

THE GREAT SUSPENDER'S UNCONSTITUTIONAL SUSPENSION OF THE GREAT WRIT

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INTRODUCTION

The Emancipation Proclamation leads many Americans to regard Abraham Lincoln as the “Great Emancipator.” Others are not so laudatory, doubting whether he did enough to end the South’s “peculiar institution.”¹ These observers regard Lincoln as principally concerned with saving the Union, rather than ending slavery.

There is a more fitting title for Lincoln, one utterly beyond cavil. Call him “The Great Suspender of the Great Writ.” He undoubtedly earned this sobriquet, having suspended the privilege of the writ of habeas corpus or delegated suspension authority almost a dozen times.² He also has the distinction of being the only President ever to suspend the privilege of the Great Writ unilaterally and the only one to do so throughout the nation.

If it can be said that massive crises often require massive suspensions of civil liberties, then Lincoln was up to the task. After initial squeamishness, he soon betrayed little doubt about the need for suspensions.³ While some have quibbled with his suspensions, arguing that certain aspects of them were too broad or unnecessary, it is too easy to play the Monday-morning General and second-guess the Commander in Chief some one-and-a-half centuries after that terrible War. It also is hard to argue with the ultimate success of his Civil War.

Instead, this article discusses the antecedent question, namely whether Lincoln had constitutional authority to suspend the privilege of the writ.⁴ Adept lawyers, including Lincoln himself,

¹ See, e.g., Speech on the Reception of Abolition Petitions (Feb. 6, 1837), in 2 THE WORKS OF JOHN C. CALHOUN: SPEECHES OF JOHN C. CALHOUN DELIVERED IN THE HOUSE OF REPRESENTATIVES, AND IN THE SENATE OF THE UNITED STATES 625, 626, 633 (Richard K. Cralle ed., 1888).

² MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 90–91 (1991) (tallying eight suspensions prior to 1863 and one in 1864).

³ See *id.* at 7, 11 (noting that Lincoln had added the qualifier “extremest necessity” in authorizing a general to suspend, but later had “overcome any initial hesitation”).

⁴ Some have suggested that various pre-existing statutes authorized Lincoln to suspend habeas corpus, particularly the Militia Acts. See, e.g., Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 176–77 (2004); see also Ku Klux Klan (Civil Rights) Act of 1871, ch. 22, §§ 3–4, 17 Stat. 13, 14–15 (expired, in part, 1873 and current version at 10 U.S.C. § 333); Suppression of the Rebellion Act of 1861, ch. 25, 12 Stat. 281 (codified at 10 U.S.C. §§ 331–335); Insurrection Act of 1807, ch. 39, 2 Stat. 443 (codified at 10 U.S.C. §§ 331–335); Militia Act of 1795, ch. 36, 1 Stat. 424 (repealed, in part,

have argued that the Constitution authorizes the President to suspend the privilege. Yet if we look to the original understanding of the Constitution as our polestar, Lincoln and his talented acolytes were (and still are) wrong. The Chief Executive has never had the constitutional power to suspend the privilege of the writ of habeas corpus. With all due respect, the question is not even a close one. Under the original Constitution, no matter how dire the situation, only Congress could suspend the privilege of the writ of habeas corpus.⁵

I. THE GREAT SUSPENDER IN ACTION

Prior to the Civil War, neither the President nor Congress had

1861 and current version at 10 U.S.C. §§ 331–335 (2006)); Calling Forth Act of 1792, ch. 28, 1 Stat. 264 (repealed 1795). Yet this clever argument seems dubious, for these acts speak of using armed force to execute the laws, suppress rebellions, and repel invasions; none speak of suspending the privilege. In any event, participants in the debates about Lincoln's actions discussed the constitutional questions, probably because Lincoln grounded his suspensions in his supposed constitutional authority, never claiming that existing statutes granted him authority to suspend. Indeed, congressional debates about whether to enact a suspension statute never seemed to discuss the possibility that existing statutes already conveyed suspension authority, suggesting that members did not believe that those laws conveyed to the President a power to suspend habeas corpus.

⁵ When this article refers to “suspending habeas corpus,” “suspending the writ,” or “suspending the privilege,” it means that someone has authorized the arrest and indefinite detention of individuals without need for any trial. Hence, this article sides with Amanda Tyler's claim about the traditional effect of suspending habeas corpus and disagrees with Trevor Morrison's assertions. Compare Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 604 (2009) [hereinafter Tyler I] (contending that the suspension of habeas corpus “lawfully expands executive power to arrest and detain during the emergency”), with Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1552–53 (2007) (claiming that suspension of habeas corpus “affect[s] only the habeas remedy itself”).

Moreover, the article also assumes that, contrary to Chief Justice John Marshall's claim in *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807), the Constitution itself guarantees that any federal court has the right to issue writs of habeas corpus. Marshall claimed that the habeas guarantee was inchoate until Congress granted statutory habeas authority to the federal courts. Without such statutory grant, the courts would lack the ability to issue writs of habeas corpus, even though there was no suspension. *Id.* If Marshall's view of implicit habeas guarantee is correct, it follows, a fortiori, that the President cannot suspend any privilege of the writ of habeas corpus that is statutorily conveyed. The President lacks a constitutional power to suspend (and thereby emasculate) any statute. The President can no more authorize detentions contrary to a statute requiring release (the essence of a statute authorizing writs of habeas corpus) than he can authorize the non-expenditure of funds in the face of a mandatory appropriation.

suspended the writ.⁶ The first attempted suspension occurred in Congress, after Thomas Jefferson's message on the Aaron Burr conspiracy.⁷ Seeking to ensure that the alleged conspirators remained in custody, Jefferson's allies in Congress unsuccessfully urged a legislative suspension.⁸ Throughout their efforts, Jefferson never acted as if he could suspend unilaterally.⁹ In the closing scenes of the War of 1812, Major General Andrew Jackson "declared martial law in New Orleans," effectively suspending the writ.¹⁰ Yet his was the act of a lone military commander, and one that President James Madison criticized as unconstitutional.¹¹

Confronted with the firing on Fort Sumter and the supposed secession of several states, Abraham Lincoln was the first President to suspend habeas corpus. His first suspension, in April 1861, was a delegation of suspension authority to General Winfield Scott.¹² The General was to suspend if necessary to

⁶ ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT: WITH A VIEW OF THE LAW OF EXTRADITION OF FUGITIVES 119 (Frank H. Hurd ed., 2d ed. 1876). Congress had enacted two statutes instructing courts not to release detainees using writs of habeas corpus. One had to do with the imprisonment of sailors who made false claims about the seaworthiness of vessels and refused (or were unable) to pay a fine. See Act of July 20, 1790, ch. 29, § 3, 1 Stat. 131, 133. The other Act had to do with keeping bankrupts in jail when they failed to answer questions put to them by bankruptcy commissioners. Act of Apr. 4, 1800, ch. 19, §§ 14–15, 21, 25, 40, 2 Stat. 19, 25–28, 32. Given that many had claimed that Congress had never suspended the writ of habeas corpus prior to the Civil War, these statutes might not have been regarded as suspensions of the privilege of the writ of habeas corpus. My colleague John Harrison has argued that only broad delegations of arrest and detention authority were understood as suspensions of habeas corpus. John Harrison, *The Habeas Corpus Suspension Clause as a Limit on Executive Discretion* 1 (Univ. of Virginia Law Sch. Pub. Law & Legal Theory Working Paper Series, Working Paper No. 123, 2009), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1191&context=uvalwps>. This argument suggests that these statutes likely were not regarded as suspensions of the writ because they were narrowly drawn.

⁷ ALF J. MAPP, JR., THOMAS JEFFERSON, PASSIONATE PILGRIM: THE PRESIDENCY, THE FOUNDING OF THE UNIVERSITY, AND THE PRIVATE BATTLE 121 (1991).

⁸ See *id.*

⁹ See *id.*

¹⁰ DAVID CLARK & GERARD MCCOY, THE MOST FUNDAMENTAL LEGAL RIGHT: HABEAS CORPUS IN THE COMMONWEALTH 77 (2000).

¹¹ See MATTHEW WARSHAUER, ANDREW JACKSON AND THE POLITICS OF MARTIAL LAW 42 (2006) (quoting Alexander J. Dallas, *Letter to Andrew Jackson (July 1, 1815)*, in 3 THE PAPERS OF ANDREW JACKSON 375, 375 (Harold D. Moser et al. eds., 1991)).

¹² Abraham Lincoln, *Executive Order to the Commanding General of the Army of the United States (Apr. 27, 1861)*, in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3219, 3219 (James D. Richardson ed., 1897) [hereinafter COMPILATION OF THE MESSAGES]; Abraham Lincoln, *Executive Order to Lieutenant-General Scott (Apr. 25, 1861)*, in 7 COMPILATION OF THE MESSAGES,

overcome resistance along the military line from Philadelphia to Washington, D.C.¹³ Lincoln sought to keep the route between these two cities clear so that reinforcements could help defend Washington. A suspension issued pursuant to the delegation from Lincoln eventually led to Chief Justice Roger Brooke Taney issuing a writ of habeas corpus to General George Cadwalader on behalf of John Merryman.¹⁴ In response, Cadwalader indicated that he had, pursuant to delegated authority from the President, suspended the writ of habeas corpus.¹⁵ When Taney issued an order to arrest Cadwalader, the lowly marshal could not enforce the order against the powerful General.¹⁶ Recognizing that his power had “been resisted by a force too strong for [him] to overcome,” Taney made a point of ensuring that a copy of the proceedings reached Lincoln so that the latter could fulfill his obligation “to take care that the laws be faithfully executed.”¹⁷ Lincoln never responded directly to Taney’s opinion or order. Instead, in the summer of 1861, Lincoln continued to delegate similar suspension authority over Florida, with respect to a “Major Chase” of the Engineer Corps of the Army of the United States, and along the “military line” from New York to Washington.¹⁸

Lincoln’s July 1861 message to Congress described the firing on Fort Sumter and the moves to secede by the southern states. Importantly, he also described his own emergency measures, dividing them into three categories. The first measures consisted of summoning the state militias and blockading southern ports. These were “strictly legal,” presumably because Lincoln thought it obvious that he could take these measures on his own.¹⁹ The

supra, at 3218, 3218. It seems that all of Lincoln’s suspensions were actually delegations of authority to suspend.

¹³ Abraham Lincoln, *Executive Order to the Commanding General of the Army of the United States (Apr. 27, 1861)*, *supra* note 12, at 3219.

