12-1996

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To Save a House Divided:  
Lincoln's Suspension of Habeas Corpus

by

Monica DeLong

Prepared for Dr. Ben McArthur  
Research Methods  
December 12, 1996
In the dead of night, soldiers battered down the door. They searched the house until they came upon their prey—a man dressed in a long night shirt asleep in his bed. The fully-armed company of soldiers abruptly woke him and wrenched him from his wife's arms. His wife and sister-in-law were left helpless and terrified. ¹ (See Appendix A)

The man? Ex-Congressman Clement L. Vallandigham, a Democrat from Ohio. His crime? According to General Ambrose Burnside, he gave a speech attacking the Union and the President. Burnside charged him with "sympathizing with the enemy," the Southern secessionists, and thereby impairing the power of government.² So why did his 1863 arrest illicit outrage from Democrats and apprehension from Republicans throughout the war? Although there are many reasons, one remains paramount. Vallandigham could not obtain a writ of habeas corpus. Why? Because it was suspended by the Union leader—Abraham Lincoln.

The writ of *habeas corpus* is an order to bring before the court a person held in custody to prove that the prisoner is being lawfully held. If the prosecution fails to show sufficient cause to detain the prisoner, the court can release the prisoner. By the time of the Magna Carta's first issuance in 1215, the writ of *habeas corpus* was clearly established in English Jurisprudence. American colonists adopted this tradition from the English and included it in the Constitution. Leo Pfeffer argues that the measure of American regard for this right was its inclusion in the original Constitution rather than as an appendage in

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the later Bill of Rights. Nolan asserts that this writ is generally "regarded as the great constitutional guaranty of personal liberty." 4

   So, why was this bastion of liberty suspended during the Civil War? Lincoln's underlying philosophy and the essence of his answer is contained in his famous declaration, "A house divided against itself cannot stand." But many would come to question whether Lincoln had destroyed the foundation of the "house" built on civil liberties. In Lincoln's message to Congress in 1861 he contended that this democratic country could not survive unless we would be allowed to save it by any means possible. He posed the question: "Must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?" 5 Thus, Lincoln believed that it was necessary to curtail civil liberties for the Union to survive.

Lincoln's position was first challenged when the case of John Merryman was brought to Roger B. Taney, the Chief Justice of the Supreme Court. This case raised many questions concerning Lincoln's war powers and his right to suspend the writ of habeas corpus. Taney deplored Lincoln's policies as unconstitutional. The defiant Taney claimed that only Congress could authorize such action—not the president. However, Lincoln maintained that his actions were indeed constitutional because this was a rebellion and as such was a specific exception granted by the Constitution. Lincoln, the perennial pragmatist, stood firm on the basis of necessity. Like an untiring leader of a flock, he pushed forth undaunted, never losing sight of his ultimate goal. Although seemingly a blemish on our civil liberties history, I believe Lincoln—in his struggle against Taney and


the debate he represented--was correct to assume control and suspend the writ of habeas corpus.

--- The Historiography ---

Although Lincoln's treatment of civil liberties is an important aspect of our constitutional history, the historical literature on this topic has been sparse. James G. Randall wrote the only book-length scholarly work, a prodigious endeavor entitled Constitutional Problems under Lincoln, published more than sixty years ago. Since then no ground-breaking study has been produced. One book, written in the 1970s, in particular departed from Randall's. Harold Hyman in A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution justifies Lincoln and presents a more one-sided work in which he argues that the Civil War and Reconstruction actually improved the Constitution. More recently, Mark E. Neely, Jr. offers a well-written and thoroughly researched work entitled The Fate of Liberty. Still, Randall's work stands as the most complete scholarly work on Lincoln and the Constitution. Subsequent works have dealt with this subject tangentially or to buttress their argument of Lincoln as dictator.

Indeed, Lincoln as a tyrant has been a common theme for historians in the past decade. I believe an historian's overall view of Lincoln determines his assessment of Lincoln's handling of civil liberties during the war. In 1911, Randall, who represented the view of most historians at that time, burnished Lincoln's memory. However, since that time historians have taken great pains to stain Lincoln's portrait. For instance, during the Second World War, Andrew C. McLaughlin touched on presidential war time powers in Constitutional History of the United States. In it he stated, "That a president armed with the 'war power' may some day wreck the whole constitutional system is theoretically possible, and the dictator, if he ever appears, may discover precedents in the conduct of
Lincoln."\(^6\) Other recent works have been critical of Lincoln. Edmund Wilson in 1962, in *Patriotic Gore*, literally compared Lincoln to Bismark and Lenin. Then in 1982, Dwight Anderson agreed with Wilson in his book, *Abraham Lincoln: The Quest for Immortality*, which argued the Lincoln was a "tyrant who would preside over the destruction of the Constitution in order to gratify his own ambition."\(^7\)

But I shall resist leaping aboard the bandwagon of deconstructionists. Inarguably, his memory should not be treated as untrammeled, sacred ground; yet from Randall's time to Neely's there is a common thread--Lincoln's pragmatism. He realized that it was necessary for the war effort to quell insurrectionist activity and did what he felt was required to reach the Union's goal. Lincoln believed, probably correctly, that if these disloyal acts were allowed to continue they could reach a feverish pitch and then become difficult to subdue.

--- The Men ---

Abraham Lincoln was born in 1809--and as fable and truth agree--in a log cabin in Illinois. He grew up to revere the satisfaction of a hard day's work on his family's rural farm and the intellectual rigor of study. Lincoln carried this philosophy throughout his life, even while he maintained a meager living during his early adult life. Later, Lincoln studied law, followed the trends of national politics, and laid the foundations for a wide personal influence.\(^8\) In 1834 he was elected to the state legislature and served four

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\(^8\) *Dictionary of American Biography*, s.v. "Lincoln, Abraham."
successive terms. Regarding his political views at this time he wrote to a friend, "I think I am a Whig; but others say there are no Whigs, and that I am an Abolitionist. I now do no more than oppose the extension of slavery."\(^9\) During this time he became a licensed attorney and began a legal practice with a friend.\(^{10}\)

As a political stump-speaker few could match his eloquence. He soon became an active member in the Republican party and his political philosophy showed a democratic liberalism many have likened to Thomas Jefferson. Moreover, principles of civil liberty were fundamental in his thinking.\(^{11}\) He displayed his talent and philosophy in seeking the Republican senatorial nomination in 1858 during the famous Lincoln-Douglas debates. There he castigated the Dred Scott decision of 1857. Apparently, this was the first time he openly attacked the Roger B. Taney. Lincoln not only denounced the court's logic, but charged conspiracy between the President and the Supreme Court.\(^{12}\)

During the next several years the name Lincoln would continue to become known with the public and within the Republican party. By 1860 he had received the Republican nomination and went on to defeat the Democratic nominee, Stephen Douglas.\(^{13}\) At his inaugural address Lincoln proclaimed what would be his determining objective throughout the next few years--to hold the Union together. Lincoln professed that the "Union is perpetual, confirmed by the history of the Union itself." He continued to assert that the basis for the Constitution was "to form a more perfect union." However, he concluded

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\(^{10}\)Malone, 11: 243.

\(^{11}\)Ibid., 11: 247.

\(^{12}\)Sandburg, II: 105.

