

# THE YALE LAW JOURNAL

AMANDA L. TYLER

## Suspension as an Emergency Power

**ABSTRACT.** As the war on terrorism continues, and along with it a heated debate over the scope of executive authority in times of national emergency, one important question deserves careful attention: how much power may Congress vest in the executive to address the crisis at hand when it chooses to take the “grave action” of suspending the privilege of the writ of habeas corpus? For example, may suspension legislation authorize the executive to arrest and detain individuals on suspicion that they might engage in future acts of terrorism? Or does suspending the privilege merely remove the courts from the governing equation without expanding the scope of executive power to arrest and detain persons of suspicion? This Article seeks to provide a definitive account of what it means to suspend the privilege. Toward that end, the Article explores in detail the relationship between suspension, executive power, and individual rights throughout American history along with how the suspension power fits into our larger constitutional scheme. The analysis yields the conclusion that in the narrow circumstances believed by the Framers to justify suspending the privilege—times of “Rebellion or Invasion”—a suspension offers the government some measure of latitude in its efforts to restore order and preserve its very existence. The idea is hardly new. Indeed, Blackstone articulated it long ago. As he both explained and cautioned, “[T]his experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with its liberty for a while, in order to preserve it forever.”

**AUTHOR.** Associate Professor of Law, The George Washington University Law School. I thank participants in faculty workshops at George Washington, Harvard, Notre Dame, and Stanford Law Schools where I presented earlier drafts, along with Michael Abramowicz, Bradford Clark, Thomas Colby, Richard Fallon, David Fontana, Allan Hutchinson, Chip Lupu, Gerard Magliocca, John Manning, Daniel Meltzer, Henry Monaghan, Trevor Morrison, Gerald Neuman, James Pfander, David Shapiro, Jonathan Siegel, Peter Smith, and Ed Swaine for helpful comments and discussions. I also thank Terri Gallego-O’Rourke of the Harvard Law School Library and Kasia Solon of the Jacob Burns Law Library for their historical research, along with Jonathan Bond, Russell Gold, and Derek Lawlor for research assistance.



## ARTICLE CONTENTS

INTRODUCTION	602
I. DEBATING WHAT IT MEANS TO SUSPEND THE PRIVILEGE	607
II. THE CONCEPTION OF SUSPENSION AT THE FOUNDING	613
A. The English Origins of the Great Writ and the Suspension Power	614
B. Pre-Convention American Suspensions	622
C. The Suspension Clause in the Constitutional Convention and Ratification Debates	627
D. The Suspension Proposed in Response to the Burr Conspiracy	630
III. THE CIVIL WAR AND RECONSTRUCTION: INVOKING THE “MOST EXTRAORDINARY POWER”	637
A. The First Suspension Under the U.S. Constitution: Suspending the Writ During the Civil War	637
1. The 1863 Act	639
2. Post-Script: Executive Action Pursuant to the 1863 Act and the Act’s Amending Legislation	651
B. Suspension During Reconstruction: Putting Down the Klan in South Carolina	655
IV. UNDERSTANDING SUSPENSION AS AN EMERGENCY POWER	664
A. Reading the Suspension Clause in Context	664
B. Giving Meaning to the Suspension Power	670
C. Mapping the Suspension Clause Within the Constitution	682
V. SUSPENSION AND THE SEPARATION OF POWERS	687
CONCLUSION	693

[A] suspension of the writ . . . is just about the most stupendously significant act that the Congress of the United States can take[.]<sup>1</sup>

## INTRODUCTION

Justice Jackson famously observed that the Suspension Clause<sup>2</sup> is the Constitution's only "express provision for exercise of extraordinary authority because of a crisis."<sup>3</sup> Historically speaking, the suspension power, though rarely invoked, has been both appreciated and wielded as an emergency power of tremendous consequence for addressing the breakdown of law and order and steering our constitutional ship back on course when it falters. Nonetheless, much of what the Suspension Clause protects during times of peace and permits during times of crisis remains shrouded in mystery. Current circumstances—namely, the attacks of September 11, 2001, and the ensuing war on terrorism—have spurred renewed interest in the Suspension Clause and, specifically, what a suspension actually allows the political branches to do in addressing the crisis at hand.

Recent legislation enacted as part of the war on terrorism has led to several important Supreme Court decisions supplying some additional clues as to the Suspension Clause's meaning,<sup>4</sup> including two this past Term,<sup>5</sup> along with

- 
1. Transcript of Oral Argument at 57-58, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2007) (No. 05-184) (recording Justice Souter's question: "Isn't there a pretty good argument that a suspension of the writ . . . is just about the most stupendously significant act that the Congress of the United States can take?").
  2. U.S. CONST. art. I, § 9, cl. 2 ("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. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring).
  4. See, e.g., *Hamdan*, 548 U.S. 557 (invoking the 1949 Geneva convention to reject the government's claim that Guantanamo Bay detainees are not entitled to habeas review of the legality of their detention and holding that the military commissions established by the President to try Guantanamo Bay detainees lack the power to proceed); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (concluding that the government must provide some opportunity for an American citizen captured abroad and being held as an enemy combatant to challenge his classification as such while suggesting that the opportunity could be provided in a non-Article III tribunal); *Rasul v. Bush*, 542 U.S. 466 (2004) (interpreting the grant of general habeas jurisdiction found in 28 U.S.C. § 2241 to permit aliens detained at Guantanamo Bay and alleged to be enemy combatants to seek review of the legality of their detentions in federal court).
  5. See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (striking down section 7 of the Military Commissions Act as an unconstitutional suspension of the privilege of the writ of habeas corpus enjoyed by noncitizen detainees being held at Guantanamo Bay); *Munaf v. Geren*,

## SUSPENSION AS AN EMERGENCY POWER

important new scholarly commentary.<sup>6</sup> But the meaning of the Suspension Clause and its application to the modern problems posed by the war on terrorism remain largely unsettled. In particular, the connection between the suspension authority and the scope of executive power remains the subject of considerable debate. How much power can a valid suspension vest in the executive to address an emergency? If, for example, Congress had suspended the writ of habeas corpus in the immediate wake of September 11,<sup>7</sup> could that legislation have empowered the executive, consistent with the Constitution, to arrest and detain a broader class of persons than those who would be subject to arrest in the absence of the suspension? That is, would a suspension authorize the executive to arrest and detain individuals on suspicion that they *might* engage in future acts of terrorism? This is a crucial question. Its resolution not only would inform the current debates over the propriety of what the government has done to date in the war on terrorism in the *absence* of a suspension, but it also says much about what the government could do in response to a future terrorist attack if Congress were in fact to take the “grave action” of suspending the privilege of the writ of habeas corpus in its aftermath.<sup>8</sup>

Two schools of thought have emerged on this matter. On one view, the Suspension Clause recognizes an extraordinary emergency power, one that does not simply remove a judicial remedy but “suspends” the rights that find meaning and protection in the Great Writ.<sup>9</sup> It follows from this account that there can be no objection “under the Constitution or any other provision of our

---

128 S. Ct. 2207 (2008) (holding that district courts may review the legality of the detention of an American citizen at a United States military camp in Iraq and denying habeas relief on the merits).

6. The range of literature is too vast to list here. A comprehensive recent work on the application of the Suspension Clause to war on terrorism detentions is found in Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007).
7. Various sources suggest that the original draft of the antiterrorism bill sent by the President to Congress following the September 11 attacks included a provision calling for suspension of habeas corpus. See, e.g., Jonathan Alter, *Keeping Order in the Courts*, NEWSWEEK, Dec. 10, 2001, at 48, 48 (observing that “the secret first draft of the antiterrorism bill” sent to Congress in October “contained a section explicitly titled: ‘Suspension of the Writ of Habeas Corpus’”); see also Petitioners’ Brief on the Merits at 14 n.12, *Rasul*, 542 U.S. 466 (No. 03-334) (collecting cites); STEVEN BRILL, AFTER: HOW AMERICA CONFRONTED THE SEPTEMBER 12 ERA 73-74 (2003) (reporting that the initial draft of the USA PATRIOT Act included a proposal to suspend the writ for an undefined period).
8. *Hamdi*, 542 U.S. at 575 (Scalia, J., dissenting) (referring to “the grave action of suspending the writ”).
9. See Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 386 (2006).

law, to the lawfulness of a detention pursuant to a valid suspension of the habeas remedy.”<sup>10</sup> Instead, “the very purpose of suspension is to permit Congress to override core due process safeguards during times of crisis. In effect, suspension operates as an ‘on/off’ switch for this due process right and possibly other portions of the Constitution as well.”<sup>11</sup> A suspension, on this view, lawfully expands executive power to arrest and detain during the emergency, albeit only so much as is necessary to combat effectively the crisis at hand. In short, this view marries the rights protected by the Great Writ with those displaced in the event of a valid suspension.

Another account, which this Article will call the “narrow view” of suspension, sets forth a very different vision of suspension. The narrow view argues that a suspension extinguishes the judicial power to order a prisoner’s discharge<sup>12</sup> but accomplishes virtually nothing else.<sup>13</sup> Thus, on this account, a suspension cannot lawfully authorize the executive to arrest or detain any person who could not be arrested and held in the absence of a suspension.<sup>14</sup> Such arrests, even if “authorized” by the express terms of the suspension, remain unlawful and unconstitutional. It follows from this view that an executive officer later may be sued and prosecuted for such illegal arrests,<sup>15</sup> so long as Congress has not *separately* conferred immunity on the officer for such conduct.<sup>16</sup>

At this point, one might observe that the import of the differing interpretations of the breadth of the suspension authority is nothing more than

- 
10. See David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 86 (2006) (finding support “in the natural understanding of those who framed the Suspension Clause and of the kinds of conditions likely to exist when its use is warranted”).
  11. Tyler, *supra* note 9, at 386.
  12. It is generally undisputed that a suspension accomplishes at least this much. See, e.g., Shapiro, *supra* note 10, at 80.
  13. See Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1552-53 (2007).
  14. See Trevor W. Morrison, *Hamdi’s Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411, 432 (2006); Morrison, *supra* note 13, at 1552-53.
  15. See Morrison, *supra* note 13, at 1541-42; see also A.V. DICEY, LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION 242, 245 (London, MacMillan & Co. 1885) (stating that a suspension “does not legalise any arrest, imprisonment, or punishment which was not lawful before the Suspension Act passed” and “does not free any person from civil or criminal liability for a violation of the law”); WILLIAM S. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS § 50, at 42-43 (San Francisco, Bancroft-Whitney Co. 2d ed. 1893) (similar).
  16. See CHURCH, *supra* note 15, § 50, at 42-43 & n.1.

## SUSPENSION AS AN EMERGENCY POWER

a debate over the proper default rule governing damages actions targeting arrests made pursuant to a suspension.<sup>17</sup> But there is much more at stake.<sup>18</sup> According to the narrow view, because suspension does not constitute authorization, the executive, in honoring his oath to uphold the Constitution, may not arrest anyone during a suspension who could not lawfully be arrested in the absence of suspension.<sup>19</sup> If this proposition is correct, then the traditional narrative that the “suspension of this writ is a most extraordinary power”<sup>20</sup> is much overstated.<sup>21</sup>

This Article contends that the narrow view is overwhelmingly at odds with the historical understanding of suspension in this country and is both theoretically untenable and functionally undesirable as a matter of constitutional interpretation. Part I offers general background on the debate over what it means to suspend the privilege of the writ of habeas corpus. Parts II and III demonstrate by a careful march through the historical evidence that the consistent understanding of suspension in this country has been one that comprehends a proper exercise of the power as expanding executive power while “suspending” those rights that find protection and meaning in the Great Writ. As this survey shows, although our tradition views imprisonment without due process of law as anathema, in the vein of William Blackstone, it nonetheless recognizes that “sometimes, when the state is in real danger, *even this* may be a necessary measure.”<sup>22</sup> As Blackstone counseled, in a situation of “extreme emergency,” a suspension of the privilege of the writ of habeas corpus calls on the nation to “part[] with its liberty for a while, in order to preserve it

- 
17. On the view defended here, the default rule provides that such suits are unavailable by the very declaration of a suspension, so long as the suspension is valid on its face and the executive’s actions are consistent with its terms. By contrast, the narrow view posits that officer damages suits and the threat of prosecution remain viable where an officer arrests someone who could not be arrested in the absence of a suspension, but Congress possesses “fairly broad authority” to immunize such officer conduct. Morrison, *supra* note 13, at 1542.
  18. With that said, the debate over the proper default rule is surely relevant in and of itself, for Congress has not consistently provided for officer immunity when suspending the privilege of the writ.
  19. The narrow view further posits that the executive is bound to implement internal procedures in an attempt to satisfy due process (what this Article will call “executive due process”) to ensure that no one is arrested or detained during a period of valid suspension without legal cause that would have sufficed in the absence of a suspension. *See* Morrison, *supra* note 13, at 1602-14.
  20. CONG. GLOBE, 42d Cong., 1st Sess. 761 (1871) (statement of Sen. Stevenson).
  21. To be sure, the courts are still removed from the equation—something that is hardly insignificant, but such an end constitutes the entirety of the formal effect of the suspension.
  22. 1 WILLIAM BLACKSTONE, COMMENTARIES \*136 (emphasis added).

forever.”<sup>23</sup> In short, suspension has never been viewed as “the mere removal of a particular remedy.”<sup>24</sup>

Part IV, in turn, contends that the text and framing of the Suspension Clause also support a broader conception of the suspension power. As is well known, the Framers “understood that individual rights begin where federal power ends.”<sup>25</sup> Their recognition of a legislative power to suspend the privilege of the writ, more than any other provision in the Constitution, underscores this lesson. Further, the whole point of a suspension is to expand the powers of the political branches so that they may address effectively the emergency at hand. Taking into account the extraordinary circumstances in which a valid suspension may be declared reveals how, by that act, Congress lawfully may authorize the executive to engage in some measure of preventive detention. By contrast, adopting the narrow view of suspension would lead a suspension (to borrow from the author of the Civil War suspension legislation) to “mean very little or nothing at all”<sup>26</sup> and certainly not to constitute anything resembling an emergency *power*.

Finally, Part V situates suspension within our constitutional structure and argues that because it represents a dramatic departure from the twin principles of government accountability and protection of individual liberty, it is imperative that exercises of the suspension power be closely guarded and carefully checked. This means, among other things, that Congress must play an active role in determining whether a suspension is the appropriate response to an existing crisis. Put another way, the executive should not be permitted to declare a suspension unilaterally. Likewise, as I have argued in prior work, it is precisely because of the dramatic effects of a suspension on individual liberty that a decision by the political branches to invoke the authority should not be understood as categorically immune from judicial review. To permit the political branches to decide for themselves the constitutionality of their decision to suspend the privilege would, in effect, convert the most fundamental of individual liberties into nonjusticiable political questions.<sup>27</sup>

In the end, I hope to convince the reader of two points. First, the suspension power is a truly stupendous emergency power, one that can lead to the displacement of those rights enshrined in the Great Writ for the purpose of

---

23. *Id.*

24. Morrison, *supra* note 13, at 1552-53 (arguing that this is all that a suspension accomplishes).

25. Bradford R. Clark, *Unitary Judicial Review*, 72 GEO. WASH. L. REV. 319, 346 (2003); see Philip A. Hamburger, *Trivial Rights*, 70 NOTRE DAME L. REV. 1, 31 (1994).

26. CONG. GLOBE, 37th Cong., 3d Sess. 1206 (1863) (statement of Sen. Collamer).

27. See generally Tyler, *supra* note 9 (developing this point).

## SUSPENSION AS AN EMERGENCY POWER

enabling the political branches effectively to steer the country through the crisis at hand. Second, this recognition underscores all the more why a decision to suspend the privilege cannot reside in one branch alone and why suspension should be viewed truly as a last resort measure. The genius in the Framers' constitutional design is demonstrated more here than anywhere—the structural protections built into the separation of powers largely ensure that this extraordinary emergency power will only be invoked during the most dire of national emergencies.

### I. DEBATING WHAT IT MEANS TO SUSPEND THE PRIVILEGE

Article I, Section 9, Clause 2 of the Constitution provides, “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.”<sup>28</sup> The Supreme Court has offered authoritative interpretations of the Suspension Clause only a handful of times, and (not coincidentally) scholars have much debated its meaning. We have come this far with much of the Clause's meaning shrouded in mystery because exercises in suspension have been few in number and limited in duration.

By its terms, the Suspension Clause constitutes both a limitation upon and recognition of congressional power. Thus, as an initial matter, the Clause restricts when the “privilege of the writ of habeas corpus” may be suspended to those situations “when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>29</sup> In so doing, the Clause arguably promises that a core writ will stand inviolate in the normal course of events. To be sure, the Suspension Clause does not expressly create a right to habeas review. Accordingly, there are those who argue that the Clause promises only that whatever habeas right

---

28. U.S. CONST. art. I, § 9, cl. 2. The wording of the Suspension Clause stems from a proposal made by Gouverneur Morris at the Constitutional Convention. One commentator has suggested that Morris celebrated the ambiguities inherent in the Clause. See Sydney G. Fisher, *The Suspension of Habeas Corpus During the War of the Rebellion*, 3 POL. SCI. Q. 454, 472 (1888).

29. The Great Writ, or the writ of *habeas corpus ad subjiciendum*, tests the legality of a petitioner's detention by requiring the custodian to justify to a court the grounds supporting the detention. See *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.) (describing it as a “high prerogative writ . . . the great object of which is the liberation of those who may be imprisoned without sufficient cause”); see also *Price v. Johnston*, 334 U.S. 266, 283 (1948) (describing the writ as affording “a swift and imperative remedy in all cases of illegal restraint upon personal liberty”); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 101 (1868) (observing that the Suspension Clause embodies the Framers' intent “that every citizen may be protected by judicial action from unlawful imprisonment”).

is given by the grace of the legislature may not be suspended temporarily except in cases of rebellion or invasion.<sup>30</sup> A different view, and one to which I have subscribed previously, posits that the Suspension Clause constitutes not only a *limitation* on Congress but also an implicit *obligation* on that body to ensure some measure of jurisdiction in the courts to award the core habeas remedy.<sup>31</sup> The Supreme Court's recent decision in *Boumediene v. Bush* appears to have embraced this view, for there a majority concluded that the Suspension Clause "ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty."<sup>32</sup>

At the same time, the Suspension Clause recognizes the authority of the general government to suspend the "privilege of the writ of habeas corpus" in narrow and specific circumstances. This Article is concerned with the ramifications—both with respect to executive power and individual rights—that follow when this step is taken.

Two views on this question have surfaced in the legal scholarship. On one view, which draws upon the "natural understanding of those who framed the Suspension Clause and of the kinds of conditions likely to exist when its use is warranted," the suspension authority represents an emergency power of

---

30. See *INS v. St. Cyr*, 533 U.S. 289, 338 (2001) (Scalia, J., dissenting) (contending that the Suspension Clause does not "guarantee[] any particular habeas right that enjoys immunity from suspension"); see also Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335, 344 (1952) (drawing upon the Madisonian compromise and the omission of an express habeas right in the Suspension Clause to question whether Congress is obligated to provide for habeas jurisdiction).

31. See Tyler, *supra* note 9, at 340-42, 382-84 (discussing, among other things, Chief Justice Marshall's opinion in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), as well as the linked heritage of the Great Writ and core due process values); see also *St. Cyr*, 533 U.S. at 305 (observing that "a serious Suspension Clause issue would be presented" if the Court interpreted a deportation statute to preclude judicial review of questions of law); Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555, 580-81 (2002) (suggesting that the Constitution does not vest jurisdiction in any specific federal court but obliges Congress to provide some effective means by which the writ will be made available). My position derives in part from my general agreement with the suggestion in Henry Hart's *Dialogue* that some court "must always be available to pass on claims of constitutional right to judicial process, and to provide such process if the claim is sustained." Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372 (1953); see also *id.* at 1398 ("Habeas corpus has a special constitutional position."). The First Congress made a general writ of habeas corpus available to federal prisoners in the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

32. 128 S. Ct. 2229, 2247 (2008) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion)).

## SUSPENSION AS AN EMERGENCY POWER

considerable consequence.<sup>33</sup> Because the Framers likely equated “the right to be free from unlawful detention with the role of habeas corpus in guaranteeing that right,”<sup>34</sup> it follows that the suspension of habeas corpus “suspends” (or “shuts off”) for a time those rights that find protection and meaning in the Great Writ.<sup>35</sup> Accordingly, a suspension “frees the Executive from the legal restraints on detention that would otherwise apply.”<sup>36</sup> Indeed, “[t]his is what makes suspension the emergency provision that it is.”<sup>37</sup> Thus, on this account, the purpose and “immediate effect of a suspension is the facilitation of detaining individuals during times of crisis.”<sup>38</sup> It follows that allowing substitute remedies (such as damages actions) for arrests made by the executive within the scope of a valid suspension would undercut “the underlying premise of the legislative decision” to suspend by, among other things, chilling executive officer actions during a period of great emergency.<sup>39</sup>

Recent scholarship suggests an entirely different account of suspension, one that views it as exclusively accomplishing the removal of the judicial remedy of discharge and nothing more.<sup>40</sup> On this view, a suspension does not abrogate any underlying individual rights, nor does it “authorize any executive action that was not already permitted.”<sup>41</sup> The work of Trevor Morrison most fully elaborates this narrow view of suspension, though he finds support for his

---

33. Shapiro, *supra* note 10, at 86; accord Tyler, *supra* note 9, at 384-87.

34. Shapiro, *supra* note 10, at 87.

35. See Tyler, *supra* note 9, at 384-87.

36. Shapiro, *supra* note 10, at 89.

37. Tyler, *supra* note 9, at 385.

38. *Id.*; see also *id.* at 385, 387 (noting that “[s]uspension accomplishes this end by displacing a prisoner’s core due process rights” along with “related claims (for example, that one is entitled to grand jury indictment, bail, or a speedy trial, etc.) [that] would undercut the very purpose of suspension in the first instance”). Many scholars writing about the suspension power appear to assume this conclusion. See, e.g., BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 127-31 (2006) (elaborating on the assumption that “preventive detention” may follow under a suspension); Neuman, *supra* note 31, at 600 (referring to the suspension power as “an ancillary power” to Congress’s substantive emergency powers, the exercise of which “may, firstly, authorize detention and, secondly, permit the denial of a judicial remedy for detention”); cf. Fallon & Meltzer, *supra* note 6, at 2034 (calling the suspension authority “an unusual emergency power”).

39. Shapiro, *supra* note 10, at 88 (“In this very practical sense then, remedy and right become not just interdependent but inseparable.”).

40. See Morrison, *supra* note 14, at 426-42.

41. *Id.* at 416.

position from various notable commentators.<sup>42</sup> Building on their work, Morrison rejects what he terms the “suspension-as-authorization” model as “both formally untenable and functionally undesirable.”<sup>43</sup>

Instead, on the narrow view, because a suspension does not alter the underlying legal order, one detained within the scope of a valid suspension retains a right to sue for damages to the extent that the detention would not have been legal in the absence of a suspension, and an officer making such an arrest may also be subject to criminal prosecution.<sup>44</sup> This is because, in such a case, the detention was simply unlawful and unconstitutional.<sup>45</sup> In his most

- 
42. See, e.g., CHURCH, *supra* note 15, § 50, at 42 (“A wrongful arrest and imprisonment . . . can not be legalized by the suspension of the privilege of the writ.”); THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 289-90 (Boston, Little, Brown & Co. 1880) (“[S]uspension does not legalize what is done while it continues . . .”); DICEY, *supra* note 15, at 242 (“[Suspension] does not legalise any arrest, imprisonment, or punishment which was not lawful before the Suspension Act passed . . .”). The commentators who have spoken to the matter, particularly those writing with respect to American law, have done so largely in conclusory terms. Morrison’s work stands alone in fully explicating the narrow view.
43. Morrison, *supra* note 14, at 416; see Morrison, *supra* note 13.
44. See Morrison, *supra* note 14, at 433-36 (noting also that an official responsible for an “unlawful” detention could face criminal liability); see also CHURCH, *supra* note 15, § 50, at 42-43 (“The suspension of the privilege of the writ . . . does not exempt the one making an arrest illegally from liability to damages in a civil action for such arrest . . . [or] from punishment [via] criminal prosecution.”); COOLEY, *supra* note 42, at 289 (arguing that “remedies for illegal arrests” are not set aside by a suspension); DICEY, *supra* note 15, at 245 (“[Suspension] does not free any person from civil or criminal liability for a violation of the law.”). In defending the idea that a damages remedy remains, Morrison’s early work equated suspending the writ with something of a “forced sale” of the prisoner’s liberty interests, “convert[ing] the detainee’s entitlement to specific relief from unlawful detention into an entitlement to after-the-fact compensation for the deprivation.” Morrison, *supra* note 14, at 438-39; see also *id.* at 439 n.150 (noting that “insofar as the habeas remedy prevents the continuation of unlawful detention,” it is more akin “to a property rule than a liability rule” (citing Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972))).
45. Morrison defines as “otherwise-forbidden . . . any executive action that was not already permitted” before the suspension. Morrison, *supra* note 14, at 416. In fleshing out the meaning of “otherwise-forbidden,” Morrison’s work appears to contemplate fairly broad authority on the part of Congress to authorize extraordinary detentions via ordinary legislation in times of national crisis. See, e.g., *id.* (embracing as “sound” an approach that “grants Congress fairly broad latitude to authorize extraordinary measures in times of national crisis, including the detention of alleged enemy combatants in the ‘war on terror’”); *id.* at 417, 442, 445 (positing that it is better for Congress to authorize extraordinary detention via “ordinary legislation” in contrast to doing so by suspending the writ); Morrison, *supra* note 13, at 1539 (favoring “[p]ermitting Congress some leeway to authorize

## SUSPENSION AS AN EMERGENCY POWER

recent work defending the narrow view, Morrison elaborates that Congress possesses “considerable leeway” to grant officers immunity in such cases.<sup>46</sup> He also contends that the narrow view is historically grounded. In particular, Morrison points to English practice in the sixteenth and seventeenth centuries, during which time, as Morrison understands it, Parliament commonly paired indemnity legislation with suspension acts.<sup>47</sup> Specifically, like A.V. Dicey before him, Morrison points to an 1801 indemnity act, which followed 1794 suspension legislation.<sup>48</sup> This example, we are told, demonstrates that the English did not equate suspension legislation itself with authorization to arrest a broader category of persons than would otherwise be permissible.<sup>49</sup> Without clear evidence suggesting that the Framers “changed the meaning of suspension” from this understanding—evidence that Morrison asserts does not exist—he contends that they surely held the same view of suspension.<sup>50</sup> Morrison finds further support for the narrow view in comments made by members of Congress during suspension debates in the Jefferson Administration<sup>51</sup> and Civil War period.<sup>52</sup>

---

extraordinary executive detention without suspending the writ”). I will have more to say on this point below. *See infra* note 354.

46. Morrison, *supra* note 13, at 1577; *see id.* at 1582-1602 (setting forth the narrow view’s understanding of Congress’s role when the writ is suspended).
47. *See id.* at 1543-45. Morrison also points to commentary supporting his position. *See id.* at 1571-73 (collecting cites).
48. *See id.* at 1548-51; *see also infra* note 80 (discussing Dicey); *infra* Section II.A (exploring the English practice). A word on terminology is appropriate here. In broader English practice, statutes conferring officer immunity were commonly referred to as “indemnity acts.” This phrase, while sometimes used in this country, is confusing because true indemnity legislation would reimburse officers for damages assessed against them in private suits. Accordingly, this Article often will refer to such legislation as providing for “officer immunity.”
49. Morrison, *supra* note 13, at 1552-53. This, Morrison says, explains the need for subsequent indemnity acts.
50. *Id.* at 1552-53; *see id.* at 1555 (positing the inquiry as focused on “whether the Clause changed the familiar meaning of a term—‘suspended’—without anyone ever saying anything about it during the Convention”).
51. *See id.* at 1557-58 (relying on comments of Representative Randolph); *see also infra* Section II.D (exploring the full debate).
52. *See Morrison, supra* note 13, at 1562-68. Morrison also points to Civil War indemnity legislation as providing additional historical support for the narrow view. *See id.* The Civil War debates and indemnity legislation are explored in detail below. *See infra* Section III.A. Morrison does not read anything into the failure of Congress to enact any officer immunity legislation applicable to the other three episodes of suspension in American history. *See Morrison, supra* note 13, at 1597-1601.

Finally, the narrow view contends that because a suspension does not abrogate any underlying individual rights, the executive must, consistent with the obligation to honor the Constitution, make no arrests during a period of suspension that he could not make in the absence of a suspension.<sup>53</sup> This obligation seemingly follows regardless of the existence of congressionally conferred officer immunity for such arrests. To ensure that such arrests are not made, the narrow view argues that the executive must implement procedural safeguards or the “core facets of due process”—what this Article will call “executive due process”—in order to internalize something approaching the standards that have been established in habeas review.<sup>54</sup> All the same, Morrison defends this view as still making the decision to suspend significant insofar as it frees the executive from the burden of litigation in the courts with respect to those lawfully held during the suspension and enables the executive to shield for a time from the public any sensitive information that provides the basis for those arrests and detentions undertaken.<sup>55</sup>

The elaboration of the narrow view of suspension in Morrison’s recent work provides a welcome expansion of the terms of the debate over the impact of a valid suspension on executive authority and individual rights. And if, as the narrow view suggests, a suspension constitutes nothing more than “the mere removal of a particular remedy,”<sup>56</sup> then it is surely correct that an executive who takes his oath seriously should not order during a period of suspension any arrest that Congress could not authorize via ordinary legislation. It likewise follows that the theoretical availability of damages actions and criminal liability, along with the independent obligation of the executive to honor the Constitution, must stand or fall together. This account of what a suspension accomplishes in the first instance, however, is both

---

53. See Morrison, *supra* note 14, at 436-37; Morrison, *supra* note 13, at 1602-14.

54. See Morrison, *supra* note 13, at 1602-14 (“My basic claim here is . . . that the executive can (and should) implement core facets of due process even during a period of suspension.”). Morrison proposes that the obligation on the executive branch during a suspension is to provide “fair process,” *id.* at 1610, which in turn “requires the government to provide detainees with notice of its reasons for holding them and a fair opportunity to challenge those reasons before a neutral decisionmaker,” *id.* at 1614. As an example of what this means in practice, Morrison points to the standard adopted by the *Hamdi* plurality setting forth that which due process requires the executive to offer detainees seeking to challenge their designation as enemy combatants. See *id.* at 1612 (noting that *Hamdi* held that “‘due process demands some system for a citizen-detainee to refute his [enemy combatant] classification’ before a neutral decisionmaker” (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 537-38 (2004) (plurality opinion))).

