

NOTES

ILLEGAL CONFINEMENT: PRESIDENTIAL AUTHORITY TO SUSPEND THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS DURING TIMES OF EMERGENCY

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I. INTRODUCTION

Civil liberties during war and national emergency are often redefined to strike a balance between safeguarding individual freedoms and furthering America's national interests. Freedom of speech, for example, is frequently subjected to restrictions when our nation is at war.¹ In times of conflict, such restrictions are tolerable even though the United States Constitution, unlike the constitutions of other countries, does not have a "state of emergency" clause or a provision that suspends constitutional rights. The only liberty explicitly mentioned in the Constitution that can be suspended is the privilege of the writ of habeas corpus. Habeas corpus is the process by which a court determines whether an imprisoned individual has been legally detained.² The Constitution provides that "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."³

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¹ *E.g.*, *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.").

² *E.g.*, ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 1, (2001).

³ U.S. CONST. art. I, § 9, cl. 2 (hereinafter this clause will be referred to as the "suspension clause").

Many saw the terrorist attacks on September 11, 2001 as an act of war on the United States of America. Terrorists used airplanes as missiles to strike the Pentagon in Washington, D.C. and the World Trade Center in New York. The unimaginable destruction caused by these acts exposed the United States' vulnerability to terrorism on its own soil. In response, the Bush Administration both proposed and adopted strong measures to protect the safety of Americans. One week following the attacks, the Administration announced new rules that would allow the indefinite detainment of immigrants during times of emergency.⁴ In addressing concerns over the potential erosion of civil liberties, Attorney General John Ashcroft promised, "We're going to do everything we can to harmonize the constitutional rights of individuals with every legal capacity we can muster to also protect the safety and security of individuals."⁵ Although concerned over homeland security, members of Congress spanning the political spectrum also worried that the Administration's proposed law enforcement powers, aimed at preventing further terrorist attacks, might excessively infringe on civil liberties.⁶ Additional concerns arose when President Bush signed an executive order on November 13, 2001, creating military tribunals as an optional venue to try foreigners charged with terrorism.⁷ The American Civil Liberties Union, law professors, and experts in military law criticized the creation and use of military tribunals on grounds that they would facilitate racial profiling and depart from the principles of American criminal justice.⁸

Although the federal government's powers traditionally expand during wartime, a liberality often treated with deference by the courts,⁹ the United States Supreme Court has yet to resolve the issue of which branch of government, the executive or legislative, has the power to suspend the writ of habeas corpus. Thus, the power struggle between Congress and the President over the power to shape wartime policy continues, as it has throughout this nation's history. During the early part of the Cold War, the President dominated the area of foreign policy, largely because Congress' knowledge of foreign affairs was viewed as inferior.¹⁰ Will the current war on terrorism bring a similar surge of presidential power? Did the Founding Fathers envision such executive branch supremacy when they included the power to suspend the writ of habeas corpus in the Constitution?

The purpose of this Note is to emphasize that during times of war, presidential authority must be carefully scrutinized to ensure that it is being

⁴ Philip Shenon & Robin Toner, *U.S. Widens Policy on Detaining Suspects; Troubled Airlines Get Federal Aid Pledge*, N.Y. TIMES, Sept. 19, 2001, at A1.

⁵ *Id.*

⁶ See Robin Toner, *Bush Law-Enforcement Plan Troubles Both Right and Left*, N.Y. TIMES, Sept. 28, 2001, at A1.

⁷ Elisabeth Bumiller & David Johnston, *Bush May Subject Terror Suspects to Military Trials*, N.Y. TIMES, Nov. 14, 2001, at A1, B8.

⁸ *Id.* at B8.

⁹ William Glaberson, *Government Has Power to Curb Some Freedoms*, N.Y. TIMES, Sept. 19, 2001, at B7.

¹⁰ See ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 127 (1973).

exercised consistently with the Constitution. Presidents often cite the actions of their predecessors to justify their policy choices. Reliance on often questionable historical precedents can lead to unwarranted expansions of presidential authority, especially when the President is acting as Commander in Chief. Through the examination of the writ of habeas corpus suspension during the Civil War, this Note aims to determine whether the President is legally entitled to such authority, as well as to discuss the consequences of exercising such authority. This Note will also explore Congress' constitutional role during war and national emergency.

Although instances may arise in which national security demands the President to suspend the writ of habeas corpus, this Note posits that under *no* circumstances should the President unilaterally do so. Sanctioning such presidential authority is contrary to the Framers' intent, violates the spirit of checks and balances established in the Constitution, and contradicts democratic principles. This Note will further demonstrate that the President's authority to "repel sudden attacks" should not *legally* justify suspending the writ of habeas corpus, even when congressional approval would be impracticable. Additionally, this Note will examine how President Bush's executive order creating military tribunals that effectively limit a defendant's right to appeal a conviction may not violate the suspension clause. Moreover, the Bush Administration should, as a matter of principle, recognize that the detainees confined in Camp X-ray in Guantánamo Bay, Cuba have a legal right to the writ of habeas corpus. Finally, this Note will suggest the roles that Congress and the public should play in checking executive authority in times of war.

Part II of the Note details the purpose, historical origin, and operation of the writ of habeas corpus, as well as the adoption of the suspension clause into the Constitution. This section argues that the Framers of the Constitution intended that Congress, and not the President, should have the power to implement the suspension clause. Part III outlines the circumstances surrounding some of President Abraham Lincoln's suspensions of the writ. Other than Lincoln's first suspension, subsequent suspensions of the writ were aimed more at prosecuting the war than protecting the public safety. Hence, the only justification for presidential suspension of the writ, if any, should be for an act of civil disobedience. Part IV evaluates changes in presidential authority since September 11 and considers whether the writ of habeas corpus has been suspended with respect to the detainees in Guantánamo Bay and under the rules for the proposed military tribunals. In conclusion, Part V suggests how the war on terrorism can be fought while striking a proper balance between protecting national security and civil liberties by emphasizing governmental actions that seek legitimacy.

II. WHAT IS THE WRIT OF HABEAS CORPUS?

A. HABEAS CORPUS: DEFINITION AND PURPOSE

Habeas corpus literally means, “[t]hat you have the body.”¹¹ It is a “writ employed to bring a person before a court, most frequently to ensure that the party’s imprisonment or detention is not illegal.”¹² The purpose of the writ of habeas corpus is not to compensate a prisoner for an alleged injustice, nor to punish the police officer or judge whose actions led to the proceeding.¹³ Rather, its purpose is to ensure the legality of the detention.¹⁴ Since a prisoner’s ultimate objective is release, the writ of habeas corpus is a viable means for prisoners to assert their substantive rights.¹⁵

The American legal system adopted the writ of habeas corpus from English common law, albeit with some changes, but its basic purpose remains the same.¹⁶ In England, conflicts often arose between Parliament and the King regarding who should be responsible for effectuating the writ’s advancement.¹⁷ The King had used the writ to compel individuals to appear before the courts.¹⁸ Parliament saw this use of the King’s power as a potential instrument to restrict an individual’s personal freedom.¹⁹ In response, Parliament passed the Petition of Right, which abolished the King’s power to imprison individuals without showing cause.²⁰ In doing so, Parliament helped transform the writ into a protection of personal freedom.²¹ Thus, the historical development of the writ in England reflects an assumption that the Executive could not be trusted with protecting individual rights.

This tension between the executive and legislative branches over the purpose of the writ is central to the question of whether the President or Congress should have the power to suspend the writ. Ultimately, two questions should be answered. First, is recognizing a constitutional basis for the President to suspend the writ a repressive restriction on personal freedom or an effective tool for the protection of the public safety? This question relates to what will likely happen in practice when the Executive unilaterally decides when to exercise the power to suspend the writ. Second, who should have the constitutional authority to suspend the writ, the President or Congress? Constitutional principles are necessary for guidance in order to answer this question. This Note will attempt to answer both of these questions.

¹¹ BLACK’S LAW DICTIONARY 715 (Bryan A. Garner ed., 7th ed. 1999).

¹² *Id.*

¹³ WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS 3 (1980).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 44.

¹⁸ *Id.* at 62.

¹⁹ *Id.*

²⁰ *Id.* at 45.

²¹ *See id.* at 62.

B. HOW THE WRIT OF HABEAS CORPUS OPERATES

The writ mentioned in the suspension clause is officially known as the writ of *habeas corpus ad subjiciendum*, and is used in all cases of illegal confinement.²² The operation of this writ has three basic characteristics. First, the writ must be directed at the person detaining the individual claiming the privilege.²³ Second, it commands the detainer to produce the body of the prisoner at a designated time and place.²⁴ Third, it commands the detainer to state the day and cause of the prisoner's capture and detention and to comply with the judge's decision.²⁵ This particular writ is an appropriate remedy to determine if any person has been legally detained and to ascertain the cause of the confinement.²⁶ If there are insufficient grounds to detain the person, the party is entitled to immediate discharge.²⁷

C. ADOPTION OF THE SUSPENSION CLAUSE

Even before the federal constitution was adopted, every state in the Union secured the writ of habeas corpus either by common law or state constitutional law.²⁸ At the time of the Constitution's drafting, the Framers assumed that the states would adequately safeguard individual liberties.²⁹ Therefore, in writing the suspension clause, the Framers were concerned that the federal government would interfere with the states' remedy.³⁰ In the debate over the suspension clause, the Framers focused mainly on the power of suspension.³¹ Opponents of the suspension clause argued against granting the federal government the power to suspend the writ because human nature inherently seeks power.³² They further argued that the granting of such power would require that governmental actions be carefully scrutinized to prevent abuse.³³ An outright ban on the suspension of the writ was defeated because even the supporters of the clause recognized that there might be circumstances where its suspension might be appropriate.³⁴

The most interesting aspect of the debate over the suspension clause is the Framers' assumption that if the power to suspend the writ were granted to the federal government, it would be given to Congress. One of the Framers, Charles Pinckney from South Carolina, proposed that the writ not

²² JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1333, at 206 (1833).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ DUKER, *supra* note 13, at 129.

²⁹ *See id.*

³⁰ *See id.*

³¹ *See* FREEDMAN, *supra* note 2, at 14.

³² *Id.* at 17.

³³ *See id.*

³⁴ *See id.*

“be suspended by the *legislature* except upon the most urgent and pressing occasions, and for a limited time not exceeding [twelve] months.”³⁵ Edward Rutledge, on the other hand, believed that a universal suspension throughout the Union would be unnecessary because the states could use their power to suspend the writ and deal effectively with emergencies.³⁶ The states that agreed with Rutledge’s position voted for a provision that would completely deny *Congress* the power to suspend the writ.³⁷ A compromise approach offered by Robert Morris provided that the privilege should not be suspended except “where . . . the public Safety may require . . .” and also provided that the power to suspend would be derived from *Congress*’ power to call for the militia to suppress rebellion and repel invasion.³⁸ Given this, it follows that the Framers’ intent was that *Congress* could suspend the privilege of the writ of habeas corpus, but only if it was necessary and proper and the public safety required it.³⁹

The manner in which public safety was to be protected was an important question facing the States. As evinced in the Articles of Confederation, Americans were more concerned with questions of control than with moral implications of military professionalism, and, thus, would support a standing army if it was raised and supported by the states.⁴⁰ Supporters of the Articles believed “[t]he localized militia also provided a check against any abuse of the government’s coercive powers.”⁴¹ George Washington and Alexander Hamilton, however, believed that “a decentralized military establishment left the nation vulnerable to foreign attack and domestic discord.”⁴² The Constitution reflects a compromise of these two positions. Congress can summon the militia but only “to execute the laws of the Union [and] suppress Insurrections and repel Invasions.”⁴³ When Congress does call out the militia, the states still retain control over training the militia and appointing its officers.⁴⁴

It may seem odd today that the states at the time of the Constitution’s framing believed Congress to be inadequate to represent their interests and feared entrusting it with control over the Republic’s armies.⁴⁵ Anti-Federalists argued that society’s law enforcement depended on either citizen support or military coercion.⁴⁶ History provided countless examples of government officials misusing armies without regard to the people’s

³⁵ *Id.* at 12 (emphasis added).