¹⁴ JAMES F. SIMON, *LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT’S WAR POWERS 186–87* (2006).

¹⁵ *Id.* at 187.

¹⁶ *Ex Parte Merryman*, 17 F. Cas. 144, 147 (C.C.D. Md. 1861) (9,487).

¹⁷ *Id.* at 153 (internal quotation marks omitted).

¹⁸ Abraham Lincoln, *Executive Order to the Commanding General, Army of the United States (July 2, 1861)*, in 7 COMPILATION OF THE MESSAGES, *supra* note 12, at 3220, 3220; Abraham Lincoln, *Executive Order to the Lieutenant-General Commanding the Armies of the United States (June 20, 1861)*, in 7 COMPILATION OF THE MESSAGES, *supra* note 12, at 3220, 3220; Abraham Lincoln, *Proclamation (May 10, 1861)*, in 7 COMPILATION OF THE MESSAGES, *supra* note 12, at 3127, 3128.

¹⁹ Abraham Lincoln, *Special Session Message (July 4, 1861)*, in 7 COMPILATION OF THE MESSAGES, *supra* note 12, at 3221, 3225.

second measures consisted of accepting volunteer soldiers and enlarging the Army and Navy.²⁰ Lincoln was equivocal here. Whether “strictly legal or not,” the measures were popular and necessary.²¹ In any event, Lincoln had done nothing “beyond the constitutional competency of Congress,” a near admission that these unilateral measures were perhaps not strictly legal.²²

We are interested in his third category, i.e., his discussion of the delegation of suspension authority to military officers—delegation of authority to, as Lincoln put it, “arrest and detain without resort to the ordinary processes and forms of law.”²³ After noting that some had questioned whether the President had suspension authority—an undoubted reference to Taney’s *Merryman*²⁴ opinion—Lincoln assured that “some consideration was given to the questions of power and propriety.”²⁵

Lincoln proceeded to make the case for presidential suspension authority, in a rather odd manner. First he asked:

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?²⁶

This portion of the argument suggested that Lincoln *had* violated the Constitution because he intimated that violating one law (the constitutional guarantee of habeas corpus) was absolutely necessary to save the government and to execute the vast majority of laws. That is to say, necessity justified the unconstitutional executive suspension of habeas corpus.

At this point, however, Lincoln abruptly switched gears, saying that his rhetorical question was not quite presented because “[i]t was not believed that any law was violated.”²⁷ He noted that the Constitution authorized the suspension of habeas in cases of rebellion and invasion and that the “Constitution itself is silent as to which or who is to exercise” suspension authority.²⁸ “[I]t can not be believed the framers of the instrument intended that in every case the danger should run its course until Congress could

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 3226.

²⁴ *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

be called together,” especially when Congress might be prevented from reassembling.²⁹ He said no more, predicting that an Attorney General opinion would “probably be presented” to Congress and noting that whether legislation would be necessary was a subject “submitted entirely to the better judgment of Congress.”³⁰

Deftly comparing the initial draft of the message with the final, James Randall suggests that the original draft hinted at a personal struggle.³¹ The changes resulting in the final draft made the text more impersonal, with few or no references to the President’s beliefs or personal role. According to Randall, Lincoln’s tentativeness reveals that the “appearance of military dictatorship was a matter of deep concern to the nation’s war chief.”³² Mark Neely is more critical of Lincoln. The message revealed a President “nervous” and “uncertain of his legal ground,” whose resort to “slippery argument” could not justify a presidential suspension power.³³

Yet Lincoln’s habeas remarks were crystal clear and rock-solid, at least compared to his Attorney General’s remarkable opinion. In his opinion, Edward Bates said that the President, as Chief Executive, had broad discretion as to the means he might use to execute the laws.³⁴ Given this discretion, the President could decide to detain indefinitely, if such confinement helped execute laws.³⁵ What of the Constitution’s Habeas Clause? In an extraordinary admission, Bates admitted that he was “by no means confident that [he] fully underst[ood] it.”³⁶ Nevertheless, he went on to endorse a curious distinction:

If by the phrase *the suspension of the privilege of the writ of habeas corpus*, we must understand a repeal of all power to issue the writ, then I freely admit that none but Congress can do it. But if we are at liberty to understand the phrase to mean, that, in case of a great and dangerous rebellion . . . the public safety requires the arrest and confinement of persons implicated in that rebellion, I as freely declare the opinion, that the President has lawful power to *suspend the privilege* of persons arrested under such

²⁹ *Id.*

³⁰ *Id.*

³¹ J. G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 121–23 (rev. ed. 1963).

³² *Id.* at 123.

³³ NEELY, *supra* note 2, at 13.

³⁴ Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att’y Gen. 74, 83 (1861).

³⁵ *Id.* at 83–84, 87.

³⁶ *Id.* at 87.

circumstances.³⁷

Bates seems to have meant that, while the President might suspend the privilege of habeas corpus of individuals actually engaged in a rebellion, he could not suspend “all power to issue the writ,” and thereby authorize the detention of non-rebels. Only Congress could completely suspend the privilege as to *all* persons, whether or not rebels.

Whatever Bates meant, Lincoln’s actual delegations did not authorize the suspension of habeas corpus merely with respect to rebels; instead, they generally authorized the suspension of “the writ of habeas corpus.”³⁸ Moreover, Lincoln’s defense of his actions invoked the Suspension Clause, thereby implying that the President had complete authority to, in the words of Bates, “repeal . . . all power to issue the writ” of habeas corpus.³⁹ Lincoln’s actual orders were oblivious to the subtle distinction that Bates had drawn.

This presidential power to suspend the privilege of individuals, said Bates, was “temporary and exceptional.”⁴⁰ It was temporary, however, in the sense that it applied only when there was a rebellion or invasion.⁴¹ It was exceptional in that it sprung into existence only when the “ordinary course of judicial proceeding[]” was too weak and ineffectual.⁴² Bates insisted he was right about the President’s ability to detain rebels indefinitely because imagining that the President would (or had to) release captured soldiers and spies upon receiving a writ of habeas corpus was simply too bizarre to countenance.⁴³

At the end of his opinion, Bates claimed that he had discussed habeas corpus only because others had raised the matter, not because he “thought it necessary to treat of that subject at all.”⁴⁴ Continuing, he wrote that

not doubting the power of the President to capture and hold by force insurgents in open arms against the Government . . . I never thought of first suspending the writ of *habeas corpus*, any more than I thought of first suspending the writ of *replevin*, before seizing arms and munitions destined for the enemy.⁴⁵

³⁷ *Id.* at 90.

³⁸ See, e.g., Abraham Lincoln, *Executive Order to the Commanding General of the Army of the United States (Apr. 27, 1861)*, *supra* note 12, at 3219.

³⁹ 10 Op. Att’y Gen. at 90.

⁴⁰ *Id.*

⁴¹ *Id.* at 88, 90.

⁴² *Id.* at 90.

⁴³ *Id.*

⁴⁴ *Id.* at 91.

⁴⁵ *Id.*

One imagines that the bluster was meant to mask the weakness of his arguments.

This final claim was remarkable for two reasons. First, Lincoln had hinted that an Attorney General opinion would defend his assertion of suspension authority. The actual opinion, however, suggested that a defense was wholly gratuitous. Second, Lincoln's orders had authorized the suspension of the writ of habeas corpus. If Bates was right, however, these authorizations were superfluous because suspensions of habeas corpus were unnecessary. Indefinite detention of the rebels was legal even without any suspension of habeas corpus. In other words, Bates' opinion argued that all the hand-wringing (by the President, Taney, and others) about the writ of habeas corpus and any orders Lincoln had issued were much ado about nothing. Little wonder that one scholar—who otherwise had an exalted opinion of Bates—claimed that the “best that could be said” of this particular opinion was that it was “simply incomprehensible.”⁴⁶

In the wake of Lincoln's speech and Bates' opinion, Congress quickly approved a law that affirmed the President's military “acts, proclamations, and orders.”⁴⁷ But this statute clearly was not thought to cover habeas, as members of Congress actively debated whether to suspend habeas for two more years.⁴⁸ While Congress dithered for two years, Lincoln's delegations continued. In October of 1861, he authorized suspension from Maine to Washington⁴⁹ and in December of the same year, he authorized suspension in Missouri.⁵⁰ In April of 1862, he authorized the suspension of habeas in Baltimore.⁵¹ In August and September of 1862, he authorized nationwide suspensions with respect to individuals escaping militia service, for those who rebelled, and for all those who aided and abetted the enemy.⁵²

⁴⁶ John P. Frank, *Edward Bates: Lincoln's Attorney General*, 10 AM. J. LEGAL HIST. 34, 43 (1966).

⁴⁷ Act of Aug. 6, 1861, ch. 63, 12 Stat. 326.

⁴⁸ See George Clarke Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by Congress*, 1 BULL. U. WIS. HIST. SERIES 217, 223–63 (1907).

⁴⁹ Abraham Lincoln, *Letter to Lieutenant-General Winfield Scott (Oct. 14, 1861)*, in 8 COMPILATION OF THE MESSAGES, *supra* note 12, at 3240, 3240.

⁵⁰ Letter to Major General, Henry W. Halleck (Dec. 2, 1861), in 5 COLLECTED WORKS OF ABRAHAM LINCOLN 35, 35 (Roy P. Basler et al. eds., 1953) [hereinafter COLLECTED WORKS].

⁵¹ Abraham Lincoln, *Letter to Major-General John A. Dix (Apr. 5, 1862)*, in 8 COMPILATION OF THE MESSAGES, *supra* note 12, at 3313, 3313.

⁵² Proclamation Suspending the Writ of Habeas Corpus (Sept. 24, 1862), in 5 COLLECTED WORKS, *supra* note 50, at 436, 436–37; Edwin M. Stanton, *Letter to the War Department (Aug. 8, 1862)*, in 8 COMPILATION OF THE MESSAGES, *supra*

In March of 1863, Congress belatedly provided that the President “is authorized” to suspend the writ of habeas corpus.⁵³ At first blush, this language might seem to suggest that Congress did not believe that the President had such authority under the Constitution itself. In fact, by saying the President “is authorized,” the text could be read as either granting such authority itself or, alternatively, as merely confirming a pre-existing fact—that the President is authorized *by the Constitution* to suspend habeas corpus. Proponents of the Act exploited this ambiguity to secure a majority amongst those who wanted to support the President’s emergency measures but who differed as to whether the Constitution itself granted habeas suspension authority to the President.⁵⁴

In June of 1863, after the Act’s passage, Lincoln, in a letter to Ohio Democrats, insisted that he had constitutional authority to suspend. He asserted that the Habeas Clause was “improperly called . . . a limitation upon the power of congress.”⁵⁵ Continuing he uttered this unequivocal claim:

The constitution contemplates the question [of suspension] as likely to occur for decision, but it does not expressly declare who is to decide it. By necessary implication, when Rebellion or Invasion comes, the decision is to be made, from time to time; and I think the man whom, for the time, the people have, under the constitution, made the commander-in-chief, of their Army and Navy, is the man who holds the power⁵⁶

Lincoln seemed to imply that the power to suspend rested *solely* with the President.

