

Supplementary Material

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

Congressional Debate over the Habeas Corpus Act of 1863¹

The Habeas Corpus Act of 1863 was originally conceived as a measure to prevent persons arrested and detained by the Lincoln administration from suing government officials. The bill proposed in the House of Representatives provided persons acting under government orders with an immunity from trespass or false arrest suits. Senator Lyman Trumbull, a moderate Republican, saw the bill as an opportunity to modify Lincoln administration policy on suspending habeas corpus and to place that modified policy on firmer legal grounds. He proposed an alternative to the indemnity bill that passed the House of Representatives. Trumbull's bill authorized the president to suspend habeas corpus, but mandated that persons so detained be quickly brought before federal judges who could determine whether they were legally imprisoned. Democrats and radical Republicans sharply challenged Trumbull's proposal. Democrats insisted that Congress could not delegate power to the president to suspend habeas corpus and that Congress should provide strong remedies to persons who were unconstitutionally arrested and detained by the Lincoln administration. Many Republicans believed the Trumbull bill too weak. They proposed granting the Lincoln Administration the power to detain indefinitely persons suspected of aiding the Confederate effort. Through deft political maneuvering, the middle held. Trumbull's version of the Habeas Corpus Act became law on March 3, 1863.

The excerpts below are from the Habeas Corpus Act, the Democratic alternative, and the debate in the Senate. How did the various parties to the debate over habeas corpus justify their favored policy? How did they combine arguments about the separation of powers with arguments about individual rights? What were the major differences between such moderate Republicans as Senator Trumbull and such Democrats as Senator Powell? What were the major differences between such moderate Republicans as Senator Trumbull and such radical Republicans as Senator Wilkinson? What do you believe best explains why Republicans did not present a united constitutional front during the Civil War on suspending habeas corpus and imposing martial law?

The Habeas Corpus Act²

. . . That, during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof. . . .

SEC. 2. That the Secretary of State and the Secretary of War be, and they are hereby, directed, as soon as may be practicable, to furnish to the judges of the circuit and district courts of the United States and of the District of Columbia a list of the names of all persons, citizens of states in which the administration of the laws has continued unimpaired in the said Federal courts, who are now, or may hereafter be, held as prisoners of the United States, by order or authority of the President of the United States or either of said Secretaries, in any fort, arsenal, or other place, as state or political prisoners, or otherwise than as prisoners of war. . . . And in all cases where a grand jury, having attended any of said courts having jurisdiction in the premises, after the passage of this act, and after the furnishing of said list, as aforesaid, has terminated its session without finding an indictment or presentment, or other

¹ *Congressional Globe*, 37th Cong., 3rd Sess. (1863), 1191-1208.

² 12 U.S. Stat. 755, 755-756 (1863).

proceeding against any such person, it shall be the duty of the judge of said court forthwith to make an order that any such prisoner desiring a discharge from said imprisonment be brought before him to be discharged; and every officer of the United States having custody of such prisoner is hereby directed immediately to obey and execute said judge's order. . . That no person shall be discharged by virtue of the provisions of this act until after he or she shall have taken an oath of allegiance to the Government of the United States, and to support the Constitution thereof; and that he or she will not hereafter in any way encourage or give aid and comfort to the present rebellion, or the supporters thereof. . . .

SEC. 4. . . . That any order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defense in all courts to any action or prosecution, civil or criminal, pending, or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress, and such defense may be made by special plea, or under the general issue.

The Democratic Alternative³

From and after the passage of this act, and during the present rebellion, it shall not be lawful for any officer or servant of the United States to arrest or detain any citizen of the United States who may be supposed or alleged to be disloyal thereto, or for any other cause, except upon oath or affirmation of some person or persons well known to be loyal to the United States, and particularly describing in said oath or affirmation the act of disloyalty or other cause for which the said citizen should be arrested and detained.

. . . That any and every officer or servant of the United States who shall arrest or detain any citizen of the United States in contravention of the provisions of the first section of this act, shall, on conviction thereof in any court having jurisdiction in the case, suffer a fine of not less than \$10,000, or imprisonment in the penitentiary for a term not less than five years.