³⁶ DUKER, *supra* note 13, at 130.

³⁷ *See id.*

³⁸ *Id.* at 131.

³⁹ *See id.*

⁴⁰ *See* LAWRENCE DELBERT CRESS, *CITIZENS IN ARMS: THE ARMY AND THE MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812*, at 95 (1982).

⁴¹ *Id.*

⁴² *Id.*

⁴³ U.S. CONST. art. I, § 8, cl. 15.

⁴⁴ CRESS, *supra* note 40, at 97.

⁴⁵ *See id.* at 99.

⁴⁶ *Id.*

will.⁴⁷ But the states, according to the Anti-Federalists, did not depend on coercion because representation within the states ensured that laws conformed to the public will.⁴⁸ Given the important role the Constitution defined for Congress in times of emergency, one could reasonably assume that when public safety required suspension of the writ of habeas corpus, Congress would have power to authorize it. The President's role during emergencies, however, lacked clear definition. But if the states had feared entrusting Congress with protecting the public safety because it might not represent their interests, then a fortiori they feared such power in the President's hands. These assumptions regarding congressional and presidential authority in times of national emergency were later challenged during the Civil War and are being challenged again in the current war on terrorism.

III. LINCOLN'S SUSPENSIONS OF THE WRIT OF HABEAS CORPUS

A. THE EFFECT OF A NATIONAL CRISIS ON A PRESIDENT: ABRAHAM LINCOLN AND GEORGE W. BUSH

Abraham Lincoln was elected President at a time when the country was bitterly divided over the issue of extending slavery into the territories. In the 1860 presidential election, Lincoln won only forty percent of the national popular vote.⁴⁹ In ten southern states, he did not receive a single popular vote.⁵⁰ Southerners perceived his election as a threat to the right of slaveholders to take slaves into the territories.⁵¹ Shortly after the election, South Carolina's senators resigned from Congress and the state legislature considered seceding from the Union.⁵² By the time of Lincoln's inauguration, several southern states had seceded and border states like Maryland also considered secession. The need to keep border states from seceding tremendously affected Lincoln's decisions on protecting the nation's capital and preserving the Union.

Like Lincoln, President George W. Bush was elected at a time when our nation was bitterly divided. The 2000 presidential election was so close that a machine recount of votes was conducted in Florida. The winner of Florida's twenty-five electoral votes would become President. A legal dispute between Bush and then-Vice President Al Gore arose over whether a manual recount could be conducted under Florida law. The United State Supreme Court eventually resolved the conflict in *Bush v. Gore*⁵³ after a manual recount had already begun. Seven Justices believed

⁴⁷ *Id.* at 101.

⁴⁸ *See id.* at 99.

⁴⁹ JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 232 (1988).

⁵⁰ WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 3-4 (1998). In fact, some southern states did not include Lincoln on their presidential ballots. *Id.*

⁵¹ *See* MCPHERSON, *supra* note 49, at 241.

⁵² REHNQUIST, *supra* note 50, at 4.

⁵³ 531 U.S. 98 (2000).

that the recount had constitutional problems and five Justices felt that continuing the recount would violate the Florida election code.⁵⁴ The decision effectively gave the presidency to Bush. Even after the Court ended the legal battle, some Americans felt that Bush was not a “legitimate” president because he lost the popular vote. Unlike Lincoln’s election, Bush did not face any resignations from Congress after his election, although Republicans did lose control of the Senate to Democrats when one of its members, Senator James Jeffords of Vermont, became an Independent.⁵⁵

A national crisis can transform a weak President into a strong one. The threat of secession constantly plagued the nation in the antebellum period. Lincoln responded to the outbreak of the Civil War by taking strong measures to preserve the Union. Likewise, in the post-Cold War era, the threat of terrorist attacks at home and abroad was a well-known concern. The September 11 attacks presented Bush with the opportunity to expand executive authority. Lincoln and Bush, like many other wartime presidents, stretched constitutional executive powers to their limit. Lincoln, however, is the only President to have explicitly suspended the writ of habeas corpus, although some may argue that Bush may have functionally suspended it in his executive order creating military tribunals. In creating these tribunals, Bush relied on the historical precedents of Lincoln and other Presidents. Therefore, reevaluating historical precedents is important in determining whether they should be regarded as constitutional precedents.

In analyzing why and under what circumstances Lincoln suspended the writ, the ultimate question is whether his actions can be *legally* justified under the Constitution. The best argument for such a *legal* justification lies within the President’s implied power to repel sudden attacks combined with Congressional acquiescence to those suspensions. This section will argue that, although Lincoln’s first suspension of the writ can be *morally* justified as a reasonable tool to preserve the Union, his actions should not be *legally* justified under the Constitution and consequently should not be considered as legal precedent for a presidential suspension of the writ unilaterally. At best, Lincoln’s first suspension should be defended as an act of civil disobedience. After this first suspension, the examples of suspensions discussed below will demonstrate why allowing the President to unilaterally suspend the writ based on war powers authority is problematic. In practice, Lincoln acted as if war powers during a rebellion trumped any limitations placed by the Judiciary and Congress on such powers. Lincoln suspended the writ during a rebellion that was caused, in part, by the South’s belief that he would infringe on slaveholders’ rights. Given this reason for the rebellion, was it not dangerous for Lincoln to have sole possession of power to suspend the writ?⁵⁶

⁵⁴ See *id.* at 111.

⁵⁵ Jill Zuckman, *Democrats Take Senate: Bipartisanship is Byword After Jefford’s Jump*, CHI. TRIB., June 6, 2001, available at 2001 WL 4080726.

⁵⁶ See FREEDMAN, *supra* note 2, at 17 (analogous argument made by opponents to the adoption of a suspension clause that would give Congress the power to suspend the writ: “The Congress will

B. THE CONNECTION BETWEEN WAR POWERS AND THE SUSPENSION OF THE WRIT

Lincoln took office March 4, 1861 hoping to preserve the Union despite the secession of several southern states.⁵⁷ Immediately after his inauguration he faced a difficult decision regarding the diminishing supplies in Fort Sumter, located off the South Carolina coast, and eventually decided to resupply the fort with provisions only.⁵⁸ In doing so, he challenged the South to choose peace or war, and by firing on the supply boats, the South became the aggressor.⁵⁹ On April 15, 1861, one day after surrendering Fort Sumter, Lincoln issued a proclamation calling for the militias of various states to suppress the rebellion.⁶⁰ While many states in the North enthusiastically responded to Lincoln's call for troops, the southern states and border states that had not seceded disputed the President's constitutional authority to call for troops.⁶¹

The Constitution does not give the President explicit authority to unilaterally summon the militia in time of invasion or rebellion to protect the public safety. This lack of explicit authority created a situation where critics questioned Lincoln's authority to activate troops when there was little time for debate. Yet, Lincoln's call for troops was not unconstitutional. The history, framing, and ratification of the Constitution implicitly suggest that the President has the unilateral authority to repel a sudden attack.⁶² An early draft of the Constitution gave Congress the power to "make war," which drafters amended in favor of the language "declare war" because the legislature might be too slow to react in an emergency.⁶³ This change in language implicitly left the President with the power to repel sudden attacks.⁶⁴ Therefore, the power to repel sudden attacks represents an emergency measure a President can take to protect American interests at home and abroad.⁶⁵

But, in repelling sudden attacks, does the President have the power to make a "defensive war"?⁶⁶ In other words, does repelling a sudden attack

suspend the writ of *habeas corpus* in case of rebellion; but if this rebellion was only a resistance to usurpation, who will be the Judge? the usurper.").

⁵⁷ See MCPHERSON, *supra* note 49, at 236 (map showing southern secession; the states that seceded from the Union before the fall of Fort Sumter were South Carolina, Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas; the states that seceded after the fall of Fort Sumter were Virginia, Arkansas, North Carolina, and Tennessee).

⁵⁸ See *id.* at 272.

⁵⁹ See *id.* at 273.

⁶⁰ See Abraham Lincoln, *Proclamation Calling Militia and Convening Congress* (April 15, 1861), in 4 COLLECTED WORKS OF ABRAHAM LINCOLN 332 (Roy P. Basler ed., 1953) [hereinafter Lincoln, 4 COLLECTED WORKS].

⁶¹ See REHNQUIST, *supra* note 50, at 17.

⁶² PETER RAVEN-HANSEN, *THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR: HISTORICAL AND CURRENT PERSPECTIVES* 35 (Gary M. Stern & Morton H. Halperin eds., 1994).

⁶³ See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 6 (1995).

⁶⁴ See *id.*

⁶⁵ See *id.* at 7.

⁶⁶ RAVEN-HANSEN, *supra* note 62, at 35.

include the power to make a preemptive strike against the enemy in order to defend the nation? This question has particular importance in the current war on terrorism because one reason the United States took military action in Afghanistan was to prevent future attacks by the Al Qaeda terrorist group. In reference to the threat of future attacks, President Bush said in his 2002 State of the Union Address, “I will not wait on events, while dangers gather. I will not stand by, as peril draws closer and closer. The United States of America will not permit the world’s most dangerous regimes to threaten us with the world’s most destructive weapons.”⁶⁷ The President also stated that American intelligence believed that thousands of terrorists trained by Al Qaeda were spread throughout the world and were “like ticking time bombs—set to go off without any warning.”⁶⁸

If United States intelligence agents became aware of an imminent attack that threatened national security, a military response authorized by the President to prevent the attack without congressional approval would be an example of “repelling a sudden attack.” This implied power raises some difficult questions in unusual, but entirely plausible, circumstances. What if the most effective means to foil a terrorist attack required apprehension of those suspected before carrying out the attacks? What if those considered possible suspects were only defined by race or general appearance? What if apprehension was required of individuals who merely had knowledge that attacks would be carried out? Should the President have constitutional authority to unilaterally suspend the writ of habeas corpus to thwart a threatened attack? These are the questions to be answered.

C. LINCOLN’S FIRST SUSPENSION OF THE WRIT OF HABEAS CORPUS

1. *Incidents that Triggered the First Suspension*

Lincoln first suspended the writ of habeas corpus after the Baltimore riots in April of 1861. Of the border states that had not seceded from the Union, Maryland was crucial to the preservation of the Union because it enclosed Washington, D.C. on three sides, with Virginia, which had already seceded, on the fourth side.⁶⁹ Maryland had a large secessionist minority and Southern-Rights Democrats controlled its legislature.⁷⁰ Maryland Governor Thomas H. Hicks, on the other hand, sympathized with the Union.⁷¹ On April 19, 1861 the 6th Massachusetts Regiment, the first to respond to Lincoln’s call for troops, had to pass through Baltimore on its way to Washington without the benefit of a rail line.⁷² A violent mob greeted the soldiers and attacked them with bricks, stones, and pistols, to

⁶⁷ David E. Sanger, *Bush, Focusing on Terrorism, Says Secure U.S. is Top Priority*, N.Y. TIMES, Jan. 30, 2002, at A1.

⁶⁸ *Id.* at A21.

⁶⁹ See MCPHERSON, *supra* note 49, at 284–85.

⁷⁰ *Id.* at 285.

⁷¹ REHNQUIST, *supra* note 50, at 20.