55. See Morrison, *supra* note 14, at 437-40; Morrison, *supra* note 13, at 1597.

56. Morrison, *supra* note 13, at 1552.

## SUSPENSION AS AN EMERGENCY POWER

inaccurate as a matter of history and unsound as a matter of constitutional interpretation. In exploring the matter, this Article seeks to convince a broad audience—those who look to history (whether as a general matter,<sup>57</sup> or with a particular focus on the “original” Founding-era history or subsequent historical “moments,” which in the case of suspension came during and immediately after the Civil War<sup>58</sup>), as well as those who are persuaded by textual, structural, and functional arguments. On each and every score, the conclusion is the same: a valid suspension can expand the scope of executive power and, at the same time, wield dramatic effects on fundamental liberty interests. It is for this reason that such exercises must be closely guarded and carefully checked in order to ensure that existing circumstances truly justify such extraordinary legislation.

## II. THE CONCEPTION OF SUSPENSION AT THE FOUNDING

History provides considerable guidance on the debates waged today over the meaning of the Suspension Clause, particularly on the question of whether a suspension constitutionally may expand the scope of executive power to arrest and detain in times of true emergency. To appreciate fully what the Framers sought to achieve by recognizing a power to suspend, one must first explore the English and colonial background against which they drafted the Suspension Clause and then consider both the Convention and the ratification debates. Confirmation of the picture of suspension that one draws from these sources is found in the first congressional debates over a proposal to suspend the writ during the Burr Conspiracy. These sources demonstrate the Founding generation’s belief that a valid suspension could, by its own terms, vest the executive with the discretion to arrest and detain free of the legal constraints that govern in the absence of a suspension. Put another way, the historical evidence reveals that the Framers fully appreciated that the rights finding protection and meaning in the Great Writ and an act of suspension were, as David Shapiro has said, “two sides of the same coin.”<sup>59</sup> Indeed, this fact explains why there was a passionate debate over whether to recognize *any*

---

57. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (“It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.”).

58. See, e.g., Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003) (discussing originalism and how the Constitution’s meaning can become “fixed” on later application).

59. Shapiro, *supra* note 10, at 87.

power to suspend in the new Constitution and also explains why the Framers provided that a suspension could only be declared in the most dire of national emergencies.

*A. The English Origins of the Great Writ and the Suspension Power*

“[The] Great Writ achieved its celebrity in the constitutional struggles of the seventeenth century as a remedy against political arrests by the King’s council and ministers.”<sup>60</sup> At its traditional core, the “writ afforded a powerful guarantee that individuals would not be detained on executive fiat instead of legally recognized grounds.”<sup>61</sup> Thus, over time, the Great Writ came to be understood as tied closely to the Great Charter’s guarantee that one may be detained only in accordance with the rule of law.<sup>62</sup> This link was highlighted by both Blackstone and Sir Edward Coke—two authors whose works were by far the most influential English sources to which the Framers turned in shaping American law.<sup>63</sup> Indeed, numerous citations to Blackstone may be found in the

---

60. Neuman, *supra* note 31, at 563; see also ROBERT S. WALKER, *THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY* 58 (1960) (tracing the writ as originating in reaction to the Privy Council having “frequently committed persons without indictment, trial or any other semblance of due process”); Neuman, *supra* note 31, at 563 (“The Habeas Corpus Act of 1679 supplemented, but did not replace, the common law procedures . . .”).

61. Neuman, *supra* note 31, at 563.

62. See DANIEL JOHN MEADOR, *HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY* 1-38 (1966) (tracing the Great Writ’s evolution from the twelfth century to the accepted linking of due process principles and the writ in the seventeenth century); WALKER, *supra* note 60 (same); David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress’s Control of Federal Jurisdiction*, 86 *GEO. L.J.* 2481, 2502 & nn.113-14 (1998) (collecting authorities); see also *Boumediene v. Bush*, 128 S. Ct. 2229, 2244 (2008) (citing 9 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 112 (1926), which also notes a connection between the Great Writ and the Magna Carta’s guarantee of due process). The link between core due process values and the Great Writ remains central to the Supreme Court’s Suspension Clause jurisprudence today. Thus, the Court has held that “the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person’s detention does not constitute a suspension of the writ of habeas corpus.” *Swain v. Pressley*, 430 U.S. 372, 381 (1977); see also *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202-03 (1830) (Marshall, C.J.) (observing that the judgment of a competent tribunal may be treated as conclusive in habeas actions brought before other courts).

63. Coke’s *Institutes of the Laws of England* “were read in the colonies by virtually everyone who undertook the study of law” and Blackstone’s *Commentaries on the Laws of England* “turned out to be even more influential on American law and lawyers in the formative decades than Coke’s *Institutes*.” MEADOR, *supra* note 62, at 23, 28. Blackstone has long been described as one of the “standard authorities” known and relied upon by the Framers. BERNARD BAILLYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 30-31 (1967); see also GRANT

## SUSPENSION AS AN EMERGENCY POWER

records of the Constitutional Convention, *The Federalist Papers*, and the records of the states' ratifying conventions.<sup>64</sup>

In his *Commentaries on the Laws of England*, Blackstone famously referred to the Great Writ as a “second *magna carta*” and held it out as a “bulwark of our liberties” and the embodiment of the “natural inherent right” of the “personal liberty of the subject.”<sup>65</sup> Coke, in his *Institutes of the Law of England*, asked, “Now it may be demanded, if a man be taken, or committed to prison *contra legem terrae*, against the Law of the land, what remedy hath the party grieved?”<sup>66</sup> To this, he answered, “He may have an *habeas corpus* . . . .”<sup>67</sup>

Accordingly, as the Great Writ evolved, it embodied the right to be free from arbitrary or unlawful detention.<sup>68</sup> One need look no further than Alexander Hamilton's writings in *The Federalist Papers* as evidence of this point. In *The Federalist No. 84*, Hamilton not only relied heavily on Blackstone, but he also went on to celebrate “the establishment of the writ of habeas corpus” as the primary means of protection against “the practice of arbitrary

GILMORE, *THE AGES OF AMERICAN LAW* 113-14 n.4 (1977) (discussing the large number of available editions of the *Commentaries*); DAVID A. LOCKMILLER, *SIR WILLIAM BLACKSTONE 169-74* (1938) (describing Blackstone's influence on American legal thought).

64. See, e.g., 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 472 (Max Farrand ed., 1911) [hereinafter *FARRAND'S RECORDS*]; *THE FEDERALIST NOS. 69, 84* (Alexander Hamilton); 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 544 (photo. reprint 1987) (Jonathan Elliot ed., New York, Burt Franklin 1888) [hereinafter *ELLIOT'S DEBATES*] (remarks of Patrick Henry in the Virginia ratifying convention); 4 *id.* at 278 (remarks of Charles C. Pinckney in the South Carolina ratifying convention).
65. 1 BLACKSTONE, *supra* note 22, at \*130, \*136, \*137; see also *infra* text accompanying notes 87-98 (exploring Blackstone's writings at greater length).
66. SIR EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 55 (London, W. Rawlins 6th ed. 1681); see *Duncan v. Louisiana*, 391 U.S. 145, 169 (1968) (noting that “by the end of the 14th century ‘due process of law’ and ‘law of the land’ were interchangeable”).
67. COKE, *supra* note 66, at 55.
68. Shapiro, *supra* note 10, at 87 (“[I]t seems more than likely that contemporary thinking [at the time of the Founding] tended to equate the right to be free from unlawful detention with the role of habeas corpus in guaranteeing that right.”); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 555-56 (2004) (Scalia, J., dissenting) (“The two ideas central to Blackstone's understanding—due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally imprisoned—found expression in the Constitution's Due Process and Suspension Clauses.”); WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 113 (Philadelphia, H.C. Carey & I. Lea 1825) (“It is the great remedy of the citizen or subject against arbitrary or illegal imprisonment[;] it is the mode by which the judicial power speedily and effectually protects his personal liberty, and repels the injustice of unconstitutional laws or despotic governors.”).

imprisonments.”<sup>69</sup> Indeed, that the writ would be made available under the new Constitution made it unnecessary, in Hamilton’s view, to include explicit recognition of additional individual liberty safeguards in the Constitution like those later enumerated in the Bill of Rights.<sup>70</sup>

For his part, Morrison contends that in the period leading up to the Constitutional Convention, the English did not view a suspension as displacing the privileges that had come to be associated with the Great Writ. Specifically, he argues that the English did not equate suspension with expansion of executive power; rather, he suggests that the English looked to subsequent indemnity acts as the separate means by which officers were cloaked with immunity for making what he terms “illegal” arrests.<sup>71</sup> (Recall, “illegal” arrests, on this view, constitute arrests that could not have been made in the absence of a suspension, even though they may have been authorized by the express terms of the suspension.) There are, however, several problems with this claim. As an initial matter, one must be careful about drawing analogies between parliamentary practice and Congress’s powers, given the stark structural differences between the English and American constitutional contexts. Parliament’s power to suspend the writ and authorize detention in ordinary legislation was checked only by custom and legislative discretion.<sup>72</sup> Further, until the Glorious Revolution in 1688, the Crown “assert[ed] some inherent lawmaking authority independent of Parliament” and exercised authority over the judiciary.<sup>73</sup> In this country, the Framers both deliberately rejected the English model that blended, rather than separated, governmental powers, and they adopted a binding Constitution.<sup>74</sup> Finally, by contrast to England, here

---

69. THE FEDERALIST NO. 84, at 453 (Alexander Hamilton) (J.R. Pole ed., 2005).

70. See THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 69, at 444. Notably, Hamilton claimed that the protection of habeas corpus was “provided for in the most ample manner in the plan of the convention.” *Id.*

71. Morrison, *supra* note 13, at 1547.

72. See Shapiro, *supra* note 10, at 83-84; see also WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 170-71 n.112 (1980) (suggesting in this context that “an argument based solely upon an analogy between the practice of the British Parliament and the United States Congress would be fatal”). To be fair, Morrison acknowledges that parliamentary supremacy meant “Parliament had the power ‘to make or unmake any law whatever.’” Morrison, *supra* note 13, at 1551 (quoting A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 39-40 (10th ed. 1959)).

73. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 47, 49 (2001).

74. See *id.* at 27-29, 36-56 (noting many structural differences between English and American traditions).

## SUSPENSION AS AN EMERGENCY POWER

“the availability of the writ is constitutionally guaranteed, subject only to narrow and explicit exceptions.”<sup>75</sup>

More importantly, regardless of what may have later taken hold, by the time of the 1787 Convention, it cannot be claimed that there existed a settled English view that suspension acts alone were insufficient to authorize an expanded range of arrests by the executive. During the seventeenth and eighteenth centuries, every suspension by its express terms “impowered”<sup>76</sup> the executive to arrest and detain certain classes of persons. Numerous parliamentary suspensions enacted during this period, moreover, were never followed by any indemnity legislation.<sup>77</sup> (This list includes the suspension made applicable to the colonies during the Revolutionary War, discussed further below.) To be sure, there were three occasions during this period on which Parliament enacted indemnity legislation, the application of which overlapped with periods during which Parliament had suspended the writ.<sup>78</sup> These acts, however, indemnified a broad range of officer conduct (including seizures of property), the bulk of which fell well outside the scope of the rather narrow (or, as some have called them, “partial”) suspensions that preceded them. Accordingly, it is not at all clear that the focus of the indemnity legislation was somehow to make “legal” arrests made within the limited terms of prior suspension acts; to the contrary, the legislation is likely best understood as directed at other ends.<sup>79</sup> Indeed, no indemnity legislation ever

---

75. Shapiro, *supra* note 10, at 83.

76. 17 Geo. 3, c. 9 (1777) (“impower”); 17 Geo. 2, c. 6 (1744) (“impower”); 9 Geo. 1, c. 1 (1722) (“impower”); 6 Ann., c. 15 (1707) (“impower”); 7 & 8 Will. 3, c. 11 (1696) (“impowering”).

77. See, e.g., 17 Geo. 3, c. 9 (1777) (suspending the writ in the American colonies); 17 Geo. 2, c. 6 (1744) (suspending the writ for persons committed for suspicion of high treason or treasonable practices); 9 Geo. 1, c. 1 (1722) (same); 6 Ann., c. 15 (1707) (same); 7 & 8 Will. 3, c. 11 (1696) (same).

78. See 19 Geo. 2, c. 20 (1746); 1 Geo., stat. 2, c. 39 (1715); 1 W. & M., 2d Sess., c. 8 (1688). The suspensions that preceded these acts, like others in the seventeenth and eighteenth centuries, applied to “persons imprisoned on charges of high treason, suspicion of high treason, or for treasonable practices,” and for this reason have been called “limited” suspensions. Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 976 (1998); accord R.J. SHARPE, *THE LAW OF HABEAS CORPUS* 91-92 (1976).

79. Some commentators, for example, have suggested that these indemnity acts were directed at detentions continued in defiance of the writ and without authorization by a suspension, see, e.g., Fisher, *supra* note 28, at 483, while others have suggested that these acts were intended “to avoid any doubts about the personal liability of those who had purported to act pursuant to [the suspension] powers,” SHARPE, *supra* note 78, at 92. The terms of the acts suggest further that Parliament intended them generally to operate as a procedural device for efficiently eliminating lawsuits challenging the actions embraced within their scope. See

referenced explicitly an earlier suspension act until 1801<sup>80</sup>—well after ratification. There, moreover, Parliament seems to have been concerned principally with the practical burdens imposed by officer suits insofar as it legislated a procedural device to eliminate efficiently lawsuits challenging actions taken in pursuance of the suspension.<sup>81</sup>

Further, the two primary influences on the Framers regarding the English conception of suspension reinforce the conclusion that the Founding generation viewed the protections embodied in the Great Writ and the effects of a suspension as mirror opposites. First, the Framers had been subjected to a suspension during the Revolutionary War that by its terms authorized the detention of persons merely suspected of high treason.<sup>82</sup> This suspension, first put in place in 1777 and renewed on a year-by-year basis through 1783,<sup>83</sup> applied in the colonies, on the high seas, and to those engaged in piracy. It authorized the detention, “without bail or mainprize” of those persons who “have been, or shall hereafter be seised or taken in the act of high treason . . . or who are or shall be charged with or suspected of the crime of high treason . . . and who have been, or shall be committed . . . for such crimes . . . or for suspicion of such crimes.”<sup>84</sup> The Act likewise precluded judicial review absent case-specific intervention by the Privy Council.<sup>85</sup> The Act did not include any

---

*supra* note 78 (collecting statutes). Thus, to the extent that they did apply to arrests made within the scope of earlier suspensions, it seems more than likely that this was their intended effect.

80. See 41 Geo. 3, c. 66 (1801) (referring to the Suspension Act of 1794 and its renewals). Morrison relies on this indemnity act to make his argument, along with A.V. Dicey’s *Lectures*. See Morrison, *supra* note 13, at 1546-49. In positing that a suspension has a “limited legal effect,” Dicey, too, relied exclusively on the 1801 Indemnity Act. See DICEY, *supra* note 15, at 244-45, 247-48. As noted, this reliance is potentially misplaced; regardless, any practice then commenced surely had no influence on the drafters of the Constitution, who wrote decades earlier.
81. See 2 THOMAS ERSKINE MAY, *THE CONSTITUTIONAL HISTORY OF ENGLAND: SINCE THE ACCESSION OF GEORGE THE THIRD, 1760-1860*, at 266-67 (London, Longman et al. 1865) (noting that many proponents viewed the Act in this way).
82. See 17 Geo. 3, c. 9 (1777). The Act’s full title was “An act to empower his Majesty to secure and detain persons charged with, or suspected of, the crime of high treason, committed in any of his Majesty’s colonies or plantations in *America*, or on the high seas, or the crime of piracy.” *Id.*
83. Parliament renewed the original one-year suspension five times. See 18 Geo. 3, c. 1 (1778); 19 Geo. 3, c. 1 (1779); 20 Geo. 3, c. 5 (1780); 21 Geo. 3, c. 2 (1781); 22 Geo. 3, c. 1 (1782).
84. 17 Geo. 3, c. 9 (1777).
85. *Id.* The Act also included a non obstante clause. See *id.* (containing the language “any law, statute, or usage, to the contrary in any-wise notwithstanding”).

## SUSPENSION AS AN EMERGENCY POWER

indemnity legislation, nor was any later forthcoming.<sup>86</sup> There was, in short, no indication that the authorization in the Suspension Act itself was insufficient justification for those arrests made within its scope.

Second, as already noted, the Framers were heavily steeped in Coke's *Institutes* and Blackstone's *Commentaries*, and each provided the primary window through which the Founding generation studied English law.<sup>87</sup> Coke did not explore the matter of suspension in any detail; Blackstone, however, did.

In passages well known to the Founding generation, Blackstone described the Great Writ as "the most celebrated writ in English law"<sup>88</sup> and as the "bulwark of the British Constitution."<sup>89</sup> He also specifically explored the connection between the Great Writ and suspension. Individual liberty, Blackstone wrote, "cannot ever be abridged at the mere discretion of the magistrate" and "without sufficient cause."<sup>90</sup> And, as Blackstone also emphasized throughout the *Commentaries*, the means by which such rights are given life and activity was the writ of habeas corpus. As he noted,

[I]f any person be restrained of his liberty . . . he shall, upon demand of his coun[sel], have a writ of *habeas corpus* . . . . And by . . . the *habeas corpus act*, the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer.<sup>91</sup>

---

86. To be sure, this is explainable in part in light of the context in which the suspension arose. Indeed, shortly before this suspension finally lapsed on January 1, 1783, Parliament enacted a statute authorizing the continued detention, as prisoners of war, of Americans "not at his Majesty's peace" who had been taken to Great Britain during this period. 22 Geo. 3, c. 10 (1782). It bears noting that indemnity legislation enacted by Parliament in 1780 had nothing to do with this suspension, but applied instead to officers who had assisted in suppressing recent "riots and tumults" within Great Britain proper. 20 Geo. 3, cs. 63, 64 (1780). That Parliament enacted indemnity legislation during this period, but not with respect to the colonial suspension, suggests that Parliament thought such legislation unnecessary.

87. See *supra* text accompanying notes 63-64.

88. 3 BLACKSTONE, *supra* note 22, at \*129.

89. 4 *id.* at \*438.

90. 1 *id.* at \*134.

91. *Id.* at \*135.

From here, Blackstone continued in a passage that was “well known to the Founders”<sup>92</sup> both to reiterate the importance of individual liberty in the English tradition and to describe the circumstances in which the law may nonetheless permit vesting in the executive discretionary control over that liberty:

Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper . . . there would soon be an end of all other rights and immunities. . . . To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom: but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient: for it is the parliament only, or legislative power, that, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus act* for a short and limited time, to imprison suspected persons without giving any reason for so doing; as the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger. . . . In like manner this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with its liberty for a while, in order to preserve it forever.<sup>93</sup>

Here, Blackstone established that, although arbitrary imprisonment is anathema to English law, “sometimes, when the state is in real danger, *even this* may be a necessary measure.”<sup>94</sup> That is, in a situation of “extreme emergency,”

---

92. *Hamdi v. Rumsfeld*, 542 U.S. 507, 555 (2004) (Scalia, J., dissenting). Blackstone’s passage is quoted in part by Hamilton in the *Federalist Papers*. See THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 69, at 453.

93. 1 BLACKSTONE, *supra* note 22, at \*135-36.

94. *Id.* at \*136 (emphasis added).

## SUSPENSION AS AN EMERGENCY POWER

Blackstone counseled, a suspension of habeas corpus calls on the nation to “part[] with its liberty for a while, in order to preserve it forever.”<sup>95</sup>

In the similarly influential “America’s Blackstone,”<sup>96</sup> St. George Tucker linked this passage with the Suspension Clause in the American Constitution.<sup>97</sup> Paired together, these two influential versions of Blackstone very much confirm the Founding generation’s understanding that a suspension vested the executive with considerable authority to arrest and “imprison suspected persons without giving any reason for so doing” as a means of addressing an “extreme emergency” and in defense of the constitutional order. To be sure, here Blackstone did not rule out the availability of ex post damages actions *per se*—although his discussion of false imprisonment actions in Book Three suggests that he did not view them as viable for arrests made during a suspension.<sup>98</sup> Regardless, in this passage, Blackstone unequivocally rejected the notion that a suspension does not expand executive authority to arrest and

95. *Id.* (emphasis added).

96. Davison M. Douglas, *Foreword: The Legacy of St. George Tucker*, 47 WM. & MARY L. REV. 1111, 1114 (2006). Tucker’s Americanized version of Blackstone’s *Commentaries* was “the first major legal treatise on American law” and “one of the most influential legal works of the early nineteenth century.” *Id.* at 1114. See generally *id.* (discussing the important role of Tucker in the early development of American law).

97. 2 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 136 (Philadelphia, William Young Birch & Abraham Small 1803) (observing in his annotation that “[t]he privilege of the writ of *Habeas Corpus*, can only be suspended by the authority of Congress, in case of *actual rebellion or invasion*”).

98. In his chapter on private wrongs and remedies, Blackstone wrote of the important function of the Great Writ in restoring liberty to one detained in contravention of the law. From there, Blackstone went on to speak of actions in trespass and for false imprisonment that were available when one, having been “apprehended upon suspicion,” had languished in detention “merely because they were forgotten.” 3 BLACKSTONE, *supra* note 22, at \*138. In the context of making this larger point, Blackstone did observe that individuals had been detained on such terms within the context of “temporary suspensions” in England. Nonetheless, the passage that follows suggests that Blackstone did not mean here to imply that a damages action for false imprisonment remained available to one detained during a suspension within the terms of the relevant suspension act. Blackstone posited that one held merely on suspicion and without legal cause “shall recover damages for the injury he has received; and also the defendant is, as for all other injuries committed with force, or *vi et armis*, liable to pay a fine to the king for the violation of the public peace.” *Id.* One easily could read Blackstone here as linking the false imprisonment action to the statutory fines applicable to officers under the 1679 Habeas Corpus Act (the terms of which he had detailed only a few pages earlier, see *id.* at \*136-37)—an Act that was of course suspended by Parliament during periods of suspension. Thus, Blackstone seems to have contemplated the availability of such actions only where the Habeas Corpus Act was not suspended.

detain. This conception of what it means to “suspend the privilege,” as we will see, has remained constant throughout American history.

*B. Pre-Convention American Suspensions*

Events in this country also influenced the Framers who drafted the Suspension Clause. For example, at least five states enacted suspension legislation during the Revolutionary War. Such acts generally by their express terms empowered the executive to arrest and detain suspected Crown sympathizers and gave no indication that such authorization was somehow constrained by external sources of law. Thus, for example, in 1777, the Massachusetts legislature empowered the governor and his council to issue warrants for the apprehension and commitment of “any person whom the council shall deem the safety of the Commonwealth requires should be restrained of his personal liberty, or whose enlargement within this state is dangerous thereto.”<sup>99</sup> One apprehended on this basis was to be “continued in imprisonment, without bail or mainprise,” until discharged by the executive or legislature.<sup>100</sup> Similarly, later in the war, the Virginia legislature enacted a statute providing that

[t]he Governor, with advice of the Council, is . . . hereby empowered to apprehend . . . and commit[] to close confinement, any persons or persons whatsoever, whom they may have just cause to suspect disaffection to the independence of the United States or of attachment to their enemies, and such person or persons shall not be set at liberty by bail, mainprise or *habeas corpus*.<sup>101</sup>

---

99. Act of May 9, 1777, ch. 45, reprinted in 5 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 641, 641 (Boston, Wright & Potter Printing Co. 1886).

100. *Id.* The Act had a one-year sunset provision and did not include any prospective grant of officer immunity, nor was one later forthcoming.

101. Act of May 1781, ch. 7, reprinted in 10 THE STATUTES AT LARGE, BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 413-16 (William Waller Hening ed., Richmond, George Cochran 1822). This legislation did not include any officer indemnity provision, nor was any later enacted. At the time the Virginia Constitution did not include a habeas clause; Virginia added such a clause in 1830. See VA. CONST. art. III, § 11 (1830) (“The privilege of the Writ of *habeas corpus* shall not in any case be suspended.”).

## SUSPENSION AS AN EMERGENCY POWER

By their terms, the Massachusetts and Virginia examples accomplished more than simply removing a judicial remedy—they also “empowered” the executive to arrest and commit an expanded category of persons. At least three other states also enacted suspension legislation during the war.<sup>102</sup>

The most important domestic prologue to the Suspension Clause is found in two Massachusetts suspensions that occurred after the Commonwealth adopted its constitution in 1780. These events are significant for several reasons. To begin, the habeas clause in the Massachusetts Constitution was a prototype for the Suspension Clause.<sup>103</sup> These suspensions, moreover, constituted pre-Convention models of how suspension functioned within a constitutional framework analogous to that which was adopted at the national level. Finally, one of these suspensions was especially important to the Framers.

The Massachusetts Constitution, adopted in 1780, enshrines several individual liberties analogous to those found in the subsequently adopted federal Constitution, and includes along with these express recognition of the privilege of habeas corpus.<sup>104</sup> Upon circulation of the draft Massachusetts Constitution, the Boston delegates expressed general support for it, but had concerns about the habeas clause, which they wished to see bolstered. “With

102. See Act of Oct. 17, 1778, No. 1109, S.C. Stat. 458 (1833), reprinted in 4 THE STATUTES AT LARGE OF SOUTH CAROLINA 458 (Thomas Cooper ed., Columbia, S.C., A.S. Johnston 1838) (suspending the writ for persons committed “whose going at large, may, in the opinion of the said President or Commander-in-chief and Privy Council, endanger the safety of this State”); Act of Dec. 22, 1780, § 9, 5 N.J. Acts 15 (1781) (applying suspension to persons apprehended for trading with the enemy or going across enemy lines). Pennsylvania suspended the writ in 1777. See Act of Sept. 16, 1777, ch. 27, 1777 Pa. Laws 51. The legislation provided that “*it shall and may be lawful*” for the executive “to arrest any person or persons, within this common-wealth, who shall be suspected from any of his or her acts . . . to be disaffected to the community of this, or all, or any, of the united states of America.” *Id.* at 51-52 (emphasis added). Likewise, the law separately prohibited judges from “issu[ing] or allow[ing] . . . any writ of habeas corpus.” *Id.* at 52. The law, unlike others during this period, included an indemnity provision, which seems to have been directed at offering protection to members of the Pennsylvania Supreme Executive Council, which, as the Act noted, “have lately, at the recommendation of Congress, taken up several persons who have refused to give to the state the common assurances of their fidelity.” *Id.* at 51; see also DANIEL FARBER, LINCOLN’S CONSTITUTION 159-60 (2003) (discussing the suspension). At the time of this suspension, Pennsylvania’s Constitution did not include a habeas provision.

103. See Neuman, *supra* note 31, at 564.

104. See, e.g., MASS. CONST. pt. 1, art. XI (“Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character.”); see also *id.* arts. XII, XIV, XXV (enshrining various criminal procedural and substantive rights, as well as the protection against unreasonable searches and seizures).

regard to the writ of Habeas Corpus, they wished that its privileges should be more accurately defined and more liberally granted, so that citizens should not be subject to confinement on *mere suspicion*.<sup>105</sup> These concerns are powerful evidence of a contemporary founding view that equated the writ with the right not to be committed on “mere suspicion.” By the same token, those who held this view acknowledged that the right could be suspended in emergencies. Thus, in final form, the habeas clause provided,

The privilege and benefit of the writ of *habeas corpus* shall be enjoyed in this commonwealth, in the most free, easy, cheap, expeditious, and ample manner; and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time, not exceeding twelve months.<sup>106</sup>

Shortly thereafter, the Massachusetts legislature suspended habeas corpus during the 1782 Ely Riots.<sup>107</sup> Shays’s Rebellion followed six years later and proved an important precursor to the Convention that followed immediately in its wake.<sup>108</sup> The rebellion served “as a catalyst in the movement for the Constitution and for its ratification.”<sup>109</sup> To many, Shays’s Rebellion suggested

---

105. 3 JOHN STETSON BARRY, *THE HISTORY OF MASSACHUSETTS: THE COMMONWEALTH PERIOD 178* (4th ed., Boston, Henry Barry 1857) (emphasis added).

106. MASS. CONST. pt. 2, ch. VI, art. VII.

107. Act of June 27, 1782, ch. 2, 1782-1783 Mass. Acts 6. This legislation broadly “authorized and empowered” the Governor and his council “to apprehend and secure . . . without Bail or Mainprize, any Person or Persons whose being at large may be judged by His Excellency and the Council, to be Dangerous to the Peace and Well-being of this or any of the United States; any Law, Usage or custom to the contrary notwithstanding.” *Id.* at 6-7. By its clear terms, the Act vested the executive with the power to arrest and detain anyone thought by him to pose a danger to the state. The legislation did not include, nor was it followed up with, any officer immunity legislation. *See id.*; Act of Feb. 5, 1783, ch. 34, 1782-1783 Mass. Acts 105 (extending the suspension). The legislature enacted the suspension to empower the executive better to suppress a group led by Samuel Ely, which had committed itself to oppose the government. *See* DAVID P. SZATMARY, *SHAYS’ REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION* 83-84 (1980).

