

## **Lincoln's Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis**

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In the 143 years since the end of the Civil War, historians have examined Abraham Lincoln and his conduct of the war in great and at times excruciating depth. Lincoln's power to suspend the writ of habeas corpus was extensively explored during the Civil War, but since then his suspensions have escaped detailed scrutiny despite the controversy they provoked, their widespread and effective use to combat malignant opposition to the war, and their uncertain grounding in the Constitution.

This scholarly inattention is surprising, but there are a number of possible explanations. Probing the constitutional validity of the suspensions requires a textual analysis of the Constitution that is more congenial to lawyers than to scholars. The crisis Lincoln faced and the stature he has achieved make it easy for historians to justify his actions without examining them. If a president has the power to suspend the writ of habeas corpus, his power exists only in the event of rebellion or invasion, neither of which is likely to occur, so why burden history with musty law? For whatever reasons, there has been no in-depth scholarly analysis of Lincoln's actions since the Civil War and little evaluation of that analysis since an 1888 article by S. G. Fisher. All accounts of Lincoln's presidency discuss the habeas corpus suspensions, of course, and many of them take sides for or against Lincoln, but the constitutional issue is not considered in detail. This is true even of James Randall's *Constitutional Problems Under Lincoln*, a brilliant synthesis of history and law. William Duker and law professors Daniel Farber and Akhil Reed Amar have examined the issue, but, as we will see, their constitutional analyses are brief, superficial, and flawed.

Under the Constitution the federal government can unquestionably suspend the privilege of the writ of habeas corpus if the public safety requires it during times of rebellion or invasion. The issue is whether Congress or the president holds this power. Historical perspective on that issue in the context of the Civil War requires a study of the actions of Congress and the president, Lincoln's defense of his suspensions of the writ, and presidential and congressional dealings with and reactions to each other. The relationship between Lincoln and Congress, like the power of suspension, has received limited historical attention, with the only extensive treatment a 1907 article by University of Wisconsin professor George Sellery.

Here we will examine Lincoln's suspensions of habeas corpus in their Civil War context, including congressional action and reaction, and see how the suspensions were viewed at the time and later by scholars. Lincoln's views of the suspensions will be considered along with a

legal/constitutional analysis to determine whether Congress or the president holds the power of suspension.

The background is well known. After Virginia seceded from the Union on April 17, 1861, the only lines for overland supplies, troop movements, transportation, and communication to Washington, D.C., ran through Maryland, with the railroads running through Baltimore. Baltimore was a rough city for the Union, and Maryland an uncertain ally. In February, Baltimore rowdies had forced President-elect Lincoln to sneak through the city in disguise, and a mob attacked the Sixth Massachusetts Regiment as it marched through Baltimore on its way to Washington. Confederate sympathizers in Maryland were numerous, organized, and sometimes violent. The Maryland legislature was of questionable loyalty, prompting Lincoln to monitor its April 26 session and, later, to order the arrest of a number of its members.

Determined to keep the Maryland lines open, on April 27 Lincoln issued an order to General Winfield Scott authorizing him to suspend the writ of habeas corpus, at or near any military line between Philadelphia and Washington if the public safety required it.<sup>[1]</sup> Lincoln issued his order pursuant to the provision in Article I, Section 9 of the Constitution stating that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion and invasion the public safety may require it," generally called the suspension clause.

On May 25, federal troops arrested John Merryman in Cockeysville, Maryland, for recruiting, training, and leading a drill company for Confederate service. Merryman's lawyer promptly petitioned Chief Justice Roger Brooke Taney, sitting as a trial judge, for a writ of habeas corpus. This writ, sometimes called the Great Writ, is a judicial writ addressed to a jailer ordering him to come to court with his prisoner and explain why the prisoner is being held.

Following a hearing in the matter, Taney ordered delivery of a writ of habeas corpus to General George Cadwallader directing him to appear before Taney on May 28 with Merryman in tow. After Cadwallader refused service of the writ, Taney ruled on May 28 that the president did not have the power to suspend the writ, and Taney announced that he later would issue an opinion in support of his ruling.

Several days later, Taney issued his opinion.<sup>[2]</sup> Only Congress, he said, could suspend the writ of habeas corpus. He observed that the limitation on suspension of the writ appeared in Article I of the Constitution, dealing with legislative powers, not in Article II, which established executive power. He explored the history of the writ of habeas corpus under English law, showing that the House of Commons had limited and then abolished the royal power to suspend the writ, leaving suspension in legislative hands. The Constitution, he said, embodied this English tradition. Article II, he asserted, gave the president very limited powers that were weakened further by the Bill of Rights. Finally, he cited eminent authority, noting that Chief Justice John Marshall, Thomas Jefferson, and Joseph Story, a luminary as both judge and scholar, had all acknowledged that the power to suspend was a congressional power.

Lincoln ignored Taney, and that was the end of the federal judiciary's involvement with the suspension of habeas corpus. Neither the Supreme Court nor the lower federal courts dealt with the issue again. The action now passed to the president and Congress.

