AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

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

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Abraham Lincoln and New York Democrats Debate Habeas Corpus and Martial Law (1863)[1]

President Lincoln's decisions to suspend habeas corpus and declare martial law were controversial. Some Republicans, including some of Lincoln's closest political advisors, believed that the administration acted unconstitutionally. Almost all Democrats condemned wartime restrictions on civil liberties. Prominent New Yorkers led the campaign against suspending civil liberties. Governor Horatio Seymour of New York in his first annual message bluntly declared, "Where courts of law are open, martial law cannot be declared." The Lincoln administration's decision to arrest former Democratic Congressman Clement Vallandigham and try him before a military commission intensified Democratic opposition. On May 19, 1863, prominent Albany Democrats sent Abraham Lincoln a public letter, accusing the president of violating fundamental constitutional rights when prosecuting the Civil War. Lincoln replied to that letter on June 12, 1863. Dissatisfied with Lincoln's response, Albany Democrats published a pamphlet further detailing their constitutional objections to wartime policy.

We have excerpted all three documents. When reading them, consider the following. What civil liberties did the New York Democrats believe Lincoln violated? To what extent did they object to presidential suspensions of habeas corpus and impositions of martial law, and to what extent did they believe that neither Lincoln nor Congress could impose martial law? How did Lincoln respond to these claims? Did he maintain that the Constitution directly authorized his actions or that his actions were necessary to preserve the Constitution? Who has the better argument?

Letter of the Committee and Resolutions, May 19, 1863

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Resolved . . .We demand that the Administration shall be true to the Constitution; shall recognize and maintain the rights of the States and the liberties of the citizen; shall everywhere, outside of the lines of necessary military occupation and the scenes of insurrection, exert all its powers to maintain the supremacy of the civil over military law.

Resolved, That, in view of these principles, we denounce the recent assumption of a military commander to seize and try a citizen of Ohio, Clement L. Vallandigham, for no other reason than words addressed to a public meeting, in criticism of the course of the Administration and in condemnation of the military orders of that general.

Resolved, That this assumption of power by a military tribunal, if successfully asserted, not only abrogates the right of the people to assemble and discuss the affairs of government, the liberty of speech and of the press, the right of trial by jury, the law of evidence, and the privilege of *habeas corpus,* but it strikes a fatal blow at the supremacy of law and the authority of the State and Federal Constitutions.

Resolved, That the Constitution of the United States—the supreme law of the land—has defined the crime of treason against the United States to consist "only in levying war against them, or adhering to their enemies, giving them aid and comfort," and has provided that "no person shall be convicted of

[1] Frank Moore, ed., *The Rebellion Record: A Diary of American Events*, vol. VII (New York: D. Van Nostrand, 1864), 298–308.

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treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court." And it further provides that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land and naval forces, or in the militia, when in actual service in time of war or public danger;" and further, that "in all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial by an impartial jury of the State and district wherein the crime was committed."

Resolved, That those safeguards of the rights of the citizen against the pretensions of arbitrary power were intended more especially for his protection in times of civil commotion. They were secured substantially to the English people, after years of protracted civil war, and were adopted into our Constitution at the close of the revolution. They have stood the test of seventy-six years of trial, under our republican system, under circumstances which show that, while they constitute the foundation of all free government, they are the elements of the enduring stability of tho republic.

Resolved, . . . [W]e declare, "it is the ancient and undoubted prerogative of this people to canvass public measures and the merits of public men." It is a "homebred right," a fireside privilege. It had been enjoyed in every house, cottage, and cabin in the nation. It is as undoubted as the right of breathing the air or walking on the earth. Belonging to private life as a right, it belongs to public life as a duty, and it is the last duty which those whose representatives we are shall find us to abandon. Aiming at all times to be courteous and temperate in its use, except when the right itself is questioned, we shall place ourselves on the extreme boundary of our own right and bid defiance to any arm that would move us from our ground. "This high constitutional privilege we shall defend and exercise in all places —In time of peace, in time of war, and at all times. Living, we shall assert it; and should we leave no other inheritance to our children, by the blessing of God we will leave them the inheritance of free principles, and the example of a manly, independent, and constitutional defense of them."