108. The Shays rioters successfully prevented courts from sitting in portions of the Commonwealth and attempted to take over a federal arsenal. They were driven by economic woes and the political and social inequality of the times. *See* BARRY, *supra* note 105, at 218-60.

109. Richard D. Brown, *Shays’s Rebellion and the Ratification of the Federal Constitution in Massachusetts*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 113, 113 (Richard Beeman, Stephen Botein & Edward C. Carter II eds., 1987).

## SUSPENSION AS AN EMERGENCY POWER

a need for—indeed, demanded—a much stronger centralized government. Thus, it is reported that George Washington, previously reluctant to participate in the drafting of a new constitution, finally agreed to go to Philadelphia in light of what he had read about the rebellion.<sup>110</sup> The episode is mentioned in no fewer than six of *The Federalist Papers* and clearly had a profound impact on the Framers.<sup>111</sup>

Shays's Rebellion also offered an example to the Framers of how a suspension operated within the framework of a binding constitution. Significantly, the suspension enacted by the Massachusetts General Court (the legislature) expanded upon the scope of executive power for putting down the rebellion. Specifically, after much debate, and in response to what it deemed a "violent and outrageous opposition . . . to the constitutional authority," the General Court "authorized and empowered" the governor and his council, by issuance of their own warrants, "to command and cause to be apprehended, and committed . . . any person or persons whatsoever, whom the Governor and Council, shall deem the safety of the Commonwealth requires should be restrained of their personal liberty, or whose enlargement is dangerous thereto; any law, usage or custom to the contrary notwithstanding."<sup>112</sup> At the same time, the act provided that "any person who shall be apprehended and imprisoned, as aforesaid, shall be continued in imprisonment, without bail or mainprize, until he shall be discharged therefrom by order of the Governor, or of the General Court."<sup>113</sup> Just as it had in 1782, the legislature empowered the

---

110. Referencing Shays's Rebellion, Washington wrote to Madison, "What stronger evidence can be given of the want of energy in our governments than these disorders?" Letter from George Washington to James Madison (Nov. 5, 1786), in 4 THE PAPERS OF GEORGE WASHINGTON 331, 332 (W.W. Abbot & Dorothy Twohig eds., 1995).

111. See THE FEDERALIST NOS. 6, 21, 25, 28, 74 (Alexander Hamilton), NO. 43 (James Madison). Referring to Shays's Rebellion, for example, Hamilton wrote in *The Federalist No. 28* that "[a]n insurrection . . . eventually endangers all government." THE FEDERALIST NO. 28 (Alexander Hamilton), *supra* note 69, at 148; see also THE FEDERALIST NO. 21 (Alexander Hamilton), *supra* note 69, at 110-12 (including the rebellion within a broader discussion of the defects of the existing Articles). The rebellion also figured prominently in the ratification debates, as many supporters of the new Constitution labeled their opponents "Shaysites." See LEONARD L. RICHARDS, SHAYS'S REBELLION: THE AMERICAN REVOLUTION'S FINAL BATTLE 139 (2002).

112. Act of Nov. 10, 1786, ch. 41, 1786-1787 Mass. Acts 102, 102. The legislature modeled the Act on the 1782 suspension; by its terms, the suspension ran for eight months. See GEORGE RICHARDS MINOT, THE HISTORY OF THE INSURRECTIONS, IN MASSACHUSETTS, IN THE YEAR MDCCLXXXVI, AND THE REBELLION CONSEQUENT THEREON 52-66 (Worcester, Massachusetts, Isaiah Thomas 1788) (detailing the delays in passing the suspension legislation).

113. 1786-1787 Mass. Acts at 103.

executive to imprison “all persons” who in his opinion posed a danger to the “safety of the Commonwealth,” while explicitly freeing the executive from the restraints of “any Law . . . to the contrary.”<sup>114</sup>

Notably, as with earlier Massachusetts suspensions, the authorizing legislation did not include any officer immunity provision, nor was any later forthcoming. Yet the legislature was hardly ignorant of how to draft such legislation—far from it. Indeed, only two weeks prior to enacting the suspension, the legislature had enacted the Riot Act, which provided that sheriffs and other officials “shall be indemnified and held guiltless” for killing rioters who did not disperse on orders or who resisted capture.<sup>115</sup> The only plausible explanation for the absence of any indemnity legislation tied to the Shays suspension is that the legislature viewed such legislation as entirely unnecessary notwithstanding the then well-established common law action of false imprisonment.<sup>116</sup>

Contemporary debates over the Shays suspension legislation, moreover, confirm that it was understood to place the liberty of the citizens of Massachusetts in the discretion of the executive. As one period commentator reported, those legislators pushing for a suspension viewed the existing rebellion as a “crisis” such that “every man’s liberty should be trusted to the discretion of the Supreme Executive, *without legal remedy*.”<sup>117</sup> As another observed, “the design” of the Act was to “authorize the Governor, with advice of Council, to apprehend and secure” anyone “judged by them to be dangerous to the peace of the State.”<sup>118</sup> Under the Act, the Governor quickly employed his expanded powers and issued warrants calling for the arrest of several individuals whom he suspected of inciting the Shays rioters. On his orders, they were arrested, transported to Boston, and detained incommunicado until the following summer.<sup>119</sup> My research has uncovered no damages suits filed by

---

114. *Id.* at 102.

115. Act of Oct. 28, 1786, ch. 38, 1786-1787 Mass. Acts 87, 88.

116. On this point, see, for example, F.W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES* 4 (A.H. Chayfor & W.J. Whittager eds., Cambridge Univ. Press 1989) (1909), which observes that “[f]rom Edward I’s day onwards trespass *vi et armis* is a common action” and describes as a typical example of such a tort where “the defendant has not only assaulted the plaintiff, but has imprisoned him and kept him in prison so many days [without legal cause].”

117. MINOT, *supra* note 112, at 65 (emphasis added).

118. See Editorial, CUMBERLAND GAZETTE, Dec. 15, 1786, at 2. Notably, this commentator also observed that in the absence of the suspension act, the “ringleaders” of the rebellion detained by the Governor would most likely have been able to secure their freedom via the writ. *Id.*

119. See MINOT, *supra* note 112, at 77-79; RICHARDS, *supra* note 111, at 19-21.

## SUSPENSION AS AN EMERGENCY POWER

any of these prisoners. Thus, the people of Massachusetts viewed a suspension as placing “every man’s liberty” in the “trust[.]” and “discretion of the Supreme Executive.”<sup>120</sup> As is shown below, the Framers held the very same conception of suspension.

### C. *The Suspension Clause in the Constitutional Convention and Ratification Debates*

The Convention debates over the proposed Suspension Clause were quite limited. All the same, they do offer insight into what the Framers thought was at stake. The decision to recognize a suspension power apparently stemmed from a proposal by Charles Pinckney, who “urg[ed] the propriety of securing the benefit of the Habeas corpus in the most ample manner” while suggesting that “it should not be suspended but on the most urgent occasions, [and] then only for a limited time not exceeding twelve months.”<sup>121</sup> Pinckney’s proposal bore many similarities to Massachusetts’s habeas provision,<sup>122</sup> and commentators, accordingly, have observed that the latter proved the model for Pinckney’s proposal.<sup>123</sup>

Pinckney’s proposal is interesting because it both recognized the need for a suspension power and deemed it important to secure expressly the privilege of habeas corpus. When the matter emerged from the Committee of Detail, limited additional debate ensued. Madison’s notes report that John Rutledge “was for declaring the Habeas Corpus inviolable—He did not conceive that a suspension could ever be necessary at the same time through all the States.”<sup>124</sup> James Wilson, in turn, “doubted whether in any case a suspension could be

---

120. See MINOT, *supra* note 112, at 65.

121. 2 FARRAND’S RECORDS, *supra* note 64, at 438. Pinckney had suggested a habeas clause even earlier. See 1 ELLIOT’S DEBATES, *supra* note 64, at 148 (remarks of Charles Pinckney) (“The legislature of the United States shall pass no law on the subject of religion, nor touching or abridging the liberty of the press; nor shall the privilege of the writ of *habeas corpus* ever be suspended, except in case of rebellion or invasion.”).

122. See, e.g., MASS. CONST. pt. 2, ch. VI, art. VII; see also N.H. CONST. pt. 2, art. XCI (“The privilege and benefit of the habeas corpus, shall be enjoyed in this state, in the most free, easy, cheap, expeditious, and ample manner, and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a time not exceeding three months.”). In addition to New Hampshire, at least two other states had habeas clauses at the time of the Convention. See GA. CONST. of 1777, art. LX; N.C. CONST. of 1776, art. XIII.

123. See JAMES F. JOHNSTON, THE SUSPENDING POWER AND THE WRIT OF HABEAS CORPUS 22 (Philadelphia, J. Campbell 1862); Neuman, *supra* note 31, at 564.

124. 2 FARRAND’S RECORDS, *supra* note 64, at 438 (emphasis omitted). Three state delegations dissented on this basis. See Neuman, *supra* note 31, at 566.

necessary, as the discretion now exists with Judges, in most important cases to keep in Gaol or admit to Bail.”<sup>125</sup> Ultimately, the drafters seized on Gouverneur Morris’s proposal that “[t]he privilege of the writ of Habeas Corpus shall not be suspended, unless where in cases of Rebellion or invasion the public safety may require it.”<sup>126</sup> The Committee on Style subsequently changed the word “where” to “when” and moved the Clause from the draft Judiciary Article to its present location.<sup>127</sup>

There is more to be found in the ratification debates. During the debates, discussion of the Suspension Clause proceeded within the larger debate over the allocation of power between the new federal government and the states, as well as within the debate over the specific enumeration of individual rights in the new Constitution.<sup>128</sup> Resistance to the draft Suspension Clause commonly centered on a fear that its recognition of a suspension power could be abused by the majority to silence political foes. Thus, Luther Martin posited that the Suspension Clause would serve as “an engine of oppression” in the general government’s hands, empowering it to “declare . . . *an act of rebellion*,” in turn suspend the writ and thereby “seize” those who “oppose its views” and “imprison them during its pleasure.”<sup>129</sup> In the realm of public debate, moreover, some warned that in light of the Suspension Clause,

Congress will then have it in their power to suspend the dearest of all privileges . . . and it will be in the power of the President, or President and Senate, as Congress shall think proper to *empower*, to take up and confine for any cause, or for any suspicion, or for no cause perhaps any person he or they shall think proper . . . and the poor man [will] after (perhaps) years of imprisonment have no kind of possibility to obtain any kind of satisfaction for the loss of his liberty.<sup>130</sup>

---

125. 2 FARRAND’S RECORDS, *supra* note 64, at 438 (emphasis omitted).

126. *Id.*

127. *See id.* at 596.

128. Some states wanted inclusion of an express guarantee of the privilege of the writ in the Constitution. *See* Neuman, *supra* note 31, at 574-78. Based on this and other evidence, Eric Freedman asserts that the Framers “were united in their belief that the maintenance of a vigorous writ was indispensable to political liberty.” Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 BUFF. L. REV. 451, 459 (1996).

129. Luther Martin, *Information to the General Assembly of the State of Maryland*, in 3 THE COMPLETE ANTI-FEDERALIST 27, 63 (Herbert J. Storing ed., 1981); *see also* Freedman, *supra* note 128, at 464-65 & n.54 (exploring the debates).

130. Editorial, *To the Convention of Massachusetts*, AM. HERALD, Jan. 14, 1788, at 1 (emphasis added).

## SUSPENSION AS AN EMERGENCY POWER

Other prominent commentators, including Jefferson, also recognized the breadth of the suspension power and held the view that the Suspension Clause should be removed from the draft Constitution and replaced by a clause protecting the writ of habeas corpus as inviolate.<sup>131</sup>

Defending the Clause in the Virginia debates, Wilson Nicholas characterized the power to suspend as “necessary” in cases of rebellion or invasion, although conceding that its effect was to “suspend our laws.”<sup>132</sup> Along the same lines, at the Massachusetts Ratifying Convention, Judge Dana defended the Clause and responded to challenges that it vested too much power in the government not by denying the point, but instead by emphasizing the limitations on its exercise that had been built into the Constitution:

The safest and best restriction [on the suspension authority] . . . arises from the nature of the cases in which Congress are authorized to exercise that power at all, namely, in those of rebellion or invasion. These are clear and certain terms, facts of public notoriety, and

- 
131. See, e.g., Letter from Thomas Jefferson to Alexander Donald (Feb. 7, 1788), in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 353, 354 (John P. Kaminski & Gaspare J. Saladino eds., 1988) [hereinafter DOCUMENTARY HISTORY] (expressing a hope that the Constitution would be amended with “a declaration of rights . . . which shall stipulate . . . no suspensions of the habeas corpus”); Letter from Thomas Jefferson to William Stephens Smith (Feb. 2, 1788), in 14 DOCUMENTARY HISTORY, *supra*, at 500; see also Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 331-33 (noting James Madison’s skepticism about the ability of a constitutional guarantee against suspension to stand up to passionate public opinion); Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 364 (Julian P. Boyd ed., 1958).
132. 3 ELLIOT’S DEBATES, *supra* note 64, at 102 (remarks of Wilson Nicholas) (“[S]uspension of the writ of *habeas corpus* is only to take place in cases of rebellion or invasion. This is necessary in those cases; in every other case, Congress is restrained from suspending it. In no other case can they suspend our laws; and this is a most estimable security.”); see 2 *id.* at 108-09 (remarks of Judge Sumner at the Massachusetts Ratifying Convention) (stating that although the privilege of the Great Writ “is essential to freedom,” the power to suspend was necessary when “the worst enemy may lay plans to destroy us, and so artfully as to prevent any evidence against him, and might ruin the country”); 3 FARRAND’S RECORDS, *supra* note 64, app. A, at 144, 149 (documenting James McHenry’s remarks before the Maryland House of Delegates that “Public Safety may require a suspension of the Habeas Corpus in cases of necessity: when those cases do not exist, the virtuous Citizen will ever be protected in his opposition to power . . .”).

whenever these shall cease to exist, the suspension of the writ must necessarily cease also.<sup>133</sup>

In the end, a review of the Convention and ratification debates underscores one simple point: whether for or against the Clause, those taking part in the debate appear to have understood that a suspension would vest considerable discretion over individual liberty in the executive. This both explains the “intensity of [the] debate” over whether to recognize a suspension power in the Constitution<sup>134</sup> and offers a window into the contemporary thinking of the Founding generation regarding the meaning of suspension.

#### *D. The Suspension Proposed in Response to the Burr Conspiracy*

Although there have been only a handful of suspensions on the federal level in American history, it was not long after ratification before a proposal to suspend the privilege of the writ found its way to Congress. Ironically, the source was President Jefferson, who earlier took the position that the government should never be permitted to suspend the privilege of the writ.<sup>135</sup> Specifically, Jefferson is reported to have requested that Congress enact a suspension in the wake of the release by a habeas court of one of the Burr conspirators.<sup>136</sup> The Senate quickly complied and after a closed door session<sup>137</sup> passed a three-month suspension bill applicable to “any person or persons, charged on oath with treason, misprision of treason, or other high crime or misdemeanor, endangering the peace, safety, or neutrality of the United

---

133. 2 ELLIOT’S DEBATES, *supra* note 64, at 108 (remarks of Judge Dana). Along similar lines, some who supported the Clause emphasized the need to include temporal restraints on the invocation of the suspension authority. Thus, the New York State Convention suggested an automatic six-month termination for suspensions. See *The Recommendatory Amendments of the Convention of This State to the New Constitution*, POUGHKEEPSIE COUNTRY J., Aug. 12, 1788, at 1, reprinted in 18 DOCUMENTARY HISTORY, *supra* note 131, at 301, 302 (“[T]he privilege of the Habeas Corpus shall not by any law, be suspended for a longer term than six months, or until twenty days after the meeting of the Congress, next following the passing of the act for such suspension.”). Speakers likewise voiced similar proposals at the Massachusetts Convention. See 2 ELLIOT’S DEBATES, *supra* note 64, at 108 (statement of Dr. Taylor).

134. Shapiro, *supra* note 10, at 87.

135. See *supra* note 131.

136. See 16 ANNALS OF CONG. 39-44 (1807) (statement of President Thomas Jefferson); see also DUKER, *supra* note 72, at 135 (stating that Jefferson asked for a suspension through a personal agent).

137. See WILLIAM PLUMER, WILLIAM PLUMER’S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, 1803-1807, at 585 (Everett Somerville Brown ed., 1923).

## SUSPENSION AS AN EMERGENCY POWER

States” who had been or “shall be arrested or imprisoned, by virtue of any warrant or authority of the President of the United States” or other executive official.<sup>138</sup> Extensive debate on the Senate bill followed in the House, where it found little support, and the proposal quickly died.<sup>139</sup> Jefferson accepted the House’s decision and did not attempt to invoke the suspension authority.

Only limited portions of the Senate debate are available.<sup>140</sup> What little exists documents that John Quincy Adams supported the measure. Although he viewed the writ of habeas corpus “as the great palladium of our rights,” he observed, “[Y]et on extraordinary occasions I beleive [sic] its temporary suspension is equally as essential to the preservation of our government [and] the priveledges [sic] of the people.”<sup>141</sup> Senator James Bayard appears to have been the lone voice in the Senate against the proposed suspension. He did not “think the *public safety* at this time require[d] [the] measure.”<sup>142</sup> In his view, “[i]ndividual liberty is not to be endangered but to preserve the security of the nation.”<sup>143</sup> Senator William Plumer recorded in his notes his strong support for the measure and disappointment over the House’s subsequent rejection of it. As he wrote, although the writ “is designed to secure our rights . . . its temporary suspension in such a state of things will most effectually secure its

- 
138. 16 ANNALS OF CONG. 402 (1807). For more on the congressional debates, consult DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829*, at 131-33 (2001). John Quincy Adams wrote that only Senator James Bayard voted against the bill. *See id.* at 131 (citing 1 MEMOIRS OF JOHN QUINCY ADAMS, COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848, at 445-46 (Charles Francis Adams ed., Philadelphia, J.B. Lippincott & Co. 1874) [hereinafter ADAMS MEMOIRS]). Plumer reports that “3 or 4” senators voted against it. PLUMER, *supra* note 137, at 590. Notably, unlike later suspensions enacted by Congress during the Civil War and Reconstruction, this legislation suspended the privilege of the writ outright; it did not delegate to the President the ultimate decision whether to do so.
139. *See* 16 ANNALS OF CONG. 402-25, 527-90 (1807). The House declined to debate in closed session, as the Senate had, *see id.* at 402-03, and ultimately rejected the bill at first reading, *see id.* at 424-25.
140. It does not appear that the Senate debates were recorded. The main resources describing the debates are John Quincy Adams’s diaries and Plumer’s summaries of the Senate proceedings. *See* 1 ADAMS MEMOIRS, *supra* note 138, at 445-46; PLUMER, *supra* note 137, at 585-92.
141. PLUMER, *supra* note 137, at 587; *see also id.* at 589 (“John Q Adams was *passionately zealous* for its passage.”). Plumer notes that Senators Giles and Smith also spoke for the measure. *See id.* at 585-92.
142. *Id.* at 585.
143. *Id.*; *see id.* at 588 (observing that the measure would establish a “precedent[] dangerous to freemen”).

object—*public security*.”<sup>144</sup> Tellingly, Plumer went on to lament the fact that, because the House failed to concur in the suspension, General James Wilkinson—the military officer who had ordered the imprisonment and transport of various Burr conspirators to Washington—would “probably fall a victim” and be “harrassed [sic] by suits” brought “by those whom he has arrested.”<sup>145</sup>

The records of the House debate on the suspension measure are more extensive, and they demonstrate that those who spoke were overwhelmingly of the view that a suspension would constitute a sweeping grant to the executive of discretionary authority to arrest and detain free from the normal legal restraints on his powers. Indeed, this belief, along with a general skepticism as to the need for such dramatic legislation under existing circumstances, ultimately swayed House members to reject the Senate bill. Time and again, members equated a suspension with “a temporary prostration of the Constitution itself”<sup>146</sup> and “suspend[ing] the personal rights of your citizens.”<sup>147</sup> Further, they equated a suspension with granting “unlimited discretion” to the executive branch to “seiz[e] and confin[e]” citizens,<sup>148</sup> giving it a power “which places their liberty wholly under [its] will.”<sup>149</sup> House members also echoed the same fears expressed during the ratification debates that “under the sanction” of such a law, the executive could “harass and destroy the best men of the country.”<sup>150</sup>

Representative William Burwell of Virginia specifically posed the question of what “reparation” would be available to “innocent” parties arrested during a

---

144. *Id.* at 592. As Plumer observed, “Laws and rules are made to promote & preserve peace & justice—but public security and justice are not to be sacrificed to the shrine of *law & rules*. This would be sacrificing the object to the means.” *Id.*

145. *Id.*

146. 16 ANNALS OF CONG. 407 (1807) (statement of Rep. Elliot); *accord id.* at 424 (statement of Rep. Dana) (observing that “the bill . . . repeal[s] the Constitution”); *id.* at 422 (statement of Rep. Smilie) (“A suspension . . . is, in all respects, equivalent to repealing that essential part of the Constitution which secures that principle which has been called . . . the ‘palladium of personal liberty.’”); *id.* at 405 (statement of Rep. Burwell) (stating that the bill “suspend[s] this most important and valuable part of the Constitution”).

147. *Id.* at 409 (statement of Rep. Eppes).

148. *Id.* at 405 (statement of Rep. Burwell); *see also id.* at 407 (statement of Rep. Elliot) (expressing a similar idea); *id.* at 422 (statement of Rep. Smilie) (same); *id.* at 424 (statement of Rep. Dana) (same).

149. *Id.* at 409 (statement of Rep. Eppes) (observing further that suspension is “one of the most important powers vested in Congress by the Constitution” and it is a “power which suspends the personal rights of your citizens”).

150. *Id.* at 406 (statement of Rep. Burwell).

## SUSPENSION AS AN EMERGENCY POWER

suspension. The answer, he suggested, lay exclusively in reproaching their representatives who had “sacrifice[d] their dearest interests” for the purported necessities of the moment:

Nothing but the most imperious necessity would excuse us in confining to the Executive, or any person under him, the power of seizing and confining a citizen, upon bare suspicion, for three months, *without responsibility*, for the abuse of such unlimited discretion. . . . [M]en, who are perfectly innocent, would be doomed to feel the severity of confinement . . . . What reparation can be made to those who shall thus suffer? The people of the United States would have just reason to reproach their representatives with wantonly sacrificing their dearest interests, when . . . it seems the country was perfectly safe, and the conspiracy nearly annihilated. Under these circumstances, there can be no apology for suspending the privilege of the writ of habeas corpus . . . .<sup>151</sup>

Representative James Elliot of Vermont viewed the measure as “the most extraordinary proposition that has ever been presented for our consideration.”<sup>152</sup> A suspension, he said, vests the executive and his subordinates with “unlimited . . . power over the personal liberty of your citizens.”<sup>153</sup> Elliot continued,

[The proposed suspension] invests [the executive] with the power of violating the first principles of civil and political liberty . . . . And it extends the operation of the suspension . . . not only to persons guilty or suspected of treason, or misprision of treason, but, to those who may be accused of any other crime or misdemeanor, tending to endanger the “peace, safety, or neutrality,” of the United States! What a vast and almost illimitable field of power is here opened, in which Executive discretion may wander at large and uncontrolled! . . . It gives the power of dispensing with the ordinary operation of the laws . . . .<sup>154</sup>

---

151. *Id.* at 405 (emphasis added).

152. *Id.* at 406 (statement of Rep. Elliot).

153. *Id.* at 407; *see also id.* (cautioning that the Framers “never contemplated the exercise of such a power, under circumstances like the present”).

154. *Id.* at 408.

Thus, Elliot viewed a suspension as the equivalent of “a temporary prostration of the Constitution itself.”<sup>155</sup> Such a dramatic measure, in his view, was only appropriate when “the existing invasion or rebellion, in our sober judgment, threatens the first principles of the national compact, and the Constitution itself. In other words, we can only act, in this case, with a view to national self-preservation.”<sup>156</sup>

Representative John W. Eppes of Virginia (Thomas Jefferson’s son-in-law), echoed these sentiments, viewing a suspension as “suspend[ing] . . . the chartered rights of the community” and placing “even those who pass the act” under military rule and their liberty “at the will of a single individual.”<sup>157</sup> Doubting the case for such an “extraordinary measure,” he observed,

I cannot, however bring myself to believe that this country is placed in such a dreadful situation as to authorize me to suspend the personal rights of the citizen, and to give him, in lieu of a free Constitution, the Executive will for his charter. I consider the provision in the Constitution for suspending the habeas corpus as designed only for occasions of great national danger. . . . [I]t ought never to be resorted to, but in cases of absolute necessity . . . .<sup>158</sup>

Representative Joseph Varnum of Massachusetts, who supported the measure, argued that he did not believe it would “have the injurious effects that some gentlemen seem to apprehend; and that it will only more effectually consign the guilty into the hands of justice.”<sup>159</sup> All the same, he maintained that the law was necessary to empower the executive to “trace the conspiracy to its source” and keep those believed to be a part of the conspiracy in jail even though the requisite evidence of their guilt did not exist.<sup>160</sup> Further, Varnum declared that even if it were possible that an

---

155. *Id.* at 407.

156. *Id.* at 406 (speaking of an “extreme emergency”).

157. *Id.* at 409, 410 (statement of Rep. Eppes).

158. *Id.* at 411.

159. *Id.* at 413 (statement of Rep. Varnum).

160. *Id.* at 411-12; *see also id.* at 412 (“Suppose the head of this conspiracy shall be taken in a district of country where no evidence exists of the crime charged to him, and he shall consequently be set at liberty by the tribunals of justice; where will the responsibility rest, but upon this branch of the Legislature?”). The same idea would later inform the Reconstruction suspension targeting Klan domination in the South. *See infra* Section III.B.

## SUSPENSION AS AN EMERGENCY POWER

innocent man will have a finger laid upon him . . . . if the public good requires the suspension of the privilege, every man attached to the Government and to the liberty he enjoys, will be surely willing to submit to this inconvenience for a time, in order to secure the public happiness.<sup>161</sup>

In this same vein, Representative Roger Nelson of Maryland viewed the suspension as permitting “confining a man in prison without a cause.”<sup>162</sup> That was, in his view, reason enough to reject it under the current circumstances. His remarks echoed many of those of his brethren, in that they embodied a belief that a suspension vests broad discretion in the executive and would cause individuals, “although innocent” or “taken up on vague suspicion,” to “continue to suffer confinement” until the suspension lapsed.<sup>163</sup>

Representative John Randolph of Virginia also spoke during these debates, and it is his comments on which Morrison relies as support for the narrow view of suspension. In his remarks, Randolph observed that should an individual be arrested pursuant to the proposed measure, to “say he shall have a remedy, in case of his innocence, against an inferior officer, is absurd.”<sup>164</sup> Randolph here rejected as “absurd” the notion that one detained during a suspension could sue his captor. Morrison interprets Randolph’s remarks as suggesting that the absurdity followed not from a lack of a cause of action, but from the fact that the officer may be judgment proof.<sup>165</sup>

As he continued, Randolph (who opposed the bill) argued that if the bill passed “it should contain a large appropriation, and Government should be obliged to make good the injured party—to afford him redress.”<sup>166</sup> Here, Randolph was speaking of paying the appropriation not to an officer-defendant as indemnification but instead to “the injured party”—namely, the person swept up in the suspension. Although Morrison’s reading of Randolph’s remarks is not implausible, Randolph’s comments are also consistent with the popular contemporary idea that although the government may have borne no legal obligation of compensation in a particular case (as it

---

161. 16 ANNALS OF CONG. 412 (1807) (statement of Rep. Varnum).

162. *Id.* at 414 (statement of Rep. Nelson).

163. *Id.* at 413.

164. *Id.* at 421 (statement of Rep. Randolph).

165. See Morrison, *supra* note 13, at 1558 (quoting 16 ANNALS OF CONG. 420–21 (1807) (statement of Rep. Randolph) (“I ask what compensation it would be to him to bring an action of damages? Against whom? A man without visible property?”)).

166. 16 ANNALS OF CONG. 421 (1807) (statement of Rep. Randolph).

would not to “the injured party” here), often it would choose to pay out of what was understood to be a moral obligation.<sup>167</sup> Notably, moreover, those speaking after him do not appear to have understood his comments to have altered the tenor of the debate. Indeed, they continued in the vein of those who spoke before Randolph to equate suspending the writ with “repeal[ing] an important part of the Constitution,”<sup>168</sup> “vest[ing] a discretionary power in the Executive,”<sup>169</sup> and “authoriz[ing]” an expanded category of arrests.<sup>170</sup> Thus, at most, Randolph was a lone voice in support of the narrow view, but the fact that none of his contemporaries seem to have equated his remarks with such a view suggests that he was not in fact taking such a position.

