the five knights forced the issue into the courts that the king had to find a strategy that might do the least political damage. Had the crown returned a charge of sedition (as it would do in different circumstances in 1629) and a trial ensued, the king would have risked permanent alienation of the local governing elites.[33]

The writs were duly issued to be returned by 11 November, although the original petitioner, Sir Thomas Darnell, did not sue his *alias habeas* until two days later and then withdrew from the case.[34] The other four plaintiffs sought relief on 22 November when their counsel, which included John Selden and William Noy, petitioned for the release of their clients on bail.[35] The plaintiffs' counsel argued two lines, that imprisonment without a specific known cause was illegal and that those imprisoned by special command of the king should be bailed. They produced an array of statutes and precedents in support of their application. Counsel took their stand on the fundamental liberties of the subject, the right to be tried for the crimes alleged against them or bailed while awaiting trial. The principle was enshrined in Magna Carta and Selden cited numerous statutes in defence of it. He and his co-counsel also produced precedents of cases in which they believed subjects who had been imprisoned by 'special commandment' had been bailed.[36] In presentations as suited to the debating chamber of the House of Commons as to the law chamber of Westminster Hall, they argued 'if this return shall be good, then his imprisonment shall not continue on for a time, but for ever; and the subjects of this kingdom may be restrained of their liberties perpetually'.[37] They played all of the stops of the volatile language of liberty and the galleries responded 'with wonderful applause, even of shouting and the clapping of hands'.[38] But applause came at a high price, for their plea was highly inflammatory.

[32] *APC*, 1627–8, pp. 217–18.

[33] It was resistance rather than refusal that was the core issue for Charles as it was for the plaintiffs and their attorneys. This was to be the crux of the sedition case in 1629 as well when Charles offered bail on condition of good conduct and Selden, Holles, Valentine, and Strode refused it.

[34] This fact leads to one of the great misnomers in English legal history, for though the case is known either as Darnell's Case or the Five Knights' Case, Darnell was not a party to it and there were only four knights who pled for bail.

[35] I have called the remaining four knights the plaintiffs since it was they who sued for relief by writ of habeas corpus. In some contemporary accounts they are called the defendants since they were in jail.

[36] There can be no question but that at the trial the plaintiffs' counsel produced precedents of imprisonment by special commandment of the king in attempting to show that such prisoners had been bailed though these cases vitiated the prior claim that such imprisonment was illegal.

[37] *State trials*, III, p. 8. It is now appreciated by historians that the accounts in *State trials* are composites of various manuscripts and that their absolute accuracy must be questioned. Paul Christianson, however, has verified this account in relation to Selden's contributions and comparison with Heath's manuscript notes leads to the same conclusion. Paul Christianson, *Discourse on history, law, and governance in the public career of John Selden, 1610–1635* (Toronto, 1996), p. 341 n. 122. PRO, SP 16/85/40–3, 66–73, 85–102.

[38] Thomas Birch, *The court and times of Charles I* (London, 1848), I, p. 292.

Challenging the fundamental prerogative of the king and raising the spectre of perpetual imprisonment without remedy turned legal issues into political ones and cut the middle ground from under the king's attorney who was presented with the breviate of these arguments, including the statute and case law, and given the weekend to prepare an answer.

Attorney General Sir Robert Heath appeared before the court on 26 November and opposed the motion for bail. Though lower keyed, Heath was no less cogent. He attempted to focus tightly on the technical points of the case and to deflate the plaintiffs' overblown rhetoric. Heath argued that none of the statutes produced by the plaintiffs had any bearing on the question of whether prisoners might be bailed when imprisoned by 'special commandment of the king' and that none of their precedents could document a case in which one was. Against them he produced a number of precedents in which bail had been denied in cases of 'special commandment'. He argued for the obvious need of the king or the privy council to imprison by command and cited numerous instances in which they had done so. Heath denied the contention that the prisoners could obtain no relief and were subject to perpetual imprisonment. It was to the king rather than the court that the plaintiffs should turn: 'and therefore I pray your Lordship that these gentlemen may be remitted and left to go the right way for their delivery which is by a petition to the king'.[39]

At dinner on the afternoon of 26 November the judges began their deliberations. The legal issues were clearly stated and on the question of law, there was little doubt. Heath had convincingly demolished the plaintiffs' precedents and equally convincingly displayed his own. Even before deliberation had begun Chief Justice Hyde had admonished the plaintiffs' attorneys for attempting to 'inveigle the court' by citing inappropriate precedents and presenting partial accounts of others. In his resolution of the case on 27 November Hyde was more direct: 'but this I dare affirm, that no one of the records that you have cited, doth inforce what you have concluded out of them, no not one'.[40] Thus the plaintiffs' plea for bail was denied and they were returned to the custody of their jailers. The debate was neither long nor contentious. Since the crimes alleged in the case of these plaintiffs were not specified, it was impossible for the judges to determine whether they should be bailed and therefore they remitted them back to the custody from which they came in accordance with all of the precedents cited by Heath.

[39] *State trials*, III, pp. 49–50.

[40] Ibid., III, pp. 50, 53. On the previous day after the final argument by Heath, Hyde had addressed the plaintiffs' lawyers: 'Touching such precedents as you urged in some of them, we know there is something urged which makes not for you, so you have omitted some material things to be shown.' Ibid., III, p. 50. This was a reference to a number of precedents in which the plaintiffs had shown that men committed by special command had been bailed but had neglected to add that though imprisoned by special command they had also been bailed by special command. Heath cited Beckwith's and Raynor's cases as examples, ibid., III, pp. 47–8. Mead's London correspondent, whose account reads like an eyewitness, wrote: 'His Lordship said, moreover, that the precedents alleged by the pleaders was brought in by halves, as if they had uttered that only which was for them, but concealed the rest.' Birch, *Court and times*, I, p. 295.

Although the plaintiffs' counsel had argued that this would create a perpetual imprisonment, and the prisoners would have no remedy, the judges concluded that this was not true. This was a crucial question for the judges and both Justices Jones and Dodderidge addressed it to Heath after the conclusion of the arguments for the plaintiffs.

Justice Jones. Mr. Attorney, if it be so that the law of Magna Carta and other statutes be now in force, and the gentlemen be not delivered by this court, how shall they be delivered? Apply yourself to show us any other way to deliver them. *Dodderidge*. Yea, or else they shall have a perpetual imprisonment.

Heath argued that the plaintiffs continued to have two remedies: they could petition the king for release by special command or they could sue for another habeas corpus. At such time as they were again granted a writ they could again come before the court.[41] While it is possible that the plaintiffs' counsel believed such continued application would be fruitless, an endless loop of returns by special command that resulted in remands, the question was made moot by the conclusion of the term the next day and the subsequent release of the prisoners on 2 January 1628.[42] But this was not the conclusion of the judges and one which should not be jumped to too quickly.[43] From the beginning of the Five Knights' Case to the conclusion of the Petition of Right the judges were consistently concerned about the duration of detentions by special command and made clear in their pronouncements that they recognized such imprisonment as an expedient only. As Justice Whitelocke later stated pointedly: 'I never did read a record that did make it appear to me that the judges of the King's Bench did deliver a man upon the first return of *per mandatum domini regis*.' The operative phrase here was 'first return'.[44] There is no reason to believe that if the case had continued on into subsequent terms the judges would have refused bail indefinitely.

But if the case was legally simple, it was politically complex. In the precedents cited by Heath it was clear that detainment by 'special command' had been upheld by previous courts but also that it was a temporary restraint in which the specification of the cause of arrest might impede the pursuit of

[41] *State trials*, III, pp. 31–2. Though it was concluded by Selden among others that there could be no relief by habeas corpus after the judges remanded the plaintiffs back to prison this was not true in law for each writ would be treated separately. The judges insisted that a refusal to bail in the first instance was not a refusal to bail perpetually and Whitelocke stated definitively: 'Objection: they might have been kept in prison all their life. Response: No, this was the first return.' *P in P 1628*, v, p. 222.

[42] Guy, 'Origins', p. 293 n. 15.

[43] I do not believe Guy's conclusion on this point to be factually correct. 'There was little point in seeking further writs of *alias habeas* in political actions at this time, because a rule of King's Bench would not be changed unless new factual grounds were produced to show that bail could be granted, which could never happen until the returns to writs of *alias habeas* were amended by the Crown to reveal the "cause of the cause" of detention.' Ibid., p. 293. The plaintiffs could have been bailed on another writ of habeas corpus without the 'cause of causes' being shown if the crown directed the judges to do so by special command. This was the gravamen of the precedents cited by the plaintiffs' counsel in their argument for bail.