Resolved, That in the election of Governor Seymour [a War Democrat], the people of this State, by an emphatic majority, declared their condemnation of the system of arbitrary arrests and their determination to stand by the Constitution. That the revival of this lawless system can have but one result: to divide and distract the North, and destroy its confidence in the purposes of the Administration. That we deprecate it as an element of confusion at home, of weakness to our armies in the field, and as calculated to lower the estimate of American character and magnify the apparent peril of our cause abroad. And that, regarding the blow struck at a citizen of Ohio as aimed at the rights of every citizen of the North, we denounce it as against the spirit of our laws and Constitution, and most earnestly call upon the President of the United States to reverse the action of the military tribunal which has passed a "cruel and unusual punishment" upon the party arrested, prohibited in terms by the Constitution, and to restore him to the liberty of which ho has been deprived.

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President Lincoln's Reply

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. . . [T]he meeting, by their resolutions, assert and argue that certain military arrests, and proceedings following them, for which I am ultimately responsible, are unconstitutional. I think they are not. The resolutions quote from the Constitution the definition of treason, and also the limiting safeguards and guarantees therein provided for the citizen on trials of treason, and on his being held to answer for capital or otherwise infamous crimes, and, in criminal prosecutions, his right to a speedy and public trial by an impartial jury. . . . But these provisions of the Constitution have no application to the case we have in hand, because the arrests complained of were not made for treason—that is, not for *the* treason defined in the Constitution, and upon the conviction of which the punishment is death—nor yet were they made to hold persons to answer for any capital or otherwise infamous crimes; nor were the proceedings following, in any constitutional or legal sense, "criminal prosecutions." The arrests were made on totally different grounds, and the proceedings following accorded with the grounds of the arrests. Let us consider the real case with which we are dealing, and apply to it the parts of the Constitution plainly made for such cases.

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. . . Nothing is better known to history than that courts of justice are utterly incompetent to [the present] cases. Civil courts are organized chiefly for trials of individuals, or, at most, a few individuals acting in concert; and this in quiet times, and on charges of crimes well defined in the law. Even in times of peace bands of horse-thieves and robbers frequently grow too numerous and powerful for ordinary courts of justice. But what comparison, in numbers, have such bands ever borne to the insurgent sympathizers even in many of the loyal States? Again, a jury too frequently has at least one member more ready to hang the panel than to hang the traitor. And yet, again, he who dissuades one man from volunteering, or induces one soldier to desert, weakens the Union cause as much as he who kills a Union soldier in battle. Yet this dissuasion or inducement may be so conducted as to be no defined crime of which any civil court would take cognizance.

Ours is a case of rebellion—so called by the resolutions before me—in fact, a clear, flagrant, and gigantic case of rebellion; and the provision of the Constitution 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," is *the* provision which specially applies to our present case. This provision plainly attests the understanding of those who made the Constitution, that ordinary courts of justice are inadequate to "cases of rebellion"—attests their purpose that, in such cases, men may be held in custody whom the courts, acting on ordinary rules, would discharge. *Habeas corpus* does not discharge men who are proved to be guilty of defined crime; and its suspension is allowed by the Constitution on purpose that men may be arrested and held who cannot be proved to be guilty of defined crime, "when, in cases of rebellion or invasion, the public safety may require it."

