

A Necessary Abuse: The Causes and Effects of Lincoln's Suspensions of *Habeas Corpus*

After the election of Abraham Lincoln, despite his efforts to maintain the Union, Southern states began seceding and joining the new Confederate States of America. The United States was divided geographically between the sides, but the loyalty of states in between established Northern and Southern territory was not clear. Lincoln and the Union needed these states to remain loyal for transportation of Union supplies and troops back and forth between enemy territory. Maryland was an especially important border state because it surrounded Washington, D.C. However, Confederate sympathies in the area made Union activity difficult, and the potential dangers were verified in the Pratt Street Riot. In this incident, Northern reinforcements were traveling to protect the capital when they were attacked by a pro-South mob, leading to the first casualties of the Civil War. Lincoln desperately needed to protect the important state from Confederate interference. He decided to do so by suspending the writ of habeas corpus between Philadelphia and Washington, D.C., for the same reasons he would later do it elsewhere; any resistance in the situation could severely damage the Union cause, and he felt that the benefit of more easily subduing this resistance was worth the risk of friction resulting from criticism of the action. One reason Lincoln feared this kind of outcry was the dubious legality of his suspensions. The writ of habeas corpus is a legal measure intended to force the body holding a prisoner to allow a court to determine the legality of the imprisonment. The writ is derived from English common law, created in order to prevent unlawful or indefinite imprisonment by the government, and is guaranteed by the United States Constitution “unless when in cases of rebellion or invasion the public safety may require it”¹ to be suspended. Lincoln

¹ U.S. Const. art. I, sec. 9, cl. 2.

relied on this clause for the ability to suspend the writ of habeas corpus, allowing him to make arrests of Confederate sympathizers in Maryland without involving the courts. However, the power was not expressly granted to the executive branch in the Constitution; ambiguous language has led to claims for the power by both the president and Congress. Lincoln originally suspended the writ himself because Congress could not be called into session at the time due to the rebellion². However, he continued doing so when necessary throughout the war, leading to criticism for abuse of power. Fearing the effects this criticism could have, Lincoln suspended the writ only when it was absolutely necessary to preserve the Union. He used the power in essential circumstances, such as insurgencies in the border states or nationally after draft riots erupted, and the arrests made generally pacified situations. However, the arrests, and especially the national suspension, resulted in widespread criticism and increased resistance to his and the Union's war efforts.

As well as being crucial to the Union cause, Maryland's citizens were particularly divided over the question of the state's loyalties. The state depended on both sides economically, and its people did not agree about whether slavery should be permitted. While many residents opposed secession, resistance to fighting against their neighbors to the south was also common. Moreover, Lincoln only received 2.5% of votes in the state during the 1860 election.³ Even Maryland's current state song, written during this time, contains references to resistance to the North, such as describing Lincoln's actions in the state with the line "The despot's heel is on thy

² Abraham Lincoln, "Message to Congress in Special Session," speech, Congressional Special Session, United States Capitol, Washington, D.C., July 4, 1861, in *The Collected Works of Abraham Lincoln*, vol. 4 (New Brunswick, NJ: Rutgers University Press, 1953), pg. #430-31.

³ Walter Dean Burnham, *Presidential Ballots, 1836-1892* (Johns Hopkins University Press, 1955), pp 247-57.

shore, Maryland!” and referring to the Union as “Northern scum”.⁴ On April 26, 1861, Maryland’s state legislature met in a special session to discuss secession, where it voted against the action while agreeing to keep closed northern railroads which could be used as supply lines by the Union.⁵ This policy of neutrality was not enough for Lincoln, who needed complete cooperation from the state, especially considering the considerable Confederate sympathy residing in it. Later, in July when defending his executive actions to Congress at a special session, Lincoln would say, “there are those who favor a policy which they call ‘armed neutrality’--that is, an arming of those states to prevent the Union forces passing one way, or the disunion, the other, over their soil. This would be disunion completed.”⁶ The circumstances in Maryland were grave for the Union even though the legislature did not sanction secession. The Pratt Street Riot had already demonstrated the damage undisguised Confederate loyalty could do, and militarily Lincoln needed full control for both protection of the capital and transportation. For these reasons, although he was wary of the questionable legality and possible ramifications with respect to support and loyalty, Lincoln felt that the situation was dire enough to warrant a suspension of habeas corpus.⁷ This initial suspension was primarily used to arrest government and military officials accused of suspected or anticipated interference with military operations.⁸ Lincoln had even considered arresting the Maryland legislature before their special session due to the possibility of a decision of secession, but according to historian George C. Sellery, “The

