TARRANT, Catherine Mae, 1945-
A WRIT OF LIBERTY OR A COVENANT WITH HELL:
HAEBAS CORPUS IN THE WAR CONGRESSES, 1861-1867.

Rice University, Ph.D., 1972
History, modern

University Microfilms, A XEROX Company, Ann Arbor, Michigan

© 1972
Catherine Mae Tarrant

ALL RIGHTS RESERVED

THIS DISSERTATION HAS BEEN MICROFILMED EXACTLY AS RECEIVED.
INFORMATION TO USERS

This dissertation was produced from a microfilm copy of the original document. While the most advanced technological means to photograph and reproduce this document have been used, the quality is heavily dependent upon the quality of the original submitted.

The following explanation of techniques is provided to help you understand markings or patterns which may appear on this reproduction.

1. The sign or "target" for pages apparently lacking from the document photographed is "Missing Page(s)". If it was possible to obtain the missing page(s) or section, they are spliced into the film along with adjacent pages. This may have necessitated cutting thru an image and duplicating adjacent pages to insure you complete continuity.

2. When an image on the film is obliterated with a large round black mark, it is an indication that the photographer suspected that the copy may have moved during exposure and thus cause a blurred image. You will find a good image of the page in the adjacent frame.

3. When a map, drawing or chart, etc., was part of the material being photographed the photographer followed a definite method in "sectioning" the material. It is customary to begin photoing at the upper left hand corner of a large sheet and to continue photoing from left to right in equal sections with a small overlap. If necessary, sectioning is continued again – beginning below the first row and continuing on until complete.

4. The majority of users indicate that the textual content is of greatest value, however, a somewhat higher quality reproduction could be made from "photographs" if essential to the understanding of the dissertation. Silver prints of "photographs" may be ordered at additional charge by writing the Order Department, giving the catalog number, title, author and specific pages you wish reproduced.

University Microfilms
300 North Zeeb Road
Ann Arbor, Michigan 48106
A Xerox Education Company
RICE UNIVERSITY

A WRIT OF LIBERTY OR A COVENANT WITH HELL: HABEAS CORPUS IN THE WAR CONGRESSES, 1861–1867

by

Catherine M. Tarrant

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

Thesis Director's signature:

Harold M. Hefner

Houston, Texas

May 1972
PLEASE NOTE:

Some pages may have
indistinct print.
Filmed as received.

University Microfilms, A Xerox Education Company
INTRODUCTION

In 1807, Chief Justice of the United States John Marshall declared, "that for the meaning of the term habeas corpus, resort may unquestionably be had to the [English] common law; but the power to award the writ by any courts of the United States, must be given by written law." Marshall stated with considerable prescience the reason for the difficulty in assessing the writ's role in the American constitutional system. The Constitution mentioned only suspension of the privilege of the writ and did not assign the writ a specific role in the American constitutional framework. Section 14 of the 1789 Judiciary Act provided little more guidance. Moreover, the writ of habeas corpus wears two faces, each having a long and respected tradition in English and American jurisprudence and popular lore. If habeas corpus is a writ by which courts speak to each other on matters of jurisdiction, it also is a right or privilege by which individuals seek to guarantee their liberty against unjust imprisonment by private or public authority.¹

During the Civil War and early Reconstruction years the writ of habeas corpus became a focal point for
controversy. Three questions concerning the writ captured Congress's and the nation's attentions. The first was whether the Constitution empowered the President or Congress to suspend the writ. Prior to Lincoln's suspension authorizations beginning in April 1861, legal experts had assumed, with little examination of the question, that only Congress had the power to suspend. The writ had never been suspended, although President Jefferson, while the Burr conspiracy in the West was afoot during the first decade of the century, had asked Congress to authorize suspension. This question ceased to be an issue early in the War.²

The second question which the War raised was the extent to which civil courts could use habeas corpus to review decisions of military tribunals which tried civilians. Like the matter of suspension, this second question had received little or no attention. The Supreme Court had refused to review the decisions of military tribunals unless the defendant could prove that he had been denied procedures which the law required the tribunals to grant him. However, the Court had never dealt with the question whether military courts could try civilians who were not connected with the military for violations of the laws of War. The Court in 1866 treated the question at length, if unsatisfactorily, in Ex parte Milligan.³
The third question by comparison with the other two received considerable attention before the War. This question was the national courts' use of the writ of habeas corpus to reach into state jurisdictions. Supreme Court decisions provided little or no guidance on this question. Section 14 of the 1789 Judiciary Act specified that judges of the district and Supreme courts could issue the writ in all cases necessary to the exercise of their respective jurisdictions in instances of imprisonment by the national authority. The section left judges to their own devices in employing the writ.

In cases coming before the Supreme Court from U.S. circuit courts by habeas appeal the Court usually followed Marshall's lead in looking to the common law for its customary usage. However, the Court's references to the common law failed to coincide with its actual employment of the writ. Among the examples of such judicial inconsistency was the Court's citation of the writ as a writ of right which issued upon petition.\(^4\) Yet the Court never issued the writ as a matter of right but always inquired either into its own power to issue the writ or into the jurisdiction of the circuit court ordering the detention.\(^5\) (Apparently, the former question did not depend upon the Court's determination of the latter and vice versa.)

Besides the Court's penchant for saying one thing and
doing another, it also steadily narrowed the habeas appeal route. In an 1810 case the Court decided that habeas corpus was not an appropriate remedy for confinements arising out of civil proceedings. For practical purposes, the Court's decision limited its review to criminal detentions. Furthermore, the Court also decided two years later that United States' courts possessed no common law jurisdiction to try crimes against the nation. According to the Court, "the legislative authority of the Union must first make an act a crime, afix a punishment to it, and declare the court that shall have jurisdiction of the offense." Since prior to the Civil War there were very few nation-defined crimes for which individuals could be arrested, tried, and convicted, the 1810 and 1812 decisions limited habeas review to an undeveloped aspect of national law for which there would be little occasion for resort to the writ. Moreover, all of the pre-Civil War cases came to the Supreme Court under section 14 of the 1789 Judiciary Act which specifically limited national courts' issuances of the writ only to those confined by the national authority. Thus national courts could not issue the writ to free states' prisoners, although the High Court in one case divided evenly on a plea for a writ of error to review a state court refusal to grant the writ of habeas corpus to a detained party.
The virtual absence of national criminal legislation and restriction on national habeas review of state-ordered confinements meant that the most likely sources for writ petitions coming to the Supreme Court would be from lower national courts possessing jurisdiction exclusive of the states in a particular locality, as in the District of Columbia. Alternatively, after 1842, a foreign national arrested by state or national authorities pending extradition to countries having extradition treaty agreements with the United States, won Supreme Court review.

The cases coming before the Supreme Court before the Civil War support the above estimation. Virtually all of the cases either came from the Circuit Court for the District of Columbia or were appeals from the writ from individuals seeking to be relieved from executive detentions pending extradition and whose habeas appeals had been refused by the lower national or state courts.

The high court's restricted employment of the writ -- a product of its lack of statutory definition, the relatively few national criminal statutes, and the specific limitation regarding its employment to cases of confinement by the national authority -- mitigates the value of using Supreme Court expositions as the standards by which pre-1867 writ developments should be
assessed.

However, use of the writ between the two jurisdictions was not novel before the War. States had used it often to review military enlistments and in the 1850s to free individuals held under U.S. authority for violating the 1850 Fugitive Slave law until the Supreme Court in an 1859 case forbade such review. However, as already noted, the national courts were never permitted to reach into state jurisdictions, but national judges were permitted to do so under section 7 of the 1833 Force Act. In the 1850s district judges and Supreme Court justices on their circuits exercised the jurisdiction.

Their opinions demonstrate why the jurisdiction was necessary as well as why the judges were anxious to minimize the impact such assertions of jurisdiction would have on state judicial processes. As such they provide a portrait in miniature of debates which occurred during the Civil War and Reconstruction years over federal judicial relations which an invigorated national authority potentially vitally affected.

States' arrests of U.S. marshals in the 1850s for their activities in enforcing the 1850 Fugitive Slave law provided the occasion for these opinions, and section 7 of the 1833 Force Act provided the means. The 1833 Act had been passed for the immediate purpose of
protecting national officers in their enforcement of the
revenue laws in South Carolina during the Nullification
危机。第一和第五节的法案，允许总统改变海关的
地点和召集民兵，已仅限于有限的时间。然而，没有
对其他部分的限制，它仍然留在法律书上。
法案第七节授权高等法院或任何地区法院法官
签发 habeas corpus "... in all cases of a prisoner
或囚犯，在监狱或监禁，他或他们
应被投入或被监禁，或由任何机构
或法律，对于任何行为所做，或未做，在
执行任何美国法律或任何命令，
过程，或裁定，由任何法官或法庭
任何事情在任何法案的反对
前。"此外，这一节赋予
的人，对他们签发的
或拒绝提供返回，或对做出一个
虚假的
 attività to the writ. 12

The law had remained buried in the statute books
until state-nation confrontationloomed over the 1850
Fugitive Slave Law. U.S. marshals were arrested in
northern states for acts in connection with the performance
of their duty in returning fugitive slaves or were cited
for contempt for failing to comply with state court
writs of habeas corpus to free fugitives in the marshals' 
custodies. The 1833 law was resurrected to deal with 
these state confinements.

National judges in cases arising under section 7 
of the 1833 Act were sensitive to the implications of 
their employment of the writ in reaching into state 
jurisdictions. The national government's enforcement of 
fugitive slave returns were very unpopular in the North. 
Northern states were aggravated enough because of this 
national interference in their domestic relationships 
without being harrassed further by another law such as 
the 1833 Act interrupting the states' judicial processes. 
Yet, referring to the 1833 Act, Justice Grier proclaimed 
in an 1853 case in his Pennsylvania circuit, that,

The authority conferred on the judges of 
the United States by this act of congress 
gives them all the power that any other 
could exercise under the writ of habeas 
corpus, or gives them none at all. If 
under such a writ they may not discharge 
their officer when imprisoned 'by any 
authority,' for an act done in pursuance 
of a law of the United States, it would 
be impossible to discover for what useful 
purpose the act was passed.

Grier affirmed implicitly the primacy of national 
authority but asserted explicitly the primacy of national 
judicial processes.  

In subsequent cases, judges followed Grier's lead, 
but at the same time they were careful to stress that 
they were interfering minimally with the states' judicial
processes. National judges generally asserted that they were neither reviewing nor reversing decisions of state courts, but at the same time they denied that state courts had concurrent jurisdiction in deciding whether national officers had broken the law. As District Judge John Kane asserted in a derivative case involving the marshals whom Grier, in the case quoted above, had discharged on habeas corpus, the purpose of the 1833 Act had been "... to make the jurisdiction of the federal court revisory, and its action controlling, for the very reason that otherwise, such a conflict might exist between the two." The relationship between state and national courts, Kane continued, was "adversary" not concurrent in these cases. Kane's position is noteworthy because he did not assert outright that state courts had no jurisdiction. He merely asserted, by use of the word "adversary" that the two jurisdictions were in competition, but at the same time he affirmed the decision of the national court would determine the resolution of the case.  

Kane minimized further the effect national court habeas issuances would have on state authority in rebutting the respondent's (i.e., the attorney for Pennsylvania) argument that since there was no national statute to punish national officers for excesses in performance of their duty, the national court's discharge of the prisoners would prevent their trial by jury.
"It will not be an anomaly, however," Kane responded, "if the action of this court shall interfere with the trial of these prisoners by jury." Trial by jury was a right of the accused but not either of the state or of the national government. Furthermore, Kane continued, jury trials were overruled or arrested many times because of grants of new trials, motions of nolle prosequis, discharges on habeas corpus, or the judge's entry of a certificate of probable cause. "No one imagines," Kane concluded, "that because a man is accused, he must therefore . . . be tried."16

In addition to the arguments already cited, national judges tried to placate the states by pointing out that the 1850 Fugitive Slave Law did not preclude state courts issuing the writ to national officers in order to inquire into causes of confinement of any fugitive. However, foreshadowing Taney's opinion in Ableman v. Booth in 1859, national courts asserted positively that the return to the writ stating that the individual was detained in pursuance of the 1850 Law, was conclusive as to the lawfulness of the detention. Therefore, state courts could proceed no further.17

The decisions of national judges on this point were in marked contrast to their determinations upon their own power to go behind the return to hear evidence preliminary to deciding the lawfulness of the detention.
The respondent's return to the writ, these judges ruled, was not conclusive in national courts. These jurists stated that the court would hear evidence after the return was made to establish the facts in connection with the commitment. If the writ were to be an effective adjunct of national authority such judicial investigation of the facts was necessary. As Judge Kane noted in one case he could imagine that records of state courts would not indicate the official nature of the officer's duty. If an act of Congress was to be made operative the national courts (judges) must be able to go behind and beyond the record of the committing court (judge) before as well as after conviction, Kane concluded. 18

The reason for national judges' position regarding the return is clear. Normally, the return of a writ regular on its face presupposed that the court authorizing the detention had proper authority to do so. There was no question that state courts had a right to arrest, indict, or try individuals who had broken state law. But the difficulty arose in a federal system where an individual (such as a national officer) in the performance of his duty (as in enforcing the Fugitive Slave Law of 1850) might "break" a state law. Federal judges had to find some way to relieve national officers from liability under state processes, which meant finding some way round the jurisdictional impasse of the federal system,
and indeed, of the writ itself.

Allowing additional evidence to be presented after the return of the writ deflected the jurisdictional question. The tactic changed the inquiry from one deciding whether the individual was rightfully detained to the broader and more crucial question whether the act complained of was done in the course of performing an official duty. Of course the judge's decision regarding the performance of duty would determine the question of the rightfulness of detention, although national judges were also insistent that the proceedings in no way protected a national officer from punishment under state law for excessive zeal in the performance of his duty.

It is difficult to prove what significance these decisions had, if any, for Congress during the Civil War-Reconstruction period. However, it would be difficult to avoid comparisons between the necessity to maintain national authority in the 1850s and the similar need in the 1860s. The most convenient summary of the writ's development in the 1850s cases, however, can be found, strikingly enough, in section one of the 1867 Habeas Corpus Act. The law declared that,

The petitioner may deny any of the material facts set forth in the return, or may allege any fact to show that the detention is in contravention of the Constitution or laws of the United States, which allegations or denials shall be made on oath. The said return
may be amended by leave of the court or judge before or after the same is filed, as also may all suggestions made against it, that thereby the material facts may be ascertained. The said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested; and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the Constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty.19

During the Civil War, Congress worried the question of the impact the expansion of national judicial jurisdiction would have on state processes. Its solution was to construct an appeals system which left intact as much as possible state initiative in the administration of justice through their courts while maximizing the alternatives for individuals who felt they were denied justice in those forums to appeal their cases to the national judiciary. The 1867 Habeas Corpus Act was an extension of this solution to the farthest extent, for it conferred upon the national courts jurisdiction which coincided with all that the Constitution conferred upon them. This jurisdiction combined with the fact of its traditional operation as a pre-trial remedy meant that the national courts, if the situation required it to, could abort state processes at its earliest stage. Yet because Congress also granted the courts post-conviction jurisdiction, the courts, which relished the traditional
federal system more than the traditional use of the writ, could allow the states the widest latitude in completing the normal course of their judicial proceedings before taking jurisdiction of the case.

Court constructions of the 1867 Habeas Corpus Act have been much discussed among courts and members of the bar, but little attention has been given to ascertaining and analyzing the reasons why Congress passed the Act or the closely related Wartime and Reconstruction legislation regarding the federal judicial system. Study of this body of legislation indicates that members of Congress strongly preferred a state-oriented federal system. They had matured during pre-War times when the state, not the nation, was the focal point in their lives, when state citizenship determined national citizenship. But to say that Congressmen preferred a state-based federal system is not to explain why they did, for such reasons go to the heart of the way in which law, custom, and politics over the previous eighty years had dictated that the federal system operate. A study of the writ of habeas corpus in the several contexts of the questions it raised during the War and early Reconstruction years provides answers to the reason why Congress preferred a state-based federalism while it places the writ in the federal judicial structure.