⁷² MCPHERSON, *supra* note 49, at 285.

which they responded by firing into the crowd.⁷³ When the soldiers finally arrived at the station, four soldiers and twelve civilians were dead and the bridges and railroads were destroyed to prevent more troop movement.⁷⁴ The riots resulted in the nation's capital being cut off from the North, with rumors of an impending attack by Virginia.⁷⁵

2. *Legal and Historical Precedent for Suspending the Writ*

These perilous circumstances caused Lincoln to consider suspending the writ of habeas corpus. Yet, Lincoln had no precedent suggesting that, as President during a rebellion, he had the authority to do. In *Commentaries on the Constitution of the United States*, originally published in 1833, Supreme Court Justice Joseph Story stated:

Hitherto no suspension of the writ has ever been authorized by congress since the establishment of the constitution. It would seem, as the power is given to congress to suspend the writ of habeas corpus in cases of rebellion or invasion, that the right to judge, whether exigency had arisen, must exclusively belong to that body.⁷⁶

Story concluded that only Congress could suspend the writ of habeas corpus, but did not provide a legal basis for his assumption. His conclusion, rather, was based on President Jefferson's assertion that he could not conceive of a situation where the President should suspend the writ even during insurrection or rebellion.⁷⁷ Furthermore, the Jefferson Administration and Congress during the *Bollman Affair*⁷⁸ considered suspending the writ and assumed that the Legislature had exclusive authority to do so.⁷⁹ The bill to suspend the writ passed in the Senate, but was rejected in the House.⁸⁰ In short, it may have been so obvious to Justice Story that Congress had the exclusive power to suspend the writ that he felt it needless to explain why.

Without a historical precedent for the presidential suspension of the writ, Lincoln acted with caution. According to his Secretary of State, William H. Seward, the writ of habeas corpus "had not been suspended because of Mr. Lincoln's extreme reluctance at that period to assume such a responsibility. Those to whom he looked for advice, almost to a man,

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *See id.* at 286.

⁷⁶ STORY, *supra* note 22, at 209.

⁷⁷ *See id.* at 209 n.1.

⁷⁸ After his first term, Jefferson removed Aaron Burr from the second-term ticket for Vice President. Burr was facing murder charges for killing Alexander Hamilton in a duel. He fled to the Western Territories where he plotted to separate some of the country's newly acquired territories from the Union. Burr and his co-conspirators, Samuel Swartwout and Dr. Erick Bollman, were seized by the United States Army commander in New Orleans, who transported them to Baltimore in defiance of writs of habeas corpus issued by federal judges. The prisoners applied to the United States Supreme Court for a writ of habeas corpus. FREEDMAN, *supra* note 2, at 20–21.

⁷⁹ *See* DUKER, *supra* note 13, at 142.

⁸⁰ STORY, *supra* note 22, at 209 n.1.

opposed this action.”⁸¹ Lincoln’s hesitation suggests that he was not only concerned with the lack of precedent, but also with creating a dangerous precedent. The situation in Maryland made his initial hesitation to suspend the writ a closer call. On April 26, 1861, the Maryland governor called a special session of the Legislature, and many feared the Legislature would vote to secede from the Union.⁸² Lincoln could have arrested the Maryland legislators before they voted on secession but chose not to, reserving such action only if necessary. He argued that the Maryland legislators had the right to assemble, and arresting them would only delay the inevitable.⁸³ Maryland’s legislature, however, did not consider the secession ordinance. Meanwhile, troops finally arrived in Washington, and two days later, Lincoln suspended the writ for the first time, even though the worst dangers appeared over.⁸⁴

Not everyone, however, believed the capital was free from danger. General-in-Chief Winfield Scott believed that an attack on the capital would occur.⁸⁵ In response, on April 27 Lincoln sent the following order to General Scott:

You are engaged in repressing an insurrection against the laws of the United States. If at any point on or the vicinity of the military line which is now [or which shall be] used between the city of Philadelphia and the city of Washington . . . you find resistance which renders it necessary to suspend the writ of Habeas Corpus for the public safety, you personally or through the officer in command [at the point where] resistance occurs, are authorized to suspend that writ.⁸⁶

Evaluating whether Lincoln’s first suspension of the writ was proper is difficult because the Union itself was threatened, which makes it easy to sympathize with his decision. The hindsight knowledge that the Union was indeed preserved also seems to justify his actions. Nevertheless, Lincoln’s actions must be carefully analyzed to determine whether they should be deemed constitutional.

Approximately one month after the suspension of the writ, troops under Captain Samuel Yohe arrested John Merryman, a farmer, state legislator, and a lieutenant in a secessionist cavalry unit and imprisoned him at Fort McHenry, Maryland.⁸⁷ He was arrested for burning bridges and ripping down telephone wires.⁸⁸ Generally, those arrested in the border states during 1861 were kept in Fort Lafayette, New York⁸⁹ and imprisoned in a

⁸¹ REHNQUIST, *supra* note 50, at 23.

⁸² See MARK E. NEELY, JR. *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 6 (Oxford University Press 1991).

⁸³ See Lincoln, 4 *COLLECTED WORKS*, *supra* note 60, at 344 (to Winfield Scott).

⁸⁴ See NEELY, *supra* note 82, at 8.

⁸⁵ See *id.*

⁸⁶ Lincoln, 4 *COLLECTED WORKS*, *supra* note 60, at 347 (to Winfield Scott).

⁸⁷ REHNQUIST, *supra* note 50, at 26.

⁸⁸ Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 *CARDOZO L. REV.* 81, 90 (1993).

⁸⁹ REHNQUIST, *supra* note 50, at 50.

chamber with anywhere from ten to forty other inmates.⁹⁰ Shortly after his arrest Merryman obtained counsel to petition for a writ of habeas corpus.⁹¹ He also visited with family and friends.⁹² Thus, at least some detained prisoners likely were not held incommunicado. Given that the North was a potential asylum for Confederate sympathizers like Merryman, suspending the writ became an effective tool to silence those interfering with the Administration's policies.⁹³ Lincoln demonstrated that he was willing to sacrifice an individual's privilege of the writ of habeas corpus to fulfill what he believed to be his duty as Commander in Chief.

The Constitution states: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."⁹⁴ With respect to initiating war, the Constitution explicitly gave Congress the power to declare war⁹⁵ and implicitly gave the President the authority to unilaterally initiate war only to repel sudden attacks.⁹⁶ The Constitution, however, does not define what powers the President can exercise as Commander in Chief. Thus, an argument can be made that Lincoln's first unilateral suspension of the writ of habeas corpus was constitutionally justifiable under the President's authority as Commander in Chief. According to this argument, the President could only suspend the writ to repel a sudden attack. However, providing a legal justification that would sanction the President's unilateral suspension of the writ under these circumstances opens the door for abuses by future Presidents. Therefore, Lincoln's first suspension of the writ violated the Constitution but was morally justified because it may have contributed to preserving the Union.

It is reasonable to conclude that Lincoln's initial suspension of the writ was necessary to prevent the capital from falling into Confederate hands. In his book, *The Fate of Liberty: Abraham Lincoln and Civil Liberties*, Professor Mark E. Neely, Jr. argues:

The purpose of the initial suspension of the writ of habeas corpus is clear from the circumstances of its issuance: to keep the military reinforcement route to the nation's capital. It is equally clear that political provocation—the meeting of the Democratic-dominated Maryland legislature—did not cause Lincoln to give Scott the historic authorization.⁹⁷

One day before Lincoln sent the order suspending the writ, General Scott had already drafted an order warning that an attack on the capital was

⁹⁰ *Id.*

⁹¹ *Id.* at 26.

⁹² *Id.* at 38–39.

⁹³ See JACOB K. JAVITZ, WHO MAKES WAR: THE PRESIDENT VERSUS CONGRESS 121 (1973).

⁹⁴ U.S. CONST. art. II, § 2, cl. 1.

⁹⁵ See U.S. CONST. art. I, § 8, cl. 11.

⁹⁶ See *supra* notes 62–65 and accompanying text.

⁹⁷ NEELY, *supra* note 82, at 9.

possible at any moment.⁹⁸ Therefore, General Scott could have used the suspension of the writ to defend Washington and protect public safety.

Despite the apparent necessity of suspending the writ to protect the capital, Lincoln's failure to publicly declare its suspension may have hurt its effectiveness in protecting public safety. Perhaps Lincoln believed that publicly declaring the suspension would have angered the masses, complicating the task of putting down the rebellion. Because the courts and other civil authorities were not notified, however, their compliance with the order was difficult. For example, on May 2, 1861, a Maryland judge, William F. Giles, was unaware of the President's order when he issued a writ of habeas corpus for the release of a minor who had enlisted in the army without parental consent.⁹⁹ The officer refused to obey the order, acting entirely on his own authority.¹⁰⁰ When Chief Justice Roger B. Taney became aware the President had suspended the writ of habeas corpus, he informed the Democratic press outside Maryland.¹⁰¹ Because Lincoln was not more forthcoming, he provided the press with more reason to criticize his actions, and angered the Judiciary that was supposed to assist him in keeping prisoners detained.

D. THE SUSPENSION CLAUSE AND THE THREE BRANCHES OF GOVERNMENT

1. *Judicial Supremacy to Interpret the Law?*

The judiciary addressed the legality of Lincoln's suspension of the writ of habeas corpus in *Ex parte Merryman*.¹⁰² Merryman's lawyer successfully petitioned for the writ directly to Chief Justice Taney, then sitting on the federal Circuit Court of Maryland.¹⁰³ On May 26, the Chief Justice, who was circuit riding as a federal court judge, issued the writ as a Supreme Court justice from chambers.¹⁰⁴ The writ was directed at General George Cadwalader, the commanding officer where Merryman was imprisoned.¹⁰⁵ The following day, General Cadwalader sent a messenger to inform the Chief Justice that he would not produce Merryman because of Lincoln's order suspending the writ of habeas corpus, but requested the case's postponement until he received further instructions from the President.¹⁰⁶ Taney responded by holding the general in contempt, and on May 28, he made his ruling from the bench.¹⁰⁷

⁹⁸ See *id.* at 8.

⁹⁹ *Id.* at 8-9.

¹⁰⁰ See *id.* at 8.

¹⁰¹ *Id.*

¹⁰² 17 F. Cas. 144 (C.C.D. Md. 1861).

¹⁰³ See Paulsen, *supra* note 88, at 90.

¹⁰⁴ See NEELY, *supra* note 82, at 10.

¹⁰⁵ Paulsen, *supra* note 88, at 90-91.

¹⁰⁶ *Id.* at 91.

¹⁰⁷ See *id.*

In his written opinion, Taney concluded that Lincoln lacked constitutional power to suspend the writ of habeas corpus.¹⁰⁸ He based his conclusion on several grounds. First, President Jefferson believed that the President possessed no power to suspend the writ.¹⁰⁹ Second, Taney reasoned that the location of the suspension clause in Article I, which deals with congressional powers, meant that Congress should have the sole power to suspend the writ.¹¹⁰ Third, Taney relied on Blackstone's *Commentaries*, which indicated that in England only Parliament could suspend the writ, and on Justice Story's *Commentaries on the Constitution of the United States*, which asserted that Congress had the sole power to suspend the writ.¹¹¹ Finally, he relied on Chief Justice Marshall's statement in *Ex parte Bollman*,¹¹² that "[i]f at any time the public safety should require the suspension of the powers vested by [the Judiciary Act of 1789] in the courts of the United States, it is for the legislature to say so."¹¹³

Taney also concluded that where life, liberty, or property of a private citizen is concerned, the President only possesses the power prescribed in Article II, section 3—to take care that the laws be faithfully executed.¹¹⁴ Furthermore, he asserted that the President could not authorize the execution of the laws either himself or through agents or officers, civil or military, independent of judicial or legislative authority.¹¹⁵ According to Taney, the courts possessed the authority to define the President's duty to faithfully execute the laws, and to command that the execution of laws conform to the interpretation of the law by the courts.¹¹⁶ This latter assertion of judicial supremacy, i.e., that the courts can tell the President what he must do, went further than Chief Justice Marshall's view on judicial supremacy in *Marbury v. Madison*.¹¹⁷ Although Taney may have gone too far in defining judicial authority, there is no doubt the President should enforce the judiciary's final judgment, even if there is disagreement over the interpretation.¹¹⁸ At the conclusion of the opinion, Taney reminded Lincoln of his duty to faithfully execute the laws.¹¹⁹

Taney provided strong support for the argument that only Congress has the authority to suspend the writ. The location of the suspension clause in the legislative article follows the section enumerating legislative powers and supports the conclusion that it was designed to limit congressional

¹⁰⁸ See *Ex parte Merryman*, 17 F. Cas. 144, 148 (1861).