### ***The Immodest Man***

On April 15, 1861, twelve days before he first authorized suspension of the writ of habeas corpus, Lincoln called a special session of Congress to convene on July 4. Before Congress convened, Lincoln followed his April 27 order authorizing suspension with a May 10 order authorizing suspension on part of the Florida coast [3] and a July 2 order authorizing suspension between Philadelphia and New York.[4]

On July 4, Lincoln delivered a message to the special session of Congress.[5] He referred to his suspensions of the writ, quoted the suspension clause, and justified the suspensions on the ground that "we have a case of rebellion, and the public safety does require" suspension of the writ. He then went on: "Now it is insisted that Congress, and not the Executive, is vested with this power. But the Constitution itself, is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that, in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented ... by the rebellion. No more extended argument is now offered, as an opinion ... will probably be presented by the Attorney General. Whether there shall be any legislation upon the subject, and if any, what, is submitted entirely to the better judgment of Congress." [6]

The promised opinion of Attorney General Edward Bates came the next day.[7] The opinion was devoted primarily to the president's power to make arrests without warrant, rather than to the suspension of habeas corpus. Bates argued that the president is authorized to suspend the writ because he is charged with preservation of the public safety, but he then concluded with his personal opinion that the power of suspension flows from the president's power to make warrantless arrests.

While Lincoln's defense of his constitutional power of suspension is stated tentatively in his message to Congress, his actions and later words confirm his belief that he, and he alone, had the constitutional power to suspend the writ of habeas corpus.

On July 2, just two days before Congress convened, Lincoln issued an order authorizing suspension of the writ of habeas corpus between New York and Philadelphia—friendly territory for the administration. But he didn't suspend the writ, which suggests a lack of urgency. Lincoln could have sought and almost certainly could have obtained congressional authorization before issuing the order, but he didn't do so. He didn't seek suspension authorization in his July 4 message or at any later time. Indeed, when he says in his message that "whether there shall be any legislation on this subject ... is submitted to the better judgment of Congress," Lincoln appears to advise Congress to act with more deliberation than speed if it decides to act at all.

Congress accepted Lincoln's invitation to dawdle. As we will see, Congress did not enact legislation authorizing suspension of habeas corpus until March 3, 1863. In the meantime, Lincoln's 1861 orders authorizing suspension remained in force, and on September 24, 1862, he issued a proclamation imposing martial law and suspending the writ of habeas corpus. The proclamation orders that, for the rest of the war, (i) "all rebels and insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid or comfort to rebels against the authority of the United States, shall be subject to martial law and liable to trial and punishment by courts martial or military commission," and (ii) "the writ of habeas corpus is suspended in respect to all persons arrested or imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority or by the sentence of any court martial or military commission." [8]

This proclamation is breathtaking in its scope, hardly the act of a man who feels the need of a congressional crutch. When Congress handed him a crutch with its March 3, 1863, suspension act, he resisted its use and said he didn't need it, and when he finally did use it in September, 1863, he positioned himself to argue that he could walk without it.

In May 1863, New York Democrats adopted resolutions criticizing Lincoln for infringements of civil liberties, including the arrest and detention of Ohio Copperhead politician Clement Vallandigham and others. Erastus Corning forwarded those resolutions to Lincoln, who responded in a well-known June 12 letter to Corning.[9] What is notable about Lincoln's letter is that it does not rely upon or even mention the recently enacted suspension law to justify his actions.

Any doubt about Lincoln's confidence in his power is removed by a letter he wrote later in June. Ohio Democrats sent to Lincoln resolutions they had adopted in response to Lincoln's position as set forth in the Corning letter. Lincoln responded in a June 29 letter to Matthew Birchard. [10] Though less well known than the Corning letter, the June 29 letter is significant because it gave Lincoln an opening to assert unequivocally his constitutional power to suspend habeas corpus. The Ohio resolutions asked what would happen if action was taken to "expunge from the constitution this limitation upon the power of Congress to suspend the writ of habeas corpus." Lincoln, after saying that the suspension clause was "improperly called, as I think, a limitation on Congress," and noting that the clause authorized suspension if the public safety required it in times of rebellion, continued: "You ask ... whether I really claim that I may override all the guaranteed rights of individuals, on the plea of conserving the public safety—when I may choose to say the public safety requires it. This question, divested of the phraseology calculated to represent me as struggling for an arbitrary personal prerogative, is either simply a question *who* shall decide, or an affirmation that *nobody* shall decide, what the public safety does require, in cases of rebellion or invasion. The constitution contemplates the question as likely to occur for decision, but it does not expressly declare who is to decide it. By

necessary implication, when rebellion or invasion comes, the decision is to be made, from time to time; and I think the man whom, for the time, the people have, under the constitution, made the commander-in-chief, of their Army and Navy, is the man who holds the power...."[11]

In 1863 there was widespread resistance to the draft, including rioting and looting in New York City in July. On September 15, 1863, Lincoln, likely seeking political cover that he would not have by enforcing his September 1862 suspension order, issued a proclamation suspending the writ of habeas corpus based upon the suspension act.[12] The order is broad, but not as broad as the suspending language in the 1862 order, which he did not revoke. His September 15 order begins by referring to both the Constitution and the legislation and ends by urging all citizens "to conduct and govern themselves ... in accordance with the Constitution of the United States and the laws of Congress." Why leave the 1862 order of suspension in place and bracket his 1863 order with references to the Constitution unless he was positioning himself to assert continuing suspension power under the Constitution as well as the statute?

