# The Suspension of *Habeas Corpus* During the Civil War: Anomaly or Dangerous Precedent?

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With the American government currently fighting a "new kind of war," debate concerning the curtailing of civil liberties while the war is being fought is not without historical precedent. Examples include the internment of Japanese-Americans during the Second World War and the arrests of anti-war radicals such as Socialist leader Eugene Debs during the First World War. In those examples, the Supreme Court acquiesced with the policies implemented by the other two branches of the government. During the Civil War, however, the high court ruled against the Lincoln Administration's most egregious violation of civil liberties: the suspension of the writ of *habeas corpus*. Regardless of the Supreme Court's opposition, and the opposition of a large number of private citizens, the writ's suspension remained in effect throughout the war's course. The suspension of the writ during the Civil War proves that during a time of war, the Judiciary's powers are subjugated, particularly, to those of the Executive branch, but also to those of the Legislative body, as well. As scholar Joseph Gambone writes, "During wartime, military leaders have to make fast and drastic decisions; the American judicial system operates too slowly to be effective under such circumstances."[1]

It was a time of great trepidation in America when Abraham Lincoln was inaugurated as the sixteenth President of the United States in 1861. Fearing the Republican platform opposing slavery, several Southern slave states led by South Carolina had already seceded from the Union after Lincoln's election the previous year. In his inaugural address, Lincoln pledged to abstain from attacking the newly formed Confederacy,[2] but most everyone feared a civil war, albeit a short one. Those fears were only partially realized: as predicted, war commenced only a month after Lincoln's ascension into the White House, but, unbeknownst at the time, the war would be prolonged longer than anyone would have guessed.

After the war commenced with the firing on Fort Sumter in April 1861, Lincoln called for seventy-five thousand Union soldiers to report to Washington D.C. to protect the capital, as it was surrounded by the slave-holding states of Virginia (which had seceded) and Maryland (which was still part of the Union despite strong pro-secessionist sentiment). Trouble immediately ensued when secessionists rioted and pelted soldiers switching trains in Baltimore.[3] As the riots increased in severity, the critical rail junction at Baltimore was rendered virtually unusable, cutting off Washington from troops traveling from the North. Lincoln, fearing what might happen if the capital city was left unprotected and besieged by Confederate troops, took decisive action on 27 April 1861. Lincoln wrote General Winfield Scott: "If at any point on or in the vicinity of military [rail] line...you find resistance which renders it necessary to suspend the writ of Habeas

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[1] Joseph G. Gambone, "*Ex Parte Milligan*: The Restoration of Judicial Prestige," *Civil War History* 16, no. 3 (1970): 246.
[2] Carl Sandburg, *Abraham Lincoln: The War Years*, vol. 1 (New York: Harcourt & Brace, 1939), 125.
[3] William Rehnquist, *All the Laws but One* (New York: Knopf & Co., 1998), 18.

Corpus for the public safety, you . . . are authorized to suspend the writ" between Washington and Philadelphia.[4]

The writ of *habeas corpus* is the right in which a prisoner may petition a court to be released from prison on the grounds that said prisoner was being unlawfully held. One of the foundations of legal freedoms, the writ dates back to England's Magna Carta in 1215, and is the only personal liberty law in the body of the Constitution, found in Article I, Section IX. However, the clause containing the writ of *habeas corpus* says it "shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Fortunately for Lincoln, the Framers had originally intended for the right to be unabridged in all circumstances, but Gouveneur Morris of Pennsylvania insisted on the provision.[5] Suspension of the writ would permit summary arrests and allow a prisoner to be held indefinitely without an indictment or judicial hearing to show cause.[6]

With such dire ramifications resulting from the suspension, this drastic action became the source of heated debate. Did the President have the power to suspend such an important protection of liberty? Since the power to suspend the writ resided under the Congressional powers as designated by the Constitution, many asserted that Lincoln was usurping powers. Lincoln countered this charge by claiming that suspension was his responsibility since Congress had been adjourned since his inauguration in March until 4 July.[7] This alleged usurpation was ironic in that as a member of the House of Representatives in 1848, Lincoln had assailed President James K. Polk for "usurping the powers constitutionally vested in the Congress" as Polk waged war against Mexico.[8] Nevertheless, Lincoln was cognizant of the precedent he was setting and attempted to curb any abuses of arbitrary arrests by imploring that military officers "use the power sparingly."[9]