Catherine M. Tarrant
I wish to acknowledge Cornell University Press for permission to quote a passage

CONTENTS

INTRODUCTION ........................................... 1

I. THE WRIT OF HABEAS CORPUS: PAMPHLETEERS' PERSPECTIVES .......... 1

II. "WHAT IS THIS SUSPENSION OF THE WRIT OF HABEAS CORPUS?" .......... 34

III. SOME EARLY-WAR CONFIGURATIONS .......................... 66

IV. THE 1863 HABEAS CORPUS ACT ............................. 93

V. THE WRIT'S SUSPENSION, INDEMNITY, AND THE ARMY, 1861-1867 .......... 126

VI. SOME RECONSTRUCTION REVISIONS .......................... 155

VII. CONGRESS, THE SUPREME COURT, AND EX PARTE MILLIGAN ............... 186

VIII. SETTING THE STAGE ................................... 225

IX. FOR ALL IMMEDIATE PURPOSES .............................. 255

X. FOR ALL PERMANENT PURPOSES .............................. 290

XI. THAT "THE FRIGHTFUL CARNIVAL OF BLOOD NOW RAGING IN THE SOUTH SHALL CONTINUE NO LONGER" .................................. 325

EPILOGUE ............................................. 352

NOTES ............................................... 358

BIBLIOGRAPHY .......................................... 442

ACKNOWLEDGMENTS ...................................... 470
CHAPTER I

THE WRIT OF HABEAS CORPUS: PAMPHLETEERS' PERSPECTIVES

The Constitution states in Article I, section 9 that, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." During the early months of the Civil War, Lincoln declared the existence of insurrection in states which had seceded and subsequently authorized the suspension of the writ along the Florida coast and along military lines between Philadelphia and Washington and New York and Washington.\(^1\) Lincoln's suspension authorizations provoked great controversy, prompted by Chief Justice Roger B. Taney's June 1, 1861 Merryman opinion censure of Lincoln for usurping a power which the Constitution had conferred upon Congress.\(^2\)

The Chief Justice's challenge of the President raised far more questions than simply whether the President or Congress could suspend the writ, for in rendering his opinion Taney discussed the rights of citizens under the Constitution during war as well as the extent of military authority over citizens and the relation of the military to the civil authorities.
During the remainder of 1861, several distinguished lawyers\textsuperscript{3} took up Taney's challenge on behalf of the President. One of these lawyers, an aging Philadelphian, Horace Binney, produced a pamphlet which became the focal point for opposition writers in early 1862.\textsuperscript{4} The pamphlets of these opposition writers, together with Binney's response in a second pamphlet, marked the second and final phase of the pamphlet discussions on the writ suspension question. By April 1862 the pamphlet discussion was exhausted but was revived later in the year as a result of the President's September proclamations of emancipation and of suspension of the writ and declaration of martial law throughout the country for certain classes of persons. This last development serves only as a postscript to the early-War discussions of the writ suspension question, for emancipation put the War in a different perspective. The War for the Union as it had been and the Constitution as it was became a war for the Union and Constitution as they should be.

The early writers who championed Lincoln's power to suspend the writ had a difficult task, for the writ of habeas corpus was little understood as a judicial remedy in peace let alone as one which could be suspended in time of war. Because of the suspension clause's place in the legislative article in the Constitution and because, in England, Parliament was vested with the suspension
power, earlier legal writers had assumed with little examination of the question that in America only Congress possessed the power to suspend the writ. These writers, in response to Taney, discussed civil liberties in wartime, attempting to place them in the context of the nation's necessity to conduct war. They also raised questions of their own such as the relation of the writ of habeas corpus\textsuperscript{5} and martial law.\textsuperscript{6}

The one topic on which their discussions proved fruitful was on martial law. In the course of their arguments they rejected the definition of martial law as the will of the military commander, which was incompatible with the Constitution's subordination of the military to the civil power. Martial law became, instead, an instrument in aid of the civil power in maintaining order. The discretion remained with the military commander under martial law powers to suspend civil authority BUT only so far as necessary to aid the civil power.

For all of the arguments on both sides of these many questions, none of them came to grips with the central question which had sparked the controversy in the beginning. That one unanswered question was where did war actually exist? Did it exist only on the battlefield? Or could it exist hundreds of miles from battle? The determination of this question affected corollary questions of where the writ could be suspended,\textsuperscript{7} of citizens' rights during
wastime, and of the ability of the military to suspend the civil proceedings of courts. Only with the events of September 1862 did these questions draw any attention.

Since Taney's opinion prompted the controversy over the writ's suspension and posed many related questions, keynoting issues which would be debated for the rest of the War, it is the proper place to begin. There were two principal points which the Chief Justice's opinion discussed: the right of the President to suspend or to authorize suspension of the writ of habeas corpus; and the validity of executive-authorized military arrests without civil process.

In mustering his arguments Taney ranged widely over various provisions of the Constitution, including its legislative and executive articles and the fourth, fifth, and sixth amendments. Section 8 of the legislative article enumerated the powers that Congress could exercise which were implemented through the "necessary and proper" clause. Because this clause was somewhat indefinite, Taney believed, the framers of the Constitution had added section 9, containing specific restrictions upon Congress's powers, including the power to suspend the writ of habeas corpus, in order to protect citizens against congressional encroachments under the cloak of the authority section 8 conferred. The clause absolutely
prohibited suspension, Taney pointed out, except in instances of rebellion or invasion, and even then permitted suspension only when the public safety required it. The placement of the suspension clause first in the section, Taney said, enhanced the argument that insulating individual liberty from legislative encroachment was one of the pre-eminent concerns of the framers of the Constitution. 8

The executive article, on the other hand, mentioned nothing about the President's authority to suspend. Both the short term for which the President was elected as well as the narrow specification of his powers provided evidence, Taney believed, of the framers' intention to withhold many of the powers which his English counterpart had exercised, "... which were considered as dangerous to the liberty of the subject..." In addition, the Constitution checked the President's war-making powers through Congress's appropriation authority as well as through states' appointments of officers. Furthermore, Congress had to authorize minor appointments, and the Senate had to advise and consent to major appointments, thus restricting the President's civil power. 9

Taney based his conclusion that the Constitution permitted Congress rather than the President to suspend upon the clause's placement in the legislative article and upon the framers' intention to make a weak executive who
would not have been empowered to exercise a momentous power such as suspension. However, his strongest arguments were in support of the judicial authority, without which the lifeblood of individual liberty -- due process -- would not be secure.

The citizen's right to due process of law, which the fifth amendment guaranteed, was absolute against the President's authorization of either civil or military authorities to make arrests. Due process meant judicial process, which would be contravened if the President exercised such arrest powers. Congress's power to suspend the writ was limited by the guarantees of the Sixth Amendment since no individual not subject to the rules and articles of war who had been arrested could "... be detained in prison or brought to trial before a military tribunal." Apart from the specific limitations the Constitution placed on the individual branches of the national government, the government itself was one of delegated and limited powers as prescribed by the Tenth Amendment.

Taney presented his strongest defense of the judiciary in admonishing the military for its activities in Maryland. The military, Taney scolded, had not merely suspended the writ but had "... by force of arms thrust aside the judicial authorities and officers to whom the Constitution has confided the power and duty of interpreting and
administering the laws, and substituted military government in its place, to be administered and executed by military officers." The judicial authorities had not been interrupted or otherwise opposed except by the military. The military, by its actions, had denied to citizens the rights which the Fourth, Fifth, and Sixth Amendments guaranteed them, rights which not even Congress could suspend. If such a state of affairs was allowed to exist, then "... the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty, and property at the will and pleasure of the army officer in whose military district he may happen to be found." Concluding that he had exercised all the powers the Constitution had conferred upon him, Taney stated that a copy of his opinion would be sent to the President "... to determine what measure he will take to cause the civil process of the United States to be respected and enforced."

Taney's opinion is difficult to explain, especially in light of his opinion in Luther v. Borden twelve years before. In the earlier case Taney had decisively upheld the President's right under the 1795 Militia Act to determine the facts as to when rebellion or insurrection existed as a prerequisite for calling out the militia. Presumably Lincoln, in 1861, had made such a decision when he issued his April 15th proclamation declaring the
existence of insurrection and calling out the militia. If the President's declaration of the existence of rebellion had been a sufficient prerequisite for calling out the militia, the question must be asked why such a declaration was not sufficient in order to suspend the writ of habeas corpus since rebellion and invasion were the only exceptions to the general prohibition against suspending the writ.\textsuperscript{12}

There is one way of explaining this apparent inconsistency. However much Taney's opinion might have changed since the Luther decision twelve years before, his argument was not entirely based on what branch of government could or could not declare the existence of rebellion and therefore suspend the writ. Granting the Chief Justice's argument that only Congress could authorize suspension of the writ, he could argue indisputably that Congress had never given any such authority to the President. In other words granting the power to suspend the writ was a separate grant from that which empowered the President to declare the existence of rebellion before calling out the militia. In the course of making the decision to authorize the President to suspend the writ, Congress would be acting as judge whether the existence of rebellion necessitated suspension for the public safety. In summary, the necessity to suspend for the public safety in addition to and because of the existence of
rebellion was the duty of Congress to determine prior to its empowering the President to suspend. Rebellion might exist, but unless the public safety required the writ's suspension, the writ could not be suspended.\textsuperscript{13}

Taney left nagging questions unanswered. First, did suspension apply only to areas actually declared to be in rebellion or could the writ be suspended in any part of the Union when rebellion existed only in one part of it? Since the major thrust of the Chief Justice's opinion condemned the President for exercising a power which only Congress could give him but had not, the presumption obtains that Taney assumed the writ could be suspended anywhere in the Union. Otherwise, not even Congress's authorization of the writ's suspension would make suspension legal in portions of the Union, such as Maryland, not declared to be in rebellion.

On the other hand, the opinion indicated that Taney was most irritated because the judiciary had been disregarded, even humiliated, by the military's refusal to honor the writ. Not only had Taney taken the opportunity to chastise the President and his military subordinates for usurping undelegated powers, but also he had placed Congress's power to suspend the writ in subordination to the judicial process. Such presumptions indicated that the Chief Justice could not have considered the existence of rebellion in one part of the Union as meaning
the writ could be suspended in the other parts. Subordination of the executive and the legislature to the judiciary could obtain only where the courts were open and unobstructed, which was the test that men in 1861 and before had universally accepted for judging whether rebellion existed. Whatever the condition of the public safety, rebellion could not exist where the courts were open, and the writ could not be suspended where rebellion did not exist.14

Second, what was the Chief Justice's opinion on martial law and its relation to suspension of the writ? Not once does the Chief Justice even mention the subject of martial law, which would have made clearer his position on military authority over civilians during wartime as well as on where the writ could be suspended in the country. Other writers in response to Taney's opinion would devote considerable attention to the problem.15

As already noted Taney's opinion provoked a storm of comment supporting and contradicting his effort. During the remainder of 1861, Harvard Law School's Joel Parker, crack Maryland lawyer Reverdy Johnson, Lincoln's Attorney General Edward Bates, and Binney published opinions refuting Taney's position.16

They denied the Chief Justice's arguments that only Congress was empowered to suspend the writ, that section 9 of article one restricted only Congress, and that the
amendments were absolute guarantees which could not be suspended even during wartime. They ranged widely over American legal history, basing their defense of the President: on his war powers which included the power to declare martial law and the existence of rebellion; on the intentions of the framers when writing the suspension clause in the Constitution; on the existence of two types of suspension, one which only the President could exercise, the other which only Congress could; and on the type of duties the respective departments performed, which meant that suspension was an act the executive most appropriately performed.

Before any of Lincoln's champions could present arguments proving that the Constitution conferred upon the President powers which presumed that he could suspend the writ, they had to disprove Taney's argument that the suspension clause referred only to Congress's power to suspend. Most of these writers inquired, as did Parker, "... whether the suspension is a denial of the writ itself, so that it cannot be issued during the term of the suspension; or whether it is merely an authority, in some way existing, permitting persons accused of certain classes of offenses to be held against the operation of the writ when issued. ..." 17

These writers either conceded, as did Reverdy Johnson, that the suspension referred to in the clause was an
absolute denial of the writ's issuance (an incorrect
assessment), which only Congress could authorize, or
asserted, as did Parker, Bates, and Binney, that the
clause meant only the holding of an individual against
the operation of the writ (the correct view). While
Johnson affirmed Taney's position, he pointed out that the
President claimed no such power but only the right to detain
individuals against the writ's operation which was a war
power. 18

Parker failed to state the reasons he believed the
clause referred only to detention against the operation
of the writ, but Bates and Binney did. Their argument
hinged on the distinction between suspension of the writ
and suspension of the privilege of the writ. 19 The writ
referred to in the suspension clause, Binney pointed out,
was habeas corpus ad subjiciendum, commanding the jailer
to bring the body of the person before a court or judge
with the cause of commitment "... to be subjected to
the order of the court or judge in regard to the dis-
posal of his person." Habeas corpus acts in the common
law secured the privilege of the detained individual
"... to be bailed, tried, or discharged without arbi-
trary delay."

The words, "shall not be suspended," Binney con-
tinued, were not technical words known to any particular
legal system but were general words when "... used in
reference to a privilege, signify the same thing as hung up, deferred, delayed, denied for a season." The privilege of the writ was "personal" and "individual" and did not extend to all persons within a territory where the privilege existed. The privilege, therefore, was a remedy in law available to individuals to secure "... the right of being exempt from arbitrary imprisonment ... and is predicable by the Common Law of every freeman. ..." Thus, "... to hang up, defer, delay, deny for a season, the privilege which a statute gives, or is expected to give, in relief of imprisonment, is to suspend it in the sense of this clause of the Constitution. Freedom is the right, either absolute or qualified. The remedy is privilege."

In another part of his pamphlet, Binney asserted, correctly, that the writ still issued in order that the judge could ascertain the cause of commitment, but the return to the writ would "... stay further proceedings as it now does in our Federal Courts, when the commitment is by the authority of a State."20

These writers found other reasons as well for doubting Taney's contention. Johnson and Binney asserted, contrary to Taney, that article one, section 9, containing the suspension clause, did not include prohibitions only upon the legislative powers set forth in the previous section. They pointed out that section 9 also prohibited
drawing money not specifically appropriated by Congress from the treasury, which restricted the executive, and accepting titles and other rewards, which restricted all branches of the government. 21

Not only was the clause's placement in the Constitution no evidence that Congress only could suspend, but also Taney's use of English authorities was questionable. Parker and Binney argued this position, although they did so for different reasons. Parker based his discussion on the assumption that the rules of war were different from those of peace and that the Constitution had provisions for war as well as for peace. He reviewed Taney's rendition of English authorities on the subject of the writ's suspension. He concluded:

If by this the Chief Justice refers to imprisonment for alleged offences in time of peace, and to detentions having no connection with military operations in time of war, it may be true, theoretically; but it is quite clear, that neither Magna Charta nor the common law prescribes rules to govern the conduct of a war, or professes to set forth the principles which in time of war shall regulate the military service of the country; and we have found no case in England in which the writ of habeas corpus has been used, in time of war, to deliver from any detention by military authority, which detention had its origin in causes and proceedings connected with the war. 22

Parker could have made his argument stronger and his point clearer if he had given some idea of what constituted regulation of "the military service of the country" in
time of war. On the one hand, if he had in mind unwarranted judicial interference with the military's efforts to cope with rioters as it made its way through Baltimore, for example, then undoubtedly his point was correct. Yet such a point raised the question to what degree the military's presence in Baltimore was connected with "causes and proceedings connected with the war." On the other hand, if Parker meant by the regulation of military service during wartime, the rules and modes by which it conducted itself in wartime, then he was absolutely wrong, for the Constitution charged Congress specifically with prescribing rules and articles of war by which the military operated.

Binney concentrated on proving that Taney's analogy between the writ's operation in the English and American systems, respectively, was fallacious and on discussing the history of the writ's consideration in the 1787 constitutional convention. He found two reasons for the false analogy. First, English law embraced an absolute principle without exception that no person shall be imprisoned arbitrarily by anyone, not even because of rebellion or invasion. This absolute principle grated with another principle (which existed because England had no written constitution) that what Parliament declared to be common law could be changed by subsequent enactments of Parliament. Although a man may be secured by the
highest authorities of English law against being detained without a trial, "...yet that Parliament may constitutionally, or imperially, authorize the King's Privy Council, or one of his Secretaries of State... to imprison a freeman in time of peace;... and may detain him without trial or bail for six months, or a year, or for any time they see fit, renewable forever at the pleasure of Parliament." In other words, the right against detention without trial was absolute for the British citizen unless or until Parliament said otherwise.

America, on the other hand, had a written constitution which could not be transcended by any legislative body. Thus, Binney concluded, the English experience afforded no analogy with America which had "...qualified the principle [i.e. of suspension], so as to secure it against the discretionary power of any body, except when the nation is forced away from its normal and orderly condition by internal war, rebellion, or invasion." In such abnormal circumstances the government could not abuse the exercise of its power because it was subject even then to the Constitution's limitations.

Binney's second reason for the false analogy was his weakest and least supported. In England, he asserted, the 1679 Habeas Corpus Act had been passed to restrain an over-powerful and assertive executive. Next to the outright exclusion of James II for the throne, the Habeas
Corpus Act had been Parliament's most powerful weapon. In America, Binney contrasted, the issue of executive power had been settled in favor of a weak executive when the suspension clause was proposed.  

After the aging lawyer demonstrated in what ways the analogy between the British and American legal systems was untenable on the question of the writ's suspension, he reviewed the history of its consideration in the 1787 Convention. Such a review revealed that the framers' consideration of the writ was novel in two respects. First, neither the words "privilege" nor "suspension" were terms known to the common law. Second, the privilege of the writ was guaranteed when there was neither rebellion nor invasion. The review also revealed that the Convention had specifically rejected conferring the suspension power upon Congress.

