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Civil War and the "Great Suspender"

> *If the president of the United States may suspend the writ, then the constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown.*
>
> CHIEF JUSTICE ROGER B. TANEY IN *EX PARTE* MERRYMAN (1861)[1]

IT WAS NOT until the Confederate attack on Fort Sumter on April 12, 1861, and the beginning of the Civil War that the United States witnessed its first suspension at the federal level. President Lincoln viewed the secession of the Confederate States as illegal, and considered those who supported the Confederacy to be traitors who needed to return to their proper allegiance.[2] In this regard, the Union view of the secessionists mirrored that held by the British of the American rebels years earlier. For this reason and largely (though not entirely) consistent with prior practice, the president quickly—and controversially—turned to suspension as the basis for detaining Confederate soldiers and sympathizers in the absence of criminal charges.

Within days of the attack on Fort Sumter, Lincoln authorized Union military leaders to suspend habeas wherever they believed it necessary to protect key geographic areas. Lincoln did so famously on his own and without congressional approval. To be sure, initially Congress was unable to meet to grant him this authority, but well after the body reconvened and for the next two years while it debated passing suspension legislation, Lincoln kept right on authorizing suspensions. Initially, the suspensions targeted only concentrated areas of particular military importance. By the fall of 1862, however, Lincoln had proclaimed a suspension applicable to every prisoner in military custody. Lincoln's unilateral assumption of what had always been a legislative power—suspension, after all, owed its very creation to Parliament—soon provoked a showdown between the president and the chief justice of the Supreme Court and, in its wake, widespread public debate over the allocation of emergency powers in wartime.

Habeas Corpus in Wartime. Amanda L. Tyler.

As explored in this chapter, although Lincoln was wrong to lay claim to the suspension power, his understanding of the necessity of suspension to legalize arrests made outside the criminal process was fully consistent with the long-standing historical view of the suspension model. The same understanding informed the suspension finally enacted by Congress in 1863, in which Congress purported to reach all those disaffected to the Union cause along with Confederate soldiers captured in battle. More generally, studying the debates over suspension that pervaded the Civil War period reveals the continuing and profound influence of the English Habeas Corpus Act and suspension framework on American law. Surveying this period also shows that the role of allegiance in the English legal tradition heavily influenced the Supreme Court's assessment of the use of military tribunals to try civilians during the war and provided the foundation for the Court's decision in Ex parte *Milligan* holding that "[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace. . . ."

The Case of John Merryman

Just days after the Confederate assault on Fort Sumter, mobs attacked the Sixth Massachusetts Infantry while it traveled through Baltimore heading south, resulting in the deaths of four soldiers and many civilians. Meanwhile, although the Maryland legislature had formally voted against secession, state officials took numerous steps to frustrate Union efforts, including refusing to reopen rail lines to the north and pushing for the withdrawal of federal troops from the state. Matters escalated to the point that the governor deployed the state militia and purportedly approved the mayor of Baltimore's orders that several key bridges be destroyed for the purpose of thwarting Union troop movements through the state.

Without the ability to move troops through Maryland, the capital in Washington, DC, would be completely cut off from the north. Recognizing the crucial importance of keeping transportation lines open through Maryland to allow Union troops to pass through the state, President Lincoln authorized his commanding general in the area, Winfield Scott, to do whatever necessary to counteract open resistance. Specifically, Lincoln informed Scott that "[i]f at any point on or in the vicinity of the military line . . . between the City of Philadelphia and the City of Washington . . . , you find resistance which renders it necessary to suspend the writ of Habeas Corpus for the public safety, you, personally or through the officer in command at the point where the resistance occurs, are authorized to suspend the writ."[3] It did not take long for the military to invoke its authority.

One person believed to play a role in destroying several bridges was a Maryland farmer by the name of John Merryman, a first lieutenant in a secessionist group called the Baltimore County Horse Guards. A few weeks after the bridge attacks and on orders from an army general in Pennsylvania, Union troops arrested Merryman at his home in Baltimore in the early morning hours of Saturday, May 25, 1861. From there, they transported Merryman to Fort McHenry for imprisonment. It does not appear that the government ever drew up a warrant for Merryman's arrest, nor did the government level any formal charges against Merryman at this point. This is surely because George Cadwalader, the Union military commander in Maryland, did not believe that he needed a warrant to hold Merryman in light of the declared suspension.

But others were not so sure. That same Saturday, a relative of Merryman's who was a lawyer began preparing a habeas petition on Merryman's behalf, swearing to it before the United States Commissioner in Baltimore and then arranging for its presentation in Washington to the chief justice of the Supreme Court of the United States, Roger B. Taney. (Taney was also the circuit justice for the area encompassing the Baltimore region; the petition was addressed to him in both capacities.) On Sunday, the chief justice ordered General Cadwalader to appear and produce the body of John Merryman at a hearing to be held the next day to ascertain whether Cadwalader had legal justification to detain Merryman. Taney traveled to Baltimore to hold the hearing, doing so, in his words, so as not to "withdraw General Cadwalader . . . from the limits of his military command."[4] Cadwalader nonetheless declined to appear, instead sending a representative to present his position. According to Cadwalader, the military was detaining Merryman as a suspected traitor engaged in hostilities against the government under the authority of the suspension in effect in the relevant area, which was necessary "for the public safety." Through his representative, Cadwalader also requested more time as he awaited further instructions from the president. Taney, however, was unwilling to delay matters and quickly found Cadwalader in contempt. Taney then decided the case the next day.[5]

And so it was that on Tuesday, May 28, 1861, Taney announced his decision before a packed courtroom, rejecting the position that the president on his own could suspend the habeas privilege, and more generally that military authorities could detain a civilian without criminal charges.[6] Days later, the chief justice followed up with a lengthy written opinion. He began by making clear that his position remained the same as before:

> As the case comes before me . . . , I understand that the president not only claims the right to suspend the writ of habeas corpus himself, at

> his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him. . . . I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands, that the privilege of the writ could not be suspended, except by act of congress.[7]

