LINCOLN'S SUSPENSION OF HABEAS CORPUS AS VIEWED BY CONGRESS. PP.217-283. [PP.5-71]

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LINCOLN'S SUSPENSION OF HABEAS CORPUS.

INTRODUCTION.

The suspension of the privilege of the writ of habeas corpus by President Lincoln in 1861 gave rise to a considerable mass of pamphlets, periodical articles and more ephemeral writings,[1] and to a large number of legal decisions.[2] In these, considerations of law, history and expediency are marshalled in the main against but to some extent for the claim of the President to suspend under the Constitution. A careful working-over of this material led the writer to the conclusion that the Gordian knot[3] of habeas corpus suspension in the United States is extremely difficult if not impossible to untie. Further investigation led to the belief that a detailed historical exposition of the attitude of Congress toward Lincoln's suspension of the privilege of the writ would not only cast light upon the psychology of Congress in war-time, but might show that the knot was cut while the pamphleteers were still at work.

The only possible federal depositories of the power to suspend are Congress and the President. Until 1861 the view that Congress alone could suspend was generally accepted, or

[1] See list of pamphlets, etc., appended to S. G. Fisher's *The Suspension of Habeas Corpus during the War of the Rebellion*, in *Political Science Quarterly*, vol. III, pp. 485–488; Democratic State Platforms, 1861, 1862; *Congressional Globe*, 37th Congress, *passim*.

[2] See Law Digests *sub* Habeas Corpus.

[3] Cf. Lieber to Sumner, January 8, 1863: "Every one who maintains that it can be proved with absolute certainty that the framers of the Constitution meant that Congress alone should have the power [to suspend the privilege of the writ] . . . is in error . . . It cannot mathematically be proved from the Constitution itself, or from analogy which does not exist, or from the debates, or history." *Life and Letters of Francis Lieber*, ed. by Perry, 1882, pp. 328–329.

at least was nowhere controverted.[4] The President's action in 1861 was a practical denial of the correctness of this view. The stand which Congress took on this seeming encroachment upon its hitherto unquestioned jurisdiction manifestly merits careful examination. If Congress acquiesced in Presidential suspension, if, as this essay attempts to demonstrate, it conceded the President's right under the given circumstances to suspend, the historical precedent thus established must be given great weight. It is true that the conditions of the time were abnormal, and true that "acts committed in time of war, under the pressure of necessity and self-preservation, are not likely to ripen into precedents for times of peace."[5] But federal suspension of the privilege of the writ of habeas corpus cannot constitutionally occur in time of peace; it is a proceeding which, fortunately for the people of the United States, can be resorted to only in most abnormal times. The importance of the decision of Congress in 1861–1863 upon the question of the President's right to suspend is therefore not weakened by the conditions under which the decision was rendered.

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[4] "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." Taney, C. J., in *ex parte* Merryman, Taney's *Circuit Court Decisions*, p. 255.

"The better opinion . . . among judges and lawyers and constitutional commentators, surely is that the writ of *habeas corpus* was never intended by the Constitution to be suspended except in pursuance of an act of Congress. The courts have so held, judges have so stated, commentators have so written, and not a commentator can be found, who has written on the Constitution before this rebellion, who ever disputed that proposition. There is great diversity of opinion in the country now." Trumbull, in the Senate, December 9, 1862. *Globe*, 3d. S. 37th Cong. p. 31.

[5] Lyman Tremain in N. Y. *Daily Tribune*, September 11, 1861.

CHAPTER I.

THE HABEAS CORPUS PROBLEM.

The exclusive right of Congress to suspend the privilege of the writ of habeas corpus[1] was challenged by President Lincoln at the outset of the Civil War. April 27, 1861, apprehensive for the safety of the isolated capital, the President issued an order authorizing General Winfield Scott to suspend the writ of habeas corpus. The order, which practically empowered General Scott to arrest and detain at will,[2] was as follows: "You are engaged in repressing an insurrection against the laws of the United States. If at any point on or in the vicinity of any military line which is now or which shall be used between the city of Philadelphia and the city of Washington you find resistance which renders it necessary to suspend the writ of *habeas corpus* for the public safety, you personally or through the officer in command at the point where resistance occurs, are authorized to suspend that writ."[3]

[1] The customary phrasing is "suspend the writ of habeas corpus."