[44] *P in P 1628*, v, p. 223.

justice. Some of these cases, like that of the gunpowder plotters, were conspiracies in which outstanding suspects were yet to be arrested, while others involved the potential for civil disturbance on behalf of those imprisoned, the analogue to the loan resisters. Since the imprisonment of the plaintiffs in this case had only just come to the cognizance of the court, it could not be argued that the crown had overstepped the temporary nature of arrest by 'special command'. Thus there was no reason yet to deny the king his prerogative. As Chief Justice Hyde concluded: 'Mr. Attorney hath told you that the king hath done it, and we trust him in great matters, and he is bound by law, and he bids us proceed by law … upon these grounds, and these records, and the precedents and resolutions, we cannot deliver you, but you must be remanded.'[45]

It was of the nature of early modern kingship that the powers of government were not separated, that the king was not an executive, the parliament a legislative, or the courts a judicial branch, with walls built around their functions and checks and balances to contain them. King, Commons, and Lords together composed parliament. King, the law courts, and Lords together composed the judiciary. Moreover, as the common lawyers increasingly insisted upon the supremacy of statute law and of the role of the House of Commons in initiating statutes, even the lower house was assuming a judicial function.[46] For though traditionally the decisions of courts like King's Bench were formally reversible by writ of error to the House of Lords, there was developing the belief that they were also reversible by statute in the House of Commons. Thus in a real sense, the lawyers for the plaintiffs in the Five Knights' Case, if elected to parliament, would serve as judges of the decisions made against them in King's Bench. More importantly, the King's Bench judges understood this from the beginning. As Justice Dodderidge testified before the House of Lords some months later, 'we were careful, knowing that in a parliament these things might be agitated'.[47] As Justice Whitelocke explained about their mindset: 'Nothing that the Commons may complain. Nothing added nor derogated from the king nor the Commons prejudiced.'[48]

Indeed the judges were so careful that they created much of the confusion that ultimately surrounded the case in parliament. Although they had heard days of complicated argument, had taken copies of dozens of statutes and precedents, and had evaluated all of this evidence, they were clearly worried about the effect of their decision and their exposure to attack by king or parliament. Because they could take no official cognizance of the cause of imprisonment, they could only decide the case on the narrow ground of whether the plaintiffs were entitled to bail. But their decision was likely to be viewed by the public as having been on the substantive grounds – as Solicitor General Shelton had reason to complain, 'it is taken up in London streets that the king may commit one for not lending money' – while resolution of the

[45] *State trials*, III, p. 59.
[46] See Sir Edward Coke's views as cited by White, *Sir Edward Coke*, p. 234.
[47] *P in P 1628*, v, p. 231.
[48] Ibid., v, p. 219.

constitutional issue of whether the king had the right to commit by 'special commandment' was more dangerous still.[49] Therefore the judges decided that they would enter only an interlocutory order and recorded in their order book that the defendants be remanded back to the separate prisons from whence they had come 'until such time, etc.'.[50] On the writs and the controlment roll where the case was registered the entry read '*remittitur*' which appears to have been the entry in the precedent cases cited by Heath and the plaintiffs' counsel.[51] On the *Coram Rege* roll, however, the judges did not order anything to be recorded. 'Our intention was only to take advice (and give no judgement) til next term', Justice Jones recalled.[52] Remitting the prisoners back to custody without any other adjudication was deemed 'the safest way' as Chief Justice Hyde testified.[53] The clerk of the court, John Keeling, was given 'no directions for entry' on the *Coram Rege* roll or whether anything was to be added to the controlment roll, an omission that began the chain of events involving Heath.[54] While the judges attempted to sidestep their responsibilities, Heath attempted to confront his head on.

As attorney general, Heath's responsibility was to ensure that the case had been concluded and to keep a copy of the judgement for his file. On 30 November, two days after the term ended, he requested such a copy and

[49] Ibid., II, p. 152. On the narrow legal question of whether the king had this right, the judges could only look to the form of the return made in the habeas corpus case. This specified *per speciale mandatum domini regis*, and this was a form known to the court. Therefore the constitutional question could never arise despite efforts by the plaintiffs' counsel to make it an issue.

[50] Guy, 'Origins', p. 292, quoting the King's Bench order book: *Ordinatum est quod defendentes remittuntur separalibus prisonis ubicunque antea fuerunt salvo custodiendo quousque, etc.* Guy writes '"quousque, etc.," or to expand the King's Bench abbreviation, "quousque secundum legem deliberati fuerint" – "until they have been delivered according to law"'. The glossary in *P in P 1628*, I, pp. 100–1, translates this same phrase in two ways, s.v. '*quousque secundum legem deliberatus fuerit*' where it is 'until they have been delivered according to law' and s.v. '*remittitur quousque secundum legem deliberatus fuerit*' where it is 'until there has been deliberation according to law'. Whitelocke explained the meaning '*remittitur quousque., id est*, until the court might be better advised' which carries the meaning of deliberation rather than delivery. All five accounts from that day have the identical language of 'advise.' Ibid., V, pp. 217, 219, 222, 224, 226.

[51] The controlment roll was a parchment record that would constitute a binding precedent and as Heath had argued to the judges in refuting the precedent of Wenden's case 'the roll saith *remittitur* and is that a warrant for them to say that he was delivered?' *State trials*, III, p. 47.

[52] *P in P 1628*, V, p. 230.

[53] Ibid., V, p. 232. Jones was franker still: 'We did this out of discretion whatsoever our opinion is.' Ibid., V, p. 230. The judges further argued that their action constituted an advice of the court rather than a final judgement because it was read out only by the chief justice and not attested by each of them, junior to senior, as was usual. This was a very subtle signal if the report of Chief Justice Hyde's statement at the conclusion of the case is accurate: 'my brothers have enjoined me to deliver to you the resolution of the whole court; and therefore, though it be delivered by my mouth, it is the resolution of us all'. *State trials*, III, p. 51. It seems certain that the judges were trying to walk a tightrope between complaint by the king or complaint by parliament.

[54] This was Justice Jones's testimony: 'Left without determining the business. No directions for entry.' *P in P 1628*, V, p. 238. Guy speculated that because the writs of the case were filed in Hilary term though the case had been heard in Michaelmas they 'were kept out until the beginning of March 1628 in connection with the special entry planned by Sir Robert Heath'. It was equally likely that they were kept out awaiting the ruling by the judges. Guy, 'Origins', p. 292 n. 12.

discovered that nothing had been entered on the *Coram Rege* roll and that only *remittitur* was recorded on the controlment roll.[55] It cannot be determined if Heath had already decided to request that Keeling draw a 'special judgement', or whether the fact that no judgement had yet been entered on the *Coram Rege* suggested it to him. There is absolutely no hint in any of the surviving evidence that Heath, Selden, members of the Commons or of the House of Lords knew before 14 April 1628 that the judges had determined not to make a substantive entry on the roll but only to enter the interlocutory order in their rule book.[56] A part of a blank membrane existed in the place where the judgement should have been entered and, as it was reported Keeling testified about one of his subsequent encounters with Heath, 'he said he wondered that there was no entry, but there is an entry to be made and it useth to be made before this time'.[57] Having learned that no entry had been made, Heath requested that Keeling draw one and suggested what it should contain, thereby requesting a special judgement.[58] Keeling told Heath that he did not know how to construct such a special judgement, but that if Heath would provide him with notes, he would see to it.[59] Then, according to Justice Jones, Keeling came to learn what judgement was to be entered and informed the judges that Heath wished to have it drawn in a specific way. Jones directed him 'on his allegiance' that nothing was to be entered on the rolls other than what was already there.[60]

As the months passed, Heath continued to be anxious over the fact that nothing had been entered on the *Coram Rege* roll or added to the controlment roll and that he had no copy of the judgement. Sometime between November

[55] Guy's assertion that Heath 'had learned at the end of 1627 that the one complete official entry of the decision in the five knights' case was in the rule book' cannot be substantiated. Guy, 'Origins', p. 295. There is no evidence to the effect that Heath had viewed the rule book or that he concluded that it contained 'the one complete official entry'. What seems certain is that he had viewed the controlment roll, which was his own working record. Whether he wished the special judgement to be placed on the *Coram Rege* roll or the controlment roll is impossible to ascertain. The fact that the *Coram Rege* contained no notice of the case at all makes it at least as likely a candidate as the controlment roll.