While Lincoln talked and acted, Congress talked without acting. On July 5, 1861, Massachusetts senator Henry Wilson introduced a bill ratifying Lincoln's prior actions in general terms, but he later replaced it with a bill that would have ratified specific acts, including the suspension authorizations. Lincoln's friend and Illinois senator Lyman Trumbull objected to this approach on the grounds that ratification of past suspension orders might suggest that Lincoln did not have authority to issue similar future orders, and he introduced legislation authorizing Lincoln to suspend habeas corpus. Neither the Wilson nor the Trumbull bill passed in the special session. [13] No habeas corpus bill was passed in the ensuing general session of Congress either. Opposition to congressional action was apparently based in part on the concern of some Republicans that legislation would be read as a rejection of presidential power.[14]

Finally, on March 3, 1863, nearly two years into the war and twenty months after the special session, Congress passed an act authorizing Lincoln to suspend the writ of habeas corpus.[15] Section 1 of the act provided that the president "is" authorized to suspend the writ when, in his opinion, public safety requires it. Section 2 required the secretaries of state and of war to provide to the federal courts lists of all prisoners held by the federal government except prisoners of war, and required the courts to order the release of all listed prisoners who were not indicted by the first available grand jury and who took a loyalty oath and, at the court's discretion, posted bond.

As enacted, the suspension act said that the president "is" authorized to suspend the writ, while earlier versions said that the president "shall be" empowered. This evolution in language coupled with the debates in and delay by Congress as it grappled with habeas corpus for twenty months convinced Professor Sellery that Congress's "dominating motive was unquestionably a desire not to deny the President's right to suspend." Sellery adds, however, that Section 2 and the succeeding sections of the suspension act converted the act as a whole into a "modified suspension of the writ of habeas corpus." [16]

Based on the evidence, Sellery fairly assesses congressional motive, but he understates the significance of Section 2. That section imposes a restriction that, if enforced, would severely restrict and even disable the presidential suspension power. Section 2 effectively time-limits suspensions. By freeing all those not indicted by the first available grand jury, it handed the jailhouse keys to all prisoners who committed subversive but non-criminal acts. This would largely defeat Lincoln's use of military detention, for as he said in the Corning letter, military arrests and detentions allowed him to imprison and hold law-abiding persons who undermined or disrupted the conduct of the war.

Under Lincoln's view of the Constitution, Section 2 of the suspension act imposed an unconstitutional restraint on his power to suspend habeas corpus, and he had made it clear in words and acts that he didn't need the authority conferred by Section 1, so he could have vetoed the act. That, however, would have provoked a congressional confrontation in the dark days following the Battle of Fredericksburg. He did not veto it or even oppose it. Nor did he issue a signing statement questioning the constitutionality of parts of the act, as he had done when he signed the Second Confiscation Act. Instead, he dealt with Section 2 of the act as he once said an old farmer had dealt with a tree trunk too big and deeply rooted to be dislodged by a breaking plow—he plowed around it.

His plow was stored in the provision of Section 2 requiring the secretaries of state and war to furnish the required lists "as soon as practicable." The courts could not act without those lists, which were to include the name, date of arrest, and federal judicial district of residence for each prisoner. Because of the September 1862 declaration of martial law and the 1862 and 1863 suspension orders, the prisoners were held throughout the country in military facilities which, in the words of the 1862 suspension order, included forts, camps, arsenals, military prisons, and "other places of confinement." The military justice system that processed and held the prisoners was newly formed, and it held a prison population in constant flux as people were summarily detained and discharged. Under the circumstances, it would have been difficult with diligence and good faith to produce the lists with the required data, and the "as soon as practicable" requirement made it easy to relax diligence, if not good faith. When the system had not produced any lists, the Senate passed a resolution directing the secretary of war to report on the lists. Nicolay and Hay describe the response: "The Secretary promptly replied, transmitting the report of the Judge Advocate General, showing that all possible vigilance had been used in complying with the terms of the law. The rolls were necessarily incomplete; the offenses with which the prisoners were charged were frequently indefinitely stated; and instead of specifying the particular officers by whom arrests were made the President and Secretary of War assumed the responsibility in all cases.... Those arrested for military offenses were tried with the greatest possible expedition.... Several commissions were actively engaged in investigating the cases of prisoners, and releasing them whenever it could be done without prejudice to the public safety." [\[17\]](#) In other words, we are responding quickly and with full

cooperation, doing the best we can in a difficult situation, committed to speedy justice for all. In the meantime, though, it appears that no lists were forthcoming, and that the prisoners continued to be processed in the military justice system, not the federal courts. Nicolay and Hay give no indication of congressional follow-up or response. The president had successfully evaded the law.