⁴ James Ryder Randall, "Maryland, My Maryland," 1861, MS, Maryland State Archives, accessed December 28, 2016, <http://msa.maryland.gov/msa/mdmanual/01glance/html/symbols/lyrics.html>.

⁵ "Civil War and the Maryland General Assembly," Maryland State Archives, accessed January 31, 2017, <http://msa.maryland.gov/msa/stagser/s1259/121/7590/html/0000.html>.

⁶ Abraham Lincoln, "Message to Congress in Special Session," in *The Collected Works of Abraham Lincoln*, vol. 4, pg. #428.

⁷ *Ibid.*, pg 430-31

⁸ United States, War Department, Secretary of War, *Executive Order No. 1—Relating to Political Prisoners*, by Edwin M. Stanton and Abraham Lincoln, accessed January 22, 2017, <http://www.presidency.ucsb.edu/ws/?pid=69792>.

President decided [...] that it would be neither justifiable nor effective to take the proposed action against the Legislature, which had, he said, clearly a legal right to assemble.”⁹ Even though he did suspend habeas corpus soon after and arrested other important government figures, this hesitance demonstrates Lincoln’s anticipation of problems that criticism of his use of the power could create.

Those criticisms first had opportunities to cause complications during the special session of Congress called by Lincoln on July 4, 1861. During his address, Lincoln defended the necessity and legality of his actions, and the Congress debated but did not pass legislation which would have indemnified Lincoln or legalized his actions.¹⁰ An early bill intended to do just that was proposed by Senator Henry Wilson, which in the language of the bill would have made Lincoln’s actions “in all respects legal and valid, [...] as if they had been issued and done under the previous express authority and direction of the Congress of the United States.”¹¹ This measure initially showed promise but failed mainly due to opposition from Republicans concerned about its wording and message; twelve senators were of the opinion that this clause did not make the suspension legal, instead only retroactively clearing Lincoln.¹² The unwillingness of many Republican senators combined with the opposition of Copperheads—anti-war Northern Democrats—doomed the resolutions and validated Lincoln’s caution with regards to the political effects of suspending the writ. Later versions of the legislation attempted to garner more Republican support by clarifying the intent to legalize

⁹ George C. Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by Congress*, 3rd ed., vol. 1, Bulletin of the University of Wisconsin History Series (Madison, WI: University of Wisconsin, 1907), pg. #221, accessed January 5, 2017, <https://archive.org/details/lincolnssuspensi00sell>.

¹⁰ Sellery, 223-37

¹¹ A Bill to Ratify and Confirm certain acts of the President for the Suppression of Insurrection and Rebellion, S. Res. 1, 37th Cong. (1861).

¹² Sellery, 223-29

executive suspensions of habeas corpus. However, when an attempt was made to push a new bill introduced by Republican senator Trumbull to a vote, Democrats led by Breckinridge blocked the motion.¹³ Further attempts were made, but Republicans could not maintain strong support on the issue. They generally approved of the measures, but any action, whether it be granting the authority of suspension to Lincoln or certifying the legality of his previous doings, would have endorsed the ability of one of the branches to suspend the writ.¹⁴ Congress could not support the president without relinquishing a power, and this was a part of the risk Lincoln had taken in his initial suspension. Acting too strongly could tip the balance of the congressional deliberations on the question of the owner of the authority. More criticism could lose whatever tentative support he had from Congress, his only possible remaining federal ally; in June the Supreme Court had ruled on the matter in favor of Congress in *ex parte Merryman* and Lincoln was already ignoring the judiciary's decision on the grounds of necessity in war.¹⁵ With his suspensions in Maryland he risked becoming one step closer to irreversibly losing the ability to suspend the writ in future and possibly more dire circumstances.