[56] Justice Whitelocke had to explain to a suspicious House of Lords that they could only review by writ of error a judgement of the court of King's Bench and as there had been no judgement, there was nothing to review. *P in P 1628*, v, p. 219. See also J. S. Flemion, 'A savings to satisfy all: the House of Lords and the meaning of the Petition of Right', *Parliamentary History*, 10 (1991), p. 33. This is a crucial point to which I will return. On 25 March Selden, Phelips, and Sir Edward Coke all spoke as if a judgement had been made. *P in P 1628*, II, pp. 99–101.

[57] *P in P 1628*, II, p. 229. It is not clear who made this remark, Heath, Keeling, or Harvey, one of the clerks in the office. See Selden's notes of the examination, ibid., VI, p. 41. Guy's gloss on it is highly prejudicial to Heath, especially since, as he points out, the records of the case had not been sewn into the Michaelmas roll. Guy, 'Origins,' p. 297 n. 28.

[58] I have been unable to determine how unusual such a request might have been. Other evidence suggests that Heath had been involved in constructing the judgements recorded on rolls in certain cases, though not in previous habeas corpus cases. The circumstantial evidence all points to this request as unexceptional; neither Keeling nor the judges made it an issue and Selden's complaint was about the content of the judgement, not the fact of the request. Nevertheless, there may have been a more subtle negative reaction that would not come out in the written record.

[59] *P in P 1628*, VI, p. 41.

[60] Ibid., V, p. 230.

1627 and March 1628 he had revealed this to the privy council and Charles himself pressed Heath to obtain a copy of the judgement. Though it is impossible to determine exactly when Charles pressed Heath on the subject, it must have been before the specific draft Heath had requested was created on 5 March because the attorney general testified that before the draft was made 'he called upon the clerk often, being often called upon himself'.[61] Less than two weeks before parliament was to open, on 5 March, Heath demanded that a draft be drawn according to the notes he had made in November. This was finally done by one of Keeling's underclerks and delivered to Heath who decided that 'perusing the old precedents with these I found no difference but a few words more and therefore resolved never to enter it'.[62] Instead he put the rough draft into the file on the case that was delivered to Solicitor General Shelton.

There was nothing unusual in the attorney general working with the clerks of enrolment and the judges on entries in court records and we should not analogize the total separation between prosecutor and judge that has developed in the modern system.[63] The draft that was made stated simply

> that after a review of the aforesaid return, as well as divers old records lying here in the court relating to similar causes, on the basis of mature deliberation of the fact that no special cause of seizure or detention of the aforesaid John is expressed, but only in general terms that he has been detained in the aforesaid prison by special command of the Lord King, therefore the aforesaid John is remanded to the aforesaid custody of the Marshal of the aforesaid Household saving the custody until etc.[64]

This was as neutral a statement of what had actually happened in the case as could be made. The judges had certainly reviewed the return; they had been

[61] The information that the king pressed Heath to secure a copy of the judgement was revealed in a single sentence by Buckingham during a brief discussion of Heath's actions in the House of Lords. Ibid., v, p. 203. Although Guy calls this admission 'an astonishing leak', from his point of view it was more astonishing that not a single member of the upper house commented upon it – 'the significance of his statement was almost completely obscured'. Guy, 'Origins,' p. 300 n. 54. Although Heath freely admitted that he had been pressed to obtain a copy of the judgement, he also said that the special judgement he had sought was based on his own initiative. 'That he did direct the clerk to make this draft out of the duty of his place for the King though he had no direction.' *P in P 1628*, v, p. 203.

[62] *P in P 1628*, v, p. 203. That the draft was never redrawn is clear from the criticisms first made of it by Selden who described it as 'full of blanks'. Ibid., ii, p. 218.

[63] Heath, himself, had been a clerk of enrolment in King's Bench during James's reign and thus knew how the office worked with attorneys general. I am grateful to Professor Catherine Patterson for providing me with examples of exchanges between the judges and the attorney general over the wording of decisions in King's Bench. The fact that the attorney general and the judges worked closely together does not, in itself, exonerate Heath, but it should remove the implicit suspicion that the suggestion of a special judgement was an attempt to pervert the record.

[64] This is a translation made by the Yale Parliamentary History Center of the Latin draft that Selden presented to the House of Lords on 9 April. *P in P 1628*, ii, p. 353. As it was to be entered after the entry of Sir John Heveningham (and thus to stand for all four cases) 'the aforesaid John' appears in all of the blanks. There is a more compressed account of what the draft said in one of the parliamentary sources that recorded it on the day Selden reported it to the house. Ibid., ii, pp. 211–12.

inundated with old records relating to similar causes; they had discovered that the cause of commitment was the special command of the king; and they had remanded the prisoners back into custody. Heath's draft did not suggest that the judges had upheld the right of the crown to imprison by special command, nor did it say specifically that bail had been denied the plaintiffs. Heath and the judges would have read 'saving the custody until' or *remittitur quousque*' to mean that bail had been denied, which, of course, it had, but in light of Selden's tendentious readings of this draft it is worth noting that nothing specific was said about bail. Indeed it is difficult to read this draft as being expansive rather than restrictive.

Because the evidence presented by Keeling to a sub-committee of the House of Commons was filtered through Selden, there will always remain some doubt as to the precise reconstruction of these events. Nevertheless, several things are clear. First, Heath's request for a 'special judgement' was unusual but not unknown. Rather than rebuffing the suggestion, Keeling requested that Heath provide notes of what he wished it to contain – 'but (said he) if you please to draw a note, and the court assent to it, I will enter it'.[65] These notes were not drawn into a draft for four months and the draft was never submitted for entry on the rolls. There was never any tampering with any record, nothing was ever added or subtracted by anyone.[66] Secondly, there was never any question of anything being entered on the rolls without the knowledge and consent of the judges. Keeling's behaviour was wholly conventional. He asked the judges what entry was to be made and later informed them of Heath's request. Had Heath returned the draft of the judgement that Keeling finally provided after 5 March, that too would have been sent to the judges as Heath himself deposed: 'I never showed it to any nor could I have entered it without acquainting the judges.'[67]

Finally, there is no evidence to suggest that Heath knew that the judges had made an interlocutory order only and therefore his pressure for a judgement cannot be considered a form of harassment. Indeed there are several pieces of circumstantial evidence to demonstrate the opposite. First, Heath was so unselfconscious about his visits to Keeling to discover whether the draft had been drawn that on one occasion he shouted to him about it through a

[65] Ibid., II, p. 229. Selden reported that Keeling said: 'the Attorney wished him to make a special entry of the habeas corpus. He told him he knew no special entry.' Ibid., II, p. 229. Guy glossed this as: 'Keeling had replied that such an entry was foreign to King's Bench practice', rather than that Keeling did not know how to draw such an entry. But Selden's notes of Keeling's examination make clear that this is what he meant: 'Mr. Attorney spoke to him for a special. He not knowing how, desired the Attorney to draw it.' Guy, 'Origins', p. 297; *P in P 1628*, VI, p. 41.

[66] The speculation by the editors of *Proceedings in Parliament* that the special judgement 'actually had been put into and later was cut out of' the controlment roll contradicts the testimony of every witness in the case. *P in P 1628*, VI, p. 40. It also creates an impossible chronology as the judgement was not drawn until after Hilary term had ended and the rolls were examined before Easter term began. Guy has shown that missing membranes were not unusual as they were numbered at the beginning rather than the end of term. Guy, 'Origins', p. 301 n. 54.