¹⁰⁹ See *id.* at 148.

¹¹⁰ See *id.*

¹¹¹ See *id.* at 151–52.

¹¹² 4 Cranch 75 (1807).

¹¹³ *Id.* at 101.

¹¹⁴ *Ex parte Merryman*, 17 F. Cas. at 149.

¹¹⁵ *Id.*

¹¹⁶ See Paulsen, *supra* note 88, at 93.

¹¹⁷ See *id.* In *Marbury v. Madison*, Chief Justice Marshall declared, "[i]t is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) 137, 177 (1803).

¹¹⁸ See Paulsen, *supra* note 88, at 95.

¹¹⁹ See *Ex parte Merryman*, 17 F. Cas. at 153.

power.¹²⁰ Also, as argued above, the Framers probably intended that only Congress should possess the power to suspend the writ if public safety required it.¹²¹ Yet, Taney's opinion did not settle the matter entirely. Chief Justice William Rehnquist argued, "Taney read [the powers of the President] narrowly, thereby ruling out any express or implied authority the President might have in this area under his 'war powers.'"¹²² In other words, Taney did not explicitly address the thorny issue of whether Lincoln's first suspension of the writ was justified under the President's implied power to repel sudden attacks.

Despite the judicial opinion, Taney's response to Lincoln's suspension of the writ is problematic. He ignored the general's request for postponement and made his ruling without the benefit of hearing the government's argument.¹²³ According to Chief Justice Rehnquist, "the judicial process is quintessentially a deliberative one . . . a judge may have instinctive or preliminary reactions against the position of one side in a case, before ever hearing argument from counsel. But one of the purposes of argument is to allow such a side to try to persuade the judge that his preliminary or instinctive reaction is mistaken."¹²⁴ Taney's quick ruling without the benefit of oral argument foreclosed the opportunity for a more democratic resolution of the important issue of presidential authority to suspend the writ of habeas corpus under the Constitution.¹²⁵ Although in the end Taney might not have changed his mind, a resolution after hearing the government's position would have legitimized his ruling. As it stood, Taney's quick opinion made it easier for Lincoln to disregard the ruling.

2. *Lincoln's Interpretation of the Suspension Clause*

Although Taney had made the ruling, Lincoln had to enforce it. He could have appealed Taney's *Merryman* decision to the United States Supreme Court but chose not to pursue it.¹²⁶ Perhaps Lincoln did not want the circuit court decision to then gain the force of a Supreme Court decision, which would have made it the law of the land.¹²⁷ Furthermore, the Supreme Court likely would have upheld the circuit court decision given that of the six active members, four of them—Taney, Wayne, Grier, and Catron—had joined the principal portion of Taney's *Dred Scott* opinion and the two dissenters were no longer on the Court.¹²⁸ Additionally, many legal scholars in the North agreed with Taney's opinion that the President

¹²⁰ See DUKER, *supra* note 13, at 131.

¹²¹ See *supra* notes 35–39 and accompanying text.

¹²² REHNQUIST, *supra* note 50, at 36.

¹²³ See *id.* at 40.

¹²⁴ *Id.* at 40–41.

¹²⁵ See *id.* at 41.

¹²⁶ See *id.* at 44. Rehnquist notes that circuit court opinions, like Taney's in *Ex parte Merryman*, were ordinarily reviewable by the Supreme Court but that "there were significant procedural obstacles to such an appeal as the law stood then." *Id.*

¹²⁷ See *id.*

¹²⁸ See *id.*

did not possess the authority to suspend the writ.¹²⁹ On the other hand, some prominent legal scholars defended Lincoln's actions. They included Joel Parker and Theophilus Parsons, two Harvard Law School professors; Horace Binney, the patriarch of the American bar; and Reverdy Johnson, the most respected constitutional lawyer in Congress.¹³⁰ Nevertheless, instead of appealing the decision through judicial channels, Lincoln took his appeal to Congress and the people.¹³¹

Lincoln delayed convening Congress from April 12, 1861 to July 4, 1861, when Fort Sumter was attacked.¹³² During the antebellum period, Congress customarily convened in December after the new President took office in March.¹³³ This gave the new administration time to set its agenda before Congress began its deliberations.¹³⁴ When Congress had come into session early in a new administration, history indicated that the Administration's agenda would take a disastrous course.¹³⁵ By delaying the convocation of Congress, Lincoln avoided the possibility that Congress would stop him from taking measures he deemed necessary to preserve the Union.¹³⁶ During this delay, Lincoln acted as if he was the legislature.¹³⁷ On July 4, 1861, in a message to Congress in special session, Lincoln informed the nation he had authorized the suspension of the writ of habeas corpus in "proper cases."¹³⁸ Although he had delayed convening Congress, he said that he trusted that Congress would ratify the measures dictated.¹³⁹

In his message to Congress, Lincoln presented two possible arguments in defense of his suspension of the writ. He stated rhetorically: "[A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?"¹⁴⁰ This "necessity defense" implies that the government would collapse if the President could not suspend the writ, regardless of Taney's order.¹⁴¹ In other words, the Constitution would be useless without an intact nation.¹⁴² Lincoln presented a second argument in the alternative. He stated:

It was not believed that any law was violated . . . the Constitution itself, is silent as to which, or who, is to exercise the power; and as the [suspension

¹²⁹ See *id.* at 45.

¹³⁰ PHILLIP SHAW PALUDAN, *A PEOPLE'S CONTEST: THE UNION & CIVIL WAR 1861-1865*, at 29 (1996).

¹³¹ See Paulsen, *supra* note 88, at 94.

¹³² See SCHLESINGER, *supra* note 10, at 58.

¹³³ See JAVITZ, *supra* note 93, at 118.

¹³⁴ See *id.*

¹³⁵ See *id.*

¹³⁶ See SCHLESINGER, *supra* note 10, at 58.

¹³⁷ See *id.* (besides suspending the writ of habeas corpus, Lincoln took actions that clearly belonged only to Congress such as assembling the militia, enlarging the army and navy beyond their authorized strength, and instituting a naval blockade).

¹³⁸ Lincoln, 4 COLLECTED WORKS, *supra* note 60, at 429 (Message to Congress in Special Session).

¹³⁹ See *id.*

¹⁴⁰ *Id.* at 430.

¹⁴¹ See Paulsen, *supra* note 88, at 95.

¹⁴² See SCHLESINGER, *supra* note 10, at 59.

clause] was made for a dangerous emergency, it cannot be believed that in every case, the danger should run its course, until Congress could be called together; the very assembling of which of which might be prevented, as was intended in this case, by the rebellion.¹⁴³

To support his position, Lincoln noted that the suspension clause did not explicitly mention who could assert the power and relied on his implicit authority to repel sudden attacks. Lincoln not only provided these two arguments in his message but also promised Congress that the Attorney General would provide a more extended argument.¹⁴⁴

Attorney General Edward Bates provided that argument on July 5, 1861.¹⁴⁵ Unlike Lincoln, who did not explicitly reference Taney's opinion in *Merryman*, Bates did address the issue of whether the President was justified in refusing to obey a writ of habeas corpus issued by a judge.¹⁴⁶ He stated: "Our fathers, having divided the government into co-ordinate departments . . . left [them] by design . . . each independent and free, to act out its own granted powers, without any ordained or legal superior possessing the power to revise and reverse its action."¹⁴⁷ Bates suggested that Lincoln could disregard Taney's order and interpretation of the suspension clause, most likely basing this conclusion on Madison's Federalist No. 49.¹⁴⁸ Arguably, Madison's conclusions were superseded by Chief Justice Marshall's declaration in *Marbury v. Madison*¹⁴⁹ that "[i]t is emphatically the province and duty of the judicial department to [s]ay what the law is."¹⁵⁰ Thus, Lincoln's defiance of Taney's order probably breached the Constitution.

Lincoln's defiance of *Merryman* reveals the potential for a President to abuse executive power by disobeying court orders intended to protect against arbitrary arrests and detentions—the substantive rights the writ of habeas corpus was designed to preserve. Given this potential for abuse, Bates's argument defending Lincoln's defiance of Taney's order must be rejected. That leaves Lincoln's two arguments defending executive authority to unilaterally suspend the writ: his first argument, a "necessity defense" and his second argument a "war powers defense." In his speech, Lincoln expressly rejected reliance on the necessity defense, i.e., that he violated any law to preserve the Constitution. Instead, he argued that his actions were consistent with presidential war powers during a rebellion.

An argument can be made that Lincoln's first suspension of the writ was legally justified under the President's implied power to repel sudden attacks. Under this argument, Congress has power to suspend the writ

¹⁴³ Lincoln, 4 COLLECTED WORKS, *supra* note 60, at 430–31 (Message to Congress in Special Session).

¹⁴⁴ *See id.* at 431.

¹⁴⁵ 10 Op. Att'y. Gen. 74 (1868).

¹⁴⁶ *Id.* at 75.

¹⁴⁷ *Id.* at 76.

¹⁴⁸ *See* Paulsen, *supra* note 88, at 96.

¹⁴⁹ 5 U.S. (1 Cranch) 137 (1803).

¹⁵⁰ *Id.* at 177.

unless the President asserts this implied power. In theory, this draws a clear line between presidential and congressional authority with respect to the suspension clause. In practice, however, the exception will probably swallow the rule; presidential war powers once asserted are difficult to limit. Moreover, the Constitution provides more restrictions on Congress' powers than on the President's powers. This might suggest that the Framers provided fewer restrictions on the President because they believed that the President's chief responsibility was to enforce laws passed by Congress. In other words, why restrict powers the President does not possess? This may explain why the suspension clause does not state who has the power to authorize the suspension of the writ.

Lincoln asserted his authority as Commander in Chief to quell the rebellion under the belief that as Commander in Chief *he* had the power to suspend the writ of habeas corpus when *he* determined the public safety required it. The suspensions of the writ described below comported with the belief that suppressing the rebellion was synonymous with protecting public safety. The suspension clause, however, has two independent requirements: 1) that a rebellion or invasion exists and 2) that the writ must be suspended to protect public safety. Moreover, given that the Constitution does not provide many limitations on the President's authority as Commander in Chief, granting the President the power to suspend the writ as part of war powers could circumvent the Constitutional checks and balances designed to prevent abuse of authority. The subsequent suspensions described below were aimed more at prosecuting the war than protecting the public safety. While Lincoln seemed to suggest that he was only relying on his authority as Commander in Chief, his actions are more consistent with Bates's argument that the President can disregard another branch's interpretation of the law.