\(^{13}\)Malone, 11: 249.
that if the Union is allowed to be broken up then the "Union is less perfect than before which contradicts the Constitution, and therefore is absurd."\(^{14}\)

After the attack on Fort Sumter, he was forced to do more than talk about preserving the Union; he had to act. He "treated" the conflict as a huge "insurrection," and before Congress on July 13, 1861, recognized a state of war. He "summoned" the militia, proclaimed a blockade, expanded the regular army more than the legal limit, and suspended the writ of *habeas corpus*.\(^{15}\) In a message to Congress on July 4, 1861, he explained his war time policy and called for a united effort. "It is now recommended," Lincoln proposed, "that you give the legal means for making this contest a short, and a decisive one; that you place at the control of the government . . . at least four hundred thousand men, and four hundred millions of dollars . . . Surely each man has as strong a motive now, to preserve our liberties, as each had then, to establish them."\(^{16}\)

Roger B. Taney was born in 1777 to a family with a long line of planter ancestors in southern Maryland. His young mind was molded by the thinking of the planter aristocracy.\(^{17}\) As a result, Taney would later be sympathetic toward the South during the war.\(^{18}\) By 1798 he was a staunch Federalist who served in the Maryland legislature for a

\(^{14}\text{CWL, IV: 253.}\)

\(^{15}\text{Malone, 11: 251.}\)

\(^{16}\text{CWL, IV: 431-32.}\)


\(^{18}\text{Malone, 18: 290.}\)
term, and the next year he was admitted to the bar. In 1812, however, he separated himself from the Federalists over the war with Great Britain. Taney then became a leader of a dissenting group who did not support the war with Britain.

Several years later he moved to Baltimore to further his legal career. He gained respect for his mastery in the technicalities of procedure and for his fairness to his opponents. By 1827 he was appointed Maryland Attorney General and by 1831 he was selected by Jackson to become United States Attorney General. When a seat on the federal judicial circuit became open Jackson nominated Taney in 1835. Although Justice John Marshall was in favor of the nomination, the Whig forces would not acquiesce. They worked to defeat the presidential nomination. Daniel Webster saw in Taney a paradigm of all that was perilous in Jacksonianism. Consequently, the Senate voted for an indefinite postponement of the nomination and the nomination died. After Marshall's death, a seat opened for Chief Justice. This time Taney was confirmed. In 1837, impassioned and strong-willed Roger B. Taney began his lengthy career as Chief Justice of the United States Supreme Court.

One principle Taney trumpeted throughout his career, before and after his appointment as Chief Justice, was the limitation on Governmental power. When he served in Jackson's cabinet he opposed the National Bank. When the institution requested to be rechartered, Taney argued that it must be with definite limitations on its powers. Moreover, he remained a crusader for state's rights and the rights of citizens. Writing for

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19 Cantor, p. 60.

20 Ibid., p. 60.

21 Malone, 18: 290.

22 Cantor, p. 60.

23 Malone, 18: 291.
the majority in *Charles River Bridge v. Warren Bridge*, he took a strict constructionist view of the constitution as it pertained to the rights granted by charters. "While the rights of private property are sacredly guarded," he contended, "we must not forget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful preservation."24

However, Taney's legacy will forever bear a stain for his decision in *Dred Scott v. Samford* (1856). This case plunged the court into the midst of the slavery controversy. Taney delivered the Supreme court's decision, which was based on the debased status of Negroes and therefore concluded that Congress had no power to prohibit slavery in the federal territories. Lincoln, on the other hand, vehemently disagreed with Taney's opinion. In an 1857 speech in Springfield, Illinois, Lincoln specifically decried Taney for his admission "that the language of the Declaration is broad enough to include the whole human family, but he and Judge Douglas argue that the authors of that instrument did not intend to include negroes."25

The *Dred Scott* decision further catapulted the country toward Civil War. This issue, furthermore, would not be the only one that Lincoln and Taney disagreed upon. By the time the Civil War began, Taney was an aged eighty-four year old man, yet he still had life left in him for one more battle--a theoretical debate between the Chief Executive and the Chief Justice.

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24Ibid., 18: 292.

25CWL, II: 405.
In April, 1861, the case of John Merryman polarized these two men and would set the tone for the debate involving Lincoln's suspension of habeas corpus. Merryman was a prominent local politician, farmer, and officer in a secessionist drill company. Phillip Paludan explains that he was caught burning railroad bridges and recruiting for the South. Merryman was imprisoned in Baltimore, and Merryman's lawyer filed a writ of habeas corpus with the closest judge. That judge turned out to be Roger Taney. Taney was the presiding judge of the federal circuit court of Maryland as well as the Chief Justice of the United States. Taney rushed to Merryman's defense, stating, "he has been so imprisoned without any process or color of law whatsoever, and that none such is pretended by those who are thus detaining him." He declared that this has been done "in violation of the Constitution and laws of the United States, of which he is a citizen." Not only did Taney issue the writ of habeas corpus to release Merryman, but he also used the Merryman case to outline his argument against Lincoln's suspension of the writ. Using this decision to lecture the nation about the meaning of the Constitution, he passionately defended civil liberties and denounced the power exercised by the President as unconstitutional. Taney claimed that the legal right to suspend the writ rested with Congress, not the president. "He [Lincoln] certainly does not faithfully execute the laws," Taney argued, "if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law." (See Appendix B)
Lincoln's retaliation—with the support of Attorney General Bates—was to ignore Taney's writ of habeas corpus. Merryman remained in prison. In response, Lincoln spent almost a third of his first message to Congress defending the constitutionality of his action. He affirmed the legality of the Merryman case. But Lincoln could not ignore the questions on the Constitution that Taney delineated. Nor could he ignore them throughout the war.

The President's Defense

In order to understand Lincoln's decision one must analyze the context in which he first used this power. Lincoln heard rumors that Maryland State Legislature was threatening to leave the Union. Then the whispers of succession became more audible when a special session of the legislature in August deplored the "gross usurpation, unjust, tyrannical acts of the President of the U. S." When another session was scheduled to meet, the administration was nervous about a plot by Confederates on Maryland, insurrection in Baltimore, and enactment of succession by the legislature. Lincoln wrote to General Scott: "The Maryland legislature assembles to-morrow at Annapolis, and not improbably will take action to arm the people of that State against the U. S." Lincoln was in desperate need of troops and needed to transport them through a "semi-hostile" Maryland.

29Paludan, p. 29.
30CWL, VI: 260-65.
31McPhearson, p. 289.
32CWL, IV: 344.
To put down insurrection and keep disloyal people under control, Lincoln on 27 April 1861 ordered a qualified suspension of the writ.33 In a special session of Congress, Lincoln displayed his reluctance to suspend *habeas corpus*. He stated, "This authority has purposely been exercised but very sparingly." He continues to explain that he had deliberated on the course of action. Lincoln's decision was part of his responsibility as president, because he stated, "I have been reminded . . . to take care that the laws be faithfully executed."34 With nearly one-third of the States resisting, Lincoln acted in line with what he felt was his duty—he gave to the commanding officer the charge to suspend the writ if the "necessity arose" in the area from Washington to Philadelphia.35

Maryland was corralled back into the Union, but there would be other times when the "necessity arose." Merryman was an example of a case that came shortly thereafter. In Lincoln's message to Congress on July 4, 1861, he responded to Taney's indignant opinion. He raised the question: "Are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?"36 Lincoln expressed his desire to protect civil liberties, but he fought ultimately for what he believed was the higher good—that the "government itself" should not "go to pieces."

Lincoln realized that this fledgling government was suffering growth pains. Lincoln commented, "Our Government has often been called an experiment. Two points in it our people have already settled—the successful *establishing* and the successful *administering* of it. One still remains—its successful maintenance against a formidable

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35 Silver, p. 28.