Taney knew his history, referring first to the debates surrounding the proposal to suspend habeas in response to the Burr Conspiracy. In those debates, Taney noted, "no one suggested that Mr. Jefferson might exercise the power himself, if, in his opinion, the public safety demanded it." Next, Taney explored the developments leading up to adoption of what he called "the great habeas corpus act" during the reign of Charles II. Taney related the story of the Petition of Right and the plight of John Selden, whose detention without criminal charges in the Tower of London, as discussed in Chapter 1, had both laid the groundwork and highlighted the need for habeas legislation in the seventeenth century. "It is worthy of remark," Taney wrote, "that the offences . . . relied on as a justification for [Merryman's] arrest and imprisonment, in their nature and character, and in the loose and vague manner in which they are stated, bear a striking resemblance to those assigned in the warrant for the arrest of Mr. Selden." Even in Selden's time, Taney emphasized, the delay of the judges in granting his discharge had "excited the universal indignation of the bar." But, Taney continued, the Habeas Corpus Act addressed such failings: "The great and inestimable value of the habeas corpus act of the 31 Car. II. is, that it contains provisions which compel courts and judges, and all parties concerned, to perform their duties promptly, in the manner specified in the statute."[8] As Taney explained, that "manner" (or tradition) served as the foundation of American habeas law and specifically established two important benchmarks of constitutional law.

The first such principle, Taney wrote, was that only the legislative body possessed the power to suspend habeas. To support this conclusion, Taney cited the Suspension Clause's placement in the legislative article of the Constitution, Article I. In addition, Taney quoted extensively from Blackstone, whose *Commentaries* taught that in English tradition " 'it is not left to the executive power to determine when the danger of the state is so great as to render [suspension] expedient.' " Instead, " '[i]t is the parliament only or legislative power that, whenever it sees proper, can authorize the crown by suspending the habeas corpus for a short and limited time, to imprison suspected persons

without giving any reason for so doing.' " Continuing, Taney labeled the president's position as all but impossible to square with this English history:

> [N]o one can believe that, in framing a government intended to guard still more efficiently [than English law] the rights and liberties of the citizen, against executive encroachment and oppression, they would have conferred on the president a power which the history of England had proved to be dangerous and oppressive in the hands of the crown, and which the people of England had compelled it to surrender after a long and obstinate struggle on the part of the English executive to usurp it and retain it.[9]

The second principle, which Taney grounded in the incorporation of the English Habeas Corpus Act into American law, was that in the absence of a valid suspension the government must charge someone such as Merryman with a crime and try him in due course. Where the government fails to do so, Taney wrote, a court is duty-bound to order the prisoner's release. In English legal tradition, he explained, "if a person were imprisoned, no matter by what authority, he had a right to the writ of habeas corpus, to bring his case before the king's bench; if no specific offence were charged against him in the warrant of commitment, he was entitled to be forthwith discharged." Here, Taney also highlighted that "the statute of 31 Car. II., commonly known as the great habeas corpus act . . . , secured [this] right."[10] Accordingly, Taney concluded, because Merryman had not been charged with any crime, his detention violated the Constitution.

Almost as though smarting for confrontation, Taney concluded his opinion by noting that he had arranged for his opinion to be delivered to President Lincoln directly. The president, Taney wrote, would then be left "to determine what measures he will take to cause the civil process of the United States to be respected and enforced." The administration responded by indicting Merryman on a number of charges, including treason, although for various reasons he was never tried.[11]

Notwithstanding the change of course in Merryman's particular case, Lincoln had hardly backed down from his position. Indeed, he openly rejected Taney's opinion as wrong and proclaimed numerous additional suspensions over the course of the next two years prior to Congress's passage of legislation governing the matter. Lincoln's suspensions culminated in a suspension applicable to every military prisoner in custody.[12] Lincoln also defended before Congress the president's unilateral power to suspend, asserting that "[i]t was

not believed that any law was violated."[13] His attorney general Edward Bates likewise submitted a defense of the president's actions to Congress.[14]

Taney's opinion in *Merryman* was widely published and circulated in legal publications and newspapers. Almost immediately, the opinion triggered an extensive public debate over the separation-of-powers questions raised in the case. Press coverage of *Merryman*, which was substantial, tended to critique or celebrate Taney's opinion in keeping with geographic and political sympathies. Thus, many Northern papers, such as the *New York Times*, pointed to the decision as proving that Taney "serves the cause of rebellion," and Horace Greeley's *New York Tribune* "advise[d]" the remaining members of the Supreme Court to "leave the task of overthrowing this formidable conspiracy against Liberty and Law to the military and naval forces of the United States."[15] Other papers more sympathetic to the Confederate cause lauded Taney's opinion. The *Baltimore American and Commercial Advertiser*, for example, found it "eminently proper that a Government which is fighting to maintain the integrity of the Constitution should interpose no arbitrary action to suspend or interfere with rights plainly guaranteed under it."[16] *Merryman* also led to the publication of a host of pamphlets taking sides on the question whether suspension is an executive or legislative power, including most famously Horace Binney's two-part publication defending Lincoln's actions.[17]

Chief Justice Taney's tenure on the Supreme Court is hardly the subject of celebration—he authored the *Dred Scott* decision, after all—but he was most assuredly right in *Merryman* about which branch possesses the authority to suspend habeas. To begin, his conclusion was the same as that reached by Chief Justice Marshall (albeit in dictum) years earlier as well as Justice Story in his famous *Commentaries on the Constitution*.[18] It was also consistent with President Madison's view of suspension, which, as discussed in the last chapter, led him to rebuke Andrew Jackson for suspending by military order during the War of 1812. Presumably, President Jefferson subscribed to the same view as well, given that Jefferson accepted Congress's decision not to pass suspension legislation during the Burr Conspiracy. Further, as Taney noted, the Committee of Style placed the Suspension Clause in Article I—the legislative article[19]—and suspension was, from its origins, a legislative creation born out of a movement to wrestle control over matters of detention from the Crown. (Indeed, one of the most influential sources consulted by the Founding generation on English law, Blackstone, emphasized this point.)[20] Additionally, the very first suspension in English history arose out of King William of Orange's request that Parliament take the dramatic step of expanding the Crown's powers to arrest and detain. (This

President Abraham Lincoln, the Constitution, Law, and Habeas Corpus

Credit: The Knight of the Rueful Countenance wood engraving cartoon of Abraham Lincoln by Adalbert J. Volck, 1862, Chicago History Museum, ICHi-022097.