Yet in subsequent suspensions, he conspicuously cited the 1863 Act of Congress as authority. In September of 1863, after citing the Habeas Clause and noting that a rebellion existed, Lincoln said that “by a statute . . . the President . . . is authorized to suspend” the privilege.⁵⁷ He proceeded to suspend the privilege of the writ of habeas corpus for all “prisoners of war, spies, or aiders or abettors of the enemy, [and] . . . deserters.”⁵⁸ This suspension

note 12, at 3322, 3322.

⁵³ Act of Mar. 3, 1863, ch. 81, 12 Stat. 755.

⁵⁴ James A. Dueholm, *Lincoln’s Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis*, 29 J. ABRAHAM LINCOLN ASS’N ¶¶ 31–33 (2008), available at <http://www.historycooperative.org/journals/jala/29.2/dueholm.html>.

⁵⁵ Letter to Matthew Birchard and Others (June 29, 1863), in 6 COLLECTED WORKS, *supra* note 50, at 300, 302.

⁵⁶ *Id.* at 303.

⁵⁷ Proclamation No. 7, 13 Stat. 734 (Sept. 15, 1863).

⁵⁸ *Id.*

overlapped substantially with a previous nationwide suspension. In July of 1864, Lincoln redundantly suspended habeas corpus in Kentucky, once again citing the Act as the source of legal authority, but this time also citing his constitutional authority.⁵⁹ One author speculates that by enforcing the new suspension rather than the one issued prior to the Act, Lincoln sought “political cover” behind Congress and its statute.⁶⁰ Mark Neely argues that the President merely approved these orders and did not draft them.⁶¹ Yet entries from Edward Bates’ diary indicate that the Cabinet (presumably with the President present) had decided to issue a proclamation suspending the privilege “under the act of Congress.”⁶² In other words, there was a collective decision to rely upon the statute, presumably because there were doubts that judges would honor suspensions done under the aegis of the President’s unilateral orders. After all, had not the Chief Justice refused to recognize the validity of executive suspensions? All in all, the striking citations of the 1863 Act without any concurrent claim of constitutional power, suggests a change of heart. At the very least, the citations bespeak of an unwillingness to rely upon unilateral authority.

As a postscript to Lincoln’s habeas suspensions, it is worth observing that President Ulysses S. Grant relied upon the Civil Rights Act of 1871 to suspend Habeas Corpus in South Carolina.⁶³ His 1871 proclamations highlighted the statute and its prerequisites for suspensions.⁶⁴ It may be that Grant did not believe that he had unilateral authority to suspend the writ and hence did not press Lincoln’s original view. Or it could be that there was no point in pushing the constitutional claim when

⁵⁹ Proclamation No. 16, 13 Stat. 742, 742–43 (July 5, 1864).

⁶⁰ Dueholm, *supra* note 54, ¶ 20.

⁶¹ NEELY, *supra* note 2, at 70.

⁶² THE DIARY OF EDWARD BATES: 1859–1866, at 307 (Howard K. Beale ed., 1933).

⁶³ Proclamation No. 4, 17 Stat. 951, 952 (Oct. 17, 1871); Proclamation No. 7, 17 Stat. 953, 954 (Nov. 10, 1871).

⁶⁴ Proclamation No. 4, 17 Stat. at 951; *see* Proclamation No. 7, 17 Stat. at 953. The suspensions also cited “authority vested in me by the Constitution of the United States” but the Acts were clearly seen as the source of authority because the President complied with the Act’s requirements for suspensions. Proclamation No. 7, 17 Stat. at 954; Proclamation No. 4, 17 Stat. at 952. Moreover, the Solicitor General’s letter to the President spoke of pursuing “as literally as possible the language of the statutes under which it is prepared.” 22 THE PAPERS OF ULYSSES S. GRANT: JUNE 1, 1871–JANUARY 31, 1872, at 178 (John Y. Simon et al. eds., 1998). Similarly, the Attorney General complained that the Act’s “awkwardness” had affected his draft proclamation and observed that he had tried to follow the Act’s third and fourth sections. *Id.* at 162–63.

Congress had granted the President generic authority in 1871. It also should be noted that the 1871 statute suggested that the President lacked constitutional authority to suspend. Section 4 of the Act provided that it “shall be lawful for the President” to suspend habeas corpus under certain circumstances only, a locution indicating that prior to the statute Congress was of the view that the President had no such authority.⁶⁵

II. THEORIES OF THE ALLOCATION OF SUSPENSION AUTHORITY

Article I, Section 9, Clause 2 of the Constitution provides that “[t]he 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.”⁶⁶ Obviously, the Habeas Clause acts as a prohibition, limiting when suspensions of the privilege may occur. Yet to limit the occasions for suspension is to imply that someone has power to suspend when the Clause’s conditions are satisfied. Indeed, though the Constitution never specifically authorizes suspension of the privilege, no one doubts that the federal government may suspend it. As President Lincoln pointed out, the provision seems to say that “[t]he Privilege of the Writ of Habeas Corpus” *may be suspended* “when in cases of Rebellion or Invasion the public Safety may require it”—a rephrasing that makes clear that someone must have the power.

Our question is not whether the privilege may be suspended, but *who* may suspend it. Unfortunately, the Habeas Clause says nothing on this particular point. Before supplying the best answer to the question, it makes sense to describe theories about the allocation of the suspension power within the federal government.

A. *An Exclusive Presidential Power*

Some might believe that only the President may suspend the Great Writ. The occasions for suspension, namely rebellion or invasion, seem to bring to mind the Commander in Chief and his authority over the armed forces. In other words, an invasion or rebellion might trigger or activate the commander in chief power (and perhaps the executive power as well) and authorize the President to suspend if he concludes the public safety requires it.

⁶⁵ Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 13, 15.

⁶⁶ U.S. CONST. art. 1, § 9, cl. 2.

Alternatively, the Habeas Clause, though written in negative terms, may itself implicitly authorize presidential suspension of habeas corpus. After all, the executive is the branch most likely to be aware of any incipient rebellion or invasion. The power would be exclusive under the theory that when the Constitution grants power to the President (even implicitly), no other branch may exercise the same power.

Lincoln never definitively claimed an exclusive power. The closest he came was in a letter to Ohio Democrats, in which he asserted that the President “is the man who holds the power,” a phrasing that perhaps implied that no one else held “the power.”⁶⁷ Yet Lincoln never expressly denied that Congress could suspend as well, an argument one might have expected had Lincoln really believed that the power was his alone. Moreover, Lincoln issued orders that cited the 1863 Suspension Act as if it were relevant to the question of whether he could suspend.⁶⁸ If Lincoln believed that Congress had no power to suspend (and hence no power to delegate the power to suspend), then he ought not to have referenced the Act.

Whatever Lincoln’s views on the matter, some of his ardent defenders certainly argued that the President had an exclusive power to suspend. Horace Binney claimed that the President had an exclusive power because the President was best situated to judge, in a timely manner, that suspension was necessary resulting the wake of a rebellion or invasion.⁶⁹ Binney also claimed that the President was “the weakest department in the government, weaker than is known in any other national government,” thereby suggesting the Founders would have been unafraid to vest the suspension power in a weak executive.⁷⁰ Finally, Binney asserted that the threat of impeachment would dissuade Presidents from abusing the power to suspend.⁷¹

B. A Concurrent Power

Others might suppose that either the President or Congress could suspend the writ of habeas corpus.⁷² Drawing upon the

⁶⁷ Letter to Matthew Birchard and Others (June 29, 1863), *supra* note 55, at 303.

⁶⁸ Proclamation No. 7, 13 Stat. 734, 734 (Sept. 15, 1863).

⁶⁹ HORACE BINNEY, *THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION* 42–46 (2d ed. 1862).

⁷⁰ *Id.* at 52.

⁷¹ *Id.* at 54–55.

⁷² DANIEL FARBER, *LINCOLN’S CONSTITUTION* 163 (2003) (arguing that habeas

arguments above, the President might be able to suspend pursuant to his commander in chief or executive powers. Congressional power might arise from the Necessary and Proper Clause. It would be necessary and proper to suspend the privilege of the writ of habeas corpus in order to ensure that the government's authority extended across the nation and as a means of suppressing any rebellion or repelling any invasion. Under this reading of the Constitution, the fact that the President enjoys a suspension power would not imply that Congress lacked a concurrent power, because this might be a power that more than one entity could exercise.⁷³ While Congress could only suspend while in session, the President could suspend at any time he believed the constitutional requirements for suspension were met.

Lincoln's observation in his July 4th speech that Congress might choose to enact habeas legislation almost seemed to countenance a concurrent power. Because Lincoln had already suspended the privilege in various contexts, his nod to the possibility of congressional legislation perhaps implied overlapping authority. Moreover, his failure to either rescind or terminate his pre-statutory suspensions perhaps points in the same direction. Finally, Congress's failure to assert exclusive authority over suspensions might suggest that at least some members believed that both Congress and the President had suspension authority.

Yet any concurrent power raises questions, such as whether one entity could terminate the other's suspensions. Relatedly, if the suspension power is concurrently vested, what happens when both Congress and the President suspend, but on different terms? In its 1863 Act, Congress limited the effect of presidential suspensions, essentially requiring executive officers to release detainees under certain circumstances. Indeed, this aspect of the Act—which required the production of lists of detainees and created a means of challenging detentions—seems never to have been fully implemented.⁷⁴ Though Congress thought it could regulate detentions, the administration ignored the regulation. Why the Lincoln Administration violated the 1863

suspension “fall[s] in the ‘twilight zone’ of concurrent power”).

⁷³ I previously have argued that both Congress and the President may remove executive officers. Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1783–84 (2006). One might argue that suspension authority is likewise vested in both branches.

⁷⁴ RANDALL, *supra* note 31, at 163–68.

congressionally imposed limits on habeas suspensions is uncertain. Perhaps there was a constitutional basis for the non-enforcement; or maybe the reasons were entirely policy based.