John Hay noted that Lincoln, like other great men, was not a modest man. In his handling of habeas corpus suspension, he was at his immodest best. He was typically self-assured, decisive, adept, and politically astute. He acted forcefully at the outset, but then, in his July 4, 1861, message to Congress he seemed to acknowledge a congressional role in habeas corpus even as he advanced a soft defense of his power to suspend the Great Writ and suggested that there was no urgent need for Congress to act. A less confident president would have welcomed congressional support, but Lincoln knew that the implications of congressional authority to suspend the writ would erode his constitutional power, and he was probably concerned that Congress might hedge his authority with burdensome restrictions (as, in the event, it did).

When Congress accepted Lincoln's invitation to inaction, he continued to act without congressional authority, most decisively in his September 1862 order imposing martial law and suspending habeas corpus throughout the country. In his response to Birchert, he abandoned the diffidence in his special session message and forcefully expressed the opinion that he, and he alone, held the power of suspension, but since this was a private letter rather than an official communication, Congress could ignore it. Faced with disabling restrictions in the suspension act, he ignored the restrictions without roiling Congress.

In sum, in an area generally thought at the time to be within the congressional domain, he manipulated Congress, challenged its powers, ignored its laws, and imposed his authority and will without ruffling congressional feathers or provoking congressional response.

In an admiring response to Lincoln's Second Inaugural Address, Charles Francis Adams Jr. compared "the men of the schools" unfavorably to Lincoln. The next section addresses how Lincoln's use of the suspension clause played with the men of the schools. In the final part of this article, an examination of the Constitution will reveal who holds the constitutional power to suspend the writ of habeas corpus, allowing us to see whether on this issue Adams fairly compares Lincoln and his doubters among the men of the schools.

### ***The Suspension Clause in the Academy***

In early 1862, Horace Binney published an article that provided strong scholarly support for Lincoln's claim to a constitutional power to suspend the writ of habeas corpus. Binney was an eighty-two-year-old Philadelphia lawyer, politician, statesman, and author who had trained in the law under Jared Ingersoll, one of the members of the Constitutional Convention. His

article remains the most penetrating analysis of the constitutional power to suspend the privilege of the writ of habeas corpus.

Binney's article is long and repetitive, but it can be distilled to a few points. Contrary to what Taney says in the *Merryman* opinion, Binney claims that presidential suspension of the writ of habeas corpus is consistent with, rather than a departure from, English practice. Under English practice, only the House of Commons can authorize suspension of the writ, but when it does so, it leaves the actual suspension to the chief executive, since only the chief executive can determine whether the conditions of suspension are met. Reading the suspension clause as both a limit on and a grant of authority to suspend the writ, Binney argues that the Constitution itself authorizes suspension, and that, as with the English chief executive, the president is the only one who can determine when suspension is called for. His position gives him the capacity to determine whether suspension is required, and he has the power to do so under his Article II powers to preserve, protect, and defend the Constitution and to take care that the laws be faithfully executed.<sup>[18]</sup>

Binney dismisses Taney's appeal to the views of Marshall, Story, and Jefferson. In *Ex Parte Bollman*, 8 U.S. 75 (1807), Marshall said that it is up to Congress to say whether the public safety requires suspension of the writ of habeas corpus. Binney points out that Marshall's statement is dictum, was not given during times of rebellion or invasion, was made without consideration of or argument on behalf of executive power, and refers to congressional limitation of judicial power to issue writs of habeas corpus, not to suspension of the privilege of individuals to have recourse to the writ. Story considers the suspension clause only briefly in the capacity of a commentator, not as a judge. His contribution is limited to a statement that "it would seem, as the power is given to Congress to suspend the writ of habeas corpus in cases of rebellion or invasion, that the right to judge whether an exigency had arisen, must exclusively belong to that body." Jefferson sought congressional authority to suspend the writ in order to detain the Burr conspirators, whose conduct was neither the rebellion nor the invasion required by the suspension clause. Under those circumstances, Jefferson's request for congressional authority was an attempt to round up a gang for an assault on the Constitution, not a bow to superior constitutional authority. <sup>[19]</sup>

Binney finds no significance in the location of the suspension clause. It is in Article I of the Constitution, which confers power on Congress, but it was moved there from the judiciary article by the Constitutional Convention's Committee on Style, suggesting that location was a matter of convenience or style, and it evolved from an earlier proposal that specifically limited legislative power of suspension. If anything, Binney says, the dropped reference to the legislature indicates that the suspension clause as adopted is not a limit on congressional power.<sup>[20]</sup> (Context confirms that location is a matter of style, for the suspension clause and all other constitutional restrictions on congressional, presidential, and state power are tucked into Sections 9 and 10 of Article I.)