On May 10, 1861, Lincoln suspended the writ by public proclamation for a second time in Florida.¹⁵¹ This suspension is particularly interesting because Florida seceded from the Union prior to the fall of Fort Sumter. Theoretically, Lincoln believed that secession was inherently unlawful and could only occur through revolution.¹⁵² Based on this theory, Lincoln suspended the writ in Florida as though the citizens of the seceding states had waived their rights under the Constitution.¹⁵³ This assumption does not seem unreasonable given the state of war. Thus, suspension of the writ in Florida was essentially a *fait accompli*.¹⁵⁴ This was one several acts carried out without congressional authorization,¹⁵⁵ which significantly impacted Lincoln's future behavior. As Professor Neely notes, "Once [Lincoln]

¹⁵¹ See Lincoln, 4 COLLECTED WORKS, *supra* note 60, at 364–65 (Proclamation Suspending the Writ of Habeas Corpus in Florida).

¹⁵² See *id.* at 265 (First Inaugural Address—Final Text).

¹⁵³ See NEELY, *supra* note 82, at 10.

¹⁵⁴ See *id.*

¹⁵⁵ Such acts included, *inter alia*, assembling the militia, enlarging the Army and Navy beyond their authorized strength, and spending public money without congressional appropriation. See SCHLESINGER, *supra* note 10, at 58.

suspended the writ of habeas corpus without suffering dire political consequences, similar actions grew easier and easier.”¹⁵⁶ Therefore, the Florida suspension, which evinced Lincoln’s willingness to act unilaterally, effectively facilitated subsequent unwarranted suspensions.

On June 20, 1861, Lincoln issued another order authorizing General Scott to “suspend the writ of habeas corpus so far as may relate to Major Chase, lately of the Engineer Corp of the Army of the United States, now guilty of treasonable practices against this government.”¹⁵⁷ In neglecting to provide Major Chase’s first and middle names, Lincoln invited a wrongful arrest.¹⁵⁸ Certainly Lincoln must have believed at this point what he would openly admit to later, that suspending the writ could result in the wrongful arrest of an innocent person.¹⁵⁹ Furthermore, unlike the first suspension, which was used as a tool to prevent an imminent attack on the capital by Virginia, this suspension order did not issue in response to a “dangerous emergency.” The “Major Chase” referred to in the suspension order was Major William Henry Chase, who had resigned from the Union Army on October 31, 1856, and in 1861, he became a commissioned colonel and major general of the Florida state troops.¹⁶⁰ Dealing with treason, not protection of the public safety, seemed to be the only justification for this suspension.

Lincoln issued another suspension order on July 2, 1861, two days before his speech to Congress. At that point, he authorized General Scott to suspend the writ “at any point, on or in the vicinity of any military line which is now, or which shall be used between the City of New York and the city of Washington.”¹⁶¹ Professor Neely notes:

Lincoln had quickly overcome any initial hesitation to use presidential power to suspend the writ. The use of the phrase “military line,” for example, was becoming expansive, if not a little deceptive. At first the term had described the threatened route to Washington. Now it referred to no particularly well-described “line” between two places quite far apart on the map.¹⁶²

Unlike the first suspension order, which was narrowly tailored to protect the capital from imminent attack, this one aimed to stop *any* resistance to the Union forces over a broad area.¹⁶³ Furthermore, this suspension was neither directed at an imminent harm nor aimed at

¹⁵⁶ NEELY, *supra* note 82, at 10.

¹⁵⁷ Lincoln, 4 COLLECTED WORKS, *supra* note 60, at 414.

¹⁵⁸ See NEELY, *supra* note 82, at 11.

¹⁵⁹ Abraham Lincoln, To Eratus Corning and Others (July 12, 1863), in 6 COLLECTED WORKS OF ABRAHAM LINCOLN 263 (Roy P. Basler ed., 1953) (defending his authority to suspend the writ of habeas corpus, Lincoln stated “Or if, as has happened, the executive should suspend the writ, without ruinous waste of time, instances of arresting innocent persons might occur, as are always likely to occur in such cases.”) [hereinafter Lincoln, 6 COLLECTED WORKS].

¹⁶⁰ Lincoln, 4 COLLECTED WORKS, *supra* note 60, at 414 n.1 (to Winfield Scott).

¹⁶¹ *Id.* at 419.

¹⁶² NEELY, *supra* note 82, at 11.

¹⁶³ See *id.*

protecting the public safety. The same can be said about the October 14, 1861 suspension order that extended the military line to Bangor, Maine,¹⁶⁴ even though no record of disturbances in New England existed to justify this action.¹⁶⁵ Even more disturbing about this latter suspension is that the original draft of the proclamation was found in Secretary of War William H. Seward's papers, written entirely in his hand.¹⁶⁶

Seward later became Lincoln's Secretary of State, and Lincoln appointed Edwin M. Stanton, a "war" Democrat, to be his new Secretary of War.¹⁶⁷ Lincoln chose Stanton, because northern Democrats could identify with him, and because he was in favor of prosecuting the war against the Confederacy.¹⁶⁸ Stanton demonstrated this determination in his August 8, 1862 orders.¹⁶⁹ The first order empowered the Secretary of War rather than the President as the first official to nationally suspend the writ of habeas corpus.¹⁷⁰ Such delegation of authority contradicted Taney's opinion in *Merryman*, in which he concluded that the President could not authorize the suspension through agents or officers, civil or military—independent of judicial or legislative authority.¹⁷¹ The second order authorized all U.S. marshals and police chiefs to "arrest and imprison any person or persons who may be engaged, by act, speech, or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or in any other disloyal practice against the United States."¹⁷²

On September 24, 1862, Lincoln issued a proclamation activating portions of the states' militias to assist the Union with the war.¹⁷³ He ordered that "all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to Rebels . . . shall be subjected to martial law and liable to trial and punishment by Courts of Martial or Military Commission."¹⁷⁴ He then suspended the writ of habeas corpus "in respect to all persons arrested, or

¹⁶⁴ See Lincoln, 4 COLLECTED WORKS, *supra* note 60, at 554.

¹⁶⁵ See REHNQUIST, *supra* note 50, at 48.

¹⁶⁶ *Id.* William Seward reportedly remarked to the British Minister, "My Lord, I can touch a bell on my right hand and order the imprisonment of a citizen of Ohio; I can touch a bell again and order the imprisonment of a citizen of New York; and no power on earth, except that of a President, can release them. Can the Queen of England do so much?" SCHLESINGER, *supra* note 10, at 58–59.

¹⁶⁷ See REHNQUIST, *supra* note 50, at 57.

¹⁶⁸ See *id.*

¹⁶⁹ Professor Neely notes, "[T]he orders of August 8 had [a] momentous effect on civil liberties in the United States. The brief period of sweeping and uncoordinated arrests that followed their issuance constituted the lowest point for civil liberties in the North during the Civil War, the lowest point for civil liberties in U.S. history to that time, and one of the lowest for civil liberties in U.S. history." NEELY, *supra* note 82, at 53.

¹⁷⁰ See *id.*

¹⁷¹ See *supra* text accompanying note 115. Even assuming *arguendo* that the President has legal authority to suspend the writ, it does not follow that the President can constitutionally delegate to a civil or military officer the discretion to suspend the writ. There are some powers that are beyond delegation and given the potential abuse of discretion, such authority should rest with an elected official.

¹⁷² See NEELY, *supra* note 82, at 53.

¹⁷³ See Abraham Lincoln, *Proclamation Suspending the Writ of Habeas Corpus* (September 24, 1862), in 5 COLLECTED WORKS OF ABRAHAM LINCOLN 436, 436–37 (Roy P. Basler ed., 1953).

¹⁷⁴ *Id.* at 437.

who are now, or hereafter during the rebellion shall be, imprisoned.”¹⁷⁵ This new suspension was powerful because it worked in concert with the Militia Act passed by Congress on July 17, 1862. The Militia Act “empowered the secretary of war to draft for nine months the militiamen of states that failed to upgrade their militias.”¹⁷⁶ Stanton’s orders and Lincoln’s proclamation meant that those arrested were not only detained, but were also subjected to martial law and to trial by military commissions.¹⁷⁷ These military commissions did not provide many of the procedural safeguards, such as trial by jury, that civilian offenders would enjoy in a civilian criminal trial.¹⁷⁸

The Militia Act was unpopular in Wisconsin where draft protestors rioted, destroying property.¹⁷⁹ One of the riot leaders, Nicholas Kemp, was imprisoned in Camp Randall.¹⁸⁰ His attorney obtained a writ of habeas corpus from the Wisconsin Supreme Court, but Kemp’s custodian cited the President’s September 24, 1862 proclamation suspending the writ of habeas corpus.¹⁸¹ The Wisconsin Supreme Court, faced with the same issues Taney had faced in *Merryman*, reached the same conclusion.¹⁸² The three justices in separate opinions decided not only that the President lacked authority to suspend the writ, but also that martial law could not prevail in areas, such as Wisconsin at that time, where there was no insurrection or combat.¹⁸³ The court did not issue an attachment against Kemp’s custodian out of respect to federal authorities, but decided to wait for the Administration’s response.¹⁸⁴ This course of action by the Wisconsin court was typical of other courts under similar circumstances.¹⁸⁵ While courts courageously checked Lincoln’s authority, their ability to affect policy change depended on the cooperation of an uncooperative administration.

3. Congress Authorizes the Suspension of the Writ of Habeas Corpus

Congress finally cooperated with the President on March 3, 1863, when it passed the Habeas Corpus Act, which suspended the writ of habeas corpus and eliminated any doubt as to the legality of subsequent suspensions by Lincoln.¹⁸⁶ The Habeas Corpus Act, however, did not address whether his suspensions prior to the act were legally justified.¹⁸⁷ In his July 4 speech, Lincoln stated his trust that Congress would ratify the

¹⁷⁵ *Id.*

¹⁷⁶ NEELY, *supra* note 82, at 52.

¹⁷⁷ REHNQUIST, *supra* note 50, at 60.

¹⁷⁸ *See id.*

¹⁷⁹ *See id.* at 62.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 62–63.

¹⁸² *Id.* at 63.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *See* NEELY, *supra* note 82, at 68.

¹⁸⁷ *See id.*

measures he had taken on Congress' behalf.¹⁸⁸ One can argue that congressional inaction ratified the prior presidential suspensions of the writ because Congress never protested the suspensions and did not enact legislation repealing those suspensions.¹⁸⁹ The reality is that Congress is usually not eager to contravene the President during war, especially when the same political party controls both the legislative and executive branches of government.¹⁹⁰ Senator John Sherman of Ohio expressed a prevalent belief that some of Lincoln's actions were nonetheless illegal when he asserted "I am going to vote for that resolution and I am going to vote for it on the assumption that the different acts of the Administration recited in this preamble were illegal."¹⁹¹ Therefore, the legality of Lincoln's actions prior to congressional authorization is still suspect.

In the Habeas Corpus Act of 1863, Congress provided limitations on the President's power. The statute required that the Secretary of State and the Secretary of War supply the area circuit or district judge with a list of the persons arrested by military authority.¹⁹² Furthermore, in cases where a grand jury met and did not indict the prisoners, the judge was to order those prisoners not indicted to be discharged.¹⁹³ If the Secretary of State or Secretary of War failed to send the list of names within twenty days, and a grand jury met but issued no indictment, then any person or prisoner could petition for release.¹⁹⁴ There is no record that Lincoln followed the limitations imposed by Congress.¹⁹⁵

Lincoln's defiance of Congress' limitations is exemplified in the arrest of Clement L. Vallandigham, a Democrat and former Congressman from Ohio.¹⁹⁶ General Ambrose Burnside arrested Vallandigham because he spoke at a rally in Columbus, Ohio in defense of the people's right to assemble to hear a debate on Lincoln Administration policies.¹⁹⁷ A military

¹⁸⁸ See Lincoln, 4 COLLECTED WORKS, *supra* note 60, at 429 (Message to Congress in Special Session).