These writers had presented compelling arguments refuting the Chief Justice's contention that only Congress could suspend. The major thrust of their arguments, save Binney's, had not been towards disproving that Congress was prohibited from suspending the writ but only that the suspension clause did not confer upon it a monopoly on the power to suspend. Having offered their arguments on these points, the writers moved on to consider other sources for the President's authority to suspend the writ. Many arguments were offered to prove he possessed the power.
But despite the impressive list of sources, none of them specifically referred to the writ's suspension. Binney was the only writer who had argued that the suspension clause empowered the President to suspend. Nevertheless, these other arguments were based on assumptions about the nature of the President's duties and on the right of any nation to preserve itself. All of these writers agreed that the right of preservation was inherent in any nation. Since the Constitution vested the President with the duty to enforce the law, he was responsible to defend the nation against threats. Bates stated the case in his opinion:

It is the plain duty of the President (and his peculiar duty, above and beyond all other departments of the Government) to preserve the Constitution and execute the laws all over the nation; and it is plainly impossible for him to perform this duty without putting down rebellion, insurrection, and all unlawful combinations to resist the General Government. 27

In order to execute the law he could exercise whatever powers he deemed necessary to meet the emergency. In extreme situations, such as war, the President's power was essentially military in character, and he was empowered to use the military in any capacity to meet the challenge war posed.

All of the sources cited for his authority to suspend contained strong arguments for the suspension power. Perhaps the most ambiguous argument, however, was that the
executive, being a co-ordinate and co-equal branch of government, was the judge of his own acts, could determine their legality, without being subject to the judgments of either Congress or of the judiciary. This view, which Bates and Johnson supported, had received its first and virtually only statement prior to 1861 in Andrew Jackson's 1832 message vetoing the re-chartering of the Bank of the United States.

On one level, this precedent is suspect. Jackson was not defending the exercise of a doubtful power. The Constitution specifically conferred upon him the power to veto legislation. He was presenting a rationale for why he was exercising his veto. The argument had been presented to him that the veto could be used when the constitutionality of the legislation was doubtful. Since the Supreme Court had passed on the constitutionality of the National Bank, Jackson had no recourse but to approve Congress's legislation re-chartering the Bank. It is this point to which Jackson had addressed his argument of his power to judge the law separately from the other two branches. In other words, Jackson was arguing for the right to be judge of the facts upon which he decided to exercise his constitutional authority to veto a piece of legislation.

Jackson's opinion served as precedent only in stating the argument, which Bates and Johnson took up in supporting
the President's right to judge the constitutionality of his own acts. Unlike Jackson's 1832 veto, Lincoln's 1861 writ suspension authorizations were not questions of discretion so much as of constitutional law, of which, Bates and Johnson argued, as had Jackson in the veto message, the President was judge. 28

The argument generally offered in part or in whole by one or another of the writers pointed to the President's oath which was stated in the Constitution and which commanded him to "preserve, protect, and defend" and to "take care that the laws be faithfully executed." These elements of the oath were given solely to the President.

His duty thus stated, the question became one of judging what powers under what circumstances the President could muster in carrying out his duty. Since rebellion existed, the question narrowed to consideration of the powers the President possessed to conduct that type of war in fulfillment of the Constitution's statement of his duty.

Any arguments offered for the President's power to deal with the special case of rebellion usually began with the 1795 Militia Act which authorized him to declare the existence of rebellion or invasion and to call out the militia. 29 Binney, Bates, and Johnson argued that this act recognized a duty which the Constitution itself
conferred upon the President and merely gave him the means to carry out his duty.\textsuperscript{30}

Once it was established that the President declared the existence of rebellion, no doubt remained that he was authorized to suspend the writ of habeas corpus which depended upon the existence of such a state of affairs before it could be suspended. None of the writers, except Binney, addressed themselves to Taney's assertion that the writ could be suspended during the course of a rebellion only when the public safety required it. Rather, they assumed that the public safety required the suspension of the writ during rebellion. Rebellion itself raised the question of the public's safety rather than a judgment of a set of facts as to the public's safety which might arise during the course of rebellion.\textsuperscript{31}

Beyond arguments asserting the President's power to declare rebellion and, therefore, to suspend the writ of habeas corpus, further support for his suspension power rested on assumptions about what powers the President possessed to conduct a war once it began. Since the writers were only interested in establishing that the President possessed such powers, which included the suspension power, discussions on this point were rather narrow.

One such means available to the President was his power to declare martial law. As Johnson argued, martial law declarations rested with the department having charge
of the conduct of war, which under the Constitution rested with the President.32 Parker defined the meaning and extent of martial law's operation as the "... military rule and authority which exists in time of war, and is conferred by the laws of war, in relation to persons and things under and within the scope of active military operations in carrying on the war..." Martial law, Parker continued, suspends civil rights, "... and the remedies founded upon them..." as long as necessary to carry out "... the purposes of the war." Military officials were not liable to suits for damages for actions done under their authority except those persons who exceeded the authority thus conferred. Martial law overruled municipal law "... in all respects where the latter would impair the efficiency of military rule and military action." Such an imposition of martial law and consequent suspension of civil government did not mean the total abolition of civil process, but only such imposition of military rule as would insure the good order of the community.33

But because civil process could be suspended by martial law, habeas corpus and martial law were antagonistic. If martial law did suspend civil process it would be difficult to argue, as Johnson pointed out, "... that this right of war, this dispensation of the ordinary civil process -- the result of such right, however, for a
time suspending all other rights -- is yet subject to the particular right of habeas corpus -- one which, of all others, might be used injuriously to the public safety, the object of war, than any other."  

At first sight, Parker and Johnson seemed to have given full rein to military authority during wartime. A second glance brings forth a somewhat different impression. Although Parker had asserted that martial law suspended civil rights and the remedies by which they were secured, he stressed that such suspension extended only as far as was necessary in order to maintain order in the community. Military authority considered in this way was an adjunct of the civil authority, acting as sort of a law enforce-ment arm of the civil authorities.  

In addition, although Parker had seemingly precluded military responsibility for its actions in civil courts, in actuality no such exemption was granted. Parker had stated that commissions of excesses in the performances of duty were not exempt, which were implicitly questions for judicial determination, the principle upon which Congress based the legal defense section of the 1863 Habeas Corpus Act and its Reconstruc-tion amendments [See Chapters 3 and 5].  

Parker and Johnson left unexamined whether martial law declarations were limited solely to areas actually in rebellion. Parker's assertion that martial law could be declared as long as necessary in order to carry out the
purposes of the war presumed that it could be declared anywhere there were military forces such as in staging areas and along railroad lines which moved troops to and from battle -- where interference from civil authorities or citizens might impede the military effort. In fact, the thrust of Parker's and Johnson's remarks presumed that the existence of rebellion was no criterion for declaration of martial law. Rather, they had based imposition of martial law on military necessity once the existence of rebellion or any civil unrest meant that the use of force beyond what the civil authority could or would employ was called for.

The 1861 writers had sketched in broad strokes on a large canvas many arguments on behalf of the President's power to suspend the writ of habeas corpus. They ranged widely over the Constitution finding many sources in it authorizing the President's suspension activities. They found authority for the President's power not only in the suspension clause but also in the "war powers" which derived from his role as Commander-in-Chief charged with conducting the war and from his oath commanding him to execute the laws. They argued that since the President's war powers permitted him to declare martial law which suspended civil process, he was authorized to suspend the writ, an aspect of that civil process. Yet these writers, at the same time, asserted that martial law precluded
civil authority only insofar as necessary for the military to prosecute war. This theme would be expanded throughout the War and Reconstruction when it achieved its major development. The justification for the imposition of martial law during the post-War period, however, would be divorced from considerations of military necessity and come to rest on the concept of the Army as an administrative or enforcement arm of civil authority whether that authority be Congress, the national courts, or local officials.

Apart from these specific developments the arguments that presidential defenders mustered to answer questions which the writ suspension controversy raised were the beginning of a process of the reconstruction of presidential powers which had degenerated after Jackson. This process progressed with vigor throughout the War and early-Reconstruction but ceased after Congress met for the first time after the War ended in December 1865. Thereafter, Congress gradually regained the initiative by chipping away at the President's discretion in exercising his powers. During Reconstruction, when Congress was ascendant, some writers continued to argue on behalf of the President, but their arguments were given little attention. Likewise, early in the War, when the President was ascendant and when the writ suspension question raged in pamphlet literature, a few individuals argued on behalf
of limiting presidential authority, and their arguments were given little attention. Attention must now be given to this phase of the pamphlet debate.

* * * * * * *

1861 had been the year that Lincoln's defenders held center stage in setting forth reasons why the President could legally suspend the writ of habeas corpus. By early 1862, the debate over the writ suspension question and related matters moved over to a new stage. Binney's defense of Lincoln's authority, by far the most thorough of the 1861 writers' discussions of the writ suspension question, became the focal point for a host of pamphlets attacking his arguments.37

Despite Binney's strong argument against drawing any analogy between the writ's operation in the English and in the American systems, writers who opposed his views drew heavily from English sources, in many instances re-developing the same arguments Taney had stated in the Merryman opinion.38

The writers who disputed Binney's contentions offered a number of arguments asserting that the habeas corpus clause granted no authority either to the President or to Congress but restricted powers which the Constitution elsewhere conferred upon Congress.39 Binney, in a second pamphlet which he published in April 1862, denied that the clause restricted Congress's power because of its
duty, as set forth in the Constitution, to create courts which gave it no discretion in regard to the writ:

"Congress have . . . a discretion as to the number, order and jurisdiction of the inferior courts; but they have no discretion whatever as to vesting the whole judicial power of the United States in courts of some description." If Congress took away the writ of habeas corpus, it would have to substitute one of several other writs which provided the same remedy as had the abolished writ. Congress's power in no case could touch the privilege of the writ.

Binney's objectors also argued that the President had no authority whatsoever under the Constitution to arrest and imprison anyone. Authority to make such arrests or imprisonments would have to come from Congress through its authorization of the suspension of the writ. In countering these assertions Binney in his second pamphlet restated his argument put forward in his first effort that if the President had the right to suspend the writ, he had the right to make arrests.

These writers offered other arguments which relied heavily on evidence from debates in the states on ratification of the Constitution to prove that men understood the suspension clause to refer to Congress. Also, the state bills of rights offered additional evidence for their contention that since the bills of rights of some
states said that the suspension of any law except by the legislature or under its authority was illegal contemporaries understood the suspension clause in the national document to refer to Congress. Binney in rebuttal asserted that state bills of rights did not govern the U.S. Constitution or were unreliable indices of men's understanding since they were inconsistent as to the writ's suspension within states' jurisdictions. He also cited English history, in a bald disregard of his argument against doing so, which showed that suspension of laws was an executive function.

Binney was certainly correct that state constitutions in no way governed the nation's document. But he had missed the point of their argument. The writers had argued only that, contrary to Binney's assertion, men in the 1780's understood suspension as being a legislative power and had made no material distinction between suspension of the writ and suspension of the privilege of the writ. Furthermore, his citation of English history to support executive suspension of laws was weak since conferring upon the state legislatures the power to suspend laws had been done in reaction to the English precedent.

* * * * * * *

By the time Binney had issued his second pamphlet in April 1862, debate on the writ suspension question had subsided considerably. Few pamphlets were published in
response to the arguments Binney presented in his second offering. But President Lincoln's September 22nd Emancipation Proclamation, his September 24th proclamation suspending the writ for all persons who interfered with the draft and who counselled or aided the rebellion, and the Secretary of War's September 26th order assigning provost marshals to arrest deserters and disloyal persons sparked anew a re-examination of the President's and Congress's war powers which had been a prominent part of the earlier discussions on the writ's suspension.

The pamphlets, which discussed the September decrees, were published in late 1862 and 1863 and marked the final phase of the wartime pamphlet discussions on the rights of citizens and the power of the government to conduct war. Rather than discussing what powers one branch of government could exercise which usurped powers the Constitution conferred upon the other two branches, these pamphlets discussed the war powers of the government in general. Such a shift in focus was a significant indication of how far the introduction of emancipation as part of the government's war policy affected men's attitudes in 1862.

Of the writers, former Supreme Court Justice Benjamin R. Curtis and Joel Parker published pamphlets denying to Lincoln and his subordinates the power to issue the proclamations and order as well as critically reviewing the
war power of the national government. The other writers, an anonymous writer, "Libertas," Pennsylvania Judge Daniel Agnew, Daniel Gardner, and Edward F. Bullard supported the President and the national government.

These pamphlets are of interest to the student of the early-War writ suspension controversy only as illustrations of how mid-War commitment to emancipation as a goal of and means of winning the War changed and confused men's attitudes towards other means such as suspension of the writ, which earlier had been an acceptable mode of conducting the War, regardless of the opinion as to who had power to suspend the writ. Before Sumter consummated secession, preservation of the Union was both a political and a legal issue. Sumter removed the question of preservation from politics by removing any doubts that the Union should be preserved. What remained was the legal debate over what means could be used consistent with the Constitution on behalf of the Union.

Since the War's beginning, antislavery advocates had agitated for emancipation and had sought to make the War an instrument for accomplishing their goal. Lincoln's strategy in the Emancipation Proclamation had been to make emancipation an instrument for ending the War, but because of earlier antislavery advocacy it was not clear whether using the War to achieve emancipation or using emancipation to end the War had been the real intention.
With such confusion about means and ends, the War, at this point in time, was transformed from being an emergency in the country which was an object of men's energies to end, to an environment in which men made qualitative decisions about what type of union should be preserved. It was at this point that goals and means of accomplishing goals blurred — that the War for the Union became for what type of Union was the War being fought, which was a political question. Once the goals were politicized, judgment of the means became dependent on the "constitutionality", on the political "correctness", on the worthiness of the goals, and writers were not always clear in distinguishing between the two. B. R. Curtis, who objected to the September declarations of the President and his Secretary of War, granted that in exceptional cases exercise of such powers as the proclama-
tions and order set forth might be necessary, but he pointed out that they did

... not relate to exceptional cases -- they establish a system. They do not relate to some instant emergency -- they cover an indefinite future. They do not seek for excuses -- they assert powers and rights. They are general rules of action, applicable to the entire country, and to every person in it; or to great tracts of country and to the social condition of their people; and they are to be applied whenever and wherever and to whomsoever the Presi-
dent, or any subordinate officer whom he may employ, may choose to apply them.
Means (powers) and goals (rights) were both attributes, as Curtis's quote implied, of the proclamations and order of September 1862.

The early debate on the writ's suspension, regardless of the point of view of the writers, had been directed towards deciding who could suspend the writ not if, when, or where the writ could be suspended. The necessity and the right to preserve the Union -- the goal of the War -- had been used as a justification of the power as well as of other powers which themselves were cited in support of the President's authority to suspend. But no one had made an issue of whether the Union could defend itself. The writ suspension controversy as discussed in the pamphlet literature and, indeed, as a political issue in the country at large had abated\(^5\) by April 1862, but after the proclamations and order of September it was brought back into politics to be re-examined not merely as a legal means of winning the War for the Union but as a legal means of achieving legal goals for which the War was being fought. Furthermore, when and where the writ could be suspended became important questions in deciding if the President had the right to suspend the writ.

Therefore, with the turn of events in September, discretion in the use of the writ suspension power, of which the questions of when and where the writ could be suspended had been classified earlier, became questions
of power themselves, of changing the Constitution as it was and the Union as it had been. This resurrection of the writ suspension controversy represented an abstraction of a question which had ceased to be (if it ever had been) a substantial issue in northern politics. Yet the abstraction by the end of the year provided the motif for debating legislation in Congress which addressed a substantial need to protect national officers from civil suits and criminal prosecutions in state courts for analogous activities in enforcing the Conscription and Confiscation acts, which themselves came under strong constitutional and political attack. Congress's consideration from the beginning of the War of what to do about the suspension of the writ of habeas corpus would illustrate how constitutionalism and politics joined to direct its response to the suspension question -- and to other questions as well.
CHAPTER II

'WHAT IS THIS SUSPENSION OF THE WRIT OF HABEAS CORPUS?'

"What is this suspension of the writ of habeas corpus?" Timothy O. Howe asked the Senate on August 2, 1861. Howe asked the same question many other individuals posed during those scary, uncertain months of 1861. Everyone knew that the writ of habeas corpus was the Writ of Liberty, and that it was the means by which an individual deprived of his liberty could secure his freedom. Suspension of the writ, therefore, deprived a detained individual of the means to obtain his freedom from imprisonment.

Howe answered his question in a fashion that demonstrated how much the coming of the Civil War had impacted upon the traditional processes for enforcement of the law. "A man is taken as an enemy of the United States upon evidence which convinces the military authorities . . . that this individual is an enemy, and that his liberty, his license to go at large, is not consistent with the welfare and safety of the Republic. . . . He has committed no single act which your statutes describe and declare
to be a crime.¹ Suspension of the writ did not mean as Howe interpolated either that the military authorities had decided that public enemies' freedom to go at large was inconsistent with the public safety or that such individuals had necessarily committed offenses not specified by statute. The President authorized the suspension; the Army was the ministerial agent for carrying out the President's commands. Lack of statutory authority was not necessarily the reason suspension was needed, but suspension was necessary in order to continue the individual's detention regardless of whether the individual had committed an offense so defined by statute. Detention rather than the type of offense allegedly committed was the reason suspension was needed.

Howe's fuzziness on the exact meaning of suspension of the writ of habeas corpus was typical of his contemporaries in and out of Congress during those early months of the War. Legal experts Binney, Parker, and Reverdy Johnson pondered the suspension issue with considerable skill in the pamphlet debates, but their influence on Congress was not perceivable until mid-War when it discussed legislation which became the 1863 Habeas Corpus Act.