In the end, the House debate overwhelmingly supports the conclusion that the Founding generation believed that a suspension did more than merely strip a judicial remedy. House members believed that, in debating whether to suspend the rights that find protection in the writ of habeas corpus, they were also debating whether to grant the executive largely unfettered discretion to arrest and detain. Their comments make clear that they equated suspension with setting aside, for a time, the normal legal constraints on the executive’s power to arrest and detain. In short, this historically significant debate is seriously at odds with the narrow view of suspension.<sup>171</sup>

Further, Justice Story’s *Commentaries*, published a quarter-century later, confirm the accuracy of the picture of suspension that emerges from these debates, although he wrote at a much greater level of generality. Justice Story repeated Blackstone’s postulate that the writ is “the great bulwark of personal liberty” and the only true remedy for “illegal restraint.”<sup>172</sup> Nonetheless, he too recognized that cases of “peculiar emergency” may “justify, nay even require”

---

167. Cf. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 785-90 (1995) (observing that before the Takings Clause, compensation for takings by the government was a matter of legislative grace).

168. 16 ANNALS OF CONG. 422 (1807) (statement of Rep. Smilie).

169. *Id.* As Representative Smilie viewed suspension, “It is in this case only, that we have power to repeal that instrument.” *Id.*; see also *id.* at 423 (contemplating that the “personal liberty of [the predominant party’s enemies] would be endangered” under a suspension).

170. *Id.* at 424 (statement of Rep. Dana).

171. Morrison observes that the balance of this debate was “in terms too general to be useful.” Morrison, *supra* note 13, at 1557. Given that House members repeatedly emphasized that a suspension would actually expand the scope of executive power and vest discretion in the executive over individual liberty, the debate provides, by contrast, considerable insight into the prevailing view at the time on the question whether a suspension can in fact lawfully expand executive power to arrest and detain.

172. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 675, at 483 (Ronald D. Rotunda & John E. Nowak eds., Carolina Academic Press 1987) (1833).

## SUSPENSION AS AN EMERGENCY POWER

its temporary suspension and the allowance of “apprehen[sion] upon suspicion.”<sup>173</sup> Because he recognized that the suspension power may serve as a “fruitful means of oppression” and is “capable of being abused,” Justice Story emphasized that the power to suspend is here “expressly confined to cases of rebellion or invasion.”<sup>174</sup> As we will soon see, this marriage of the rights enshrined in the Great Writ and suspension has remained constant throughout American history.

### III. THE CIVIL WAR AND RECONSTRUCTION: INVOKING THE “MOST EXTRAORDINARY POWER”

With the onset of the Civil War, the matter of suspension took center stage in constitutional debates waged both inside and outside of Congress. During this period, much of what the Suspension Clause authorizes the government to do in times of crisis was called into question. With that said, a review of the suspension enacted during the Civil War demonstrates that the dominant view of suspension remained that which the Framers imported from the pages of Blackstone. Further confirmation of this conclusion is found in studying the Reconstruction suspension put in place to combat the Ku Klux Klan in the South.

#### *A. The First Suspension Under the U.S. Constitution: Suspending the Writ During the Civil War*

In response to the initial wave of states seceding from the Union, President Abraham Lincoln acted quickly, authorizing his military leaders to suspend the writ as needed to protect geographic areas that were critical to the early defense of the Union.<sup>175</sup> His first suspension came during a period when Congress was not in session;<sup>176</sup> subsequent proclamations of suspension made over the next

---

173. *Id.* § 676, at 483.

174. *Id.*

175. See Letter from Abraham Lincoln to Winfield Scott, U.S. Lieutenant Gen. (Apr. 27, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 347, 347 (Roy P. Basler ed., 1953) [hereinafter COLLECTED WORKS] (authorizing suspension of the privilege in the face of “resistance” encountered between Philadelphia and Washington); Letter from Abraham Lincoln to Winfield Scott, U.S. Commanding Gen. (Apr. 25, 1861), in 4 COLLECTED WORKS, *supra*, at 344, 344 (authorizing suspension of the privilege in Maryland in situations of the “extremest necessity”).

176. See *supra* note 175.

two years did not fall into this category.<sup>177</sup> Indeed, Congress actively debated for two years whether formally to authorize the President to suspend the writ.<sup>178</sup> During this period, under Lincoln's orders, military officials arrested thousands of prisoners, many on nothing more than suspicion of disloyalty. Thus, as Lincoln historian James G. Randall noted, "The arrests were made on suspicion. Prisoners were not told why they were seized . . . [T]he purpose of the whole process was temporary military detention."<sup>179</sup> As Randall also observed, "That all this procedure was arbitrary, that it involved the withholding of constitutional guarantees normally available, is of course evident."<sup>180</sup> Meanwhile, there was widespread public debate over the President's authority to suspend without approval of Congress.<sup>181</sup>

- 
177. See, e.g., Proclamation No. 1, 13 Stat. 730 (Sept. 24, 1862) (providing that "the writ of habeas corpus is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement [sic] by any military authority or by the sentence of any court-martial or military commission"); Exec. Order (Aug. 8, 1862), in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 332 (James D. Richardson ed., New York, Bureau of Nat'l Literature, Inc. 1897) [hereinafter MESSAGES AND PAPERS] (suspending the privilege with respect to all draft evaders); Proclamation No. 7, 12 Stat. 1260 (May 10, 1861) (suspending the privilege in Florida); Letter from Abraham Lincoln to Henry W. Halleck, U.S. Major Gen. (Dec. 2, 1861), in 5 COLLECTED WORKS, *supra* note 175, at 35 (authorizing suspension of the privilege in Missouri); Letter from Abraham Lincoln to Winfield Scott, U.S. Lieutenant Gen. (Oct. 14, 1861), in 4 COLLECTED WORKS, *supra* note 175, at 554 (suspending the privilege as far north as Maine); Letter from Abraham Lincoln to Winfield Scott, U.S. Commanding Gen. (July 2, 1861), in 4 COLLECTED WORKS, *supra* note 175, at 419 (authorizing suspension of the privilege between Washington and New York where resistance was encountered); Letter from Abraham Lincoln to Winfield Scott, U.S. Commanding General (June 20, 1861), in 4 COLLECTED WORKS, *supra* note 175, at 414, 414 (authorizing suspension of the privilege with respect to Major General William Henry Chase Whiting of the Engineer Corps of the Army, whom Lincoln "alleged to be guilty of treasonable practices").
178. JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 128-30 (1926); see *id.* at 149 (noting that during the early days of the war alone, "hundreds of prisoners were apprehended"). These suspicions were sometimes aroused by speech. See Geoffrey R. Stone, *Abraham Lincoln's First Amendment*, 78 N.Y.U. L. REV. 1, 28 (2003) [hereinafter Stone, *First Amendment*] (suggesting that "most individuals who were arrested for their expression were quickly released"); Geoffrey R. Stone, *Freedom of the Press in Time of War*, 59 SMU L. REV. 1663, 1665 (2006).
179. RANDALL, *supra* note 178, at 150; see also *id.* (observing that the object of these detentions was "precautionary"). Randall noted that it was with great reluctance that Lincoln suspended "the citizen's safeguard against arbitrary arrest." *Id.* at 121.
180. *Id.* at 152.
181. For a list of the numerous pamphlets on this subject published during this period, consult DUKER, *supra* note 72, at 178 n.189 (collecting citations); and Fisher, *supra* note 28, at 485-88 (same). As is well known, Chief Justice Taney concluded in *Ex parte Merryman*, 17 F. Cas.

## SUSPENSION AS AN EMERGENCY POWER

Lincoln defended his actions as fully compliant with the law. In his words, he had authorized his officers 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.”<sup>182</sup> In so doing, Lincoln asserted to Congress, “[i]t was not believed that any law was violated.”<sup>183</sup> Lincoln defended his actions not only on the basis that he believed the President had power to declare a suspension; as David Currie has noted, Lincoln also believed that a suspension was “tantamount to authorization to make arrests that otherwise would be illegal.”<sup>184</sup>

### 1. *The 1863 Act*

To defuse the controversy over where the suspension power resided, Congress finally enacted suspension legislation in 1863. Section 1 of the Act provided, “[D]uring the present rebellion, the President . . . 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.”<sup>185</sup> The Act by its terms provided that no officer need answer a writ so long as a presidential order of suspension remained in force and the rebellion “continued.” Congress intended by its chosen wording (stating that the President “is authorized” rather than “is hereby authorized”) to be ambiguous on the question whether the bill was an investiture of the power in the President or a validation of the President’s prior acts.<sup>186</sup>

---

144 (Taney, Circuit Justice, C.C.D. Md. 1861) (No. 9487), that the President does not possess the unilateral power to suspend the writ, and Chief Justice Taney ordered the release of John Merryman, who was taken by the military from his home in Baltimore and detained at Fort McHenry, all pursuant to a unilateral presidential authorization of a suspension in the area. A full explication of the story of the *Ex parte Merryman* case can be found in BRIAN MCGINTY, *LINCOLN AND THE COURT* 65-91 (2008). For a defense of Lincoln’s actions, see Richard H. Fallon, Jr., *Executive Power and the Political Constitution*, 2007 UTAH L. REV. 1, 21.

182. Abraham Lincoln, Message to Congress (July 4, 1861), in 4 COLLECTED WORKS, *supra* note 175, at 421, 429.

183. See *id.* at 430. The original version of Lincoln’s statement read: “In my opinion I violated no law.” *Id.* at 430 n.53.

184. David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1135 n.18 (2006). For more on Lincoln’s views, see *infra* text accompanying notes 243-245.

185. See Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755, 755.

186. See CONG. GLOBE, 37th Cong., 3d Sess. 1186 (1863) (statement of Sen. Trumbull) (observing that both those who believed the power to suspend resides in Congress and those who thought it resides with the President could vote for a bill worded in this fashion); see also *id.* at 1094 (statement of Sen. Bayard) (referring to the measure as “intentionally ambiguous

The delegation of the power to suspend, however, came with rather hefty strings attached; that is, the Act both empowered and limited the executive at the same time. Section 2 of the Act required, among other things, that lists of all prisoners be provided by the executive to the local federal court in states “in which the administration of the laws has continued unimpaired in the said Federal courts.”<sup>187</sup> If the next sitting grand jury failed to indict the “state or political prisoners” being held,<sup>188</sup> they were to be released upon taking an oath of allegiance to the Union.<sup>189</sup> If prisoners falling into this description were not released, the law commanded the courts to issue an order of discharge. Violation of this provision subjected an officer of the United States to indictment for a misdemeanor along with a fine and imprisonment.<sup>190</sup>

Section 2’s terms highlight what the fuller inquiry below demonstrates—namely, that the 1863 Congress viewed suspension as vesting a broad power in the executive to arrest and detain preventively. Indeed, the section’s procedural safeguards (release upon failure to indict) arguably would have been superfluous if Congress had interpreted section 1 to authorize only traditional arrests. Going further, section 2 countenanced executive detention of individuals *not* indicted for crimes where those individuals refused to take an oath to support the government—that is, *preventive detention of disloyal citizens*.<sup>191</sup>

The Act also provided a measure of protection to officers for acts taken in defense of the Union. In final form, section 4 of the Act deemed following a presidential order a valid defense to any proceeding, “civil or criminal,” that attacked “any search, seizure, arrest, or imprisonment” made pursuant to such an order “or under color of any law of Congress.”<sup>192</sup> Subsequent sections provided for removal of suits against federal officers from state courts and imposed a two-year statute of limitations on any suit or prosecution attacking “any arrest or imprisonment made, or other trespasses or wrongs done or committed” during the rebellion.<sup>193</sup>

---

... [and] intended to be so framed that it may be read two ways”); RANDALL, *supra* note 178, at 130-31.

187. § 2, 12 Stat. at 755.

188. *Id.* The Act distinguished these prisoners from prisoners of war. *See id.*

189. *Id.* at 755-56. The Act permitted the judge in such situation to require bond. *See id.* at 756.

190. *See id.* at 755.

191. *See id.* at 755-56.

192. *Id.* § 4, at 756.

193. *Id.* §§ 5, 7, at 756-57. The Supreme Court later struck down as unconstitutional the section that provided for retrial of removed cases in federal court. *See* *Justices v. Murray*, 76 U.S. (9 Wall.) 274, 282 (1869).

## SUSPENSION AS AN EMERGENCY POWER

It is section 4, along with Senator Lyman Trumbull's support for it, to which Morrison points as supporting the narrow view of suspension.<sup>194</sup> But a careful review of the debates leading up to the 1863 Act demonstrates both that (1) Congress agreed with Lincoln that a suspension equated with authorization to make arrests that would be illegal in the absence of a suspension and (2) Congress directed section 4 at providing protection to executive officers who had up to this point acted in the absence of such authorization from Congress.

The evolution of section 4 says much about why Congress enacted the provision. The section grew out of the first section of a House bill originally introduced by Representative Thaddeus Stevens that was by its terms exclusively directed at protecting the President and his officers from suits attacking their actions in the period leading up to the delegation by Congress of the power to suspend.<sup>195</sup> (Concern over such suits was heightened by reports of the recent arrest of the Secretary of War on trespass and false imprisonment allegations.<sup>196</sup>) By design, Stevens's bill sought to quash all lawsuits or prosecutions that had been or would be filed against the President and his officers for arrests made up to this point.

Representative Abram Olin saw no need for the bill, given his view that the President possessed the independent authority to suspend in the first instance. In Olin's view, all of the arrests and detentions following under presidential orders to this point had been perfectly legal.<sup>197</sup> Stevens responded to Olin,

I have not confessed the illegality of these acts, for this reason: the Attorney General . . . and the Administration have held that the President had, without such a bill, full power; and *if he had the power to order all these acts, then there is no remedy for anybody*. A remedy exists only when there is a wrong. If the President had the right to suspend the writ of *habeas corpus*, and under that these results took place, I should like to know who had the right of action against him? There can be no such thing. . . . [I]f the President was right in supposing that he had the authority to suspend the privilege of the writ of *habeas corpus*, I admit with my friend from New York [Mr. Olin] that there

---

194. See Morrison, *supra* note 13, at 1559-60.

195. See H.R. 591, 37th Cong., § 1 (3d Sess. 1862) (enacted).

196. See George Clarke Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by Congress*, 1 BULL. U. WIS. HIST. SERIES 214, 249 (1907).

197. Olin threw his support behind the bill all the same. See CONG. GLOBE, 37th Cong., 3d Sess. 20-21 (1862) (statement of Rep. Olin).

would be no necessity for this bill. . . . But I have recited that there is doubt on that subject.<sup>198</sup>

Thus, Stevens held the view that, to the extent Lincoln possessed the unilateral power to suspend, the arrests made under Lincoln's proclamations were fully legal regardless of the fact that many were preventive in nature. Shepherded by Stevens, House Bill 591, which passed overwhelmingly,<sup>199</sup> spoke exclusively in retroactive terms that "confirmed" and made "valid" executive acts taken prior to enactment of the legislation. Along the same lines, the bill "discharged and made void" all actions brought against the President and his officers for such acts.<sup>200</sup>

At the same time, the House passed a version of what would become section 1 of the 1863 Act—namely, a provision authorizing the President to suspend the privilege. Comments focusing on this section underscore broad agreement with Stevens's view equating suspension with authorization.

Representative John Bingham, for example, rejected the idea (inserted into the debate by Representative John Phelps) that the provision authorizing suspension should draw a distinction between those who were "not accused of any offenses against the State" and those who were accused of such offenses.<sup>201</sup> In Bingham's view, any such distinction "ought to rest in the discretion of the Executive, and doubtless it would under such a law as this."<sup>202</sup> Representative Samuel Shellabarger's comments echoed this point.<sup>203</sup> Bingham continued, moreover, to observe that the authorization of a presidential power to suspend was necessary for the protection of the executive. Put another way, Bingham equated the suspension both with vesting the executive with broad discretion

---

198. *Id.* at 22 (statement of Rep. Stevens) (second alteration in original) (first emphasis added).

199. The vote was ninety to forty-five. *See id.* at 20-22.

200. H.R. 591, 37th Cong. § 1 (3d Sess. 1862) (enacted). The provisions that became section 2 of the 1863 Act originated in a companion bill, House Bill 362, which also passed the House. *See* H.R. 362, 37th Cong. (2d Sess. 1862) (enacted); CONG. GLOBE, 37th Cong., 3d Sess. 195-96 (1863) (reproducing the bill). House Bill 362 contained no provisions governing officer immunity.

201. CONG. GLOBE, 37th Cong., 2d Sess. 3106 (1862) (statement of Rep. Phelps).

202. *Id.* (statement of Rep. Bingham); *see also id.* ("I am free to say, however, that it is one of those powers . . . which is subject to great abuse, but, on the other hand, with an honest Executive, careful and jealous of the rights of the citizen, it does seem to me that this bill is just as well guarded as it could be . . .").

203. *Id.* at 2073 (statement of Rep. Shellabarger) (observing that the discretion to determine who must, for the public safety, be imprisoned and denied the privilege of the writ was an "Executive function"—"the only matter of discretion and choice which is in the Constitution").

## SUSPENSION AS AN EMERGENCY POWER

to arrest and detain *and* with protecting the executive for taking such acts.<sup>204</sup> Likewise, Bingham viewed the legislation as “essential to the defense of the citizens” and the Union itself.<sup>205</sup>

The Senate passed a substitute bill for House Bill 591 that had been introduced by Senator Jacob Collamer of Vermont.<sup>206</sup> The Collamer bill emerged from a committee led by Senator Trumbull, and it is at this point that Trumbull made a statement to which Morrison points as support for the assertion that the Civil War Congress embraced a narrow view of suspension.<sup>207</sup> Trumbull observed that the bill

would be just as necessary if [the President] had the power to suspend it as it would be if he had not; because the suspension of the writ of *habeas corpus* does not of itself justify the arrest of anybody. . . . [T]here would be the same necessity for this act to protect the officers, in case, acting from probable cause and in good faith, they had wrongfully made arrests. Therefore this bill . . . goes upon the ground that we should protect these officers in the present crisis against vexatious suits . . . .<sup>208</sup>

There are several problems with assigning any broad significance to Trumbull’s statement. First, as we have just seen, this was not the view held in the House.<sup>209</sup> Second, in the Senate, the only support that Trumbull found for this view came from a handful of minority Democrats who opposed the suspension legislation outright—indeed, two of them made extraordinary

**204.** *See id.* at 3106.

**205.** *Id.*

**206.** *See* CONG. GLOBE, 37th Cong., 3d Sess. 247 (1863); *see also* CONG. GLOBE, 39th Cong., 2d Sess. 2021 (1866) (statement of Sen. Trumbull) (stating that Senator Collamer was the author of the 1863 Act). Collamer’s bill differed from the House bill in large measure because while the House bill declared proceedings against officers null and void, the Senate substitute provided that a presidential order would be a valid defense. *See supra* text accompanying note 200.

**207.** *See* Morrison, *supra* note 13, at 1559-60.

**208.** CONG. GLOBE, 37th Cong., 3d Sess. 534 (1863) (statement of Sen. Trumbull). In a portion of Trumbull’s remarks not relied upon by Morrison, the Senator arguably went further in advocating the narrow view of suspension. *See id.* (“All that [suspension of the writ] amounts to is, that the party arrested cannot be discharged from his imprisonment by virtue of the writ of *habeas corpus*; but the man who arrests him may be liable in damages just as much as if the writ of *habeas corpus* were not suspended.”).

**209.** Indeed, my research has failed to uncover any comments in the House embracing a narrow view of suspension.

efforts to filibuster the final bill<sup>210</sup>—and whose comments at their broadest suggested that a suspension could never be allowed consistent with the Constitution.<sup>211</sup>

Third, Trumbull's Republican colleagues who drove the bill to passage took a view entirely at odds with his statement. For example, Senator Collamer, who had introduced the Senate bill that would eventually be combined with Stevens's bill in conference, made his disagreement with Trumbull on this score evident. Thus, in introducing his bill, he observed,

What did the executive need to do for these periods of extremity? What was wanted? It was this: that he might, if the privilege of that writ was suspended, arrest people who had not committed crimes, and hold them to prevent their committing crimes that would put the nation in jeopardy. If he was only to arrest those people who had committed crimes, he could do that without having the *habeas corpus* suspended at all.<sup>212</sup>

---

210. See James G. Randall, *The Indemnity Act of 1863: A Study in the War-Time Immunity of Governmental Officers*, 20 MICH. L. REV. 589, 593-94 (1922) (noting that Senators Bayard and Powell as well as others attempted to filibuster the bill through the night of the last hours of the session).

211. Morrison cites two of these Senators for their support of Trumbull. See Morrison, *supra* note 13, at 1560 n.118 (referencing Senators Carlile and Bayard). A full reading of their statements, however, suggests that they held the view that no one other than possibly a prisoner of war could ever be arrested without being afforded judicial process, even during a suspension. See, e.g., CONG. GLOBE, 37th Cong., 3d Sess. 1093 (1863) (statement of Sen. Carlile) (stating that “[t]o no other department of this Government is this power of arrest given”; it is given to “the judiciary”); *id.* at 1195 (suggesting that no suspension was constitutional in “loyal” states and that where the courts are open, no one may be deprived of a speedy trial); *id.* at 1475 (statement of Sen. Bayard) (arguing that although the Suspension Clause allows setting aside the privilege of the writ in emergencies, none of the provisions in the Bill of Rights include such exceptional language and, accordingly, those rights may never be set aside during an emergency). Also in keeping with these views were statements by Senator Powell. See *id.* at 1193 (statement of Sen. Powell) (arguing that arrests made during “a sudden emergency” require that the prisoners be handed “immediately over to the judicial magistrates to have the case investigated,” and that only “prisoners of war” may be arrested during “times of war . . . without judicial process”).

212. *Id.* at 247 (statement of Sen. Collamer); see also *id.* at 541 (similar); *id.* at 550 (noting that by a suspension “the President would be in the exercise of his power rightfully in arresting men who had been guilty of no crime, for the purpose of securing against the commission of [acts] . . . dangerous to the Government”); *id.* at 1206 (“I say again that the suspension of the writ . . . has nothing to do with the arrest of criminals . . . [A suspension] 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.”). Thus, the assertion that “[i]t does not appear that anyone in

## SUSPENSION AS AN EMERGENCY POWER

Collamer elaborated on the point several times, on one occasion observing that the whole point of a suspension is to “enable [the executive] to take and to hold persons independent of their committing crimes, for State reasons, for public safety, for the public security.”<sup>213</sup> Indeed, he emphasized that adopting a more limited view of suspension would cause it to “mean[] very little or nothing at all.”<sup>214</sup>

Further, one member after another who rose in support of the legislation and specifically its authorization of suspension, made clear by their statements that they too understood that the act would confer expansive *power* to arrest preventively and on suspicion alone.<sup>215</sup> None of these statements contained even a hint of support for the proposition that one swept up in a suspension who could not have been arrested under ordinary legislation would retain a remedy at law. Senator James Doolittle’s comments are representative of many made on the Senate floor. Doolittle observed that under what would become section 1, the President

will be authorized to seize upon . . . [not only] those who are guilty of the crime of treason [but also] those whom he knows, or has every reason to believe, are about to join the enemy, or give them aid or

---

the Senate disagreed” with Trumbull’s earlier view, *see* Morrison, *supra* note 13, at 1560, is simply wrong.

213. CONG. GLOBE, 37th Cong., 3d Sess. 1206 (1863) (statement of Sen. Collamer).

214. *Id.* Trumbull responded that the suspension would allow one who had committed aailable offense to be held during the suspension. *See id.* at 1207 (statement of Sen. Trumbull).

215. Most opponents of the bill, moreover, did not disagree with this premise. Indeed, it was because of the power that the bill gave the President as well as disagreement over whether existing conditions warranted it that many resisted the bill. *See, e.g., id.* at 1203 (statement of Sen. Saulsbury) (viewing the authorization as “plac[ing] at [the President’s] absolute will the liberty of every citizen”); *id.* at 1105 (statement of Rep. Wickliffe) (“[Under this bill,] [m]y fate will depend upon the President’s will and pleasure.”); *id.* at 1060 (statement of Rep. Voorhees) (“Without [habeas] the tyrant may laugh to the winds every doctrine of *Magna Charta*, every provision of our own Constitution.”). Others opposed the bill on the ground that Congress could never delegate the ultimate decision whether to suspend—a decision that they believed had dramatic ramifications on individual liberty. *See, e.g., id.* at 1462 (statement of Sen. Wall) (“Our fathers very justly conceived that in dangerous, critical times like the present, the people would be willing to part with a portion of their freedom temporarily; but the warning voice of history had clearly indicated to them that such loss to be enduring must rest in the discretion of their representatives, and not in the breast of one man.”).

comfort; for it is to reach that class of men that it is necessary that the Executive should be clothed with this power.<sup>216</sup>

Thus, like Collamer before him and consistent with the conception of suspension that predated the Civil War period, Doolittle equated suspension with vesting expanded power in the executive to arrest and detain.

Further, Senator Edgar Cowan, responding to one of the Democratic obstructionists of the bill, rejected the narrow view of suspension because “the authorities [and] the precedents” were “against” it.<sup>217</sup> Then, referring to the English practice of suspension as he understood it, Cowan asked, “Is it not so, that there the monarch arrests *without due process of law*, and without, in fact, the parties arrested having committed any offense whatever; but they were arrested . . . *out of excessive caution?*”<sup>218</sup>

These comments represent a consistent thread in the Senate deliberations.<sup>219</sup> Other Senators, believing that the President possessed the inherent power to suspend, defended the arrests and detentions made under Lincoln’s orders as perfectly consistent with a suspension of the privilege.<sup>220</sup>

216. *Id.* at 1194 (statement of Sen. Doolittle) (emphasis added); *see id.* (“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.*” (emphasis added)). Senator Morton Wilkinson likewise noted that “there 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” and observed that the suspension was necessary to detain such persons until order returned to the Union. *Id.* at 1200 (statement of Sen. Wilkinson).

217. *Id.* at 1472 (statement of Sen. Cowan). Senator Cowan here responded to comments made by Senator Powell. *See supra* note 211 (noting Powell’s statement).

218. CONG. GLOBE, 37th Cong., 3d Sess. 1472 (1863) (statement of Sen. Cowan) (emphasis added).

219. Thus, for example, earlier in the debates, Senator Timothy Howe asked,

What is this suspension of the writ of *habeas corpus*? A man is taken as an enemy of the United States upon evidence which convinces the military authorities . . . that this individual is an enemy, and that his liberty, his license to go at large, is not consistent with the welfare and safety of the Republic. He has committed no overt act; he has committed no single act which your statutes describe and declare to be a crime.

CONG. GLOBE, 37th Cong., 1st Sess. 395 (1861) (statement of Sen. Howe).

220. *See* CONG. GLOBE, 37th Cong., 3d Sess. 544 (1863) (statement of Sen. Howard) (stating that the power “to make military arrests and to take persons into custody, and detain them temporarily, who have made themselves suspected of having carried on improper intercourse with the enemy, or who have rendered aid and assistance to the enemy, or are aiming to do so” falls with the President); CONG. GLOBE, 37th Cong., 1st Sess. 392 (1861)

## SUSPENSION AS AN EMERGENCY POWER

Fourth, when what would become section 2 of the 1863 Act was added to the Senate bill (requiring that prisoners not indicted by the next sitting grand jury be released), Senator Collamer led a movement to strike the material on the basis that it improperly “seems to imply that nobody is to be arrested unless they are persons guilty of some crime for which they can be indicted.”<sup>221</sup> Collamer viewed this provision as “utterly inconsistent” with the recognition of authority to suspend that came in section 1.<sup>222</sup> Trumbull only succeeded in fighting off Collamer’s motion with the aid of the Democrats and Unionists, many of whom were against authorizing any suspension, whatever its scope.<sup>223</sup>

Indeed, many in his own party attacked Trumbull for his support of what would become section 2. Senator Charles Sumner thought Trumbull’s position suggested that he was “deny[ing] entirely the efficacy of the suspension.”<sup>224</sup> Sumner asked, “What is the effect of a suspension of the writ of *habeas corpus*? Clearly, the very statement of the question is an answer to it. The writ is suspended, and the parties who are imprisoned can be detained *because* the writ cannot be had for the asking.”<sup>225</sup> Sumner went even further, suggesting that beyond simply stripping a judicial remedy, the broad powers conferred in what would become section 1 would permit the President to override normal legal constraints on his power to arrest, for Sumner suggested that the President could “make [a] suspension effective against the operation of” section 2.<sup>226</sup>

Finally, even Trumbull himself, though having articulated a narrow view of suspension in the statement above, was not entirely consistent on this point.

---

(statement of Sen. Morrill) (“[E]ach and every act of the President . . . calculated to put down this rebellion . . . is legal and is constitutional.”).

221. CONG. GLOBE, 37th Cong., 3d Sess. 1206 (1863) (statement of Sen. Collamer); *see also id.* at 1202 (statement of Sen. Wilkinson) (“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.”). Likewise, in the House, Representative Wilson wanted to strike the analogous first two sections of House Bill 362 as “too lenient[.]” CONG. GLOBE, 37th Cong., 2d Sess. 3359 (1862) (statement of Rep. Wilson).
222. CONG. GLOBE, 37th Cong., 3d Sess. 1206 (1863) (statement of Sen. Collamer).
223. Sellery, *supra* note 196, at 48 (citing CONG. GLOBE, 37th Cong., 3d Sess. 1207 (1863)). Most of those supporting Trumbull here later voted against the final bill. *See id.* Trumbull opposed Collamer’s position by observing that under the blanket suspension in section 1, “the President may hold a man in custody as long as the rebellion lasts without his ever having an opportunity to know why he is held.” CONG. GLOBE, 37th Cong., 3d Sess. 1206 (1863) (statement of Sen. Trumbull).
224. CONG. GLOBE, 37th Cong., 2d Sess. 3385 (1862) (statement of Sen. Sumner).
225. *Id.* (emphasis added); *see also* CONG. GLOBE, 37th Cong., 3d Sess. 1207 (1863) (statement of Sen. Doolittle) (viewing the final bill as a “modified” suspension).
226. CONG. GLOBE, 37th Cong., 2d Sess. 3385 (1862) (statement of Sen. Sumner).