¹⁸⁹ See Special Event, *The Impeachment Trial of President Abraham Lincoln*, 40 Ariz. L. Rev. 351, 368 (1998) [hereinafter *Impeachment Trial*].

¹⁹⁰ See *id.*

¹⁹¹ JAVITZ, *supra* note 93, at 121.

¹⁹² An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases, 12 Stat. 755, 755 (1863).

¹⁹³ See *id.*

¹⁹⁴ See *id.* at 756.

¹⁹⁵ See *Impeachment Trial*, *supra* note 189, at 363.

¹⁹⁶ See NEELY, *supra* note 82, at 65.

¹⁹⁷ See REHNQUIST, *supra* note 50, at 65. Rehnquist notes that:

Vallandigham was not only tried by a military commission, rather than a jury, but the charge upon which he was tried was that he violated an order issued by Burnside—an order that forbade the expression of sympathy for the enemy. A criminal trial in a civil court must be based on a charge that the defendant engaged in conduct prohibited by an Act of Congress (in a federal court), or by an act of a state legislature (in a state court). Burnside's order had no such pedigree; it was not even based on an order of the President or the Secretary of War. It originated with Ambrose Burnside, the commanding general of the military district of Ohio. Members of the armed forces are naturally accustomed to being governed by such orders. But Vallandigham was not a soldier; he was a civilian.

Id. at 68.

commission sentenced him to confinement for the duration of the war, but Lincoln commuted the sentence to banishment into Confederate lines.¹⁹⁸ The Administration did not give Vallandigham his day in court,¹⁹⁹ and thus, blatantly disregarded the law's requirement that prisoners either be released or tried by a civilian court, if it was in session.

Vallandigham's arrest led to Democratic protest throughout the North, which compelled Lincoln to defend his policies.²⁰⁰ Specifically, Lincoln formally replied to Erastus Corning, who protested the arrest in a mass meeting in New York.²⁰¹ To the claim that Vallandigham was arrested only because of his speech at the rally criticizing the Administration and his violation of the general's order, Lincoln replied that Vallandigham was "damaging the military power of the country."²⁰² According to Lincoln, he "was laboring, with some effect, to prevent the raising of troops, to encourage desertions from the army."²⁰³ In Lincoln's reply, he admitted that the possibility of arresting innocent persons was likely to occur when acting in haste.²⁰⁴ Additionally, he argued that arrests in areas where there was no rebellion, i.e., in the North, were justified on grounds that the Constitution does not say where the writ could be suspended, but only that it be suspended wherever public safety so required.²⁰⁵

Lincoln's defense of the Vallandigham arrest is problematic because the President failed to explain why Vallandigham's words deserved punishment, only that the words had "some effect" on damaging the Army. The determination to arrest him was probably made because General Burnside had advance notice of the itinerary and sent spies to take notes on the speech.²⁰⁶ Thus, a determination that his words had "some effect" on the Army was probably premature and pure speculation. Although Lincoln stated he had to suspend the writ "without ruinous waste of time" to protect public safety, he did not set a standard to avoid arresting innocent persons. How likely was it that Vallandigham's speech in a small county, to fellow Democratic supporters, would damage the Army? Indeed, Vallandigham was not even the type of person meant to be arrested under the Administration's policy,²⁰⁷ which had been directed at arresting dangerous Confederate sympathizers and bridge-burners like John Merryman, not political activists like Vallandigham.²⁰⁸ The Vallandigham arrest and

¹⁹⁸ *Impeachment Trial*, *supra* note 189, at 364.

¹⁹⁹ *See id.*

²⁰⁰ NEELY, *supra* note 82, at 66.

²⁰¹ *Id.* at 67.

²⁰² Lincoln, 6 COLLECTED WORKS, *supra* note 159, at 266 (To Erastus Corning and Others).

²⁰³ *Id.*

²⁰⁴ *Id.* at 263.

²⁰⁵ *See id.* at 265.

²⁰⁶ *See* REHNQUIST, *supra* note 50, at 65. Vallandigham's motive for making the speech was probably not for the purpose of damaging the Army. Having just lost the nomination for Governor of Ohio, he apparently decided that he needed to become a martyr, and had himself arrested. *See id.*

²⁰⁷ NEELY, *supra* note 82, at 67.

²⁰⁸ *See id.*

Lincoln's defense of it demonstrated how granting the President authority to suspend the writ, even with some limitations, can still lead to abuse.

E. CIVIL DISOBEDIENCE AS A "DEFENSE" TO UNILATERAL PRESIDENTIAL AUTHORITY TO SUSPEND THE WRIT OF HABEAS CORPUS

A President should only be able to justify unilaterally suspending the writ of habeas corpus with a "civil disobedience" defense. Implicit in such a defense is that the action taken is illegal but morally justified under the circumstances. Henry David Thoreau advocated the idea of civil disobedience in his essay "Resistance to Civil Government" first published in *Aesthetic Papers* in 1849.²⁰⁹ The idea of civil disobedience was popular in the North after the Compromise of 1850 required all citizens to aid in the return of fugitive slaves.²¹⁰ While Thoreau's idea of civil disobedience was associated with passive resistance, John Brown also used it to incite a slave insurrection.²¹¹ Lincoln could have relied on a civil disobedience argument to justify suspending the writ of habeas corpus. In his July 4 speech, Lincoln hinted at such a defense when he stated, "are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?"²¹² But Lincoln rejected this defense and believed his use of emergency powers was constitutional because of the crisis's unprecedented nature.

Lincoln could have argued that because secession was not only illegal, but also morally wrong, he was justified in suspending the writ to prevent the capital from falling. Throughout his First Inaugural Speech, Lincoln addressed the legality and morality of southern secession and of civil war. He stated: "But if destruction of the Union . . . be lawfully possible, the Union is *less* perfect than before the Constitution, having lost the vital element of perpetuity. It follows from these views that no State, upon its own mere motion, can lawfully get out the Union."²¹³ Towards the end of his inaugural speech he emphasized the moral consequences of southern secession:

In *your* hands, my dissatisfied fellow countrymen, and not in *mine*, is the momentous issue of civil war. The government will not assail *you*. You can have no conflict, without being yourselves the aggressors. *You* have no oath registered in Heaven to destroy the government, while *I* shall have the most solemn one to "preserve, protect and defend" it.²¹⁴

Thus, at the time of his inaugural speech Lincoln believed secession was illegal and that starting a civil war would violate the heavenly oath to preserve the Union.

²⁰⁹ See *Thoreau and Civil Disobedience*, at http://www.walden.org/thoreau/overview/thoreau_cd.htm (last visited Nov. 23, 2002).

²¹⁰ See *id.*

²¹¹ See *id.*

²¹² Lincoln, 4 COLLECTED WORKS, *supra* note 60, at 430 (Message to Congress in Special Session).

²¹³ *Id.* at 265 (First Inaugural Address—Final Text).

²¹⁴ *Id.* at 271.

A civil disobedience defense differs from a “necessity” defense. President Jefferson formulated a necessity defense based on “[John] Locke’s idea that ‘the laws of necessity, of self-preservation, of saving our country when in danger’ must override written law, lest the end be absurdly sacrificed to the means.”²¹⁵ Civil disobedience, for purposes of this Note, is the violation of a law that causes a minor injustice, relatively speaking, in order to promote a higher objective that cannot be reasonably achieved without violating the law. Unlike a necessity defense, a civil disobedience defense implies a more careful weighing of interests and a moral justification. Admittedly, it is difficult to distinguish between a civil disobedience defense and a necessity defense. Neither defense should be considered as legal precedent. Arthur Schlesinger writes that the Founding Fathers may have believed that a crisis might justify unconstitutional actions to save the Constitution, but they did not want to legitimize such actions because “the legal order would be better preserved if departures from it were frankly identified as such than if they were anointed with a factitious legality and thereby enabled to serve as constitutional precedents for future action.”²¹⁶

Lincoln’s first suspension can at best be seen as an act of civil disobedience. At the time he considered suspending the writ, he grappled with whether he had the authority to do so, and wrestled with the implications of doing so. He felt morally obligated to uphold his oath to preserve the Union against southern aggression. Lincoln reasonably believed that but for the suspension of the writ, more northern troops would have failed to reach the capital, and an attack by Virginia would have resulted in the loss of the capital and, ultimately, the Union, unlike the suspensions described above where Lincoln had other options. He could have appealed Taney’s decision in *Merryman*; he could have requested congressional approval for suspending the writ in his July 4 speech before Congress; he could have followed the limitations placed by Congress in the Habeas Corpus Act. Therefore, while the first suspension can be morally justified as an act of civil disobedience, the other suspensions were at best pragmatic moves to facilitate the Union’s war effort. These other suspensions show that Lincoln failed to uphold his oath by disregarding the checks and balances enshrined in the Constitution.

Although we can thank Lincoln for suspending the writ and declare his first suspension morally justified and the others simply illegal, we are left with an important question: Is the Constitution different during wartime, making unconstitutional actions in times of peace constitutional in times of war? The Constitution certainly makes the distinction between war and peace by providing for the suspension of the writ of habeas corpus during times of rebellion or invasion. But even the suspension clause limits its invocation to situations where protecting public safety is required, and it

²¹⁵ SCHLESINGER, *supra* note 10, at 60.

²¹⁶ *Id.* at 9.

only allows for the suspension of the writ of habeas corpus. Lincoln considered the possibility that he had abused his power:

If I be wrong on this question of constitutional power, my error lies in believing that certain proceedings are constitutional when, in cases of rebellion or Invasion, the public Safety requires them, which would not be constitutional when, in absence of rebellion or invasion, the public Safety does not require them.²¹⁷

Lincoln's belief was not wrong given the explicit distinction made in the text of the suspension clause, but by disregarding judicial decrees and congressional limitations, he failed in his constitutional stewardship.

Constitutional stewardship requires that presidents realize that Congress—and not an emergency—creates power. The Constitution provides that the President shall recommend to Congress “such Measures as he shall judge necessary and expedient.”²¹⁸ Lincoln's belief that as President during an emergency he possessed “inherent powers” to address an emergency contradicts the Framers' vision. But the Framers could not have envisioned the risks of a nuclear or terrorist attack as this nation has faced in the modern era. President Harry S. Truman believed the President had inherent powers to avert a national catastrophe. In *Youngstown Sheet & Tube Co. v. Sawyer*,²¹⁹ the Truman Administration argued that the President, as Commander-in-Chief, could seize most of the nation's steel mills to prevent labor disputes from stopping steel production.²²⁰ According to the Administration, a work stoppage would have jeopardized national security because steel production was indispensable to all weapons and other materials.²²¹ The Court held that Congress, and not the President, had the power to authorize the seizure of the steel mills.²²² Moreover, the Court noted that “[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself,” and Congress had not authorized the seizure.²²³

In his concurring opinion, Justice Jackson discussed the wisdom of recognizing presidential emergency powers under the Constitution. He suggested that the Founding Fathers had omitted emergency powers from the Constitution, except for the suspension of the writ of habeas corpus, because they knew that emergencies would create pressures for authoritative action.²²⁴ After evaluating emergency powers in other nations, Justice Jackson stated, “This contemporary foreign experience may be inconclusive as to the wisdom of lodging emergency powers somewhere in a modern government. But it suggests that emergency powers are consistent with free government only when their control is lodged

²¹⁷ Lincoln, 6 COLLECTED WORKS, *supra* note 159, at 267 (To Erastus Corning and Others).

²¹⁸ U.S. CONST. art. II, § 3.

²¹⁹ 343 U.S. 579 (1952).