. . . That all persons arrested under the provision of this act upon the charge of disloyalty to the Government of the United States, or for any other cause, shall have the privilege of the writ of *habeas corpus*; and the said writ shall not be suspended in any time, so far as the same may relate to persons arrested as aforesaid.

SENATOR LAZARUS POWELL (Democrat, Kentucky)

I did say that where the courts were open and were in the exercise of all their functions, I did not believe the writ of *habeas corpus* should ever be suspended, and I am now clearly of that opinion. If you have a virtuous and intelligent judiciary, let those who are arrested be brought before the courts, and let them be punished if they be guilty. Let the man that is arrested come before the judges. If he has committed no crime, let him be discharged. If the case be bailable, let him give bond for his appearance at court. Where the courts are open and none of their functions obstructed, and the judges are upright and honest men, in my judgment a free people should never allow this great remedial writ to be suspended. . . .

Mr. President, I do not believe that we have any power under the Constitution to delegate to the President of the United States the power to suspend the writ of *habeas corpus*; it is a power conferred upon us which we cannot delegate to another. We have as much right to delegate it to one of the judges of the Supreme Court or to any other individual, either indicated by his office or by his name, as we have to delegate to the President of the United States. We cannot delegate over functions. I hold that the power

³ *Congressional Globe*, 37th Cong., 3rd Sess. (1863), 1092.

belongs to us, and whenever the writ is lawfully suspended, in my judgment, it must be done by Congress, for Congress alone, under the Constitution, has authority to suspend the writ. . . .

I think it would be a dangerous precedent for this Congress or any other Congress to delegate to any other power on earth this privilege of suspending this great writ. A people who love their liberties and who are jealous of their personal rights, in my judgment, never should enter upon any such hazardous enterprise. Why, sir, suppose you delegate to the President of the United States the privilege of suspending this writ, taking it for granted that we alone have the right and the power to suspend it, where will you place your liberties? If the President of the United States should be a wicked or corrupt man, he could by one stroke of his pen compel every citizen who might be arrested by the minions of power, however unlawfully, to languish in prison, until he should see fit, not by virtue of the law, but in the exercise of his will and pleasure, to discharge him. It is a power, Senators, that we never should confer on any individual. I would not confer it on any man, I care not how great, how good, how wise, how virtuous he may be, and I do not concede that those who are the real and true friends of constitutional and civil liberty ever will part with this power. They should exercise it themselves. The representatives of the States and of the people in Congress assembled should alone exercise it.

I am not one of those who believe that any great good in distempered times ever did or ever will result from the suspension of the writ of *habeas corpus*. Suppose you suspend it, what then? What is the effect of the suspension? All it does is to prevent a man who conceives that he is unlawfully imprisoned from being brought before the judicial tribunals of the country to have the causes of imprisonment investigated. That is all. The mere suspension of the writ of *habeas corpus* does not authorize the President or anybody else to arrest a citizen. The arrest is a separate and distinct thing from taking a man out of prison on a writ of *habeas corpus*. The power to arrest a citizen is confided not to the Executive or to any of his agencies or to any of his heads of Departments. It is confided by the Constitution to a separate and distinct body of magistracy, to wit, the judiciary, through the instrumentality and aid of the marshals and sheriffs of the country. You may suspend the writ of *habeas corpus* tonight if you please, and then the President of the United States, the Secretary of War, or one of your generals in the field, or your hands of Departments, would not be authorized to make an arrest of a citizen not in the military service; and if any of them did make an arrest he would be liable as a trespasser in the courts for that encroachment on the personal rights of the citizen. An arrest under the Constitution can only be made on warrant, sued out for just and proper cause on affidavit. That is the Constitution of your country. . . .

