ESSENTIAL CIVIL WAR CURRICULUM

The Suspension of Habeas Corpus in the North and South

By **Frank J. Williams**

As the Civil War progressed, Northerners and Southerners alike faced a mounting predicament: how to handle those who were disloyal to their respective causes. The whole country was a war zone and there was widespread distrust of many American courts that were perceived by either side as being loyal to the other.

The answer for both the North and South was the suspension of the writ of habeas corpus. Habeas corpus[1] is the constitutionally authorized means by which a court may immediately assume jurisdiction and inquire into the legality of an individual's detention.[2] By suspending the writ of habeas corpus, the government was permitted to make arrests--with or without cause--and detain individuals without trial or with a trial by a military court, as opposed to the ordinary court system. Although the North is more widely criticized for its suspension of the writ of habeas corpus, it was a necessary measure in both the North and South to punish those who were disloyal to their respective causes.

The North

After the Confederates had bombarded Fort Sumter in Charleston Harbor in April 1861, newly elected President Abraham Lincoln called for reinforcements to protect Washington, D.C.[3] The Civil War was underway and the nation's capital was in

[1] The suspension clause, as set forth in Article I, Section 9, Clause 2 of the Constitution, reads: "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." U.S. Const. art. I, § 9.

[2] See Eric M. Freedman, Habeas Corpus: Rethinking the Great Writ of Liberty 1 (2001).

[3] Proclamation Calling Militia and Convening Congress, April 15, 1861, Roy P. Basler, ed., *The Collected Works of Abraham Lincoln* (New Brunswick, NJ: Rutgers University Press, 1953), 4, 430. See also Don E. Fehrenbacher ed., *Abraham Lincoln: A*

jeopardy, given that it was bordered by Virginia, a secessionist state, and Maryland, whose threats to secede were widely known.[4] In the days and weeks that followed, the city of Washington was virtually severed from the states of the North.[5] Troops stopped arriving,[6] telegraph lines were slashed,[7] and postal mail from the North reached the city only infrequently.[8] Lincoln immediately perceived the grave danger that the war would be lost if the Confederates seized the capital or caused it to be completely isolated.[9]

Prompted by the urging of his Secretary of State, William H. Seward, Lincoln, an attorney, concluded that it was necessary to suspend the Great Writ of habeas corpus.[10] Although Congress was in recess, Lincoln authorized General Winfield Scott to suspend the writ, believing that his duty to protect the capital and the Union required such an action.[11]

Documentary Portrait Through His Speeches and Writings (Stanford, California: Stanford University Press, 1964), 160-62.

[4] Daniel Farber, *Lincoln's Constitution* (Chicago: University of Chicago Press, 2003), 16.

[5] Frank J. Williams, *Abraham Lincoln and Civil Liberties: Then and Now - The Southern Rebellion and September 11* (New York: New York University Annual Survey of American Law, 2004), 60.

[6] Michael Lind, *What Lincoln Believed: The Values and Convictions of America's Great President* (New York: Doubleday, 2004), 174.

[7] David Herbert Donald & Harold Holzer eds., *Lincoln in the Times: The Life of Abraham Lincoln as Originally Reported in The New York Times* (New York: St. Martin Press, 2005), 110-11.

[8] William H. Rehnquist, *All the Laws But One* (New York: First Vintage Press, 1998), 22; see also Abraham Lincoln, Annual Message to Congress (Dec. 1, 1862), Roy P. Basler ed., *The Collected Works of Abraham Lincoln* (Brunswick, NJ: Rutgers University Press, 1953), 5, 518, 524.

[9] See Abraham Lincoln, Order to General Winfield Scott (Apr. 27, 1861), Roy P. Basler ed., *The Collected Works of Abraham Lincoln* (Brunswick, NJ: Rutgers University Press, 1953), 4, 344.

[10] William H. Rehnquist, *All the Laws But One* (New York: First Vintage Press, 1998), 23 (quoting A Day with Governor Seward at Auburn, *F.B. Carpenter, Seward Papers, No. 6634* (July 1870)).