request, moreover, came hand-in-hand with the King's acceptance of the English Declaration of Rights, the first provision of which declared "[t]hat the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal."[21]) The idea that the executive could suspend without legislative involvement is at odds both with the entire history of the suspension framework and the Founding generation's deep suspicion of concentrated executive authority.[22] (On this point, for example, note that the original Articles of Confederation did not even provide for an executive branch.) Further support for this conclusion may

be found in the fact that many of the original state constitutions restricted all power to suspend laws to the state legislative body[23] and/or expressly recognized suspension of the privilege as a legislative power.[24] Finally, viewing the power as residing in the legislature is consistent with the Founding generation's desire that suspension only be invoked in the most extraordinary of circumstances.[25]

All the same, some have argued in favor of recognizing a limited and temporary executive authority to suspend where Congress is unable to assemble and circumstances are truly dire. Indeed, this is how President Lincoln defended his initial suspensions at the outset of the Civil War.[26] Of course, this justification quickly passed once Congress returned to session. Taney's failure to account for the fact that Lincoln's actions leading up to *Merryman* came during a period in which Congress was not in session may justify some of the criticism that his opinion has received.[27] Notably, in the extensive public debates that followed *Merryman*, several prominent voices defended a limited role for the president to act when Congress cannot do so itself. In the House debates, for example, Thaddeus Stevens, although firm in his position that suspension is a legislative power, nonetheless suggested that a protective exercise of the power by the executive might sometimes be appropriate.[28] A critic of such a position might argue that such an exception could quickly swallow the proverbial rule. The fact that the Constitution expressly grants the president the power, "on extraordinary Occasions, [to] convene both Houses," moreover, further suggests that the president can call upon Congress to engage with the matter in a timely fashion.[29]

Whether to recognize a temporary protective suspension power presents a terrifically difficult question. At most, any such recognition should sweep no further than to cover a period when Congress is unable to convene. Where Congress *is* able to take up the question whether suspension is constitutionally justified and appropriate, the executive cannot be said to be functioning in a protective posture. In such circumstances, the Constitution plainly contemplates that the decision whether to suspend, or to continue a suspension declared during an emergency period, resides solely within the legislative branch. Given that we live in an age of instant electronic communication, moreover, it is likely that members of Congress could convene remotely if necessary, a prospect that counsels that any decision of this magnitude can and should be made by the legislature in the first instance.

In all events, Lincoln appears to have lost little sleep over his decision to act ahead of Congress and likely anyone else in Lincoln's position would have done the same to protect critical areas at the outset of the war. But it should not go overlooked that Lincoln's actions and particularly his decision to keep

authorizing suspensions once Congress returned to session clearly strained the Constitution. Necessity, moreover, does not equate with legality. As Justice Story once wrote:

> It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws. Such measures are properly matters of state, and if the responsibility is taken, under justifiable circumstances, the Legislature will doubtless apply a proper indemnity. But this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress.[30]

Nevertheless, in analyzing Lincoln's actions during the Civil War, his famous defense of his actions should give pause to any critic,[31] as should the argument that although Lincoln's actions may not have been strictly legal, they could be easily defended on moral grounds.[32] Finally, it should not go overlooked that Congress bears some of the blame for delaying two years before enacting a suspension in the face of a war that was tearing apart the Union.[33]

The Sweep of Suspension

Lincoln was mistaken about which branch possessed the authority to suspend, but he certainly appreciated the dramatic nature of suspension and understood its necessity as a means of legalizing arrests that otherwise would be unconstitutional in the ordinary course. In a widely-published letter, Lincoln wrote that the Suspension Clause "plainly attests to the understanding of those who made the constitution that . . . the purpose" of suspension was so that "men may be held in custody whom the courts acting on ordinary rules, would discharge."[34] The "ordinary rules" to which Lincoln was referring comprised the protections inherent in the criminal process. Thus, as Lincoln explained, "Habeas Corpus, does not discharge men who are proved to be guilty of defined crime; and its suspension is allowed by the constitution on purpose that, men may be arrested and held, who can not be proved to be guilty of defined crime, 'when in cases of Rebellion or Invasion the public Safety may require it.' "[35]

Continuing, Lincoln posited that in these dire circumstances, "arrests are made, not so much for what has been done, as for what probably would be

done. [They are made] for the preventive. . . ." Any other conclusion, Lincoln observed, would negate the entire purpose of suspension. As he phrased it: "Of how little value the constitutional provision I have quoted will be rendered, if arrests shall never be made until defined crimes shall have been committed. . . ." Finally, to drive home his understanding of the role of suspension, Lincoln offered a concrete example. What if, Lincoln asked, the Union had arrested those Confederate military leaders within Union grasp and known to be "traitors" at the outset of the war?

> Unquestionably if we had seized and held them, the insurgent cause would be much weaker. But no one of them had then committed any crime defined in the law. Every one of them if arrested would have been discharged on Habeas Corpus, were the writ allowed to operate.

In light of these examples, the President concluded by suggesting that "the time [is] not unlikely to come when I shall be blamed for having made too few arrests rather than too many."[36]

Over the course of the war, military officials, acting under Lincoln's orders, arrested thousands of civilians.[37] Many were Confederate residents who were trapped in the North or who came from border states.[38] (Suspension was also wielded as a potent tool to enforce conscription.) As historian James G. Randall has written: "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."[39] As the war progressed, formal prosecutions for treason were undertaken on a highly selective basis for fear of encountering sympathetic juries and creating martyrs for the Confederate cause. Further, Attorney General Bates subscribed to the view that for deterrence purposes, "[t]he penitentiaries will be far more effectual than the gallows."[40] With suspension, of course, came the power to detain. No trial was necessary, at least so long as the war continued.