The issue quickly came to a head on 25 May in the Circuit Court of Baltimore with Chief Justice Roger Taney presiding.[10] The case of John Merryman, a prominent man in Maryland imprisoned for his Confederate sympathies, became one of the most important cases of the Civil War. Taney issued a writ of *habeas corpus*, but the commanding officer of Ft. McHenry, where Merryman was being held, refused to comply. After another attempt to retrieve Merryman, Taney ruled in *Ex Parte Merryman* that the captive should be freed, and he denounced both military arrests and the unconstitutional usurpation of power by Lincoln.[11] Taney called for President Lincoln "to perform his constitutional duty to enforce the laws" as stated by the Constitution and

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[4] Roy P. Basler, ed., *The Collected Works of Abraham Lincoln*, vol. 4 (New Brunswick, NJ: Rutgers University Press, 1953), 347.

[5] Webb Garrison, *The Lincoln No One Knows: The Mysterious Man Who Ran the Civil War* (New York: MJF Books, 1993), 102.

[6] J.G. Randall, *Constitutional Problems Under Lincoln* (Urbana, IL: The University of Illinois Press, 1951), 153.

[7] David M. Silver, *Lincoln's Supreme Court* (Urbana, IL: The University of Illinois Press, 1956), 35.

[8] Alexander J. Groth, *Lincoln: Authoritarian Savior* (Lanham, MD: University Press of America, 1996), 119.

[9] Randall, 121.

[10] It must be remembered that as the issue of *habeas corpus* came before Chief Justice Taney, he was already a villain in the eyes of Northerners for his decision in *Dred Scott v. Sandford* in which he ruled against allowing Scott his freedom from slavery. Because of his opinion for the majority, many in the North accused the Maryland jurist of harboring pro-South sympathies.

[11] Silver, 30.

interpreted by the Supreme Court.[12] Building on earlier precedents set by Justices Story and Marshall, Taney ended his opinion saying only Congress could decide whether or not the nation was in such a dire situation as to warrant suspension of the writ for public safety.[13]

Lincoln, who feared the courts because of this very outcome, remained obstinate and ignored Taney's opinion on the suspension of the writ. Attorney General Edward Bates rebutted *Ex Parte Merryman* for the President, taking an extreme and unfounded position, stating that since the three branches were equal, the Executive could not "rightly be subjected to the judiciary" because he was the one strong enough to suppress the rebellion, not the Judiciary.[14] Lincoln remained mute on the controversy until 4 July before a special session of Congress. In front of the men whose power he had allegedly usurped, he justified his actions by saying, "The whole of the laws which were required to be faithfully executed were being resisted . . . are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?"[15] Lincoln then pointed out that "the Constitution itself is silent as to which, or who, is to exercise the power (of suspending the writ)."[16] Since Congress had not been in session at the time of the Baltimore riots, the President did not believe he could wait for the legislators to convene before taking action.[17]

The refusal to adhere to *Ex Parte Merryman* vexed Taney. After resigning himself to the fact that the President would not uphold decisions of the Judiciary, he avoided treason cases while on circuit at all costs.[18] So disillusioned was the Chief Justice that he would not allow the district judge on circuit to hear capital cases in Taney's absence, preventing others like Merryman from ever receiving a trial to gain release![19]

Lincoln refused to apologize for his conduct, much less rescind his own orders. The Republican-controlled Congress passed a resolution approving Lincoln's actions during the body's adjournment, but not without strong reservations from Peace Democrats and moderate Republicans.[20] Lincoln parlayed the resolution into further extension of the suspension of the writ of *habeas corpus* beyond Maryland from Washington to Bangor, Maine.[21] But again, this sparked outrage, as the war was nowhere close to New England, and people questioned how the public safety was threatened. Lincoln ignored the complaints despite increasing concerns that he was becoming a tyrant. As the fury grew more intense, the President relented in the middle of February 1862 and granted blanket amnesty to political prisoners who were no longer considered dangerous.[22]

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[12] Sandburg, 280.
[13] Randall, 120.
[14] Ibid., 124.
[15] Basler, 430.
[16] Ibid.
[17] Silver, 35.
[18] Ibid., 169.
[19] Rehnquist, 39.
[20] Sandburg, 313.
[21] Basler, 554.
[22] Dean Sprague, *Freedom Under Lincoln* (Boston: Houghton Mifflin, 1965): 297.