Fortunately, the arrests in the border states were as effective as Lincoln had hoped them to be, justifying the risk. Maryland governor Thomas Holliday Hicks remarked, "I believe that arrests and arrests alone saved the State of Maryland not only from greater degradation than she suffered, but from everlasting destruction."¹⁶ Maryland was firmly in Union hands, easing

¹³ Sellery, 234-37

¹⁴ *Ibid.*

¹⁵ James A. Dueholm, "Lincoln's Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis," *Journal of the Abraham Lincoln Association* 29, no. 2 (Summer 2008), accessed December 29, 2016, <http://hdl.handle.net/2027/spo.2629860.0029.205>.

¹⁶ Isaac N. Arnold, *The History of Abraham Lincoln: And the Overthrow of Slavery* (Chicago: Clarke &, 1866), pg. #243, accessed January 31, 2017, <https://books.google.com/books?id=AXcTAQAAMAAJ&dq=The%20History%20of%20Abraham%20Lincoln%20and%20the%20Overthrow%20of%20Slavery>.

defense and transportation, and no more incidents of the magnitude of the Pratt Street Riot occurred. Notable arrests had been made in the state in September of 1861, such as House representative Henry May. Lincoln even arrested fifteen pro-Confederate members of the Maryland Congress as he had contemplated doing in April, preventing any possibility of the state regaining Confederate loyalties.¹⁷ Additionally, although the writ of habeas corpus had not yet been suspended there, similar arrests were made in September in Kentucky. Often the only crime of those imprisoned was Confederate sympathy,¹⁸ and although habeas corpus had not yet been officially suspended, the line between following court orders and martial law was in question.

For example, after arresting two men for aiding and abetting rebels, A.H. Smead wrote to

Lincoln:

writ of Habeas Corpus have been issued by Judge Cartron & I am ordered to bring the prisoners before him in the place on Monday at twelve (12) oclock what action shall I take. four thousand (4000) rebels are in seventy five 75 miles of here advancing on the place on this line of the Nashville R. R the effect of these arrests has had a beautiful beneficeal [sic] Effect here & it would be disastrous to have them released.¹⁹

Even with rebels nearby and a writ of habeas corpus ordered, the arrests had been so effective that Smead did not want to obey the writ. With matters in the border states under a reasonable degree of control, on February 14, 1862, Lincoln issued a proclamation freeing almost all political prisoners currently held, as long as they did not promote the Confederacy. He justified the action by observing that

¹⁷ "NAMES OF THE ARRESTED MEMBERS OF THE MARYLAND LEGISLATURE.," *New York Times*, September 19, 1861, accessed January 29, 2017, <http://www.nytimes.com/1861/09/19/news/names-of-the-arrested-members-of-the-maryland-legislature.html>.

¹⁸ Terry Healy, "Suspicious Sympathies: Suspension of Habeas Corpus and Perry Wherritt," NEH Landmarks of American History and Culture, accessed January 29, 2017, <http://history.ky.gov/landmark/suspicious-sympathies-suspension-of-habeas-corpus-and-perry-wherritt/>.

¹⁹ "Arrests in Kentucky," A. H. Smead to Abraham Lincoln, September 20, 1861, accessed January 9, 2017, [http://memory.loc.gov/cgi-bin/query/r?ammem/mal:@field\(DOCID+@lit\(d1191600\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mal:@field(DOCID+@lit(d1191600))).

a favorable change of public opinion has occurred. The line between loyalty and disloyalty is plainly defined. The whole structure of the Government is firm and stable. Apprehension of public danger and facilities for treasonable practices have diminished with the passions which prompted heedless persons to adopt them. The insurrection is believed to have culminated and to be declining.²⁰

He appears to have hoped to remove himself somewhat from criticism and the debate over his actions, and to have felt that the move would not harm the Union's war effort. For now, Lincoln had mostly resolved a problem that had been hanging over his presidency since the outset of the war.