Not surprisingly, Binney's article prompted responses. In his 1888 article, S. G. Fisher summarizes these responses, with particular emphasis on the serial responses of George Wharton, another Philadelphia lawyer. [21] In claiming that the suspension clause is a grant of authority to suspend, Binney ignored Lincoln's stricture that he who pleads what he need not, may have to prove what he cannot. The suspension clause is manifestly not a grant of authority, and Binney didn't need to argue that it was in order to make his case; he could have argued that the president's executive powers under Article II of the Constitution include the limited power to suspend recognized, but not granted, by the suspension clause. By finding a grant in the suspension clause, he created a weak point that his opponents exploited to great effect.

Since the suspension clause was not a grant, the opponents correctly argued, the power of suspension had to be elsewhere in the Constitution, and Wharton found it in a number of congressional powers in Article I, including the powers to declare war, raise and support armies, make rules concerning captures, call out the militia, and make all laws that may be necessary and proper to carry out these enumerated powers. [22] Binney responded, but he had been thrown on the defensive. Fisher, who was sympathetic to Lincoln's exercise of power, concludes that Wharton's responses, and particularly his reliance on the necessary and proper clause, were unanswerable.

Even though they were sparring 146 years ago, Binney and his opponents give us the only hard look at the meaning and implications of the suspension clause. Fisher's 1888 article is substantial, but it is largely a summary of the positions of Binney and his opponents, with little independent analysis. Randall's *Constitutional Problems Under Lincoln* generally plumbs the legal depths of the constitutional issues raised by Lincoln's conduct, but he doesn't examine the suspension clause. Without offering his own analysis or opinion, he surveys the views of Binney, other commentators, Taney, and a number of state judges, and then concludes that "the weight of opinion would seem to incline to the view that Congress has the exclusive suspending power." [23] Clinton Rossiter's *Constitutional Dictatorship* devotes only one relatively short chapter to the Civil War, and a small part of that to the suspension clause, and he takes no position on whether Congress or the president holds the suspension power. [24]

Randall's is the last extended discussion of the suspension clause. Most accounts of Lincoln's presidency address the habeas corpus suspension in a few paragraphs or pages, with little examination of the underlying legal issues. Lincoln's defenders tend to find justification for his actions in the need for quick response to crisis, not in the words of the Constitution. [25] Lincoln critics tend to conclude quickly and with little analysis that Congress holds the power of suspension. [26]

Duker, Farber, and Amar make some attempt to explore the suspension clause, but their attempts are brief, buried in books on larger topics, short on analysis, and unpersuasive. [27] Duker finds a congressional power of suspension in the militia clause, but his is a weaker defense of congressional power than George Wharton mounted in 1862. Duker,

Farber, and Amar all argue for a dominant power of suspension in Congress with a presidential power in emergencies when Congress is not in session,<sup>[28]</sup> but they find little support for their argument, and they don't explore its implications. For example, does presidential power die when Congress assembles, to rise again if it adjourns without taking action, or does the president have a power that dies forever once Congress convenes? What if a sitting Congress sits with no action during an "emergency"? What language in the Constitution can be read to give the president a power that exists in fits and starts? Amar goes even further than Duker and Farber, claiming that the president is a spear-carrier for Congress. Lincoln, he said, viewed himself "as America's chief officer, always on deck and oath-bound to keep the constitutional ship afloat," with a power "to suspend habeas corpus ... so long as he received legislative authorization as soon as Congress could be safely convened." <sup>[29]</sup> This clearly misstates Lincoln's position.

The scholars who have considered the suspension clause since the Civil War have failed to examine that clause in its constitutional context. It is important to look at the suspension clause in its constitutional setting, and in that context consider Lincoln's brief on his own behalf.

### ***Text and Context: The Suspension Clause in its Constitutional Bed***

In his paper, Horace Binney effectively countered Taney's arguments based upon English history, the location of the suspension clause, and the wisdom of the elders. We could embellish these points a little, but that would simply buttress a strong case. With those issues swept away, the only remaining issue is whether Congress or the president holds the power to suspend the privilege of the writ of habeas corpus when the public safety requires it during times of rebellion or invasion.

Section 1 of Article I of the Constitution says that Congress has only the powers "herein granted." The granted powers are listed in Section 8. Given the limit in Section 1, Congress does not have the authority to suspend the writ of habeas corpus unless it can be found in one of the powers listed in Section 8.