[67] *P in P 1628*, V, p. 203.

window.[68] Secondly, Heath thought the draft that was finally made inconsequential and he simply folded it up and placed it in a file which he then passed on to the solicitor general, Sir Richard Shelton. It is difficult to imagine that if this draft was written evidence of an attempt to commit felony by perverting the records of the court of King's Bench that Heath would have treated it so casually or that he would have told Shelton that 'he gave directions to draw a form of a judgement'.[69] Most importantly, there is the testimony of the judges themselves when called before the House of Lords on 14 and 15 April. By then, the question of Heath's conduct had faded into the background, but Selden had raised it before the Lords in an unfavourable light and Heath had responded to it moderately, apologizing not for what he had done, but that it 'has given much distaste which I am sorry for'.[70] All of the judges repeated that they had intended to enter no judgement and had directed Keeling not to enter anything on the roll after he first, and then Heath through him, asked what was to be entered. But Justice Whitelocke, who spoke first, declared pointedly: 'Mr. Attorney did the office of a good servant', a remarkable observation if it had been demonstrated or even suspected that Heath had actually attempted to alter the record to make it appear that the judges had made a decision which they had not made.[71] The judges knew that Heath had come to Keeling asking for a special form of words to be entered and none of them suggested that this was improper, only that they told Keeling to enter nothing on the rolls.[72]

Nevertheless, it must be considered why Heath wished that a special form of words should be entered in the judgement of the case. As he never was summoned before the sub-committee of the Commons or the full House to explain his actions and as his testimony before the Lords only touched on these matters in passing (as they were only raised in passing by Selden) Heath's reasons are a matter of speculation. In the first place, of course, Heath simply sought the record of the judgement and receiving none was concerned that this would lead to misinterpretation of what the judges had done once parliament had assembled which, in the event, it did. The misinterpretation that the government was most concerned about was that the judges had somehow decided either the legality of the loan or of imprisonment for not lending. Both of these were egregious misrepresentations of what had happened and both were political nightmares. Though many assumed that the plaintiffs were in prison for their refusal to lend, the crown's position was that they were detained for obstruction rather than non-compliance.

[68] Ibid., II, p. 235. [69] Ibid., II, p. 212. [70] Ibid., V, p. 203.

[71] Ibid., V, p. 220. The full entry reads: '4. We have been touched that we intended to enter a judgement and a judgement drawn. Mr. Attorney did the office of a good servant. But we all required Keeling not to make any other entry than the common and usual entry. We never saw that entry before it was read here.'

[72] Jones, Dodderidge, and Hyde all told exactly the same story with slightly different details. None suggested there was anything unsavory about Heath's actions, let alone 'felonious'.

But there was a second, more limited set of misrepresentations that were likely to cause trouble in parliament and those were about the interpretations of the statutes and precedents that had been presented on the narrow question of whether the king and privy council could imprison by special command.[73] Plaintiffs' counsel had presented statutes to argue that the king had no right to imprison without showing the cause of imprisonment and without a clear statement that the judges had not decided this issue but only the narrow question of bail, the king's prerogative power could become the focus of attack in parliament which, in the event, it did. Moreover, the plaintiffs' counsel had presented precedents which they clearly believed entitled their clients to bail and had argued that without bail there was no remedy and imprisonment was perpetual. Heath's draft would have shown that the judges had considered these arguments and rejected them, thereby denying that there was a potential for perpetual imprisonment. Some of these lawyers would undoubtedly be returned to parliament where the dispute would be carried on in the political rather than the legal arena. This was probably why Heath wanted so full a declaration of what had happened, to protect the judges from attack or prosecution and to protect the government from charges of arbitrary action. What Heath did not want was a statement that the judges had decided substantive issues relating to loans or imprisonment and the draft of a judgement made this clear despite its subsequent misrepresentation by Selden.

The one reason that probably did not motivate Heath to request the enrolment of a special judgement was so that he would gain another binding precedent on the question of whether defendants could be bailed when committed by the king's special command. As he had demonstrated in the hearing and as the judges had determined in their resolution, there were quite enough of those already. Heath argued before the judges 'my Lord … I could be infinite in this case in precedents', and Hyde, when he read the court's resolution, told the plaintiffs' lawyers 'we will show you some precedents on the other side; and I believe there be 500 of this nature that may be cited to this purpose'.[74] This opinion was so unanimously held that when Charles I subsequently surveyed the judges of all of the royal courts on the question of whether the crown had the right to commit without showing cause, they unanimously agreed 'that the king may commit a subject without showing cause, for a convenient time'.[75] This was so clearly the law of the land that it was necessary for the Commons to create the Petition of Right to abrogate it. Because Guy accepted Selden's argument that the '*remittitur*' on the controlment roll could not be used as a precedent for the denial of bail, he believed that Heath's motive was to establish such a precedent. But as it never

[73] Ironically, one other body had the power to imprison by special command: parliament. The judges defended their trust in the king by citing the fact that they would have equal trust in the parliament when presented by a writ citing 'special command' as the cause of detainment.

[74] *State trials*, III, p. 49, 57.

[75] *P in P 1628*, VI, p. 47.

occurred to Heath that there was a difference between *remittitur* and *remittitur quousque* (because there was not) he could not possibly have been attempting to repair a defect that he did not believe to have existed.[76]

II

If this sequence of events is roughly what happened, it only remains to relate what occurred once parliament met in March 1628. The entire episode of Heath's supposed 'felonious perversion' of the Kings' Bench records took place in a single week during debates in the House of Commons and in a single exchange in the House of Lords.[77] From the beginning of the session there was complaint about both the loan and about the legal status of imprisonment without cause shown. But the debates during the first week of parliament show that there was widespread confusion over the judges' action in the Five Knights' Case. Sir Robert Phelips was the first to mention the case specifically, claiming provocatively that a single judge had ruled that men could be 'pent up in jail without remedy by law'.[78] His view was that a judgement had been delivered on the question of the legality of imprisonment by special command and that the judgement was that it was legal and perpetual. It is clear from these early debates that few in the House of Commons understood the exact nature of the action taken by the judges or the significance of the distinctions between the issues of imprisonment by special command and the question of bail.

On 25 March a full-scale debate ensued in the committee of the whole House on imprisonment, chaired by Sir Edward Littleton, which would have jurisdiction over these questions. The confusion deepened. Selden spoke first and presented his alarmist account of what had happened in the case: 'the gentlemen returned to prison, there to remain ever, for aught I know'.[79] Significantly, he stated that 'a declaration of judgement was given, and so adjudged that upon commitment by the king or the council no enlargement can be'. Like Phelips he asserted that the case had been judged and the king's power of commitment had been adjudicated.[80] 'Arguments were made and

[76] Guy, 'Origins', pp. 295–6.

[77] The accusation made by Selden against Heath actually took place on only two days, 31 March and 1 April, and does not appear ever to have been mentioned again in the House of Commons. Selden repeated it more mildly in a conference with a committee of the House of Lords on 7 April and Heath responded briefly on 12 April. It does not appear to have been mentioned again in the upper house. As Guy admits, 'the full impact of the arguments of Selden, Coke and Phelips on the minds of ordinary MPs cannot be accurately gauged from the diary accounts' though he does not add that this is because they were never mentioned after 1 April. Ibid., pp. 297–8.

[78] *P in P 1628*, II, p. 63. The account of Phelip's speech in British Library Stowe MSS 366 has it: 'there are 3 great judgements upon us. The first, the judgement of the *postnati*; secondly the judgement of impositions upon a judgement in the Exchequer; thirdly, depriving of liberty and imprisonment by judgement.' *P in P 1628*, II, p. 69.

[79] Ibid., II, p. 109.

[80] Ibid., II, p. 100.

judgement given, and although acts of parliament were alleged, no notice was taken', Selden steamed.[81] Either Selden was unaware that only an interlocutory order had been made or he was deliberately misleading the House in order to inflame moderate opinion.[82] Sir Edward Coke followed with the citations of statutes to invalidate the claim that the crown could imprison without trial, which he disingenuously argued was the logical consequence of committing without cause shown. All three called for Attorney General Heath to appear before the Commons and answer the case against imprisonment by special command.[83] Only Sir Thomas Fanshawe, clerk of the crown in King's Bench, attempted to correct these misrepresentations. The question before the court was on a writ of habeas corpus and the only issue was whether to bail the defendants or to remand them back into custody. The question of whether the king could imprison by special command or could imprison perpetually was not a consideration.[84] This explanation caught Phelips by surprise but otherwise made little impact.[85] On the 27th Selden followed a long speech attacking imprisonment without cause shown made by Richard Cresheld by presenting many of the same arguments that had been heard by the judges.[86] In response, Solicitor General Shelton reminded the House that the court had not decided the question of whether the king could commit or not, but only whether bail was to be given. 'They desired to see what their predecessors did upon the writ of habeas corpus. They found not one of the precedents truly cited by the counsel of the prisoners. They found divers precedents, *remittitur quousque*, etc.'[87]

The following day, 28 March, another debate took place on the substance of the issue of the king's right to imprison without cause shown. Additional lawyers cited statutes and precedents in opposition and it was the larger constitutional issue that riveted their attention. Selden, who had been stung by the revelation that none of the precedents he had produced in the case had been 'truly cited', requested a sub-committee to view the precedents and the records of the case. Then, with a great flourish he contradicted Shelton's assertion that the controlment roll recorded *remittitur quousque*. He had viewed it and had

[81] Ibid., II, p. 106 (Stowe MSS). In another account of the same speech Selden said: 'Seven acts of Parliament were mentioned, and all were passed over, and only commended.' *P in P 1628*, II, p. 100 (P & D). A third version had it: 'the judgement given in the king's bench, a thing never done before'. *P in P 1628*, II, p. 113 (Harl. 1601).