. . . .
I do not think the Senator's bill is as it should be. It allows those persons to be kept for twenty days. Sir, a free citizen of a free country should not be detained and deprived of his liberty a single moment after he demands to be brought before the judicial tribunals of the country to have the charges against him investigated; and that is not a free country which will allow a man to be deprived for one moment of his liberty longer than he can apply to the proper tribunals to have the cause of his confinement investigated. I would vote for no law that would authorize any power on earth to keep any man twenty days or twenty hours, unless he was committed in obedience to the laws of his country. If you arrest him on a sudden emergency, which under the law you have a right to do in a large number of cases, hand him immediately over to the judicial magistrates to have the case investigated, and if he is guilty, punished; if innocent, acquitted. That is our duty, and whenever we fall short of that we are delinquent.

. . . . You admit that thousands of people have been arrested without warrant of law. You admit that persons have ordered arrests who had no authority under the Constitution and laws to make arrests; and, so far from facilitating the people thus injured in having their remedies and rights of action against those who have acted thus wrongfully, we are engaged in passing laws to prevent, hinder, and delay these persons in appeals to the proper judicial tribunals to have their wrongs righted. . . . I do not believe that magistrates who in open violation of the laws imprison citizens unjustly will regard any law you pass, unless you impose heavy penalties, and visit them with heavy fines and long imprisonment. Do that, and per possibility it will deter them. Anything short of that, in my humble judgment, will be treated with as little consideration as the Constitution and laws of your country are now treated by your officials.

SENATOR JAMES DOOLITTLE (Republican, Wisconsin)

...

Mr. President, the necessity for the suspension of this writ is absolute; it is immediate; the only question is—and that is the disputed one—who has the power to suspend it, who shall judge when it shall be suspended? On that subject we all know there has been a great difference of opinion. Some of the very best legal minds of the country, and I will say some of the best legal minds in this Chamber, maintain, and earnestly maintain, that the suspension of *habeas corpus* in time of war is of necessity an executive power, and they put it on the ground of the very nature of the power. If it depends upon the Congress to suspend it, Congress is not in session for one half the year. The Executive is always in session, is always active, and always ready to exert his power. Not so with Congress. Before Congress could be called together, an insurrection might seize your seat of Government, seize your archives, seize your public offices, and prevent the assembling of Congress which is necessary to the suspension of the writ. But, sir, on the other hand it is maintained that the jealousies of our people are such that they are unwilling to place in the hands of a single individual this immense power to imprison a man in time of war and insurrection; and hence it is contended that it should be in the legislative power, it should belong to Congress, and to Congress alone to judge the necessity of when this writ should be suspended.

Now, in that, which is the practical state of this case, what shall we do? The bill of the honorable Senator from Illinois is drawn in such a manner that those who maintain that the power is in the President can vote for that section for it amounts to but a declaratory section, declaring that the President is authorized; and those who maintain that the power is in Congress can vote for that section, for if the President does not have it under the Constitution, that section will clothe him with the power. . . .

...

. . . I have no doubt, no misgiving as to the validity of this act, nor have I any doubt or any misgiving as to the beneficial effects which it will exercise throughout the lands; and then, under this act, the President clothed with this power upon his responsibility to suspend this writ, will be authorized to seize those who are guilty of the crime of treason, or those who are lending the rebellion aid or comfort, or those whom he knows, or has every reason to believe, are about to join the enemy, or give them aid or comfort; for it is to reach that class of men that it is necessary that the Executive should be clothed with this power. It is not enough that he may be permitted to arrest those who have been guilty of actual crime. In times of war it is necessary to arrest those who are about to engage in crime. . . .

SENATOR JOHN CARLILE (Unionist, Virginia)

. . . [I]t is the direction of this legislation contained in this bill, and in other bills that have received the sanction of the Senate, not against rebels, not against traitors, not against men in arms, but against loyal citizens of the loyal States of this country. That is the question which is at issue, nothing more, nothing less. This is no effort to arrest rebels or traitors, men who, it is contended, have forfeited rights under the Constitution; but this bill puts it in the power of the Executive to arrest every loyal citizen in every loyal State of the Union. . . .