Because President Lincoln firmly believed that the Confederate states could not legally secede from the Union, it followed in his view that southerners retained their duty of allegiance to the Union. This explains why the Lincoln administration was reluctant to enter formal cartels for the exchange of prisoners, just as Great Britain had been during the Revolutionary War—cartels implied recognition that the opposing soldiers were in the service of a foreign sovereign.[41] This also explains why the president held the view that the detention of Confederate soldiers and civilian supporters outside the criminal process required a suspension. Thus, on September 24, 1862, Lincoln proclaimed a sweeping suspension, the terms of which reached

virtually every prisoner who might be captured in the war. Specifically, he ordered:

> 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 by any military authority or by the sentence of any court-martial or military commission.[42]

Although Lincoln's proclamation (like earlier ones) met many critics, the *New York Times* heralded his announcement as "restrain[ing] and defin[ing] and mitigate[ing] the operation of a system which is already in active use."[43] Indeed, this proclamation followed on the heels of an August proclamation that was similarly sweeping in nature, applying as it did to draft evaders and "all persons arrested for disloyal practices."[44] In the immediate wake of that earlier proclamation, there were "sweeping and uncoordinated arrests" that had a "momentous effect on civil liberties."[45]

By the next spring, after actively debating suspension for two years, Congress finally passed legislation in March 1863 that it hoped would put to rest the controversy over whether the president could suspend without its authorization. Part of what finally spurred Congress to act was the existence of a large number of lawsuits brought against federal officials for false imprisonment. These suits, like one brought by John Merryman against General Cadwalader, often cited Chief Justice Taney's *Merryman* opinion to argue that military arrests under presidential order were unconstitutional.[46] The growing number of suits proved to be of grave concern not only to the individual defendants (typically Union military officials), but also to the president, and led the attorney general to draft and deliver proposed legislation to Congress a year before that body finally acted.[47]

In the resulting legislation, entitled "An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases," Congress provided:

> That, during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof. And whenever and wherever the said privilege shall be suspended, as aforesaid, no military or other officer shall be compelled, in answer to any writ of habeas corpus, to return the body of any person or persons detained by him by authority of the President . . . so long as said suspension by the President shall remain in force, and said rebellion continue.[48]

Congress intended 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.[49] This being said, members almost uniformly subscribed to the same position as the president's with respect to the necessity of a suspension to legalize detention—even of those suspected of treason—outside the criminal process.[50]

Congress's suspension authorization, however, came with substantial strings attached. Specifically, in Section 2 of the Act, Congress 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." In such states, if the next sitting grand jury failed to indict any "state or political prisoners" in custody, they were to be released upon taking an oath of allegiance to the Union. If prisoners falling into this description were not so released, the Act commanded the courts to order their discharge. Violation of this provision subjected an officer of the United States to indictment for a misdemeanor along with a fine and imprisonment.[51] Further, in response to the flood of civil lawsuits that had been filed against Union military officials, Congress included a provision in the Act declaring that following a presidential order was a valid defense to any "civil or criminal" proceeding that attacked "any search, seizure, arrest, or imprisonment" made pursuant to such an order "or under color of any law of Congress."[52]

Now unquestionably armed with the authority to suspend in the face of the rebellion, Lincoln issued his most sweeping suspension in September 1863. Notably, Lincoln cited the 1863 Act as the basis of his authority, practically conceding the questionable constitutionality of his earlier proclamations. In this proclamation, he declared:

> [I]n the judgment of the President, the public safety does require that the privilege of the said writ shall now be suspended throughout the United States in the cases where, by the authority of the President of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy. . . .[53]

The proclamation specifically encompassed persons held in military custody and deemed "prisoners of war"—clearly a reference to Confederate soldiers captured on the battlefield. This is noteworthy because it shows that both Congress and Lincoln did not believe that the executive had inherent

authority to detain such persons in the absence of a suspension. This position was of course consistent with Lincoln's view that the Confederate states could not legally secede and that its members still owed a duty of allegiance to the Union. Likewise, it mirrored precisely the stance that the British had taken toward the American rebels during the Revolutionary War. This was also how Congress viewed the matter. Specifically, the 1863 Act distinguished "state or political prisoners" from "prisoners of war"—the latter surely a reference to Confederate soldiers—and although the Act authorized the detention of prisoners of war under Section 1, it provided that they were not covered by the requirements of Section 2.[54]

In the wake of Lincoln's newest proclaimed suspension, Union military officials continued to arrest and detain individuals across the country, including both civilians and Confederate soldiers captured in battle.[55] Only a portion of those detained during the war were ever tried for criminal conduct and, in a great number of cases, those trials occurred before military tribunals[56]—a practice, as discussed below, that implicates a host of additional constitutional issues. Meanwhile, 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 in compliance with Section 2 of the 1863 Act. He therefore concluded that Section 2 of "the act seems to have had but little practical effect."[57] Executive officials were either unfamiliar with the terms of the Act,[58] construed it narrowly,[59] or simply chose not to honor it.[60] As matters unfolded, Lincoln's suspension remained in place in some states as late as a full year after General Robert E. Lee surrendered to General Ulysses S. Grant at Appomattox Court House. Only then did President Andrew Johnson finally lift the last of the suspension's reach.[61]

Ex parte Milligan *and Military Trials*

The use of military tribunals during the war proved another controversial aspect of Lincoln's agenda, earning the postwar rebuke of the Supreme Court in its 1866 decision in Ex parte *Milligan*. From the outset, the case's importance was obvious to all involved, leading the Court to preside over six days of oral arguments.

The case was an outgrowth of the trial of Lamdin Milligan, a lawyer and former candidate for governor of Indiana, and others before a military commission in Indiana for a range of charges relating to their Copperhead activities and support of the Confederacy. The charges included "violat[ing] the laws of war," conspiracy, inciting insurrection, and disloyal practices. Many of the charges could not be grounded in existing federal criminal statutes enacted by

Congress but were announced in the first instance by the commission.[62] (The trial of the Lincoln conspirators, explored below, likewise reveals that the creation of new crimes by Civil War military tribunals was a common practice.) Further, the commission procedures only required a two-thirds majority to issue a death sentence and the punishments awarded often far exceeded what federal law authorized civilian courts to issue.[63]

Milligan had been tried, convicted, and sentenced to death by military officers as opposed to a jury. Thereafter, Milligan (joined by two others) pursued habeas corpus relief in federal court challenging the legitimacy of his conviction. When the case eventually came before the Supreme Court, Milligan's attack on the military commission prevailed. Justice David Davis's majority opinion for five justices began by noting that "in Indiana[,] the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances." (Interestingly, the Court contrasted Virginia, "where the national authority was overturned and the courts driven out," an observation that suggests the five justices in the majority were imminently comfortable rendering an opinion as to whether wartime conditions in certain areas warranted emergency measures.[64]) It did not matter to the majority that Milligan had been charged with violations of the laws of war. Such laws, they concluded, "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."[65]