[82] Though Selden's duplicitous conduct throughout the controversy over the Five Knights' Case should not rule out the second possibility, I think that he too was unaware of the judges' resolution.

[83] Coke's precedents, *P in P 1628*, II, pp. 100–2.

[84] Ibid., II, p. 100. Fanshawe opposed summoning Heath before the Commons: 'I do not remember that the Attorney or King's counsel ever came into this House to argue.'

[85] 'I either did mistake or am mistaken', Phelips is reported to have said directly after Fanshawe spoke, though he went on to repeat his assertion that a judgement against the subjects' liberties had been given, changing tack a little by arguing that perhaps it had been given in haste. Ibid., II, p. 100.

[86] Cresheld's speech, ibid., II, pp. 146–50; Selden's speech, ibid., II, pp. 150–2.

[87] Ibid., II, p. 152. Shelton was very concerned that the Commons would censure the judges: 'I know this assembly will not tax them with suspicion or distrust.' Ibid., II, p. 159.

found only *remittitur*.[88] The following day debate continued on the substance of the constitutional issue with more learned attacks upon the king's prerogative to imprison. William Hakewill again attempted to restore precision to the argument over what the judges had actually done: 'the late judgement which lies in bar is only an award and no judgement. In the Lord Chief Justice's argument there was no word spoken that the king may commit or detain without cause. The point of long imprisonment was not in question.'[89] But his caution was quickly swept away by a long declamation of Sir Edward Coke's to the effect that there was neither precedent, law, nor reason to allow the king to detain without showing cause. This was followed by Solicitor General Shelton's finest moment. He had uncovered just such a precedent to uphold the royal prerogative: it was clear, unambiguous, and came with impeccable pedigree having been given in King's Bench in the thirteenth year of the reign of James I. The report of the case not only specified that the prisoners had been denied bail on review of a writ by special command but also quoted one of the judges as saying: 'if the privy council commit one, he is not bailable by any court of justice'. That judge was Sir Edward Coke.[90]

It was abundantly clear that the issue which roused the lawyers in the Commons was the underlying constitutional power of the monarch to imprison without showing cause and the subsidiary question of whether writs of habeas corpus could be refused. Neither had been the focal point of the Five Knights' Case, for although the plaintiffs' counsel had attacked the crown's right to imprison by special command, their own precedents were cases in which the right had been exercised. Though the question of a right to bail continued to be mixed into the larger issues, if every defendant had the right to habeas corpus and the cause of commitment had to be shown, then the question of bail would be resolved in the normal course of the habeas corpus hearing. Thus there was strong sentiment in the House for some form of remedy to secure 'the liberties of the persons of subjects from undue imprisonment' before Selden discovered Heath's draft judgement on 29 March and reported it to the Commons on the following day. It was Shelton who ingenuously presented it at the sub-committee hearing, believing it to be a copy of the actual judgement despite the fact that it was written in two different hands and was in an unfinished state.[91]

[88] Ibid., II, pp. 173–4. It is clear from Selden's later admission that he had learned there was a difference between *remittitur* and *remittitur quousque* from 'an ancient clerk' in the office that he was no expert in King's Bench record keeping. Sir Thomas Fanshawe attempted to correct his mistake immediately but Selden was either oblivious or was being deliberately obtuse. 'Sir Thomas Fanshawe. There are 4 *quousque's* upon a *habeas* 1, insufficient only 2, to be kept in our own prison. *A Mar. remanent.* 3, the case of bailing or *traditur*, 4, the *remittitur*.' Ibid., II, p. 176.

[89] Ibid., II, p. 190.

[90] Ibid., II, pp. 192–3. Coke was to be doubly embarrassed when Heath cited his similar opinion in the House of Commons in 1621. White, *Sir Edward Coke*, p. 246.

[91] At least one of the hands was of Waterhouse, the underclerk to whom Keeling had given the assignment. The other seems to be that of one Harvey, another of the clerks in Keeling's office. *P in P 1628*, VI, p. 41.

Selden presented his discovery with a great flourish, contending that a simple entry of *remittitur* did not imply that the prisoners had been denied bail or remanded on the basis of the precedents cited in the case. The draft judgement made both of these claims and Selden argued that it could only have been intended to change the simple order of remand into a perpetual imprisonment.[92] This provocative interpretation inflamed several members of the House, including Phelips and Coke, and Selden added fuel by claiming 'I do so very believe that this order had been recorded but for the parliament, as I do believe that it will be recorded yet so soon as the parliament arises, if it be not prevented.'[93] But the fear expressed most cogently by Phelips, that Heath's draft 'takes away all qualification. It determines the question against us for ever and ever', was baseless. It was precisely to prevent this misrepresentation that Heath had probably wished for a special judgement.[94]

The following day, 1 April, Selden reported his examination of Keeling which revealed the details of the creation of the draft judgement. At this point, recognition that the main issue was that the judges had entered an interlocutory order to remand the plaintiffs back to prison rather than that they had judged the question of the crown's right to imprison without cause shown was still hazy. Selden certainly thought that a final judgement had been made: 'the judgement given in the king's bench, a thing never done before'.[95] He seized on the absence of *quousque* on the controlment roll as a way to argue that no decision on the question of bail had actually been rendered and he made this a centrepiece of his presentation in the House of Lords the following week.[96] Whether this was an attempt to assert that since there was no definitive legal position on the matter it was a fit subject for legislation or was simply another

[92] *P in P 1628*, II, p. 180. Selden (according to Newdegate's diary) stated: 'I am sure my client was sent back without any relation to the precedents… I asked at the Crown office what is the reason or meaning of *quousque*, *etc*., and I was told by an ancient clerk that it was until he should be delivered by order of law.' It is very hard to justify Selden's conduct or place any favourable construction on his contention that his client had been remanded 'without any relation to the precedents'. While he may have genuinely not known that there was no difference between *remittitur* and *remittitur quousque* and may have attempted to exploit the potential ambiguity, his assertions on 7 April before the Lords were refuted by the judges the following week and yet he insisted upon them in the debate with Heath on 16 April. Guy's excuse of Selden's 'frustration' is unpersuasive after 1 April. Guy, 'Origins', p. 293 n. 15.

[93] *P in P 1628*, II, p. 219.

[94] Ibid., II, p. 212.

[95] Ibid., II, p. 113 (Harl. 1601). He is also recorded as saying that when Keeling approached the judges with the information that Heath wished a special entry 'the judges he said would not assent other then the common judgement'. Ibid., II, p. 232.

[96] Guy follows Selden in arguing that the absence of '*quousque*, *etc*.' creates an inherent ambiguity in all cases in which *remittitur* only appears. 'It followed that, if the terms *remittitur* and *remittitur quousque*, *etc*. were interchangeable, it was impossible for the Crown ever to prove in the aftermath of a rule of court that a prisoner's application for bail had been refused.' Guy, 'Origins', p. 295. This judgement commands respect, but since the state of precedents was that there were many cases in which commitment had been made by the king's special command and not a single one in which bail had been granted, the potential ambiguity did nothing to alter the weight of precedents.

self-justification to demonstrate that the case he had lost had been wrongly decided, Selden's fixation upon the absence of *quousque* on the controlment roll led him to advance the contradictory positions that the plaintiffs had not been denied bail and that they were victims of perpetual imprisonment.