To the contrary, Trumbull later described what would become section 1 of the final bill as bestowing very broad powers on the President:

It allows . . . a temporary arrest of parties; and in times like this I think that may be allowed. I think, when the country is environed by dangers all around it, when spies and traitors are traversing the North, giving information and aid and comfort to the rebellion, when others are preparing plots not yet matured so that you can arrest them for treason, and when, in the opinion of the Executive, charged with the duty of suppressing this rebellion, their being at large is dangerous to the public peace, *I think it well to provide that he may arrest them*, and that they may not be discharged by the writ of *habeas corpus* . . . .<sup>227</sup>

Implicit in this statement is the view that a suspension by its own terms can vest the President with power to engage in preventive detention. Notably, Trumbull did not suggest at any point in this discussion that an officer suit against the President would follow. To the contrary, here he held out as the only “remedy” available to such persons section 2, which compelled release of any person not indicted by the next sitting grand jury who took an oath of loyalty.<sup>228</sup>

In the end, the debates in both chambers leading up to passage of the 1863 Act reveal several important points. To begin, with only a handful of exceptions, the Civil War Congress plainly conceived of suspension as vesting the executive with broad discretion to arrest and hold persons that he believed posed a threat to the Union, whether their acts had matured to the commission of crimes or not. And the legislative history of section 4’s indemnity provision demonstrates that its purpose was to provide a cloak of protection to the President and his officers for the arrests and detentions undertaken *prior* to the congressional authorization of suspension that came in section 1 (since on the view of many, those arrests and detentions had been illegal because the President did not possess the unilateral power to suspend). Stevens and Collamer, the sponsors of the House and Senate provisions that were combined into section 4, held this view, and the debates more broadly suggest

---

227. CONG. GLOBE, 37th Cong., 3d Sess. 1092 (1863) (statement of Sen. Trumbull) (first emphasis added); *see also infra* note 288 (citing similar comments made by Trumbull in 1871).

228. *See* CONG. GLOBE, 37th Cong., 3d Sess. 1092 (1863) (statement of Sen. Trumbull) (“However, the party is not to be left there without remedy, but is to have an opportunity, at the very first term of the court, to obtain his discharge, unless the facts are such as to warrant further proceedings against him.”).

## SUSPENSION AS AN EMERGENCY POWER

that addressing prior presidential acts was the mischief at which Congress directed section 4. Indeed, as Randall described it,

the very basis of the bill of indemnity, in the minds of many who voted for it, was an assumption that the President did not constitutionally have this power, or at least a doubt as to the legality of this presidential suspension and a desire to clear up the matter once for all.<sup>229</sup>

To be sure, the final language of section 4 suggests that it goes beyond a mere retroactive grant of officer immunity, for it likewise referenced acts taken “under . . . any act of Congress.” Such language could be understood to signify a belief on the part of the Congress that it needed to provide separately for prospective officer immunity because section 1 did not itself make legal a broader category of arrests than those which could be made in the normal course. But whatever the *effect* of the inclusion of this language in section 4, there is absolutely no support whatsoever in the legislative history for the proposition that Congress viewed this language as a necessary counterpart to the grant of authority made in section 1. How the language came to be inserted in the bill demonstrates this point well.

The House version of what would become section 4, as we have seen, spoke exclusively to prior executive acts.<sup>230</sup> The original language of the Senate’s substitute bill also spoke exclusively to “any arrest or imprisonment made . . . by virtue or under color of any authority derived from or exercised by or under the President,” and the bill provided only for removal of officer suits predicated on such acts; it did not provide any defense.<sup>231</sup> It was only when Senator Cowan proposed an amendment to the Senate bill that the Senate considered

---

229. RANDALL, *supra* note 178, at 192-93. As Randall observed, military officers had up to this point refused to honor writs issued by courts on the basis that they were acting pursuant to a presidential proclamation of suspension. “It was for the purpose of terminating such conflicts” (over where the suspension power resided), “that Congress passed the Habeas Corpus Act of 1863 which attempted a sort of compromise between camp and bench.” *Id.* at 163.

230. H.R. 591, 37th Cong., § 1 (3d Sess. 1863), *reprinted in* CONG. GLOBE, 37th Cong., 3d Sess. 529 (1863) (“[A]ll such suspensions, arrests, and imprisonments . . . made . . . under the authority of the said President shall be confirmed and made valid; and the said President . . . and all persons who have been concerned in making said arrests . . . are hereby indemnified and discharged in respect thereof, and all . . . suits . . . against . . . them[] are hereby discharged and made void.”).

231. H.R. 591, 37th Cong. § 1 (as amended and reported by S. Comm. on the Judiciary, Jan. 28, 1863), *reprinted in* CONG. GLOBE, 37th Cong., 3d Sess. 529 (1863).

providing for a defense in such suits. Notably, his original proposal referenced exclusively actions taken under presidential order.<sup>232</sup> The Senate initially voted down Cowan's amendment, but when he later "renew[ed]" his amendment, the Senate adopted it. For the first time at this point, Cowan included the phrase "under an act of Congress" in his amendment, and he did so without any discussion of the significance, if any, of the new language.<sup>233</sup> The Senate quickly approved the amendment, and then immediately passed the bill.<sup>234</sup>

This Senate substitute bill was rejected by the House.<sup>235</sup> Each chamber then sent representatives to the conference.<sup>236</sup> As Trumbull described the conference, "Neither House had agreed with the other upon a single line."<sup>237</sup> Nonetheless, the conferees hammered out a compromise bill, taking some sections from the House and some from the Senate. Upon introducing the conference draft, which remained unaltered in the final bill, Trumbull described section 4 as "the first section of the House bill, a little altered."<sup>238</sup> In short, even Trumbull did not point to section 4 as providing a necessary cloak of protection to executive officers for *prospective* acts, and he described the bill as only "a little altered" from the original House version that spoke exclusively to acts taken under presidential orders in the absence of prior approval from Congress. Thus, the best evidence suggests that the Thirty-Seventh Congress thought of section 4 as offering protection to officers for acts taken outside the scope of prior congressional authorization.<sup>239</sup> It follows that section 4, at least as understood by those who voted for it, simply does not support the narrow view of suspension.<sup>240</sup>

Ultimately, the debates in the Thirty-Seventh Congress demonstrate that the body believed that section 1 vested the President with exceptionally broad powers to arrest and detain and that any arrests within the terms of the statute

---

232. See CONG. GLOBE, 37th Cong., 3d Sess. 540 (1863).

233. *Id.* at 554. Thus, here "under an act of Congress" was inserted into the bill without *any* discussion and certainly without Cowan or anyone else explaining that the language was a necessary counterpart to the suspension authorized in section 1.

234. See *id.*

235. See *id.* at 1097, 1107. The vote to non-concur was 114-35. See *id.* at 1107.

236. The conferees were Senator Trumbull, Senator Collamer, Representative Stevens, and Representative Bingham. See H.R. REP. NO. 37-45, at 5 (3d Sess. 1863).

237. CONG. GLOBE, 37th Cong., 3d Sess. 1436 (1863) (statement of Sen. Trumbull).

238. *Id.*

239. As is discussed below, the subsequent Civil War indemnity acts confirm this reading.

240. At most, one could speculate that Congress included the prospective grant of immunity merely to avoid any negative implication (that is, that such immunity did not exist) by reason of Congress having provided explicitly for retroactive immunity.

## SUSPENSION AS AN EMERGENCY POWER

were by definition legal. Indeed, if members of Congress really thought that section 1 did not expand the President's power to order arrests beyond the category of those arrests that he could order pursuant to ordinary legislation, why did they include section 2, which significantly cabined the President's ability to detain persons who were not subsequently charged with crimes and who were willing to take an oath of loyalty to the Union?

2. *Post-Script: Executive Action Pursuant to the 1863 Act and the Act's Amending Legislation*

Under the 1863 Act, Lincoln announced additional proclamations of suspension.<sup>241</sup> Just as before, Lincoln's men detained thousands of individuals, many on a preventive basis.<sup>242</sup> Lincoln continued to defend such arrests as a valid exercise of the suspension power. The Suspension Clause, Lincoln argued, "plainly attests the understanding of those who made the constitution that . . . their purpose [in 'cases of Rebellion' was that] men may be held in custody whom the courts acting on ordinary rules, would discharge."<sup>243</sup> Such arrests, Lincoln stated, "are constitutional" and are not made "so much for what has been done, as for what probably would be done. [They are] more for the preventive . . ."<sup>244</sup> Finally, echoing Senator Collamer, Lincoln observed, "Of how little value the constitutional provision . . . will be rendered, if arrests shall never be made until defined crimes shall have been committed . . ."<sup>245</sup>

Notably, the Lincoln Administration's obedience to section 2 of the 1863 Act was begrudging. With one possible exception, Randall's research of contemporary court records and War Department files failed to reveal any lists of prisoners being turned over to the courts;<sup>246</sup> thus, he concluded that "the act

---

241. See, e.g., Proclamation No. 7, 13 Stat. 734, 734 (Sept. 15, 1863) (suspending the writ nationwide with respect to persons held as "prisoners of war, spies, or aiders or abettors of the enemy" along with draft evaders and deserters from the military).

242. See FARBER, *supra* note 102, at 144 (estimating that "thirteen thousand civilians were held under military arrests during the course of the war"); MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES (1991) (detailing the thousands of arrests made during the war).

243. Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863), in 6 COLLECTED WORKS, *supra* note 175, at 260, 264 (citation omitted).

244. *Id.* at 265. Lincoln defended the arrests based on the existing "clear, flagrant, and gigantic case of Rebellion." *Id.* at 264.

245. *Id.* at 265. Lincoln elaborated on the point: "The constitution itself makes the distinction," *id.* at 264-65, between "arrests by process of courts, and arrests in cases of rebellion," *id.* at 267.

246. RANDALL, *supra* note 178, at 166 n.50; accord Sellery, *supra* note 196, at 267-68 n.14.

seems to have had but little practical effect.”<sup>247</sup> The executive and his officials were either unfamiliar with the terms of the Act,<sup>248</sup> construed it narrowly,<sup>249</sup> or simply chose not to honor it.<sup>250</sup> Congressional condemnation followed in due course.<sup>251</sup> So did thousands of suits—both civil and criminal—in local courts against Union soldiers and officials.<sup>252</sup> For this reason, Congress enacted additional officer immunity legislation in 1866.

The 1866 legislation by its very terms sought to protect executive and military officials from suit for those acts taken outside the scope of the authority conferred by the 1863 Act.<sup>253</sup> The legislation spoke exclusively in retroactive terms and declared that

any search, seizure, arrest, or imprisonment made, or any acts done or omitted to be done during the said rebellion, by any officer or person, under and by virtue of any order . . . issued by the President or

- 
247. RANDALL, *supra* note 178, at 166. Another Lincoln expert documents the turning over of one list—“late and reluctantly”—by the War Department. Mark E. Neely, Jr., *The Lincoln Administration and Arbitrary Arrests: A Reconsideration*, 5 J. ABRAHAM LINCOLN ASS’N 6, 21 (1983).
248. See ROBERT B. WARDEN, AN ACCOUNT OF THE PRIVATE LIFE AND PUBLIC SERVICES OF SALMON PORTLAND CHASE 546 (Cincinnati, Wiltstach, Baldwin & Co. 1874).
249. Lincoln’s Administration interpreted sections 2 and 3 not to apply to “‘aiders or abettors of the enemy’ and all other prisoners who had previously been deemed ‘amenable to military law.’” David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1005 (2008) (quoting Abraham Lincoln, Proclamation No. 7, 13 Stat. 734 (Sept. 15, 1863)).
250. Indeed, the President on occasion actively intervened to direct his inferior officers *not* to comply with court orders issued pursuant to section 2 of the Act. See *In re Dugan*, 6 D.C. 131 (1865) (upholding refusals to comply with section 2 because the President has the inherent power to suspend). The Supreme Court granted review in *In re Dugan*, 69 U.S. (2 Wall.) 134 (1865), only to hold the case over and see it mooted upon Dugan’s release. See CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864-88, pt. 1, at 57-58 (The Oliver Wendell Holmes Deviser, History of the Supreme Court of the United States, vol. 6, 1971).
251. See, e.g., CONG. GLOBE, 38th Cong., 2d Sess. 63, 73-77, 189, 318-20, 784, 1323-30, 1372-80 (1864-1865). Trumbull was among those who condemned the Administration.
252. See, e.g., CONG. GLOBE, 39th Cong., 2d Sess. 2021 (1866) (statement of Sen. Clark) (noting that “thousands of suits are springing up all through the land”); *id.* at 1983 (statement of Sen. Trumbull) (same); RANDALL, *supra* note 178, at 193 (same). The debates leading up to the 1866 Act also highlight that many state courts read the 1863 Act’s defenses narrowly and refused to honor removals. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1387 (1866) (statement of Rep. Cook); RANDALL, *supra* note 178, at 197-98. The Kentucky legislature had in fact passed laws forbidding its judges to honor removals. See Act of Feb. 16, 1866, ch. 690, 1866 Ky. Acts 54; Act of Feb. 5, 1866, ch. 372, 1866 Ky. Acts 25.
253. See Act of May 11, 1866, ch. 80, 14 Stat. 46.

## SUSPENSION AS AN EMERGENCY POWER

Secretary of War, or by any military officer of the United States . . . shall be held, and are hereby declared, to come within the purview of the act to which this is amendatory.<sup>254</sup>

In this class of cases, the amending Act also made it easier to prove the defense that one was acting under superior orders; it likewise made it easier to remove officer suits to federal court.<sup>255</sup>

Thus, the 1866 Act did nothing more than declare that those actions by the executive taken outside the scope of the 1863 Act were retroactively deemed to come within the purview of that Act. Indeed, members of Congress took the view that “[i]f there was any justification for the act at the time it was committed, then this bill is unnecessary.”<sup>256</sup> Thus, the 1866 Act underscores two points. First, Congress believed that its 1863 suspension legislation did by its terms authorize executive actions (for in this legislation, Congress retroactively sought to fold a broad category of acts into that authorization). Second, Congress was focused during this period on providing protection to officers who had acted beyond the scope of congressional authorization.

Morrison asserts that one (and only one) legislator made a statement during the debates preceding passage of the 1866 Act suggesting that he embraced the narrow view of suspension.<sup>257</sup> Reading Senator Cowan’s comments in context, however, suggests that he was not in fact endorsing such a position,<sup>258</sup> which would have, in any event, contrasted with his remarks

254. *Id.* § 1, at 46 (emphasis added).

255. *Id.* §§ 2, 3, at 46. The Act also created a cause of action against state officials and other parties for proceeding in state court in a case that had been properly removed. *See id.* § 4, at 46.

256. CONG. GLOBE, 39th Cong., 1st Sess. 1390 (1866) (statement of Rep. Harding).

257. *See Morrison, supra* note 13, at 1561-62 (quoting remarks by Senator Cowan).

258. Thus, although Cowan defended the proposition that one may maintain an action for redress arising out of an arrest made during a suspension, CONG. GLOBE, 39th Cong., 1st Sess. 2020 (1866), his elaboration on the point strongly suggests that he was concerned about officer conduct that was *ultra vires*, *see id.* (referring to officer actions that were “wanton, malicious, and unnecessary” and that did not follow under superior orders). To be sure, Cowan disagreed with the “impression [that] prevails in some places that when you suspend the privilege of the *habeas corpus*, all people, innocent and guilty, without any difference or distinction, may be arrested and may be held until the supposed danger is over, without any remedy on the part of those innocently arrested.” *Id.* But reading this statement in context reveals that Cowan was challenging more broadly the idea that the suspension declared by Lincoln in the states outside the active theater of war was legal in the first instance. Right before the above statement, Cowan had asked,

Is this bill to extend everywhere, or is it to extend only to those portions of the Union where rebellion has prevailed? Or are we to establish the principle that

made during the 1863 debates embracing a view of suspension as authorizing preventive detentions.<sup>259</sup> In all events, the 1866 amending legislation by its terms merely related back to expand upon the congressional authorization enacted in 1863. The Thirty-Ninth Congress was concerned about the need to cloak Union officers with protection from damages suits and prosecutions, yet it seems simply to have assumed that no such immunity legislation was necessary for acts taken within the scope of the suspension grant.

In 1867, Congress once again enacted retroactive legislation to protect executive officers from legal challenges to their actions that had exceeded the scope of congressional authorization. Specifically, the 1867 legislation addressed the executive's creation of military tribunals to try a broad category of suspects.<sup>260</sup> In the Act, Congress declared that any presidential "acts, proclamations, and orders . . . or acts done by his authority or approval . . . respecting martial law, military trials by courts-martial or military commissions, or the arrest, imprisonment and trial of persons charged with participation in the late rebellion against the United States" are "hereby approved in all respects, legalized and made valid, to the same extent and with the same effect as if said orders and proclamations had been issued and made" and the acts had been taken "under the previous express authority and direction of the Congress . . . and in pursuance of a law thereof previously enacted and expressly authorizing and directing the same to be done."<sup>261</sup>

Thus, here again, Congress's focus was conduct taken by the executive that had not received prior congressional authorization—specifically, the trial of citizens by military commissions.<sup>262</sup> The debates preceding enactment show

---

when rebellion prevails in any portion of the United States, that of itself operates to create a dictatorship in the Executive?

*Id.* To the extent that Cowan viewed the suspension of the writ in peaceful states as unconstitutional, he understandably believed that persons arrested without cause in those states retained the right to a remedy at law.

259. See *supra* text accompanying notes 217–218.

260. See FARBER, *supra* note 102, at 20 ("After September 24, 1862, suspects were not merely detained without legal process, they were also tried by military tribunals. The jurisdiction of these tribunals extended to 'all Rebels and Insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to Rebels against the authority of the United States.'" (quoting NEELY, *supra* note 242, at 64–65 (citing Proclamation No. 1, 13 Stat. 730 (Sept. 24, 1862)))).

261. Act of Mar. 2, 1867, ch. 155, 14 Stat. 432, 432–33 (emphasis added). Further, the legislation provided that no civil court (state or federal) "shall have or take jurisdiction of" any of these acts. *Id.* at 433.

262. See, e.g., CONG. GLOBE, 39th Cong., 2d Sess. 646 (1867) (statement of Rep. Delano) (urging quick passage "to show . . . disapprobation to the decision of the Supreme Court which has

## SUSPENSION AS AN EMERGENCY POWER

that the legislation was in direct response to the Supreme Court's decision in *Ex parte Milligan*, declaring illegal Milligan's trial by a military commission in a state where the courts were "open and their process unobstructed."<sup>263</sup> The *Ex parte Milligan* majority offered in dictum that even Congress could not have authorized the commissions; on this point, the concurring justices disagreed.<sup>264</sup> Here, Congress joined camp with the concurring justices and crafted legislation to protect officers involved with the commissions by declaring that their actions should be treated as though they followed under prior congressional authorization.<sup>265</sup>

Taken together, the 1866 and 1867 indemnity acts demonstrate that the prevailing concern of the Civil War Congresses in providing for officer immunity was to shelter acts taken *without* prior congressional authorization. By contrast, legislation to shelter acts taken *within* the scope of the suspension was viewed as simply not necessary.<sup>266</sup>

### B. Suspension During Reconstruction: Putting Down the Klan in South Carolina

Following the Civil War, Congress again authorized the President to suspend the writ to address what had become a domestic terrorist organization

---

rendered this bill a necessity"); *id.* (statement of Rep. Wilson) ("It is not the purpose of the committee to go beyond the class of cases named by the decision of the Supreme Court in the Milligan case."); *id.* at 1961 (statement of Sen. Trumbull) ("[T]he bill . . . intends . . . to protect the party just as far as it would have been competent for Congress to have protected him had a law previously existed.").

263. 71 U.S. (4 Wall.) 2, 121 (1866). The relevant Civil War case law on suspension is discussed *infra* at Section IV.B.

264. See *Ex parte Milligan*, 71 U.S. (4 Wall.) at 122; *id.* at 137 (Chase, C.J., concurring in the judgment).

265. Thus, the 1866 and 1867 acts do not constitute examples of Congress immunizing conduct taken *within* a suspension, as Morrison appears to suggest. See Morrison, *supra* note 13, at 1589 n.270.

266. Even if one could read the amending legislation as overlapping with authorized conduct, moreover, it does not necessarily follow that the Civil War Congresses embraced the narrow view of suspension. Indeed, the impetus for such provisions was likely nothing more than a desire to emphasize as a symbolic matter the lawfulness of the authorized behavior or, alternatively, to provide an extra layer of prophylaxis to guard against judicial second-guessing of exercises of the executive's expanded powers. Indeed, this latter purpose seems to have animated at least in part the English indemnity provisions. See *supra* note 79. The one Civil War-era decision to explore the matter viewed these acts as "merely declaratory" of the original suspension legislation. See *infra* text accompanying note 378 (quoting *McCall v. McDowell*, 15 F. Cas. 1235, 1245 (C.C.D. Cal. 1867) (No. 8673)).

of tremendous consequence—the Ku Klux Klan. This episode further underscores that suspension has always been understood to expand the scope of executive authority to arrest and detain.

In many parts of the South, but particularly the upcountry of South Carolina, Klan violence reached dramatic proportions during this period. Night riders engaged in scores of murders, whippings, attacks, and rapes, and these routine occurrences met little if any resistance or prosecution from local authorities.<sup>267</sup> The Klan terrorized anyone who dared to testify against its members and also controlled many arms of local government, rendering some Southern states “unable to provide even the semblance of criminal law enforcement.”<sup>268</sup> In response, President Grant initially requested that Congress “examine the need for reimposing military rule” in affected areas.<sup>269</sup> Later, he “urgently” requested legislation that would expand his powers, as he doubted that they were “sufficient” to address the “present emergencies.”<sup>270</sup> In particular, the Grant Administration sought the power to detain suspected Klan members without charges as a means of breaking through the secretive

- 
267. See LOU FALKNER WILLIAMS, *THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS: 1871-1872*, at 19-39 (1996) (describing Klan atrocities); Lou Falkner Williams, *The Constitution and the Ku Klux Klan on Trial: Federal Enforcement and Local Resistance in South Carolina, 1871-72*, 2 GA. J. S. LEGAL HIST. 41, 50 (1993) (“Klan brutality reached fearsome proportions in . . . the [South Carolina] upcountry . . . [M]asked riders rode almost nightly . . . terrorizing black families until they were forced to sleep in the woods and swamps in the dead of winter for fear of their lives.”).
268. ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876*, at 81 (1985); see *District of Columbia v. Carter*, 409 U.S. 418, 425-26 (1973); see also Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871-1872*, 33 EMORY L.J. 921, 925 (1984) (noting that local law enforcement undermined federal efforts to restore order to the region). The Klan also appears to have wielded considerable influence on at least some federal courts in the South, see STEPHEN BUDIANSKY, *THE BLOODY SHIRT: TERROR AFTER APPOMATTOX* 133 (2008) (noting that Major Merrill described proceedings in South Carolina as a “farce”), and they controlled some of the wires by which federal officials communicated in the region, see *id.* at 125. As Attorney General Akerman later reported to Congress, “In some parts of the country . . . [Klan] . . . operations have been marked by an atrocity that is without precedent in the previous history of the United States.” 1871 ATT’Y GEN. ANN. REP. 4.
269. ROBERT W. COAKLEY, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1789-1878*, at 309 (1988).
270. Letter from Ulysses S. Grant to the Senate and House of Representatives (Mar. 23, 1871), in 9 MESSAGES AND PAPERS, *supra* note 177, at 4080, 4081.

## SUSPENSION AS AN EMERGENCY POWER

veil that protected the organization's structure and composition<sup>271</sup> as well as to prevent witness intimidation.<sup>272</sup> In other words, Grant and his military officers sought authorization to engage in preventive detention.

Congress responded with the Ku Klux Klan Act of 1871.<sup>273</sup> The Act established several new federal civil rights crimes and vested two important enforcement powers in the executive. Its third section empowered the president to employ "the militia or the land and naval forces of the United States" to suppress "insurrection[s], domestic violence, or combinations."<sup>274</sup> The fourth section, in turn, authorized the president to suspend the writ to put down a "rebellion" orchestrated by "unlawful combinations" set on "overthrow[ing] or . . . def[y]ing" the constituted [government] authorities," where "the conviction of . . . offenders and the preservation of the public safety shall become in such district impracticable."<sup>275</sup>

Building on the Civil War model, Congress also strictly cabined this grant of power to the executive. First, the Act required the President to order insurgents to disperse prior to suspending the writ in any area. Second, Congress provided that the suspension authorization would lapse at the end of its next regular session.<sup>276</sup> Finally, the 1871 Act incorporated the second section of the 1863 Act, which required, among other things, that the executive furnish local courts with a list of prisoners, and that all prisoners, "other than prisoners of war," shall be released if not indicted by the next sitting grand jury.<sup>277</sup>

---

271. See COAKLEY, *supra* note 269, at 312 (noting that the suspension was used as a basis for detaining suspected Klansmen for weeks in part to obtain information on the Klan hierarchy).

272. See, e.g., *id.* at 308-09. "Violent retaliations usually met those who brought complaints to federal authorities or who supported complaints with evidence." KACZOROWSKI, *supra* note 268, at 58; see also 1871 ATT'Y GEN. ANN. REP. 4 (noting that witness protection was one purpose behind the suspension).

273. Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13.

274. *Id.* § 3, at 14.

275. *Id.* § 4, at 14-15. The law defined "unlawful combinations" to encompass, among other things, combinations designed to oppose the government or to interfere with the enjoyment of the rights secured by the Reconstruction Amendments. *Id.* § 2, at 13-14. Grant referred to these sections as conferring upon him "extraordinary powers" that he would invoke "in cases of imperative necessity . . . for the purpose of securing to all citizens . . . enjoyment of the rights guaranteed to them by the Constitution and laws." Ulysses S. Grant, A Proclamation (May 3, 1871), in 9 MESSAGES AND PAPERS, *supra* note 177, at 4090, 4090.

276. See § 4, 17 Stat. at 15.

277. *Id.*; see also *supra* text accompanying notes 187-191 (detailing the 1863 Act provisions).

Notably, the 1871 Act included no officer immunity provision, nor did any such legislation follow.<sup>278</sup>

As the Supreme Court has noted, the “spirited” debates preceding the 1871 Act took place in a partisan and “highly inflamed” environment and with all participants appreciating the “grave character and susceptibility to abuse” of the proposed legislation.<sup>279</sup> The debates are replete with statements showing that members understood that the legislation would vest the President with broad discretion over individual liberty. Thus, member after member equated suspension with placing “unbounded trust” in the executive’s judgment<sup>280</sup> and vesting him with broad discretion and “tremendous power” over individual liberty.<sup>281</sup> Members understood this delegation as following from the Act’s displacement of the protections embodied in the Great Writ.<sup>282</sup> The only point of contention was whether existing conditions warranted such dramatic legislation.

Supporters defended the legislation as necessary to combat the Klan effectively, all the while acknowledging that suspension is “the last extreme remedy of the Constitution.”<sup>283</sup> As one member observed, “[S]evere diseases

---

278. The lack of indemnity legislation is notable—just as it was in conjunction with the Shays suspension—because the liability in tort of officers and jailors for false imprisonment was long settled. *See, e.g.,* MARTIN L. NEWELL, A TREATISE ON THE LAW OF MALICIOUS PROSECUTION, FALSE IMPRISONMENT, AND THE ABUSE OF LEGAL PROCESS, AS ADMINISTERED IN THE COURTS OF THE UNITED STATES OF AMERICA §§ 2, 106, at 100-01, 229-30 (Chicago, Callaghan & Co. 1892) (noting the established general rule of liability for unlawful arrests and detentions); *see also supra* note 116 (citing Maitland on the common law tort).

279. *Collins v. Hardyman*, 341 U.S. 651, 657 (1951).

280. CONG. GLOBE, 42d Cong., 1st. Sess. app. at 50 (1871) (statement of Rep. Kerr).

281. CONG. GLOBE, 42d Cong., 1st. Sess. 479 (1871) (statement of Rep. Leach); *see also id.* at 480 (lamenting that such power “can be used for subjugating a free people”); *id.* at 362 (statement of Rep. Swann) (similar); *id.* app. at 154 (statement of Rep. Garfield) (similar); *id.* app. at 260 (statement of Rep. Holman) (“[U]pon his discretion alone rest the guarantees of liberty . . .”); *id.* at 601 (statement of Sen. Saulsbury) (viewing the proposal as placing “the liberties of the people at his mercy”); *id.* app. at 82 (statement of Rep. Bingham) (“The people grant discretionary power to the President, they trust and confide in him, and have reason to believe that he will faithfully do his duty.”); *id.* app. at 315 (statement of Rep. Burchard) (“To no man would I intrust the wide discretion sooner than to the present Executive.”); *id.* at 367 (statement of Rep. Arthur) (referencing the executive’s “boundless power”); *id.* app. at 180 (statement of Rep. Voorhees) (similar).

282. *See, e.g., id.* app. at 164 (statement of Rep. Bird) (equating suspension with “remov[ing] the corner-stone thereof, personal liberty”); *id.* at 373 (statement of Rep. Archer) (deeming habeas corpus “essential to liberty” and observing that “no people can be free without it”).