C. Shifting Powers

From an institutional design perspective, one might suppose that the suspension power shifts (or ought to be regarded as shifting) depending upon the status of Congress. Arguably the Constitution grants Congress the exclusive power to suspend while it is in session. When Congress is out of session, however, the President may suspend. After all, invasions or rebellions might occur when Congress is out of session. Indeed, such calamitous events might make it impossible for Congress to convene, as when a nearby invasion or rebellion would endanger legislators. Because suspension is a power that might be absolutely necessary during recesses and because Congress clearly cannot suspend when out of session, someone else must have the power during legislative recesses. Some might argue that the President may suspend when Congress is out of session, because the Chief Executive is always on duty and has access to the information necessary to judge whether a suspension is necessary.

Under this reading of the Constitution, the President has the same suspension power that Congress has, albeit only exercisable when it is not in session. Once again, this theory leaves open the question of whose suspension rules take precedence in cases where there is a conflict. Despite the appeal of such an allocation of constitutional power, it seems that no one has ever claimed that the Constitution grants a shifting suspension power. Lincoln certainly never did because he never asserted that suspension authority shuttled back and forth between the two branches depending upon whether Congress was in session.

D. Temporary Presidential Power

One might suppose that only Congress can suspend for the duration of an invasion or rebellion, but that the President must be able to suspend, on a temporary basis, when Congress is not in session. Perhaps the temporary presidential suspension ends when Congress convenes. Or perhaps the temporary executive suspension lasts until Congress's next session ends, as is the case with recess appointments. Whatever the precise length of a

temporary presidential suspension, the point is that some interim authority is necessary and the power arguably rests with the only constitutional officer that is always on duty, the President.

This theory implicitly acknowledges congressional preeminence in this area. The President is not on par with Congress, but instead has a more limited power meant to, in some way, preserve the status quo until Congress has had the opportunity to act. This reading of the Constitution may offer the best of both worlds: satisfying the need for emergency action when Congress is out of session, but also ensuring that the ultimate fate of civil liberties does not rest with a relatively unchecked executive.

Some have asserted that Lincoln claimed only a temporary presidential suspension power.⁷⁵ This account supposes that Lincoln only asserted a temporary power to suspend, leaving the ultimate fate of suspensions to Congress. This assertion mistakenly regards Lincoln's atmospheric—his assertion that Congress might wish to legislate on the matter—as if they imposed real limitations on the duration of his suspension delegations. In fact, Lincoln's delegations of suspension authority were wholly indefinite. None of his delegations were limited in time and none turned on whether Congress subsequently approved of his actions. Moreover, his speech to Congress defending his suspensions never asserted that his suspensions were temporary.⁷⁶ As it turned out, habeas corpus suspensions imposed pursuant to Lincoln's habeas delegations lasted for two years, i.e., from the spring of 1861 until 1863, when the President re-suspended habeas corpus pursuant to the 1863 statute. Put simply, whatever one might wish to say about the desirability of a temporary presidential power to suspend, Lincoln's delegations of suspension authority cannot supply evidence of, or lend credence to, the notion that the Constitution grants the President temporary suspension authority because his delegations certainly were not temporary either in design or in effect.

E. An Exclusive Congressional Power

Lastly, the traditional view supposes that only Congress can

⁷⁵ AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 122 (2005).

⁷⁶ In his opinion delivered to Congress, Attorney General Bates claimed that the President's power to suspend the privilege as to individuals engaged in rebellion was "temporary." But all he seems to have meant by this was that presidential suspensions would have to terminate at the end of any invasion or rebellion. See *Suspension of the Privilege of the Writ of Habeas Corpus*, 10 Op. Att'y Gen. 74, 90 (1861).

suspend the privilege of the writ of habeas corpus. As argued earlier, perhaps Congress has power to suspend using its Necessary and Proper Clause. In contrast, the President cannot suspend because the Habeas Clause itself grants no suspension authority (either to the President or anybody else) and because neither the Commander in Chief nor the Executive Power Clauses convey such a power. It follows that no previously unauthorized suspensions can occur when Congress is out of session, because only Congress may suspend or authorize suspensions. This reading of the Constitution leads to the conclusion that Lincoln was mistaken when he claimed that the Constitution authorized him to suspend the writ of habeas corpus.

III. EVALUATING THE THEORIES OF SUSPENSION

As noted at the outset, the original Constitution did not permit the President to suspend the privilege of the writ of habeas corpus. That is to say, the President lacks constitutional authority to detain people indefinitely, even when during a rebellion or invasion, he believes the public safety may require it. To see why this is so, we first consider the source of a congressional power to suspend and why the power was so closely identified with the legislature.

A. Why Congress May Suspend the Writ

The case for a congressional suspension power is straightforward. Using its Necessary and Proper Clause authority, Congress may suspend the writ of habeas corpus. To begin with, suspensions are “necessary” when they help ensure the continued viability of the government, the nation, and the Constitution. Those who obstruct the writ of the government through violent attacks on its officials and other instrumentalities may be detained indefinitely, thereby safeguarding the government and the Constitution. Those who support an invader, by words or deeds, may be detained and neutralized for the same reason. Moreover, suspensions are “proper” whenever Congress concludes that there has been an invasion or a rebellion and also determines that the public safety requires a suspension. Finally, when a suspension helps ensure the continued execution of governmental laws and sustains the Constitution’s ultimate authority, the suspension statute clearly

can be said to be “carrying into execution” all of the federal government’s powers.

Reading the Necessary and Proper Clause as authority to suspend hardly demonstrates that congressional authority is exclusive. Instead, the case for exclusivity, made at length below, rests on background understandings about habeas suspensions and early commentary on the Constitution. To begin with, legislatures traditionally had a monopoly on suspensions. Though executives participated by suggesting occasions for suspension, they clearly lacked unilateral suspension authority. Given this context, it seems likely that the Constitution granted Congress exclusive suspension authority for it contains nothing suggesting a departure from the existing regime of legislative monopoly. Confirming this intuition, commentary before and after ratification uniformly read the Constitution as ceding Congress exclusive suspension authority. Indeed, on the eve of the Civil War, many claimed that only Congress could suspend the writ.

One of the principal reasons for supposing that Congress enjoys a suspension monopoly comes from English practice. The Habeas Corpus Act of 1679 was meant to improve the operation of the common law writ of habeas corpus, ensuring that people were released when there was no warrant for confining them.⁷⁷ The English Bill of Rights made the Act’s protections more secure, for the former declared that the Crown could not suspend any law, meaning that the Crown could not suspend the privilege secured by the Habeas Corpus Act.⁷⁸ Hence, for a century prior to the Constitution’s ratification, only Parliament had legal authority to suspend the privilege of the writ of habeas corpus. Indeed, whenever England suspended the writ, an act of Parliament was the instrument of the suspension.

In America, state constitutions that discussed suspension made clear that the legislature could suspend.⁷⁹ This was in keeping with English practice of legislative suspensions. Consider the provision in the 1780 Massachusetts Constitution, which provided that

[t]he privilege and benefit of the writ of *habeas corpus* shall be enjoyed in this commonwealth, in the most free, easy, cheap, expeditious, and ample manner; and shall not be suspended by the

⁷⁷ 31 Car. 2, c. 2 (Eng.).

⁷⁸ An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M., c. 2 (Eng.).

⁷⁹ See, e.g., GA. CONST. of 1777, art. LX.

legislature, except upon the most urgent and pressing occasions, and for a limited time, not exceeding twelve months.⁸⁰

If one supposes that the Massachusetts executive had a concurrent suspension power, then the Governor could suspend for years (even decades) and in the absence of the “most urgent and pressing occasions.”⁸¹ The New Hampshire Constitution of 1784 had a similar provision, albeit one that limited legislative suspensions to three months.⁸² Again, the notion that the New Hampshire executive could suspend leads to the conclusion that its executive had unchecked suspension authority. It is hard to fathom why state constitutions would significantly constrain legislative suspensions but leave executive suspensions wholly unconstrained. One would have to imagine that the framers of these constitutions were particularly concerned about state legislatures and their propensity to suspend but left executive suspensions unconstrained. And one would have to suppose that they reached these conclusions against the backdrop of an Anglo-American tradition in which legislatures traditionally had a monopoly on suspensions precisely because of hostility towards indefinite executive detention.

Whenever states suspended the privilege, legislatures enacted statutes.⁸³ In keeping with the best reading of the Massachusetts Constitution, the General Court (the legislature) suspended habeas corpus in 1786 during Shay’s Rebellion.⁸⁴ But even prior to the 1780 Constitution, Bay Staters knew that the legislature was the proper department, for the General Court had suspended habeas in 1777.⁸⁵ Also adhering to the Anglo-American tradition of legislative suspension during the Revolutionary War were New

⁸⁰ MASS. CONST. of 1780, pt. 2, ch. 6, art. 7.

⁸¹ *Id.*

⁸² N.H. CONST. of 1784, pt 2, art. 91 (“The privilege and benefit of the habeas corpus, shall be enjoyed in this state, in the most free, easy, cheap, expeditious, and ample manner, and shall not be suspended by the legislature, except upon most urgent and pressing occasions, and for a time not exceeding three months.”).

⁸³ Amanda L. Tyler, *The Suspension Clause and the Protection of Individual Liberty* 41 (2010) [hereinafter Tyler II] (unpublished working paper, on file with author).

⁸⁴ Act of Nov. 10, 1786, ch. 41, 1786 Mass. Acts 102, 102–03; see JOSIAH GILBERT HOLLAND, 1 HISTORY OF WESTERN MASSACHUSETTS 249 (1855); Dallin H. Oaks, *Habeas Corpus in the States—1776–1865*, 32 U. CHI. L. REV. 243, 251 n.41 (1964).

⁸⁵ See Act of May 9, 1777, ch. 45, reprinted in 5 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 641, 641 (1886).

Jersey, Pennsylvania, Maryland, Virginia, and South Carolina.⁸⁶ The assemblies took the initiative in all suspensions because Americans understood that only the legislative power could suspend the privilege of the writ of habeas corpus.

