

B. Lincoln and the Suspension of Habeas Corpus⁵⁵

On April 27, 1861, President Lincoln issued an order to Commanding General Winfield Scott authorizing him to suspend the writ of habeas corpus (by which persons deprived of liberty can challenge the legality of their detention in a court). On May 25, military troops arrested John Merryman for participating in the destruction of railroad bridges following an antiwar riot in Baltimore.

The Constitution, in section 9 of Article I, specifically authorizes the suspension of habeas corpus "when in cases or rebellion or invasion the public safety may require it." The question is: Who can make such a determination?

55. See Carl Swisher, *5 History of the Supreme Court of the United States: The Taney Period 1836-64*, Chapter 14 (1974).

1. *Chief Justice Taney on the Exclusive Authority of Congress*

Merryman was a prominent politician; his father and Chief Justice Taney had attended Dickinson College together. Merryman's lawyer filed a writ of habeas corpus before the Chief Justice. The writ was addressed to General George Cadwalader, who refused either to attend the May 27 hearing before Taney or to produce Merryman, who ignored it, refusing even to attend the May 27 hearing. Cadwalader refused to comply with a second order to be present the following day. Upon further noncompliance, Taney read a statement asserting that Merryman's detention was illegal on two grounds:

1. The President, under the Constitution and laws of the United States, cannot suspend the privilege of the writ of habeas corpus, nor authorize any military officer to do so.
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 and of the judicial authority and subject to its control—and if the party is 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.

Taney indicated his intention to write a fuller opinion elaborating his conclusions to “report them with these proceedings to the President of the United States, and call upon him to perform his constitutional duty to enforce the laws. In other words, to enforce the process of this Court.” He issued his opinion the following week in *Ex parte Merryman*, 17 F. Cas. 144 (1861):

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. . . . I certainly listened to [the argument] 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. . . . [B]elieving, 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. . . .

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 is the second article of the constitution that provides for the organization of the executive department, enumerates the powers 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 here is not a word in it that can furnish the slightest ground to justify the exercise of the power.

. . . 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, 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 power; 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 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, not prohibited by it to the states, are reserved to the states, respectively, or to the people."

... The right of the subject to the 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 one 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. . . .

[Blackstone writes that] "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 [suspension of habeas corpus] 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.

Ultimately, the Administration indicted Merryman for treason by a civil grand jury. He was released on bail and never tried.

2. *The President Asserts Executive Authority*

Lincoln did not respond directly to Taney, but delivered this message to Congress on July 4:

Soon after the first call for militia, it was considered a duty to authorize the Commanding General, in proper cases, according to his discretion, to suspend the privilege of the writ of habeas corpus; or, in other words, to arrest, and detain, without

resort to the ordinary processes and forms of law, such individuals as he might deem dangerous to the public safety. This authority has purposely been exercised but very sparingly. Nevertheless, the legality and propriety of what has been done under it, are questioned; and the attention of the country has been called to the proposition that one who is sworn to "take care that the laws be faithfully executed," should not himself violate them. Of course some consideration was given to the questions of power, and propriety, before this matter was acted upon. The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practically, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated? To state the question more directly, are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it? But it was not believed that this question was presented. It was not believed that any law was violated. The provision of the Constitution . . . is equivalent to a provision — is a provision — that such privilege may be suspended when, in cases of rebellion, or invasion, the public safety does require it. 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. 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, as was intended in this case, by the rebellion.

Discussion

It is not clear whether Congress' retroactive approval, on August 6, of "all the acts, proclamations, and orders of the President . . . respecting the army and navy of the United States" included the suspension of the writ of habeas corpus. On March 3, 1863, Congress passed a habeas corpus act providing that "during the present rebellion the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States or any part thereof." Does this congressional authorization affect the power that President Lincoln held prior to its enactment? If so, was his original order suspending habeas corpus unconstitutional? (Some have argued that the suspension was legitimate only so long as Congress was not in session, but that Congress's failure specifically to enact a suspension when it reconvened invalidated further enforcement of the Presidential order.)