283. *Id.* at 477 (statement of Rep. Dawes); *see also id.* app. at 182 (statement of Rep. Mercur) (making a similar observation); *id.* app. at 315 (statement of Rep. Burchard) (same). Some

## SUSPENSION AS AN EMERGENCY POWER

require severe remedies, and when the disease exists, the sooner the remedy is applied the better.”<sup>284</sup> In the same vein, supporters stated that “no other means were adequate to the end”<sup>285</sup> of “restor[ing] order [and] protecti[ng] the citizen in the exercise of his civil and political rights.”<sup>286</sup>

Not a single member of Congress ever mentioned—much less suggested—the need for officer immunity legislation to protect the executive and his officers when their actions went beyond that which would be permissible in the absence of the suspension. There is only one way to interpret the silence: no one deemed such legislation remotely necessary.<sup>287</sup> In the end, the debates confirm a consensus on one point: the “suspension of this writ is a most extraordinary *power*.”<sup>288</sup>

Armed with expanded powers but knowing that he did not have the forces to blanket the South, Grant followed the advice of military leaders and concentrated efforts on a key Klan stronghold—the South Carolina upcountry.<sup>289</sup> Attorney General Amos T. Akerman is reported to have remarked at the time that the Klan’s actions “amount[ed] to war” and could

---

complained that the suspension did not vest *enough* discretion in the President. *See id.* at 567-68 (statement of Sen. Edmunds) (opposing incorporation of section 2 of the 1863 Act).

**284.** *Id.* app. at 202 (statement of Rep. Snyder).

**285.** *Id.* at 477 (statement of Rep. Dawes); *see also id.* at 820 (statement of Sen. Sherman) (“This bill will enable the President to again meet force with force, and I do not hide from myself the terrors of this kind of warfare, or the dangerous precedent we set for this kind of legislation.”).

**286.** *Id.* app. at 316 (statement of Rep. Burchard); *see also id.* at 483 (statement of Rep. Wilson) (defending the suspension on similar grounds).

**287.** Indeed, Representative Bingham suggested that the proper check on an executive who abuses the discretion vested in him by a suspension was impeachment proceedings. *See id.* app. at 82 (statement of Rep. Bingham) (“If the President violate the discretionary powers vested in him the people by their Representatives summon him to the bar of the Senate to answer [for his actions] . . .”).

**288.** *Id.* at 761 (statement of Sen. Stevenson) (emphasis added). Trumbull moved to strike section 4, *see id.* at 705 (statement of Sen. Trumbull), presumably because, as he had earlier stated, he equated suspension with displacing “the privileges of [the] great writ of right” which “protect[s] the citizen against arbitrary arrest and imprisonment.” *Id.* at 581 (statement of Sen. Trumbull).

**289.** CHARLES W. CALHOUN, *CONCEIVING A NEW REPUBLIC: THE REPUBLICAN PARTY AND THE SOUTHERN QUESTION, 1869-1900*, at 31 (2006); *see COAKLEY, supra* note 269, at 310-11 (noting that a military report in June 1871 “painted a grim picture of Klan domination in the area” and reported that up to three-fourths of the white men in the region were members of the Klan); WILLIAMS, *supra* note 267, at 44 (noting that Attorney General Amos T. Akerman reported that “no community nominally civilized, has been so fully under the domination of systematic and organized depravity.” (internal quotation marks omitted)).

not “be effectively crushed on any other theory.”<sup>290</sup> Grant suspended the writ in this area<sup>291</sup> and ordered military officials, led by Major Lewis Merrill, to conduct widespread arrests of suspected Klan members.<sup>292</sup> Merrill’s troops “responded with a massive round-up of suspects”<sup>293</sup>—a response that “would have been impossible if normal procedural safeguards had been honored.”<sup>294</sup> Akerman would later describe the arrests as “unavoidably summary and severe.”<sup>295</sup> As Merrill’s aide in South Carolina, Louis Post, wrote, these arrests were “without warrant or specific accusation” of criminal conduct; persons were targeted based on their “presume[d] members[hip]” in the Klan.<sup>296</sup> The job was then left to Merrill and his men to sort through those arrested to decide who should be referred to the U.S. Attorney for criminal prosecution.<sup>297</sup>

Merrill wielded the temporary power to detain without warrant or charges as a potent law enforcement tool. Because Merrill was able to hold suspects on this basis, “confessions became quite the fashion as arrests multiplied.”<sup>298</sup> “For a time the prisoners were silent,” Merrill’s aide recorded, “[b]ut as hope of

---

290. WILLIAMS, *supra* note 267, at 44-45. The Klan controlled the courts and even the wires by which federal officials reported to Washington. See J. MICHAEL MARTINEZ, *CARPETBAGGERS, CAVALRY, AND THE KU KLUX KLAN* 138-39 (2007).

291. See Ulysses S. Grant, A Proclamation (Oct. 17, 1871), in 9 MESSAGES AND PAPERS, *supra* note 177, at 4090; Ulysses S. Grant, A Proclamation (Nov. 10, 1871), in 9 MESSAGES AND PAPERS, *supra* note 177, at 4093. Grant’s suspension followed a commandment to disperse and turn over all weapons to federal authorities, see Ulysses S. Grant, A Proclamation (Oct. 12, 1871), in 9 MESSAGES AND PAPERS, *supra* note 177, at 4089, which, unsurprisingly, went unheeded, see COAKLEY, *supra* note 269, at 311-12.

292. Ulysses S. Grant, A Proclamation (Oct. 17, 1871), in 9 MESSAGES AND PAPERS, *supra* note 177, at 4090, 4091. In previous months, Merrill had investigated the Klan in the area, but his efforts were frustrated by the secrecy and compartmentalization of the organization. See David Everitt, *1871 War on Terror*, 38 AM. HIST. 26, 30 (2003).

293. Hall, *supra* note 268, at 925; accord BUDIANSKY, *supra* note 268, at 135; COAKLEY, *supra* note 269, at 312. After the raids, the empty streets of Yorkville “took on a haunted look.” MARTINEZ, *supra* note 290, at 150.

294. Williams, *supra* note 267, at 53; see also *id.* at 55 (noting that many more Klan members surrendered to federal authorities). As one newspaper reported, Merrill “gathered up the Ku Klux by the dozen. The people were panic stricken.” FARMER’S CABINET, Nov. 22, 1871, at 2. In just a few months, Merrill arrested hundreds of men suspected of Klan ties. See, e.g., Letter from George H. Williams, Att’y Gen., to Ulysses S. Grant (Apr. 19, 1872) (reporting 501 arrests), in H.R. EXEC. DOC. NO. 42-268, at 3 (2d Sess. 1872); 1871 ATT’Y GEN. ANN. REP. 5 (reporting 472 arrests).

295. 1871 ATT’Y GEN. ANN. REP. 5.

296. Louis F. Post, *A “Carpetbagger” in South Carolina*, 10 J. NEGRO HIST. 10, 41 (1925).

297. See MARTINEZ, *supra* note 290, at 153.

298. Post, *supra* note 296, at 44; see also *id.* at 43 (elaborating on the point); Williams, *supra* note 267, at 53 (same).

## SUSPENSION AS AN EMERGENCY POWER

release died out and fears of hanging grew stronger, the weaker ones sought permission to tell Major Merrill what they knew. This developed evidence on which to make further arrests . . . .”<sup>299</sup> Eventually, a large portion of those arrested were indicted on federal charges (typically violations of the criminal provisions in the 1871 Act).<sup>300</sup> Others were released after telling Merrill all that they knew.<sup>301</sup> Still others were detained as witnesses for the government in future prosecutions.<sup>302</sup> The government only actively prosecuted a handful, though many of those arrested were convicted on the basis of confessions made during their detentions.<sup>303</sup>

This extraordinary show of force by the federal government helped to restore some measure of order in the area by the following year.<sup>304</sup> In retrospect, however, many have raised questions about whether the federal response was severe enough, given that the Klan regrouped and continued in many of its old ways within months of Merrill’s initial sweep of arrests.<sup>305</sup> As the dust settled, Congress evaluated Grant’s invocation of the suspension power and concluded, “The results of suspending the writ of *habeas corpus* in South Carolina show that where the membership, mysteries, and power of the organization have been kept concealed this is the most and perhaps only

- 
299. Post, *supra* note 296, at 44; *see also* WILLIAMS, *supra* note 267, at 47 (noting several murders that came to light under these circumstances); Post, *supra* note 296, at 44 (“By this means [Merrill] gathered an accumulating mass of testimony, each day bringing forth further clues for further arrests.”).
300. *See* JAMES E. SEFTON, *THE UNITED STATES ARMY AND RECONSTRUCTION 1865-1877*, at 226 (1967); WILLIAMS, *supra* note 267, at 49, 56, 61.
301. *See* WILLIAMS, *supra* note 267, at 47.
302. *See* Letter from George H. Williams to Ulysses S. Grant, *supra* note 294, exhibit A, at 8 (listing many witnesses held without charges, including one “very important witness for Government”).
303. Prosecuting all offenders was beyond the capacity of the courts. *See* WILLIAMS, *supra* note 267, at 111 (noting that 1188 Enforcement Act cases remained pending in South Carolina alone at the end of 1872). Most of the South Carolina Klan cases were never tried. *See id.* at 122.
304. *See* CALHOUN, *supra* note 289, at 31; Francis B. Simkins, *The Ku Klux Klan in South Carolina, 1868-1871*, 12 J. NEGRO HIST. 606, 646 (1927) (noting that Merrill’s 1872 report stated that order had been restored to the area). President Grant later pardoned or offered clemency to Klan members captured in the South Carolina efforts. *See* WILLIAMS, *supra* note 267, at 125.
305. *See* KACZOROWSKI, *supra* note 268, at 72, 112 (arguing that greater success would have been achieved had it been exclusively a military effort without any court involvement); Richard Zuczek, *The Federal Government’s Attack on the Ku Klux Klan: A Reassessment*, 97 S.C. HIST. MAG. 47, 62-64 (1996) (noting that by September 1872, Merrill admitted that his earlier optimism was “premature”).

effective remedy for its suppression.”<sup>306</sup> This report suggests that the political branches recognized the need for expanding executive authority to arrest preventively when combating a crisis on the scale of that wrought by the Klan.<sup>307</sup>

Besides standing as entirely inconsistent with the narrow view of suspension, moreover, the Klan episode also underscores many of its flaws. Had Merrill been restrained from arresting anyone merely on suspicion of Klan affiliation, federal efforts at breaking the Klan and restoring order would have failed at the outset. As noted, such efforts were necessary in order even to have a chance at breaking through the organization’s secrecy and undercutting its domination in the area. Further, without question, Major Merrill ordered arrests and detentions that would not have been lawful in the ordinary course. Indeed, the chief federal prosecutor in the area recognized at the time that most of the crimes for which the government had indicted the suspected Klan members had occurred prior to enactment of the Enforcement Act’s criminal provisions and were, therefore, potentially constitutionally problematic under the Ex Post Facto Clause.<sup>308</sup> Congress, moreover, never enacted officer immunity legislation to go along with this suspension. Thus, if the narrow view of suspension is correct, Merrill should have been held both civilly and criminally accountable for these and other arrests that he made. He was not, and, in my view, this is as it should have been.<sup>309</sup>

\* \* \*

In the end, a review of the influences weighing on the Framers when they drafted the Suspension Clause, the Founding-era debates over the suspension power, and the subsequent episodes of suspension in this country overwhelmingly demonstrates that suspension has always been understood in the United States as a means by which the executive is freed from the legal

---

**306.** S. REP. NO. 42-41, pt. 1, at 99 (1872); *accord supra* note 292.

**307.** As one commentator described things, the Klan had “created a virtual reign of terror in the up-country of South Carolina.” Herbert Shapiro, *The Ku Klux Klan During Reconstruction: The South Carolina Episode*, 49 J. NEGRO HIST. 34, 48 (1964); *see also* Everitt, *supra* note 292, at 26 (making a similar observation); Zuczek, *supra* note 305, at 49 (calling the Klan “a widespread, organized paramilitary force”).

**308.** Letter from D.T. Corbin, Dist. Att’y, to Amos T. Akerman, Att’y Gen. (Nov. 13, 1871) (on file with author), *microformed on Record Group 60*, Microform Publication M947, Roll 1 (Nat’l Archives).

**309.** My research has uncovered no reported judgments against Merrill for arrests that he ordered.

## SUSPENSION AS AN EMERGENCY POWER

constraints that govern his power to arrest and detain in the absence of a suspension.<sup>310</sup> Further, the two remaining episodes of suspension in American history,<sup>311</sup> including the suspension declared in the Hawaiian Islands immediately following the bombing of Pearl Harbor in World War II,<sup>312</sup> are fully consistent with this conclusion.

One need not be an originalist to care about the Suspension Clause's history, for what the Founding generation thought "is surely of interest . . . to anyone trying two hundred years later to figure out what the Constitution means."<sup>313</sup> The same could easily be said of the views held by those who, for the first time in our nation's history, witnessed circumstances dire enough to

310. I should add here that by no means do I suggest that every action taken by the political branches during these episodes was necessarily constitutional. Cf. Currie, *supra* note 184, at 1225 ("Wars place unusual strains on constitutions, and the Civil War was no exception."); accord *infra* text accompanying notes 402-408.
311. These episodes took place in a territorial setting and did not involve a timely decision by Congress that circumstances warranted suspension. Thus, it is unclear how well these examples inform the debate over the meaning of the Suspension Clause. The first suspension followed under a 1902 declaration by the governor of the Philippines Territory. See *Fisher v. Baker*, 203 U.S. 174, 179-81 (1906); see also Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 691, 692 (authorizing the President or governor to suspend the writ as necessary). During this period, persons were detained without charges and for preventive purposes. See *Barcelon v. Baker*, 5 PHIL. REP. 87, 89-91 (S.C., Sept. 30, 1905); Estelito P. Mendoza, *The Suspension of the Writ of Habeas Corpus: Suggested Amendments*, 33 PHIL. L.J. 630, 632 (1958) ("To legally detain them, certain legal requirements had to be satisfied. But conditions then existing did not permit compliance with such requirements. Hence, the suspension.").
312. This suspension followed under a gubernatorial proclamation, approved by the President, and came along with a declaration of martial law. See *Duncan v. Kahanamoku*, 327 U.S. 304, 307-08 (1946); Garner Anthony, *Martial Law, Military Government and the Writ of Habeas Corpus in Hawaii*, 31 CAL. L. REV. 477 (1943); accord Act of Apr. 30, 1900, ch. 339, § 67, 31 Stat. 141, 153 (authorizing in the Hawaiian Organic Act the governor to suspend "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it"). During this period, citizens were detained for "subversive" activities and without charges. For details on three habeas actions initiated on behalf such persons, see Anthony, *supra*, at 483-98. In one such action, the Ninth Circuit upheld the detention in language embracing a broad view of suspension. See *Ex parte Zimmerman*, 132 F.2d 442, 446 (9th Cir. 1942); see also *infra* text accompanying notes 385-386 (quoting the decision). For more on this suspension episode, consult generally Anthony, *supra*; and Tyler, *supra* note 9, at 346-47, 357-59. Congress never enacted officer immunity legislation applicable to the Philippine or Hawaiian suspensions.
313. David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. CHI. L. SCH. ROUNDTABLE 161, 218 (1995); cf. David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 865 (1994) (noting that early congressional debates provide "important evidence of what thoughtful and responsible public servants close to the adoption of the Constitution thought it meant").

warrant invoking the “extreme” emergency power recognized in the Suspension Clause, as occurred during and immediately following the Civil War. My own view is that history alone should not make the case for a particular interpretation of the Constitution, but it is surely relevant insofar as it sheds light on how we might wrestle with the modern problems posed by the war on terrorism and the role of the Suspension Clause.

#### IV. UNDERSTANDING SUSPENSION AS AN EMERGENCY POWER

This Part now turns to focus on how the Suspension Clause fits into our broader constitutional framework. Further, because many view “[t]he Suspension Clause, like other constitutional guarantees, [as] a part of an evolving constitution tradition,”<sup>314</sup> this Part will inquire more generally into which view of suspension makes the most sense from a functional perspective. As set forth below, these inquiries yield an answer entirely consistent with the historical office of suspension—namely, one that recognizes it as an emergency power that expands the scope of executive authority while “suspending” those rights traditionally given meaning by the Great Writ.<sup>315</sup> The narrow view of suspension, by contrast, does not hold up under any of these inquiries.

##### A. Reading the Suspension Clause in Context

The text of the Suspension Clause and its placement in Article I strongly suggest that it recognizes an emergency power (albeit one that is strictly constrained by its own terms).<sup>316</sup> To be sure, the Clause is framed in the negative and therefore merely implies that what it prohibits—namely, suspension in the absence of a “Rebellion or Invasion”—is permitted where

---

314. Neuman, *supra* note 78, at 970; *see also id.* at 980 (noting problems with pure originalist inquiries into the meaning of the Suspension Clause); *infra* note 404 (quoting Paul Freund).

315. A full explication of how suspension “maps” into the Constitution—or, more particularly, which rights are subject to suspension by Congress when it suspends the privilege—is a topic itself worthy of an entire article. My preliminary thoughts on the subject are set forth below. *See infra* Section IV.C.

316. The constraints framed within the Suspension Clause are in addition to Article I’s general constraints on lawmaking. *See* U.S. CONST. art. I, § 7. As history has demonstrated, together these constraints render enacting suspension legislation exceedingly difficult. *See supra* Section I.D (discussing the suspension proposal that did not pass during the Jefferson Administration); *supra* Section III.A (noting that it took two years of deliberations before the Civil War Congress enacted suspension legislation); *infra* Part V (exploring separation-of-powers matters in the suspension context).

## SUSPENSION AS AN EMERGENCY POWER

those conditions exist.<sup>317</sup> For this reason, scholars have observed that the suspension authority is best understood as “an ancillary power to implement one of Congress’s substantive powers that is relevant to the particular emergency.”<sup>318</sup> Thus, Gerald Neuman has suggested that technically speaking it is the marrying of the Suspension Clause with other enumerated legislative powers that together comprise a “power to detain.”<sup>319</sup> The key point is that the Clause carries with it the affirmative recognition of an emergency *power* for addressing certain extraordinary situations and effectively defending the constitutional order.<sup>320</sup>

This is, of course, how suspension has always been viewed. One need only think back to the English suspensions of the sixteenth and seventeenth centuries and the pre-Convention suspensions in the colonies, which by their terms “authorized and empowered” the executive to arrest and detain certain classes of persons. Participants in the Founding era debates similarly spoke of a suspension “power.” In the Burr Conspiracy suspension debates, for example, Representative Eppes observed that the Suspension Clause encompasses “one of the most important powers vested in Congress by the Constitution.”<sup>321</sup> The Civil War and Reconstruction Congresses also viewed suspension in this way,<sup>322</sup> for they included strict conditions on its exercise when they delegated the power to the President.

At the time of the Founding, moreover, the Framers “understood that individual rights begin where federal power ends.”<sup>323</sup> Thus, they believed that it was only where the new Constitution expressly enumerated affirmative government powers that any rights had been surrendered by the plan of the

---

317. U.S. CONST. art. I, § 9, cl. 2.

318. Neuman, *supra* note 31, at 600 (listing, among other powers, the war power and the power to put down insurrections and repel invasions).

319. *Id.* at 600 n.193.

320. This is presumably what Justice Jackson meant when he referred to the Suspension Clause as the Constitution’s only “express provision for exercise of extraordinary authority because of a crisis.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring).

321. 16 ANNALS OF CONG. 409 (1807) (statement of Rep. Eppes).

322. Recall, for example, Senator Doolittle’s description of suspension as “cloth[ing]” the executive “with this power,” which he defined as “the authority to seize” persons on a preventative basis. CONG. GLOBE, 37th Cong., 3d Sess. 1194 (1863) (statement of Sen. Doolittle).

323. Clark, *supra* note 25, at 346; *see also* Hamburger, *supra* note 25, at 31 (noting a similar understanding).

Convention.<sup>324</sup> This explains why, as noted earlier, Alexander Hamilton (like other Federalists) argued that an enumerated bill of rights was unnecessary; more importantly for our purposes, Hamilton emphasized that the Suspension Clause very much confirmed that except in the extraordinary situations in which the suspension power could be invoked, the rights classically embodied in the Great Writ would stand inviolate.<sup>325</sup> It naturally follows that the Framers viewed the rights encapsulated in the Great Writ (most especially a right to due process) as having been surrendered during those situations when the Constitution recognizes a suspension power. This insight accounts for both the passionate debate over whether to recognize *any* suspension power in the Constitution and the consistent historical understanding that the rights traditionally embodied in the Great Writ and the suspension power are “flip sides of the same coin.”<sup>326</sup> Recall Representative Eppes’s description of the Suspension Clause during the Burr Conspiracy debates, which perfectly encapsulates this point. As he observed, suspension equates with a “power which suspends the personal rights of your citizens, which places their liberty wholly under the will” of the executive.<sup>327</sup>

This view of suspension also makes sense in light of the manner in which the Framers conceived of the relationship between rights and remedies. As Justice Harlan once observed, the Framers tended “to link ‘rights’ and ‘remedies’ in a 1:1 correlation.”<sup>328</sup> To be sure, *Marbury*’s proposition that for every right there is a remedy has not held up entirely well over time,<sup>329</sup> but my

---

324. See Clark, *supra* note 25, at 333-51.

325. THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 69, at 453.

326. Clark, *supra* note 25, at 350 (making this observation in the context more generally of how “both Federalists and Antifederalists understood individual rights and limited federal powers”). Hamilton’s comment also confirms that the Founding generation equated the writ of habeas corpus with the right to due process and other attendant rights that found express enumeration immediately on the heels of the Constitution’s ratification in the Bill of Rights. For more on the connection of the Great Writ and due process, see *supra* text accompanying notes 60-70.

327. 16 ANNALS OF CONG. 409 (1807) (statement of Rep. Eppes).

328. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 400 n.3 (1971) (Harlan, J., concurring). Justice Harlan made this observation in a case in which the Court recognized a damages remedy implied in the Constitution. For the plaintiff in that case, as Justice Harlan noted, “it [wa]s damages or nothing.” *Id.* at 410. *Bivens*, to be sure, has been deemed “constitutional common law,” see Henry P. Monaghan, *The Supreme Court, 1974 Term – Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 23-24 (1975), but at its broadest, it certainly underscores the rights/remedy paradigm.

329. See, e.g., Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778-81 (1991) (noting exceptions to this rule); accord *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (observing that the law

## SUSPENSION AS AN EMERGENCY POWER

point is only this: The Framers expressly recognized and gave constitutional significance to the habeas corpus remedy, and they equated that remedy with the rights that it protected. It would seem to follow that they viewed the removal of that remedy (as authorized in specified circumstances) as concomitantly displacing those rights. Thus, when the suspension power is exercised consistent with the terms of the Constitution, because it displaces such rights, it can in fact authorize arrests and detentions that would not be permissible in the absence of valid suspension legislation. Indeed, it follows in turn that when Congress wields this emergency power and suspends the privilege, Congress is making “law” that the executive bears a duty to execute faithfully.<sup>330</sup> Thus, the narrow view’s reliance on the executive oath puts things precisely backwards.

To be sure, the Constitution “presupposed a going legal system, with ample remedial mechanisms.”<sup>331</sup> Thus, the discussion above does not necessarily rule out the conclusion that the Framers might have assumed that certain common law rights to be free from false imprisonment and other tortious conduct would remain intact in the event of a valid suspension. But what evidence we have of how the Founding generation understood the relationship between common law rights/remedies and suspending the writ strongly suggests that they equated a suspension with displacing such rights and remedies. The suspension tied to Shays’s Rebellion, for example, by its terms displaced “any Law, Usage or Custom” at odds with the expanded executive discretion to arrest that followed under the suspension<sup>332</sup>—a discretion that appears to have been universally understood at the time as leaving those detained during the suspension “without legal remedy.”<sup>333</sup>

Contemporary notions of officer accountability further underscore that the Founding generation understood rights to relate to power and remedies in this way. Consider *Little v. Barreme*.<sup>334</sup> Following orders from the President, Captain George Little libeled a vessel. But in giving the order, the President had acted beyond the scope of the authority conferred on him by Congress. In

---

must furnish a “remedy for the violation of a vested legal right”). There is obviously an extensive body of literature on the relationship between rights and remedies. See, e.g., Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

330. See U.S. CONST. art. II, § 1, cl. 7 (setting out the executive oath: “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States”).

331. Fallon & Meltzer, *supra* note 329, at 1779.

332. Act of Nov. 10, 1786, ch. 41, 1786-1787 Mass. Acts 102, 102.

333. MINOT, *supra* note 112, at 65; see *supra* Section II.B.

334. 6 U.S. (2 Cranch) 170 (1804) (Marshall, C.J.).

a subsequent damages suit brought by the owner of the ship, Little argued that he should not be held liable for complying in good faith with orders from his superior. The Marshall Court rejected this argument, holding instead that, to the extent that the President's orders were "not strictly warranted by law," Little was "answerable in damages to any person injured by their execution."<sup>335</sup> As Chief Justice Marshall concluded, "[T]he instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass."<sup>336</sup> The Court's opinion suggests that had the act been legal (that is, authorized by a valid exercise of legislative power), the vessel's owner would have had no right to damages.<sup>337</sup> This same idea is also demonstrated by the Court's post-Civil War decision in *Mitchell v. Clark*,<sup>338</sup> which suggested that Congress's power to confer officer immunity (thereby effectively defeating any claim to a remedy) is tied entirely to the question whether Congress has the *power* to authorize the executive conduct outright.<sup>339</sup>

The examples above also suggest that to the extent that Morrison contends that Congress could immunize arrests deemed unconstitutional by the narrow

---

335. *Id.* at 170. To be sure, Chief Justice Marshall's opinion suggests that he was "troubled" by the conclusion that the officer enjoyed no good faith immunity defense, and therefore one could read it as a harbinger of officer immunity doctrinal developments to come. *Cf.* Barron & Lederman, *supra* note 249, at 969 (observing that Chief Justice Marshall seemed "troubled by his ultimate conclusion").

336. *Little*, 6 U.S. (2 Cranch) at 179. Of course, the understanding of the period was that if an officer's actions were authorized by federal law, this was a complete defense to a state lawsuit pursuant to the Supremacy Clause.

337. *See id.* The Court did suggest that an action might lay directly against the government here, a point that might be read to suggest the possibility of a temporary takings claim under the Fifth Amendment. For more on the details of *Little*, see Barron & Lederman, *supra* note 249, at 968-70.

338. 110 U.S. 633 (1884).

339. *See id.* at 640 ("That an act passed after the event, which in effect ratifies what has been done, and declares that no suit shall be sustained against the party acting under color of authority, is valid, so far as Congress could have conferred such authority before, admits of no reasonable doubt. These are ordinary acts of indemnity passed by all governments when the occasion requires it."). The issue presented in *Mitchell* was whether Congress had the authority to impose a statute of limitations on suits brought in state court against federal officers. The Court held in the affirmative, over the dissent of Justice Field.

## SUSPENSION AS AN EMERGENCY POWER

view,<sup>340</sup> that is a proposition the Framers would have dismissed out of hand.<sup>341</sup> Indeed, *Little v. Barreme* indicates that the Founding generation rejected the notion that an officer could enjoy immunity for conduct that was otherwise illegal, regardless of whether he acted in good faith or was following presidential orders.<sup>342</sup> Other contemporary evidence points to the same conclusion.<sup>343</sup> To the extent that Morrison does not advocate that Congress may immunize broader executive conduct than it could authorize *ex ante*, it is hard to see why Congress cannot simply authorize such conduct directly via the express terms of a suspension itself.

Continuing, there are additional problems with the narrow view's position that a suspension does not affect existing individual rights. Following the point to its most logical conclusion would not allow for congressional immunization of the deprivation of such rights but instead would rewrite the Suspension Clause as a sort of "Just Compensation Clause for Liberty."<sup>344</sup> The idea would go something like this: Congress—whenever it viewed the deprivation of liberty as an essential means for putting down the crisis at hand—could suspend the privilege (thereby extinguishing the remedy of discharge), but it would have to "pay" for any temporary taking of liberty that was not otherwise legal. (Continuing with the analogy, we might say that the liberty had been

---

340. Morrison embraces the *Mitchell* standard, see Morrison, *supra* note 13, at 1594-96, but at other places posits that Congress has "considerable leeway in this area" and "fairly broad" authority to provide for immunity, *id.* at 1577, 1542; see also *id.* at 1595 (positing that the breadth of permissible immunity is a question "committed principally to Congress").

341. See *id.* at 1583, 1584-90.

342. *Accord* Meigs v. McClung's Lessee, 13 U.S. (9 Cranch) 11 (1815); *United States v. Peters*, 9 U.S. (5 Cranch) 115 (1809); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 468 (1987) ("Under the legality model of the Marshall Court, objective illegality determined liability for compensatory damages."). The law has evolved considerably on this score. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (recognizing "qualified or good-faith" immunity); see also *infra* text accompanying notes 359-361.

343. For example, in one early congressional debate, a member of the House suggested that the Framers adopted a much narrower conception of indemnification than that embraced by the English (who at times did confer broad officer immunity by indemnification legislation). See, e.g., 16 ANNALS OF CONG. 564 (1807) (statement of Rep. Burwell) (defining "indemnification" as *not* meaning "an act of indemnity, in the British sense of the term, pleadable in bar both to an action for damages and to a prosecution for an offence" because "[s]uch an act might here be considered unconstitutional and void," and noting that "[a] remuneration for damages incurred has been the mode of indemnification adopted by our Government" (emphasis added)).