[11] Abraham Lincoln, Order to General Winfield Scott (Apr. 27, 1861), Roy P. Basler ed., *The Collected Works of Abraham Lincoln* (Brunswick, NJ: Rutgers University Press, 1953), 4, 344.

The effect was to enable military commanders to arrest and detain individuals indefinitely in areas where martial law had been imposed.[12] Many of those detained were individuals who attempted to halt military convoys.[13] Lincoln saw that immediate action and a declaration of martial law was necessary to divest civil liberties from those who were disloyal and whose overt acts against the United States threatened its survival without the rights explicit in our usual judicial process.[14]

Lincoln was acutely aware that some citizens would sharply criticize him for suspending the Great Writ. The alternative, however, was far worse in his estimation. In Lincoln's judgment nothing would be worse than allowing the nation to succumb to Confederate forces.

Lincoln's actions were challenged through the judicial process and, ultimately, United States Supreme Court Chief Justice Roger Brooke Taney authored *Ex parte Merryman*, in which he opined that Congress alone had the power to suspend the writ of habeas corpus.[15] Unfortunately for Chief Justice Taney, his words carried no precedential value as an in-chambers opinion.[16] Chief Justice Taney's opinion did not deter Lincoln. Rather, Lincoln turned to Attorney General Edward Bates for confirmation that his decision to suspend habeas corpus was within his authority.[17] Bates responded as follows:

---

[12] Michael Lind, *What Lincoln Believed: The Values and Convictions of America's Great President* (New York: Doubleday, 2004), 174.

[13] David Herbert Donald & Harold Holzer eds., *Lincoln in the Times: The Life of Abraham Lincoln as Originally Reported in The New York Times* (New York: St. Martin Press, 2005), 117.

[14] Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford: Oxford University Press, 2006), 45.

[15] *Ex parte Merryman,* 17 F. Cas. 144, 147 (C.C.D. Md. 1861). The Chief Justice pointed to the suspension clause found in Article I of the Constitution, which outlines congressional duties. *See also* Brian McGinty, *The Body of John Merryman: Abraham Lincoln and the Suspension of Habeas Corpus* (Cambridge, Mass.: The President and Fellows of Harvard College, 2011).

[16] Typically, a Circuit Justice would either grant or deny the application before him. Occasionally, however, Circuit Justices would issue an in chambers opinion explaining the reasons for their decisions. Cynthia J. Rapp, In Chambers Opinions by Justices of the Supreme Court, 5 Green Bag 2d 181, 182 (2002). These opinions were typically brief and were not circulated to the full court before release. *Id.*

Essential Civil War Curriculum | Copyright 2012 Virginia Center for Civil War Studies at Virginia Tech

> I am clearly of opinion that, in a time like the present, when the very existence of the nation is assailed, by a great and dangerous insurrection, the President has the lawful discretionary power to arrest and hold in custody persons known to have criminal intercourse with the insurgents, or persons against whom there is probable cause for suspicion of such criminal complicity.[18]

Disregarding the in-chambers opinion of Chief Justice Taney, Lincoln boldly broadened the scope of the suspension of the writ.[19] In the draft of Lincoln's report to Congress (the only extant copy of his speech of July 4, 1861),[20] he passionately defended his position:

> The provision of the Constitution that "the privilege of habeas corpus, shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it," is equivalent to a provision - is a provision - that such privilege may be suspended when, in cases of rebellion, or invasion, the public safety does require it. It was decided that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made. Now it is insisted that Congress, and not the Executive, is vested with this power. But the Constitution itself, is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous

[17] Abraham Lincoln, Letter to Edward Bates (May 30, 1861), Roy P. Basler ed., *The Collected Works of Abraham Lincoln* 390 (Brunswick, N.J.: Rutgers University Press, 1953), 4, 390.

[18] 10 *Official Opinions of the Attorney General of the United States, Advising the President and Heads of Departments in Relation to their Official Duties* (Washington, D.C.: W.H. & O.H. Morrison 1868), 81.