Here the matter rested and was overtaken by more important events.[97] Phelips urged that Selden's sub-committee be empowered to delve further into these matters, 'and have the power to send for records and parties' but there is no evidence of further activity.[98] Certainly Heath was never called before the sub-committee or the full House to provide an explanation. On the same day that Selden reported on Keeling's testimony, the lower House drafted three resolutions against imprisonment without cause shown, the distillation of the debates of the previous two days. When it was decided to ask the Lords to join in asserting the illegality of imprisonment by special command, Selden was appointed to argue the precedents in the case on 7 April, during which he made a brief reference to Heath's draft judgement. Because Shelton had admitted his mistake in claiming that the draft judgement had been enrolled and quoted Heath as saying that it never had been, Selden now conceded that no judgement had been entered on the roll, though he added, ominously, 'but there is room enough for any kind of judgement to be entered'. He then misrepresented Heath's draft by claiming it asserted 'that the laws were, that no man could ever be enlarged from imprisonment that stood committed by any such an absolute command'.[99] Selden read out the draft declaration and made two objections to it, the first that 'it was contrary to the many acts of parliament already cited' and the second that it claimed the judges had considered 'old records' when 'there is not any one record at all extant that

[97] I cannot find the evidence for Guy's assertion that the volume of opinions of Justice Anderson which was brought into the House on 1 April was 'compared with the copy of Heath's draft "judgement" already secured by Selden'. Ibid., p. 298. Guy's citation is to all of the diaries for the entire day (n. 35: 'CD 1628, II, 229–41'). Nor can I find the authority for the assertion that the text of Anderson's report 'served to convince M.P.s that the House was entitled to condemn Heath's special "judgement" as illegal before another entry was made on the controlment roll' for which Guy cites at n. 36: 'CD 1628, I, 106; II, 229–30, 232–3, 235–6, and n. 18 above, which was to I, 106.' These citations are all to the interpretation of Anderson's judgement, but nowhere is there any suggestion of a condemnation of Heath, or even mention of him in connection with Anderson's judgement. What is notable is how in the subsequent debate no speaker ever returns to the story of Heath's draft once the entry in Anderson's MSS book is read. This suggests that its impact was minimal even on the day in which it was introduced by Selden.

[98] *P in P 1628*, II, p. 212. Guy wrote: 'Apart from himself [Selden], at least two other of the House's acknowledged leaders in 1628 immediately appreciated the enormity of what had been attempted by the crown.' Guy, 'Origins', p. 297. Phelips and Sir Edward Coke referred to the draft judgement after Selden's revelation but in the middle of speeches that had other subjects as their main matter. Wentworth commented that the matter should be further investigated, but that is all the attention Selden's revelation drew.

[99] *P in P 1628*, II, p. 353. It was this misrepresentation that had originally upset Phelips, Wentworth, and Coke on 1 April. The issue was not whether the judges had made a formal enrolment but whether their decision had been to justify perpetual imprisonment. There is nothing in Heath's draft to justify that interpretation and, indeed, it was to avoid such a misunderstanding of what the judges had done that Heath had probably wished the content of his draft to be enrolled.

with any color … warrants the judgement'.[100] In other words, he condemned Heath's draft because it did not agree with his reading of the evidence, explaining tendentiously that 'there was never like cause' because he simply rejected the precedents that Heath had supplied. How he had the temerity to deny that records had been studied is incomprehensible considering that he had supplied some of the records to the judges himself.[101] Very little was made of this aspect of Selden's presentation when the earl of Devonshire reported from the conference to the full House of Lords and only one diary or table book even recorded it.[102] When Heath replied the following week, he too soft-pedalled the issue of the draft judgement.[103] So did the judges who mostly defended their own position during their testimony. They stressed that they had made an interlocutory order only, but also revealed in devastating detail why they had rejected the substantive case presented by Selden and his co-counsel. As for the assertion that had led to Selden's irresponsible charges, that there was a fundamental difference between *remittitur* and *remittitur quousque*, they were scathing. Each echoed Justice Whitelocke's terse explanation: 'Much spoken of the form of entry between *remittitur* and *remittitur quousque*, but no difference. This is new, we stand against it. They have mistaken. They have not dealt with understanding nor knowledge herein.'[104]

[100] Ibid., II, p. 354. Again Heath's draft stated: 'that after a review of the aforesaid return, as well as divers old records lying here in the court relating to similar causes, on the basis of mature deliberation of the fact that no special cause of seizure or detention of the aforesaid John is expressed, but only in general terms that he has been detained in the aforesaid prison by special command of the Lord King, therefore the aforesaid John is remanded to the aforesaid custody of the Marshal of the aforesaid Household saving the custody until etc.'.

[101] In the account of the case in *State trials*, III, 56, Chief Justice Hyde was particularly withering about the records in the cases of Beckwith and Raynor that Selden had supplied ('vide the record in Mr. Selden aforesaid'). Indeed, at the end of oral arguments Hyde instructed both sides 'you must bring in your precedents; for though we have seen some of them, yet some of them we have not seen'. Ibid., III, p. 50.

[102] In the Petyt MSS, which were Elsynge's own notes, Devonshire is recorded as saying: 'Having gone through these precedents; then somewhat else met with casually, viz., a draft of a judgement to be entered upon the late habeas corpus, a room being left for the same to be entered. Drawn up by direction of Mr. Attorney general. Unusual to bind forever.' *P in P 1628*, v, p. 181. Selden's speech took up '60 sides close written' and the matter of Heath's draft was but a single paragraph within them. Ibid., v, p. 186.

[103] Guy offers no direct citation for his assertion that 'the peers now saw plainly that the Crown's action and subsequent attempt to pervert the legal record had created an explosive situation'. There are no other references to Heath's action in the records of the Lords to judge that the peers connected this to the Commons' 'political manifesto'. Nor is there any citation to the subsequent assertion that the Lords' investigation of the judges 'served to cast in a sinister light Heath's earlier attempt to pervert the King's Bench records'. Guy, 'Origins', p. 302.

[104] *P in P 1628*, v, p. 220. Dodderidge proclaimed: 'Here is, I perceive, a question inter, *remittitur*, *etc*., and *remittitur quousque*, *etc*. He a judge long and practicer there long, never knew difference. The haste of the clerk sometimes omitted *quousque*, but *et cetera* always supplies what was else to be understood.' Ibid., v, p. 231. Cf. Guy, 'Origins', p. 301. I concur with Guy's summary of the 'five fundamental points' but would add the rejection of the substantive case as a sixth and the rejection of Selden's spurious distinction as a seventh.

III

After Selden's initial discovery and his highly coloured reports to the Commons on 31 March and 1 April, there was never again the slightest suggestion that there was a 'perversion' of the records or that Heath was guilty of any crime. Indeed, the episode does not appear to have ever been mentioned during the remaining two months of the parliament.[105] Had members actually believed Heath guilty of feloniously attempting to pervert the record of the court of King's Bench it does not seem likely that they would have graciously allowed him to present the arguments against the Commons' case in the conferences on 14 and 16–17 April, where he had no standing because he was not a member of the upper house. It seems especially unlikely that if Selden truly believed that Heath had attempted to 'feloniously pervert' the record of the case, that he would have refrained from mentioning it when he finally had the opportunity to debate with the attorney general face to face on 16 April. But while Selden challenged every claim Heath made on precedents in the case, he never raised the matter of the draft judgement.[106] Nor does it seem that such a crime, supposedly sanctioned by the king, could have escaped the catalogue of 204 of Charles's misdeeds that parliament lovingly compiled in the Grand Remonstrance. Hardly anything else did.

Yet even if Selden's allegations were tendentious, his accusations unsubstantiated, and both based on utter ignorance, a question remains. True or false, did Selden's vilification of Heath poison the atmosphere between king and parliament and lead to the radical solution of the Petition of Right? This is, of course, a question that can never be answered with certainty. The near total silence on the issue after 1 April by everyone but Selden suggests that it had less impact than has been argued. The fact that the substance of the clauses on imprisonment and habeas corpus had already been drafted and debated before Selden's report and were accepted without substantive change on the same day also suggests that the course which led to the Petition of Right had already been determined without Selden's insinuations. One thing is certain, the knowledge that Heath had been chided by Charles I to obtain enrolment of a judgement was not available to anyone before 12 April when Buckingham mentioned it in the Lords: and by 12 April the Commons had completed their resolutions and had already argued for their acceptance by the upper house. The Petition of Right was well in motion before anyone privy to the duke's offhand remark might have deduced the connection, if anyone ever did. The king's actions in relation to the draft judgement, whatever they may have been,

[105] Guy does not offer any citation for his assertion that there was a 'wide apprehension created since 1 April that Charles's government had effectively renounced its commitment to the rule of law by attempting to pervert the King's Bench records'. Guy, 'Origins', p. 307.