344. The Just Compensation Clause provides that private property may not "be taken for public use, without just compensation." U.S. CONST. amend. V.

taken “for public use.”<sup>345</sup>) Thus, Congress could not immunize such takings and would be obligated to compensate the relevant detainees out of the public fisc. There is no indication that the Framers thought of suspension in this way, nor does the Constitution’s text reflect such an understanding.<sup>346</sup> The reason is simple: the Framers viewed the *power* to suspend as equating with the displacement of the *rights* that traditionally find meaning and protection in the privilege of the writ of habeas corpus.<sup>347</sup>

### B. Giving Meaning to the Suspension Power

In trying to make sense of what it means to suspend the privilege, one must take into account the circumstances in which the power constitutionally may be

---

345. Although our Constitution does not typically allow forced sales of the rights there enshrined, it does permit the government to take property “for public use.” See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987) (“As its language indicates . . . [the Fifth Amendment] does not prohibit the taking of private property, but instead places a condition on the exercise of that power.”). This rule applies with equal force during times of emergency. See *United States v. Russell*, 80 U.S. (13 Wall.) 623, 628 (1871) (noting that “[e]xigencies . . . do arise in time of war” that justify takings but that “the government is bound to make full compensation to the owner”); *id.* at 630 (viewing the Just Compensation Clause as “an implied promise on the part of the United States to reimburse the owner”). Thus, one might ask, if our Constitution does not allow even temporary takings of property in wartime to go uncompensated, why should the same understanding not follow with respect to temporary takings of liberty during emergencies? It bears highlighting that this proposition is distinct from that advocated by Eugene Kontorovich, who suggests that in certain situations in which mass detention would advance national security interests, “liability rules” should be adopted in the place of “property rules.” See Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755 (2004). Kontorovich specifically suggests that detainees would not enjoy an entitlement to the remedy of discharge; instead the government could detain them and pay damages later. See *id.* at 790-94. Significantly, Kontorovich does not limit his proposal to situations in which a valid suspension could be declared. See *id.* at 792 n.119. Accordingly, his proposal is seriously at odds with the Suspension Clause’s remedial promise. See *supra* text accompanying notes 30-32.

346. Indeed, the contrast between the wording of the Suspension Clause and the clarity with which the Framers secured the remedy of just compensation for takings of property could not be greater.

347. It is an intriguing idea all the same. Bruce Ackerman suggests that the government should compensate detainees swept up in a suspension “\$500 for every day they are deprived of freedom.” ACKERMAN, *supra* note 38, at 106. To the extent that a valid suspension does, as is argued here, displace underlying rights as opposed to merely the judicial remedy of discharge, it would seem that such compensation does not follow as constitutional mandate. But it is a requirement, all the same, that would raise the stakes of any decision on the part of Congress to invoke the suspension power; thus, the idea has much appeal as a matter of policy.

## SUSPENSION AS AN EMERGENCY POWER

invoked—namely, a “Rebellion or Invasion.” If history is prologue, then one can say with confidence that such circumstances are truly extraordinary. In this country, suspensions have been “rare and . . . essentially confined to those circumstances in which the dangers of chaos and lawlessness were so great as to warrant emergency measures tantamount to martial law.”<sup>348</sup> The question posed by such situations—that is, the question posed by our inquiry—can be stated as follows: how much power may be vested in the executive to address such conditions and restore the public order?

Consider the situation gripping the Hawaiian Islands on December 7, 1941. Within hours of the Japanese bombing of the Islands, the Territorial Governor (with the President’s approval) suspended the privilege, knowing the Islands to be under attack and fearing that the Japanese were attempting an invasion.<sup>349</sup> Assume that these circumstances satisfied the constitutional requirement of an “Invasion,” and assume further that the “public Safety” required the suspension. In the immediate wake of the bombing, there was utter chaos on the Islands, and little was known regarding the extent of the continuing Japanese threat. On the narrow view of suspension, even after lawfully suspending the privilege, the executive was constitutionally required to institute internal procedural safeguards to provide all those arrested and detained with timely review of their detentions to ensure that the requirements of due process were satisfied.<sup>350</sup> Indeed, per Morrison’s explication of that view, the executive potentially should have sought “an opinion on the constitutionality of a particular detention program” from the Office of Legal Counsel in the Department of Justice before instituting the same.<sup>351</sup> Is this really all that the “grave action” of suspension accomplishes? To state the question is to answer it, for in such circumstances the executive must act quickly, decisively, and with limited information at his disposal. But act he must, for the constitutional order itself is under attack. In these situations,

---

348. Shapiro, *supra* note 10, at 87. It bears noting here that I believe that a suspension cannot sweep in either scope or duration more broadly than the predicate conditions justify and that any challenge to a suspension on these grounds is justiciable. See Tyler, *supra* note 9, at 387-91.

349. See *Duncan v. Kahanamoku*, 327 U.S. 304, 307-08 (1946); Anthony, *supra* note 312, app. 1, at 507 (reprinting the full text of the Governor’s Proclamation); *id.* at 478 (detailing communications between Territorial Governor Poindexter and President Roosevelt).

350. See Morrison, *supra* note 13, at 1602-14. Morrison posits that I overreached in prior work by equating suspension with the displacement of a range of due process safeguards. See *id.* at 1609-10 (citing Tyler, *supra* note 9, at 384, 386-87). As the discussion above sets out, however, the narrow view infuses a suspension with little, if any, practical significance.

351. *Id.* at 1608. This is one of Morrison’s suggestions for how the executive can internalize and provide due process safeguards during a period of suspension.

generally there is no time for elaborate investigations preceding arrests, nor can or should the executive—who is, recall, responding to a dire military crisis—be asked to institute internally in the immediate wake of such arrests the processes and review that all agree need not be offered in the courts. The same lesson follows from studying the circumstances surrounding the Civil War suspension. Lincoln and his military officers were fighting a war and defending the very existence of our union. The notion that they should have provided within the executive branch the equivalent of habeas review during such a period is as remarkable as it is unsound.<sup>352</sup>

The point is simply this: “There are times when military exigency renders resort to the traditional criminal process impracticable.”<sup>353</sup> It is during just such extraordinary occasions (such “extreme emergenc[ies],” as Blackstone termed them)—*and only during such periods*<sup>354</sup>—that the extraordinary decision to suspend the privilege may be understood to free the executive to act quickly and decisively, and without fear of repercussion, to meet the crisis head-on and steer our constitutional ship back on course. Indeed, if in such dramatic times the suspension authority does not vest the executive with broader discretion than he normally may exercise in arresting and detaining individuals, then what does it accomplish? Put another way, what would be the point of suspending the privilege in these circumstances if not to free the executive to arrest on suspicion anyone who he believes poses a threat to the public safety?

---

352. To be sure, Morrison does not expressly state that the narrow view contemplates the equivalent of habeas review in the executive branch, *see id.* at 1614 (noting that due process can be “flexible enough to accommodate the nature of the national emergency at hand”); his definition of what due process requires the executive to provide, *see supra* note 54 (quoting Morrison’s definition of “fair process”), however, mirrors the *Hamdi* plurality’s definition of the same, *see id.* (setting out Morrison’s interpretation of the *Hamdi* standard). The *Hamdi* Court, moreover, was sitting in habeas review, the case having been brought as a petition for a writ of habeas corpus. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 511 (2004); *id.* at 538 (positing that “a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved”).

353. *Id.* at 561 (Scalia, J., dissenting).

354. Morrison advocates in favor of permitting Congress “some leeway to authorize extraordinary executive detention *without* suspending the writ,” Morrison, *supra* note 13, at 1539 (emphasis added). Although space does not permit exploring the idea in detail here, I offer a few words. Morrison apparently reads the Suspension Clause as contemplating a rather narrow conception of the suspension authority—a power that is limited by the terms of the Clause to two extreme situations of national emergency and that the political branches have rarely invoked in our nation’s history—while he also reads the Suspension Clause as not precluding Congress from authorizing extraordinary detention via ordinary legislation. I hold precisely the opposite view on both fronts.

## SUSPENSION AS AN EMERGENCY POWER

Anticipating this argument, Morrison asserts that a suspension remains significant on the narrow view because it relieves the executive from the burden of litigating in the courts the validity of arrests made during the emergency and from having to expose potential state secrets to justify arrests until the crisis has passed. To be sure, “[i]t would be a considerable burden on the officers who are seeking to cope with the emergency if they were required to attend to habeas litigation.”<sup>355</sup> Accordingly, all agree that a suspension relieves the officers of this burden in the judicial context. But the narrow view of suspension transplants much, if not all, of that burden—in effect, reimposing it—to the internal administrative context where the executive is said to be obligated to “implement core facets of due process” to ensure that no detentions are continued that could not be ordered in the absence of the suspension.<sup>356</sup> How could such “executive due process” be anything but summary if it does not require law enforcement and military officers to justify the arrests and detentions that they have made? Thus, even this long-accepted purpose of a suspension—that it is designed to relieve executive officials from justifying detentions so that they can focus exclusively on running a war or putting down an insurrection—is completely undermined by the narrow view of suspension.

As for the concern over state secrets, it is not at all clear that a suspension is necessary to address this problem. For example, under the Classified Information Protection Act (CIPA),<sup>357</sup> the government already enjoys considerable protections against the release of classified information to criminal defendants and the public. Under CIPA, upon a proper showing made to a judge in an *ex parte*, in camera proceeding, the government may be permitted “to delete specified items of classified information from documents to be made available to [a criminal] defendant . . . to substitute a summary of the information . . . or to substitute a statement admitting relevant facts that the classified information would tend to prove.”<sup>358</sup> To be sure, there may well

---

355. FARBER, *supra* note 102, at 191; *see also id.* (observing that suspensions, “by definition,” occur in “dire emergencies”).

356. Morrison, *supra* note 13, at 1609 (contending that “the executive can (and should) implement core facets of due process even during a period of suspension”).

357. 18 U.S.C. app. § 1-16 (2000).

358. *Id.* app. § 4; *see also* FED. R. CRIM. P. 16(d)(1) (providing that “[a]t any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief” and that “good cause” may be demonstrated by “a written statement that the court will inspect *ex parte*”). CIPA defines “classified information” as “information or material that has been determined by the . . . Government . . . to require protection against unauthorized disclosure for reasons of national security.” 18 U.S.C. app. § 1. National

be cases in which failing to turn over classified information will be so damaging to the criminal defendant's ability to mount a defense that due process demands the release of that information, but those cases are likely to be exceedingly rare, especially when one takes into account that the government often has the ability to proceed against a defendant on lesser charges.

Thus, adoption of a narrow view of suspension could very well render suspension entirely ineffective. Indeed, if a suspension cannot authorize arrests or detentions beyond those permissible in the normal course, government officers are extremely unlikely to alter their conduct during a suspension for fear of being subjected to damages suits or criminal prosecutions or even out of "an understandable reluctance to violate their oaths to support the Constitution and laws."<sup>359</sup> If anything, the threat of prosecution today is far more real than it was at the Founding.<sup>360</sup> In addition to this development, moreover, administrative and legal restrictions on official conduct have grown, as have the remedies available to aggrieved parties along with the complexity and cost of litigation itself. As a result, the perceived need to shield government officials from the risk of liability—and even from the threat of litigation itself—in order to ensure that officials will not be discouraged from taking vigorous action, has given rise to broad immunity doctrines of a kind that did not exist in England or in the early Republic.<sup>361</sup> To be sure, some believe that immunities have been extended too broadly or that any expansion of individual immunities should be accompanied by a corresponding expansion of governmental liability. Nonetheless, if even in "ordinary" times concerns about the risks posed to government administration by suits for redress have led to expanded immunities and a willingness to preclude redress, one might view the case for immunity to be stronger still when a genuine emergency has led Congress to take the dramatic step of suspending the privilege. In all events, the all too real potential for chilling officer action during a period of emergency is why the default rule in this context matters a very great deal.

---

security is defined in turn to mean "the national defense and foreign relations of the United States." *Id.*

359. Shapiro, *supra* note 10, at 90.

360. For elaboration of this point, see generally JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007), which discusses how keen apprehensions of criminal prosecution have been in connection with the war on terrorism.

361. See *supra* note 342; see also Fallon & Meltzer, *supra* note 329, at 1781-85 (explicating the expansion of officer immunity defenses and observing that "cases have always existed in which no effective redress could be obtained" in light of government and officer immunity doctrines).

## SUSPENSION AS AN EMERGENCY POWER

Morrison's explication of the narrow view does not meet this point; instead, it suggests that Congress may provide separately for immunity for such actions. Putting aside the fact that Congress has not generally been in the habit of passing such legislation<sup>362</sup> and that it is far from clear that Congress can immunize deprivations of liberty that it could not authorize outright,<sup>363</sup> officers may still hesitate to violate their respective oaths to honor the Constitution. All this at a time when "Congress has determined that emergency conditions justify extraordinary action, in particular, permitting detentions that would otherwise be subject to challenge in habeas corpus proceedings."<sup>364</sup> Thus, in order for a suspension to accomplish anything under the narrow view, which views suspension as merely stripping a legal remedy, the executive would have to violate his oath. The better view understands suspension as a means by which Congress may expand executive *power*.

Recall the narrow view's dual contentions that (1) arrests made within the scope of a valid suspension are not by the terms of the suspension thereby legalized and (2) officer suits for damages and criminal liability should lie for illegal arrests in the absence of a congressional conferral of officer immunity.<sup>365</sup> What is to stop a prisoner who was detained only very briefly at the outset of a suspension from suing for damages while the suspension remains in place? Morrison recognizes that this could happen under his view and declines to rule out that possibility all the same.<sup>366</sup> But this outcome, which would have

---

362. See *supra* Part III. Of course, as the Article contends above, this result follows from the fact that Congress has always viewed such legislation as unnecessary.

363. See *supra* text accompanying notes 341-343.

364. Shapiro, *supra* note 10, at 90. Note that well into the twentieth century, the only vehicle for civil damages suits against federal officers was state tort law. (Recognition by the Supreme Court of implied causes of action under the U.S. Constitution came much later in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), a decision at which more recent decisions have chipped away significantly, see, e.g., *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).) And, the Court has long recognized that state imposition of liability on federal officers can threaten federal functions. See, e.g., *Kendall v. Stokes*, 44 U.S. (3 How.) 87, 98-99 (1845) (holding that a federal officer would not be liable in damages if he "acted from a sense of public duty and without malice"); cf. *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871) (holding that state courts cannot issue writs of habeas corpus running to federal officers).

365. Presumably today this would only be true where the qualified immunity defense (among other immunities, such as the President's absolute immunity) does not lie. Cf. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (defining the contours of qualified immunity and contrasting absolute immunity).

366. See Morrison, *supra* note 13, at 1598-99 ("[S]ome individual detentions might last for only a small portion of the overall period of suspension. That was the case during the Civil War. Without a comprehensive, forward-looking grant of immunity in those circumstances, the

officers litigating in the courts the propriety of their arrests made during a suspension while the suspension and “Rebellion or Invasion” continue, undercuts the most basic premise of a suspension. If a suspension is intended to accomplish nothing else, it is supposed to remove the judiciary from the governing equation while freeing executive officers to focus exclusively on quashing the “Rebellion or Invasion” at hand. Both of these goals are entirely undermined by permitting those who were arrested consistent with the congressional directive to sue for damages and challenge the legality of their arrests during the pending crisis. (To be sure, one could argue that such suits should be stayed until the crisis has passed, but Morrison does not advocate this position,<sup>367</sup> and it is at best only a half-response.)

Further, if the narrow view is correct that suspension only precludes the habeas remedy of discharge and leaves intact all other legal remedies, one could imagine a host of other ways by which arrests made pursuant to a suspension could be attacked. To make the point more concrete, imagine that Congress enacts a suspension applicable to anyone who the President declares is or might be a member of al Qaeda. Would such an act preclude a lawsuit contending that the government is arresting suspected al Qaeda members without probable cause in violation of the Fourth Amendment and seeking to enjoin government officials from arresting such suspects going forward? (Such a lawsuit would not, as framed above, seek the discharge of any particular prisoner.) Seemingly, under the narrow view, this action would lie, for it is difficult to see a theoretical basis for distinguishing such an action from a subsequent damages action or criminal prosecution brought against an officer insofar as all of these seek remedial ends beyond those traditionally embodied in the habeas remedy of discharge. Each, moreover, equally undercuts the purpose of the suspension.

It has long been settled that the powers given by the Constitution to the political branches must be construed in light of “the purposes for which they were conferred.”<sup>368</sup> The narrow view of suspension, however, ignores this simple lesson. Thus, in one of the few decisions that has analyzed the effects of a valid suspension, the judge observed, “Unless the suspension changes the

---

courts could end up hearing suits seeking compensation for unlawful detention while the ‘rebellion or invasion’ is still threatening the nation and the writ is still suspended.”).

367. *See id.*

368. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824) (Marshall, C.J.); *see also* *United States v. Classic*, 313 U.S. 299, 316 (1941) (“If we remember that ‘it is a Constitution we are expounding,’ we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose.” (quoting *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819))).

## SUSPENSION AS AN EMERGENCY POWER

law, so to speak, for the time being, in regard to arrests and imprisonments, I am at a loss to conceive how the republic can be thereby preserved from imminent danger, or the public safety conserved.”<sup>369</sup> As we have already seen, members of Congress made the very same point on numerous occasions (recall Senators Collamer and Doolittle, among others) when debating whether to suspend the privilege, as did President Lincoln.

The point has also long resonated with the Supreme Court. Take the Court’s decision in *Ex parte Milligan*, decided in the immediate wake of the Civil War. There the Court held that Milligan was entitled to discharge from custody because he had been detained outside the scope of the 1863 suspension legislation and because his conviction by a military tribunal did not independently justify his continued detention.<sup>370</sup> Thus, the Court was not directly presented with the question whether a suspension expands executive power. Nonetheless, the majority did discuss the purpose served by a suspension in times of “great crisis.” As the Court observed,

It is essential to the safety of every government that, in a great crisis, like the one we have just passed through, there should be a power somewhere of suspending the writ of *habeas corpus*. In every war, there are men . . . wicked enough to counsel their fellow-citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies; and their influence may lead to dangerous combinations. *In the emergency of the times, an immediate public investigation according to law may not be possible; and yet, the peril to the country may be too imminent to suffer such persons to go at large.* Unquestionably, there is then an exigency which demands that the government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the persons arrested in answer to a writ of *habeas corpus*.<sup>371</sup>

In this passage, the Court recognized the very impracticality of mustering probable cause and providing due process in such circumstances (noting in particular that “an immediate public investigation according to law may not be

---

369. *McCall v. McDowell*, 15 F. Cas. 1235, 1243 (C.C.D. Cal. 1867) (No. 8673); see also *infra* text accompanying note 376 (quoting additional language in the opinion).

370. 71 U.S. (4 Wall.) 2, 116-18, 125-27 (1866). Specifically, the Court concluded that because Milligan had not been indicted by the next sitting grand jury, sections 2 and 3 of the 1863 Act forbade his continued detention. See *id.* at 116-18, 130.

371. *Id.* at 125-26 (second emphasis added).

possible”). Likewise, the majority appeared to recognize that the exigency vests some measure of “discretion” in the executive to make arrests.

To be sure, the *Ex parte Milligan* majority earlier observed that “[t]he suspension of the writ does not authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty.”<sup>372</sup> This broad statement concededly offers support for the narrow view. In response, the four concurring Justices asserted that “when the writ is suspended, the Executive is authorized to arrest as well as to detain.”<sup>373</sup> The matter was not formally presented in the case and, significantly, “no Justice on the Court said or implied that, despite the Act of suspension, detentions covered by its terms could be held unlawful.”<sup>374</sup> Further, the Civil War decision in *McCall v. McDowell*<sup>375</sup> confirms the conclusion that a valid suspension expands the scope of executive power. As the federal court presented with a challenge to an arrest made under Lincoln’s nationwide suspension reasoned, “The suspension being the virtual authorization of arrest without the ordinary legal cause or warrant, it follows that such arrests, pending the suspension, and when made in obedience to the order or authority of the officer to whom that power is committed, are practically legal.”<sup>376</sup> This end followed, the court explained, because we adopted an understanding of “the suspension of the privilege of the writ, whereby [personal] liberty was left at the discretion of the

- 
372. *Id.* at 115. The Court further observed that “[t]he suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it.” *Id.* at 130-31. As Gerald Neuman has pointed out, the Court’s explanation here “cuts against the conventional phrase, ‘suspension of the writ.’” Neuman, *supra* note 78, at 979.
373. *Ex parte Milligan*, 71 U.S. (4 Wall.) at 132, 137 (Chase, C.J., concurring in the judgment); *see also id.* at 136 (describing the 1863 Act as providing that “[a]ny person regarded as dangerous to the public safety might be arrested and detained until after the session of a grand jury”).
374. Shapiro, *supra* note 10, at 84; *id.* at 85 (“The disagreement was whether there were circumstances in which a valid suspension could be accompanied by a valid authorization to try a detainee before a military commission.”).
375. 15 F. Cas. 1235 (C.C.D. Cal. 1867) (No. 8673).
376. *Id.* at 1245; *see also In re Fagan*, 8 F. Cas. 947, 948 (D. Mass. 1863) (No. 4604) (dismissing writs of habeas corpus brought by draftees in light of the President’s suspension while observing that a suspension “preclude[s the court] from granting the privilege, benefit, or relief” sought by the petitioners). *But see Griffin v. Wilcox*, 21 Ind. 370, 372 (1863) (concluding that a federal suspension could not preclude state courts from granting the writ to federal prisoners, while also observing that “the suspension of the writ of *habeas corpus* does not legalize a wrongful arrest and imprisonment”).

## SUSPENSION AS AN EMERGENCY POWER

government for the time being.”<sup>377</sup> (As for the Civil War indemnity legislation, the *McCall* court concluded that such “acts of [C]ongress are merely declaratory of the law, as it resulted from the passage of the act suspending the privilege of the writ.”<sup>378</sup>) Several of the leading Civil War commentators on the suspension authority also adopted this conclusion.<sup>379</sup>

In subsequent decisions, the Court has gone even further in recognizing that where the country is faced with the kind of circumstances warranting a suspension, individual rights may be forced to yield to the “necessities of the

377. *McCall*, 15 F. Cas. at 1243.

378. *Id.* at 1245; *see also supra* note 266 (discussing the role of the Civil War indemnity statutes).

379. *See, e.g.*, HORACE BINNEY, THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION, PART I, at 52 (Philadelphia, C. Sherman & Son, 2d ed. 1862) (describing suspension as “a most dangerous power [that] is fortunately confined to the most dangerous times. In such times the people generally are willing, and are often compelled, to give up for a season a portion of their freedom to preserve the rest”); JOHNSTON, *supra* note 123, at 35-36 (disagreeing with Binney that suspension is an executive power but agreeing that “[t]o suspend the privilege of the Writ of Habeas Corpus, is to suspend the laws and the execution of the laws” and “the right itself,” while placing individual liberty under “executive fiat”); RANDALL, *supra* note 178, at 154 (“The compensating element in the situation is that [during a suspension], the ‘public safety’ is being guarded as the Constitution-makers contemplated; and . . . unavoidable wrong done to a few individuals may perhaps be tolerated in view of the promotion of general security.”); Fisher, *supra* note 28, at 455 (“In such a crisis some arbitrary power must be given. The sovereign . . . must be allowed to arrest on suspicion, without giving reasons . . .”). As Morrison notes, there are, to be sure, several treatises that support the narrow view. *See, e.g., supra* notes 15, 44 (collecting cites); *see also* Morrison, *supra* note 13, at 1571-74 (quoting various treatises). With that said, some treatises that may be read to support the narrow view are inconsistent on the point, at times embracing a broader view of that which a suspension accomplishes. *See, e.g.*, E.C.S. WADE & G. GODFREY PHILLIPS, CONSTITUTIONAL LAW 295 (1st ed. 1931) (“[A]rbitrary arrest and imprisonment in [times of emergency] can only be made legal by the intervention of Parliament, which takes the form of the suspension of the Habeas Corpus Acts.”). And a leading habeas authority on which Morrison relies, namely Hurd, never embraced the narrow view himself; to the contrary, the editor of his treatise’s second edition added one sentence in a footnote to that effect. *Compare* ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT: WITH A VIEW OF THE LAW OF EXTRADITION OF FUGITIVES 136-38 (Albany, W.C. Little & Co. 1st ed. 1858), *with* ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT: WITH A VIEW OF THE LAW OF EXTRADITION OF FUGITIVES 119-28 & n.2 (Frank H. Hurd ed., Albany, W.C. Little & Co. 2d ed. 1876) (containing the additional annotation: “The suspension of the privilege of the writ does not legalize a wrongful arrest and imprisonment; it only deprives the party thus arrested of the means of procuring his liberty, but does not exempt the person making the illegal arrest from liability to damages, in a civil suit, for such arrest, nor from punishment in a criminal prosecution”).

moment.” Thus, in *Moyer v. Peabody*,<sup>380</sup> the Court held that an action for damages did not lie against a governor and his subordinate officers based on arrests that they made while putting down a local insurrection. Writing for the Court, Justice Holmes found irrelevant the plaintiff’s allegations that he had been arrested and held for several months on the governor’s orders in the absence of probable cause and without being afforded anything resembling due process.<sup>381</sup> To the contrary, the Court held that so long as the governor had the authority under the state constitution to put down the insurrection and his actions were consistent with that authority, he possessed the power to order arrests “not necessarily for punishment, but . . . by way of precaution to prevent the exercise of hostile power.”<sup>382</sup> The Court concluded, “When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment.”<sup>383</sup> *Moyer*’s breadth is troubling in many respects because the detention followed from a unilateral decision by the executive without legislative consent to engage in preventive detentions (and all this in the apparent absence of a “Rebellion or Invasion”). Thus, I do not fully embrace the decision in light of my views, explored below, on the importance of legislative involvement in any decision to suspend the writ as well as the strict constitutional limitations on when a valid suspension may be declared. All the same, *Moyer* does stand squarely for the proposition that in times of great crisis individual rights may be suspended along with any right to legal remedy.

And although *Moyer* is not a case involving a federal suspension of the privilege, the Court has described the decision as speaking to “the power of the military simply to arrest and detain civilians interfering with a necessary military function at a time of turbulence and danger from insurrection or war”—that is, preventive detention.<sup>384</sup> Further, in a case challenging the legality of the practice of preventive detention during the World War II suspension in the Hawaiian Islands, the Ninth Circuit relied on both *Ex parte Milligan* and *Moyer* for the proposition that “a prime purpose of the suspension of the writ is to enable the executive, as a precautionary measure, to detain without interference persons suspected of harbouring designs harmful to the

---

380. 212 U.S. 78 (1909).

381. *See id.*

382. *Id.* at 84-85.

383. *Id.* at 85 (“Public danger warrants the substitution of executive process for judicial process.”).

384. *Duncan v. Kahanamoku*, 327 U.S. 304, 314 & n.10 (1946).

## SUSPENSION AS AN EMERGENCY POWER

public safety.”<sup>385</sup> “Where taken in the genuine interest of the public safety,” the Ninth Circuit concluded, such measures “are not without, but *within*, the framework of the constitution.”<sup>386</sup> Together, these decisions are representative of a point that bears emphasis: there does not appear to be a single case that has awarded a non-habeas form of redress (such as damages) for action taken pursuant to a valid suspension, much less a consistent tradition of awarding such redress.<sup>387</sup>

Accordingly, the lesson here is that even though our constitutional tradition is built on the cornerstone of individual liberty, we recognize that in certain extraordinary circumstances Congress may vest the executive with discretionary authority over individual liberty as a necessary means of preserving the constitutional order itself.<sup>388</sup> Indeed, this is precisely why modern jurists describe the decision to suspend the privilege as both a

---

385. *Ex parte Zimmerman*, 132 F.2d 442, 446 (9th Cir. 1942) (citing *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 125 (1866); *Moyer*, 212 U.S. at 84, 85); *see id.* (“[T]he purpose of the detention of suspected persons in critical military areas in time of war is to forestall injury and to prevent the commission of acts helpful to the enemy.”).

386. *Id.* (emphasis added). The Ninth Circuit suggested that it would have disregarded the existing suspension in the event that a proper showing had been made by Zimmerman that his detention was “unrelated” to the danger threatening the Islands or resulted from “bad faith” on the part of the Board. *See id.* One could infer from this statement that the Court of Appeals was not reluctant to review whether the executive was abusing the suspension power during the relevant period, but that so long as the detentions appeared to have some connection to the underlying justification for the suspension, it would stay its hand. This practice, generally speaking, marries with my own views about what courts should do in these cases. *See infra* Part V. Notably, the *Zimmerman* dissent fully agreed with the proposition that so long as “the action of the military [was] reasonably necessary for it ‘to execute the Laws of the Union, suppress Insurrections and repel Invasions’ and to protect each of the states ‘against invasion,’” then it was proper. 132 F.2d at 451, 453 (Haney, J., dissenting) (quoting U.S. CONST. art. I, § 8, cl. 15; *id.* art. IV).

387. To be sure, the post-Civil War decision *Beckwith v. Bean*, 98 U.S. 266 (1878), on which Morrison relies, *see Morrison*, *supra* note 13, at 1564-65, does appear to contemplate that such redress could be awarded, but the Court in the end remanded the case for a new trial and more importantly reserved all relevant issues on this question, stating, “We express no opinion as to the construction of [the 1863 and 1867 statutes], or as to the questions of constitutional law which may arise thereunder.” *Beckwith*, 98 U.S. at 285.

388. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 552 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (acknowledging that “in a moment of genuine emergency, when the Government must act with no time for deliberation, the Executive may be able to detain a citizen if there is reason to fear he is an imminent threat to the safety of the Nation and its people”); *Rumsfeld v. Padilla*, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting) (“Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction.”).

“stupendous[]”<sup>389</sup> and “grave action.”<sup>390</sup> This is also why such a decision should only be made as a true last resort.

### C. Mapping the Suspension Clause Within the Constitution

If, as this Article contends, a valid exercise of the suspension authority by Congress does in fact expand the scope of executive power to arrest and detain, there remains the question of how far Congress may go. The lessons of the power/rights dichotomy explored above suggest that where a right is arguably bound up with the Great Writ, it is protected from blanket displacement by the Suspension Clause’s terms. That is, Congress should not be permitted to “turn off” that right in the *absence* of a suspension following from valid premises—namely, the existence of a “Rebellion or Invasion [where] the public Safety may require it.”<sup>391</sup> But in the event of a valid suspension, these rights *are* subject to displacement, albeit temporarily and only so much and so long as is necessary to address the crisis at hand.<sup>392</sup> Fleshing out the precise contours of how the suspension power intersects with the individual rights enshrined in our Constitution is a daunting task itself worthy of an entire article. This Section offers some preliminary thoughts on the matter.