At this point in time, the Northern outlook in the war was optimistic, as demonstrated by Lincoln's reasoning for releasing political prisoners. However, as the months wore on, it became more and more clear that the war would not be over as soon as the Union hoped it would be. McClellan's invasion forces were stopped in the Seven Days Battles, which would later lead to Lee's Northern Virginia campaign and first invasion of the North. That summer, Lincoln began requesting more troops from the state militias, and the use of drafts to fill quotas was authorized beginning July 17 with the Federal Militia Act of 1862.²¹ While the drafts were mainly a tool to encourage voluntary enlistment, they were still unpopular, with attempts to escape the draft occurring from the outset.²² These incidents led to an August 8 War Department order suspending habeas corpus in arrests of men fleeing enrollments. The order marked the first authorization of suspension of the writ which could be applied nationwide, although it was temporary and only used in a few crucial locations, such as Baltimore.²³ Unfortunately the War

²⁰ United States, *Executive Order No. 1—Relating to Political Prisoners*

²¹ Douglas Harper, "The Northern Draft of 1862," *The Northern Draft of 1862*, accessed January 30, 2017, <http://www.etymonline.com/cw/draft.htm>.

²² *Ibid.*

²³ *Ibid.*

Department's measure did not solve the problem, which only grew worse. Resistance to the upcoming nationwide drafts continued, leading to Lincoln's broader September 24 suspension of habeas corpus nationwide. He justified it in his proclamation "as a necessary measure for suppressing the same, all Rebels and Insurgents, [...] and all persons discouraging volunteer enlistments, [or] resisting militia drafts".²⁴ His statement of the direct link between draft avoidance and the more radical suspension indicates how problematic the resistance was. While this course of action was more successful in enforcing the draft laws, the nationwide suspension brought criticism of Lincoln's actions to an entirely new level. When he reopened the issue of habeas corpus, with the measures this time affecting more people than ever before, Lincoln was met with new opposition that would cross party lines more than ever before and even have tangible effects on the war.

The national suspension led to controversial arrests on a much larger scale and therefore to a much larger audience. Because of this, the resulting outcry was louder both from Republican and Democratic camps. However, when the 37th Congress tried to pass legislation on habeas corpus, support for the bill was still divided on party lines despite increased criticism from Republicans outside the legislature. During one senate vote, a version was agreed to by an almost entirely partisan vote, with only one senator in each party defecting to the other side.²⁵ In the end, the Republicans won out and the Habeas Corpus Suspension Act was eventually signed into law on March 3. The act both indemnified the president for his past actions and authorized future suspensions. This victory in Congress was important for Lincoln, but the nationwide suspension

²⁴ Abraham Lincoln, "A Proclamation on the Suspension of Habeas Corpus, 1862," 1862, TS, GLC06099, Gilder Lehrman Institute of American History, Washington, D.C, accessed December 29, 2016, <https://www.gilderlehrman.org/collections/c248448c-f402-4728-9e2a-541129553905>.

²⁵ Sellery, 260

was being debated perhaps even more fiercely outside Washington. Historian James A. Dueholm argues that while “in the end, the public and Congress stayed with him[,] [t]he Democrats, enraged by Lincoln's actions, pushed opposition to the verge of disloyalty.”²⁶ While many Northern Democrats supported the war efforts despite resisting Lincoln’s suspensions,²⁷ others, especially Copperheads, made attempts to stir up the public and loudly attacked him. Charles Ingersoll, a Pennsylvania Democrat who had served in the United States House of Representatives, wrote on the matter: “The suggestion [...] that there was a higher law than the Constitution was a great political mistake which has stuck to the author of it like the poisoned shirt. [...] [T]hese MEN LOST THEIR LIBERTIES WHEN THEY FOUND A LAW HIGHER THAN THE CONSTITUTION!”²⁸ The attempts to engineer panic in the general public worked to a certain extent, as demonstrated by a letter written by former House member Isaac N. Morris to Lincoln on November 20, 1862 which verifies that, “Your proclamation suspending all over the United States the writ of Habeas Corpus, justly alarmed the people.”²⁹ This public outrage, partially engineered by Democrats, would stir up resistance and cause problems for the Union.