[19] Abraham Lincoln, Letter to Henry W. Halleck (Dec. 2, 1861), Roy P. Basler ed., *The Collected Works of Abraham Lincoln* (Brunswick, NJ: Rutgers University Press, 1953) 5, 35; Abraham Lincoln, Proclamation Suspending the Writ of Habeas Corpus (Sept. 24, 1862), Roy P. Basler ed., *The Collected Works of Abraham Lincoln* (Brunswick, NJ: Rutgers University Press, 1953), 5, 436-37; Abraham Lincoln, Proclamation Suspending Writ of Habeas Corpus (Sept. 15, 1863), Roy P. Basler ed., *The Collected Works of Abraham Lincoln* (Brunswick, NJ: Rutgers University Press, 1953), 6, 451-52.

[20] No official copy of Lincoln's speech of July 4, 1861 has been found. The cited text is Lincoln's second proof, which contains his final revisions. See Roy P. Basler ed., *The Collected Works of Abraham Lincoln* (Brunswick, NJ: Rutgers University Press, 1953), 4, 421 n.1.

Essential Civil War Curriculum | Copyright 2012 Virginia Center for Civil War Studies at Virginia Tech

> emergency, it cannot be believed that the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion . . . The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution? . . . Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?[21]

Lincoln explained that his actions were not only justified, but were required of him pursuant to his oath to preserve, protect, and defend the Constitution of the United States.[22] In August 1861, Congress ratified the President's actions in all respects.[23]

That same month, General John C. Frémont declared martial law in Missouri, purportedly giving him the authority to try all persons captured bearing arms to be tried by court martial.[24] In Frémont's estimation, the circumstances in Missouri were of "sufficient urgency to render it necessary that the commanding general of this department should assume the administrative powers of the State."[25] Frémont described the conditions he observed as disorganized, lacking in civil authority and replete with bands of murders and marauders who were devastating property. Frémont believed that "public safety and success of [the Union's] arms require[d] unity of purpose."[26] Therefore,

---

[21] Abraham Lincoln, Speech to Special Session of Congress (July 4, 1861), Roy P. Basler ed., *The Collected Works of Abraham Lincoln* (Brunswick, NJ: Rutgers University Press, 1953), 4, 430.

[22] *Id.* (Lincoln's actual words were: "Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?").

[23] Act of August 6, 1861, ch. 63, Sec. 3, *12 Stat. 326.* Although this language did not expressly ratify the President's suspension of habeas corpus, it was widely understood as having done so. See Brian McGinty, *Lincoln and the Court* (Cambridge, Mass.: Harvard University Press, 2008), 3, 29.

[24] 2:1 *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* (Washington, D.C.: Government Printing Office, 1894), 221.

[25] *Id.*

[26] *Id.*

Essential Civil War Curriculum | Copyright 2012 Virginia Center for Civil War Studies at Virginia Tech

Frémont declared martial law to "suppress [such] disorders, maintain the public peace and give security to persons and property of loyal citizens."[27] Frémont proclaimed that all persons found guilty of bearing arms within certain prescribed territory "will be shot."[28] Importantly, Frémont noted that the object of his declaration was "to place in the hands of military authorities power to give instantaneous effect to the existing laws . . . but it [was] not intended to suspend the ordinary tribunals of the country where law will be administered by civil officers in the usual manner and with their customary authority while the same can be peaceably administered."[29]

Upon receiving word of Frémont's proclamation, Lincoln acted immediately, instructing Frémont that no one should be shot without his consent.[30] Lincoln feared--and correctly so--that shooting of Confederates in these circumstances could lead to further insurrection and the shooting of Union soldiers. Lincoln wrote to Frémont: "Two points in your proclamation of August 30th give me some anxiety. First, should you shoot a man, according to the proclamation, the Confederates would very certainly shoot our best man in their hands in retaliation; and so, man for man, indefinitely. It is therefore my order that you allow no man to be shot, under the proclamation, without first having my approbation or consent."[31]