It is best to highlight at the outset of this task that habeas traditionally has concerned itself with “detention *simpliciter*.”<sup>393</sup> Thus, functionally speaking, it is the assertion of those rights that would attack the legality of one’s detention that are most vulnerable to suspension. Start with an easy example—the core due process right to demand that one’s custodian justify to a court the legal basis for one’s detention. This right is obviously subject to suspension, for it is just another means of describing that which is offered in habeas review. Similarly, other rights that are functionally bound up with the core due process right and the recognition of which would undercut the purpose of a suspension

---

389. Transcript of Oral Argument at 57–58, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2007) (No. 05–184) (quoting Justice Souter).

390. *Hamdi*, 542 U.S. at 575 (Scalia, J., dissenting).

391. U.S. CONST. art. I, § 9, cl. 2.

392. I elaborate here on prior work. See Tyler, *supra* note 9, at 385–88.

393. *Fay v. Noia*, 372 U.S. 391, 430 (1963), *overruled on other grounds* by *Wainwright v. Sykes*, 433 U.S. 72 (1977); see also *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973) (describing the “core” of the privilege embodied in the Great Writ as a challenge to the “fact or duration” of confinement).

## SUSPENSION AS AN EMERGENCY POWER

should be understood as subject to suspension.<sup>394</sup> These rights include the right to demand reasonable bail under the Eighth Amendment, a claim that obviously provides a vehicle for release from detention.<sup>395</sup> They likely include as well the Sixth Amendment right to indictment and speedy trial, for surely it is not the case that as part of a valid suspension, one is precluded from demanding that a custodian justify the grounds of a detention to a court but nonetheless one can demand a speedy trial on criminal charges in order to garner an opportunity to win one's freedom.<sup>396</sup> The list seemingly also includes the protections embodied in the Fourth Amendment that one may not be arrested in the absence of a judicial warrant or probable cause. Finally, the same must be said of any related right to "executive due process," which would seem theoretically to work in tandem with the probable cause component of the Fourth Amendment. This is not only because these rights find life and activity in the Great Writ, but also because they functionally relate to the underlying justifications for detention. For this reason, recognition of these rights during a period of suspension would undermine the purpose of the suspension in the first instance.<sup>397</sup>

By contrast, it would seem that rights not attendant to the underlying basis of a detention (that is, those that do not speak to the lawfulness of an arrest and detention *per se*) should not be understood as subject to displacement via a suspension.<sup>398</sup> This conclusion follows from the traditional marriage of the rights protected and given meaning in the Great Writ—which do speak to the legality of detention on its face—and the suspension power. Thus, for example, there is a strong argument to be made that the restraints embodied in the Fifth

---

394. Cf. Collings, *supra* note 30, at 340 (observing that in England, when Parliament enacted a suspension of the writ, the Habeas Corpus Act ceased to operate and this "allow[ed] confinement without bail, indictment, or other judicial process").

395. Cf. *United States v. Salerno*, 481 U.S. 739, 748 (1987) (upholding the Bail Reform Act against due process and Eighth Amendment challenges).

396. Cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 573 (2004) (Scalia, J., dissenting) (asserting that in the absence of a suspension, Hamdi had a right to be charged or released). Of course, one could argue that this right is not relevant insofar as the detainee is not being held on any criminal charges.

397. With that said, one should be free to challenge a conviction rendered during a period of suspension to the extent that the conviction serves as justification for detaining the prisoner *after* the suspension has lapsed, as Milligan was allowed to do. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); see also *Duncan v. Kahanamoku*, 327 U.S. 304, 307-08 (1946) (permitting a similar challenge); Shapiro, *supra* note 10, at 91-92 (making this same point). The same follows with respect to any sentence attendant to a conviction (including, of course, a death sentence).

398. See Shapiro, *supra* note 10, at 91 (adopting a similar view).

and Eighth Amendments governing the treatment of prisoners should not, under any circumstances, be understood as subject to displacement by a valid suspension.<sup>399</sup> To be sure, one could imagine the same functional arguments set forth above being advanced in favor of the position that in a true emergency, Congress ought to be given latitude in determining the full breadth of that which a suspension may empower the executive to do. But here, history and tradition—neither of which support the idea that a valid suspension may reach rights beyond those attendant to the legality of a detention on its face—have much to say on this question and should, in my view, carry the day. (Similarly, habeas historically has not been the vehicle by which challenges to conditions of confinement and prisoner treatment are advanced.<sup>400</sup>) Thus, because a prisoner’s right not to be tortured has nothing to do with the legality of a prisoner’s confinement *per se*, it should not be amenable to displacement by an act suspending the privilege of the writ.<sup>401</sup>

---

399. *See id.*

400. *See* SHARPE, *supra* note 78, at 145-46 (noting that although “[t]he authorities are meagre,” they generally hold that habeas corpus is not available “to test the legality of the conditions of confinement or of some added restraint”). To be sure, at least one modern habeas treatise suggests that these claims may be cognizable in habeas corpus today. *See* 1 RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* 404 (4th ed. 2001). But only a handful of relatively modern decisions even arguably support such a proposition, and it is fairly clear that no such understanding of habeas existed at common law. To the extent that modern expansion of the scope of habeas corpus as a vehicle for enforcement of these rights could be advanced as a justification for “suspending” such rights in emergencies, such an end may prove to be a cautionary tale.

401. Accordingly, to the extent that one imprisoned may lay claim to these constitutional protections, the provision in the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, that precludes jurisdiction in *any* court “to hear or consider any . . . action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement” brought by an alien detainee deemed to be an enemy combatant (or awaiting such determination) is deeply problematic. *See id.* § 7(a), at 2635-36 (amending 28 U.S.C. § 2241(e)(2), and incorporating procedures set forth in the Detainee Treatment Act (DTA) of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2740, 2741-43). It is not, however, problematic because of anything in the Suspension Clause for the reasons set forth above. *See* Curtis A. Bradley, *Agora (Continued): Military Commissions Act of 2006: The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT’L L. 322, 335 n.87 (2007) (assuming “that the constitutional right of habeas corpus does not include a right to challenge conditions of confinement, as opposed to the legality of detention”). The MCA’s provision is instead problematic because of the principle—most prominently suggested in Henry Hart’s *Dialogue*—that some court must stand open to vindicate constitutional rights for which tradition assigns a judicial remedy. Hart, *supra* note 31, at 1372; *see also* Fallon & Meltzer, *supra* note 6, at 2063 (“[W]e believe that the total preclusion of review in the DTA and MCA is unconstitutional because it contravenes a broader postulate of the constitutional structure of which the Suspension Clause forms a part: that some court must always be open to hear an individual’s claim to possess a

## SUSPENSION AS AN EMERGENCY POWER

A host of complicated questions remain, however, regarding the full effects of a valid suspension. For example, consider the arrests of suspected Confederate sympathizers during the Civil War based on what today would be regarded as protected First Amendment speech.<sup>402</sup> Was that a valid exercise of the suspension authority, or does the First Amendment impose an external constraint on the power? And what of equal protection principles? May Congress suspend the writ with respect to members of a particular race or religion? These are very difficult questions, in no small part because our traditions respecting civil liberties during wartime have evolved considerably,<sup>403</sup> as has the reach of habeas over time.<sup>404</sup> Further, history has instructed that there are special reasons to worry about race-based and speech-based deprivations of liberty that the founding and Civil War generations may not have fully appreciated. Indeed, experience has shown that the political safeguards may fail to protect sufficiently the rights of discrete minorities. (One need only think of the internment of Japanese-Americans during World War II.) All the same, there exists a formidable argument, sounding in both historical and functional terms, that these constitutional rights are subject to at least some displacement by a suspension. Recall that a key purpose of suspension is to free the executive to engage in preventive detention. Our evolving traditions render it difficult to reach anything other than a tentative conclusion on this point without extensive explication of the matter, but

---

constitutional right to judicial redress of a constitutional violation.”). The Court’s recent decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), had no occasion to speak to this provision. See *id.* at 2274 (“[W]e need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.”).

402. See *Ex parte Vallandigham*, 68 U.S. 243 (1863); Stone, *First Amendment*, *supra* note 178 (elaborating on this history). Nevertheless Mark Neely has noted that many of the Civil War arrests had “nothing to do with political dissent.” Neely, *supra* note 247, at 16.
403. Cf. Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 281-89 (2002) (discussing this evolution).
404. Paul Freund once observed, “[A]s to habeas corpus I would say that whether or not a specific wrong could be redressed by habeas corpus . . . as of 1787 is not controlling, because the whole history of habeas corpus shows that the courts in England were capable of developing the writ, and we did not adopt an institution frozen as of that date.” Paul Freund, Professor of Law, Harvard Law Sch., Discussion (1953), in SUPREME COURT AND SUPREME LAW 59, 61 (Edmond Cahn ed., 1954) (recording Freund’s unedited remarks at a 1953 symposium on Willard Hurst’s article, *The Role of History*).

permitting attacks on detention during a period of suspension on these bases could undermine the functional purpose of the suspension.<sup>405</sup>

Many more questions remain. What about evidence obtained during a period of suspension? Recall how Major Merrill wielded detention as a tool for extracting confessions from suspected members of the Ku Klux Klan in South Carolina during the 1871 suspension. May such confessions later be used in criminal proceedings? They were then.<sup>406</sup> And what of evidence secured pursuant to a search that was undertaken without probable cause but consistent with implementing a valid suspension? May such evidence be used in a subsequent criminal prosecution? And, can a suspension be invoked, as it was by Lincoln, as a means toward insulating a draft from judicial review?<sup>407</sup> More broadly, for what purposes may individuals be detained during a period of valid suspension? May suspension only authorize the detention of those who are dangerous to the public safety for the specific kinds of reasons that justify the suspension in the first place?<sup>408</sup> These questions are difficult and important and deserve further study. The power to suspend the privilege is indeed stupendous, but its limits remain to be fully explored in future work.

\* \* \*

In the end, the immediate effect of a suspension is to facilitate the arrest and detention of individuals during times of crisis.<sup>409</sup> A valid suspension

---

405. One could conceive of a compromise position permitting certain kinds of challenges—for example, facial attacks on suspension legislation as opposed to as-applied attacks on specific arrests. Again, the matter deserves far greater explication than space allows here.

406. See *supra* Section III.B (noting as well that the executive relied upon the Reconstruction suspension as a basis for detaining government witnesses).

407. See Exec. Order (Aug. 8, 1862), in 7 MESSAGES AND PAPERS, *supra* note 177, at 3322 (suspending the privilege with respect to all draft evaders); Proclamation No. 7, 13 Stat. 734 (Sept. 15, 1863) (same). One court during this period honored the President's suspension as precluding its review of challenges to induction. See *In re Fagan*, 8 F. Cas. 947, 948-49 (D. Mass. 1863) (No. 4604).

408. Continuing, one might ask whether a suspension of the writ is permissible when a rebellion or invasion disrupts normal law enforcement, and if so, whether then all forms of law enforcement may be carried out on the basis of suspicion. Another question in this line is whether to the extent that Congress authorizes detention for specific purposes, the courts may review whether a particular detention followed from an unauthorized purpose. For some discussion of this point, consult Tyler, *supra* note 9, at 387-90.

409. As one treatise observes, "The effect of [a] suspension is to make it possible for military commanders or other officers to cause the arrest and detention of obnoxious or suspected persons, without any regular process of law . . ." HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW § 267, at 703-04 (4th ed. 1927).

## SUSPENSION AS AN EMERGENCY POWER

accomplishes this end by “suspending,” where it applies, those rights classically given protection and meaning by the Great Writ. In this way, the Great Writ and the suspension power are married in scope. It follows, accordingly, that “[d]etention [w]ithin the [s]cope of a [v]alid [s]uspension [i]s [n]ot [u]nlawful.”<sup>410</sup>

## V. SUSPENSION AND THE SEPARATION OF POWERS

For the reader who remains fearful of placing such extraordinary authority in the hands of the executive, a few words are in order on how the suspension power fits within the Constitution’s separation of powers. As explored above, the suspension power is an extraordinary power—one that constitutes a dramatic deviation from the principle of government accountability that lies in large measure at the heart of our constitutional structure. It is for this reason that exercises of the power must be closely guarded and carefully checked to ensure that the power is not invoked except in the most dire of national emergencies. This cautionary tale leads to two conclusions. First, the executive should not (save possibly in extraordinary and temporary circumstances) be permitted to declare unilaterally that existing circumstances warrant a suspension. Congress, the branch closest to the people, must agree that circumstances warrant taking the dramatic step of suspending the writ. Second, as I have argued previously, the constitutional limitations on the suspension power should be subject to judicial enforcement. Thus, in this context more than any other we should remember that the “Constitution diffuses power the better to secure liberty.”<sup>411</sup>

The first and most important check on executive abuse of the suspension power resides in the legislature. The case for viewing the suspension authority as a legislative power has been made before, and this Article shall not attempt to repeat at length those arguments.<sup>412</sup> In brief, it bears noting that (1) the Framers put the Suspension Clause in Article I, (2) the original proposal for a habeas clause advanced at the Constitutional Convention mentioned Congress

---

410. Shapiro, *supra* note 10, at 86.

411. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

412. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (Marshall, C.J.) (concluding in dicta that only Congress may suspend the writ); *Ex parte Merryman*, 17 F. Cas. 144, 151-52 (Taney, Circuit Justice, C.C.D. Md. 1861) (No. 9487) (holding that the President may not suspend the writ); *In re Kemp*, 16 Wis. 382 (1863) (same); 3 STORY, *supra* note 172, § 676, at 483.

expressly,<sup>413</sup> and (3) taking the view that the executive could suspend unilaterally is hard to reconcile with the idea embraced in our Constitution that exercises of power implicating individual rights are best checked by multiple branches. To borrow from Justice Jackson, “emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them.”<sup>414</sup> Indeed, given the extraordinary powers that a suspension usually vests in the executive, it is exceedingly unlikely that the Framers contemplated that the choice to invoke the power resided in that branch exclusively.<sup>415</sup> (The Framers, after all, were deeply concerned about concentrating power in the hands of a single leader.<sup>416</sup>) Nor should we contemplate such a model today. Finally, viewing the power as residing in the legislature is also consistent with the Framers’ desire—one that we should embrace equally today—that suspension only be invoked in the most extraordinary of circumstances. Not only does the Suspension Clause require the existence of a “Rebellion or Invasion,” in such circumstances, any decision to suspend must also emerge from the arduous process of bicameralism and presentment, internal checks on the political branches that ensure careful deliberation on a decision of this magnitude. That this check is meaningful, moreover, is demonstrated by the fact that the proposed suspension in the Jefferson Administration stalled in the House<sup>417</sup> and the fact that Congress deliberated for two years before finally authorizing a suspension of the writ during the Civil War.<sup>418</sup>

---

413. The drafters moved the Clause from its original position in Article III to Article I, and then dropped its reference to the legislature. See 2 FARRAND’S RECORDS, *supra* note 64, at 341, 435.

414. *Youngstown*, 343 U.S. at 652 (Jackson, J., concurring).

415. Notably, to my knowledge, it was not until the Civil War that anyone ever suggested that the power could be wielded unilaterally by the executive. See Letter from Edward Bates, Att’y Gen., to Galusha Aaron Grow, Speaker of the House of Representatives (July 5, 1861), in H.R. EXEC. DOC. NO. 37-5, at 1, 12 (1st Sess. 1861) (defending Lincoln’s unilateral suspensions).

416. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 568 (2004) (Scalia, J., dissenting) (“The proposition that the Executive lacks indefinite wartime detention authority over citizens is consistent with the Founders’ general mistrust of military power permanently at the Executive’s disposal.”); *Brown v. United States*, 12 U.S. (8 Cranch) 110, 129 (1814) (speaking of the decision to vest incidental powers of war in the executive: “Like all other questions of policy, it is proper for the consideration of a department which can modify it at will [the legislature]; not for the consideration of a department which can pursue only the law as it is written”).

417. See *supra* Section II.D.

418. See *supra* text accompanying note 178. For a different view, see ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 45-57 (2007), which questions the merit in requiring Congress to take the lead in formulating emergency

## SUSPENSION AS AN EMERGENCY POWER

Historically and functionally speaking, accordingly, the executive should not be understood to lay claim to the unilateral power to suspend. But beyond this important premise, many very difficult questions remain. Must Congress initiate any decision to suspend, or will its *ex post* ratification of the President's actions (as occurred during the Civil War) suffice? Similarly, may Congress delegate the ultimate decision to suspend to the President?

Taking up the second question first, recall that during both the Civil War and Reconstruction suspensions, Congress left the ultimate decision whether to suspend to the executive. There are strong arguments both in favor of and against permitting Congress to do this. On the one hand, one could argue that such an act constitutes an improper delegation of congressional powers to the executive, a branch that does not necessarily enjoy the same measure of political accountability to the people. Further, such a decision absolves the Congress of engaging in extensive debate on the crucial decision at hand, a practice which has led the body in the past to rebuff presidential requests for a suspension. (Recall again the Jefferson episode.) Finally, delegating the power to Lincoln resulted in a nationwide suspension—hardly something carefully crafted to meet the conditions on the ground to which the President was most keenly attuned.

On the other hand, the Reconstruction episode suggests that delegation to the executive can result in a narrowly tailored suspension, for Grant took a broad delegation of authority to suspend and exercised it only in nine counties of the South Carolina upcountry. Permitting such fine-tuning by the executive and his officials on the ground, one could argue, ultimately might lead to lesser infringements on liberty interests than forcing Congress to define the scope of the suspension being authorized at the outset, when Congress might err on the side of overinclusiveness. Without greater explication of the matter, it is difficult to subscribe to a position on the question just yet. What seems clear is that Congress must, at a minimum, timely declare that current circumstances constitute a Rebellion or Invasion.<sup>419</sup> The matter of whether Congress may then delegate the final decision as to when and where to suspend to the President is not nearly as significant as whether the President may seize the

---

policies and observes that “expedited action is sometimes good” while “congressional involvement increases the costs of adopting new emergency policies.” *Id.* at 47.

419. The Civil War and Reconstruction suspensions suggest that it is possible for Congress in practical terms to delegate a portion of the suspension power to the executive without in principle abandoning its obligation to face current circumstances and go on record supporting the conclusion that a suspension is justified by existing conditions. Further, analogies may be drawn here to a host of other war-making decisions that typically follow under legislative delegation to the President.

authority entirely on his own.<sup>420</sup> A suspension, recall, expands the scope of executive *power*; accordingly, the executive should not be understood to possess the unilateral authority to take this dramatic step on his own.<sup>421</sup>

To be sure, there may be a situation in which, temporarily, he may do so. Lincoln, for example, defended his unilateral suspensions at the outset of the Civil War in part because he claimed that Congress was unable to meet during this period.<sup>422</sup> Justice Souter made something of the same point in his opinion in *Hamdi v. Rumsfeld* when he suggested that “in a moment of genuine emergency, when the Government must act with no time for deliberation, the Executive may be able to detain a citizen if there is reason to fear he is an imminent threat to the safety of the Nation and its people.”<sup>423</sup> During the Civil War, Thaddeus Stevens likewise suggested that such a protective exercise of the power by the executive might be appropriate.<sup>424</sup>

---

420. During the Civil War and Reconstruction suspension debates, many took the position that the decision to suspend could not be delegated under any circumstances. *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 352 (1871) (statement of Rep. Beck) (“The people have a right to have the action of their Representatives, under all their responsibilities, acting on the existing facts; and there is no warrant anywhere for the transfer of that authority to act on such facts as may arise hereafter . . .”).

421. Thus, I am not convinced that the executive has the independent power to declare a suspension in conjunction with the imposition of martial law. *See Ex parte Field*, 9 F. Cas. 1, 8 (C.C.D. Vt. 1862) (No. 4761) (“[T]he president has the power . . . to proclaim martial law, and, as a necessary consequence thereof, the suspension of the writ of habeas corpus in the case of military arrests. It must be evident to all, that martial law and the privilege of that writ are wholly incompatible with each other.”); *cf.* FARBER, *supra* note 102, at 169 (positing that “[i]n emergencies—sudden attack or insurrection—the president has the power to suspend the writ of habeas corpus and detain suspects within the general zone of military conflict,” but that “Congress has the ultimate control over suspension of habeas”).

422. *See* Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 COLLECTED WORKS, *supra* note 175, at 421, 430–31 (“[A]s the provision was plainly made for a dangerous emergency it cannot be believed 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.”). Of course, this reasoning does not justify the numerous executive proclamations of suspension that followed once Congress reassembled.

423. 542 U.S. 507, 552 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

424. *See* CONG. GLOBE, 37th Cong., 3d Sess. 22 (1863) (statement of Rep. Stevens) (“I do doubt the authority of the President of the United States to suspend the privilege of the writ of *habeas corpus* except when there is an absolute necessity for him to have that power, or an emergency when Congress is not in session.”); *see also* CONG. GLOBE, 37th Cong., 1st Sess. 341 (1861) (statement of Sen. Cowan) (similar). David Shapiro has observed that the executive may still “run the risk of eventual rejection of any emergency power” in truly “dire circumstances.” Shapiro, *supra* note 10, at 72.

## SUSPENSION AS AN EMERGENCY POWER

As for the first question noted above, this is not the occasion to explore in full measure what the President might do in the absence of consultation with Congress.<sup>425</sup> Where Congress is able to take up the matter, the executive is not functioning in a “protective” posture, and it follows that in such circumstances he should not be understood as possessing unilateral authority to suspend the writ. The obligation on Congress, when possible, to engage in determining whether a suspension is appropriate is perhaps what Bruce Ackerman means when he says that “placement [of the Clause in Article I] suggests that legislative consent is required for a suspension of habeas.”<sup>426</sup> In short, Congress must play a role—and an active role at that—in determining that a suspension is both justified and necessary in light of current circumstances.<sup>427</sup>

Second, as I have argued at length in prior work, because an act of suspension has such dramatic ramifications on individual liberty, it is essential that the courts remain open to check exercises of the suspension power that do not follow from valid constitutional premises.<sup>428</sup> The judiciary is the sole branch constituted for the purpose of ensuring that individual rights are not improperly displaced by a political majority merely for the sake of expediency, and the Framers expected that “independent tribunals of justice will consider themselves in a peculiar manner the guardians of [the protections set forth in the Bill of Rights].”<sup>429</sup> As already noted, the origins of the Great Writ link it

---

425. Cf. Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993) (exploring the question more generally).

426. Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1053 (2004). Lincoln recognized that Congress could override his decision. See Abraham Lincoln, Message to Congress in Special Session, *supra* note 422, at 431 (“Whether there shall be any legislation upon the subject, and, if any, what, is submitted entirely to the better judgment of Congress.”).

427. It bears noting here that any legislation suspending outright the privilege or delegating that decision within a particular context should be made in a clear legislative statement. Put another way, given how extraordinary the suspension power is when pushed to its broadest regions, courts should be slow to assume the suspension of rights in this area. See Tyler, *supra* note 9, at 389-90 (arguing for this position); see also *INS v. St. Cyr*, 533 U.S. 289, 298 (2001) (recognizing a “longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction”).

428. See generally Tyler, *supra* note 9 (developing the point). A different, subsidiary question exists with respect to the level of deference that courts must give political branch determinations respecting current circumstances (for example, the determination that the country is in the midst of a “Rebellion”). See *id.* at 408-12. Although deference may be appropriate here, that is not the same thing as categorically rejecting the availability of judicial review. See *id.* at 408.

429. 1 ANNALS OF CONG. 457 (1789) (statement of Rep. James Madison). The quote is from Madison’s statement in the House (made without contradiction) during the debates over adopting the Bill of Rights. In particular, Madison predicted that “independent tribunals of

inextricably to core due process safeguards derived from the Great Charter and enshrined in our Constitution. For this reason, a suspension can “suspend” those due process safeguards as well as other fundamental liberty interests. To go on to say that displacement of such individual rights is a matter fit exclusively for resolution by the political branches is to advance a proposition entirely at odds with our constitutional tradition.<sup>430</sup>

Thus, the courts must retain the power to inquire whether the triggering conditions for invocation of the suspension authority exist.<sup>431</sup> Likewise, courts should play a role in ensuring that a suspension remains properly tethered in scope to the underlying justification for the suspension in the first instance (that is, the predicate circumstances), lest suspension be wielded as an unconstitutional pretext for displacing fundamental liberties.<sup>432</sup> By way of example, this means that judicial review should remain available to ensure that the existence of a rebellion in one part of the country is not held out as a justification for suspending the writ in another part of the country.<sup>433</sup>

---

justice will consider themselves in a peculiar manner the guardians of those rights . . . [and] they will be naturally led to resist every encroachment upon [these] rights.” *Id.* Jefferson likewise referred to the declaration of rights as placing a “legal check . . . into the hands of the judiciary.” Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), reprinted in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 218, 218 (Helen E. Veit et al. eds., 1991).

430. Thus, assigning political question status to a decision to suspend the privilege of the writ assigns the same status to the host of individual rights that are displaced during a suspension. See Tyler, *supra* note 9, at 337-38; see also *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008) (“Within the Constitution’s separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.”); cf. Fallon & Meltzer, *supra* note 329, at 1788 (“Within the constitutional scheme, an important role of the judiciary is to represent the people’s continuing interest in the protection of long-term values, of which popular majorities, no less than their elected representatives, might sometimes lose sight.”). Even if the narrow view is correct and formally speaking only *judicial* due process is suspended by a suspension, see Morrison, *supra* note 13, at 1609-10, the case for judicial review remains strong for the very same reasons articulated here.

431. See Tyler, *supra* note 9, at 380-88. Further, “[c]ourts . . . have performed similar analyses in war powers cases since the time of Chief Justice Marshall.” *Id.* at 402.

432. See *id.* at 388-91.

433. See *id.*; see also *id.* at 387-90 (discussing other points that follow from this general conclusion). Adopting a similar view, Shapiro suggests that had there been a suspension encompassing the West Coast during World War II (and the same was held out as a basis for there interning Japanese-Americans), it may have been “vulnerable” to attack on the basis that there was no “rebellion” or “invasion” on the Coast, but instead any arguable invasion had occurred thousands of miles away. See Shapiro, *supra* note 10, at 93-94. I quite agree.

## SUSPENSION AS AN EMERGENCY POWER

In sum, I have always found compelling Justice Murphy's suggestion in the World War II-era case of *Duncan v. Kahanamoku* that

[t]he right to jury trial and the other constitutional rights of an accused individual are too fundamental to be sacrificed merely through a reasonable fear of military assault. There must be some overpowering factor that makes a recognition of those rights incompatible with the public safety before we should consent to their temporary suspension.<sup>434</sup>

The courts, as traditional guardians of these fundamental rights, must stand ready to check their displacement when predicated on unsubstantiated assertions of national security. The Framers defined in plain terms the circumstances in which the extraordinary power recognized by the Suspension Clause could be wielded, and it is consistent with their views and our broader constitutional tradition to comprehend judicial enforcement of those constraints.<sup>435</sup>

In the end, by requiring the legislature to take the lead in any decision to suspend the privilege and by allowing for judicial enforcement of the Constitution's restrictions on that decision, exercises of the suspension power truly will be reserved for those situations in which dramatic measures are indeed justified and necessary.

## CONCLUSION

The questions addressed here go to the very heart of how we understand our Constitution to operate during times of national emergency. During times of peace, the government may not deprive one of liberty where doing so runs afoul of any number of constitutionally enshrined protections. And to make this guarantee real, the Constitution promises access to the privilege of the writ

---

434. 327 U.S. 304, 330 (1946) (Murphy, J., concurring).

435. To be sure, there exists a forceful argument that in situations of war and emergency, the courts traditionally have taken and should take a back seat to the political branches on decisions weighing national security and liberty interests so long as Congress clearly authorizes the liberty deprivations at issue. Cf. Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1 (2004) (observing that courts create broad political accountability by focusing on congressional endorsement of emergency measures).

of habeas corpus, long heralded as the “bulwark of our liberties,”<sup>436</sup> the embodiment of the “natural inherent right” of the “personal liberty of the subject.”<sup>437</sup>

But what happens in an emergency? The Framers included only one express provision in the Constitution recognizing a true emergency power—the Suspension Clause. Recent scholarship has suggested that a suspension of the privilege accomplishes “the mere removal of a particular remedy” and does not by its own terms authorize any arrest or detention that could not be made in its absence.<sup>438</sup> I have suggested here that this view is inconsistent with the conception of suspension that has existed throughout American history and is unsound as a matter of constitutional interpretation.

In the narrow circumstances believed by the Framers to justify suspending the privilege—times of Rebellion or Invasion—a suspension offers the government some measure of latitude in its efforts to restore order and preserve its very existence. This idea is hardly new. It is precisely the one articulated by Blackstone many years ago. As he both explained and cautioned, “[T]his experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with its liberty for a while, in order to preserve it forever.”<sup>439</sup>

---

436. 1 BLACKSTONE, *supra* note 22, at \*137.

437. 3 *id.* at \*133, \*135.

438. Morrison, *supra* note 13, at 1552-53.

439. 1 BLACKSTONE, *supra* note 22, at \*136. Representative Eppes’s remarks during the Burr Conspiracy debates echo this idea. As he then observed, suspension should “never . . . be resorted to, but in cases of absolute necessity.” 16 ANNALS OF CONG. 411 (1807) (statement of Rep. Eppes).