One event in particular was attacked by Democrats and significantly increased resistance to the Union: the arrest of Clement Vallandigham on May 5 1863. The situation surrounding the prominent Copperhead before his arrest was already problematic for the Union; he was publicly criticizing the war and the North, as well as encouraging resistance. His agitated followers even

²⁶ Dueholm

²⁷ "The Albany Democrats Resolution, 1863," Erastus Corning to Abraham Lincoln, May 19, 1863, accessed December 29, 2016, <https://hsp.org/sites/default/files/albanydemsresolution.pdf>.

²⁸ Charles Ingersoll, *An Undelivered Speech on Executive Arrests* (Philadelphia, 1862), pg. #97-98, accessed January 9, 2017, <https://catalog.hathitrust.org/Record/008728258>.

²⁹ "Thoughts on Political and Military Affairs," Isaac N. Morris to Abraham Lincoln, November 20, 1862, accessed January 13, 2017, [http://memory.loc.gov/cgi-bin/query/r?ammem/mal:@field\(DOCID+@lit\(d1961100\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mal:@field(DOCID+@lit(d1961100))).

burned a pro-Union Ohio newspaper.³⁰ These actions having violated General Order No. 38 forbidding public Confederate sympathy, Vallandigham was arrested under the authority of the recently passed Habeas Corpus Suspension Act³¹ The arrest sent shockwaves through the nation, and both Republicans and Democrats were roused by it. Newspapers aligning with both sides printed an abundance of articles on the matter, inflammatory speeches were made, and letters flew across the country. One to Secretary of State William H. Seward reads

The arrest of Vallandigham is making a great excitement throughout the country. By a large and honest portion of the community it is deemed the invasion of a great principle [...] Unless this cause of complaint is done away, I have serious apprehension of civil war in the loyal states. The Democratic party every where are taking that ground. Union Leagues cannot resist them. Wherever they have the control of a state government, such an arrest will be resisted by force.³²

While the outcry against the arrest was strong, and it significantly increased resistance as described above, many Union advocates were even more afraid of what might happen if Vallandigham was released. One House representative wrote to Lincoln:

The arrest, trial and conviction of Vallandigham had an excellent effect in this State on the violent and noisy Copperheads in the Democratic counties in my District [...] the release and return of Vallandigham would be a terrible blow to the Union cause in this State. I give it to you as my opinion that his release and return would be one of the most fatal act of your administration.³³

Even though agitated Democrats were opposing the Union more fiercely than ever before, Republicans feared that caving into Democratic demands for Vallandigham's release would only

³⁰ Wyatt Kingseed, "The Fire in the Rear: Clement Vallandigham and the Copperheads," HistoryNet, April 13, 2016, accessed February 01, 2017,

<http://www.historynet.com/the-fire-in-the-rear-clement-vallandigham-and-the-copperheads.htm>.

³¹ "Clement Vallandigham," Ohio History Central, accessed February 01, 2017,

http://www.ohiohistorycentral.org/w/Clement_Vallandigham.

³² "Arrest of Clement Vallandigham and Its Consequences," Nathaniel P. Tallmadge to William H. Seward, May 24, 1863, accessed January 08, 2017,

[http://memory.loc.gov/cgi-bin/query/r?ammem/mal:@field\(DOCID+@lit\(d2366100\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mal:@field(DOCID+@lit(d2366100))).