More specifically, the majority rejected the argument that martial law justified Milligan's military trial and sentencing:

> Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the "military independent of and superior to the civil power"—the attempt to do which by the King of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence.[66]

Accordingly, five members of the Court held that in areas in which civilian courts were "open and their process unobstructed," civilians must be tried by those courts and given the full panoply of constitutional rights relating to criminal procedure, including a jury trial—even in the face of ongoing civil war. In so holding, the Court rejected the government's argument that the Bill of Rights were "peace provisions" that "like all other conventional and legislative laws and enactments, are silent amidst arms, and when the safety of the people becomes the supreme law." More generally, in an oft-quoted passage,

the majority wrote, "[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."[67]

The majority's understanding of the limits of martial law and application of military law to civilians is consistent with the example set by President Washington during the Whiskey Rebellion, when, as discussed in the last chapter, he ordered military officials to refer those arrested to the civilian authorities for prosecution. Likewise, it accords with the positions of both President Madison and Chief Justice Kent during the War of 1812. More generally, *Milligan* stands as an important precedent taking a limited view of the role and legitimacy of martial law. Mindful as the Court was of the dramatic effects of such a regime on civil liberties, it staked out an exceedingly narrow view of when martial law might be appropriate, positing that where civilian courts are up and running, there can be no such state of affairs. As will be seen in Chapter 10, this precedent wielded considerable influence over the Supreme Court's later rejection of the declaration of martial law in the Hawaiian Territory during World War II. (Although, as is discussed in Chapter 11, *Milligan* came under fire in the middle of that same war.)

The *Milligan* Court also rejected the argument that the existence of a nationwide suspension validated Milligan's trial before a military commission. Suspension, the Court held, only permits *detention* during its duration; it says nothing about the propriety of military versus civilian courts, nor does it legitimate the denial of standard procedural protections. As Justice Davis phrased it, "[t]he Constitution goes no further. It does not say after a writ of *habeas corpus* is denied a citizen, that he shall be tried otherwise than by the course of the common law. . . . [The Founding generation] limited the suspension to one great right, and left the rest to remain forever inviolable."[68] As a separate matter, the Court rejected the argument that Milligan's detention (separate and apart from his trial and resulting sentence) had been authorized by the terms of the 1863 Act, holding that the requirements of Section 2 had not been satisfied in his case.[69] Finally, the Court dismissed out of hand the assertion that Section 2's procedural requirements did not apply to Milligan because he could be treated as a prisoner of war:

> It is not easy to see how he can be treated as a prisoner of war when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion. If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offence, he cannot plead the rights of war, for he was not engaged in

> legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?[70]

The *Milligan* decision proved immensely controversial, in part because many appreciated the grave threat it posed to the legitimacy of the temporary military governments established during Reconstruction in most of the former Confederate States.[71] Indeed, Radical Republican Thaddeus Stevens assailed the decision as "far more dangerous in its operation upon the lives and liberties of the loyal men of this country" than the "infamous . . . Dred Scott decision."[72] Within months, Congress reacted to *Milligan* by passing legislation to protect those officers involved with the commissions by declaring that their actions should be treated as though they followed under prior congressional authorization. As the debates preceding the 1867 indemnity legislation made clear, it came in direct response to *Milligan* and revealed that Congress agreed with Lincoln and the separate opinion of the four concurring justices in *Milligan* that it possessed the authority to authorize the military trials of civilians.[73] As things unfolded, military trials continued in the wake of *Milligan*, although predominantly, if not entirely, such trials involved Union soldiers or were held in former Confederate States and territories under military rule.[74]

Notably, a full year before *Milligan*, many in the administration were already nervous about the potential for Supreme Court rebuke of military trials, and this nervousness translated to a series of extraordinary decisions in the days following President Lincoln's assassination. (It may also have been responsible for the order issued on behalf of the president by Secretary of War Edwin M. Stanton in May 1865 throwing out all existing sentences by military tribunals.[75])

Lincoln's Assassination: Military Courts and Legal Islands

On April 14, 1865, only five days after General Lee's surrender, John Wilkes Booth shot President Lincoln at Ford's Theatre. Taken to a house across the street from the theater, Lincoln died the next day. In the days that followed, the military apprehended most of the conspirators believed to have helped Booth in plotting and carrying out the assassination, although Booth himself died during the attempt to capture him. Almost immediately, executive officials began debating how to prosecute the so-called Lincoln

conspirators—specifically, whether to try them before a military tribunal or civilian court.

Despite resistance from some quarters, once those arrested were winnowed down to a list of eight,[76] President Johnson signed an order directing their trial before a military commission composed of nine military officers.[77] Critics included members of the president's own cabinet and the same attorney general who had earlier defended Lincoln's unilateral suspensions to Congress. Specifically, former attorney general Edward Bates was highly critical of the decision to try the conspirators before a military tribunal, believing that "[s]uch a trial is not only unlawful, but it is a gross blunder in policy: It denies the great, fundamental principle, that ours is a government of *Law*, and that the law is strong enough, to rule the people wisely and well." He added, "if the offenders be done to death by that tribunal, however truly guilty, they will pass for martyrs with half the world."[78] Within the current cabinet, Navy Secretary Gideon Welles similarly held the view that the conspirators should be tried by a civilian court, and recorded in his diary that Treasury Secretary Hugh McCulloch subscribed to the same position. By contrast, Secretary of War Edwin M. Stanton reportedly held the view that "the proof [of guilt] is clear and positive" and he "was emphatic" in his support for a military commission.[79] New attorney general James Speed similarly pushed for a commission, and later defended this position on the basis that "the commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles."[80] (Cabinet members engaged in a similar debate just two months later over whether to try Jefferson Davis before a commission or civilian court. As things turned out, Davis never stood trial in either forum.[81])