When we turn to the Constitutional Convention, Charles Pinckney may have proposed habeas text as early as May 1787. In any event, the record seems clear that he offered text on August 20:

The privileges and benefit of the writ of habeas corpus shall be enjoyed in this government in the most expeditious and ample manner: and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding months.⁸⁷

This resolution was referred to committee for consideration.⁸⁸ The committee adopted the language found in the Constitution, which was approved on August 28.⁸⁹ Was the text altered to suggest that others could suspend as well or was the reference to Congress deemed redundant? The ultimate placement of the Habeas Clause in Article I, Section 9, generally regarded as consisting of restraints on Congress, suggests that the Clause was understood as limitation on congressional powers granted in Article I, Section 8.⁹⁰

While debating whether to ratify the Constitution, both proponents and opponents recognized that Congress (and not the President) could suspend the writ. In Philadelphia, James Wilson observed that the Habeas Clause was “restrictive of the general Legislative Powers of Congress.”⁹¹ Sometimes this understanding led critics to denounce the Constitution for ceding broad powers, as when one Virginia delegate complained that Congress could suspend laws in every case, with the Habeas Clause serving as but a modest constraint.⁹² In Massachusetts,

⁸⁶ See Tyler II, *supra* note 83, at 41–45.

⁸⁷ Journal from Monday, August 20th. 1787, in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 334, 334 (Max Farrand ed., 1911) [hereinafter RECORDS OF THE FEDERAL CONVENTION].

⁸⁸ *Id.*

⁸⁹ James Madison, Tuesday August 28. 1787— In Convention, in 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 87, at 437, 438.

⁹⁰ The Clause was apparently moved from the Article dealing with the judiciary. See Tor Ekeland, *Suspending Habeas Corpus: Article I, Section 9, Clause 2, of the United States Constitution and the War on Terror*, 74 FORDHAM L. REV. 1475, 1485–86 (2005).

⁹¹ R. Carter Pittman, *Jasper Yeates's Notes on the Pennsylvania Ratifying Convention, 1787*, 22 WM. & MARY Q. 301, 307 (1965).

⁹² The Virginia Convention: Friday, 13 June 1788, in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE

one convention delegate, a judge, noted that the Habeas Clause was “a restriction on Congress.”⁹³ Another Massachusetts judge asserted that Congress had less suspension discretion than the Massachusetts legislature.⁹⁴ Similarly, New York’s “Brutus,” an opponent of the Constitution, described the Habeas Clause as limiting “the power of the legislature.”⁹⁵

Though most participants in the ratification campaign never identified which congressional powers authorized suspension, a few specified sources of authority. Virginia Governor Edmund Randolph claimed that congressional power to regulate courts granted Congress the power to suspend the writ.⁹⁶ In Massachusetts, a delegate claimed that the habeas “paragraph” gave Congress “power to suspend the writ.”⁹⁷ A Pennsylvania delegate suggested that the power to suspend was subsumed in the power to declare war.⁹⁸

Two state resolutions from New York proposing amendments to the Constitution also assumed that only Congress could suspend. One provided that everyone should be able to challenge

CONSTITUTION BY THE STATES: VIRGINIA 1228, 1299–1337 (John P. Kaminski et al. eds., 1993) [hereinafter DOCUMENTARY HISTORY: VIRGINIA]. For other claims that Congress would be the one to suspend, see *The Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution*, in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 1, 102 (Jonathan Elliot ed., 1888) [hereinafter THE DEBATES]; *The Virginia Convention: Friday, 6 June 1788*, in 9 DOCUMENTARY HISTORY: VIRGINIA, *supra*, at 970, 1002 (remarking that Habeas Clause restrains Congress); *The Virginia Convention: Friday, 10 June 1788*, in 9 DOCUMENTARY HISTORY: VIRGINIA, *supra*, at 1092, 1099 (John P. Kaminski et al. eds., 1990) (claiming that privilege is as secure as in England by noting that only Parliament could suspend—implying that only Congress could).

⁹³ *The Massachusetts Convention: Saturday, 26 January 1788*, in 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES: MASSACHUSETTS 1358, 1359 (John P. Kaminski et al. eds., 2000).

⁹⁴ *See id.* at 1359.

⁹⁵ Brutus, Letter No. IX, in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION 393, 394 (John P. Kaminski et al. eds., 1984).

⁹⁶ *The Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution*, *supra* note 92, at 1, 464 (statement of Gov. Randolph).

⁹⁷ *Debates in the Convention of the Commonwealth of Massachusetts, on the Adoption of the Federal Constitution*, in 2 THE DEBATES, *supra* note 92, at 1, 137 (statement of Mr. Nason).

⁹⁸ *The Debates in the Convention of the State of Pennsylvania, on the Adoption of the Federal Constitution*, in 2 THE DEBATES, *supra* note 92, at 415, 515–16; *see* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 118–19 (2d ed. 1829).

his or her detention except when Congress had suspended habeas corpus; the other spoke of suspending by “Act,” wording that made clear that only Congress could suspend.⁹⁹ Though there may have been no deep consensus on the source of a congressional suspension power, it also seems evident that there was a broad agreement that only Congress could suspend, for no one mentioned the possibility of presidential suspensions.

After ratification, commentators and Congress read the Constitution as granting the legislature the sole power to remove. In *Ex parte Bollman*, Chief Justice John Marshall noted (albeit, in dicta) that if “the public safety should require the suspension” of habeas corpus, “it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide.”¹⁰⁰ Marshall’s comments were made against the backdrop of General James Wilkinson’s arrest and transport of two alleged co-conspirators of Aaron Burr. Two courts had issued writs of habeas corpus which Wilkinson had ignored.¹⁰¹ It apparently never occurred to Wilkinson that he might ask his Commander in Chief to suspend the writ. It also never occurred to members of Congress, because Jefferson’s allies in the Senate moved to suspend the writ for a period of three months.¹⁰² Neither Republicans nor Federalists ever claimed that consideration of the bill was wholly unnecessary because Jefferson could suspend habeas corpus unilaterally as a means of suppressing the aftermath of Burr’s rebellion.

What was unfathomable to General Wilkinson and Jefferson’s allies was also unfathomable to the President himself. Though his General faced liability and though the treasonous prisoners might be released, Jefferson never attempted to suspend the writ himself. He must have recognized that he lacked constitutional authority to suspend the writ. Indeed, well after leaving office he complained that the Bill of Rights had not changed the fact that “[h]abeas corpus was left to the discretion of Congress.”¹⁰³

⁹⁹ Monday July 14, 1788, in 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 171, 198 (1894).

¹⁰⁰ 8 U.S. (4 Cranch) 75, 101 (1807). Marshall was referring to the habeas provisions of the Judiciary Act because he believed that the Constitution itself did not guarantee habeas corpus. Congress had to act and grant jurisdiction to issue habeas writs in order for the Habeas Clause to have effect. *See id.*

¹⁰¹ ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WAR OF LIBERTY 21 (2001).

¹⁰² *Id.*

¹⁰³ Autobiography, 1 THE WORKS OF THOMAS JEFFERSON 119 (Paul Leicester Ford ed., 1904).

Jefferson's criticisms would have been far more pronounced had he supposed that habeas corpus was not only left to the discretion of Congress but also left to the President's as well.

Treatise writers referenced the congressional monopoly repeatedly. William Rawle in his book, *A View of the Constitution of the United States of America*, observed that

the Constitution probably intends, that the legislature of the United States shall be the judges [of when suspension is appropriate]. Charged as they are with the preservation of the United States from both those evils, and superseding the powers of the several states in the prosecution of the measures they may find it expedient to adopt, it seems not unreasonable that this control over the writ of *habeas corpus*, which ought only to be exercised on extraordinary occasions, should rest with them. It is at any rate certain, that congress, which has authorized the courts and judges of the United States to issue writs of *habeas corpus* in cases within their jurisdiction, can alone suspend their power¹⁰⁴

Joseph Story wrote in his famous *Commentaries on the Constitution* that “[i]t would seem, as the power is given to Congress to suspend the writ of *habeas corpus* in cases of rebellion or invasion, that the right to judge whether exigency had arisen must exclusively belong to that body.”¹⁰⁵ St. George Tucker, in his revision of Blackstone, noted that “[i]n England the benefit of this important writ can only be suspended by authority of parliament In the United States, it can be suspended, only, by the authority of congress.”¹⁰⁶

On the eve of the Civil War, a number of authors insisted that only Congress could suspend the privilege. The author of a book on habeas corpus, published in 1858, noted that as

[r]ebellion and invasion are eminently matters of national concern; and charged as Congress is, with the duty of preserving the United States from both these evils, it is fit that it should possess the power to make effectual such measures as it may deem expedient to adopt for their suppression.¹⁰⁷

The author went on to note that Congress had never suspended the writ, the closest occasion being the Burr conspiracy.¹⁰⁸ A

¹⁰⁴ RAWLE, *supra* note 98, at 118.

¹⁰⁵ 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION 208 (Thomas M. Cooley ed., 4th ed. 1873).

¹⁰⁶ 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 292 (2d ed., Augustus M. Kelley Publishers 1969) (1803).

¹⁰⁷ HURD, *supra* note 6, at 116.

¹⁰⁸ *Id.* at 117.

number of other books claimed that Congress could suspend, including one authored by Columbia Law School Professor Francis Lieber, author of the "Lieber Code," who said the fact that the President could not suspend "need hardly be mentioned."¹⁰⁹

The only Attorney General to opine on the issue prior to the Civil War, Caleb Cushing, noted that in the United States, only legislatures could suspend.¹¹⁰ He observed that treatise writers had claimed that only Congress could suspend, that in England only Parliament could do so, and in the states, only the state legislatures.¹¹¹ So, though he did not unequivocally express his own view on federal suspension, he seems to have agreed with the commentators he cited.

Finally, even though it postdated Lincoln's claim of suspension authority, one cannot ignore Chief Justice Taney's opinion in *Ex Parte Merryman*. Taney began by noting his "surprise, for [he] 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."¹¹² Taney cited the placement of the Habeas Clause, the history in England, and the uniform opinion since the Constitution's ratification.¹¹³ He also said that if the President was to have this power, it would have been granted expressly, rather than by implication. Concluding, he said that he could "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."¹¹⁴

Taney was likely hostile to Lincoln and may have been guilty of partisan bias. Matthew Warshauer points out that in 1844, Taney wrote to Andrew Jackson claiming that the judge-imposed fine against Jackson for his imposition of martial law was "unjust & . . . a grosser act of injustice was never perpetrated by any

¹⁰⁹ FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 111 (1859); see WILLIAM C. DE HART, OBSERVATIONS ON MILITARY LAW. AND THE CONSTITUTION AND PRACTICE OF COURTS MARTIAL 18 (1859); HENRY FLANDERS, AN EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 134 (1860); BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 340 (1832).