²²⁰ *See id.* at 582.

²²¹ *Id.* at 583.

²²² *See id.* at 587.

²²³ *Id.* at 585.

²²⁴ *See id.* at 649–50 (Jackson, J., concurring).

elsewhere than in the Executive who exercises them.”²²⁵ If Justice Jackson’s arguments on emergency powers extend to cover the writ of habeas corpus, they suggest that democracy demands that Congress possess the power to authorize the suspension of the writ.

IV. PRESIDENTIAL AUTHORITY AFTER SEPTEMBER 11

Are we seeing resurgence in presidential dominance where Congress and the courts are reluctant to check presidential authority? During the early part of the Cold War, the Presidency reached a dominant position compared to Congress in the area of foreign policy. This was due in part because in the fight against communism, “[t]he menace of unexpected crisis hung over the world, demanding . . . the concentration within government of the means of instant decision and response.”²²⁶ With Congress largely incompetent in foreign relations, President Truman benefited from “bipartisan foreign policy” in his fight to preserve democracy in a world threatened by communism.²²⁷ President Bush has also benefited from “bipartisan foreign policy,” as Congress has generally supported his actions in the war on terrorism. Will this current war provide unique circumstances where the President might again decide to unilaterally suspend the writ of habeas corpus? Does the appeal provision in the military tribunals created by President Bush to try suspected terrorists captured abroad infringe on the privilege of the writ of habeas corpus? Do the detainees held at Camp X-ray in Guantánamo Bay, Cuba have the privilege of the writ of habeas corpus? These are issues that have yet to be resolved conclusively.

A. ANOTHER OPPORTUNITY TO SUSPEND THE WRIT OF HABEAS CORPUS?

Given the real possibility of another attack on the United States like the one experienced on September 11, a President might have to consider suspending the privilege of the writ of habeas corpus. Since September 11, there have been warnings indicating the possibility of an imminent attack. On February 11, 2002, the Federal Bureau of Investigation (FBI) issued a highly specific warning of an imminent attack on the United States or Yemen.²²⁸ The FBI based its warning on information received from detainees held in Guantánamo Bay.²²⁹ Unlike previous warnings of terrorist attacks that were vague and lacked an attached element of time, the February 11 warning named a possible attacker and his associates and stated the attack could occur the following day.²³⁰ The alert advised law enforcement to “stop and detain” any of the named individuals because

²²⁵ *Id.* at 652.

²²⁶ SCHLESINGER, *supra* note 10, at 128.

²²⁷ *See id.*

²²⁸ *See* David Johnston, *F.B.I. Issues Alert of Possible Attack on U.S. or Yemen*, N.Y. TIMES, Feb. 12, 2002, at A1.

²²⁹ *See id.*

²³⁰ *See id.*

they were “considered extremely dangerous.”²³¹ The names of sixteen people whose whereabouts were unknown were placed on a bulletin issued to law enforcement.²³²

If a President, under circumstances presented by the February 11 warning, chose to suspend the writ it would most certainly be problematic. Because the whereabouts of those individuals was unknown, the President would have to suspend the writ nationally to be effective. This could subject thousands of persons to being stopped, detained, and questioned by law enforcement. Individuals detained in jails could not petition for the writ, thus preventing a judge from determining whether or not they had been confined legally. Innocent people could conceivably be detained for long periods of time. Under these circumstances, allowing the President to suspend the writ under his power to repel a sudden attack would be no different than claiming a suspension out of necessity. Seemingly, a President could always argue that he suspended the writ because an attack was “imminent” or because a potential attack needed to be thwarted.

The questions in these circumstances are what is the likelihood the danger, i.e., the terrorist attack, will occur and what is the appropriate tool to reduce the likelihood of that danger? These are difficult questions to answer. The fact that a terrorist attack like the one on September 11 can be extraordinary seems to justify the use of any means necessary to prevent harm. On the other hand, taking strong measures to protect public safety might enhance security for all but at an unreasonable cost to those considered “potential suspects,” most of whom are innocent. Suspending the writ of habeas corpus may be a legitimate tool to prevent a terrorist attack, but will the suspension be used when danger has been exaggerated? Allowing the President to have the *legal* authority to unilaterally suspend the writ with respect to potential suspects will render the writ’s suspension much easier when danger has been exaggerated. Even more dangerous is a situation where the President attempts to avoid the political problems of declaring the suspension of the writ and acts in a way that essentially suspends the writ without saying so.

B. THE GUANTÁNAMO DETAINEES AND THE WRIT OF HABEAS CORPUS

Arbitrary detentions may have occurred without suspension of the writ of habeas corpus since September 11. On November 4, 2001, the *Los Angeles Times* released an investigation it conducted into 1,147 individuals detained in the FBI’s criminal investigation of the September 11 attacks.²³³ One of those investigated, Tarek Fayad, a dentist trained in his native Egypt, was taken from his home in California two days after the attack and

²³¹ *Id.*

²³² *See id.*

²³³ See Richard A. Serrano, *Isolation, Secrecy Veil Most Jailed in Roundup*, L.A. TIMES, Nov. 4, 2001, at A1.

held in New York for allegedly overstaying his student visa.²³⁴ The FBI apparently believed Fayad knew a man imprisoned in Jordan for allegedly plotting attacks on Western targets.²³⁵ According to the *Los Angeles Times*, Fayad has not been held incommunicado; he has been allowed one phone call per month and has contacted his attorney.²³⁶ Strikingly, the *Times* investigation discovered that nearly eight weeks after the attacks, none of those detained had been charged with conspiracy in connection with the attacks.²³⁷ Fayad was ultimately charged with violating his visa three weeks after the *Times* investigation.²³⁸ His request for bond was rejected on the grounds that he was a flight risk.²³⁹

Although Fayad's story is markedly similar to John Merryman's arrest and detention under the Lincoln Administration, the tales diverge in two important ways. First, Fayad's alleged offense of overstaying his visa frames him as a less dangerous culprit than Merryman, a man who destroyed infrastructure. Second, unlike Merryman, Fayad was purportedly arrested because he was in the United States illegally. This illegal immigration charge was significant after September 11 in light of Attorney General John Ashcroft's revocation of an Immigration and Naturalization Service rule. The previous rule had required that detainees be charged within 24 hours of being arrested. The new version of the rule allows the government to detain an individual in custody for a "reasonable period of time."²⁴⁰ Although the government understandably needs leeway to determine whether detained immigrants threaten national security, immigration lawyers worry that a vague standard could lead to the detention of immigrants without government explanation.²⁴¹ It is also worrisome that visa violations are used as pretexts to detain individuals for extended periods of time.

In *Zadvydas v. Davis*,²⁴² the United States Supreme Court held that the government cannot indefinitely detain immigrants while awaiting permission to deport them.²⁴³ However, per Justice Breyer, the Court stated, "[n]either do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."²⁴⁴ Recently, Congress rejected the Attorney General's "reasonable period of time" standard through the anti-

²³⁴ See Laurie P. Cohen, *Egyptian Dentist, Held on Visa Charges, Illustrates Terror Detainees' Plight*, WALL ST. J., Nov. 28, 2001, at B1, available at 2001 WL-WSJ 29679079.

²³⁵ See *id.*

²³⁶ See Serrano, *supra* note 233, at A1.

²³⁷ See *id.*

²³⁸ See Cohen, *supra* note 234, at B1.

²³⁹ See *id.*

²⁴⁰ David G. Savage, *To Some Immigrants, Justice More an Idea Than a Reality*, L.A. TIMES, Nov. 4, 2001, at A23.

²⁴¹ See *id.*

²⁴² 533 U.S. 678 (2001).

²⁴³ See *id.* at 682.

²⁴⁴ *Id.* at 696.

terrorism bill passed after the September 11 attacks that requires the government to file charges against detained immigrants within seven days. At the expiration of the seven-day period, jurisdiction vests in federal courts to hear claims.²⁴⁵ Despite the United States Supreme Court's edicts that "[t]he writ of habeas corpus has always been available to review the legality of executive detention" and "the basic principles of due process cannot be waived,"²⁴⁶ it is unclear whether the government has complied with the anti-terrorism bill's limitations on detention.

Even more controversial has been President Bush's executive order creating military tribunals to try foreigners charged with terrorism. According to White House officials, the "[military] tribunals [are] necessary to protect potential American jurors from the danger of passing judgment on accused terrorists" and to "prevent the disclosure of government intelligence methods, which normally would be public in civilian courts."²⁴⁷ Experts in military law, however, noted that the tribunals created in Bush's order would severely limit defendants' rights because the tribunals do not require proof beyond a reasonable doubt and do not require strict rules of evidence like those in military and civilian courts.²⁴⁸ The original order, in fact, did not firmly establish the rules that would apply. Perhaps in response to criticism of certain rules in the original order, the Bush Administration released a new set of rules on March 20, 2002. The rules now require, *inter alia*, unanimous verdicts for death penalty cases, that suspects should be presumed not guilty, and that a finding of guilt must be beyond a reasonable doubt.²⁴⁹

The lack of an independent appeals process did survive the revision, thus preserving the military's control over the chain of command.²⁵⁰ Section 4(B)(8) of the original order provides for the "submission of the record of the trial, including any conviction or sentence, for review and final decision by me [the President] or by the secretary of defense if so designated by me [the President] for that purpose."²⁵¹ Does this lack of independent appellate review of military decisions of military tribunals by federal courts violate the suspension clause? Michael Ratner, a lawyer at the Center for Constitutional Rights, stated his desire to challenge the President's executive order creating military tribunals on the grounds that "by trying to limit appeals' rights, the President had effectively repealed the constitutional guarantee of the right to bring habeas corpus proceedings."²⁵² Ratner is most likely referring to question of whether the limitation on appeals violates the suspension clause.

²⁴⁵ See Savage, *supra* note 240, at A23.

²⁴⁶ *Id.*

²⁴⁷ Bumiller & Johnston, *supra* note 7, at B8.

²⁴⁸ *Id.*

²⁴⁹ See Katharine Q. Seelye, *Government Sets Rules for Military on War Tribunals*, N.Y. TIMES, Mar. 21, 2002, at A1.

²⁵⁰ See *id.*

²⁵¹ Bumiller & Johnston, *supra* note 7, at B8.

²⁵² William Glaberson, *Groups Gird for Long Legal Fight On New Bush Anti-Terror Powers*, N.Y. TIMES, Nov. 30, 2001, at B7.

The President's order limiting appeals, however, does not address whether those tried can challenge the legality of their confinement. The writ of habeas corpus as included in the suspension clause is directed specifically at challenging the legality of a prisoner's confinement. In his *Commentaries on the Constitution of the United States*, Justice Story wrote:

In order to understand the meaning of the terms here used [in the suspension clause], it will be necessary to have recourse to the common law At the common law there were various writs, called writs of habeas corpus. But the one spoken of here . . . is used in all cases of illegal confinement . . . the writ of *habeas corpus ad subjiciendum*.²⁵³

At common law, the writ of *habeas corpus cum causa*, in conjunction with the writ of certiorari, was employed in England to rectify unjust decisions in the lower courts.²⁵⁴ President Bush's order, therefore, seems to limit only the ability of those convicted in the tribunals to file an independent appeal of their conviction, not their present right to challenge the legality of their detention.