[106] *P in P 1628*, II, pp. 490–9. The conference was to dispute the reports made by Selden et al. on 7 April and replied to by Heath on 12 April. Since Selden's report and Heath's reply had both briefly touched upon the draft judgement, there would have been scope for it to have been raised at this conference, especially if Selden felt strongly about it.

could not have provided a motive for the Commons' attack upon the crown's prerogative rights.

We might equally ask the opposite set of questions. Did the explanations presented by Heath and the judges allay fears that the law was being misused? The depositions of Heath and of the four judges of the King's Bench were put into writing and delivered to the House of Commons. Though the testimony of the judges made nonsense of Selden's claims that statutes and precedents had been ignored or that there was any difference between *remittitur* and *remittitur quousque* as an entry in King's Bench records, the full lower house was not made privy to these opinions. Their depositions were shunted off to Selden's sub-committee for the searching and keeping of records on 21 April and a month later the sub-committee had yet to meet.[107] In the report of the conference Sir Dudley Digges perfectly summarized Lord Keeper Coventry's account of the judges' declaration with but one omission: he neglected to mention 'the difference betwixt *remittitur*, *etc*., or a *remittitur quousque*, none at all'.[108] The attempt by the Commons to establish a legal case against the right of the crown to commit by special commandment collapsed as soon as all of the evidence had been amassed. The Lords' efforts to find a compromise position by offering saving clauses to the Commons' resolutions that would have acknowledged the king's prerogative were rejected in a brute display of power and by the naked use of bullying. There was no talk of *quousques* then. The same tactics were adopted toward the king, though there the Commons battered with the heavier stick of subsidies to gain submission.

But the most important question that needs to be addressed cannot easily be settled by vindicating Heath from charges of 'felonious perversion' or Charles from charges of tyranny. Indeed, it only makes things worse. If Charles never asserted a right to arbitrary imprisonment and Heath never defended a process that would lead to detention without remedy, why did members of the House of Commons insist that they had? The lawyers may have believed that the Petition of Right closed loopholes in the common law, but they were loopholes that had existed from time out of mind and the claim on the part of the Commons that they were doing nothing but reasserting traditional liberties can only be charitably interpreted as self-delusional. Arrest without formal charges or trial was a characteristic of the reigns of the Tudors and of James I and the

[107] Ibid., III, p. 4. When it was presented at the conference, summarized by Lord Keeper Coventry, Sir Edward Coke replied that the Commons' representatives had power only to hear 'that which is new. Therefore not to meddle with the resolution of the judges, but report it to the House.' Ibid., II, p. 500. On 19 May the House ordered the sub-committee to meet and two days later added new members to it. But there is no evidence that it ever did. Ibid., III, pp. 464, 511.

[108] Ibid., II, p. 500, for Coventry's speech. Ibid., III, pp. 5, 10–11, 13, 16, for the variants of Digges's speech without the definitive statement that there was no difference between *remittitur* and *remittitur quousque*. It is interesting to note that in his report of the entry that had been made one diarist recorded Digges as saying that the plaintiffs had been remanded 'with a *remittitur* in the usual way' while another recorded the clerk had made 'an ordinary entry of *remittitur quousque*'. Ibid., III, pp. 13, 16.

detention of the earl of Arundel as recently as 1626 did not lead to cries of common law in danger or hysterical charges that subjects were no better than slaves, but only to complaints that he was being denied his seat in the upper house. Imprisonment by special command of the king or council had binding precedents going back at least as far as the reign of Edward III and yet had never been the subject of parliamentary inquiry except once in 1621 when no less an authority than Sir Edward Coke pronounced it not only legal, but necessary for the very safety of the commonwealth. What made 1628 different?

The conventional answer to this question is that King Charles I had abused his powers by using a procedure designed for emergencies to raise revenues that should have been granted by parliament. When ordinary law-abiding gentlemen refused to loan, the crown resorted to what amounted to prerogative arrests. When these were challenged by lawyers defending the traditional constitution, the crown evaded the law by using the device of imprisonment by special command, a justification that may have been legitimate when used to keep confederates of the Gunpowder Plot in prison but not when used to detain loan resisters. This has explanatory weight, especially when attempting to judge the actions of moderates and the silent majority in the lower house whose views went unrecorded. Wartime emergency powers unsettled local communities and raised fears of irregular administrative and legal proceedings. The very prominence of so many loan refusers made the use of legal proceedings against them a dubious undertaking. Even if the king believed that he was acting under emergency conditions and in accord with well-established precedents, there could be no doubt that the loan would be seen as extra-parliamentary taxation and would be deeply unpopular.[109] No monarch had ever before imprisoned so many for refusing to lend, though never before had so many gentlemen resisted any aid, benevolence or loan. But the unpopularity of the loan and the concerns that men of moderate opinion shared about the direction of royal government in wartime does not explain why deliberate confrontations like the Five Knights' Case took place and why the Commons' leadership in 1628 abandoned not only moderate courses, but every offer of compromise.

To understand that we must look more closely at the motives of the Commons' leadership. There can be no doubt that those who suffered detention did not look favourably upon the king's powers of coercion or that some few of them believed that Charles and the duke of Buckingham were carrying out reprisals against those who had been outspoken in parliament. Hatred of the duke had been fanned by all means possible; copies of the Commons' 1626 indictment (but rarely his answer) circulated in manuscript; he was the target

[109] In planning the campaign for the loan, the privy council was fully aware of the problems they were likely to face. This was why the commissions for the loan were drawn broadly in an effort to include local worthies, why the privy councillors went personally into their counties to urge generosity, and why every effort to deal with resisters began with a carrot rather than a stick. See Cust, *Forced loan*, pp. 46–55.

of scatological ribaldry that passed from mouth to mouth; he was the focus of implicit attacks in stage plays, political tracts, and satires.[110] More to the point, he posed an enormous threat to those who had risked the winner-take-all gamble of impeachment in the parliament of 1626. They had set out to ruin the duke by fair means or foul, charging him not only with the incompetence and avarice of which he was guilty, but even with the incredible act of poisoning James I. When they failed, they expected that their own tactics would be reciprocated and initially they were correct. Eliot, who was already under investigation for peculation as vice admiral of Devon (of which he was probably guilty) was forced out of office.[111] Sir Robert Phelips had seen the elevation of his bitterest county rival to the peerage and had himself been dismissed from the Somerset bench and all of his local offices.[112] Sir Thomas Wentworth, who had been spared a role in Buckingham's impeachment by his exclusion from the parliament, now found himself dismissed from the office of *custos rotolorum* in the West Riding of Yorkshire.[113] Sir Edward Coke at age seventy-six was beyond reach, but Selden and Noy might well have imagined their promising legal careers were over.[114] These men had much to fear if they were served the same dish they had attempted to feed to the duke.

This in part explains both why they sought a confrontation over the loan and why they placed the most extreme interpretation upon the king's actions. If they could prevent Charles from raising money for what he regarded as an emergency, they might still gain the duke's dismissal. Charles was desperate to provide the support he had promised his sister and uncle and had staked his personal reputation upon giving it. Blocking the loan would necessitate another assembly in which Buckingham's sacrifice would be the *quo* for parliament's *quid*. Moreover, there was every prospect of success. The privy seal loans that were tried first were a dismal failure, there was a long tradition of evading benevolences, and the argument that money should be raised in a parliamentary way allowed moderates to mix conscience with expedience. Subsidies in 1624 and 1625, heavy militia rates throughout the nation, and coat and conduct money had all added up to a level of taxation not seen in decades.[115] There were many reasons to believe that moderate opinion could be

[110] See, for example, Thomas Cogswell, 'Underground verse and the transformation of early Stuart political culture', in Susan Amussen and M. A. Kishlansky, eds., *Political culture and cultural politics in early modern England* (Manchester, 1995), p. 284, and David Underdown, *A freeborn people* (Oxford, 1996), pp. 37–9.

[111] See Harold Hulme, ed., 'Sir John Eliot and the Vice-Admiralty of Devon', *Camden Miscellany*, 17 (1940).