¹¹⁰ *Martial Law*, 8 Op. Att'y Gen. 365, 372-73 (1857).

¹¹¹ *Id.*

¹¹² *Ex Parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9,487).

¹¹³ *Id.* at 148, 150.

¹¹⁴ *Id.* at 149.

court, than the infliction of that fine upon you.”¹¹⁵ Although Warshauer is convinced that Taney is guilty of an obvious inconsistency, for having supported Jackson’s declaration of martial law while opposing Lincoln’s emergency measures, Warshauer may be mistaken. It may well be that Taney believed that Jackson had no legal authority to declare martial law and suspend the writ, but also that no fine for contempt was appropriate. In other words, Taney might have believed that Jackson acted illegally, but believed that the court should not have levied any fine due to the wartime circumstances.

Speaking of Jackson’s martial law decree, it is the one bit of evidence supposedly suggesting that Congress does not have the exclusive power to suspend habeas corpus. In the closing months of the War of 1812, General Andrew Jackson declared martial law in New Orleans, thereby suspending the writ of habeas corpus.¹¹⁶ After reading an article criticizing the continuation of martial law after the seeming defeat of the British, Jackson ordered the author arrested.¹¹⁷ When a federal judge issued a writ of habeas corpus, he soon found himself in jail, next to the writer.¹¹⁸ Then, when a third person sought habeas for the author and the judge, both the petitioner and the second judge who received the habeas motion were sent to jail—albeit only for a short time.¹¹⁹ After it became clear that the War was over, Jackson released the writer and the judge, whereupon a private party initiated contempt proceedings against Jackson before the formerly imprisoned judge.¹²⁰ Jackson received a fine of \$1,000 and paid it before he left the courtroom, all the while maintaining that necessity justified his measures.¹²¹

That was not the end of the matter, however, for the issue lingered for decades. The Secretary of War, writing at the behest of President James Madison, noted that while an “American Commander” might suspend habeas corpus on the ground of necessity, “he cannot resort to the established law of the land, for the means of vindication.”¹²² Madison apparently meant that

¹¹⁵ WARSHAUER, *supra* note 11, at 210 (emphasis omitted) (internal quotation marks omitted).

¹¹⁶ *Id.* at 184.

¹¹⁷ *Id.* at 35.

¹¹⁸ *Id.* at 35–36.

¹¹⁹ *Id.* at 36–37.

¹²⁰ *Id.* at 38.

¹²¹ *Id.* at 39–40.

¹²² *Id.* at 42 (quoting Alexander J. Dallas, *Letter to Andrew Jackson (July 1, 1815)*, *supra* note 11, at 375).

while necessity was relevant to whether an act was justified, the necessity of some action did not make it constitutional. During Jackson's presidential campaign, some of his supporters came close to arguing that something otherwise unconstitutional was, in fact, constitutional if it was absolutely necessary.¹²³ Much later, after Jackson's service as President, Congress voted to refund the fine, plus interest.¹²⁴ Democrats supported the refund on various grounds, including that Jackson actually had constitutional authority to declare martial law and suspend the writ.¹²⁵ But because many refund supporters admitted that Jackson had acted illegally, his supporters were split. Still, there were some who argued that General Jackson had constitutional authority to suspend the privilege.

In the spring of 1863, Lincoln took delight in reciting this episode to Democrats who objected to his war measures, many of whom had defended Jackson's unilateral declaration of martial law. Yet if Jackson's imposition of martial law proves that Congress lacks a monopoly on habeas suspensions, it proves much too much. Assuming Jackson acted constitutionally, *any* military commander might declare martial law and thereby suspend the writ. Lincoln did not seem to understand that if Jackson was right, his delegations of suspension authority in 1861 were entirely superfluous because any general or commander might suspend when—during a rebellion or invasion—they believed that the public safety might require it. More generally, the refund of Jackson's fine was rather evidently a partisan battle in which Democrats were primarily interested in reviving their political fortunes by reminding Americans of their cherished President and war hero. Arguments in favor of the view that each military commander had a generic power to declare martial law and thereby suspend habeas corpus resulted from a fierce desire to vindicate Jackson and bolster Democratic electoral fortunes, not from a dispassionate analysis of the constitutional issue.

It also bears emphasizing that in 1815, when Jackson's controversial actions came into the national eye, President Madison made clear his belief that there was no legal warrant for any "American Commander" to "suspend the writ of Habeas Corpus, to restrain the liberty of the Press, [to impose military

¹²³ *Id.* at 72.

¹²⁴ Act of Feb. 16, 1844, ch. 2, 5 Stat. 651 (refunding \$1,000 fine imposed on General Andrew Jackson, plus interest).

¹²⁵ See WARSHAUER, *supra* note 11, at 78, 79, 92, 107.

punishment on civilians], and generally to supersede the functions of [a] civil magistrate.”¹²⁶ In other words, there was no doubt in Madison’s mind that though the imposition of martial law upon civilians and the accompanying suspension of “the writ of habeas corpus” might be absolutely necessary, it was nonetheless contrary to the “law of the land.”¹²⁷

In sum, prior to the Civil War, there was virtual unanimity that only the Congress could suspend habeas corpus. Indeed, so prevalent was this consensus that habeas corpus discussions rarely even mentioned the President, much less claimed that he had authority to suspend. And when they did mention the President, they denied that he could suspend. The only time the congressional monopoly was denied was in the midst of a debate to refund a fine to Andrew Jackson, a debate that was mired in partisanship and a desire to revive the Democratic Party by recounting the wartime heroics of the former President. But even here, the claim was not that the President had an exclusive power to suspend or a concurrent power shared with Congress. Instead, some members of Congress made the fantastic claim that the Constitution authorized every military commander to suspend, a claim never made before or since.

B. Why the President Lacks a Power to Suspend

Though prior to the Civil War the belief that no one but Congress could suspend was commonplace, that consensus frayed in the face of Lincoln’s suspensions. Five different arguments have been made, with some asserting that the President could suspend and others maintaining that certain states of the world automatically suspended the writ. None of these arguments, considered below, are persuasive as readings of the original Constitution. More specifically, no convincing case can be made that the original Constitution authorized the President to suspend the privilege of the writ.

1. The Commander in Chief as Suspender of Habeas Corpus

Recall that Lincoln believed that his authority as Commander in Chief permitted him to suspend the writ of habeas corpus. The

¹²⁶ *Id.* at 42 (quoting Alexander J. Dallas, *Letter to Andrew Jackson (July 1, 1815)*, *supra* note 11, at 375).

¹²⁷ *Id.* (quoting Alexander J. Dallas, *Letter to Andrew Jackson (July 1, 1815)*, *supra* note 11, at 375).

problem with his claim is that there was no historical warrant for it. Prior to the Constitution's creation, no other Commander in Chief, at any level, ever claimed, much less exercised, a power to suspend the writ. English commanders in chief never claimed the authority to suspend the writ, implicitly recognizing that only Parliament could authorize the executive to detain individuals indefinitely without charges or trial.¹²⁸ Given that additional protections were incorporated into the Habeas Corpus Act and that the Crown was statutorily barred from suspending statutes,¹²⁹ there was no way that the Crown, much less its subordinate commanders in chief, could suspend the writ of habeas corpus.

Americans had the same understanding of commander in chief authority. State commanders in chief honored writs of habeas corpus; they never imagined that they could suspend the privilege itself.¹³⁰ As Commander in Chief of the Army, George Washington complied with writs of habeas corpus issued by state courts; again, it never seemed to occur to him that he might suspend the writ. Indeed, Congress had to give Washington special "dictatorial" authority to arrest individuals who refused to accept continental currency and even then, it required Washington to hand the arrestees over to state officials, together with evidence to prove the offense.¹³¹ In other words, the grant of power to arrest civilians was a power to arrest them for violations of law so that they might be tried in the ordinary courts; it was not a power to hold people indefinitely. If the Continental Commander in Chief needed special authority to arrest civilians, he certainly did not have authority to suspend habeas corpus, which as Amanda Tyler has recently argued, conveys the authority to arrest and detain indefinitely.¹³²

2. The Executive Power as a Source of Suspension Authority

What of the separate notion, advanced in modern times,¹³³ that the grant of executive power included authority to suspend? If we

¹²⁸ J.G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 125 (Peter Smith 1963) (1951).

¹²⁹ *Id.*

¹³⁰ Tyler I, *supra* note 5, at 621–22.

¹³¹ Friday, December 27, 1776, in 6 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 1042, 1045–46 (Worthington Chauncey Ford ed., 1906) [hereinafter JOURNALS].

¹³² See generally Tyler I, *supra* note 5.

¹³³ See generally Dueholm, *supra* note 54.

regard the executive power as encompassing all power to protect a nation and its inhabitants, perhaps the executive has the authority to hold people who pose serious risks to the nation. Though the benefits of executive suspensions might be considerable, history belies this expansive understanding of executive power. Despite having the executive power, the Crown clearly lacked this authority after the enactment of the Habeas Corpus Act. The same limited understanding of executive power prevailed in the revolutionary state constitutions, almost all of which granted the “executive power” to the executive branch. Notwithstanding such grants, no state executive ever claimed authority to suspend. Finally, despite the conspicuous grant of executive authority to the President, everyone at the founding who discussed the question of who might suspend read the Constitution as ceding Congress exclusive authority, a reading that precludes any presidential power of suspension.¹³⁴

3. The Habeas Clause as a Source of Suspension Authority

In the wake of Lincoln’s suspensions, Philadelphia lawyer and former Representative Horace Binney advanced a third approach, the novel view that the Habeas Clause itself authorized suspension of the writ. Binney said the Clause was “elliptical.”¹³⁵ When the ellipsis is supplied, it reads thus: “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; *and then it may be suspended.*”¹³⁶ Arguing that the Clause authorized suspensions, Binney further claimed that the power rested with the President. First, he noted that the original version of the Clause had expressly limited congressional power; he read the omission of any mention of Congress from the final Clause as eliminating any notion that suspension was a congressional power.¹³⁷ Second, he noted that because suspension authority was rather circumscribed and that the President was a very weak creature, it made sense to suppose that the Clause vested suspension authority with the President.¹³⁸ Finally, in private letters, he said that if suspension was left to Congress, he

¹³⁴ See Tyler I, *supra* note 5, at 687–88.

¹³⁵ BINNEY, *supra* note 69, at 9.

¹³⁶ *Id.*

¹³⁷ *Id.* at 30–31.