After the proclamation of amnesty, the tempers of Union citizens cooled to an extent. 1862, however, was not a successful year in terms of the Union's progress in the war, and low grumbles in opposition to the war developed into loud complaints to end the fighting. Alarmed, President Lincoln broadened the suspension of the writ throughout the entire Union on 24 September 1862 to include those "discouraging enlistment, resisting the draft, or guilty of any disloyal practice," as well as the already-established criteria of rebels and insurgents.[23] Lincoln's proclamation said that "disloyal persons are not adequately restrained by the ordinary processes of law . . . the Writ of Habeas Corpus is suspended in respect to all persons arrested."[24] The timing of this must be considered highly suspect in light of the upcoming midterm elections. Since the war was not popular, Peace Democrats were quickly gaining support. Using the vague language of the proclamation to their advantage, the Republicans and Lincoln retained control of the Congress by jailing anti-war voters in border states, preventing the election of anti-war Democrats.[25] Such tactics were also employed in the 1864 election by the President. Saving the nation at the expense of civil liberties might be justified, but to win an election at the expense of civil liberties is simply tyrannical.

With Republicans still in control of the legislative branch, Congress put to rest the issue of the President's constitutional authority to suspend the writ of *habeas corpus*. The Habeas Corpus Act of 1863 was a compromise of sorts—Congress approved the President's power to suspend the writ, but at the same time emphasized that Congress held the power over the writ, and *Congress* temporarily ceded power over it.[26] The Act also attempted to appease those concerned about civil liberties, requiring lists of prisoners to be given to district and circuit courts for grand juries to decide if the prisoner in question should remain detained. If the lists were not supplied, then judges could issue writs of *habeas corpus*.[27] Despite this latter provision to protect civil liberties to an extent, little changed in practice. The War Department under Secretary Edwin Stanton retained all authority over the releasing of prisoners rather than the Judiciary.[28]

Despite the passage of the Habeas Corpus Act, the threat of detainment did little to stem anti-war sentiment. The Emancipation Proclamation issued at the first of the year turned many Unionists against the war. Thousands of soldiers deserted in Illinois after refusing to fight for "Negro freedom," and it was feared the Democrat-controlled legislature might defy federal authority and reinstate the writ of *habeas corpus*.[29] The governor of Indiana feared the pro-Confederate legislature was going to "acknowledge the Southern Confederacy and to urge the Northwest to break all bonds of law with New England."[30] His fear did not materialize, but the legislature did withhold appropriations from the state budget to hinder Indiana's contribution to the war effort.[31]

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[23] Randall, 152.
[24] Roy P. Basler, ed., *The Collected Works of Abraham Lincoln*, vol. 5 (New Brunswick, NJ: Rutgers University Press, 1953), 437-438.
[25] Groth, 132.
[26] Carl Sandburg, *Abraham Lincoln: The War Years*, vol. 2 (New York: Harcourt & Brace, 1939): 155.
[27] Randall, 166.
[28] Ibid., 167.
[29] Sandburg, 157.
[30] Ibid.
[31] Ibid.

As 1863 progressed, the populace was disgruntled with the absence of the writ. Lincoln ignored the concerns of unhappy citizens, and on 15 September 1863 Lincoln formally suspended the writ under the Habeas Corpus Act of 1863. This proclamation effectually subjected civilians to military rule. Lincoln had no faith in the civil system where "a jury too frequently have [sic] at least one member more ready to hang the panel than to hang the traitor."[32] The vague wording of the September 1863 suspension left anyone who voiced opposition to the war vulnerable to military arrest. Nothing short of full support for the cause to save the country was expected. It was only a matter of time before a legal challenge would be made against Lincoln's fiat. That legal challenge came from a former U.S. representative from Ohio.