George Wharton found congressional authority to suspend the writ of habeas corpus in the congressional powers to declare war, make rules concerning captures, raise and support armies, call out the militia, and make all laws necessary and proper to implement these powers. William Duker points to the power to call out the militia. The language of the provisions on which Wharton and Duker rely is critical for purposes of analysis. They rely on the provisions of Article I, Section 8 of the Constitution giving Congress the power:

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; To provide for calling forth the militia to execute the laws of the Union,

suppress insurrections and repel invasions; To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

None of these powers gives Congress authority to suspend the privilege of the writ of habeas corpus. Congress has the power to declare war, but the president has the power to wage war. If the power to suspend the writ of habeas corpus arises from a war power, it arises from a power to wage, rather than a power to declare, war. The power to raise armies is subject to the same analysis; Congress raises armies, but the president commands them. The power to support armies is broader, but the reference to appropriations makes it clear that the support power is the power to provide money and materiel, not a power to wage war.

The congressional power to make rules concerning captures on land and sea is coupled with the powers to declare war and grant letters of marque and reprisal. In this context, the capture power is a power to establish general rules governing the capture or treatment of persons captured in the conduct of war. It is not a power to determine whether persons imprisoned away from the field of battle can be deprived of the privilege of the writ of habeas corpus.

The power to "provide for calling forth the militia" does not appear to authorize Congress to call the militia to federal service, but only to authorize the president to do so. But even if Congress has the power to order a call-up, the militia once called would be subject to the president's command under his commander-in-chief power. If anyone were to direct militiamen to hold prisoners without benefit of the writ of habeas corpus because the public safety required it, it would be the president. Besides, regular army troops might be able to repel an invasion or quell a rebellion without calling up the militia, and even if the militia is called, it might not be used to arrest civilians. It is hard to argue that the power to suspend the writ of habeas corpus rises from the power to call up the militia when the writ could be suspended without calling up or using the militia.

Suspension of the writ of habeas corpus cannot be used as a necessary and proper tool for carrying the foregoing powers into effect unless it is a tool calculated to exercise those powers. It is not. The nature of those powers is such that a power of suspension would be of no use in discharging the enumerated powers. There is a better argument to be made for use of the necessary and proper clause to support congressional suspension of the writ. The necessary and proper clause authorizes Congress to make laws to implement the powers of any officer of the United States, including the president. One could argue that this provision gives Congress power to suspend the writ to assist the president in his role as commander in chief.

This is a good argument if the power of suspension is in its nature a legislative power. In the Steel Seizure Case,<sup>[30]</sup> for example, the Supreme Court held that President Harry Truman could not seize steel mills during the Korean War without congressional authority because the

power to take the property of American citizens during war time is a legislative power. Congress presumably could have provided the necessary authority under the necessary and proper clause. It is not a good argument if Article II gives the president the power to suspend the writ, for then he can do so without help from Congress. As Binney notes, the necessary and proper clause does not apply unless its use is necessary as well as proper. [31]

Article II, Section 1 of the Constitution says that "the executive power shall be vested in a president of the United States of America." Sections 2 and 3 of Article II give the president specifically listed powers. In his *Merryman* opinion, Taney argues that the president's powers are limited to those listed in Sections 2 and 3. Justice Robert H. Jackson advances the same argument in his concurring opinion in the Steel Seizure Case. It's a weak argument. Article I of the Constitution grants Congress only the legislative power "herein granted." Article III, Section 2 says that federal judicial power "shall extend to" only designated cases and controversies. Article II, Section 1, on the other hand, gives the president all of the executive power of the United States, without any indication that it is limited to enumerated powers, and there is nothing in Sections 2 or 3 to suggest that the list of presidential powers in those sections is exhaustive. On the contrary, Sections 2 and 3 are clearly designed to achieve specific objectives, not to exhaust the universe of executive power. They contain powers that would not necessarily be included in a general grant of executive power, such as the commander-in-chief power and the powers to nominate judicial officers, grant pardons and reprieves, and convene and adjourn Congress; powers shared with Congress, such as the powers to make treaties and appoint officials; and powers mixed with duty, such as the power to suggest laws and report on the state of the Union to Congress and the power to "take care that the laws be faithfully executed." These provisions serve to clarify, enlarge, or modify Section 1's grant of executive power, not displace it.

Given the breadth of the president's powers under Article II, it is easy to find sources of presidential authority to suspend habeas corpus to the extent permitted by the suspension clause. The authority is executive in its nature. It can be exercised only if required by "the public safety." This is a very fact-specific requirement, demanding quick response and decisive action. The executive is equipped for this. A legislative body that meets intermittently and acts slowly is not. Binney made this point, as did Lincoln in his Bircharde letter when he said that the public safety demands suspension "from time to time."

Upon taking office, the president takes a constitutionally mandated oath to "preserve, protect and defend the Constitution." While this oath is not itself a source of power, it recognizes that the president's broad executive powers include a "preserve, protect and defend" power, for the Constitution would not impose a duty without conferring the power to discharge it. This power is sufficiently broad to include authority to suspend habeas corpus in the limited circumstances permitted by the suspension clause.