¹³⁸ *Id.* at 52.

doubted whether they would ever suspend habeas corpus.¹³⁹

Everyone reads the Clause as implying that habeas corpus may be suspended. To read the Clause as affirmatively authorizing suspension—as a source of suspension authority—is a rather different story, however. The Clause does not read as authority and is not found in a section that generally authorizes Congress. Instead it reads as a limitation that presumes authority to suspend. If one wishes to find hidden authority in a clause of express limitation, one must rework the Clause, as Binney did.

In any event, even if we imagine that the Clause provided that habeas “may hereby be suspended,” there is no reason to suppose that *only* the President may suspend based on a Clause that never mentions the President. Indeed, Binney’s version of the Habeas Clause gives us no reason to suppose that the case for presidential suspensions is any stronger than the case that all military commanders may suspend or the equally plausible view that the courts may suspend.

Given the Clause’s placement, in a section that generally restricts Congress, it makes more sense to suppose that the Clause implies that only Congress could suspend and then only in certain situations. This is especially true given that one can discern Congress’s power to suspend without engaging in textual gymnastics. The deletion of any mention of Congress in the Habeas Clause likely resulted from a sense that a reference to Congress was unnecessary. For almost three-quarters of a century after the Constitution’s ratification, it does seem as if Congress’s absence from the Clause mattered little in its interpretation.

Binney’s prediction that Congress likely would not ever suspend habeas corpus is disproved by the 1863 and 1871 Acts. Lincoln can be blamed for the two-year delay in congressional action, for his delegation of suspension authority caused some members to doubt whether they ought to legislate on the matter. Some members were wary of doing anything that might appear to undermine the Commander in Chief in time of war.¹⁴⁰ Had the President admitted that he lacked suspension authority, Congress would have passed a suspension act much sooner than it did.

Finally, Binney’s claim that the President was weak and could

¹³⁹ Letter to Dr. Lieber (Mar. 20, 1862), in *THE LIFE OF HORACE BINNEY* 353, 356 (Charles C. Binney ed., 1903).

¹⁴⁰ See Sellery, *supra* note 48, at 238 & n.56.

be trusted with habeas suspension authority speaks to whether the Founders might plausibly have granted suspension authority. To begin with, one could contest his claim that the Constitution's President was weak; many prominent supporters and opponents of the Constitution thought otherwise. Moreover, given the background understanding that only legislatures could suspend habeas corpus, the Framers would have made an unambiguous grant to the President had that really been their aim. Again, there is nothing in the Constitution suggesting that the supposedly weak American Chief Executive had power to suspend habeas corpus.

4. Martial Law as an Automatic Suspension of Habeas Corpus

Writing a few months before Binney, Harvard Professor Joel Parker argued that the suspension of habeas corpus followed from the existence of martial law:

[I]n time of actual war . . . there may be justifiable refusals to obey the command of the writ, without any act of Congress, or any order . . . of the President . . . [;] the existence of martial law . . . is *ipso facto*, a suspension of the writ.¹⁴¹

Under martial law, executives could search and arrest at will:

a fortiori they may hold [someone] after his arrest against any civil process issued for his liberation. The law of the arrest is the law of the detention, and the *habeas corpus* is suspended so far that no return to the writ can be required of the officer who holds the prisoner under the law which authorized the arrest.¹⁴²

Parker had a point. Sometimes the writ will be unavailable or ineffectual. When it comes to areas that are not under the control of the executive, the writ of habeas corpus cannot be delivered to rebels or invaders and even if delivery is made, there certainly will be “no return” of the prisoner or any explanation justifying the detention. It is safe to say that rebels and invaders generally will not honor process emanating from the enemy's courts. Similarly, the privilege of the writ might be unavailable in areas newly re-conquered or under shaky control, where compliance with the writ might be actually or virtually impossible. If the Army is actively fighting in a particular area, it may be unable to respond to a court's writ of habeas corpus. Finally, even in an area firmly under executive authority, the writ might not issue—

¹⁴¹ JOEL PARKER, HABEAS CORPUS AND MARTIAL LAW: A REVIEW OF THE OPINION OF CHIEF JUSTICE TANEY, IN THE CASE OF JOHN MERRYMAN 52 (2d ed. 1862).

¹⁴² *Id.* at 26–27.

say where courts are not able to function for some reason. Imagine judges who abandon their posts in the face of an invasion. They might not return as soon as the executive retakes an area, fearing that the enemy might return. In each of these circumstances, the privilege of the writ would be unavailable. Yet though the privilege of the writ might be unavailable, no one would say that the writ has been suspended in the constitutional sense because suspension under the Constitution implies a choice by the government and not mere weakness or ineffectiveness. There is no suspension when a government proves to be feckless, for whatever reason.

But the more interesting and relevant question is whether the executive can invoke martial law in an area where the courts are ready, willing, and able to function. In keeping with pre-Constitutional understandings, the original Constitution never authorized the President to invoke martial law and apply it to civilians, thereby suspending habeas corpus indirectly.

The idea that the executive could not impose or invoke martial law was well understood during the Revolutionary War. Whenever military rule or justice was imposed on civilians during the War, it was done pursuant to congressional resolve. For instance, the Continental Congress authorized such justice in 1777, in areas around Pennsylvania, New Jersey, and Delaware.¹⁴³ The sense was that the local executive was too feeble to suppress those who aided the British, so Congress granted George Washington power to seize such inhabitants and try them “by a court-martial,” with death as a possibility.¹⁴⁴ Many civilians were tried before court-martials and punished, with some executed.¹⁴⁵ When such laws expired or did not apply

¹⁴³ Wednesday, October 8, 1777, 9 JOURNALS, *supra* note 131, at 782, 784.

¹⁴⁴ *Id.*; see Friday, February 27, 1778, in 10 JOURNALS, *supra* note 131, at 204, 204 (providing that those who kidnap loyal Americans would be tried by court martial); Thursday, November 12, 1778, in 12 JOURNALS, *supra* note 131, at 1123, 1129 (noting that one John Connolly could be tried by “law martial as a spy”); Wednesday, August 21, 1776, in 5 JOURNALS, *supra* note 131, at 692, 693 (condemning all those “lurking as spies in or about the fortifications or encampments” of the United States to “suffer death” “by sentence of a court martial”).

¹⁴⁵ See, e.g., General Orders (Mar. 1, 1778), in 11 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745–1799, at 8, 10–11 (John C. Fitzpatrick ed., 1934) (noting several inhabitants were found guilty and given sentences of lashing or death) [hereinafter WRITINGS]; Letter to Major General John Armstrong (Mar. 27, 1778) in 11 WRITINGS, *supra*, 156, 158 (noting that an inhabitant had been executed for helping to sell horses to enemy).

for geographic or other reasons, Washington understood that the military could not detain or try civilians.¹⁴⁶ It was up to the state executive to try them for any state crimes that they might have committed. In sum, neither the Continental Congress nor the Commander in Chief of the Continental Army thought that the latter could impose military justice upon civilians. Rather every such imposition by the Army was pursuant to a congressional law.

In the states, governors were likewise not thought to have any constitutional authority to declare or recognize martial law. Statutes were necessary. Margaret Burnham MacMillan, in her excellent book on wartime governors, recounts that some states passed short-term acts granting their executives authority to “declare martial law.”¹⁴⁷ For instance, in New Jersey, an executive council of safety was given authority to suspend habeas and banish people, albeit on a temporary basis.¹⁴⁸ Such statutes implied that the governor otherwise lacked such authority, for there would be no need to convey such authority had there been a generic ability to declare or recognize martial law.¹⁴⁹ Indeed, governors were heard to complain that certain individuals could not be tried by military courts precisely because they were outside the ambit of statutes that declared who might be subject to martial law.¹⁵⁰

Nothing about the Constitution suggests a departure from the background understanding that the executive could not impose martial law upon civilians. The Commander in Chief Clause

¹⁴⁶ See Letter to Brigadier General John Lacey, Junior (Apr. 11, 1778), in 11 WRITINGS, *supra* note 145, at 243, 243–44 (stating that because law expired, further apprehensions and court-martials of inhabitants were not possible); Letter to Brigadier General William Smallwood (May 19, 1778), in 11 WRITINGS, *supra* note 145, at 420, 420–21 (declaring that because a “Jetson” had been caught outside a thirty mile perimeter around Army headquarters, he could not be tried by court martial but suggesting that if he was guilty of kidnapping, he might be tried under a separate congressional resolve); Letter to Colonel Israel Shreve (Apr. 6, 1778), in 11 WRITINGS, *supra* note 145, at 222, 222 (stating that an inhabitant could not be tried because he was outside the geographical limit that Congress applied to those who might be court-martialed for supplying the enemy).

¹⁴⁷ MARGARET BURNHAM MACMILLAN, *THE WAR GOVERNORS IN THE AMERICAN REVOLUTION* 86 (1943).

¹⁴⁸ *Id.* at 87.

¹⁴⁹ See Letter from President Reed to Washington (June 5, 1780) in 2 LIFE AND CORRESPONDENCE OF JOSEPH REED 209, 211 (William B. Reed, ed. 1847) (noting that the statute “gives us a power” to do what is necessary, thereby implying that absent such a statute, council would not have a power to do what is necessary).

¹⁵⁰ See MACMILLAN, *supra* note 147, at 176.

surely does not grant the President any more authority than the Continental Commander had, for it would have been rather odd to use the same title as a means of conveying far greater power. Likewise, the grant of executive power does not change the equation, for in the states those with the executive power were not thought to have constitutional authority to impose military justice on civilians. Only statutes could sanction martial law for civilians.

Episodes and statements made in the wake of the Constitution's ratification point in the same direction. During the Whiskey Rebellion, Washington ensured that his troops only helped arrest the tax rebels, leaving prosecution, judgment, sentence, and execution of sentence to the civilians in the executive and judicial branches.¹⁵¹ Washington specifically told his General to turn over rebels to the "civil magistrates" for prosecution and trial, recognizing that congressional authority to use the militia did not, by itself, authorize the trial of civilians before military courts.¹⁵² This limited conception of executive authority was still prevalent in 1815, when President James Madison admonished General Andrew Jackson for his imposition of "martial law" on New Orleans, declaring it inconsistent with the "law of the land."¹⁵³

Whether they knew it or not, defenders of Andrew Jackson's declaration of martial law in New Orleans began the process of recasting martial law as an ordinary battlefield decision left to the military and their Commander in Chief. Their sense that the executive could recognize or impose martial law upon civilians seems to have become somewhat respectable by the mid-nineteenth century. After all, the Royall Professor of Law at Harvard Law School and former Chief Justice of the New Hampshire Supreme Court made such claims unapologetically.¹⁵⁴ More importantly, Lincoln's extensive use of military commissions to punish those accused of aiding secessionists (some four thousand trials by military commissions occurred during the Civil War¹⁵⁵), reflected how much perceptions had changed from the era in which a President had chastised an impetuous General

¹⁵¹ WILLIAM HOGELAND, *THE WHISKEY REBELLION: GEORGE WASHINGTON, ALEXANDER HAMILTON, AND THE FRONTIER REBELS WHO CHALLENGED AMERICA'S NEWFOUND SOVEREIGNTY* 215 (2006).