Ten days after President Johnson signed the order directing the conspirators' trial by military commission, proceedings began at the Old Arsenal Penitentiary in Washington, DC.[82] The President's Order authorized the commission and empowered it to "establish such order or rules of proceeding as may avoid unnecessary delay and conduce to the ends of public justice." Exercising that authority, the commission adopted rules that, among other things, provided that a majority vote of the officers would sustain a guilty verdict and that a two-thirds majority vote could sustain a death sentence. Further, the rules provided that the only possible appeal on the part of the defendants came in the form of seeking clemency or a pardon from President Johnson.[83]

Before the tribunal, the prosecution team included Representative John Bingham, who just one year later would serve as the primary drafter of the Fourteenth Amendment to the Constitution. Bingham argued from the outset of the proceedings that the due process guarantee in the Fifth Amendment

was "only the law of peace, not of war." "[I]n war," Bingham contended, "it must be, and is, to a great extent, inoperative and disregarded."[84]

In response, one of the defense lawyers, Maryland senator Reverdy Johnson, argued that military trial of the conspirators violated the Constitution. As legal scholar Gerard Magliocca has written, "Johnson's logic was simple. The defendants were citizens, and the courts were open. Thus, the accused were entitled to a jury trial and the other criminal procedure guarantees in the Bill of Rights."[85] Specifically, Johnson asserted that fundamental liberties " 'are more peculiarly necessary to the security of personal liberty in war than in peace. All history tells us that war, at times, maddens the people, frenzies government, and makes both regardless of constitutional limitations of power. Individual safety, at such periods, is more in peril than at any other.' "[86] Only members of the military, Johnson argued, could be constitutionally tried by military commission.

But Bingham had yet another argument to press. He believed that suspension meant that in times of war, " 'the rights of each citizen, as secured in time of peace, must yield to the wants, interests, and necessities of the nation.' "[87] Congress's 1863 suspension legislation, he contended, implicitly authorized use of military commissions for civilian trials until the president and Congress declared that the rebellion had ended. Further, President Lincoln had declared martial law and authorized such commissions back in 1862—well before Congress intervened with legislation—and, in all events, Bingham observed, courts were only open in the District " 'by force of the bayonet.' " Many of Bingham's arguments would be rejected one year later by the Supreme Court in *Milligan*, but for the time, they carried the day.

After a seven-week trial, the military officers found all eight defendants guilty of various conspiracy-related charges, including the charge of traitorously conspiring to commit murder, a crime not codified in federal law but one that instead had been announced by the officers for the case at hand. (In this respect and others, many parallels to the *Milligan* case may be drawn.) Four of the defendants were sentenced to death, three received life sentences, and one (Spangler) received a six-year sentence.[88] Days later and just over two months after President Johnson had ordered the creation of the military tribunal, the government hanged Mary Surratt, Lewis Payne, David Herold, and George Atzerodt on July 7, 1865.[89]

It was the four conspirators who lived that caused the most concern to the Johnson cabinet. The decision to assign the fate of the conspirators to a military tribunal rather than a civilian court had been immensely controversial and its legality widely questioned.[90] Many in government recognized, moreover, the possibility that a habeas court might intercede on behalf of the

living conspirators and overturn their convictions as unconstitutional under logic similar to that subsequently adopted by the Supreme Court in *Milligan*. Indeed, Mary Surratt's lawyers had already tried to obtain habeas relief in an effort to halt her execution by challenging the constitutionality of the military tribunal that had overseen her trial. In seeking relief, Surratt's lawyers emphasized that "she was a private citizen of the United States" and that her offense was "in no manner connected with the military authority of the same."[91] Her habeas petition, filed the night before Surratt's scheduled hanging, resulted in an overnight issuance of the writ by Justice Andrew Wylie of the Supreme Court of the District of Columbia calling upon the government to produce Surratt in court the next morning and defend her commitment and sentence. But instead of producing Surratt, the official upon whom the writ had been served, Major-General W. S. Hancock, appeared in court alongside Attorney General Speed and produced an "Indorsement" prepared by President Johnson for Hancock "declar[ing] that the writ of *habeas corpus* has been heretofore suspended in such cases as this."[92] It further proclaimed: "I do hereby especially suspend this writ, and direct that you proceed to execute the order heretofore given upon the judgment of the Military Commission, and you will give this order in return to the writ." In response, the court quickly ruled that the suspension curtailed its jurisdiction to review the case and "yielded" to the president.[93] The hangings followed less than two hours later.

But habeas remained a very serious threat to the legitimacy and enforceability of the sentences of the four conspirators who lived. Accordingly, during an excursion to visit the Navy sloop USS *Pawnee* on July 11, 1865, Secretary Stanton pulled Secretary Welles aside to ask "if the Navy could not spare a gunboat to convey some prisoners to Tortugas." According to Welles, when he asked the secretary why he "did not send them by one of his own transports," Stanton:

> told me he wanted to send the persons connected with the assassination of President Lincoln to Tortugas, instead of a Northern prison, that he had mentioned the subject to the President, and it was best to get them into a part of the country where old Nelson or any other judge* would not try to make difficulty by *habeas corpus*.[94]

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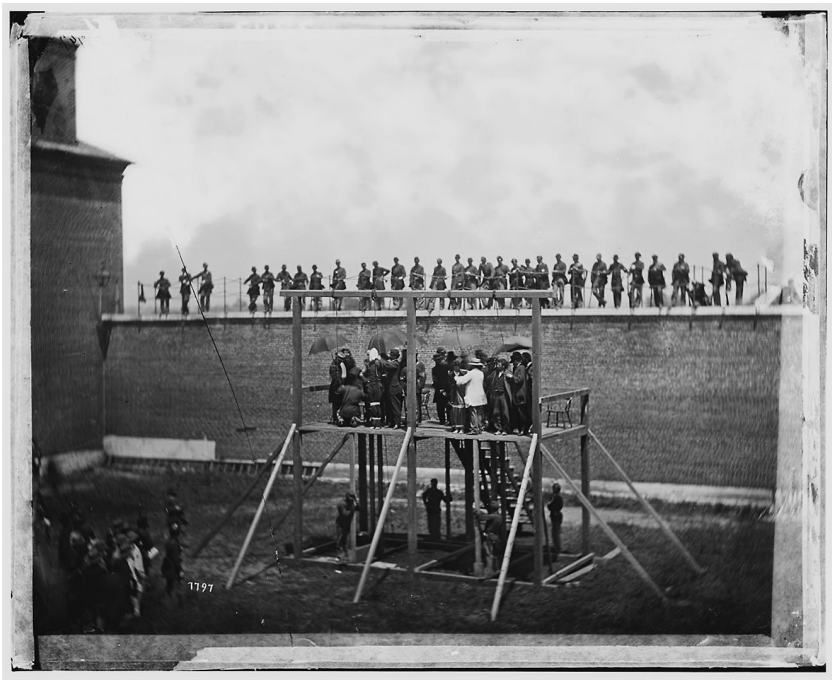
* The reference is presumably to Supreme Court Justice Samuel Nelson. Justice Nelson had been a critic of expansive notions of executive authority during the Civil War. For example, Nelson had dissented in the *Prize Cases* in part on the basis that Lincoln's blockade of Southern ports was illegal because it occurred before Congress declared war. See 67 U.S. (2 Black) 635, 687–689 (1862) (Nelson, J., dissenting).