36 *CWL*, IV: 430.
internal attempt to overthrow it." In order to accomplish this goal, Lincoln usurped the political reins and used what he deemed "war powers." He implied that Taney had been incorrect to decide this matter by constitutional law, because it was essentially a political question.37

Nevertheless, Lincoln did use the Constitution to support his actions. In a speech to Congress he quoted Article 1 in the Constitution where it states: "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." He contended that "It was decided that we have a case of rebellion, and that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made."38

Yet whether the suspension was necessary or not was not Taney's main argument; he contended that the power to suspend the writ belonged to Congress. In his opinion in the Merryman case, Taney exclaimed that he thought there was "no difference of opinion" that the writ was to be suspended by Congress. He supported this claim with the fact that the article in which this clause is contained is devoted to the legislative department of the United States. This article begins with 'that all legislative powers therein granted, shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.' Taney continued to say that the "congress is, of necessity, the judge of whether the public safety does or does not require it; and their judgment is conclusive."

The Chief Justice defended his position by arguing that if the framers had intended that the President hold this power then "it would undoubtedly be found in plain words in this

38 CWL, IV: 430.
article; but there is not a word in it that can furnish the slightest ground to justify the exercise of the power."\textsuperscript{39}

Sydney G. Fisher wrote in the \textit{Political Science Quarterly} some twenty years after the Civil War a rebuttal to Taney's argument. Fisher places Taney's contention in the context of the Constitutional Convention. At the Convention, Thomas Pinckney proposed that the legislature has the right to suspend the writ. However, the convention rejected Pinckney's view, and thus all reference to the legislature were excluded. Moreover, the convention did not originally adopt this clause as part of the legislative article. The clause was initially slated to become part of the third article, which involves the judiciary.\textsuperscript{40} Fisher surmises that the clause may have been intended to provide a restraint upon the judiciary's power over the writ. But whatever the case, it is understood that the convention expressly denied Pinckney's suggestion that the suspending power lie with Congress.\textsuperscript{41}

Another oversight in Taney's opinion, according to Randall, was his use of a case opinion given by the former Chief Justice John Marshall. In the Merryman decision, Taney cites Marshall's opinion that states, "If... the public safety should require the suspension... it is for the legislature to say so."\textsuperscript{42} Randall, however, puts Marshall's opinion in context, because Marshall's meaning was that "it was not for the court to say so." The dilemma presented to the court was not the writ's suspension, but rather the provision of the Judiciary Act of 1789 giving United States courts the power to issue the

\textsuperscript{39}Ex Parte Merryman.

\textsuperscript{40}The committee on style and arrangement placed it in its current position.


\textsuperscript{42}Ex Parte Merryman.
writ. Marshall, furthermore, claimed that the power to deny the writ was a political function and not a judicial one. The whole passage reads as follows:

If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws.43

Clearly, then, an excerpt from this passage is not germane to the controversy over whether Congress or the President has the suspending power.

Lincoln did not specifically address Taney's opinion until he spoke out against resolutions proposed at a Democratic Convention in the summer of 1863. Lincoln conceded that the Constitution does not explicitly state who decides to suspend the writ. However, Lincoln reasoned that the constitution has given the Commander-in-Chief the power to make the decision of whether the "public safety does require" in times of "Rebellion or Invasion."44 Fisher buttresses Lincoln's argument by stating that "The direction of a war, whether of rebellion or invasion, is necessarily with the executive." He continues to assert that the "suspension of habeas corpus is an instrument for repelling invasion or rebellion, and so its use must lie with the President."45

Indeed, in 1862, Congress agreed. The House passed a bill declaring that it is "lawful for the President of the United States, whenever in his judgment by reason of 'rebellion or invasion the public safety may require it,' to suspend . . . the writ of habeas

43Randall, pp. 133-34.

44CWL, VI: 303.

45Fisher, p. 460.
Furthermore, the House asserted that "It shall be unlawful for any of the judges of the several courts of the United States or of any State, to allow said writ." The Habeas Corpus Act was finally passed by Congress in March 3, 1863 giving the President discretionary power to suspend the writ during the rebellion.

Even if the Chief Justice was correct in attacking Lincoln on constitutional grounds, the reality was that the national machinery was simply inadequate to cope; Taney was unrealistic to imply that individual trials could handle actual disloyalty. Of course, Lincoln could have theoretically recruited more federal judges and lawyers. But, as Hyman points out, it is doubtful that Congressmen would be able to create the small legion of court officials needed to mount the trials that the Chief Justice specified. Moreover, the trials would be rife with the complication of partisan politics. Many Republicans were suspicious of federal judges because of southern dominance. Also, most Democrats could be depended upon to fight any administration effort designed to expand national strength.

Another complication in Taney's theoretical plan was that it would be difficult to have the trial in the place where the alleged offense occurred. The Constitution requires that treason and indictment trials happen where the purposed crime took place. However, this would be impossible in the rebellious states. In addition, the requirement of local venue meant that neighbors of the accused would form the jury panel. Therefore, Merryman and other Maryland disloyalists would almost be assured of a not guilty verdict.

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46 Congressional Globe, July 3, 1862, 37 Cong., 2 sess., p. 3106.

47 It should also be noted here that a new draft law went into effect the same day as the Habeas Corpus Act. The draft law received more uproar from the public than did Congress's suspension of habeas corpus. Before it was used to imprison disloyal members. Now, when the writ was used for imprisoning draft-dodgers, there were riots.

48 Hyman, p. 96.
The arrest of Merryman was typical in that most of these arrests took place in the border slave states of Maryland, Kentucky, and Missouri. In these states loyalties were divided and active fighting was going on. Most of those arrested had in fact engaged in activities with military significance, such as guerrilla attacks on Union soldiers, burning of bridges, blowing up of supply dumps, or espionage. But some men were arrested for merely speaking or writing in favor of peace with the Confederacy or against the war policies of the Union government. Some of those arrested lived in northern states far from active war zones. Such was the case of one of the most notorious arrests of a civilian during the Civil War.⁴⁹ This notable anti-war agitator was Vallandigham. He was convicted in Ohio of treason for speaking out against the government. His arrest was under General Ambrose Burnside's General orders, No. 38. Burnside accused him of "sympathizing with the enemy and declaring disloyal . . . opinions with the object . . . of weakening the power of the government."⁵⁰ Burnside defended his arrest by asserting that the country was in a "state of civil war." Therefore, he must abide by his duty to end disloyal speech which would weaken the Union cause.⁵¹

According to Neely, when Vallandigham applied for a writ of *habeas corpus*, it was rumored that he might file his application in the Ohio federal district court with Justice Noah H. Swayne. Secretary of War Edwin M. Stanton feared that Swayne might issue the writ. Thus, Stanton drafted an order which stated that "it is hereby ordered by the President that the privilege of the writ of *habeas corpus*, and any writ which has been

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⁵⁰Randall, p. 177.

⁵¹Ibid., p. 178.
or may be hereafter issued during the present rebellion in the case of said Vallandigham be hereby suspended."

This case was especially contentious because Vallandigham had not committed an act against the government but rather spoke out against the president. As Paludan points out, even the witnesses for the prosecution conceded that Vallandigham did not avow violent opposition to the law. Vallandigham had advised people to "come up united to the ballot box and hurl the tyrant from his throne." Lincoln contended in a letter, however, that Vallandigham's arrest was not for political aims, but because of military objectives. Lincoln continued to maintain that the Constitution makes a distinction between the government's operation in normal times and those in times of rebellion or invasion.

Although Vallandigham contended he was entitled to due process of arrest, indictment, and jury trial, Vallandigham was found guilty by the military commission. He then applied to the Circuit Court at Cincinnati for a writ of habeas corpus. However, he was turned down and the case went to the Supreme Court. Consequently, a question arose concerning judicial review of military proceedings.