At earliest stage of the War Congress had little guidance other than the informed opinions of its most astute members. Even so, congressional opinion, put
forward mainly in the Senate during the special session of the 37th Congress which met during July and August 1861, anticipated some of the legal commentators like Binney who supported arguments on behalf of the President's authority to suspend the writ. During that session, the Senate attempted to come to some agreement on the issue but failed principally because most of its members believed that it was unnecessary for Congress to take a stand. They believed that the President's prior authorizations of suspension had been legal, and that any position Congress took might imply that the President's previous actions had been illegal.

Although most members of the Senate recognized the President's power they were concerned about regulating the conditions under which he used that power. The Senate, however, came to no decision about the limits of the President's discretion. Such an outcome reflects the uncertainty it felt over uses of unaccustomed powers at this early state of the War. Lyman Trumbull of Illinois, Chairman of the Senate Judiciary Committee, spoke for many of his contemporaries in lamenting, "There has been a great deal of important business before the Judiciary Committee, some of it needing a good deal of reflection and examination. The questions are new, as our condition is unprecedented, & I have really felt but poorly qualified to take the lead which my position as Chairman
sometimes requires of me."²

"New questions" would not wait for Congress to get over its sense of inadequacy during this early stage of the War, nor would these questions do so throughout the War and Reconstruction. By the end of the War, however, Congress possessed a certain familiarity with many questions which had been novel in 1861.

Among the "new questions" which cornered Congress's immediate attention was how to make the Army serve most effectively in winning the War yet to define its role in such a way that the rights and liberties of citizens would not be jeopardized by an envigored military establishment. This concern to strike a balance produced tensions in Congress's conception of its role and purpose as well as of other questions it faced.

Such tension was evident in the Senate during the summer months of 1861. Questions centering on the writ suspension question and the implementation of the Army for the Union and Constitution were debated. During the session the Senate discussed three principal issues which in one way or another concerned the writ. First, the Senate tried to arrive at some agreement on the legality of the President's authorizations of the writ's suspension and other acts done after the War had begun in April and before Congress met in July. Second, some Republican members, principally Trumbull, felt that Congress should
act to regulate the discretion of the President and his military commanders in declaring martial law, in making executive arrests, and in confiscating rebel property, and to supplement certain neglected areas of military law. Third, late in the session, Republicans urged passage of a resolution ratifying the President's enlargement of the standing Army and call for volunteers. The courts apparently were issuing writs of habeas corpus on behalf of men who had volunteered under the President's proclamation and who later claimed that since the President's act had been illegal, they were not obligated to serve and, therefore, sought discharge.

* * * * * * *

When the session opened, one of the first duties Massachusetts Republican Senator Henry Wilson thought Congress should perform was "... to ratify and confirm certain acts of the President for the suppression of insurrection and rebellion." Wilson put his idea into practical form by giving notice of his intention to introduce a bill for that purpose on the first day of the session. The bill declared legal all acts without specifying them which the President performed in calling up the militia and military and naval forces prior to Congress's meeting, and gave the President equivalent authority for the future in the event Congress was not in session. It said nothing about the writ of habeas corpus.
Two days later, however, in pursuit of his previous notice he changed the style of his proposal from a bill to a joint resolution and listed not only the proclamations of the President which the Senate was to ratify but also the orders which Lincoln had given authorizing the writ's suspension. The original bill and the joint resolution were the same in granting equivalent authority for the future should Congress not be in session.\textsuperscript{4}

After being referred to and reported from the Committee on Military Affairs, which Wilson chaired, the resolution was brought up for debate on July 10. Republicans demonstrated their interest in the measure and seemed anxious to pass it, but they were little inclined to give it extended debate. They felt that Congress had much work to do in a short space of time, crucial to putting the nation on a footing for war. Howe put the matter squarely: "The resolution seems to be universal to do nothing more than the special session demands & to do that speedily -- to use few words & no palaver -- to clothe the President with the utmost potentiality of this great people, and command him to see that the "Republic receives no detri-
ment."

The spurt of debate on the resolution early in the session showed that Republicans generally supported the President's actions, including those which authorized the writ's suspension. Their principal concern was to make
certain by amending the resolution that his proclamation calling for volunteers in no way permitted a permanent increase in the standing army. They believed that they could properly regulate the matter in appropriate forthcoming legislation. After this initial effort on the resolution all efforts to pass it ceased until late in the session when Wilson made one final effort to have it passed. Democrats, however, carried on a lively debate on the measure throughout the session principally in opposition, centering on the volunteer call-ups and the writ suspension clauses.

Not until late in the session, however, did Congress exhibit any intention to regulate present and future presidential acts regarding the Army's role in writ suspension and related loyalty-security matters. On July 26th Trumbull reported from the Judiciary Committee an insurrection and sedition bill. Aside from the tensions which the subject matter of the bill created in the Senate's consideration of the measure, the bill itself in some of its provisions regarding the Army's role bore a striking resemblance to duties Congress conferred on it during Reconstruction.

The bill authorized military commanders to declare a state of insurrection and war in any section of the country once the President had issued a proclamation to that effect. The commander of the department declared martial law and
issued sets of rules and regulations which closely as possible conformed to the civil laws of the locality. The civil authorities administered the regulations. However, if they refused, the Army took over.

Under section four of the bill the writ of habeas corpus was considered suspended when the President issued his proclamation. The section specified the proper return which a military officer should make to any court issuing the writ, and "... further proceedings, under the writ of habeas corpus, shall be dismissed by the judge or court having issued the said writ." Section five of the bill gave the government three alternatives in treating individuals captured within the insurrectionary areas who were found in arms or otherwise aiding the rebellion. First, they could be brought before the civil courts to be tried for treason or sedition. Second, they could be tried before courts-martial "... to be dealt with according to the rules of war in respect to unorganized and lawless armed bands not recognized as regular troops, ..." Or, third, they could be discharged from custody on parole not to give any additional aid to the rebellion. Section eight required military commanders to command persons suspected of disloyalty to take a loyalty oath. Other sections of the bill outlined procedures for trying recaptured rebels by courts-martial, expanded courts-martial jurisdiction in felony cases in which persons
connected with the Army committed crimes against other Army personnel, declared that property taken from persons resisting the government's authority would be confiscated as if taken from a foreign enemy, and forbade executions being carried out unless the military commander approved them.8

This bill is instructive in two points. First, the habeas corpus section of the bill avoided the whole question whether Congress or the President had the power to suspend the writ. The section merely stated that when the President issued his proclamation the writ was suspended thereafter. This provision was an implicit answer to the question Taney's Merryman opinion had raised whether the President's proclamation declaring the existence of insurrection and rebellion under the 1795 Act authorized him to suspend the writ. The section joined the President's proclamation and the writ's suspension into one and was the Senate's statement of the effect the issuance of such a proclamation would have rather than authorization of the suspension power. Furthermore, the section tied suspension to areas which the President declared to be in insurrection, thus again in effect answering a question implicit in the decision.9

Second, since it did not confine issuances of presidential proclamations to states which had seceded, the Senate recognized that the existence of insurrection was
not co-extensive with the question of the seceded states' legal status under the Constitution. Rather, insurrection was measured according to the degree of disorder which civil authorities would not or could not subdue in a particular locality. In other words, secession was irrelevant, and traditional standards for judging when disorder existed which required national assistance to put down held sway.

However, while traditional standards in judging the necessity for national action were followed, the bill, as already noted, greatly expanded the nation's legal authority for suppressing insurrection. Prior to the War, the little legal opinion which existed on how far the President could go in suppressing rebellion suggested that he could call out the military to suppress insurrection only in aid of civil authorities in the enforcement of the laws. The military was considered always to be subordinate to the civil authorities in this respect.

This duty was conferred in the 1795 Militia Act. Upon issuing a proclamation declaring a state of insurrection "... in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings ... the President could call out the militia ... to suppress such combinations, and cause the laws to be duly executed." By a subsequent act the provisions of the 1795 Act were extended to include the
calling out of the Army and Navy.\textsuperscript{10}

Although the President's authority was clear in respect to declaring a state of insurrection and to calling out the militia, Army, and Navy, the acts were by no means clear on what ways these forces could be used for the execution of the laws. The acts specified that the militia aided civil law enforcement efforts, but they were silent about what would happen if the civil authorities refused to maintain order.

Most interpretations of the military's role confined its authority merely to support civilian law enforcement efforts, did not consider the nation's power to enforce laws when the civil authorities did not exist to enforce them, or confined the military's enforcement role to a support function and concluded that, therefore, the nation had no power to enforce the laws if the civil authorities did not exist. Attorney General Jeremiah Sullivan Black wrote an opinion which he submitted to President James Buchanan on November 20, 1860 that followed the last of these three interpretations. His pessimistic conclusion undermined any determination to use the nation's powers on behalf of the Union.

\ldots \text{[W]}hat can be done in case we have no courts to issue judicial process, and no ministerial officers to execute it. In that event, troops would certainly be out of place, and their use wholly illegal. If they are sent to aid the courts and marshals, there must be courts and marshals to be aided. Without the exercise of those
functions which belong exclusively to the civil service, the laws cannot be executed in any event, no matter what may be the physical strength which the Government has at its command. Under such circumstances, to send a military force into any State, with orders to act against the people, would simply be making war upon them.\textsuperscript{11}

Black had confined his remarks to the question of the military's role in aiding the national courts and ministerial officers, most of whom in the southern states resigned during the secession winter. The 1795 Act also authorized the President to call out the militia to execute the laws of the state, but the state legislature or executive (when the legislature could not be convened) had to make the request. And secession made it unlikely that the southern states would make such a request.

Lincoln, unlike Black, did not concern himself with worrying about the existence of national civil institutions in the southern states only in aid of which the Army could act. Rather, Lincoln read the 1795 law as requiring him to act, when the laws were obstructed, to enforce the laws. Closed courts meant the laws were obstructed. The enforcement of national law, not the manner in which they were enforced, was the primary concern.\textsuperscript{12}

Trumbull's bill built on these traditional concepts of civil-military relations and the President's power to enforce the law but differed with them in two important
respects. First, the bill made no distinction between the President's power to authorize the Army to enforce national laws and his power to do so in regard to states' laws. Once the insurrection had been declared, the military commander issued his police rules and regulations. The bill's phrasing in this particular suggests the Army played a peace-keeping role, but within whose jurisdiction? A clue lay in the requirement that the regulations the commander promulgated were to conform as closely as possible to previously existing laws. The only jurisdiction which had such municipal laws were the states. Thus the bill gave the military the power regardless of whether the states desired its presence to carry out the states' functions if its officials failed or refused to do so themselves.

Second, tradition implied that the military supported civil authority in its efforts to enforce civil processes. The bill seemed clearly within tradition in preferring civilian to military enforcement of the law; however, it departed from tradition in that a proclamation of insurrection meant ipso facto a suspension of civil laws and a declaration of martial law, by definition a suspension of civil process. In reality, this feature of the bill created a distinction without a difference, as Pennsylvania's Republican Senator Edgar Cowan objected. There was no reason why military officials could not enforce
the civil laws. There was no need for "similar rules and regulations." If they could enforce military laws they could enforce the civil laws. Even though the civil authorities did not aid military officials, such a refusal was not a sufficient reason to set up new rules. It was the force which the military commander could muster and not the rules and regulations which protected loyal citizens and restored order. Cowan's objection was well taken. Furthermore, by the end of the War, martial law meant the force the military could muster to keep the peace through enforcement of the civil laws and not the rules and regulations it might promulgate to keep the peace.13

Cowan's incisive comment cut to the heart of the problem which the bill had been put forward to solve. Secession had raised the constitutional question of the status under the Constitution of states which no longer recognized the authority of the national government and declared their obligations and powers as defined in the Constitution were severed. The War meant disruption of the normal processes for the maintenance of law and order. Secession provided a convenient mode of defining the territorial limits where such disruptions had occurred and were most likely to occur. However, such a mode rested on the assumption that the states' acts of secession or refusals to secede not only expressed the wishes of each and every citizen within the respective states but also
committed the states to legal positions to which they legally bound their citizens and to which their citizens were commanded to give obedience. The disorders in Maryland and Missouri provided proof during the months after the War began and demonstrated to Congress that a basis other than secession was needed to define when insurrection existed and therefore when the government could use its power.

Lincoln's proclamations had tied the existence of insurrection to secession, for he declared only states which had seceded prior to the time he issued his proclamation to be in insurrection. His action had not been unreasonable or untraditional since a state's act of secession meant that the laws of the United States could not be enforced through the ordinary course of judicial proceedings or by the marshals with the powers ordinarily vested in them by law.  

This equation, however, did not account for acts of individual citizens without their state's authority which in effect meant the obstruction of national law.

Trumbull's bill changed the equation to account for such acts whether they were committed under authority of the insurrectionary states or by individuals acting on their own volition within or without those rebellious states. Thus the equation rested on acts of individuals and not of their states, which meant that citizens within
the insurrectionary states as well as those in the "loyal" states who maintained their allegiance to the national government were entitled to be protected in their rights.

The situation in Maryland and Missouri showed that the equation between secession and insurrection was faulty, and the Senate's concern about unregulated Union military activity in portions of Virginia -- a rebel state -- further indicated that it did not accept Lincoln's equation. In portions of that state, New Jersey Republican Senator Jacob Ten Eyck reported, the laws were flagrantly violated, and the courts were either closed or could not cope with the situation. Military officers were acting as justices of the peace and issuing warrants for arrests under their own authority. Ten Eyck felt that there should be some regulation of that situation.15

Trumbull was deeply concerned about not only regulating situations in which the civil law was not in operation but also in limiting military arrests and other activities as much as possible to areas actually in insurrection against the national authority. "Is a war existing in my State? By virtue of the military authority, men in the State of Illinois have been arrested." Trumbull declared, "Is war existing in Baltimore? By what authority are you arresting men in the city of Baltimore and holding them in custody? Is the Senator from Vermont [Collamer], or is anybody in this country, for leaving
the power in the hands of the President, or rather in the hands of your Commanding General, just when he pleases, without proclamation, to march to any locality, arrest men, put them in prison, and do what he pleases with them?"16

Presumably, by proclamation of the President under the authority Trumbull's bill granted, a state of insurrection could be declared anywhere in the country. Willard Saulsbury, Democratic Senator from Delaware, seized this interpretation and proclaimed that the bill would make "a dictator of the President of the United States; and that, if it passes, there will not be, in fact, a free citizen in any State of the United States. "Why, sir, if this bill passes, the President . . . can declare my State in rebellion to-morrow; he can declare the State of New York, or any other State, in rebellion to-morrow, . . . ." Trumbull denied such an interpretation. A state of insurrection could be declared only when the civil authorities were incapable of enforcing the laws. The purpose of the bill was merely once insurrection was declared "... to place the military authority, so far as is practicable, under the law." Otherwise, the military commander would be free to go into any locality and "... establish just such a system as he pleases; that will be the condition of things if you have no law on the subject, for we all admit that the public peace must be preserved somehow."17 Thus
insurrection existed when individuals committed acts, the cumulative effects of which meant that the civil authorities could not or would not enforce the laws through traditional means such as the courts and their ministerial agents.

Despite Trumbull's assurances much uncertainty still existed among the Senators as to exactly what effect the bill would have. Democrats were effective in raising the specter of the President having the power under the bill to declare a state of insurrection in any part of the Union and thus subject it to martial law. But on the other hand some Senators, notably Cowan, Delaware Democrat James A. Bayard, and Vermont Republican Jacob Collamer, raised the objection that the bill hampered the war effort.18

Cowan was the chief spokesman for this point of view. He believed that the war powers of the national government which the President exercised were as ample as those of any other nation on earth. He objected to the bill because it attempted to enumerate the war powers and in so doing possibly excluded powers which were absolutely necessary. If Congress recognized a state of war as presumably it did by its actions during the session in raising an army, then the laws of war were in effect. By terms of the laws of war, a rebel had no recourse to the Constitution, to a writ of habeas corpus. Under the laws of war, he continued, there were two ways of treating
a rebel. If insurrection became rebellion by the criteria of the laws of nations, a rebel should be treated as a prisoner of war as would a citizen of a foreign power taken in arms against the government, or having as a citizen forsworn his allegiance and the right to appeal to the Constitution and laws, "... he may be treated by the Government as a traitor, and may be tried for treason." Cowan followed this line of reasoning in objecting to the habeas corpus section of the bill. Since rebels, by their action had placed themselves outside the provisions of the Constitution, they had no right to apply for a writ.