This is precisely our present case—a case of rebellion, wherein the public safety does require the suspension. Indeed, arrests by process of courts, and arrests in cases of rebellion do not proceed altogether upon the same basis. The former is directed at the small percentage of ordinary and continuous perpetration of crime, while the latter is directed at sudden and extensive uprisings against the Government, which, at most, will succeed or fail in no great length of time. In the latter case, arrests are made, not so much for what has been done, as for what probably would be done. The latter is more for the preventive and less for the vindictive than the former. In such cases the purposes of men are much more easily understood than in cases of ordinary crime. The man who stands by and says nothing when the peril of his Government is discussed, cannot be misunderstood. If not hindered, he is sure to help the enemy; much more, if he talks ambiguously—talks for his country with "buts" and "ifs" and "ands." . . . I think the time not unlikely to come when I shall be blamed for having made too few arrests rather than too many.

By the third resolution the meeting indicate their opinion that military arrests may be constitutional in localities where rebellion actually exists, but that such arrests are unconstitutional in localities where rebellion or insurrection does not actually exist. They insist that such arrests shall not be made "outside of the lines of necessary military occupation, and the scenes of insurrection." Inasmuch, however, as the Constitution itself makes no such distinction, I am unable to believe that there is any such constitutional distinction. I concede that the class of arrests complained of can be constitutional only when, in cases of rebellion or invasion, the public safety may require them; and I insist that in such cases they are constitutional *wherever* the public safety does require them; as well in places to which they may prevent the rebellion extending as in those where it may be already prevailing; as well where they may restrain mischievous interference with the raising and supplying of armies to suppress the rebellion, as where the rebellion may actually be; as well where they may restrain the enticing men out of the army, as where they would prevent mutiny in the army; equally constitutional at all places where they will conduce to the public safety, as against the dangers of rebellion or invasion. Take the peculiar case mentioned by the meeting. . . . Mr. Vallandigham avows his hostility to the war on the part of the Union; and his arrest was made because he was laboring, with some effect, to prevent the raising of troops; to encourage desertions from the army; and to leave the rebellion without an adequate military force to suppress it. He was not arrested because he was damaging the political prospects of the Administration, or the personal interests of the commanding general, but because he was damaging the army, upon the existence and vigor of which the life of the nation depends. He was warring upon the military, and this gave the military constitutional jurisdiction to lay hands upon him. If Mr. Vallandigham was not

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damaging the military power of the country, then his arrest was made on mistake of fact, which I would be glad to correct on reasonably satisfactory evidence.

I understand the meeting, whose resolutions I am considering, to be in favor of suppressing the rebellion by military force—by armies. Long experience has shown that armies cannot be maintained unless desertion shall be punished by the severe penalty of death. The case requires, and the law and the Constitution sanction, this punishment. Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert? This is none the less injurious when effected by getting a father, or brother, or friend, into *a* public meeting, and there working upon his feelings till he is persuaded to write the soldier boy that he is fighting in a bad cause, for a wicked Administration of a contemptible Government, too weak to arrest and punish him if he shall desert. I think that, in such a case, to silence the agitator and save the boy is not only constitutional, but withal a great mercy.

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: in other words, that the Constitution is not, in its application, in all respects the same, in cases of rebellion or invasion involving the public safety, as it is in times of profound peace and public security. The Constitution itself makes the distinction; and I can no more be persuaded that the Government can constitutionally take no strong measures in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man because it can be shown to not be good food for a well one. Nor am I able to appreciate the danger apprehended by the meeting, that the American people will, by means of military arrests during the rebellion, lose the right of public discussion, the liberty of speech and the press, the law of evidence, trial by jury, and *habeas corpus,* throughout the indefinite peaceful future, which I trust lies before them, any more than I am able to believe that a man could contract so strong an appetite for emetics during temporary illness as to persist in feeding upon them during the remainder of his healthful life.