For the Guantánamo detainees, challenging the legality of their confinement is of great concern because the President may intend to send them before these military tribunals. A group referring to themselves as the "Coalition of Clergy, Lawyers, and Professors," filed a petition for the writ of habeas corpus on behalf of "Persons Held Involuntarily at Guantánamo Naval Air Base, Cuba."²⁵⁵ The petitioners included, among others, constitutional law expert Erwin Chemerinsky, former Attorney General of the United States Ramsey Clark, and civil rights attorney Stephen Yagman. On behalf of the petitioners, Professor Chemerinsky argued that the detainees

are in custody in violation of the Constitution or the laws or treaties of the United States, in that they: (1) have been deprived of their liberty without due process of law, (2) have not been informed of the nature and cause of the accusations against them and (3) have not been afforded the assistance of counsel.²⁵⁶

The petitioners sought a writ

to show cause (1) directing the respondents to "identify by full name and country of domicile and all other identifying information in their possession each person held by them within three days," (2) directing respondents "to show the true cause(s) of the detention of each person," and (3) directing respondents to produce the detainees at a hearing in this court.²⁵⁷

On February 21, 2002, the district court, per Judge Matz, dismissed the writ of habeas corpus petition on three grounds. First, the court ruled that petitioners did not have standing because they lacked a "significant

²⁵³ See STORY, *supra* note 22, at 206.

²⁵⁴ See DUKER, *supra* note 13, at 27.

²⁵⁵ Coalition of Clergy v. Bush, 189 F.Supp. 2d 1036 (C.D.Cal. 2002).

²⁵⁶ *Id.* at 1038.

²⁵⁷ *Id.*

relationship” with the detainees—“indeed any relationship.”²⁵⁸ Second, the court ruled that the federal district court in the Central District of California lacked jurisdiction to issue the writ because no custodian was within the territorial jurisdiction of the court.²⁵⁹ Lastly, Judge Matz concluded that the detainees:

[A]re aliens; they were enemy combatants; they were captured in combat; they were abroad when captured; they are abroad now; since their capture, they have been under the control of the military; they have not stepped foot on American soil; and there are no legal or judicial precedents entitling them to pursue a writ of habeas corpus in American civilian court.²⁶⁰

Accordingly, “[n]o federal court would have jurisdiction over petitioners; claims, so, there is no basis to transfer this matter to another federal district court.”²⁶¹ On appeal, the Ninth Circuit affirmed the lower court’s dismissal because the petitioners lacked a significant relationship with the detainees.²⁶²

Judge Matz’s ruling indicates that by imprisoning foreign citizens on foreign soil, the President has effectively eliminated the possibility the detainees can claim the privilege of the writ of habeas corpus. In his order, Judge Matz stated, “there are sound practical reasons, such as legitimate security concerns, that make it unwise for this or any court to take the unprecedented step of conferring such a right on these detainees.”²⁶³ But, Matz stated at the end of the order that this case did not present the question of whether the Guantánamo detainees had any rights that the United States should recognize.²⁶⁴ Unquestionably, at least some of the detainees are dangerous individuals who want to commit terrorist acts. Some of them may be willing to kill themselves and take many American lives with them. But are all the detainees extremely dangerous?

The Bush Administration should, as a matter of principle, recognize that the Guantánamo detainees have the privilege of the writ of habeas corpus. To determine what rights should be recognized, the Administration should put itself behind the Rawlsian veil of ignorance, making a decision on what type of society is desired before making decisions regarding that society. Under this theory, most people would likely choose a legal system in which every person accused of a crime has the right to be informed of the nature and cause of the accusations against them and has a neutral and detached decision-maker determining whether they have been illegally detained. It is also likely that there are dangerous individuals detained in

²⁵⁸ *Id.* at 1044.

²⁵⁹ *See id.*

²⁶⁰ *Id.* at 1048.

²⁶¹ *Id.* at 1039.

²⁶² *See Coalition of Clergy v. Bush*, 2002 U.S. App. LEXIS 23705 (9th Cir. 2002).

²⁶³ *Coalition of Clergy*, 189 F.Supp. 2d at 1048.

²⁶⁴ *See id.* at 1050.

Guantánamo but what if some have been detained illegally? Further, what if some are American citizens like Louisiana-born Yasser Esam Hamdi?²⁶⁵

Even assuming *arguendo* that the Guantánamo detainees have the privilege of the writ of habeas corpus under the Constitution, the suspension clause renders the privilege less than absolute. A broad argument can be made that the September 11 attacks constituted an “invasion” of the United States and that public safety requires that the privilege of the writ be suspended with respect to the Guantánamo detainees. If so, the power to authorize such a suspension should rest with Congress. Because it is considered the “Great Writ of Liberty,” protecting individuals against wrongful detainment, it should be difficult to suspend. Given institutional differences between the legislative and the executive branches, Congress would have a more difficult time authorizing the suspension of the writ than the President would. But if public safety so demands its suspension, then Congress should have power to authorize it.

V. CONCLUSION: BALANCING CIVIL LIBERTIES WITH NATIONAL SECURITY

The privilege of the writ of habeas corpus is equally important during this current war on terrorism as it was at the time of the framing of the Constitution. The protections against the “tyranny of the majority” enshrined in the Constitution were ideals to which the Founding Fathers hoped this nation would aspire. Wartime renders such aspirations more difficult to attain. The question during times of war and emergency is how do we balance protecting civil liberties with ensuring national security? David Blunkett, the British Home Secretary stated succinctly, “We can live in a world with airy-fairy civil liberties and believe the best in everybody—and then they destroy us.”²⁶⁶ To prevent society’s destruction during wartime, a strong President and effective law enforcement are essential. How to protect civil liberties while promoting the need for strong law enforcement is a difficult question.

It is difficult to derive lessons from past wars because each new war brings novel challenges. Who would have thought that planes would be used as missiles to destroy buildings? In his book *The Fate of Liberty: Abraham Lincoln and Civil Liberties*, Professor Neely concludes:

If a situation were to arise again in the United States when the writ of habeas corpus were suspended, government would probably be as ill-prepared to define the legal situation as it was in 1861. The clearest lesson is that there is no clear lesson in the Civil War—no neat

²⁶⁵ See Adam Liptak, Neil A. Lewis, & Benjamin Weiser, *After Sept. 11, a Legal Battle on the Limits of Civil Liberty*, N.Y. TIMES, Aug. 4, 2002, at 16.

²⁶⁶ Robin Toner, *Civil Liberty vs. Security: Finding a Wartime Balance*, N.Y. TIMES, Nov. 18, 2001, at B6.

precedents, no ground rules, no map. War and its effect on civil liberties remain a frightening unknown.²⁶⁷

Nevertheless, because our Constitution aspires to protect civil liberties, this generation should more intently aim to realize the Constitution's ideals than past generations. Our goal should be that measures taken to ensure national security should not be so broad as to unreasonably infringe on individual rights.

First, the Bush Administration should continue its receptivity toward concerns over civil liberties and not be afraid to make changes in policy that more closely meet the goals of preventing terrorism and preserving important rights. President Bush was receptive to criticism regarding the rules for military tribunals and sought advice from several outside experts, including a prominent Democratic lawyer.²⁶⁸ According to Mary Cheh, a professor of criminal procedure and constitutional law, the Administration has "given ground on points that are fundamentally important. The openness and civilian attorney and proof beyond a reasonable doubt—that combination, even against a different evidentiary standard, is far more palatable and at the end of the day is with the range of reasonableness."²⁶⁹ The President has also declared that some Guantánamo detainees will receive protective status as provided by the Geneva Convention.²⁷⁰ These changes show that public opinion can impact policy when a President is receptive.

Second, Congress needs to continue to press the President to clearly define his goals for the war. Members of Congress on the right and on the left expressed their concerns with the Administration's proposals to enhance law enforcement shortly after the attacks.²⁷¹ If more is to be done to protect civil liberties, then the public must inform representatives of their concerns so that members of Congress may pressure the President. Senate Majority Leader Tom Daschle was criticized for comments questioning the President on the war.²⁷² Senator Daschle told reporters, "I don't think it would do anybody any good to second-guess what has been done to date . . . I think it has been successful . . . I think there is expansion without at least a clear direction."²⁷³ Such comments can help the President because they indicate what the American people are willing to tolerate in war. Lastly, Congress can pass legislation as a "prior restraint" to executive actions affecting civil liberties. The earlier Congress acts in time of emergency, the easier it will be for the legislature to have a hand in shaping policy.

²⁶⁷ NEELY, *supra* note 82, at 235.

²⁶⁸ See Seelye, *supra* note 249, at A15.

²⁶⁹ *Id.*

²⁷⁰ See Richard Serrano, *Response to Terror: U.S. Will Apply Geneva Rules to Taliban Fighters Law: Bush's Declaration Still Allows Interrogation of Detainees and Excludes Al Qaeda*, L.A. TIMES, Feb. 8, 2002, at A1, available at 2002 WL 2452323.

²⁷¹ See Toner, *supra* note 6, at B5.

²⁷² See Todd S. Purdum, *Democrats Are Questioning Bush on the Future Conduct of the War*, N.Y. TIMES, Mar. 1, 2002, at A1.

²⁷³ *Id.*

Finally, law enforcement officials should be careful in how they use profiling to determine whom to detain and question in searching for terrorists²⁷⁴ because using stereotypes for such purposes can lead to ineffective law enforcement. Professor Jody Armour describes the impact of stereotypes:

Under the influence of a stereotype, we tend to see *what the stereotype primes us to see*. If violence is part of the stereotype, we are primed to construe ambiguous behavior as evincing violence . . . Thus, even if race marginally increases the probability that an “ambiguous” person is an assailant, decision makers inevitably exaggerate the *weight* properly accorded to this fact.²⁷⁵

Certain individuals, by virtue of their race, probably deserve closer scrutiny when trying to determine who will likely be the next terrorist. Therefore, the need for some profiling may be greater because of the great harm terrorist attacks have.

But relying solely on an individual’s race, religion, or general appearance can be ineffective and problematic. Given that when using stereotypes people have a tendency to overstate the danger of an allegedly suspicious person, law enforcement should do more work to improve their ability to assess the danger a suspected individual poses. In addition to profiling a person’s race, religion, or general appearance, law enforcement should profile a person’s behavior. If the basis upon which people are profiled is too narrow, i.e., solely on race, law enforcement could miss a terrorist, who might be similar to Richard Reid, the alleged “shoe bomber.” His Anglo name and British passport made it easier for him to board a plane, but his behavior should have led to his detainment.²⁷⁶ He traveled with minimal luggage, he was nervous, he paid approximately \$4,000 cash for a last-minute ticket to Miami, and he had a criminal record.²⁷⁷ Random searches may help stop terrorists who do not fit the narrow profile. More importantly, random searches will send a signal to Middle Easterners that they are not being singled out. Additionally, law enforcement should be as polite as possible to those searched to alleviate the intrusiveness of the experience.

There are no easy answers to challenges that have emerged in this war on terrorism. There is no doubt that this war on terrorism requires a strong president and effective law enforcement. A wartime president’s power is enhanced when policy is formulated in cooperation with Congress. A president who acts with Congress’ blessing enjoys a strong presumption of legitimacy not only from the American people, but also from other nations. While it may be more efficient to act unilaterally during war, the

²⁷⁴ This section is based upon class lecture notes taken from USC Law Professor, Thomas D. Griffith’s Topics in Criminal Law class, as modified by the author of this text (on file with author).

²⁷⁵ JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 41, 41–42 (1997) (emphasis original).

²⁷⁶ See Mark Steyn, *Dumb and Dumber; Incompetence of Airport Security Topped by that of Shoe Suspect Richard Reid*, CHI. SUN-TIMES, Dec. 30, 2001, available at 2001 WL 7256102.

²⁷⁷ See *id.*

Constitution demands cooperation to protect the public from conflicts that might affect financial and physical well-being. If a situation arises in the future where the suspension of the writ of habeas corpus might be necessary, Congress should authorize its suspension to ensure that the denial of the privilege does not sweep more broadly than necessary to protect public safety.