Cowan's remarks until this point, despite his difference with Trumbull over the necessity for the bill, indicated that in reality he and Trumbull differed only in the matter of whether congressional ratification of the President's actions were necessary in order for them to be legal. Cowan believed that no congressional ratification was necessary. Trumbull did. Trumbull in arguing for the bill and in striking similarity to arguments offered on behalf of military reconstruction legislation after the War, had drawn extensively from Taney's argument in Luther v. Borden for use of the national authority in guaranteeing each state a republican form of government. He had also joined the "necessary and proper" clause to those enumerated clauses giving Congress the power to declare war, to suppress insurrection and rebellion, to
raise armies and navies, and to call out the militia as the means by which the national authority would be asserted.\textsuperscript{20}

But in the next part of his argument, Cowan withdrew from his breath-taking view of the national authority. After stating that rebels had no right to a writ of habeas corpus, Cowan further argued that he believed the President by virtue of the war power had the right to arrest individuals when Congress was not in session, but (and here is where his whole argument crumbles) "... eo instanti upon the assembling of Congress, if there be a question of the writ of habeas corpus, or of the privilege conferred by it, then that power falls into the lap of this body, and is to be exercised by it." Congress should determine how long and in what areas the writ was to be suspended and include the proper safeguards in the exercise of the suspension powers. Absolutely no discretion should be given to subordinates -- military commanders.\textsuperscript{21}

Heretofore, Cowan's argument had been on behalf of the plenary authority of the President in order to pursue the war effort, and of exclusion of rebels from the privileges of the Constitution. But in his comments on section four, he contradicted himself and argued in favor of congressional oversight of suspension. If the President had plenary authority as Cowan claimed, he could do
whatever was necessary in order to suppress the rebellion. If an objection arose that the President's authority thus granted jeopardized a citizen's rights, Cowan's argument that rebels had no rights fully answered it. But Congress's oversight of suspension meant a restriction on the President's plenary authority. Thus his contradiction became fully apparent, but reason for its existence did not become equally apparent until he discussed the next section of the bill. This section, section five, provided for trials on charges of treason and sedition or other crimes, for trials by courts-martial according to the laws of war "in respect to unorganized and lawless armed bands not recognized as regular troops," and for releases on parole upon the guarantee that individuals would not serve against the United States.

It raised the most difficult question for Cowan. There was no question in his mind of what to do with rebels. They had no right to the privilege of habeas corpus, no right to be tried by laws, "... except by the option of the Government." However, loyal and disloyal individuals were mixed together. The military commander might arrest a loyal man by mistake, he continued, and "... there is the point at which I think we should intervene for the purpose of relieving the President of that difficulty, and should determine it by referring them to the proper tribunals of the State or district within which they
were taken."

At this point the reason for Cowan's contradiction was readily apparent. Trumbull, not fully comprehending Cowan's contradictory position, nevertheless cogently stated the reason for its existence. "I think that the idea that the rights of the citizen are to be trampled upon and that he is to be arrested by military authority, without any regulation of law whatever is monstrous in a free Government." The Illinois Senator could not agree "at all" to Cowan's suggestion "... that a man may be arrested on the ground that he is a rebel and has no rights. Who is to decide that he is a rebel? Is he an outlaw that anyone may shoot? ... The idea that the laws of war prevail is the most monstrous proposition I ever heard enunciated anywhere." Thus once Cowan recognized an exception his argument fell apart, for he could not grant the whole and then exclude a part.

After this day's debate concluded, little more was done on the bill despite efforts to keep it before the Senate and to pass it. Reasons for the Senate's indecision on this bill, which they felt was so vitally linked with the war effort, are not difficult to perceive. Much uncertainty had existed about the legal nature of the War. Congress, in its debates, had been inclined to recognize by its actions that a war actually existed, but it was divided over the type of war which it was fighting and,
consequently, divided over the legality of the measures they deemed necessary in order to suppress hostilities. 25

Trumbull's bill was a perfect case in point. Debate on it only increased the previously existing uncertainty. From time to time throughout the debates, Senators who were inclined to support the bill had to be reassured when Senators who were opposed to it made objections which seemed to have substance. Time after time Senators stated their uncertainty and became increasingly more reluctant to take a definitive stand to which the passage of the bill would have committed them. 26

Furthermore, the roll-calls and debates on the bill revealed that the Judiciary Committee had been deeply divided on the legality of the bill. Trumbull had reported the bill from the Judiciary Committee without a recommendation that it pass as he would have done if the Committee had recommended its passage. In addition, remarks of members of the Committee indicate that since they had been deeply divided over the merits of the issue, they had decided to report the bill to the Senate in the hope that debates on it would result in some determination of its controversial features. 27 It was a vain hope, however, to believe that the Senate could overcome its uncertainties when the committee specially charged with determining the legality of the measures the Senate was to pass could itself come to no agreement.
The resolution approving the President's acts which was still pending when the Senate dropped consideration of Trumbull's bill, was consigned to a similar fate -- for somewhat different but not unconnected reasons. As in the case of Trumbull's bill, the debates on the resolution during the latter part of the secession showed that the Republicans were divided over the proper course of action. 28 Republicans favored giving some form of recognition to the President's acts but divided over whether they should approve his acts, which meant Congress believed he had the power without congressional authorization to do the acts outlined in his proclamations, or whether they should declare that the President's acts were legal when performed as though done under the authority of law, which meant that Congress gave the authority of law to acts the President performed for which he had no legal authority when he commanded them. Republican Senator James W. Grimes of Iowa explained the point at issue: "The objection urged by some gentlemen against them [the resolutions] as they stood without amendment was, that they were improperly drawn, inasmuch as the phraseology was in the past tense, and declared that the acts of the President were legal and valid when performed, whereas, as they insisted, [the resolution] ought to have declared that those acts should be legal and valid as though done
under the sanction of law."^{29}

Wilson tried until the last hour of the session to get the resolution passed. Republicans spent the time in answering Breckinridge's taunts that since the Republicans were decided on the legality of the President's acts, no vote would be taken.\^{30} Breckinridge, of course, predicted correctly what happened, but the reason which he suggested was incorrect. No Republican had ever been opposed to approving the President's acts. During the early days of the session they had wanted and had expected to be able to put the resolution through without much debate, but Democrats had forestalled their efforts. By the time that the last day of the session had come, the truth was that Republicans probably saw no reason for passage of the resolution. Their actions throughout the session in voting money for volunteers and otherwise financing the War meant implicit approval of the President's actions. Furthermore, on August 5th, the day before the session ended, Congress declared legal when performed all past presidential acts concerning the military and naval forces in a rider to the pay of the troops bill.\^{31}

Why, therefore, in light of the foregoing should Wilson have made one final effort to pass the resolution? First, it was doubtful that the rider passed the previous day encompassed portions of the resolution regarding habeas corpus suspension. Lest failure to pass the resolution
be interpreted as the Senate's refusal to support the President on this matter, Wilson might have felt that the Senate should act in order to erase any doubts on the subject. No matter how much or in what ways the Senate through its actions during the session had implicitly or explicitly approved the President's actions, it had made no statement on the writ suspension issue, and the resolution contained the only statement on the subject still before it.

So far as most Senators were concerned, however, this face-saving was unnecessary. The rider to the pay of the troops bill, most Senators believed as Grimes wrote, "... ratifies and confirms, to the fullest possible extent, all the acts of the President that needed or that were susceptible of ratification, and was adopted by the vote of every Republican and loyal Democratic member of the Senate present. So far as I am informed, I believe it was all the confirmation of the acts of the President that he either expected or desired."

Thus, the Senate, or at least the Republican members of that body, believed that no ratification of the President's writ suspension authorizations was necessary. Grimes was conclusive upon this point and stated the problem which the Senate's passing upon this matter would have posed. "It must be apparent, I think, to every one who will reflect upon the subject, that to have attempted
such confirmation would be to inferentially admit that, as commander-in-chief of the Army and Navy of the United States, the President had no power to suspend the operation of that writ without congressional authority. Very few, if any, loyal members of Congress were willing to admit that." They believed the Constitution authorized the President to suspend the writ and chose to let him exercise his power as he judged necessary for the safety of the country. "They did not believe that his acts in this regard needed confirmation, and therefore," Grimes concluded, "confined their ratification and approval to such acts as required legal enactments for their basis, and in the initiation of which they had been anticipated by him."\(^{32}\)

In taking this position, Republicans stood opposed to the Chief Justice's Merryman opinion challenge to the President's authority to suspend the writ. Taney's opinion had declared the President's suspension authorization unconstitutional. Any congressional attempt to express approval for the President's acts in writ suspension matters would have put Congress on Taney's side against the President. Any statement saying that the President's writ suspensions were legal would have implied that Congress ratified them and therefore made them legal just as any statement expressly giving ex post facto ratification did. If the President's acts were legal no statement from
Congress would make them any more so and, therefore, would be construed as meaning Congress did not believe they were legal when performed. Under the circumstances, therefore, congressional silence was the only form of support Congress could give.

Congress chose not to take issue with the President over the power to suspend the writ. But the Democrats were not stymied, for they attempted particularly throughout the first half of the War to tie the arrest issue to all aspects of the government's efforts to conduct war, particularly those aspects which regulated citizens' conduct or required them to serve in the Army.

The acts Grimes referred to which Congress ratified in the August 5th rider, were, among others, those calling for volunteers. Since the President had issued his May 3rd proclamation calling for volunteers Congress had approved their employment. "But some of the volunteers now make a point," Maine Republican William Pitt Fessenden pointed out, "that although have enlisted for three years, yet the President having had no authority at that time [i.e., when they enlisted], and no legal authority having been conferred upon him by Congress, they are discharged, and cannot be held under that enlistment."33

The volunteers made such claims in petitions for writs of habeas corpus through which they sought release from military service. These petitioners' claims did not by
themselves prompt Congress's ratification of the President's call for volunteers. The courts generally claimed the power to review military enlistments on petitions for the writ and, if they found regularity in such enlistments wanting, to release the petitioner. (See Chapter 5). And if the courts accepted their arguments, declaring the President's call illegal, then Congress's ratification was necessary. Apparently, one or several courts had so declared, but no records discovered thus far indicate which courts did so.\textsuperscript{34} Such declarations likely came from the lower national courts, since records which do exist for a bit later in the War show that such courts claimed the power to review military enlistments. Furthermore, the President rarely, if ever, suspended the writ in response to issuances in such cases from those courts prior to his September 15, 1863 proclamation suspending the writ throughout the United States. On the other hand, the government's policy was not to recognize state court writ issuances in such cases or in any case which the government detained an individual. It cited as authority for its non-recognition the 1859 Supreme Court decision in Ableman v Booth,\textsuperscript{35} in which Chief Justice Roger Taney had declared in strong terms against such state court review of cases of persons detained under national authority (See Chapter 5).

This early-War congressional and presidential necessity to respond to writ issuances which concerned the
integrity of military organization set the pattern for the early and middle portions of the War. For all the rhetoric that was expended during the first half of the War on the rights of citizens and the threat to those rights which the President's writ suspensions posed, "citizens" most often resorted to the writ in order to release themselves from military service. John Merryman's case was not typical. While, perhaps, many citizens were arrested during the War on vague charges, very few petitioned for the writ of habeas corpus to gain their releases. Part of the reason for this anomaly, perhaps, lies in asking the unanswered and probably unanswerable question of how accustomed were individuals to look to courts for remedies for wrongs allegedly committed against them. Tocqueville noted the frequency with which individuals resorted to litigation to solve their differences, but citizens' infrequent petitions for writ of habeas corpus during the early part of the Civil War raise doubts as to the accuracy of his observation.

However, there are other reasons which more likely account for the lack of writ petitions from citizens and which derive from the comparatively primitive state of the national criminal statutory development and the consequent sporadic operation and administration of the criminal justice system on the national level. The employment of the Army was the chief index of events in the country which
had gone beyond the ability of the traditional system of justice to cope with the disorder; yet the manner in which the government used the Army suggests that its role would be subordinate to the judicial system, acting as sort of a screening agency to sort out instances when individuals' conduct warranted the courts' attention and to assure the future good conduct of other individuals.

Trumbull's bill was an attempt to regulate the outer limits of the Army's conduct by defining what it should be when the traditional system was not in operation or could not cope with the disorder -- when insurrection existed -- and in so doing limit the Army's role to those areas. Individuals within those areas would not have the privilege of having the writ of habeas corpus operate on their behalf which would have given the military authorities considerable discretion in keeping individuals in detention as it saw fit. However, other features of the bill implied that detentions for unlimited durations without trial were not sanctioned, for they commanded the military commander to see that individuals took a loyalty oath, were tried by courts-martial, were turned over to civil authorities for trial, or were released on parole. Although the Senate came to no decision on the proper mode of regulating such conduct, Congress did so two years later in order to defuse efforts of a vocal minority to tie the political arrests issue to the
conscription of a national army.

As in 1861, the rhetoric expended in 1862 and 1863 in opposition to the writ's suspension as being inconsistent with the rights of citizens under the Constitution jarred quite strikingly with the actual context in which the government asserted the power to suspend and in which individuals resorted to the writ to have the legality of their detention tested. During the first half of the War the context itself changed considerably, but the rhetoric changed little. And, therefore, the rhetoric gave a false characterization to and interpolated descriptions of the actions of the government and of the intentions of Congress, which can be corrected by examining what the government did and Congress intended.
CHAPTER III
SOME EARLY-WAR CONFIGURATIONS

The great Civil War historian, James G. Randall, noted that the President pursued his executive arrest and writ suspension programs for nearly two years before Congress passed the 1863 Habeas Corpus Act which authorized him to suspend the writ and to regulate arrests. While Randall's chronology was correct, his analysis of what Congress did in that great Act was wide of the mark. Congress neither authorized the President to suspend the writ of habeas corpus nor regulated arrest policy. Congress did make a statement on the President's power to suspend the writ, but it phrased the statement in such a way as to please both individuals who believed the President possessed the power independent of congressional permission and those who believed the President could not legally exercise the power without Congress's authorization. Rather than regulating arrest procedures Congress provided rules for limiting the time by which the military could detain individuals whom the President or Secretary of War ordered arrested. Regulation of the length of detention rather than of the
discretion which the Administration exercised in making arrests, therefore, was Congress's major object in legislation in this regard.¹

However, these features of the 1863 Habeas Corpus Act should not diminish the emphasis that rightfully should be given to other portions of the Act which protected national officers from civil suits and criminal prosecutions. By 1863 conditions in the country had changed dramatically. Individuals were no longer arrested largely on vague charges or for statutorily undefined offenses. Furthermore, the national government had greatly expanded its warfront activities which extended far beyond its early-War duties of separating loyal from disloyal individuals. By 1863, therefore, congressional emphasis had come to rest on the theme of protecting national officers for the multitude of duties they performed on behalf of the Union and Constitution. Although Congress was concerned to safeguard the rights of citizens, it recognized that fairly narrow and precise standards had been established for deciding when an individual's conduct required censure through his arrest.

Despite the Democrats' rhetoric on the arrests issue which in its less extreme forms had been accepted by later-day scholars as presenting an accurate description of the threat to individual liberty the government's bloated wartime duties in suppressing rebellion posed,
the evidence suggests that neither the government's duties resembled nor northern opinion accepted Democrats' assertions. Rather, throughout the first half of the War the government continually refined its conceptions and defined its policy to cope with rebellion. Northern opinion resented less the measures which the government undertook to suppress the rebellion than the lack of vigor which prolonged the War and thus resulted in mounting losses of blood and treasure.

By 1863, therefore, a more vigorous prosecution of the War became Congress's major theme, and under this theme it categorized a number of policy decisions which joined antislavery advocates' fondest hopes for abolition of slavery with a more vigorous prosecution of the War.

* * * * * *

Undoubtedly thousands of individuals were arrested during the War. During the first ten months of the War, no systematic procedure existed or particular bureaucratic agency was enjoined to make arrests. National, state, and local law enforcement personnel as well as the Army made arrests. Lincoln's February 1862 order that thereafter only the Army would arrest was an effort to systematize such efforts and to curb the effects of over-zealous local officials.

The arrest policy for this period in the War had its bad features. Most persons were arrested and confined
without charge, but this "due processless" policy was mitigated by the government's lenient policy of releasing such persons once they took a loyalty oath, which one historian had justly called "the key to freedom." Even after the Army took over sole responsibility for the loyalty-security program, arrests continued without accompanying charges. By September 1862, this shortcoming was erased on order of the Secretary of War.

Most of the arrests which were made were not political arrests -- arrests for conduct, ideas, or speech which the government arbitrarily defined as subversive or disloyal. The government itself referred to some individuals whom it arrested as political or state prisoners to distinguish them from two other classes of prisoners which it termed "United States Prisoners" and "Prisoners of War." The first of these two classes referred to soldiers or other persons in the service of the United States who were arrested by the military authority for committing military offenses defined in the Rules and Articles of War. The second class of prisoners were individuals in the service of the Confederacy who were captured during battle. Political or state prisoners, therefore, were individuals who were not members of or otherwise connected with the Union or Confederate armies. Within this category were individuals who were arrested
for a broad range of offenses. Congress's criminal legislation brought the Army's arrest duties within law and underscored the purely police nature of its efforts. By mid-War few individuals were arrested for offenses which were not defined as such by statute.\(^6\)

However, the increase in the government's criminal statutory authority apparently changed its basic indictment and trial policy very little. The government continued to release most individuals upon their swearing a loyalty oath. Although many indictments against offenders were initiated, the government followed through with only a few prosecutions.

Several reasons for the government's leniency can be noted. First, the organization of the national judicial system and its law enforcement agencies was not conducive to a prompt and vigorous execution of the law. National courts met once or twice a year, and the time of their meeting was fixed by statute. When judges could not sit (which was often) because of illness, death or other reason the court did not hold its session.\(^7\)

Second, the national courts operated according to the rules and procedures of the state in which they respectively sat.\(^8\) This factor was less a problem for the court than to the Attorney General at Washington who was authorized in an August 1861 statute to supervise district attorneys and marshals in the "manner of
discharging their respective duties. 9

Lincoln's Attorney General, Edward Bates, interpreted the statute in October 1861 as not investing him with the impossible duty of supervising all "particular" prosecutions. While Bates refrained from advising district attorneys in particular cases, he did give advice on general policy. He urged restraint in prosecutions, particularly in treason cases since, he told the U.S. district attorney for Missouri, "it is not desirable to try many treason cases, nor any one in which you have not a great probability of success. Better enter a nol[le] pros[equis] than be beaten..."