General Ambrose Burnside, Ohio military commander, issued General Order No. 38, which stated, "The habit of declaring sympathies with the enemy will no longer be tolerated . . . Persons committing such offenses will be at once arrested."[33] Clement Vallandigham, a prominent Democrat and former U.S. representative for the state, called for the people to vote Lincoln out of office in a speech in Mt. Vernon, Ohio, and was promptly arrested.[34] The arrest sparked protest throughout the country, and even pro-administration newspapers were restrained in their defense of the arrest. Vallandigham appealed for a writ of *habeas corpus* in the District Court of Southern Ohio, but Judge Humphrey Leavitt denied the writ, stating in *Ex Parte Vallandigham* that "where there is no express legislative declaration, the President is guided solely by his own judgment and discretion . . . when the necessity exists, there is a clear justification of the act."[35] Brought before a military tribunal, Vallandigham offered no plea, denying the military's authority since he was not in the military.[36]

The longer Vallandigham was detained, the angrier Lincoln's critics and the meeker his supporters became. Lincoln was being pressured by both Democrats and Republicans to rectify the situation. Lincoln took a peculiar course of action, releasing the prisoner but deporting him behind Confederate lines.[37] This was actually an ingenious move by the President. Had he kept Vallandigham under military detention, it is very possible that riots might have broken out in opposition to the holding of Vallandigham and to the suspension of the writ. On the other hand, had Lincoln allowed the writ of *habeas corpus* to be granted, it would have rendered all other martial arrests of civilians invalid, freeing those who were working to undermine the Union cause.

As the tide of the war turned after Gettysburg in 1863, the writ's suspension remained in effect, but it was not always being adhered to by the lower courts. Judges were issuing writs of *habeas corpus* to those who deserted or dodged the draft, and Lincoln complained, saying the judges were "defeating the draft" by "discharging the drafted men rapidly under *habeas corpus*."[38] Military officers, however, had the

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[32] Roy P. Basler, ed., *The Collected Works of Abraham Lincoln*, vol. 6 (New Brunswick, NJ: Rutgers University Press, 1953), 264.
[33] Rehnquist, 64.
[34] Sandburg, 162.
[35] Ibid.
[36] Silver, 148.
[37] Sandburg, 163. Though he was deported, Vallandigham caused so much trouble in the Confederacy, that they secretly smuggled him back into the Union. Even the Southerners he sympathized with did not want him in their presence!
[38] Ibid., 444.

authority through the blanket suspension of *habeas corpus* in 1863 to ignore any writs issued by judges, and the officer may call "to his aid any force that may be necessary to make such resistance effectual."[39]

The case that would eventually solve the issue of the constitutionality of suspending the writ of *habeas corpus* began in Indiana in 1864. Lambdin Milligan was arrested in October for espousing violence against vague targets and making a speech critical of Lincoln.[40] Weeks later, Milligan was tried, convicted and sentenced to death, to be carried out the following May. As specified by the Habeas Corpus Act of 1863, a grand jury convened in 1865 and failed to indict Milligan on any charges.[41] After an appeal, the opinion of the Supreme Court for *Ex Parte Milligan* was not issued until after the end of the war, making the decision written by Justice David Davis moot but for future applications. Nevertheless, Davis wrote that though the suspension of the writ of *habeas corpus* during times of crisis is "essential to the safety of every government,"[42] the Bill of Rights are inviolable at all times and "martial law cannot arise from a threatened invasion. The necessity must be actual and present."[43]

The *Milligan* decision posthumously vindicated President Abraham Lincoln's decision to suspend the writ of *habeas corpus* while at the same time criticized the military tribunals used in place of open civilian courts. The number of those who were affected by the writ's suspension is unknown, but some scholars estimate the number to be in the vicinity of seventy-five hundred individuals who were more often than not "avowed secessionists or...outspoken sympathizers of the Southern cause."[44] Indeed, Lincoln himself believed, "I think the time not unlikely to come when I shall be blamed for having made too few arrests rather than too many."[45] Ultimately, though, *Milligan* saw the Supreme Court reassert itself in defending civil liberties guaranteed to the nation's citizens by the Constitution.[46]

If the threat to the Republic caused by the Civil War was not reason enough to suspend the writ, then there would never be a just cause to do so. The Framers of the Constitution had the foresight to realize that there could be unforeseen circumstances that would require suspension, and the federal government was certainly within its powers to suspend the writ of *habeas corpus* during the rebellion. To what extent, however, would future governments perceive threats to the Republic?