³³ "Vallandigham and Political Situation in Ohio," James M. Ashley to Abraham Lincoln, June 23, 1863, accessed January 11, 2017, [http://memory.loc.gov/cgi-bin/query/r?ammem/mal:@field\(DOCID+@lit\(d2434100\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mal:@field(DOCID+@lit(d2434100))).

hurt the situation. Now with fierce supporters across the country, Vallandigham would be able to do even more damage than before his arrest. Lincoln's suspension of habeas corpus allowed Vallandigham to be kept in prison indefinitely, but on June 2 Lincoln decided to release him to the Confederacy to prevent him from being made a martyr.³⁴ In this way the suspension helped the situation, but only after it had created the expanded opposition in the first place.

This general outcry was found throughout the country and was not just in response to Vallandigham's arrest. For example, in Indiana, as in many previously solid Union states, response to the nationwide suspension created warlike tensions. A report to Lincoln about the situation stated

We are upon the eve of civil war in Indiana [...] Only yesterday one of our Judges of the Supreme Court, (Butternut) declared that the President had no right to issue an order suspending the writ of Habeas Corpus, and he should enforce the mandate of his court, if the streets of Indianapolis run with blood. [...] The copperheads here, are of the meanest and most detestable [sic] character, and are capable of doing anything.³⁵

While the suspension did allow federal troops to more easily remove these anti-Union men, and many Republicans viewed the actions as necessary, some questioned whether the national suspension had a net positive effect, such as Indiana's Republican governor:

I am satisfied that the effect of the order is bad, and that it has wholly failed to accomplish the purpose for which it was intended; that on the contrary it is greatly intensifying the hatred of the masses of the Democratic party, toward the Government, and is rapidly converting what in many, was mere clamor and general opposition to the Administration into bitter hostility to the Government and the War.³⁶

While Lincoln had certainly recognized the potential for this to occur, he had observed the effectiveness of the Maryland suspension and Kentucky arrests, and he felt he needed to deal

³⁴ Kingseed

³⁵ "Turmoil in Indiana," W. R. Halloway to John G. Nicolay, January 2, 1863, accessed January 9, 2017, [http://memory.loc.gov/cgi-bin/query/r?ammem/mal:@field\(DOCID+@lit\(d2091600\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mal:@field(DOCID+@lit(d2091600))).

³⁶ "Protests General Burnside's Order No. 38," Oliver P. Morton to Abraham Lincoln, May 30, 1863, accessed January 13, 2017, [http://memory.loc.gov/cgi-bin/query/r?ammem/mal:@field\(DOCID+@lit\(d2378000\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mal:@field(DOCID+@lit(d2378000))).

firmly with the resistance to the drafts. As in his other suspensions, he evidently felt that solving the draft problems was worth the risk of a movement in opposition to his policies. It is difficult to tell if maintaining loyalty in the states would have been easier, or if the effects of anti-Union resistance would have been less, if Lincoln had not suspended habeas corpus nationally. However, dealing with the resistance that did occur, whether it was general Confederate sympathy or the reaction to suspensions, was certainly made easier by being free to arrest opposition and hold them without trial.

From the beginning of the war, Lincoln kept the suspension of habeas corpus as a last resort in cases of extreme resistance from within the Union. He realized the possibility that a perceived abuse of power by him could spark a movement which could undermine the stability he hoped to gain in the first place. Wary of this potential outcome, he used the power only when he felt it was absolutely necessary. The first time he did, in Maryland, it successfully quelled dangerous opposition in a vital state, and the resulting criticism did not lead to much additional difficulty in keeping the peace. However, when Lincoln suspended the writ nationally in response to the similarly threatening and more widespread draft resistance, the action nearly sparked civil wars in previously loyal states. The ultimate net effectiveness of the move was disagreed upon by observers at the time, but undoubtedly the unpopular suspension being brought into the attention of the entire nation at once created an opportunity for manufacturing disloyalty that anti-Union and anti-war groups seized. Lincoln's suspensions of habeas corpus remain a controversial issue to this day, but his actions for the most part accomplished their goals, and his decisions on the matter played a large role in the course of the war.

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