The best source of executive suspension authority is the president's war power. This power is often equated with and limited to the president's power as commander in chief of the armed forces. But the war power is broader than this, as the following example shows. In 1864, General Ulysses S. Grant was given command of all of the land forces of the United States. If he had in addition been given control of the naval forces, he would have had the same command power as Lincoln (except, of course, for command over Grant himself). As this commander of all of the armed forces, Grant could not have imposed a blockade, or freed slaves throughout the South, or suspended habeas corpus, arrested and detained civilians, opened mail, suspended newspaper publication or gathered intelligence in areas beyond the theaters of operation. The war power is a combined military and executive power.

The nature of the war power was explored in the Prize Cases.<sup>[32]</sup> On April 19 and April 27, 1861, Lincoln imposed blockades of Southern ports. <sup>[33]</sup> His action was challenged on the grounds that the South was not a recognized combatant and that Congress had not declared war. In upholding the blockades, the Supreme Court brushed technicalities aside. For purposes of international law, a war in fact is a war in law, and "it is not necessary to constitute war that both parties should be ... sovereign states. A war may exist when one of the belligerents claims sovereign rights as against the other."<sup>[34]</sup> The absence of a congressional declaration of war was irrelevant, for while a declaration of war might be necessary to start a war, the president had the power as well as a duty to respond to a war forced upon the United States, whether by rebellion or invasion and whether or not Congress had acted. The blockades were legitimate means of waging the war.

Under the doctrine of the Prize Cases, the president's war power is an amalgam of a military power to command forces and an executive power to wage war, whether declared or forced upon the United States by hostile forces; his executive power includes recourse to means needed to achieve the end.

Suspension of habeas corpus is a constitutionally created weapon that can be used in, and only in, civil war and invasion. The president can wage war against rebels and invaders without a congressional declaration of war. It would be an absurd reading of the Constitution to conclude that the president needs congressional authority to deploy a constitutional weapon designed specifically for use in wars that the president can wage without congressional authority.

Lincoln recognized the combined executive/military source of his war power, and he used that power to explain and justify his conduct. In his message to the special session of Congress, he said that the action of the rebels had left him "no choice" but to "call out the war power." <sup>[35]</sup> In an earlier draft of his message, "war power" had been "military power."<sup>[36]</sup> In a September 22, 1861, letter to his friend Orville Browning, who had criticized Lincoln's revocation of General John Charles Frémont's order freeing slaves in Missouri, Lincoln said that the liberation of slaves is purely political, not based on military law or necessity. <sup>[37]</sup> And when

he took this "purely political" step in the Preliminary Emancipation Proclamation, he identified himself as president of the United States as well as commander in chief of the armed forces.<sup>[38]</sup> The Emancipation Proclamation is based upon the commander-in-chief power, but it describes itself as "a fit and necessary war measure."<sup>[39]</sup> The Corning letter makes a forceful case for presidential war powers.

Lincoln combined a simple appeal to his war power with a few simple justifications for its use. In his special session message he famously asked whether he had to forego enforcement of all other laws in order to observe one law. In the Corning letter, he asked whether he had to shoot a "simple-minded soldier boy" who deserted without touching the "wily agitator" who induced him to desert.<sup>[40]</sup> In that same letter, justifying preventive arrest and detention, he asked Corning to imagine how much better off the Union would have been if the government had nabbed Generals John Breckenridge, Robert E. Lee, Joseph Johnston, John Magruder, William Preston, and Simon Buckner and Commodore Franklin Buchanan before they took command of Confederate forces.<sup>[41]</sup>

In his pre-war speeches, Lincoln often engaged in extended, closely reasoned and powerfully argued legal analysis. In his First Inaugural Address and the Special Session Message, he swung a long, lawyerly club at the claimed right of secession. Yet he used a non-lawyerly appeal to his war powers to justify his extraordinary wartime measures and a folksy approach to support the appeal. He may have sensed that his vast exercise of authority could only be sold by grounding it in a comprehensive, easy to understand power.

It worked. Lincoln's actions were often controversial, even among some Republicans, and his personal popularity waxed and waned with the fortunes of the Union armies. But in the end, the public and Congress stayed with him. The Democrats, enraged by Lincoln's actions, pushed opposition to the verge of disloyalty. They nominated McClellan for president in 1864 on a peace platform just days before Atlanta fell, lost the 1864 election in a landslide, and wandered in the political wilderness for most of the next seventy years.

Horace Binney begins his paper by asserting that "the power to suspend the privilege is supplementary of the power to suppress or repel. It is a civil power to arrest for privity or supposed privity with rebellion, as the military power is to suppress by capture for overt acts of rebellion."<sup>[42]</sup> This passage captures the source of executive power to suspend habeas corpus, and it expresses Lincoln's position. The difference between Lincoln and Binney is that Binney goes on for another fifty pages. This is not to criticize Binney (except for prolixity). His role differed from Lincoln's, and he could no more be expected to stop at two pages than Edward Everett at Gettysburg could have been expected to stop at two minutes. But Lincoln's simple argument is more compelling, truer to the Constitution, and less open to attack than Binney's more reasoned discourse. As a lawyer pleading his own case, no less than as politician and statesman, "the president is," as Secretary of State William Seward said, "the best of us."