[2] It is still a disputed point in legal theory whether the suspension of the privilege of the writ authorizes arrests. The *obiter dictum* of the Supreme Court, in *ex parte* Milligan, that the suspension "does not authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty," was a flat denial of the correctness of the practice of the Civil War. Four minority justices, however, including Chief Justice Chase, upheld the legality of the practice. See 4 *Wallace*, pp. 115, 137. The President in his message of the extra session, July 4, 1861, said that he had authorized General Scott to suspend the privilege of the writ, or, as he explained, "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." *Works*, vol. II, p. 59. See also the President's letter to Erastus Corning and others, June 12, 1863. *Ibid.* p. 348. See also Seward to Lyons, October 14, 1861. 115 *War Records*, p. 633.

[3] 115 *War Records*, p. 19. The words, "on or in the vicinity of any military line" etc., were a euphemism for "anywhere in Maryland." See, for example, Latham's statement in the Senate, July 20, 1861. *Globe*, 1st S. 37th Cong. Appendix, p. 19.

Hard upon this order came the proclamation of May 10, 1861, in which the President authorized the United States commander on the Florida coast to suspend the writ, commanding him "to permit no person to exercise any office or authority upon the islands of Key West, Tortugas and Santa Rosa which may be inconsistent with the laws and the Constitution of the United States, authorizing him at the same time if he shall find it nesessary to suspend there the writ of *habeas corpus* and to remove from the vicinity of the United States fortresses all dangerous or suspected persons."[4]

These are the two authorizations of suspension which were the text for the habeas corpus debates in the first session of the thirty-seventh Congress. It is not necessary to refer specifically to any of the subsequent orders.[5] The practice which was almost straightway adopted was to dispense with any general order to suspend, and to make extraordinary arrests whenever and wherever necessary, the theory being that such arrests were *ipso facto* suspensions of the writ. Except at the very beginning of the war there was no hard and fast line to be determined by reference to this or that particular order of suspension beyond which the Government could not consistently, or would not, make summary arrests. No one, by virtue of residence in even the most peaceful portions of Union territory, was safe from executive apprehension.

The extra session of Congress began July 4, 1861, and July 5 the message of the President was read in both Houses.[6] In it he reviewed, among other matters, the measures he had taken to meet the crisis. The relevant portion of the message is as follows: "Recurring to the action of the Government, it may be stated that at first a call was made for seventy-five thousand militia; and rapidly following this a proclamation was issued for closing the ports of the insurrectionary districts by proceedings in the nature of a blockade. So far all was believed to be strictly legal. At this point the insurrectionists announced their purpose to enter upon the practise of privateering.

[4] 115 *War Records*, p. 19.
[5] They may be found in the *War Records*.
[6] *Globe*, 1st S. 37th Cong. pp. 11, 13.

"Other calls were made for volunteers to serve for three years, unless sooner discharged, and also for large additions to the regular Army and Navy. These measures, whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then as now that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress.

"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.[7] 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

[7] The subject of habeas corpus suspension appears to have been first debated by President and Cabinet when the special session of the Maryland Legislature, called for April 26, was under consideration. It was believed that the Legislature would probably attempt some act of secession. The question was would it not be wise to prevent the meeting of the Legislature. The President decided, after Attorney-General Bates had submitted his legal notes and other Cabinet officers had given their advice, that it would be neither justifiable nor effective to take the proposed action against the Legislature, which had, he said, clearly a legal right to assemble. April 25, he gave his special directions to General Scott: "I therefore conclude that it is only left to the commanding general to watch and await their action, which, if it shall be to arm their people against the United States, he is to adopt the most prompt and efficient means to counteract, even if necessary to the bombardment of their cities, and, in the extremest necessity, the suspension of the writ of *habeas corpus.*" *Works,* vol. II, p. 38; Nicolay and Hay, vol. IV, p. 167. No authority was exercised under this order. Such an attitude toward suspension must have seemed strange a few months later.