Taney did not get a chance to present an opinion for this case. Nonetheless, similar to the Merryman case, Taney contended in the Vallandigham case that Lincoln was guilty of rejecting the due process clause. He quoted the Constitution where it says that no person "shall be deprived of life, liberty or property, without due process of law."

Taney makes his position clear when he states that "I can see no ground whatever for

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53 Paludan, p. 241.
54 Randall, p. 184.
55 Ex Parte Vallandigham, 68 U.S. 243.
56 Randall, pp. 177-78.
supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of *habeas corpus*, or the arrest of a citizen, except in aid of the judicial power."^57

In retaliation to Vallandigham's arrest, the Democrats met in Albany, New York and vehemently protested his arrest and the power of the military commander. They asserted that it was a travesty that this commander could "seize and try a citizen of Ohio, Clement L. Vallandigham, for no other reason than words addressed to a public meeting, in criticism of the course of the Administration, and in condemnation of the military orders of that General." The Democrats broadened their attack to include the Union administration. They asserted that when the people lose their right to the writ of *habeas corpus*, it "strikes a fatal blow at the supremacy of law, and the authority of the State and Federal constitutions."^58

Lincoln responded to this attack in a letter to Erastus Corning. Lincoln asserted that Vallandigham's arrest was not for political aims but because of military objectives. He argued that if Vallandigham had done nothing other than criticize the administration, then his arrest was wrong. But, Lincoln continues, that the arrest was made for a very different reason. He was arrested, Lincoln stated, because "he was laboring, with some effect, to prevent the raising of troops, to encourage desertions from the army, and to leave the rebellion without an adequate military force to suppress it." Lincoln continued to claim that the army is of paramount importance, because "the existence, and vigor of which, the life of the nation depends."^59 Then Lincoln devised what had been conspicuously lacking

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^57*Merryman*.


^59*CWL*, VI: 266.
before, a pertinent example. "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert?" Lincoln asked. "I think that in such a case, to silence the agitator, and save the boy, is not only constitutional, but, withal, a great mercy."\textsuperscript{60}

\textit{The Conclusion}

In a letter to Orville H. Browning, Lincoln wrote, "So much as to principle. Now as to policy." Lincoln adhered to this pragmatic philosophy throughout the war. Yet many wandered, "Did he value the Union more than liberty?" Taney thought so and railed against the President, for to the Chief Justice nothing is more precious than liberty. Lincoln, however, did value liberty. But he realized that to keep the nation united—with its liberty intact—he must use the means available to accomplish this task.

Since the time of the Civil War, there has never been another general suspension of the writ of \textit{habeas corpus}. There have been two World Wars, however, when the government has wrestled with similar civil liberties dilemmas. The question of what is constitutional for a president during a time of emergency has seen some revision. Indeed, a year after the Civil War was over, the Supreme Court decided that the military commissions used during the war to try prisoners were unconstitutional.\textsuperscript{61} However, during the Civil War the fact is that neither Congress nor the courts constrained Lincoln. Whether his actions were constitutional will remain controversial. What cannot be denied is that Lincoln realized he needed to save a house divided against itself. Thus, Lincoln's

\textsuperscript{60} Jacob, p. 16.

\textsuperscript{61} \textit{Ex Parte Milligan}, 71 U.S. 2.
policy became one not merely a matter of the constitution, but more importantly, of necessity.
Bibliographic Essay

As I mentioned in my historiography section, *Constitutional Problems under Lincoln* by James G. Randall remains the most complete scholarly work on the topic. There are, however, other informative gems. To support one's views on Lincoln as the usurper of civil liberties, Phillip Shaw Paludan is a good place to begin. One should read his book, *A People's Contest: The Union and Civil War 1861-1865*. I would suggest Paludan with caution for he becomes so impassioned that he does not appear even-handed. For more evidence of his intellectual fervor consult *Victims: A True Story of the Civil War*. On the other end of the civil liberties debate is Harold M. Hyman. In *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* he supports Lincoln and even argues that the Civil War and Reconstruction improved the Constitution. For a more recent and less biased approach, Mark E. Neely, Jr.'s *The Fate of Liberty* is an excellent source.

When delving into primary material, *The Collected Works of Abraham Lincoln* is an invaluable resource. During the civil war, furthermore, a flood of pamphlets were printed discussing the issue of the suspension of the writ. One can find many of these, I discovered, in the Rare Books Collection in the Library of Congress. Sadly, however, the librarians had to escort me to the exit at closing time before I was able to get my hands on them. The pamphlets by authors Attorney General Bates and Horace Binney would have been especially helpful.

Another disappointment I encountered was the Interlibrary Loan Requests. After inundating the library with requests, I received a meager two books, only one of which was useful. One source that looked promising was the article entitled "Legal History in High Court--Habeas Corpus" in the 1966 issue of *Michigan Law Review*. Another periodical worth consulting would be the 1971 edition of *American Journal of Legal History* (volume 15).
Appendix A
Arrest of Vallandigham at Dayton, May 5, 1863
(From Frank Leslie's Illustrated Newspaper, May 23, 1863)
Appendix B
Ex parte MERRYMAN.
Circuit Court, D. Maryland.
April Term, 1861.

Habeas corpus. On the 26th May 1861, the following sworn petition was presented to the chief justice of the United States, on behalf of John Merryman, then in confinement in Fort McHenry:

"To the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States: The petition of John Merryman, of Baltimore county and state of Maryland, respectfully shows, that being at home, in his own domicile, he was, about the hour of two o'clock a.m., on the 25th day of May, A.D. 1861, aroused from his bed by an armed force pretending to act under military orders from some person to your petitioner unknown. That he was by said armed force, deprived of his liberty, by being taken into custody, and removed from his said home to Fort McHenry, near to the city of Baltimore, and in the district aforesaid, and where your petitioner now is in close custody. That he has been so imprisoned without any process or color of law whatsoever, and that none such is pretended by those who are thus detaining him; and that no warrant from any court, magistrate or other person having legal authority to issue the same exists to justify such arrest; but to the contrary, the same, as above stated, hath been done without color of law and in violation of of constitution and laws of the United States, of which he is a citizen. That since his arrest, he has been informed, that some order, purporting to come from one General Keim, of Pennsylvania, to this petitioner unknown, directing the arrest of the captain of some company in Baltimore county, of which company the petitioner never was and is not captain, was the pretended ground of his arrest, and is the sole ground, as he believes, on which he is now detained. That the person now so detaining him at said fort is Brigadier-General George Cadwalader, the military commander of said post, professing to act in the premises under or by color of the authority of the United States. Your petitioner, therefore, prays that the writ of habeas corpus may issue, to be directed to the said George Cadwalader, commanding him to produce your petitioner before you, judge as aforesaid, with the cause, if any, for his arrest and detention, to the end that your petitioner be discharged and restored to liberty, and as in duty, & c. John Merryman. Fort McKenry, 25th May 1861.

'United States of America, District of Maryland, to wit: Before the subscriber, a commissioner appointed by the circuit court of the United States, in and for the Fourth circuit and district of Maryland, to take affidavits, & c., personally appeared the 25th day of May, A. D. 1861, Geo. H. Williams, of the city of Baltimore and district aforesaid, and made oath on the Holy Evangel of Almighty God, that the matters and facts stated in the foregoing petition are true, to the best of his knowledge, information and belief; and that the said petition was signed in his presence by the petitioner, and would have been sworn to by him, said petitioner, but that he was, at the time, and still is, in close custody, and all access to him denied, except to his counsel and his brother-in-law:-this deponent being one of said counsel. Sworn to before me, the 25th day of May, A. D. 1861. John Hanan, U.S. Commissioner.