With Frémont's order in place, military commission trials began, focusing on trying individuals--mostly civilians--who were caught bearing arms, sabotaging infrastructure - mostly railroad tracks and telegraph lines--or recruiting or enlisting Confederate forces.[32] The effect of Frémont's proclamation declaring martial law was unclear. On November 20, 1861, Major General Henry W. Halleck commanding in Missouri sent a telegraph to Major General George B. McClellan commanding in Virginia, which read: "No written authority is found here to declare and enforce martial law in this department. Please send me such written authority and telegraph me that it has been sent by mail."[33] On November 21, 1861, Lincoln responded to this request with one

[27] *Id.*

[28] *Id.*

[29] *Id.* at 222.

[30] Roy P. Basler ed., *The Collected Works of Abraham Lincoln* (Brunswick, N.J.: Rutgers University Press, 1953), 4:506.

[31] *Id.*

[32] Louis Fisher, *Military Tribunals and Presidential Power: American Revolution to the War on Terrorism* 46 (Lawrence, Kan.: University of Kansas Press, 2005), 46.

Essential Civil War Curriculum | Copyright 2012 Virginia Center for Civil War Studies at Virginia Tech

simple statement: "If General McClellan and General Halleck deem it necessary to declare and maintain martial law at Saint Louis the same is hereby authorized. A. LINCOLN."[34] Having not received the President's message, on November 30, 1861, Halleck again informed McClellan that without the requested authorization, "I cannot arrest such men and seize their papers without exercising martial law for there is no civil law or civil authority to reach them . . . if the President is not willing to intrust me with it he should relieve me from the command."[35] To this Lincoln responded: "General: As an insurrection exists in the United States and is in arms in the State of Missouri, you are hereby authorized and empowered to suspend the Writ of Habeas Corpus within the limits of the military division under your command and to exercise martial law as you find it necessary in your discretion to secure the public safety and the authority of the United States."[36]

With the climate in Missouri worsening, on December 26, 1861, Halleck declared martial law in Saint Louis and in and about all railroads in Missouri. Halleck's order read:

> In virtue of the authority conferred in me by the President of the United States, martial law, heretofore issued in this city, will be enforced. In virtue of authority, martial law is hereby declared and will be enforced in and about all the railroads in this State. It is not intended by this declaration to interfere with the jurisdiction in the court which is loyal to the Government of the United States, and which will aid the military authorities in enforcing order and punishing crimes.[37]

Although Halleck was quick to note that his order was not intended to interfere with the jurisdiction of civil courts, like many military officers, he had little trust for the civil court system. In a letter to the Hon. Thomas T. Ewing, one of Ohio's delegates to a peace conference designed to stave off the Civil War, Halleck wrote, "[t]he civil courts can give us no assistance as they are very generally unreliable." In Halleck's estimation,

---

[33] Roy P. Basler ed., *The Collected Works of Abraham Lincoln* (Brunswick, NJ: Rutgers University Press 1953), 5, 27.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 35.

[37] Order From Gen. Halleck, The New York Times (Dec. 27, 1861), *available at* http://www.nytimes.com/1861/12/27/news/order-from-gen-halleck.html (last visited October 10, 2011).

"[t]here [was] no alternative but to enforce martial law."[38] A general order communicated from Halleck's headquarters later that day stated:

> "crimes and military offenses are frequently committed which are not triable or punishable by courts-martial and which are not within the jurisdiction of any existing civil court. Such cases, however, must be investigated and the guilty parties punished. The good of society and the safety of the army imperiously demand this. They must therefore be taken cognizance of by the military power."[39]

However, "civil offenses cognizable by civil courts whenever such loyal courts exist will not be tried by a military commission."[40]

In total, during the Civil War, the Union Army conducted at least 4,271 trials of U.S. citizens by military commission and another 1,435 during the Reconstruction period that followed.[41] Most of those tried by military commission were charged with guerilla activity, horse stealing and bridge-burning.[42] The military commission trials lacked procedural safeguards and the guarantees of due process. Prisoners languished without trial by military commission or otherwise. The trials have been described as lacking the appearance of impartiality and exhibiting vengeance.[43] And, in what some scholars have dubbed "the dark side of the Civil War," in the summer of 1863, the army developed a form of water torture that was widely used.[44]

Nevertheless, a presidential check on the military commission system was prominent in the Lincoln Administration. President Lincoln personally reviewed certain cases that came before the military commissions during the Civil War.[45] After the Sioux

---

[38] 2:1 *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* (Washington, D.C.: Government Printing Office, 1894), 247.