Bates left to his subordinates' discretion whether to try individuals for lesser offenses. In any case, he believed that indictments for offenses less than treason were infinitely more preferable. Treason indictments should be saved for leaders of the rebellion. If a man were charged with treason and a felony, Bates advised the district attorneys to prosecute the felony, pursuing trials for treason only if the district attorney was sure that he had the evidence necessary to convict. 10

The files of the Attorney General's Office indicate that the government's prosecutors were most active in the border states and in port cities. They called special sessions of grand juries to bring in indictments for treason, conspiracy, and other offenses. Their work was
particularly burdensome, and they often made requests for the Attorney General's permission for them to employ assistants. Bates made such authorizations sparingly for budgetary reasons. His permission when granted depended upon whether the district of the attorney which made the request for an assistant took in receipts of more than $6000 per year out of which the assistant could be compensated. 11

The nation's lenient enforcement of its laws was particularly true in the first half of the War. In addition to the decentralized structure of the judicial system which prevented development of a uniform policy in Washington, the government itself was slow to come to a decision as to what course it should follow in arrest matters. During the first four months of the War Bates either refused to give an opinion on matters which his opinion was requested or told his subordinates in the field to use their own discretion in handling matters until the government decided its course. As policy developed he gave his subordinates discretion to handle matters as they saw fit within the broad limits already outlined. 12

From a practical point of view a decentralized government policy was, perhaps, the best approach, for conditions varied greatly from locality to locality. In many areas of the border states the people opposed the
government. Prosecutions requiring juries would not likely be successful. Bates' instructions to his district attorneys to use restraint in prosecutions for treason was as much the result of a desire to create a good impression in the local communities as of the technical legal difficulty of proving guilt in such cases. The trick was to impress the community with the government's authority without making that authority seem oppressive. Bates believed that a few prosecutions would produce an excellent effect in these localities, but that it was "Better to let twenty of the guilty go free of public accusation, -- than to be defeated in a single case."

One reason Bates urged his subordinates to prosecute cases for crimes less than treason was that "a few convictions for that sort of crime, I think would help the cause, by rubbing off the varnish of romantic treason, and shewing the criminals in the homely garb of vulgar felony."

Bates' subordinates also were attuned to the political effects of the government's law enforcement efforts. As example, Asa Jones, the United States Attorney for Missouri, reported in June 1861 that his office had been "flooded" with affidavits charging many individuals with treason. Jones believed his duty was to proceed cautiously and ", . . . not cause warrants to issue, except in cases where there seemed to be
'probable cause' of guilt of overt acta of Treason." Some Union zealots, Jones continued, had criticized him for being "too tardy" in performing his duty, as "... they would demand me to commence prosecutions against every person toward whom Rumor pointed suspiciously." Jones believed that many persons in the state were guilty of "Moral Treason" but that many fewer individuals could actually be convicted of an overt act, and thought it safe to say that his convening a special grand jury had "been productive of much good, throughout the State." Reliable sources told him "that in many parts the effect has been to discontinue Secession clubs & to convince many men, heretofore secessionists, that they are firm Union Men. The arrests that have been made in this City on this charge of Treason has had a similar effect but more marked. A large number, conscious of guilt, fearing that they might be brought to bar, have changed their secession sympathies entirely & many have left the State."

Perhaps the most explicit and emphatic statement of the essentially political nature of the government's law enforcement efforts came from Bates in late January 1863. The Wisconsin Supreme Court was in the midst of deciding a series of habeas appeals from individuals who wished to evade the draft. Bates learned from William Whiting, Solicitor of the War Department, that Secretary
of War Stanton contemplated appealing the Wisconsin court's decision to the Supreme Court.

Bates wrote Stanton imploring him not to appeal the cases, for he strongly believed that "it will be extremely impolitic for the Government at this time to bring the question . . . before the Supreme Court . . . ." Bates asserted that given the existing state of parties and public opinion an adverse decision from the Supreme Court would seriously injure the Administration. Bates noted that the Democrats had made arrests a partisan issue, attempting to divide the country. "Thus far," the Attorney General continued, "they have failed to destroy the popular confidence in the President, because the people have regarded these efforts as of partisan or disloyal origin. But suppose the Supreme Court, invoked by the Executive to sustain these arrests, should pronounce them illegal. You will readily agree with me that such a decision at this time would do more to paralyse the Executive arm and to animate the enemies of the Union than the worst defeat our armies have yet sustained."

Bates anticipated that the Supreme Court, with its present composition would not sustain the President. "If, then, we have reason to fear that their decision will be against the power, or if we do not know that it will sustain it, ought we now to incur the risk of an adverse decision[?]"

Bates reiterated that the question he asked Stanton
to consider was not whether the government should contest a person's application for a writ of habeas corpus to the Supreme Court "... but whether the Executive shall ask that Court to sustain him in such arrest." If the Supreme Court declared his act unconstitutional, the President, having asked the Court to decide the issue, could hardly refuse to abide by its decision. "And if he does not conform to that rule, he will be compelled to pronounce a large number of the acts by which he has aimed to suppress the rebellion, illegal and unwarranted, and so confound his friends and justify his enemies and the enemies of the Union." His friends, Bates concluded, should not put him in this position. 15

Whatever the government's efforts to strike a balance between asserting its authority and minimizing the bad effects of asserting its authority on public opinion, discontent was bound to exist. Democrats, especially during the first half of the War, attempted to capitalize on such discontent which they hoped to transform into electoral support at the polls. However, as Bates noted, their efforts to capitalize on the arrest issue had failed. Moreover, political configurations were determined not by specific issues such as the government's law enforcement and arrest efforts as by the success with which the government conducted the War and by the North's changing conceptualization of why its government was
fighting the War.

By the time the 37th Congress convened for its third session in December 1862 the government's conduct of the War had gone far beyond arresting suspicious persons for alleged disloyalty which had cornered the nation's attentions early in War. Confiscation, emancipation, and conscription were aspects of the War effort which impacted in perceivable, very concrete ways on many individuals in northern society and in areas of the South which the Army brought under control. The government's policy in these three areas was as much the result of the necessity of conducting War as of the changed and changing goals for which the nation believed it was fighting the War.16

This change in goals was reflected generally in northern politics in 1862 and specifically in the legislation which Congress put forward during the third session of the 37th Congress. The North demanded in 1862 that the government prosecute the War more vigorously, and Congress responded in 1863 with a galaxy of legislation including the 1863 Habeas Corpus Act. It protected national officers from civil suits by disaffected individuals who sued them for damages and from hostile states which might initiate prosecutions against them for acts done in the course of performing their duty. Emancipation, confiscation, and conscription efforts were bound to meet resistance in form of suits against national officers.

* * * * * * *

* * * * * * *
The shock of war which prompted the House in July 1861 to adopt unanimously the Crittenden resolution, declaring that the sole aim of the War was to put down the rebellion and leave slavery untouched, had worn off by the opening of the third session of the 37th Congress in December 1862. The grim realities of war impelled men to search for ways and means of obtaining victory and forced them to re-assess their various understandings of why and how the War had begun. Winning the War and understanding how it had begun blended to produce a change in men's conceptions of why they fought. By 1863 it was clear to most observers that slavery would be a casualty of the War. This view was a product of pre-and early-War abolition preachings. More important, it was a product of a belief that slavery not only caused the War but also sustained and prolonged it.

Like the pre-War Republican standard of the non-extension of slavery into the territories, the President's September 22nd Emancipation Proclamation became a standard around which Republicans of all shades could rally. It was not only the capstone of previous Republican starts at emancipation in the form of drafting black men and confiscation of southern property, including property in human beings, but also it provided a base for future activity in emancipation efforts. "Emancipation is now a war measure," Sumner exulted in a speech at Faneuil Hall
in October 1862, "to be sustained as you sustain an army in the field." 18

Although the Proclamation invigorated Republicans and offered a measure of party unity to Republicans, the 1862 elections seriously threatened to undermine their majority in the House and thus stall efforts to end the War and slavery. This election reduced Republican strength in Congress to its lowest point during the War. The Democrats won Ohio, Illinois, Indiana, New York, and Pennsylvania while splitting Wisconsin and maintaining control of New Jersey. The result was that the Republican majority fell to a slim 9 seat margin. Elections still to be held in the border states (except Missouri), California, Connecticut, New Hampshire, Rhode Island, Vermont, and Virginia would determine whether the Republicans organized the House in the 38th Congress.

Democrats cited these elections as evidence of popular discontent with the Administration's internal security policies, the slow progress in winning the War, and the President's emancipation policy. Democrats made executive arrest their major line of attack on the Administration after the election campaign, carrying on their offensive when Congress met in December. Once Congress convened, Republicans, apparently not cowed by the dismal election returns, rebutted Democrats' charges, as the Republican Chicago Daily Tribune reported,
by insisting "on the President's clear right and duty to make the arrests, and will maintain that his great error had been in being too lenient, and not making enough arrests, but will not deny that occasional mistakes have been made, or that some of the President's subordinates may have exercised this unwonted power injudiciously and tyrannically. As this is to be the main point of Opposition attack, this line of Republican attack is especially important."¹⁹

Although Republicans fully intended to meet the Democrats' assertions on the arrests issue, they attributed their losses to the people's discontent over the conduct of the War and to factionalism within the party at the local level. Republican Senator Orville Hickman Browning of Illinois attributed Republican electoral defeat to the Proclamation. Other Republicans, including Illinois's Lyman Trumbull, Justin Morrill of Vermont, and Carl Schurz divorced Republicanism from the Administration and blamed Republican losses on the conduct of the War. "The Democrats are making capital on the ground of our imbecility more than our radicalism," Morrill wrote to Secretary of the Treasury, Salmon P. Chase during the Fall elections. In a similar vein, Schurz analyzed the results of the elections in a letter to Lincoln: "The defeat of the administration is the administration's own fault. It admitted its professed opponents to its
counsels. It placated the army ... into the hands of its enemies [sic]. ... It forgot the great rule, that, if you are true to your friends, your friends will be true to you, and that you make your enemies stronger by placing them upon an equality with your friends."

Even some Democrats admitted these Republican estimations were correct. Pennsylvania Representative Hendrick B. Wright pointed out,

I learn by all the speeches made by Mr. Seymour, of New York, both before and since his election, that he speaks unqualifiedly in favor of a vigorous prosecution of the war. I do not believe that any man could maintain a political position in Pennsylvania for a day who would declare himself in favor of peace on any terms, whether with the Government broken, or with the Government supreme. No, sir; the change of principles as evinced by the late elections has been caused by the unfortunate failure in the conduct of the war; because never was a war so bunglingly managed, ... 20

The returns themselves suggest that these optimistic conclusions in the face of apparent defeat were not entirely unwarranted. While it is true that 57% of the Republicans who served in the 37th Congress were not returned to the 38th Congress, fully 40% of the Democrats who served in the 37th Congress would not serve in the 38th Congress. A state by state investigation reveals that Republican defeat or Democratic gains might not necessarily have meant dissatisfaction with Republican policy. In New York, for example, the Democrats
increased their number of seats from 10 to 17, yet only 4 Democrats who served in the 37th Congress would serve in the 38th. A similar pattern can be exhibited for other Democratic "showcase" states of Pennsylvania and Ohio as well as to a lesser degree in other northern states holding elections in 1862. Such results suggest that great dissatisfaction existed on the local level within the Democratic and Republican parties themselves and further suggests a tendency to vote the in party out and the out party in. 21

And, in fact, correspondence among New York Republicans during the latter part of 1862 offers ample evidence that factionalism existed at the local levels in that state. As example, in western New York one party worker reported in early October that "There is trouble in our district. A call has been issued for a Convention to nominate another member of Congress other than Pomeroy. Respectable parties (our folks) are engaged in it. I am fearful it will defeat Pomeroy, & elect a loco foco alias an apologist for the Rebellion. It must be headed off in some way." At about the same time, Representative E. G. Spalding reported from Buffalo that "Some of our Republican friends are openly or secretly working against us, [while] others throw cold water... to some extent over efforts on the State & county tickets."

Spalding cited as one reason for divisions within
the party in his district discontent over the distribution of patronage. He believed that "... owing to the disaffection of disappointed applicants for office..." he might be defeated in his re-election bid and requested Secretary of State Seward's aid in securing "correct" appointments."

In mid-November, Ohio Republican Senator John Sherman succinctly summarized the two major reasons for Republican losses in the election. Sherman believed that the President and his followers had abandoned the Republican organization "... and a no party Union was formed to run against an old well drilled [Democratic] party organization. This was simply ridiculous. It was as if you would disband your Army organization because it was tyrannical & substitute the temporary enthusiasm of masses to fight regular armies." The other major reason "... for defeat is that the people were dissatisfied at the conduct & results of the war." The plodding pace of the Army discouraged the people, Sherman concluded.

If Republicans saw the 1862 elections as indication of dissatisfaction with the conduct of the War, they had every reason to presume that the same issue would be the crux of the forthcoming 1863 elections. Thus Republicans, during the third session, which ended before any of the 1863 elections occurred, sought to bolster the War effort by more vigorous policies. Ohio Democrat George H. Pendleton observed at the opening of Congress in December
that "The Republicans are more bitter, and radical and determined to be devilish than ever before. They are going to use their power this winter as if they would not have it next winter. . . ." If a more vigorous conduct of the War was to be the basis of Republicans' activity during the third session, they would have to adjust their emancipation policy in order to fit border state politics. Compensated rather than outright emancipation was the product of this adjustment.

The 1862 elections had a grim side which Republicans could not easily ignore. Although only New York and New Jersey elected Democratic governors almost all of the legislatures went Democratic. Conduct of the War thus far had been based on nation-state cooperation in raising troops, the backbone of the War effort. Congress during the second session of the 37th Congress had tried to regulate states' efforts in raising troops when it enacted the 1862 Conscription law. But this unworkable measure met strong resistance throughout the country. Opposition control of the state governments seriously threatened the War effort. Democrats were not prepared to raise troops, and without troops Lincoln could not continue the War much less win it.

When Congress met for the third session, Republicans tried to compensate for these dour troop-raising prospects. Early in December 1862, Thaddeus Stevens introduced a
bill to raise black soldiers, ostensibly to put them on a par with white soldiers. Confederates, Stevens argued, were shooting blacks they captured on the pretext that Congress's 1862 conscription legislation had not made black soldiers equal to white soldiers, and therefore, black soldiers were not entitled to treatment then existing conventions of war guaranteed prisoners of war. But placing blacks on an equal basis with whites would also mean that they could be armed, something which the 1862 Conscription law was unclear on, although it provided for drafting of blacks. Black soldiers once armed would be an effective supplement to the failing troop raising efforts in the North. Although the black soldiers bill eventually passed the House, it stalled in the Senate. Late in the session Congress passed a law for the conscription of a national army, and it was thought that this conscription law effectively replaced the black soldiers bill.27

According to this new conscription law, provost marshals, whose previous duties had mainly been oversight of the internal loyalty-security program, were to be the drafting officers. Blacks were included within the definition "citizen" in the preamble and as such were draftable. The Act also included provisions supplementing the Articles of War in regards to felony offenses triable by military commissions, thus redressing a deficiency
noted since the beginning of the War. 28

Because the 1862 law had met resistance from drafted individuals in form of petitions to state and national courts for writs of habeas corpus to be released from military service, it seemed likely that resistance to the 1863 law was bound to increase. Protection of national officers for drafting unwilling individuals, then, was of primary importance. As the Army became increasingly more active and therefore, more conspicuous to Americans who resented encroachments of national authority in their daily lives, means had to be found to protect it from increasingly virulent local passions. Removal of suits against provost marshals and other drafting officers into the national courts together with an increase in military court jurisdictions, which respectively the 1863 Indemnity and Conscription Acts provided, effectively closed gaps into which state courts had previously thrust themselves. This closed system of justice buffered the Army against local passions. Provost marshals who drafted men in portions of the southern states which the Army brought within its lines after January 1, 1863 potentially faced criminal prosecutions in those states' courts after the War for interfering with slave property. Since the Army at this time was the chief avenue for the black man's achieving freedom, these developments assured him a measure of equality
before law which was not yet his right as a civilian. Emancipation meant that thousands of former slaves could be drafted into the Army. However, these blacks, though freed by national declaration, still retained their status as property before states' laws.\textsuperscript{29}

There was another dimension, perhaps the most important one, to politics during this third session of the 37th Congress -- that of bringing back the seceded states into the Union. Congress by this session had backed off from its early-War advocacy of territorialization as a viable approach to reconstruction. That theory presumed that the seceded states because of their rebellion were no longer in the Union in their constitutional relationship as states. Instead, Republicans used their power to admit representatives as a method of controlling the reconstruction process.

