

## Sec. 9—Powers Denied to Congress

## Cl. 2—Habeas Corpus Suspension

ture” the suspending power,<sup>1779</sup> but the author of this proposal did not retain this language when the matter was taken up,<sup>1780</sup> the present language then being adopted.<sup>1781</sup> Nevertheless, Congress’ power to suspend was assumed in early commentary<sup>1782</sup> and stated in dictum by the Court.<sup>1783</sup> President Lincoln suspended the privilege on his own motion in the early Civil War period,<sup>1784</sup> but this met with such opposition<sup>1785</sup> that he sought and received congressional authorization.<sup>1786</sup> Three other suspensions were subsequently ordered on the basis of more or less express authorizations from Congress.<sup>1787</sup>

When suspension operates, what is suspended? In *Ex parte Milligan*,<sup>1788</sup> the Court asserted that the Writ is not suspended but only the privilege, so that the Writ would issue and the issuing court on its return would determine whether the person applying can proceed, thereby passing on the constitutionality of the suspension and whether the petitioner is within the terms of the suspension.

Restrictions on habeas corpus placed in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) have provided occasion for further analysis of the scope of the Suspension Clause. AEDPA’s restrictions on successive petitions from state prisoners are “well within the compass” of an evolving body of principles restraining “abuse of the writ,” and hence do not amount to a suspension of the writ within the meaning of the Clause.<sup>1789</sup> Interpreting IIRIRA so as to avoid what it viewed as a serious consti-

<sup>1779</sup> 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 341 (rev. ed. 1937).

<sup>1780</sup> Id. at 438.

<sup>1781</sup> Id.

<sup>1782</sup> 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1336 (1833).

<sup>1783</sup> *Ex parte Bollman*, 8 U.S. (4 Cr.) 75, 101 (1807).

<sup>1784</sup> Cf. J. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 118–139 (rev. ed. 1951).

<sup>1785</sup> Including a finding by Chief Justice Taney on circuit that the President’s action was invalid. *Ex parte Merryman*, 17 Fed. Cas. 144 (No. 9487) (C.C.D. Md. 1861).

<sup>1786</sup> Act of March 3, 1863, 1, 12 Stat. 755. See Sellery, *Lincoln’s Suspension of Habeas Corpus as Viewed by Congress*, 1 U. WIS. HISTORY BULL. 213 (1907).

<sup>1787</sup> The privilege of the Writ was suspended in nine counties in South Carolina in order to combat the Ku Klux Klan, pursuant to Act of April 20, 1871, 4, 17 Stat. 14. It was suspended in the Philippines in 1905, pursuant to the Act of July 1, 1902, 5, 32 Stat. 692. Cf. *Fisher v. Baker*, 203 U.S. 174 (1906). Finally, it was suspended in Hawaii during World War II, pursuant to a section of the Hawaiian Organic Act, 67, 31 Stat. 153 (1900). Cf. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). For the problem of *de facto* suspension through manipulation of the jurisdiction of the federal courts, see *infra* discussion under Article III, The Theory of Plenary Congressional Control.

<sup>1788</sup> 71 U.S. (4 Wall.) 2, 130–131 (1866).

<sup>1789</sup> *Felker v. Turpin*, 518 U.S. 651 (1996).