The question of whether or not the President could suspend the power on his own is debatable. The Constitution is silent on which branch can take action. One could argue, as Chief Justice Taney ruled in *Ex Parte Merryman*, that the power resides with the legislative branch since that the clause is found in Article I of the Constitution. On the other hand, Congress was out of session, so one could also argue that Lincoln was within his powers as commander-in-chief to suspend the writ. This question became largely irrelevant after the Habeas Corpus Act of 1863, but it continued to linger because

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[39] Basler, 460.
[40] Rehnquist, 102.
[41] *Ex Parte Milligan*, 4 Wallace 2, 108 (1866).
[42] Ibid., 125.
[43] Ibid., 127.
[44] Garrison, 105
[45] Basler, 6:265.
[46] Gambone, 255.

the Act implied that Congress retained the power over *habeas corpus* and was merely ceding control to the President for the duration of the war.

Perhaps more troubling in this episode of constitutional debate is the nominalization of the Judiciary and the precedent it set for future acts during wartime. While the power to suspend the writ of *habeas corpus* is expressly granted, the other rights guaranteed by the Constitution cannot be so easily eviscerated. Whenever judges attempted to curb the authoritarianism that accompanied the writ's suspension, the officers in charge duly ignored such decisions as empowered by the President himself. This is certainly not the first time judicial sovereignty has been ignored. President Andrew Jackson mocked Chief Justice John Marshall after issuing the *Worcester v. Georgia* decision in the 1830s, and the decision was not enforced, much like *Ex Parte Merryman*. The difference between the two, however, is that Jackson ignored a court order in a time of peace. Another precedent, again involving Andrew Jackson when he was a general in the army, saw him suspend *habeas corpus* in New Orleans, but civilian power carried the day as Jackson was held in contempt and fined $1,000.[47] No officer was held in contempt or fined during the Civil War.

Though extra powers were conferred on the President, there is no reason to believe that Lincoln would not have adhered to judicial decisions had the war been fought with a foreign enemy. The President had strong reservations in imposing the suspension of *habeas corpus*, saying, "Thoroughly imbued with a reverence for the guaranteed rights of individuals, I was slow to adopt the strong measures."[48] Coupled with his plea for officers to invoke the suspension sparingly, it is apparent that Lincoln had great respect for civil liberties; the grave situation of the war left him with no choice but to suspend the writ of *habeas corpus* so that Southern sympathizers living in the North could be prevented from hindering Union efforts. His disregard for the *Ex Parte Merryman* decision was regrettable, because the checks each branch exercises are designed to prevent the rise of an authoritarian regime. Lincoln chose to interpret the Constitution in such a manner as to grant him the power to suspend the writ, but interpretation is the Judiciary's assigned task, not the Executive's. What is worrisome is that while President Lincoln had no intentions to abuse his powers for personal gain (election practices notwithstanding), that is not to say another person sitting in the Oval Office could not make himself into a tyrant on the premise that the nation's security requires it.

Though the Judiciary had made great strides in gaining equality with the other two branches in the previous seventy years, it suffered a great loss in prestige prior to the war due to the infamous *Dred Scott* decision in 1857.[49] It is likely, however, that the importance of Supreme Court would have been minimized during the war regardless of any controversial decision as a result of power being centralized. During the Civil War, historian Joseph Gambone writes, "The necessity of politics rather than laws reigned supreme."[50] This truth established a precedent for future abridgements of civil liberties, and as the United States currently fights another war at the beginning of the twenty-first

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[47] Randall, 145.
[48] Basler, 6:260.
[49] Stanley I. Kutler, Judicial Power and Reconstruction Politics (Chicago: University of Chicago Press, 1968), 11. Kutler argues in his first chapter that while the Dred Scott case certainly harmed the Court's prestige, most directed their rage not at the institution itself, but rather the infamous decision. Despite some extremists in Congress, the Supreme Court persevered to remain a viable institution.
[50] Gambone, 249.

century, the power struggles between the Judiciary and a strong Chief Executive are no less intense than they were in 1861. Perhaps Lincoln's refusal to obey a judicial decision was a key factor in future judges falling in line with administration policies such as those espoused in the First and Second World Wars. Whether this is true or not, the importance of the Judiciary's opinion being heeded during war cannot be overstated—safeguarding civil liberties is an awesome responsibility, and only the courts can prevent the rise of tyranny.