Such a policy presumed, first, that states, though in rebellion, were still in the Union, and second, that there were loyal men within these rebellious states who were entitled to be represented. As Herman Belz recently pointed out, this policy "... utilized an established constitutional practice which, though usually under the control of the states, could be carried on by Congress under its undoubted power to legislate concerning the time, place, and manner of federal elections ... combined
local Unionist activity with federal initiative and supervision, and politically, held out the promise of increased Republican strength in Congress.\textsuperscript{30}

Belz might have added that this approach also served Republicans' antislavery purposes. Representation could be used as an effective lever to insure that states seeking representation demonstrate their willingness to abolish slavery as a condition for seating their representatives. Representative John A. Bingham of Ohio, Chairman of the House Judiciary Committee, in his final argument prior to the vote on passage of the bill admitting West Virginia to the Union, implicitly recognized the importance of the assumption upon which admittance of representatives was based. Said Bingham,

Refuse to pass this bill, and if they attempt, by their present Legislature, to adopt the emancipation policy of the President, you will have the argument thrown back in your faces that that is not the Legislature of the State, and has no power to consent to the Proclamation of the President of the United States; and therefore you will be required to repudiate it. Pledge yourself to this. Declare that [i.e., Virginia] the Legislature of the State, and upon that hypothesis admit the State [of West Virginia], and, of course, once admitted, its own Legislative Assembly will be beyond question; and when the new Legislature under the new State of [West] Virginia shall accept the President's proposition, as stated in his proclamation of the 22nd of September, all doubters about the constitutionality of the act will be silenced; and whether they be silenced or
not, there will stand the record of the majority of this House to give validity to their act, and from which there can be no appeal.31

The implicit assumption here was that the legitimate state government was what Congress said it was. Bingham assumed that it would be easier to control politics within states if states were in the Union rather than out of it and that Congress's recognition would be a potent factor in directing the course of state politics. Furthermore, recognition of loyal governments depended upon their fulfilling Congress's requirements which meant loyal individuals in the states would develop their policy to fit congressional requirements in order to gain congressional recognition.

Thus, the lineaments of Republicans' policy become clear. First, Republicans were committed to emancipation on a broad scale, including service of blacks in the Army, emancipation in the unoccupied portions of rebeldom, compensated emancipation for border states, and reconstruction of occupied portions on the basis of legal abolition using representation as a lever to guide state politics towards Congress's goals.

This last point is most instructive for the future Republican policy towards the as yet unoccupied portions of the Union. In addition to the doubts some individuals already possessed about the legality of the President's
Proclamation, many Republicans were uncertain about the Proclamation's effectiveness once the War was over. William Whiting, Solicitor of the War Department, in the Preface to his tenth edition of the War Powers pointed out that the Proclamation only affected blacks who at the time of the Proclamation's issuance were enslaved. The proclamation said nothing about and in no way affected the legal status of the institution of slavery within the states.\(^\text{32}\) Therefore, unless some way could be found to get citizens of the rebel states to abolish slavery themselves, slavery could flourish again.

Short of a constitutional amendment abolishing slavery, congressional control over seating of representatives remained the most effective way of directing state politics toward that end, not only because it could accomplish the goal fully as effectively as the territorialization approach but also because it had wide support among all segments of the party, something which territorialization schemes never obtained.\(^\text{33}\)

Therefore, not only the broad efforts to end the War and with it slavery but also congressional Republicans' legislative position on reconstruction which assumed states existed and that, therefore, loyal men existed in the South to reorganize them once the Union won the War -- argued for the necessity of protecting national
officers in the manner the 1863 Habeas Corpus Act provided. Yet in 1863 the necessity was only prospective, for no great avalanche of suits had been commenced. Only a very few reports of such suits had been made, and from these Congress interpolated a host of suits which disaffected individuals would commence once the War ended.34 Ironically, when the War ended, the suits came not from rebel but from loyal states, and resulted from drafting not black but white men.35

In 1863 Congress considered legislation which became the Habeas Corpus Act amidst the background which its emancipation, conscription, and confiscation policies as well as the general political configurations provided. The government during the first half of the War had been sensitive to the political nature of its law enforcement efforts within loyal states and had managed for the most part to defuse the arrests issue as a viable political issue upon which the Democrats could capitalize.

In the 1863 Habeas Corpus Act Republicans would completely defuse the issue and at the same time meet more important present and future war-effort requirements by providing legal protections for national officers who enforced an envigored Union policy. The parliamentary history of the Act attests to Republicans' desire primarily to attend to providing needed protections.
In addition, the mode by which they would choose to protect officers from suits would underscore their sensitivity to the essentially political manner in which they had to respond to local conditions, asserting national authority through judicial means in the least offensive and most traditional manner.
CHAPTER IV

THE 1863 HABEAS CORPUS ACT

By the end of 1862 the government had systematized its arrest policy. Congressional criminal legislation largely provided the framework of offenses within which the Army made arrests, and congressional legislation during the third session of the 37th Congress filled in most of the remaining gaps. As the government structured its system of Army enforcement of the nation's criminal laws, the writ suspension executive arrest issue ceased to be a viable political issue because arrests became separated from the question of political liberty and identified, instead, with criminal conduct which most individuals accepted as such and on the other hand, in which most individuals were not engaged.

Despite the decline of the arrest issue in northern politics by the spring of 1862 it became even more of an issue in legal circles during the last half of 1862, for regardless of the President's power to suspend the writ of habeas corpus and to make arrests for offenses specified in statute, the right to sue national officers for such arrests remained. This fundamental fact became even
more important as the government, through its confiscation, conscription, and emancipation policies, exercised powers of strongly contested constitutionality at an increased number of points which impacted on the daily lives of the citizen.¹

As the government's activities increased, the necessity of protecting its officers became more imperative. Some members of Congress during the summer of 1862 recognized this necessity and requested Attorney General Edward Bates to draft a bill to provide the needed protections. Nothing was stated publicly until December 1862 when Congress met.²

Illinois Republican Senator Lyman Trumbull publicly keynoted Congress's shift in focus on the writ suspension-executive arrest which had occurred by 1863. Referring to the Senate's version which became in modified form sections 4 through 7 of the 1863 Habeas Corpus Act, Trumbull declared in the Senate on January 27th, 1863: "I will say to him [Garrett Davis] that this bill does not depend at all upon the power of the President to suspend the writ of habeas corpus. Whether he has the power or not, this bill would be necessary; and it would be just as necessary if he had the power to suspend it as it would be if he had not; because the suspension of the writ of habeas corpus does not of itself justify the arrest of anybody." The right to sue remained
regardless of the President's authority to suspend the writ. As Trumbull pointed out, even "... if the writ of habeas corpus was suspended by act of Congress with the concurrence of the President, both acting together, there would be the same necessity for this act to protect the officers, in case, acting from probable cause and in good faith, they had wrongfully made arrests."\(^3\)

One might argue that regardless of the apparent shift in the Senate's concern away from the question of whether the President could suspend the writ without Congress's authorization to the question of "indemnity"\(^4\) the problem of authorization still remained. The final form which the 1863 Act took would offer strong support to such an argument, for the first three sections of the bill dealt specifically with the problem. Section one of the Act declared that the President "... is authorized to suspend the writ of habeas corpus..." Section two ordered the Secretaries of War and of State to provide the civil authorities with lists of individuals who had been arrested by presidential authority. Section three specified procedures whereby individuals arrested by executive authority could obtain their release if within the time allowed in the Act the civil authorities did not indict the individual for any offense recognized by law.\(^5\) The inclusion of these sections within the Act would, indeed, seem to indicate that the writ suspension
question was still an important issue in 1863.

However, events prior to and during the 3rd session of the 37th Congress, when Congress considered and passed the Act, belies such a notion. Developments in the country prior to 1863 have been noted, but the parliamentary history of the Act also proves how deceptive such a conclusion is. Democrats, with their flamboyant rhetoric were in essence beating a dead horse on the political prisoners issue, but they raised a challenge which some Republicans like Thaddeus Stevens could not resist, and which moderate Republicans like Trumbull, who drew up most of the judicial legislation during the War and Reconstruction years, had to meet.

Congress, in considering protective legislation, had two alternatives to choose between. The alternative it did not choose -- indemnifying national officers from suits -- had been the course pursued in England in periods of national crisis after 1688 when the King had suspended the writ of habeas corpus and other laws. In the aftermath of such crises, Parliament had passed legislation immunizing the King's officials from suits for false arrest.

The alternative Congress chose -- removing suits actually brought against national officers from state to national courts and providing the defense in court for their action -- found its precedents in the American past.
Congress, shortly after the War of 1812 and during the Nullification crisis, enacted legislation to remove suits against national officers brought forward in state courts from those courts into the national courts where, presumably, the goal of removing the case -- a fair trial -- would be assured. The removals sections of the 1863 Habeas Corpus Act were drawn directly from the earlier of these two American precedents.

That Congress chose removals rather than indemnity is significant for several reasons. First, removals in previous American experience had not been associated with executive activity in authorizing and making arrests but rather had been associated with executive enforcement of revenue laws. Indemnity, on the other hand, had been directly associated with writ suspensions and arrests. The fact that Congress chose removals rather than indemnity suggests it no longer believed protections for the government's executive arrests activities were major reasons for legislation, but had in mind other areas of executive activity such as revenue law enforcement, confiscation, conscription, and emancipation where the need for protecting national officers was daily growing more imperative and which were more analogous to the types of activities for which removals had been provided in the past.

Second, the Supreme Court had not yet rendered any
opinion on the legal nature of the War which Congress and the Administration were charged with conducting. An opinion which declared invalid any activity of the national government, particularly in form of its blockading and confiscation policies, could seriously hamper the War effort from the standpoint not only of the future conduct of the War but also of making national officers vulnerable to thousands of suits for expressly illegal activity in enforcing national policy. By changing the forum for trials and providing the defense, removals would safeguard officers from the dangerous results of such suits from the standpoints of past and future activities should the national government decide to continue its policies, the Supreme Court's judgment notwithstanding.¹⁰

Third, perhaps most important, removals allowed suits to be brought against national officers whereas indemnity aborted such suits. In a wartime society where individuals often felt their rights were being sacrificed to an overweening national authority and were accustomed to living in a federal system where states rather than the national government were the primary governmental authority in their lives, removals accommodated custom by allowing individuals who traditionally cherished the rule of law to continue to seek redress for wrongs and solutions to conflicts through legal processes, which checked rather than annulled state processes.
All three reasons for the significance of Congress's choice of removals over indemnity make writing a history of the 1863 Habeas Corpus Act extremely difficult. For removals implied enormously complex political considerations for Congress which were intimately linked with the reasons for which the War was being fought and with the actual conduct of the War.

* * * * * * *

James G. Randall described the 1863 Habeas Corpus Act as a hasty piece of legislation put through hurriedly with little consideration during the third session of the 37th Congress. What consideration there was "... shot wide of the mark and was hardly more than a general debate on the war and on party policy." His description needs modification, for this Act in its several forms was before Congress throughout the session and at times received close scrutiny in debate. Granted that the debate seemingly diverged widely from the subject matter of the bill. Yet such divergence represented recognition of how closely such legislation was linked with the war effort.

By contemporaries' standards, the Act, which became law on March 3, 1863, extraordinarily leaped across the federal system to buttress Republican war aims and at the same time maintained as much as possible the traditional federal judicial framework. The legislative
history of the Act reflects both the changing nature of Congress's perception of the problems they faced and of the purposes an act of this type could serve as did the political background in which Congress passed the Act.

Thaddeus Stevens brought the writ suspension-indemnity controversy before Congress during the third session in form of a bill he introduced in the House on December 8, 1862 which indemnified national officers for their anti-disloyalty efforts and authorized the President to suspend the writ of habeas corpus. Without debate the bill passed and went to the Senate the same day, and on the following day it was referred to the Judiciary Committee where it remained for little more than a month. Stevens' bill was actually the second bill on the executive arrest-writ suspension subject the House had sent to the Senate for its consideration since the beginning of the War. During the previous session, the House had passed a bill to release state prisoners and to authorize the President to suspend the writ of habeas corpus. The Senate failed to pass the bill, and it carried over to the third session.

At the beginning of the third session, only two days after the House passed Stevens' indemnity bill, as a preliminary to taking up the state prisoners bill, Trumbull moved to have it printed as amended by the Senate
and with a pending amendment Charles Sumner had offered
the previous session.

After the initial flurry on these two bills, little
congressional activity on the subject was evident for the
next month. The Senate continued debating the state
prisoners bill but with little apparent interest other
than to give Senators who wished to speak on the subject
a chance to do so. Massachusetts Republican Senator
Henry Wilson put forward the best reason for such apparent
indifference: "As to this bill [the state prisoners
bill] as it stands, I must say that I care nothing about
it. I do not know that I have any anxiety to try these
prisoners." What had fostered Wilson's apparent unconcern?
Wilson continued, "Most of the political prisoners have
been discharged; and the greater portion now under arrest
have been arrested for frauds upon the Government; and I
want them tried in the manner in which the Government sees
fit to do it."\(^{15}\)

Debate on the subject gained momentum and direction
on January 9th when Vermont Republican Jacob Collamer,
member of the Judiciary Committee, introduced what became
the Senate's substitute for Stevens' bill and substantially
sections 4 through 7 of the Habeas Corpus Act.

When he introduced his bill he was accorded the very
rare privilege of making a speech on it.\(^{16}\) In his
remarks, Collamer pointed out, among other things, that
any forthcoming legislation from Congress should not imply that the President had made a wrong decision in his construction of the Constitution, nor should court determinations upon the legality of the President's acts be suspended. For these reasons he had objected to the Stevens' and to the state prisoners bills and offered his as a substitute.

The important point regarding Collamer's bill is that he introduced it as a substitute for both Stevens' bill and the state prisoners bill. His substitute contained several provisions for removal of suits or prosecutions against national officers for acts done under the President's authority from state to U.S. circuit courts. It also provided a defense which could be offered in court and suspended execution, later deleted, in cases where judgment was against the defendant until after adjournment of the session of Congress following the judgment. In addition, the substitute provided for carrying cases in instances where a final judgment might be rendered in the circuit court to the Supreme Court, and specified that suits had to be commenced within two years after the alleged offense had occurred. 17

Although the bill was introduced ostensibly solely to protect national officers for their executive arrest activities, when the Senate took up Collamer's bill its intention became crystal clear to extend the removals
principle to the whole range of executive- and congressional-authorized activity.

Before adopting Collamer's bill as a substitute for Stevens' bill, the Senate specifically included both civil and criminal cases in the removal provisions, which presumed that state criminal cases as well as private suits for damage would be removable. It extended the classes of cases to be removed to include acts done under a law of Congress as well as those omitted to be done, which would have made removable cases arising under the confiscation, conscription, and all other congressional war legislation. It specified that facts which sustained the defenses of probable cause and acting in good faith be submitted to juries to pass upon their validity as to the fact supporting such defenses under instruction of the court, which extended a principle mainly developed in revenue-law enforcement litigation to the entire spectrum of removable cases and insured that judges could not subsume questions of law as questions of fact thereby frustrating removal. It limited the removal by writ of error from the circuit court to the Supreme Court to civil cases only, which meant that defendants in criminal cases, presumably national officers, would not face the possibility of being tried again in national courts. Finally, the two year limitation for the commencement of suits was to begin
after the Act became law. It also added a section authored by Ohio Republican John Sherman, providing for the release of prisoners if indictments were not brought against detainees within a specified period. 18

Although Collamer had introduced his bill as a substitute for the Stevens and the state prisoner bills, Congress had continued thereafter to debate the latter bill. When the Senate passed the Collamer version it did so as a substitute for Stevens' bill only. The Senate ceased consideration of the prisoners bill on January 19th about a week before it passed its substitute and did not resume consideration until late in the session when House consideration of the Senate's version and the Stevens' bill indicated that it would not concur in the Senate's amendment. 19

The House's non-concurrence put the indemnity and writ suspension issue right back to where it had been when Collamer introduced his bill in early January and meant that Congress could no longer avoid coming to some determination on the writ suspension question. Thus Trumbull again brought up the state prisoners bill late in the session in order to perfect it, which he did by re-writing it, offering the re-write as a substitute, and then having the Senate adopt the substitute and pass the bill so that when he went to conference on the Stevens and Collamer bills he could substitute the state
prisoners bill for both the House version and the Sherman section of the Senate's bill. Support for this interpretation can be garnered from James A. Bayard of Delaware, a member of the Judiciary Committee, who expressed surprise that the state prisoners bill should have come up again because he believed ". . . that the bill was in some measure abandoned in consequence of other legislation, . . . It takes me entirely by surprise."\(^{20}\)

Trumbull's strategy paid off. The first three sections of what became the Habeas Corpus Act were the state prisoners bill, and the remaining four sections of the Act were in substance Collamer's bill. The ambiguous phrasing of section one -- the writ suspension section -- which declared simply that the President ". . . is authorized to suspend the writ of habeas corpus . . ." avoided the difficult question of whether Congress by this act was giving the President authority to suspend. The clause, phrased in the passive tense, could be construed either as a grant of power to the President or as a declaration of already existing law, depending upon the opinion and purposes of those engaged in interpreting the legislative intent of the bill's drawers. Therefore, those who believed only Congress could authorize suspension of the writ as well as those who believed the President already possessed the power could support the bill.\(^{21}\)
Furthermore, sections two and three of the Act -- the remaining sections of the state prisoners bill -- had the virtues of settling in law a troublesome political question without materially altering the system under which the President and the military had operated since the beginning of the War. As already noted, few political prisoners were detained under military arrest by the end of 1862. The overwhelming majority of detainees could be, if the government so desired, indicted for statutorily defined offenses. The legislation defining crimes passed during the 3rd session -- principally in the Conscription Act -- only reinforced this pattern, for additional statutorily defined crimes meant a broader range of offenses for which indictments could be brought against such individuals.\(^{22}\) As a consequence they could be detained without bail until their cases were disposed of.