Adjusting the Ropes for Hanging the Lincoln Assassination Conspirators
Credit: Photograph by Alexander Gardner, "Washington, D.C. Adjusting the ropes for hanging the conspirators," July 7, 1865. Library of Congress.

And so, perhaps drawing on the example of the British sending Ethan Allen and his Green Mountain Boys back to the Americas to avoid habeas proceedings in their case during the lead-up to the Revolutionary War, Welles arranged transport of the remaining conspirators—Samuel Arnold, Dr. Samuel Mudd (known for having set John Wilkes Booth's broken leg after the assassination), Michael O'Laughlin, and Edward Spangler—to the military prison at Fort Jefferson, located on an island in the remote Dry Tortugas off the coast of Florida. The Earl of Clarendon, famous for his proclivity for sending English prisoners in the seventeenth century to "remote islands' garrisons and other places, thereby to prevent them from the benefit of the law,"[95] would have been proud.

The Johnson administration was right to worry about the potential for habeas proceedings. As early as June 1866, Samuel Mudd's wife had met with lawyers about petitioning for habeas relief on her husband's behalf.[96] And, notwithstanding the remote location of their prison, Mudd, Arnold, and

Fort Jefferson in the Dry Tortugas Today
Credit: National Park Service.

Spangler succeeded in filing habeas petitions in federal district court in Florida, arguing that their trial and convictions were unconstitutional and, accordingly, that they were entitled to their freedom. (O'Laughlin, who had received a life sentence, had died in the meantime.) Nonetheless, the court rejected their claims without even awaiting a return from the government. In so doing, the court distinguished *Milligan*, reasoning:

> There is nothing in th[at] opinion . . . , nor in the third article of the Constitution, nor in the [1863 Act] to lead to the conclusion that if any army had been encamped in the State of Indiana (whether in the immediate presence of the enemy or not,) and any person, a resident of Indiana or any other State (enlisted soldier or not) had, not from any private animosity, but from public reasons, made his way within the army lines and assassinated the commanding general, such a person could not have been legally tried for his military offence by a military tribunal, and legally convicted and sentenced.

Accordingly, because "[i]t was not Mr. Lincoln who was assassinated, but the Commander in Chief of the army for military reasons," the court concluded that *Milligan* was inapposite.[97]

Early on in the war, Chief Justice Taney observed in dictum in *Merryman* that suspension did not justify the use of military tribunals, rejecting one of the key arguments advanced by Bingham to defend the commission that tried the Lincoln conspirators. By the war's conclusion, Taney's dicta became the holding of the Court in *Milligan*. But in the interim, Mary Surratt's habeas petition, which unquestionably raised serious and unresolved constitutional questions, evaded judicial review because Justice Wylie held that suspension precluded his jurisdiction entirely. With Surratt being halfway to the gallows by the time her lawyers filed her habeas petition, perhaps it is unsurprising that the judge declined to review her case. Nonetheless, the court's decision equating suspension with the power to sentence and execute a person by military tribunal free of all judicial review was wrong, plain and simple. From its origins, suspension was conceived of as a legal means by which to justify temporary detention without trial, and nothing more. Indeed, looking back on earlier episodes of suspension in English history, one finds a flurry of trials in the wake of their lapsing. To be sure, at least three episodes of suspension in English history encompassed trials of suspected traitors during the pendency of the suspension,[98] but there is nothing in that history to suggest that the suspects enjoyed lesser protections in their trials than they would have received in the absence of a suspension. Nor is there any support to be found in the Revolutionary War suspensions or the Founding period for the proposition that a suspension's effects sweep beyond legalizing detention without trial during the extreme circumstances that justify the suspension. In short, there exists no historical support for the proposition that suspension legalizes streamlining trial and punishment outside the standard criminal process.

As for the underlying merits of Surratt's petition, the questions posed are more difficult. Unlike Justice Wylie in Surratt's case, the district judge presiding over the habeas petitions of Mudd, Arnold, and Spangler did decide their constitutional objections, finding *Milligan* distinguishable. This narrow reading of *Milligan* suggested that the assassination of the president in any state, including Indiana where the courts were open and the Union unopposed, likely would have justified military trial of the conspirators. Of course, if the judge's debatable reasoning is correct, then the fact that the assassination occurred in Washington, DC, is of no moment. But it seems wrong to read *Milligan* in such a cramped fashion. *Milligan* was much more concerned with the geographic realities of the area in question than the particular crime or victim at issue. Thus, whether Washington, DC, was in or near the theater of war was relevant, as of course was the question whether the District stayed loyal to the Union and maintained operating civilian courts. On the one hand, the proximity of the capital to Virginia battlefields where the war waged on into

the spring of 1865 supported the trial of the conspirators by military tribunal. On the other, however, General Lee had surrendered before the assassination, the District remained tied to the Union throughout the war, and courts had been operating in the District well before the conspirators' trial. (To be sure, Bingham argued during the conspirators' trial that this was only "by force of the bayonet.")