'United States of America, District of Maryland, to wit: Before the subscriber, a commissioner appointed by the circuit court of the United States, in and for the Fourth circuit and district of Maryland, to take affidavits, & c., personally appeared this 26th day of May, 1861, George H. Williams, of the city of Baltimore and district aforesaid, and made oath on the Holy Evangel of Almighty God, that on the 26th day of May, he went to Fort McHenry, in the preceding affidavit mentioned, and obtained an interview with Gen. Geo. Cadwalader, then and there in command, and deponent, one of the counsel of said John Merryman, in the foregoing petition named, and at his request, and declaring himself to be such counsel, requested and demanded that he might be permitted to see the written papers, and to be permitted to make copies thereof, under and by which he, the said general, detained the said Merryman in custody, and that to said demand the said Gen. Cadwalader replied, that he would neither permit the deponent, though officially requesting and demanding, as such counsel, to read the said papers, nor to have or make copies thereof. Sworn to this 26th day of May, A. D. 1861, before me. John Hanan, U. S. Commissioner for Maryland.'
Upon this petition the chief justice passed the following order:

"In the matter of the petition of John Merryman, for a writ of habeas corpus: Ordered, this 26th day of May, A. D. 1861, that the writ of habeas corpus issue in this case, as prayed, and that the same be directed to General George Cadwalader, and be issued in the usual form, by Thomas Spicer, clerk of the circuit court of the United States in and for the district of Maryland, and that the said writ of habeas corpus be returnable at eleven o'clock, on Monday, the 27th of May 1861, at the circuit court room, in the Masonic Hall, in the city of Baltimore, before me, chief justice of the supreme court of United States. R. B. Taney."

In obedience to this order, Mr. Spicer issued the following writ:

"District of Maryland, to wit: The United States of America, to General George Cadwalader, Greeting: You are hereby commanded to be and appear before the Honorable Roger B. Taney, chief justice of the supreme court of the United States, at the United States court-room, in the Masonic Hall, in the city of Baltimore, on Monday, the 27th day of May 1861, at eleven o'clock in the morning, and that you have with you the body of John Merryman, of Baltimore county, and now in your custody, and that you certify and make known the day and cause of the caption and detention of the said John Merryman, and that you then and there, do, submit to, and receive whatsoever the said chief justice shall determine upon concerning you on this behalf, according to law, and have you then and there this writ. Witness, the Honorable R. B. Taney, chief justice of our supreme court, &c. Thomas Spicer, Clerk. Issued 26th May 1861."

The marshal made return that he had served the writ on General Cadwalader, on the same day on which it issued; and filed that return on the 27th May 1861, on which day, at eleven o'clock precisely, the chief justice took his seat on the bench. In a few minutes, Colonel Lee, a military officer, appeared with General Cadwalader's return to the writ, which is as follows:

"Headquarters, Department of Annapolis, Fort McHenry, May 26 1861. To the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, Baltimore, Md.—Sir: The undersigned, to whom the annexed writ, of this date, signed by Thomas Spicer, clerk of the supreme court of the United States, is directed, most respectfully states, that the arrest of Mr. John Merryman, in the said writ named, was not made with his knowledge, or by his order or direction, but was made by Col. Samuel Yohe, acting under the orders of Major-General William H. Keim, both of said officers being in the military service of the United States, but not within the limits of his command. The prisoner was brought to this post on the 20th inst., by Adjutant James Wittimore and Lieut. Wm. H. Abel, by order of Col. Yohe, and is charged with various acts of treason, and with being publicly associated with and holding a commission as lieutenant in a company having in their possession arms belonging to the United States, and avowing his purpose of armed hostility against the government. He is also informed that it can be clearly established, that the prisoner has made often and unreserved declarations of his association with this organized force, as being in avowed hostility to the government, and in readiness to cooperate with those engaged in the present rebellion against the government of the United States. He has further to inform you, that he is duly authorized by the president of the United States, in such cases, to suspend the writ of habeas corpus, for the public safety. This is a high and delicate trust, and it has been enjoined upon him that it should be executed with judgment and discretion, but he is nevertheless also instructed that in times of civil strife, errors, if any, should be on the side of the safety of the country. He most respectfully submits for your consideration, that those who should co-operate in the present trying and painful position in which our country is placed, should not, by any unnecessary want of confidence in each other, increase our embarrassments. He, therefore, respectfully requests that you will postpone further action upon this case, until he can receive instructions from the president of the United States, when you shall hear further from him. I have the honor to be, with high respect, your obedient servant, George Cadwalader, Brevet Major-General U. S. A. Commanding."

The chief justice then inquired of the officer whether he had brought with him the body of John Merryman, and on being answered that he had no instructions but to deliver the return, the chief
justice said: 'General Cadwalader was commanded to produce the body of Mr. Merryman before me this morning, that the case might be heard, and the petitioner be either remanded to custody, or set at liberty, if held on insufficient grounds; but he has acted in disobedience to the writ, and I therefore direct that an attachment be at once issued against him, returnable before me here, at twelve o'clock to-morrow.' The order was then passed as follows:

'Ordered, that an attachment forthwith issue against General George Cadwalader for a contempt, in refusing to produce the body of John Merryman, according to the command of the writ of habeas corpus, returnable and returned before me to-day, and that said attachment be returned before me at twelve o'clock to-morrow, at the room of the circuit court. R. B. Taney. Monday, May 27 1861.'

The clerk issued the writ of attachment as directed. At twelve o'clock, on the 28th May 1861, the chief justice again took his seat on the bench, and called for the marshal's return to the writ of attachment. It was as follows:

'I hereby certify to the Honorable Roger B. Taney, chief justice of the supreme court of the United States, that by virtue of the within writ of attachment, to me directed, on the 27th day of May 1861, I proceeded, on this 28th day of May 1861, to Fort McHenry, for the purpose of serving the said writ. I sent in my name at the outer gate; the messenger returned with the reply, 'that there was no answer to my card,' and therefore, I could not serve the writ, as I was commanded. I was not permitted to enter the gate. So answers Washington Bonifant, U. S. Marshal for the District of Maryland.'

After it was read, the chief justice said, that the marshal had the power to summon the posse comitatus to aid him in seizing and bringing before the court, the party named in the attachment, who would, when so brought in, be liable to punishment by fine and imprisonment; but where, as in this case, the power refusing obedience was so notoriously superior to any the marshal could command, he held that officer excused from doing anything more than he had done. The chief justice then proceeded as follows:

'I ordered this attachment yesterday, because, upon the face of the return, the detention of the prisoner was unlawful, upon the grounds: 1. That the president, under the constitution of the United States, cannot suspend the privilege of the writ of habeas corpus, nor authorize a military officer to do it. 2. A military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offence against the laws of the United States, except in aid of the judicial authority, and subject to its control; and if the party be arrested by the military, it is the duty of the officer to deliver him over immediately to the civil authority, to be dealt with according to law. It is, therefore, very clear that John Merryman, the petitioner, is entitled to be set at liberty and discharged immediately from imprisonment. I forbore yesterday to state orally the provisions of the constitution of the United States, which make those principles the fundamental law of the Union, because an oral statement might be misunderstood in some portions of it, and I shall therefore put my opinion in writing, and file it in the office of the clerk of the circuit court, in the course of this week.'