## *SELECTED CONSTITUTIONAL PROVISIONS*

### ***The suspension clause, Article I, Section 9***

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

### ***The "herein granted" limit on congressional power, Article I, Section 1***

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

### ***Selected congressional powers, Article I, Section 8***

The Congress shall have power

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections

and repel invasions; To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

### ***Presidential powers, Article II***

Section 1. The executive power shall be vested in a president of the United States of America ...

Section 2. The president shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not otherwise provided for, and which shall be established by law; but the

Congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments.

The president shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

Section 3. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he may think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

### ***Presidential oath, Article II, Section 1***

Before he enters on the execution of his office, he shall take the following oath or affirmation—"I do solemnly swear (or affirm) that I shall faithfully execute the office of president of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

### **Notes**

1. Roy P. Basler et al., eds., *The Collected Works of Abraham Lincoln*, 9 vols. (New Brunswick, N.J.: Rutgers University Press, 1953–1955), 2:347. ↗
2. *Ex Parte Merryman*, 17 F. Cas. 144 (1861). ↗
3. *Collected Works*, 4:364. ↗
4. *Ibid.*, 4:419. ↗
5. *Ibid.*, 4:421. ↗
6. *Ibid.*, 4:430–31. ↗
7. House of Representatives Executive Document No. 5, *Suspension of the Writ of Habeas Corpus: Letter from the Attorney General, transmitting, in answer to a resolution of the House of the 12th instant, and opinion relative to the suspension of the writ of habeas corpus.* ↗
8. *Collected Works*, 5:436–37. ↗
9. *Ibid.*, 6:260. ↗
10. *Ibid.*, 6:300. ↗
11. *Ibid.*, 6:303. ↗
12. *Ibid.*, 6:451. ↗
13. For the history of the special session, see George Clarke Sellery, "Lincoln's Suspension of Habeas Corpus as Viewed by Congress," *Bulletin of The University of Wisconsin* 149, History Series, vol. 1, no. (1907) 3: 213–85. ↗

14. Ibid., 239–45. ♣
15. The act is reproduced in *ibid.*, 278–83. ♣
16. Ibid., 264–65. ♣
17. John G. Nicolay and John Hay, *Abraham Lincoln* (New York: Century, 1904), 8:40. ♣
18. See Horace Binney, *The Privilege of the Writ of Habeas Corpus Under the Constitution*, 2d ed. (Philadelphia: C. Sherman & Son, 1862), 9–14, 47–48, 51–52. ♣
19. Ibid., 37–39, on Marshall; 39 on Story; 53–54 on Jefferson. ♣
20. Ibid., 26–31. ♣
21. For summary of the responses to Binney and his rejoinders, see Sidney G. Fisher, "The Suspension of Habeas Corpus During the War of the Rebellion," *Political Science Quarterly* 3 (September 1888): 454–88. ♣
22. Ibid., 469–71. ♣
23. James G. Randall, *Constitutional Problems Under Lincoln*, rev. ed. (Urbana: University of Illinois Press, 1951), 120–27, 131–36. ♣
24. Clinton Rossiter, *Constitutional Dictatorship* (New York: Harcourt Brace, 1948). ♣
25. See, for example, James M. McPherson, *Abraham Lincoln and the Second American Revolution* (New York: Oxford University Press, 1990), 59–64; Phillip Shaw Paludan, *The Presidency of Abraham Lincoln* (Lawrence: University Press of Kansas, 1994), 77–78. ♣
26. See, for example, William Marvel, *Mr. Lincoln Goes to War* (Boston: Houghton Mifflin, 2006), 43–44; Thomas J. DiLorenzo, *The Real Lincoln* (New York: Three Rivers Press, 2003), 135–38. ♣
27. William F. Duker, *A Constitutional History of Habeas Corpus* (Westport, Conn.: Greenwood Press, 1980), 141–49; Daniel Farber, *Lincoln's Constitution* (Chicago: University of Chicago Press, 2003), 157–63; Akhil Reed Amar, *America's Constitution* (New York: Random House, 2005), 121–22. ♣
28. Duker, *Constitutional History*, 144; Farber, *Lincoln's Constitution*, 161–62; Amar, *America's Constitution*, 122. ♣
29. Amar, *America's Constitution*, 122. ♣
30. *Youngstown Steel & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). ♣
31. Binney, *Privilege of the Writ*, 51. ♣
32. *The Amy Warwick*, 67 U.S. 635 (1862). ♣
33. *Collected Works*, 4:338 (April 19 order); 346 (April 27 order). ♣
34. *Amy Warwick*, 666. ♣
35. *Collected Works*, 4:426. ♣
36. Ibid., 426 n. 27. ♣
37. Ibid., 4:531. ♣
38. Ibid., 5:433. ♣
39. Ibid., 6:29. ♣
40. Ibid., 6:266. ♣

41. Ibid., 6:265. ↗

42. Binney, *Privilege of the Writ*, 8. ↗