These difficult questions are worthy of their own extensive analysis. Given that Lee had surrendered and civilian courts were open (seriously weakening any argument that martial law prevailed in the District), the conspirators' trial by military tribunal ran afoul of the Constitution at least under the precedent of *Milligan*. The broader question whether *Milligan* is itself correct raises its own, much more difficult, set of questions. As is discussed in Chapter 11, *Milligan* has been limited in Supreme Court decisions rendered during World War II and more recently.[99] Nonetheless, Justice Davis's opinion in *Milligan* is consistent with historical understandings animating habeas jurisprudence in the Anglo-American tradition. As explored in earlier chapters, that tradition had long distinguished between application of domestic law to those who clearly could claim its protections and those with whom the state's relationship has traditionally been governed by the law of nations and therefore the law of war. If that same distinction carries over to the question of procedural rights during criminal trial—and there is little reason to believe that it should not—then there are serious constitutional problems with prosecuting citizen civilians before military commissions for violations of the laws of war. To borrow from Justice Davis, if the Constitution can be so easily evaded in times of national emergency, then maybe "it is not worth the cost of preservation."[100]

Complications of the Civil War Example: The Laws of War, Lines of Allegiance, and Martial Law

This complex narrative of Union actions during and immediately after the Civil War suggests a shifting and pragmatic (if not opportunist) understanding of where the lines of allegiance fell. Many in the North at the time argued that those tied to the Confederacy had forsaken their allegiance and could be treated akin to foreigners who fell outside the protection of domestic law.[101] Further, members of Congress and the president moved increasingly toward the position that those fighting with the Confederacy or living within its borders could be denied the privileges of citizenship and treated as enemies under the international laws of war.[102] It was this reasoning that led to the

decision to try the Lincoln conspirators (deemed "enemy belligerents" subject to the laws of war by Attorney General James Speed) before a military tribunal.

In keeping with this idea, early in the war, a divided Supreme Court upheld the president's blockade of Southern states in the *Prize Cases* by deferring to the president's decision to treat those aligned with the Confederacy as belligerent enemies under the law of nations and, as such, the laws of war.[103] In so doing, the Court posited that "it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents, claims sovereign rights as against the other." The Court continued to cite Vattel for the proposition that

> [a] civil war breaks the bands of society and government, or at least suspends their force and effect: it produces in the nation two independent parties, who consider each other as enemies. . . . Those two parties, therefore, must necessarily be considered as thenceforward constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms.[104]

Notably, the Court's reasoning rested in part on the assumption that such persons had "cast off their allegiance" to the Union,[105] and it followed that legislation often required persons who had sided with the Confederacy to renew their allegiance to the Union during the war in order to regain full enjoyment of its protections.[106]

Because the president could treat the insurrection as war, the Court concluded, the president could lawfully treat those who supported the Confederacy as belligerent enemies. It followed that over the course of the Civil War, the Union invoked its authority under the laws of war to kill or capture Confederate soldiers on the battlefield, take and destroy certain Confederate property, and control captured Confederate territory by military rule. Yet many examples from the war, including even the blockade at issue in the *Prize Cases*, highlight the uneasy tension among domestic law, the laws of war, and the role of allegiance during this period. Thus, even when implementing the blockade of southern ports, Lincoln declared that captured private vessels operating under Confederate commissions would be treated criminally as pirates, rather than as privateers who could claim the protection of the laws of war.[107] Further, by the war's end, the Johnson administration once again treated those who sided with the Confederacy as traitors who owed allegiance; that, at least, would seem to be the premise on which President Johnson pardoned "all and every

person who participated, directly or indirectly, in the late insurrection or rebellion" for "the offence of treason against the United States or of adhering to their enemies during the late civil war."[108] (Johnson also required Confederate soldiers to take an oath of allegiance before being discharged.[109]) The role of suspension also implicated this uneasy tension. On the authority of the *Prize Cases*, one could certainly argue suspension was unnecessary to hold enemy soldiers as prisoners of war. But, as explored above, the Civil War suspensions, whether proclaimed by the president or Congress, encompassed Confederate "prisoners of war" within their terms. In so doing, they followed the model established during the Revolutionary War, when the British enacted a series of suspensions to hold American rebels in such a posture.

The Civil War also raised questions about the relationship between martial law and suspension. In many of the areas that saw the worst of the war and accordingly witnessed the greatest number of arrests of Confederate soldiers, martial law prevailed because civilian courts had been shuttered as a result of the war.[110] As a pre-Civil War opinion by Attorney General Caleb Cushing had described it, a proclamation of martial law "must be regarded as the statement of an existing fact, rather than the legal creation of that fact" and follows where "civil authority has become suspended . . . by the force of circumstances."[111] (Martial law is discussed further in Chapter 10.) Indeed, without functioning courts, a suspension could be viewed as superfluous. Further, in practice, the Lincoln administration often referred to suspension and martial law interchangeably.[112] But where courts were open and functioning, no one—not even the "Great Suspender"—questioned the need for a suspension to detain persons deemed to owe allegiance outside the criminal process.

BECAUSE THE UNION was not entirely consistent in its treatment of those who aligned with and supported the Confederacy, reasonable people can disagree about the extent to which the Civil War period provides insights into broader questions of the meaning and application of the Suspension Clause. Further, the scale and devastation of the Civil War was unprecedented in many respects. Regardless, there is much to learn from studying the Civil War period. Perhaps the most significant lesson is that even in the face of the direst of circumstances, the formal understanding held by the president and Congress of the relationship between the privilege and the suspension power remained overwhelmingly consistent with that which the Founding generation imported from English tradition. Specifically, where it was believed that allegiance remained unbroken in the eyes of the law and where courts remained open, President Lincoln and Congress held fast to the position that it was only by a suspension that the president lawfully could claim the power

to detain persons owing allegiance as so-called "prisoners of war" or "for State reasons"—namely, outside the criminal process. To be sure, that position did not always hold in related contexts, including the application of military law to civilians. But here it was understood, as one contemporary commentator explained, that "[w]hen the term of suspension has passed, the right to apply for the Writ, or the privilege or benefit of the Writ revives; and any one in confinement, who has not been tried, may demand it, in order to bail or trial."[113] In the end, despite the myriad legal complications posed by the horrors of the Civil War, it should not be surprising that Lincoln and Congress worked within the Suspension Clause framework. After all, the Clause's express terms list "Rebellion" as one of only two justifications for a suspension.