He concluded by saying, that he should cause his opinion, when filed, and all the proceedings, to be laid before the president, in order that he might perform his constitutional duty, to enforce the laws, by securing obedience to the process of the United States.

HABEAS CORPUS--POWER TO SUSPEND IN TIME OF WAR--PRESIDENT--MILITARY AUTHORITY--SUSPENSION BY CONGRESS.

1. On the 25th May 1861, the petitioner, a citizen of Baltimore county, in the state of Maryland, was arrested by a military force, acting under orders of a major-general of the United States army, commanding in the state of Pennsylvania, and committed to the custody of the general commanding Fort McHenry, within the district of Maryland; on the 26th May 1861, a writ of habeas corpus was issued by the chief justice of the United States, sitting at chambers, directed to the commandant of the fort, commanding him to produce the body of the petitioner before the chief justice, in Baltimore city, on the 27th day of May 1861; on the last-mentioned day, the writ was returned served, and the officer to whom it was
directed declined to produce the petitioner, giving as his excuse the following reasons: 1. That the petitioner was arrested by the orders of the major-general commanding in Pennsylvania, upon the charge of treason, in being 'publicly associated with and holding a commission as lieutenant in a company having in their possession arms belonging to the United States, and avowing his purpose of armed hostility against the government.' 2. That he (the officer having the petitioner in custody) was duly authorized by the president of the United States, in such cases, to suspend the writ of habeas corpus for the public safety. Held, that the petitioner was entitled to be set at liberty and discharged immediately from confinement, upon the grounds following: 1. That the president, under the constitution of the United States, cannot suspend the privilege of the writ of habeas corpus, nor authorize a military officer to do it. 2. That a military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offense against the law of the United States, except in aid of the judicial authority, and subject to its control; and if the party be arrested by the military, it is the duty of the officer to deliver him over immediately to the civil authority, to be dealt with according to law. Approved in Re Kemp, 16 Wis. 367.

**HABEAS CORPUS--POWER TO SUSPEND IN TIME OF WAR--PRESIDENT--MILITARY AUTHORITY--SUSPENSION BY CONGRESS.**

2. Under the constitution of the United States, congress is the only power which can authorize the suspension of the privilege of the writ. Cited in Ex parte Field, Case No. 4,761; McCall v. McDowell, Id. 8,673.

*147 TANEY, Circuit Justice.

The application in this case for a writ of habeas corpus is made to me under the 14th section of the judiciary act of 1789 [1 Stat. 81], which renders effectual for the citizen the constitutional privilege of the writ of habeas corpus. That act gives to the courts of the United States, as well as to each justice of the supreme court, and to every district judge, power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. The petition was presented to me, at Washington, under the impression that I would order the prisoner to be brought before me there, but as he was confined in Fort McHenry, in the city of Baltimore, which is in my circuit, I resolved to hear it in the latter city, as obedience to the writ, under such circumstances, would not withdraw General Cadwalader, who had him in charge, from the limits of his military command.

The petition presents the following case: The petitioner resides in Maryland, in Baltimore county; while peaceably in his own house, with his family, it was at two o'clock on the morning of the 25th of May 1861, entered by an armed force, professing to act under military orders; he was then compelled to rise from his bed, taken into custody, and conveyed to Fort McHenry, where he is imprisoned by the commanding officer, without warrant from any lawful authority.

The commander of the fort, General George Cadwalader, by whom he is detained in confinement, in his return to the writ, does not deny any of the facts alleged in the petition. He states that the prisoner was arrested by order of General Keim, of Pennsylvania, and conducted as aforesaid to Fort McHenry, by his order, and placed in his (General Cadwalader's) custody, to be there detained by him as a prisoner.

A copy of the warrant or order under which the prisoner was arrested was demanded by his counsel, and refused: and it is not alleged in the return, that any specific act, constituting any offense against the laws of the United States, has been charged against him upon oath, but he appears to have been arrested upon general charges of treason and rebellion, without proof, and without giving the names of the witnesses, or specifying the acts which, in the judgment of the military officer, constituted these crimes. Having the prisoner thus in custody upon these vague and unsupported accusations, he refuses to obey the writ of habeas corpus, upon the ground that he is duly authorized by the president to suspend it.

The case, then, is simply this: a military officer, residing in Pennsylvania, issues an order to arrest a citizen of Maryland, upon vague and indefinite charges, without any proof, so far as appears; under this order, his house is entered in the night, he is seized *148 as a prisoner, and conveyed to Fort McHenry, and there kept in close confinement; and
when a habeas corpus is served on the commanding officer, requiring him to produce the prisoner before a justice of the supreme court, in order that he may examine into the legality of the imprisonment, the answer of the officer, is that he is authorized by the president to suspend the writ of habeas corpus at his discretion, and in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ.

As the case comes before me, therefore, I understand that the president not only claims the right to suspend the writ of habeas corpus himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him. No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the president claimed this power, and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands, that the privilege of the writ could not be suspended, except by act of congress.

When the conspiracy of which Aaron Burr was the head, became so formidable, and was so extensively ramified, as to justify, in Mr. Jefferson's opinion, the suspension of the writ, he claimed, on his part, no power to suspend it, but communicated his opinion to congress, with all the proofs in his possession, in order that congress might exercise its discretion upon the subject, and determine whether the public safety required it. And in the debate which took place upon the subject, no one suggested that Mr. Jefferson might exercise the power himself, if, in his opinion, the public safety demanded it.

Having, therefore, regarded the question as too plain and too well settled to be open to dispute, if the commanding officer had stated that, upon his own responsibility, and in the exercise of his own discretion, he refused obedience to the writ, I should have contented myself with referring to the clause in the constitution, and to the construction it received from every jurist and statesman of that day, when the case of Burr was before them. But being thus officially notified that the privilege of the writ has been suspended, under the orders, and by the authority of the president, and believing, as I do, that the president has exercised a power which he does not possess under the constitution, a proper respect for the high office he fills, requires me to state plainly and fully the grounds of my opinion, in order to show that I have not ventured to question the legality of his act, without a careful and deliberate examination of the whole subject.

The clause of the constitution, which authorizes the suspension of the privilege of the writ of habeas corpus, is in the 9th section of the first article. This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department. It begins by providing 'that all legislative powers therein granted, shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.' And after prescribing the manner in which these two branches of the legislative department shall be chosen, it proceeds to enumerate specifically the legislative powers which it thereby grants [and legislative powers which it expressly prohibits]; [FN2] and at the conclusion of this specification, a clause is inserted giving congress 'the power 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.'

FN2 From 9 Am. Law Reg. 524.

The power of legislation granted by this latter clause is, by its words, carefully confined to the specific objects before enumerated. But as this limitation was unavoidably somewhat indefinite, it was deemed necessary to guard more effectually certain great cardinal principles, essential to the liberty of the citizen, and to the rights and equality of the states, by denying to congress, in express terms, any power of legislation over them. It was apprehended, it seems, that such legislation might be attempted, under the pretext that it was necessary and proper to carry into execution the powers granted; and it was determined, that there should be no room to doubt, where rights of such vital importance were concerned; and accordingly, this clause is immediately followed by an enumeration of certain subjects, to which the
powers of legislation shall not extend. The great
importance which the framers of the constitution
attached to the privilege of the writ of habeas
corpus, to protect the liberty of the citizen, is
proved by the fact, that its suspension, except in
cases of invasion or rebellion, is first in the list of
prohibited powers; and even in these cases the
power is denied, and its exercise prohibited, unless
the public safety shall require it.