SENATOR DANIEL CLARK (Republican, New Hampshire)

...

. . . Suppose the President finds it necessary to suspend the writ of *habeas corpus*, and that he should have the power to do it, has not Congress the right to give it to him? . . . What, then, is the meaning of the provision of the Constitution? The Constitution requires him to protect, defend, and preserve the Constitution. He says, "in order to do that, I must suspend the writ of *habeas corpus*." You say Congress cannot authorize him to do it. Then the power is not in him to preserve the Constitution, and we have not what the Constitution says we have, the power to pass all necessary laws to enable him to do it. The Constitution says the privilege of *habeas corpus* may be suspended in time of rebellion or

invasion, and the Constitution says the President shall take an oath to preserve, protect, and defend the Constitution. He says, "I cannot do it unless you will allow me to suspend the writ of *habeas corpus*; these traitors are so thick about me that they overrun me, and unless I can lay my hand upon them and put them in prison and hold them there, I cannot preserve the Constitution." Is that instrument so weak that we cannot authorize the President to do it?

SENATOR JOHN HENDERSON (Republican, Missouri)

...
... [N]o arrests should be made in the loyal States except upon warrant. During the time of this rebellion, you may suspend the privilege of the writ wherever you please for certain offenses; but my honest judgment is that no arrests ought to be made in the loyal States except upon warrant. . . .

...
My honest opinion is that there is no necessity for arresting anyone in the loyal States unless he has been guilty of some crime. If an individual in one of the loyal States is guilty of treason, or of any kindred crime, is it not a very easy matter where the courts are open to file an affidavit as is usually filed in such cases of crime, and when the party has once been imprisoned, if it be an offense which arises from opposition to the Government, or, in other words, an act of treason, let the privilege of the writ be suspended? But make no arrests in loyal States except upon affidavit. It is very different when a State has been declared to be in a state of insurrection, one whose inhabitants are known to be in open rebellion against the United States. In the first place, the courts are not open to justice at all, and you have no means of arresting parties who are inimical to the Government except by military power.

...
SENATOR MORTON SMITH WILKINSON (Republican, Minnesota)

... [T]here are a great many ways in a rebellion of this magnitude in which a party can oppose the Government without committing those overt acts which render him liable to an indictment for treason. I think the Constitution says that nobody shall be condemned for treason except for an overt act against the Government, levying war against it, or rendering aid or comfort to its enemy in time of war. There are thousands of ways in which a man can retard the operations of this Government, if he is a man of influence, without rendering himself liable to a charge of treason under the terms of the Constitution.

... The simple question is here: there are a large number of people in the North who wish to embarrass and stop the operations of the Government in every possible way; they do not try to disturb treason they do not use their great ability and talent to put down this rebellion; they do not come up and way the ways and means to supply our armies; they vote against them all; but they are very enthusiastic when they think the Constitution is to be infringed.

...
Mr. President, there are but two parties in this country during this rebellion. Those who are not for this Government are against it; and it is just as true now as it was eighteen hundred years ago, that "he who is not for me is against me." The lines are clearly drawn; and it is treason or patriotism, and nothing else. There is no half way measure.

...
... I do not confine my remark that there are two parties here, one for the Government and the other against it, to the Republican and Democratic parties by any means, though it is true that no Republican is a traitor, and it is also true that a great many Democrats are traitors. . . .

...
... I do not think very much of the bill which the Senator from Illinois has introduced. I do not believe it is half strong enough. I believe it ought to have more power in it than the bill possesses. Where political arrests are made for offenses which are not, perhaps, punishable under the laws of the land, but which tend to defeat the Government, I do not believe in turning those men over to the courts to be tried,

because I think it will amount to nothing. I think that the strong arm of this Government ought to lay hold of every man who in an hour like this, is arraying himself directly or indirectly against the Government in its efforts to put down this rebellion.