[39] *Id.*

[40] *Id.* at 248.

[41] United States v. Hamdan, CMCR 09-002, 2011 U.S. CMCR LEXIS 1 at *135-36 (U.S. Ct. Mil. Comm. Rev. June 24, 2011).

[42] Mark E. Neely, Jr., *The Fate of Liberty* (Oxford: Oxford University Press, 1991), 169.

[43] Louis Fisher, Military Tribunals: A Sorry History 5, available at http://www.soc.umn.edu/~samaha/cases/FisherSorryHistory.pdf

[44] Mark E. Neely, Jr., *The Fate of Liberty* (Oxford: Oxford University Press, 1991), 110.

uprising in Minnesota that killed hundreds of white settlers in 1862, the military court had sentenced 303 Sioux to death.[46] These cases came before Lincoln to review as final judge.[47] Yet, despite great pressure to approve the verdicts, Lincoln insisted and, in fact, ordered that the complete records of the trial be sent to him.[48] Working deliberately, Lincoln reviewed each case, one-by-one.[49] For a month, Lincoln carefully worked through the transcripts to sort out those who were guilty of serious crimes.[50] Ultimately, Lincoln commuted the sentences of 265 defendants, and only thirty-nine of the original 303 were executed.[51] Although Lincoln was criticized for this act of clemency, he responded, "I could not afford to hang men for votes."[52]

The South

Days after Confederate President Jefferson Davis gave his inaugural address, the Confederate Congress passed an act authorizing him to suspend the writ of habeas corpus and declare martial law in areas that were in "danger of attack by the enemy."[53] As in the North, there was considerable criticism of the decision to authorize Davis to suspend the writ of habeas corpus. Among the more controversial aspects of the bill was that it allowed the government to detain suspects and keep them in custody for extended periods of time without bringing them to trial.[54]

Almost immediately, Davis proclaimed martial law in two Virginia cities that the Union had invaded. His February 27, 1862 proclamation suspended the writ in Norfolk and Portsmouth, Virginia and "the surrounding country to the distance of ten miles from

[45] David Herbert Donald, *Lincoln* (New York: Touchstone, 1996), 394.

[46] Id.

[47] Id.

[48] Id.

[49] Id.

[50] Id.

[51] Id.

[52] Id. at 394-95.

[53] James M. McPherson, *Battle Cry of Freedom: the Civil War Era* (Oxford: Oxford University Press, 1988), 424.

[54] David J. Eicher, *Dixie Betrayed: How the South Really Lost the Civil War* (New York: Little Brown and Company, 2006), 104.

Essential Civil War Curriculum | Copyright 2012 Virginia Center for Civil War Studies at Virginia Tech

said cities, and all civil jurisdiction and the privilege of the writ of habeas corpus are hereby declared to be suspended within the limits aforesaid."[55] Days later, Davis extended the suspension to include the nearby city of Richmond.[56]

With martial law having been declared, Brigadier General John H. Winder, the keeper of military prisons in Richmond, who later served as provost marshal, ordered the arrest of soldiers and civilians for a variety of crimes and misdemeanors, as well as several "disloyal" citizens, including two women, and the Rev. Alden Bosserman, a Universalist minister who had prayed for Union defeat, and former United States congressman John Minor Botts, a unionist who was alleged to have been preparing a manuscript exposing the secessionist movement as a conspiracy of Southern Democrats.[57] Winder's arrests were reported to be so numerous that they took up the entire second floor of Castle Thunder military prison.[58] In other parts of the South, the climate was similar. Inmates in a Mississippi prison included "a number of political prisoners . . . about one hundred and fifty Mississippi citizens, such as were suspected of Union sentiments."[59]