It is true, that in the cases mentioned, congress is,
of necessity, the judge of whether the public safety
does or does not require it; and their judgment is
consclusive. But the introduction of these words is a
standing admonition to the legislative body of the
danger of suspending it, and of the extreme caution
they should exercise, before they give the
government of the United States such power over
the liberty of a citizen.

It is the second article of the constitution that
provides for the organization of the executive
department, enumerates the powers *149
conferred on it, and prescribes its duties. And if
the high power over the liberty of the citizen now
claimed, was intended to be conferred on the
president, it would undoubtedly be found in plain
words in this article; but there is not a word in it
that can furnish the slightest ground to justify the
exercise of the power.

The article begins by declaring that the executive
power shall be vested in a president of the United
States of America, to hold his office during the
term of four years; and then proceeds to prescribe
the mode of election, and to specify, in precise and
plain words, the powers delegated to him, and the
duties imposed upon him. The short term for
which he is elected, and the narrow limits to which
his power is confined, show the jealousy and
apprehension of future danger which the framers
of the constitution felt in relation to that department
of the government, and how carefully they withheld
from it many of the powers belonging to the
executive branch of the English government which
were considered as dangerous to the liberty of the
subject; and conferred (and that in clear and
specific terms) those powers only which were
deemed essential to secure the successful operation
of the government.

He is elected, as I have already said, for the brief
term of four years, and is made personally
responsible, by impeachment, for malfeasance in
office; he is, from necessity, and the nature of his
duties, the commander-in-chief of the army and
navy, and of the militia, when called into actual
service; but no appropriation for the support of the
army can be made by congress for a longer term
than two years, so that it is in the power of the
succeeding house of representatives to withhold the
appropriation for its support, and thus disband it,
if, in their judgment, the president used, or
designed to use it for improper purposes. And
although the militia, when in actual service, is
under his command, yet the appointment of the
officers is reserved to the states, as a security
against the use of the military power for purposes
dangerous to the liberties of the people, or the
rights of the states.

So too, his powers in relation to the civil duties and
authority necessarily conferred on him are carefully
restricted, as well as those belonging to his military
character. He cannot appoint the ordinary officers
of government, nor make a treaty with a foreign
nation or Indian tribe, without the advice and
consent of the senate, and cannot appoint even
inferior officers, unless he is authorized by an act of
congress to do so. He is not empowered to arrest
any one charged with an offence against the United
States, and whom he may, from the evidence before
him, believe to be guilty; nor can he authorize any
officer, civil or military, to exercise this power, for
the fifth article of the amendments to the
constitution expressly provides that no person 'shall
be deprived of life, liberty or property, without due
process of law'—that is, judicial process.

Even if the privilege of the writ of habeas corpus
were suspended by act of congress, and a party not
subject to the rules and articles of war were
afterwards arrested and imprisoned by regular
judicial process, he could not be detained in prison,
or brought to trial before a military tribunal, for
the article in the amendments to the constitution
immediately following the one above referred to
(that is, the sixth article) provides, that 'in all
criminal prosecutions, the accused shall enjoy the
right to a speedy and public trial by an impartial
jury of the state and district wherein the crime shall
have been committed, which district shall have
been previously ascertained by law; and to be
informed of the nature and cause of the accusation;
to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.'

The only power, therefore, which the president possesses, where the 'life, liberty or property' of a private citizen is concerned, is the power and duty prescribed in the third section of the second article, which requires 'that he shall take care that the laws shall be faithfully executed.' He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the co-ordinate branch of the government to which that duty is assigned by the constitution. It is thus made his duty to come in aid of the judicial authority, if it shall be resisted by a force too strong to be overcome without the assistance of the executive arm; but in exercising this power he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments. With such provisions in the constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, except in aid of the judicial power. He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law.

Nor can any argument be drawn from the nature of sovereignty, or the necessity of government, for self-defence in times of tumult and danger. The government of the United States is one of delegated and limited powers; it derives its existence and authority altogether from the constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted; for *150 the tenth article of the amendments to the constitution, in express terms, provides that 'the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people.'

Indeed, the security against imprisonment by executive authority, provided for in the fifth article of the amendments to the constitution, which I have before quoted, is nothing more than a copy of a like provision in the English constitution, which had been firmly established before the declaration of independence. Blackstone states it in the following words: 'To make imprisonment lawful, it must be either by process of law from the courts of judicature, or by warrant from some legal officer having authority to commit to prison.' 1 Bl. Comm. 137.

The people of the United Colonies, who had themselves lived under its protection, while they were British subjects, were well aware of the necessity of this safeguard for their personal liberty. And no one can believe that, in framing a government intended to guard still more efficiently the rights and liberties of the citizen, against executive encroachment and oppression, they would have conferred on the president a power which the history of England had proved to be dangerous and oppressive in the hands of the crown; and which the people of England had compelled it to surrender, after a long and obstinate struggle on the part of the English executive to usurp and retain it.

The right of the subject to benefit of the writ of habeas corpus, it must be recollected, was one of the great points in controversy, during the long struggle in England between arbitrary government and free institutions, and must therefore have strongly attracted the attention of the statesmen engaged in framing a new and, as they supposed, a freer government than the one which they had thrown off by the revolution. From the earliest history of the common law, if a person were imprisoned, no matter by what authority, he had a right to the writ of habeas corpus, to bring his case before the king's bench; if no specific offence were charged against him in the warrant of commitment, he was entitled to be forthwith discharged; and if an offence were charged which was bailable in its character, the court was bound to set him at liberty on bail. The most exciting contests between the crown and the people of England, from the time of Magna Charta, were in relation to the privilege of this writ, and they continued until the passage of the statute of 31 Car. II., commonly known as the great habeas corpus act.
This statute put an end to the struggle, and finally and firmly secured the liberty of the subject against the usurpation and oppression of the executive branch of the government. It nevertheless conferred no new right upon the subject, but only secured a right already existing; for, although the right could not justly be denied, there was often no effectual remedy against its violation. Until the statute of 13 Wm. III., the judges held their offices at the pleasure of the king, and the influence which he exercised over timid, timeserving and partisan judges, often induced them, upon some pretext or other, to refuse to discharge the party, although entitled by law to his discharge, or delayed their decision, from time to time, so as to prolong the imprisonment of persons who were obnoxious to the king for their political opinions, or had incurred his resentment in any other way.

The great and inestimable value of the habeas corpus act of the 31 Car. II. is, that it contains provisions which compel courts and judges, and all parties concerned, to perform their duties promptly, in the manner specified in the statute.

A passage in Blackstone's Commentaries, showing the ancient state of the law on this subject, and the abuses which were practised through the power and influence of the crown, and a short extract from Hallam's Constitutional History, stating the circumstances which gave rise to the passage of this statute, explain briefly, but fully, all that is material to this subject.

Blackstone says: "To assert an absolute exemption from imprisonment in all cases is inconsistent with every idea of law and political society, and in the end would destroy all civil liberty by rendering its protection impossible. But the glory of the English law consists in clearly defining the times, the causes and the extent, when, wherefore and to what degree, the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made, that the court, upon a habeas corpus, may examine into its validity, and according to the circumstances of the case, may discharge, admit to bail or remand the prisoner.