SENATOR WILLARD SAULSBURY (Democrat, Delaware)

...
... In my humble judgment, the Congress of the United States have no authority under the Constitution to clothe the President of the United States with this power. I contended, when I addressed the Senate before, that the power to suspend the writ of *habeas corpus* was in Congress, and not in the Executive. I maintain that still.

But this bill is liable to two objections upon constitutional ground. It does not attempt to suspend the privilege of *habeas corpus* by power of Congress itself, but it proposes to delegate that power to the President of the United States; and it also proposes to suspend that privilege in all those States unaffected by the rebellion. Now, sir, there is no principle more clearly settled in law—and if this be not law, then I confess that twenty years of what I consider somewhat diligent study of its principles has availed to me but little—no principle is more clearly settled than that a legislative power cannot be delegated. . . .

... [T]he power of suspending the writ of *habeas corpus* was never claimed by the President until the present time. The bill under consideration seems to abandon the ground originally assumed by the friends of the President, that he has the power to suspend the privilege of *habeas corpus*; for I cannot see exactly the propriety of the argument of the Senator from Wisconsin, that a person who believes that the power is in the President may consistently vote for this bill, and a person who believes the power is not in him may also vote for it. This bill proposes to give the authority, and the persons who vote for it must believe the power is in Congress. Those who believe the power to suspend is in Congress alone, must say that, being a legislative power, it cannot be delegated, but if exercised directly by Congress and not by another acting under authority derived from Congress. It requires the same authority and power to suspend as to enact a law. If the power to enact a law cannot be delegated it necessarily follows that the power to suspend a law cannot be delegated.

...
Mr. President, the crowning glory of the Democratic party is, that during its entire administration of the Government the political and civil rights of the citizen were never invaded, the constitutional rights of the States infracted, or the domestic peace and happiness of the country disturbed. The press was free. Not one newspaper was ever by its authority suppressed. No illegal arrests were made. No citizen was deprived of his liberty without due process of law. No one was ever denied the privilege of the writ of *habeas corpus*, or refused a speedy and impartial trial according to the law of the land. . . .

SENATOR JACOB COLLAMER (Republican, Vermont)

... The first section authorizes the suspension of *habeas corpus*, so that courts and judges cannot relieve the man arrested; the second and third sections provide that they shall relieve the man. They cannot stand together with any degree of consistency; and it seems to me, taking the whole bill together as it stands, it becomes a sort of *felo de se*; it is comparatively of no use; its parts are inconsistent with each other and destructive of the whole. That is the way it appears to me; and therefore I move to strike out the second and third sections.

SENATOR LYMAN TRUMBULL (Republican, Illinois)

... Because the writ of *habeas corpus* is suspended, does the Senator from Vermont say that it is inconsistent with itself, if you do not suspend it forever? Several Senators have suggested to me that we ought to limit this jurisdiction to a particular time. Suppose we pass a law of Congress to suspend the

privilege of the writ of *habeas corpus* for twenty days or for ninety days, would not that be a good suspension, or must it be perpetual?

The second and third sections provide that this suspension shall not be forever. That is the very thing that is complained of in the country. What is the complaint? What is it that has created so much feeling throughout all this land? It is that a man is arrested without a warrant, without any charge, without being informed for what, and placed in prison, and held there indefinitely, without ever knowing why. . . .

SENATOR COLLAMER

. . . [T]he suspension of the writ of *habeas corpus* has nothing to do with the arrest of criminals. The Government do not need the suspension for that purpose at all. It is not used for that. This *habeas corpus* is to be suspended to enable them to hold in arrest persons who have not committed crime. Does not this provide that all such persons must, at least after a term has gone by, be discharged?

. . . [I]f they have the power of suspending the writ of *habeas corpus*; it should be to enable them to take and to hold persons independent of their committing crimes, for State reasons, for public safety, for the public security; and because a term has come the court should not be allowed to deliver a man from arrest provided he will take an oath. This should not be left with the court. It should be left to the Executive, with whom we leave the suspension of the writ, as it seems to me, to be at all consistent; otherwise it means very little of nothing at all.



OXFORD
UNIVERSITY PRESS