Unlike the military commissions that existed in the North, those arrested under Davis's authority to suspend the writ of habeas corpus were presented to a habeas corpus commissioner.[60] The habeas corpus commissioner was designed to filter out those who were not in fact disloyal to the Confederate cause.[61] Although it had been in practice for some time, the habeas corpus commissioner was not mentioned by the Confederate Congress until October 1862 when it ordered the "President shall cause proper officers to investigate the cases . . . in order that they may be discharged, if improperly detained."[62]

---

[55] Ibid.

[56] Ibid.

[57] David Williams, *Bitterly Divided: The South's Inner Civil War* (New York: The New Press, 2010), 116.

[58] Ibid.

[59] Ibid. at 117.

[60] Mark E. Neely Jr., *Southern Rights: Political Prisoners and the Myth of the Confederate Constitutionalism* (Charlottesville, Va.: University of Virginia Press, 1999), 80.

[61] Ibid.

[62] Ibid. at 81.

Essential Civil War Curriculum | Copyright 2012 Virginia Center for Civil War Studies at Virginia Tech

It is unclear exactly how the habeas corpus commissioner conducted his investigation. There were no recorded transcripts of matters that were before the habeas corpus commissioner.[63] The civilian court system operated under a strict set of rules, but the habeas corpus commissioner operated without any set of rules to follow.[64] There were no juries and prisoners were not afforded counsel.[65]

After completing his investigation, which consisted primarily of a conversation with the prisoner, the commissioner could recommend that the prisoner be freed or turned over to civil authorities for a trial before the civilian court system, if appropriate.[66] If the commissioner did not make such a recommendation, the prisoner likely would be subject to long confinement in the military prison.[67]

Davis's authority to suspend the writ of habeas corpus was brief. In August 1862, in response to complaints that Winder had exceeded his authority, Senator Ethelbert Barksdale of Mississippi introduced a bill to limit Davis's power to suspend habeas corpus to twenty days, unless Congress approved a continuance. The bill was referred to the Senate Judiciary Committee and in mid-September it declared that Davis's use of martial law had effects "far beyond a mere suspension of the writ of habeas corpus."[68] The Judiciary Committee made clear that only Congress had the authority to suspend the writ of habeas corpus and called for the introduction of new legislation to limit the president's authority.[69] Even those who had supported Davis's first request for authority to suspend the writ, like Senator Henry Foote of Mississippi, now opposed it. While the fate of Davis's authority was debated, Foote declared: "I will never again consent to a suspension of the writ of Habeas Corpus unless the enemy is within sight of the city . . . and then only so long as circumstances might render absolutely necessary."[70] Days later, the Judiciary Committee announced that it had drafted a bill that would enable Davis to suspend the writ of habeas corpus in towns or cities in danger of rebellion, in the

[63] Ibid. at 82.

[64] Ibid.

[65] Ibid.

[66] Ibid.

[67] Ibid.

[68] David J. Eicher, *Dixie Betrayed: How the South Really Lost the Civil War* (New York: Little Brown and Company, 2006), 142.

[69] Ibid.

[70] Ibid.

Essential Civil War Curriculum | Copyright 2012 Virginia Center for Civil War Studies at Virginia Tech

neighborhoods of armies, or in areas of potential attack.[71] Arrests would be limited to those needed to discipline the army or to punish those who had committed crimes against the Confederate States. In October 1862 he asked Congress to renew his authorization and although Congress did so, it called for the expiration of his authority in February 1863. A year later, in February 1864, Davis was able to make a case for the renewal of his authority to suspend the writ, citing draft resistance at the time, but again his authority expired on its own terms in July 1864.[72]

Author's note. I am particularly grateful to my former law clerk Nicole Benjamin, Esq. for her great assistance in preparing this article.

****

[71] Ibid.

[72] Ibid.