And yet even in the reign of Charles I. the court of kings bench, relying on some arbitrary precedents (and those perhaps misunderstood) determined that they would not, upon a habeas corpus, either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king or by the lords of the privy council. This drew on a parliamentary inquiry, and produced the 'Petition of Right' (3 Car. I.) which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when, in the following year, Mr. Selden and others were committed by the lords of the council, in pursuance of his majesty's special command, under a general charge of 'notable contempts, and stirring up sedition against the king and government,' the judges delayed for two terms (including also the long vacation) to deliver an opinion how far such a charge was bailable; and when at length they agreed that it was, they however annexed a condition of finding sureties for their good behavior, which still protracted their imprisonment, the chief justice, Sir Nicholas Hyde, at the same time, declaring that if they were again remanded for that cause, perhaps the court would not afterwards grant a habeas corpus, being already made acquainted with the cause of the imprisonment.' But this was heard with indignation and astonishment by every lawyer present, according to Mr. Selden's own account of the matter, whose resentment was not cooled at the distance of four and twenty years.' 3 Bl. Comm. 133, 134.

It is worthy of remark, that the offences charged against the prisoner in this case, and relied on as a justification for his arrest and imprisonment, in their nature and character, and in the loose and vague manner in which they are stated, bear a striking resemblance to those assigned in the warrant for the arrest of Mr. Selden. And yet, even at that day, the warrant was regarded as such a flagrant violation of the rights of the subject that the delay of the time-serving judges to set him at liberty, upon the habeas corpus issued in his behalf, excited the universal indignation of the bar.

The extract from Hallam's Constitutional History is equally impressive and equally in point: 'It is a very common mistake, and that not only among foreigners, but many from whom some knowledge of our constitutional laws might be expected, to suppose that this statute of Car. II. enlarged in a great degree our liberties, and forms a sort of epoch in their history. But though a very beneficial

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enactment, and eminently remedial in many cases of illegal imprisonment, it introduced no new principle, nor conferred any right upon the subject. From the earliest records of the English law, no freeman could be detained in prison, except upon a criminal charge or conviction, or for a civil debt. In the former case it was always in his power to demand of the court of king's bench a writ of habeas corpus ad subjiciendum, directed to the person detaining him in custody, by which he was enjoined to bring up the body of the prisoner, with the warrant of commitment, that the court might judge of its sufficiency, and remand the party, admit him to bail, or discharge him, according to the nature of the charge. This writ issued of right, and could not be refused by the court. It was not to bestow an immunity from arbitrary imprisonment, which is abundantly provided for in Magna Charta (if indeed it is not more ancient), that the statute of Car. II. was enacted, but to cut off the abuses by which the government's lust of power, and the servile subserviency of the crown lawyers, had impaired so fundamental a privilege. 3 Hall. Cons. Hist. 19.

While the value set upon writ in England has been so great, that the removal of the abuses which embarrassed its employment has been looked upon as almost a new grant of liberty to the subject, it is not to be wondered at, that the continuance of the writ thus made effective should have been the object of the most jealous care. Accordingly, no power in England short of that of parliament can suspend or authorize the suspension of the writ of habeas corpus. I quote again from Blackstone (1 Bl. Comm. 136): 'But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient. It is the parliament only or legislative power that, whenever it sees proper, can authorize the crown by suspending the habeas corpus for a short and limited time, to imprison suspected persons without giving any reason for so doing.' If the president of the United States may suspend the writ, then the constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown; a power which the queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign even in the reign of Charles the First.

But I am not left to form my judgment upon this great question, from analogies between the English government and our own, or the commentaries of English jurists, or the decisions of English courts, although upon this subject they are entitled to the highest respect, and are justly regarded and received as authoritative by our courts of justice. To guide me to a right conclusion, I have the Commentaries on the Constitution of the United States of the late Mr. Justice Story, not only one of the most eminent jurists of the age, but for a long time one of the brightest ornaments of the supreme court of the United States; and also the clear and authoritative decision of that court itself, given more than half a century since, and conclusively establishing the principles I have above stated.

Mr. Justice Story, speaking, in his Commentaries, of the habeas corpus clause in the constitution, says: 'It is obvious that cases of a peculiar emergency may arise, which may justify, nay, even require, the temporary suspension of any right to the writ. But as it has frequently happened in foreign countries, and even in England, that the writ has, upon various pretexts and occasions, been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design, and sometimes because they were forgotten, the right to suspend it is expressly confined to cases of rebellion or invasion, where the public safety may require it. A very just and wholesome restraint, which cuts down a blow a fruitful means of oppression, capable of being abused, in bad times, to the worst of purposes. Hitherto, no suspension of the writ has ever been authorized by congress, since the establishment of the constitution. It would seem, as the power *152 is given to congress to suspend the writ of habeas corpus, in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body.' 3 Story, Comm. Const. s 1336.

And Chief Justice Marshall, in delivering the opinion of the supreme court in the case of Ex parte Bollin and Swartwout, uses this decisive language, in 4 Cranch [8 U. S.] 95: 'It may be worthy of remark, that this act (speaking of the one under which I am proceeding) was passed by the first congress of the United States, sitting under a constitution which had declared 'that the privilege of the writ of habeas corpus should not be

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suspended, unless when, in cases of rebellion or invasion, the public safety may require it.' Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means, by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they gave to all the courts the power of awarding writs of habeas corpus.' And again on page 101: 'If at any time, the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislative will be expressed, this court can only see its duty, and must obey the laws.' I can add nothing to these clear and emphatic words of my great predecessor.

But the documents before me show, that the military authority in this case has gone far beyond the mere suspension of the privilege of the writ of habeas corpus. It has, by force of arms, thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers. For, at the time these proceedings were had against John Merryman, the district judge of Maryland, the commissioner appointed under the act of congress, the district attorney and the marshal, all resided in the city of Baltimore, a few miles only from the home of the prisoner. Up to that time, there had never been the slightest resistance or obstruction to the process of any court or judicial officer of the United States, in Maryland, except by the military authority. And if a military officer, or any other person, had reason to believe that the prisoner had committed any offence against the laws of the United States, it was his duty to give information of the fact and the evidence to support it to the district attorney; it would then have become the duty of that officer to bring the matter before the district judge or commissioner, and if there was sufficient legal evidence to justify his arrest, the judge or commissioner would have issued his warrant to the marshal to arrest him; and upon the hearing of the case, would have held him to bail, or committed him for trial, according to the character of the offence, as it appeared in the testimony, or would have discharged him immediately, if there was not sufficient evidence to support the accusation. There was no danger of any obstruction or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military.

Yet, under these circumstances, a military officer, stationed in Pennsylvania, without giving any information to the district attorney, and without any application to the judicial authorities, assumes to himself the judicial power in the district of Maryland; undertakes to decide what constitutes the crime of treason or rebellion; what evidence (if indeed he required any) is sufficient to support the accusation and justify the commitment; and commits the party, without a hearing, even before himself, to close custody, in a strongly garrisoned fort, to be there held, it would seem, during the pleasure of those who committed him.

The constitution provides, as I have before said, that 'no person shall be deprived of life, liberty or property, without due process of law.' It declares that 'the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' It provides that the party accused shall be entitled to a speedy trial in a court of justice.

These great and fundamental laws, which congress itself could not suspend, have been disregarded and suspended, like the writ of habeas corpus, by a military order, supported by force of arms. Such is the case now before me, and I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found. [FN3]

FN3 The constitution of the United States is

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founded upon the principles of government set forth and maintained in the Declaration of Independence. In that memorable instrument the people of the several colonies declared, that one of the causes which 'impelled' them to 'dissolve the political bands' which connected them with the British nation, and justified them in withdrawing their allegiance from the British sovereign, was that 'he (the king) had affected to render the military independent of, and superior to, the civil power.' *153

In such a case, my duty was too plain to be mistaken. I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him; I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the circuit court of the United States for the district of Maryland, and direct the clerk to transmit a copy, under seal, to the president of the United States. It will then remain for that high officer, in fulfilment of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced.

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