¹⁵² ROBERT W. COAKLEY, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1789-1878*, at 55 (1988).

¹⁵³ *Id.* at 319.

¹⁵⁴ PARKER, *supra* note 141, at 52.

¹⁵⁵ NEELY, *supra* note 2, at 168.

who had imposed military justice upon civilians.

5. Executive Suspensions Between Sessions of Congress

Finally, some have made structural arguments in favor of a presidential suspension power. These arguments are based on the notion that in an era where legislatures met infrequently, the Founders could not have granted Congress an exclusive power over habeas corpus because days, weeks, or months might pass before the necessary suspension might become law. Indeed, a rebellion or invasion might preclude a congressional sitting, thereby making a suspension impossible. Given the absurdity of an exclusive allocation, it simply must be the case that the President can temporarily suspend at least until Congress reconvenes. Professor Akhil Amar, in his *America's Constitution: A Biography*, makes the case for temporary suspensive authority resting with the executive.¹⁵⁶

The supposed absurdity of an exclusive congressional power to suspend sometimes leads to a broader claim that the President can suspend the privilege indefinitely in times of rebellion or invasion. Professor Paul Finkelman has made this claim, noting that the Founders knew that Congress would not always be in session.¹⁵⁷ In support of his claim, he observes that Abraham Lincoln expressly argued that it could not have been 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.”¹⁵⁸

Both of these related structural claims fail to overcome the textual and historical arguments against a presidential suspension power. First, they fail to identify a source of presidential power, something crucial to the viability of their arguments. In a system of enumerated powers, no branch of government has authority merely because a compelling case can be made that it ought to have such authority. As we have seen, there is no plausible source of presidential power to suspend. The grants of executive power and commander in chief authority, as potent as they were, never were understood to convey habeas

¹⁵⁶ AMAR, *supra* note 75, at 122.

¹⁵⁷ Paul Finkelman, *Civil Liberties and the Civil War: The Great Emancipator as Civil Libertarian*, 91 MICH. L. REV. 1353, 1366–67 (1993).

¹⁵⁸ Paul Finkelman, *Ex Parte Merryman*, in THE POLITICAL LINCOLN: AN ENCYCLOPEDIA 242, 244 (Paul Finkelman & Martin J. Herschock eds., 2009).

suspension authority. If the Founders had wanted to grant a power to suspend to the President, because the failure to do so would lead to absurd results, they would have specifically granted such authority. Again, one does not convey new and controversial authority never before associated with an office by using language never before understood to convey such authority.

Second, both structural claims rest on the intuition that it makes little sense to grant a suspension monopoly to the legislature when the legislature is not always in session. If a part-time legislature were a new phenomenon, associated only with the Federal Constitution, then perhaps an innovative allocation of suspension authority would be necessary. But in fact, there is (and was) nothing unique about the part-time status of Congress. Legislatures predating Congress were typically part-time institutions, with often lengthy periods in which they were not in session. If previous legislatures were often out of session and yet nonetheless enjoyed a monopoly on suspensions, the mere fact that the Federal Constitution likewise contemplates a part-time legislature hardly suggests that the federal legislature lacks a suspension monopoly.

Third the structural arguments against a congressional monopoly share an unwarranted confidence that such exclusivity would be absurd. Other war powers, far more necessary than the suspension power, have long been thought to rest with Congress exclusively. No one imagines that the President may raise a navy when Congress is not in session and circumstances suggest to him that such a measure is absolutely necessary. Similarly, while Congress is not in session, the President cannot decide that the Army needs to be twice as large. Indeed, the President cannot even decide that new weaponry is necessary and proceed to raid the Treasury to build new warships and better artillery. If one admits that the President lacks all of these crucial authorities, as most everyone does, one is hard-pressed to read the Constitution as granting the President the far less consequential authority to suspend habeas corpus.

More generally, there is nothing absurd at all about a congressional monopoly on suspensions of habeas corpus, just as there is nothing absurd about a congressional monopoly on determining the size, composition, and funding of the Army and Navy. These powers were given to Congress because of a sense, born out by history, that vesting such powers with the Executive might prove dangerous to civil liberties. Though that cautious approach to executive authority has its costs, there will be

drawbacks associated with *any* allocation of power.

Finally, the claims about absurdity also downplay or minimize constitutional mechanisms that enable the government to handle unforeseen circumstances. To begin with, the Constitution authorizes the President to convene Congress on “extraordinary occasions,” language that brings to mind an emergency.¹⁵⁹ In cases of invasion or rebellion, he can convene Congress and request a suspension, just as he may ask a reconvened Congress to augment the Army and appropriate extra funds for the Navy.¹⁶⁰ Lincoln might have called Congress back in April, rather than July, and sought a congressional suspension of habeas corpus.

But what if Congress cannot meet because rebels or an invader effectively prevent a session so that the President’s attempt to convene Congress early utterly fails? Will not suspension under such circumstances be impossible under a regime where Congress has a monopoly? As persuasive as this argument seems, the same questions can be asked of any war power granted to Congress, including those powers that are far more consequential. Unless we are willing to read the Constitution as granting the President to take whatever war measures he deems necessary when Congress is not in session, there is no warrant for supposing that he has a special, limited power to suspend habeas corpus during such periods.

In any event, it seems clear that Congress may enact a general suspension statute authorizing the President to suspend in such cases. In the first Militia Act, Congress exercised its authority to provide for calling for the militia to execute the laws by specifying conditions in which the President might summon the militias.¹⁶¹ Similarly, the Congress might use the Necessary and Proper Clause to specify the circumstances in which the President might suspend habeas corpus. The Constitution grants Congress some flexibility and it may use it to deal with difficult situations where Congress believes that the President must act without first securing congressional sanction for a particular suspension.

The claim of temporary suspension authority advanced by Professor Amar is more limited and hence more reasonable.¹⁶² But when we examine the theory, it too has its difficulties. To begin with, no one from the founding era through the Civil War

¹⁵⁹ U.S. CONST. art II, § 3.

¹⁶⁰ *See id.*

¹⁶¹ Calling Forth Act of 1792, ch. 28, 1 Stat. 264 (repealed 1795); *see* Vladeck, *supra* note 4, at 159.

¹⁶² AMAR, *supra* note 75, at 122.

ever claimed that the President had a power to temporarily suspend. Neither Lincoln nor any defender of the President made such a claim probably because nothing that Lincoln said or did suggested that he asserted a right to make temporary suspensions that had to automatically expire after Congress returned. Lincoln believed he had a generic power to suspend, without any requirement that his suspensions sunset after Congress reconvened. His delegations of suspension authority were not time constrained and the suspensions issued under them apparently lasted for years. Though Attorney General Bates noted that presidential suspensions would be “temporary,” he apparently meant that they could last only so long as there was a rebellion or invasion.¹⁶³

No one, at the time, claimed a presidential power to suspend habeas corpus temporarily because there was no textual or historical warrant for such a claim. The Constitution grants the President a power to make temporary appointments, specifying when those appointments expire.¹⁶⁴ There is nothing in the Constitution indicating when a President’s temporary suspension would end—probably because no one drafting the Constitution believed that it somehow granted the President any authority over habeas corpus. Moreover, there was no custom or practice of temporary executive suspensions, either in England or in the States, making it difficult to find such authority in the Constitution. When we suppose that the President simply must have a power to suspend habeas corpus, albeit temporarily, we not only must discover a source of such power, we also must craft a restriction to limit the supposed power. And again, we also must ask what other war powers, far more necessary to the nation’s survival, the President must be able to exercise on a temporary basis.

CONCLUSION

A quote widely attributed to Secretary of State William Seward underscores the unprecedented nature of the power asserted by Lincoln and his administration. Seward was widely reported to have boasted to Lord Lyons, the English ambassador to America:

I can touch a bell on my right hand and order the imprisonment of a citizen of Ohio; I can touch the bell again and order the

¹⁶³ See Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att’y Gen. 74, 90 (1861).

¹⁶⁴ U.S. CONST. art II, § 2, cl. 3.

imprisonment of a citizen of New York; and no power on earth, except that of the President, can release them. Can the Queen of England do so much?¹⁶⁵

So awesome was the authority asserted by the administration that even some of its members had doubts. Gideon Welles, the Navy Secretary, noted that Seward had “queer fancies for a statesman In administrating the government he seems to have little idea of constitutional and legal restraints, but acts as if the ruler was omnipotent.”¹⁶⁶ If Mark Neely is to be believed, Welles’ attitude was in line with the President’s. The Pulitzer Prize winning Neely repeatedly claims that Lincoln was uninterested in constitutional arguments, once claiming that Lincoln had a “profound lack of interest in constitutional theory” and ending his book with the assertion that Lincoln was “indifferen[t] to constitutional scruple.”¹⁶⁷

Reverence for Lincoln sometimes blinds us to his constitutional faults. Rather than recognizing that Lincoln violated the Constitution, we sometimes whitewash the momentous and terrible measures he implemented. But this is just wishful thinking and yields a distorted sense of the Constitution. As much as we love Lincoln, one of his legacies for executive power should not be a distorted sense of what Presidents might do in cases of rebellion and invasion. The Constitution never authorizes the President to suspend habeas corpus. Instead that authority rests exclusively with Congress. Some may regard this exclusive allocation of emergency authority as a flaw of the Constitution, but if flaw it is, it is one of many.

¹⁶⁵ JOHN M. TAYLOR, WILLIAM HENRY SEWARD: LINCOLN’S RIGHT HAND 169 (1991). Though there is some doubt about the accuracy of the quote, at least one historian says that there is little doubt that Seward could have “honestly said it.” See DEAN SPRAGUE, FREEDOM UNDER LINCOLN 159 (1965).

¹⁶⁶ January 30, in 2 DIARY OF GIDEON WELLES 231, 232 (John T. Morse, Jr. ed., 1911).

¹⁶⁷ NEELY, *supra* note 2, at 68, 235.