[112] T. G. Barnes, *Somerset, 1625–1640* (Cambridge, MA, 1961), p. 289.

[113] William Knowler, ed., *The earl of Strafforde's letters and dispatches* (London, 1739), I, p. 36. It remains unclear why Wentworth was a target of Buckingham after 1625.

[114] That neither were beyond such prosaic concerns is demonstrated by the fact that Noy worked his way back into royal government, succeeding Heath as attorney general, while Selden dedicated the publication of *Mare Clausum* to Charles I in 1635 'as part of making his peace with King Charles'. Christianson, *Public career of John Selden*, p. 248.

[115] Thomas Cogswell, *Home divisions* (Manchester, 1998), pp. 108–26.

rallied. Thus to ensure that the loan would fail it was not enough for individuals to refuse to give, it was necessary for leading gentry to oppose the loan actively on grounds of principle and conscience. This tactic provoked exactly the response most likely to polarize communities and obstruct collection: mass arrests, and detentions. But the loan did not fail and resistance had only demonstrated that the king's resolve was as great as his power.

It must be remembered that the vast majority of those called to account by the council were refusers and not resisters. Most would not lend on principle but believed that principle was a matter of individual conscience not of collective action. Nor did they expect that the king would simply shrug off their refusals. Sir Thomas Wentworth would not pay the loan but nor would he resist his punishment: 'I am none of those which will refuse confinement. I will not dispute but obey', he promised Sir Humphrey May.[116] Sir George Radcliffe accepted his summons to London and appearances before the council as a logical result of his actions and wrote to his wife that he would not become a resister and sacrifice himself or his family: 'For my part, though I will not willingly give way to what I disapprove of in my judgement, yet, when my opposition appears that it can do no good, I resolve not to stand out longer than is fit.'[117] Most accepted their confinement in alien counties without complaint. Only a very few refused to leave their London prisons (from which they were being sent because of unhealthy conditions) and only four took the most extreme course of suing for release on bail. This was a direct challenge to the king and the fact that it took place so late in the day (the loan was almost entirely collected by November 1627) seems to indicate that it was a desperate attempt to find a lever to resist future loans and non-parliamentary levies. It could not have been anticipated that the council would respond with the general return of 'special command of the king' or that a larger constitutional issue than the loan would emerge.

Over a century ago Gardiner recognized that Selden, Coke, Phelips, and the other activists who promoted the Petition of Right were radicals rejecting the moderate path offered in the Commons by Sir Thomas Wentworth and by the majority in the House of Lords until the very end of the struggle. He had little sympathy for the king and believed that since Charles could not be trusted with his prerogative powers there was justification for them being stripped from him.[118] In recent decades, the radicalism of the promoters of the Petition has been less obvious. Coke and Selden have been elevated into oracles of the law while the common law mind has taken its place as one of the essential modes of

[116] Cooper, ed., *Wentworth papers*, p. 261.

[117] Whitaker, ed., *Original correspondence of Sir George Radcliffe*, p. 138.

[118] 'Practically, the great evil of the day was that Charles was not fit to be entrusted with powers which had been wielded by former sovereigns.' S. R. Gardiner, *History of England* (London, 1896), VI, p. 242. Gardiner's entire discussion is shot through with his discomfort at the implications of the arguments of Coke and Selden. See especially his reference to the suspension of the Habeas Corpus Act which would have given the crown exactly the power Charles had by using commitment by special command.

discourse in the seventeenth-century state.[119] The use of the language of loophole has suggested that there was something inherently illegitimate in the crown's capacity to detain without showing cause.[120] Charles and Heath were the innovators, a view made all the more plausible by the rationalization of the Commons' leadership who insisted that they were doing nothing other than reasserting traditional liberties already established by statute.[121]

Thus it is worthwhile to remember that Selden, Coke, and others of the Commons' leadership did not argue that the crown had misused its legitimate rights. From the beginning of the Five Knights' Case, Selden argued that the crown had no such rights and that what was being asserted had nothing to do with temporary detention but with perpetual imprisonment. Though there was no evidence that the crown sought to assert such a right or that the judges would have allowed it and much evidence to the contrary, this was the deepest fear of those who, in Charles's words, had struck at the king by stabbing the side of the duke. There was no loophole in the common law in the Five Knights' Case; men could not be imprisoned without trial indefinitely even though the king had the right to detain by special command for a period of time. Indeed, if there was a 'loophole' it was that the crown could have refused to issue the writs of habeas corpus in the first place, a right that Charles did not assert. A remedy had been found for a disease that did not exist, but one which any rational person would have feared. Thus once parliament met and the lawyers presented their case as one against arbitrary perpetual imprisonment that violated Magna Carta, the Statute of Westminster, and every other pillar of the ancient constitution it was not difficult to garner support.

But it was difficult for the crown to respond reasonably to the onslaught, for Charles to deny that he was a tyrant. Efforts to state the facts of the Five Knights' Case, to explain the action of the judges, and to deny their constitutional implications were losing causes from the beginning. The attorney general had been barred from the House of Commons in 1626 and therefore Heath could not speak for himself. There was little interest in the case from the beginning and not even Selden's outrageous charges against Heath attracted much response. Though the debate in the conference committee for the benefit of the House of Lords centred on many of the same precedents as had the original case, the gravamen of the Commons' position was statute law and perpetual imprisonment. The crown could hardly attack Magna Carta or the Statute of Westminster and the argument that neither applied in these limited circumstances fell on stony ground even when repeated by the judges. Thus Charles's first offer to the Commons was a bill that reaffirmed all of the cited

[119] White, *Sir Edward Coke*; Christianson, *Public career of John Selden*; J. G. A. Pocock, *The Ancient Constitution and the feudal law* (2nd edn, Cambridge, 1987).

[120] Guy called it 'a minor loophole which had become a political weapon in the hands of Charles I'. Guy, 'Origins', p. 294.

[121] C. S. R. Russell, *Parliaments and English politics* (Oxford, 1979), p. 368. 'The Commons had the choice, either of restoring trust in the common law, or of restoring trust in the king. Under the leadership of common lawyers, they chose to restore trust in the certainty of the common law.'

statutes. He had not and would not violate their stipulations. This was rejected outright as insufficient despite the claim in the Commons that they sought nothing other than the law as already established. The king's second effort was a pledge that he would not use his powers of imprisonment in future against those who refused requests for loans. His third attempt was to give his word and demand that parliament trust him. All failed. In the end, it was parliament who demanded that the king trust them. They asserted that the Petition of Right intended no innovation and invaded no prerogative of the king. They rejected all saving clauses devised by the House of Lords on the grounds that since they were not trenching the king's prerogative disclaimers were supererogatory. How far Charles could trust these assurances was glimpsed first when his conventional answer to the Petition was rejected and he was forced to receive it as if it were a statute.[122] It was not long before the Petition of Right was being used to justify the refusal to pay tonnage and poundage and impositions.

If one of the principal causes of the breakdown of traditional government in the reign of Charles I was mutual distrust, nothing contributed more to Charles's distrust of parliament than his experience during the creation of the Petition of Right. Charles believed that it was parliament's responsibility to provide extraordinary finance during times of war and that in 1626 it had not only failed to do its duty but had also used the leverage of the king's necessity to attempt to destroy his closest adviser and friend. When the European situation deteriorated dramatically and Charles was forced to resort to alternate means of finance – which included the sale of crown lands, the pawning of the crown jewels, loans from privy councillors and the City of London – those who had failed in their responsibility to provide in a parliamentary way compounded their sin by opposing a nationwide loan and then forcing a confrontation over its collection. Rather than recognize the extraordinary nature of the king's actions, past and future parliamentary leaders did all they could to rouse fears that arbitrary arrest and perpetual imprisonment, the use of martial law and the suspension of civil liberties were policy rather than expedients. The deliberate misrepresentation of his actions, the refusal to accept his pledges, the unabashed bargain of subsidies for Petition all made a profound impression upon the king and helped transform his self-identification from the prince of parliaments into their hammer. In this sense, Selden's accusation against Heath may well have had an impact upon the long-term course of events in the reign of Charles I. It was yet another example of the deliberate misrepresentation of his government, another attack upon his inner circle of councillors, more proof of the existence of a conspiracy against him. It was also one less reason to think that he was paranoid.

[122] L. J. Reeve, 'The legal status of the Petition of Right,' *Historical Journal*, 29 (1986), pp. 257–77.