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Society for the Diffusion of Political Knowledge, "Reply to President Lincoln's Letter of 12th June, 1863"

To His Excellency Abraham Lincoln. . . . :

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We have carefully considered the grounds on which your pretensions to more than regal authority are claimed to rest; and if we do not misinterpret the misty and clouded forms of expression in which those pretensions are set forth, your meaning is, that while the rights of the citizen are protected by the Constitution in time of peace, they are suspended or lost in time of war, when invasion or rebellion exist. . . . You claim to have found not outside, within the Constitution, a principle or germ of arbitrary power, which in time of war expands at once into an absolute sovereignty, wielded by one man; so that liberty perishes, or is dependent on his will, his discretion, or his caprice. This extraordinary doctrine you claim to derive wholly from that clause of the Constitution which, in case of invasion or rebellion, permits the writ of habeas corpus to be suspended. . . .

You must permit us to say to you, with all due respect, with the earnestness demanded by the occasion, that the American people will never acquiesce in this doctrine. In their opinion the guarantees of the Constitution which secure to them freedom of speech and of the press, immunity from arrest for offenses unknown to the laws of the land, and the right of trial by jury before the tribunals provided by those laws, instead of military commissions and drum-head courts-martial, are living and vital principles in peace and in war, at all times and under all circumstances. . . .

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. . . [Y]our doctrine undisguised is, that a suspension of this writ justifies arrests without warrant, without oath, and even without suspicion of treason or other crime. Your doctrine denies the freedom of

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speech and of the press; it invades the sacred domain of opinion and discussion; it denounces the "ifs" and the "buts" of the English language, and even the refuge of silence is insecure.

We repeat, a suspension of the writ of habeas corpus merely dispenses with a single and peculiar remedy against an unlawful imprisonment; but if that remedy had never existed, the right to liberty would be the same, and every invasion of that right would be condemned not only by the Constitution, but by principles of far greater antiquity than the writ itself. . . .

. . . The Constitution is not open to the new interpretation suggested by your communication now before us. . . . The possible suspension of the writ of habeas corpus is consistent with freedom of speech and of the press. The suspension of that remedial process may prevent the enlargement of the accused traitor or conspirator, until he shall be legally tried and convicted or acquitted, but in this we find no justification for arrest and imprisonment without warrant, without cause, without the accusation or suspicion of crime. It seems to us, moreover, too plain for argument that the sacred right of trial by jury, and in courts where the law of the land is the rule of decision, is a right which is never dormant, never suspended, in peaceful and loyal communities and States. Will you, Mr. President, maintain, that because the writ of habeas corpus may be in suspense, you can substitute soldiers and bayonets for the peaceful operation of the laws, military commissions and inquisitorial modes of trial for the courts and juries prescribed by the Constitution itself? . . .

Upon what foundation, then, permit us to ask, do you rest the pretension that men who are not accused of crime may be seized and imprisoned or banished at the will and pleasure of the President or any of his subordinates in civil and military positions? Where is the warrant for invading the freedom of speech and of the press? Where the justification for placing the citizen on trial without the presentment of a grand jury and before military commissions? THERE IS NO POWER IN THIS COUNTRY WHICH CAN DISPENSE WITH ITS LAWS. The President is as much bound by them as the humblest individual. . . .

This power which you have erected in theory is of vast and illimitable proportions. If we may trust you to exercise it mercifully and leniently, your successor, whether immediate or more remote, may wield it with the energy of a Caesar or Napoleon, and with the will of a despot and a tyrant. It is a power without boundary or limit, because it proceeds upon a total suspension of all the constitutional and legal safeguards which protect the rights of the citizen. . . . It is a despotism unlimited in principle, because the same arbitrary and unrestrained will or discretion which can place men under illegal restraint or banish them, can apply the rack or the thumb-screw, can put to torture or to death. . . .

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Permit us, then, in this spirit, to ask your Excellency to reexamine the grave subjects we, have considered, to the end that, on your retirement from the high position you occupy, you may leave behind you no doctrines and no further precedents of despotic power to prevent you and your posterity from enjoying that constitutional liberty which is the inheritance of us all, and to the end, also, that history may speak of your administration with indulgence, if it cannot with approval.

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