Supplementary Material

Chapter 6: The Civil War and Reconstruction—Criminal Justice/Habeas Corpus and Due Process/The Civil War

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Edward Bates, **Opinion on the Suspension of the Privilege of the Writ of Habeas Corpus**[1]

Abraham Lincoln and Attorney General Edward Bates choose to defend Lincoln's suspension of habeas corpus before Congress rather than in the courts. Lincoln's message to Congress on July 4, 1861 responded to Taney's accusation of lawlessness in Ex parte Merryman. *While defending the constitutionality of his decision to suspend habeas corpus, Lincoln indicated that he may have had supra-constitutional reasons taking unilateral executive action.*

> *Soon after the first call for militia, it was considered a duty to authorize the Commanding General, in proper cases, according to his discretion, to suspend the privilege of the writ of habeas corpus; or, in other words, to arrest, and detain, without resort to the ordinary processes and forms of law, such individuals as he might deem dangerous to the public safety. This authority has purposely been exercised but very sparingly. Nevertheless, the legality and propriety of what has been done under it, are questioned; and the attention of the country has been called to the proposition that one who is sworn to "take care that the laws be faithfully executed," should not himself violate them. Of course some consideration was given to the questions of power, and propriety, before this matter was acted upon. The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practically, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated? To state the question more directly, are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it? But it was not believed that this question was presented. It was not believed that any law was violated.*

Attorney General Bates followed up Lincoln's speech with an official opinion justifying the president's suspension of the writ of habeas corpus as consistent with the Constitution.

Bates insisted that impeachment is the only remedy for an abusive suspension of habeas corpus. Was he correct as a constitutional matter? Was he correct as a practical matter? President Lincoln was unwilling to obey the judicial order in Merryman. *During times of national crisis, is the judiciary likely to be able to impose constitutional limitations on the president without legislative support? What are the constitutional means for challenging a president during wartime? How many of these means are politically feasible? Suppose you believed that Merryman and his allies were a serious threat to efforts to move Union troops from New York to the defense of Washington, DC. What would you have done in Lincoln's place?*

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. . . 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

[1] 10 Op. Atty Gen. 74, July 5, 1861.

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. . . .

The Constitution requires the President, before he enters upon the execution of his office, to take an oath that he "will faithfully execute the office of President of the United States, and will, to the best of his ability, preserve, protect and defend the Constitution of the United States."

The duties of the office comprehend all the executive power of the nation, which is expressly vested in the President by the Constitution, (article 2, sec. 1,) and, also, all the powers which are specially delegated to the President, and yet are not, in their nature, executive powers. For example, the veto power; the treaty making power; the appointing power; the pardoning power. These belong to that class which, in England, are called prerogative powers, inherent in the crown. And yet the framers of our Constitution thought proper to preserve them, and to vest them in the President, as necessary to the good government of the country. The executive powers are granted generally, and without specification; the powers not executive are granted specially, and for purposes obvious in the context of the Constitution. And all these are embraced within the duties of the President, and are clearly within that clause of his oath which requires him to "faithfully execute the office of President."

The last clause of the oath is peculiar to the President. All the other officers of the Government are required to swear only "to support this Constitution;" while the President must swear to "preserve, protect, and defend" it, which implies the power to perform what he is required in so solemn a manner to undertake. And then follows the broad and compendious injunction to "take care that the laws be faithfully executed." And this injunction, embracing as it does all the laws—Constitution, treaties, statues—is addressed to the President alone, and not to any other department or officer of the Government. And this constitutes him, in a peculiar manner, and above all other officers, the guardian of the Constitution—its preserver, protector, and defender.

It is the plain duty of the President (and his peculiar duty, above and beyond all other departments of the Government) to preserve the Constitution and execute the laws all over the nation; and it is plainly impossible for him to perform this duty without putting down rebellion, insurrection, and all unlawful combinations to resist the General Government. . . .

The argument may be briefly stated thus: It is the President's bounden duty to put down the insurrection, as . . . the "combinations are too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals." And this duty is imposed upon the President for the very reason that the courts and the marshals are too weak to perform it. The manner in which he shall perform that duty is not prescribed by any law, but the means of performing it are given, in the plain language of the statutes, and they are all means of force—the militia, the army, and the navy. The end, the suppression of the insurrection, is required of him; the means and instruments to suppress it are lawfully in his hands; but the manner in which he shall use them is not prescribed, and could not be prescribed, without a foreknowledge of all the future changes and contingencies of the insurrection. He is, therefore, necessarily, thrown upon his discretion, as to the manner in which he will use his means to meet the varying exigencies as they rise. If the insurgents assail the nation with an army, he may find it best to meet them with an army, and suppress the insurrection in the field of battle. If they seek to prolong the rebellion, and gather strength by intercourse with foreign nations, he may choose to guard the coast and close the ports with a navy, as one of the most efficient means to suppress the insurrection. And if they employ spies and emissaries, to gather information, to forward rebellion, he may find it both prudent and humane to arrest and imprison them. And this may be done, either for the purpose of bringing them to trial and condign punishment for their crimes, or they may be held in custody for the milder end of rendering them powerless for mischief, until the exigency is past.

In such a state of things, the President must, of necessity, be the sole judge, both of the exigency which requires him to act, and of the manner in which it is most prudent for him to employ the powers entrusted to him, to enable him to discharge his constitutional and legal duty—that is, to suppress the insurrection and execute the laws. . . .

This is a great power in the hands of the chief magistrate; and because it is great, and is capable of being perverted to evil ends, its existence has been doubted and denied. It is said to be dangerous, in the hands of an ambitious and wicked President, because he may use it for the purposes of oppression and

tyranny. Yes, certainly it is dangerous—all power is dangerous—and for the all-pervading reason that all power is liable to abuse; all the recipients of human power are men, not absolutely virtuous and wise. Still it is a power necessary to the peace and safety of the country, and undeniably belongs to the Government, and therefore must be exercised by some department or officer thereof.

Why should this power be denied to the President, on the ground of its liability to abuse, and not denied to the other departments on the same grounds? Are they more exempt than he is from the frailties and vices of humanity? Or are they more trusted by the law than he is trusted, in their several spheres of action? If it be said that a President may be ambitious and unscrupulous, it may be said with equal truth, that a legislature may be factious and unprincipled, and a court may be venal and corrupt. But these are crimes never to be presumed, even against a private man, and much less against any high and highly-trusted public functionary. They are crimes, however, recognized as such, and made punishable by the Constitution; and whoever is guilty of them, whether a President, a senator, or a judge, is liable to impeachment and condemnation.