The Constitution guaranteed only a speedy trial by a jury of one's peers, but no one was prepared to define what constituted a speedy trial or the lack of one during times of peace let alone during civil war.\(^{23}\) In addition, if individuals could be lawfully detained in consequence of indictments then the military's role becomes that of a law enforcement agency and a penal institution rather than a despotic, arbitrary force asserting itself over and thrusting itself into the lives of the ordinary
citizen -- incidentally, a most apt description of its role during Reconstruction.

If the first three sections of the Act, therefore, seemed to be merely pro forma inclusions, no such estimate is warranted for the remaining sections. As already noted the right to sue remained regardless of whether the writ had been suspended. This fundamental fact is even more important in a federal system where state and national courts operated in distinct if overlapping jurisdictions. National officers were liable to suits, in the absence of legislation forbidding them, for damages in state courts or were subject to criminal prosecution by state authorities for acts done in the performance of duty which might be classified as crimes under state law.

This fact was even more important in 1863 in the wake of the Emancipation Proclamation which had politicized the goals for which the North was fighting the War. Contemporaries could not agree on whether emancipation was a means or an end in winning the War. This confusion, which infused pamphlet debates on the writ suspension question, also affected in similar manner general questions regarding the government's policy for winning the War. Once the goals were politicized, judgment of the government's policy became dependent on the "constitutionality", on the political "correctness," on the "worthiness" of the goals, and men were not always clear
in distinguishing between the two.\textsuperscript{24}

The removals sections of the Habeas Corpus Act were
recognition of this fundamental change, for they attempted
to end the confusion by isolating the controversy in
national courts through removal and then ending the
controversy in that forum by providing the defense that
acts were done under the President's authority which made
irrelevant any determination as to the constitutionality
of the act(s) the President authorized. Regardless of
whether the courts held ultimately that any of the wartime
legislation or executive orders and proclamations were
unconstitutional, the fourth section of the Habeas Corpus
Act specified that the President's authorization was a
complete defense to any action for which an officer was
being sued or prosecuted.\textsuperscript{25}

Such a system of removals might be characterized as
nullifying the judicial process as effectively as if Con-
gress had forbidden suits outright. Yet such an analysis
is not warranted, for the Act left undefined what con-
stituted an order from the President, and the cases coming
from the state courts in subsequent years illustrate that
the courts were aware of this weakness.\textsuperscript{26} Furthermore,
the removals sections demonstrated Congress's reverence
for the traditional federal system where states not the
national government were the primary components and to
whose court citizens could look first for redress of
grievances.

* * * * * * *

The debates in the Senate on the defense and removals sections of the 1863 Act demonstrate how much it revered the traditional system. Collamer had stressed tradition when he introduced the original bill in January containing these sections. He pointed out that he had taken the removals section from an 1815 law which permitted removals of suits arising out of revenue law enforcement efforts.27 Democrats objected to the scope of the bill. The 1815 law, inveterate Delaware dissenter James A. Bayard pointed out, had been ". . . confined to acknowledgedly constitutional powers of the Government in relation to its custom-house affairs, its revenue affairs. . . . The present bill is to cover an indefinite exercise of power, be it constitutional or unconstitutional, on the part of the Executive of this country."28

Bayard was correct as to Republican intentions regarding the scope of the bill, but he failed to acknowledge the Republican wish to conserve as much as possible the traditional judicial configurations while providing the needed protections. These Senate debates occurred in January 1863 on Collamer's substitute for Stevens' and the state prisoners bills. Aside from the scope of the bill, to which the Democrats objected, Republicans themselves argued over whether criminal cases could be
removed from state to national jurisdiction. This aspect of the removals question was the biggest issue for Republicans and prompted the greatest uncertainty. The removals section as finally passed in the 1863 Habeas Corpus Act provided that both civil and criminal cases could be removed before trial had begun and both before and after final judgment in the state courts. Once the case was removed, it could be retried as if no previous trial had occurred. Removal by either party to a suit was limited by a proviso attached at the end of the section prohibiting removals in criminal cases where judgment had been in favor of the defendant. Adversaries in suits who were citizens of the same state could have their cases removed.

The bill as reported from committee did not clearly permit removal in criminal cases. However, soon after debate began, New York's Ira Harris moved to amend section one to permit specifically removals in criminal cases. His motion touched off a heated debate over the necessity for the amendment. To some Senators the wording of the section implied that criminal cases were already included, and to others that criminal cases were not included since the Constitution conferred no appellate jurisdiction of the national courts in criminal cases. Moreover, the amendment set the tone of the rest of the debate on the substitute in the Senate, for some Senators, notably
Trumbull and Pennsylvania's Edgar Cowan, worried that this bill would usurp state court criminal jurisdictions.

Trumbull led opposition to Harris's amendment. He believed that the section was so drawn that removals would cover only civil cases. United States courts, furthermore, had no jurisdiction in criminal cases for removals from state courts. Trumbull asserted that state criminal laws could not be administered in national courts. Hence, the proposed amendment would materially alter the existing provisions for removals from state to national courts. At present, Trumbull continued, in cases where a question of right under the Constitution was made, "... a writ of error lies to the Supreme Court of the United States. It is only the question of law that is removed there, and the case is certified back to the State courts." Trumbull speculated that there might be a possibility of transferring the question of state criminal law thus removed, back to the state court for it to administer, but no machinery existed at that time to accomplish it.

In arguing this point Trumbull cited as example a national officer who contended that in acting under authority of the government in the course of his duty, he murdered a man in Illinois and on these grounds had his case removed to the national courts. Since murder was no offense against the United States unless the national officer was in the military service or committed the
offense in an area under the exclusive jurisdiction of the United States, there would be no mode of proceeding in the national courts in this case. Harris, in countering Trumbull's argument, cited an 1816 Supreme Court case which declared, among other things, that the right of removal by which a court could exercise its appellate jurisdiction extended to criminal as well as to civil cases.29

Harris was on the correct side of the argument. Congress created courts and invested them with their respective jurisdictions. It was commonly believed and asserted in Supreme Court opinions that Congress had not conferred on the national courts any appellate jurisdiction in criminal matters except the jurisdiction the courts could exercise by means of habeas corpus. The implication was the courts possessed no criminal jurisdiction not because the Constitution invested them with none but because Congress had not seen fit to confer such jurisdiction on them.30

Furthermore, Trumbull's contention that even if national courts had jurisdiction in criminal matters there would be no established procedure for administering criminal cases was simply wrong. Congressional statutes had established and Supreme Court decisions had affirmed that national courts would follow procedures of the state where the national court held its sessions.31
The federal criminal law question was substantially continued in a somewhat different form in a debate over the second section of the Senate's original bill. The section as reported from the Judiciary Committee provided for two types of defense before the courts in suits or prosecutions described in the removal section of the substitute. If it appeared to the court that the defendant had probable cause for or acted in good faith in performing the action complained of in the suit or prosecution, the court would issue a proper certificate stating that fact, and execution of the judgment or other proceedings would be suspended until after the adjournment of the session of Congress following judgment.

Cowan offered a substitute for this section which provided for these two defenses, but stipulated that the court submit them as facts to the jury with the instruction "... that the foregoing facts, or either of them, constitute a full and complete defense to the action, and that the finding must be accordingly." Cowan, in highly technical legal language which, like that of the sociologist, often confounds rather than clarifies an argument, went on to present the reasons for adoption of his substitute. He objected to section two because it provided the defendant with no defense before a jury. Generally in cases encompassed by the bill, Cowan continued, "... there can be no defense ... except
probable cause and the authority of the President of the United States." A plea of "not guilty" would encompass these assertions as defenses. He believed that a majority of cases would arise where the plaintiff had been arrested by the defendant ". . . and in such a case under this second section as it stands there will be no way possible of preventing a judgment against the defendant. The only question to be determined would be the actual force. Then there is a judgment; then there is an assessment of damages; and after all that is done, the defendant is turned over to the court upon two questions of fact." Bayard had objected that the court should properly determine a question of probable cause. Cowan agreed with Bayard, but he also believed that the facts upon which the court based its determination of probable cause was a question for the jury.

Cowan next offered the most important reason for adoption of his substitute when he outlined the consequences if the court were allowed to decide the facts: "I want these questions [of fact] to be submitted to the jury, and I want them to be submitted to the jury for this reason: if they are not submitted to the jury, but are questions of fact to be submitted to the court afterward, and the court decide them against the defendant, there is an end of it. No writ of error lies to an improper decision of a fact [by a court]." Although Cowan
was correct in stating that no appeal by writ of error would result from a court's improper determination of a question of fact, he failed to mention that a jury's improper determination of a fact would also not provide grounds for removal by writ of error and indeed would prohibit questions of fact being retried once the case was removed. But his strategy was not simply to prescribe jury determination of facts and thus to provide grounds for removal.

Cowan's strategy was much more complex, revealing his recognition of the necessity to assert national authority yet to maintain as much as possible traditional federal judicial relations. An exchange with Garrett Davis, Democrat from Kentucky, an opponent of the bill provide the clues to understanding Cowan's strategy. Davis wanted to know if arrests other than by warrant, for example, would be justified facts. Cowan replied that "... it is claimed here ... that the President has the power to issue a warrant to his officers, military or otherwise, to arrest, in cases of rebellion or invasion, people whom he thinks to be dangerous to the country, although they may not yet have committed any overt act." But Cowan declined to say whether he believed it to be the correct view. He wished to put the question in a form that the courts could determine. Davis then wanted to know if the law regarding probable cause was as clear
as Cowan implied it was, why was his amendment necessary. Cowan replied that he did "... not know that the necessity [for the amendment] is absolute in the case of probable cause; but I do know that it is absolute in the case of the other question which lies behind, [i.e., the circumstances under which the defendant acted] and upon which probable cause may to some extent depend." Cowan intended that the question which lay behind the plea of probable cause be submitted as a fact to be determined by the jury "... under the instruction of the judge, to which instruction the defendant may except and may have his writ of error, thus disturbing as little as possible the machinery to which we have been accustomed heretofore, ..." 32

Thus, one-half of Cowan's strategy -- the conservation of federal relations aspect -- was revealed. In discussing Harris's amendment providing for removal of civil and criminal cases from state to national courts, Senators had worried the proposition that such removals would usurp state court jurisdiction, particularly in criminal matters. Cowan, with Trumbull and others, had opposed Harris's amendment, because they believed the bill had been drawn to remove civil cases, the only types of cases they believed were properly included in the appellate jurisdiction of the national courts. Removal of criminal cases far more than of civil cases, these Senators
believed, opened the door to possible conflict between state and national authorities. Thus, Cowan introduced his amendment in order to restrict the possibility of removals, particularly in criminal matters to questions of law only, and thus restrict the possibilities for retrial of cases in national courts only as to the question of law.

Cowan then revealed the assertion-of-national-authority aspect of his strategy in another portion of his speech. He pointed out that "... no one can furnish a proper objection to my amendment, particularly no one who is interested to protect defendants under circumstances of this kind, ..." He was certainly justified in making this assertion. By providing that the jury rather than the court would determine the validity of the facts upon which the plea of probable cause was based, the defendant was protected from the court's subsuming questions of law as questions of fact, an improper determination of which as Cowan pointed out would prevent removal by writ of error. If the question of probable cause were left to the court to determine, the judge could uphold the validity of the President's authority in every way. Moreover, he could admit that probable cause was a sufficient defense but assert that the facts upon which the defense was pleaded were not sufficient to establish that the defendant acted out of probable
cause or under the authority of the President, thereby frustrating any chance for removal. On the other hand, if the judge instructed the jury that its decision as to the validity of the defense depended upon the sufficiency of the facts presented to them to establish that the defendant had acted with probable cause or under the authority of the President, his instruction -- an instruction as to the law -- would furnish proper grounds for the defendant to apply for a writ of error, since the section permitted no question of sufficiency to be raised in the judge's instruction.

Thus Cowan's amendment, if adopted, would have had the effect of restricting removals to questions of law only but at the same time would have insured that a state court could not frustrate removal of a case by determining it in such a way that no grounds for removal could be established. Cowan's amendment failed in Committee of the Whole but was adopted after the bill was reported to the Senate. When the House and Senate went to conference to work out differences over their respective bills, Cowan's amendment was deleted in favor of one which stated that an order from the President would be a sufficient defense.

The Senate's hesitation to interfere with states' criminal jurisdictions was again manifested when Lazarus Powell of Kentucky moved to strike out from the last part
of the first section the provision prohibiting removal by writ of error or appeal in instances when the judgment had favored the defendant. Illinois's Orville Hickman Browning prevailed upon Powell to change the motion to limit the prohibition to criminal cases only. He pointed out that this provision was inconsistent with the first part of the section which permitted either party to remove a case. Browning believed that in a civil action either party should have the right to transfer a case. If this amendment were adopted, or the original provision allowed to stand, it would change the law significantly, Browning argued, in regard to removal by writ of error as it had theretofore been practiced. 35

Browning was correct. Section 25 of the 1789 Judiciary Act had allowed removal by writ of error to either party in a dispute when the right or title which the party had claimed under the Constitution had been declared invalid. Both the original provision and the Browning-Powell amendment retained the removal by writ of error feature of the 1789 Act for cases involving a federal question. But the proviso to section one added an additional qualification that decisions in criminal and civil cases involving a federal question which favored the defendant could not be removed. The only difference between the original provision and the Browning-Powell amendment was that the original provision would
deny removal in cases decided in favor of the defendant in both civil and criminal cases. On the other hand, the amendment would allow either party to remove a case in a civil proceeding, but would deny removal in cases decided in favor of the defendant in criminal cases.

Jacob Collamer, who authored the substitute, believed that the original provision conformed with section 25 of the 1789 Judiciary Act. He assumed that any decision in favor of a defendant presumed state court affirmation of a United States law or the Constitution. But theoretically there could be (and had been in the past) cases where a plaintiff claimed a right or title under the Constitution, its laws, or treaties.36

However, since the bill under consideration was nominally a bill of indemnity it encompassed cases brought by irate citizens against national officers performing their duty under authority of the President at which point an issue involving the Constitution or any of its laws would be brought forward. In other words, the defendant-officer would always be the one claiming a right or title under the Constitution. Thus in effect, the provision, as Collamer claimed, did conform with section 25, although in substance its requirements were quite different.

If Browning was willing to support removal of civil cases before trial in the state court he was opposed to
allowing cases to be removed once the trial had been completed and final judgment rendered. He moved, therefore, to strike out the provision of section one allowing removal after final judgment to the circuit court on the grounds that the provision usurped state court jurisdiction and provided for a degree of centralization theretofore unknown.

Collamer argued against the deletion. He cited the 1815 Act from which he had copied the provision as adequate precedent for its inclusion. Apparently, Collamer believed that removals of suits from state to national courts would have the effect of discouraging the initiation of such suits. In further support of his argument on behalf of the propriety of the provision, Collamer presented the classic argument that all cases which drew into contention the Constitution or laws of the United States were proper matters for national courts. However, the procedures for removing these cases from state to national courts were to be regulated by statute. Pursuant to this authority, Collamer concluded, Congress had provided for removals by writ of error from the highest court of the state to the Supreme Court and by reason of diversity of citizenship from the state court to the circuit courts of the United States. The provision under consideration, Collamer stated, extended the removal tradition to cases where "... a judgment has been
rendered before he [the defendant-officer] can get this removal."\(^{37}\)

In his response to Collamer, Browning did not doubt the right of Congress to provide for removals in cases pending or to be commenced when the Constitution, a law of the United States, or the authority of the President was questioned, but he doubted that Congress had the power or should consider it wise "... to annul absolutely the final judgments and decisions of the State tribunals, take the case de novo into the Federal courts, and try the whole thing over again there." He believed, however, that Congress should grant ". . . every privilege and every opportunity of defense that ought to be given . . . to the defendant when we confer upon him the right, and furnish him the means and the opportunity of removing his case before there has been an investigation of it." In any case, Browning felt that adequate removal provisions already existed for appeals and writs of error from inferior to superior state courts and from the highest state court to the Supreme Court.\(^{38}\)

Browning was incorrect when he asserted that cases from the highest state court to the Supreme Court could be removed by appeal. Under the then existing law, the only mode of removal directly from the highest state court to the Supreme Court was by writ of error. The distinction between a writ of error and appeal is a fine,
although a material one. A writ of error permitted removal of questions of law only, whereas an appeal removed questions of law and of fact. Furthermore, an appeal annulled the decision of the court which had tried the case and permitted a new trial in the court which granted the appeal.

These debates on removals and defense procedures demonstrate how committed Republicans were to traditional concepts of federalism even as they recognized that that same federalism was the source of many difficulties in sustaining the national authority. The object of this legislation had been to control, not abort, state judicial processes, and the manner in which Congress chose to exercise such control was through the framework which it had created previously to make work traditional areas of state-nation interactions in revenue law enforcement. If the framework was old, some of the questions it would handle were new, such as the nation's supervision of a state's administration of criminal justice. Events after the War would demonstrate just how new such supervision was. The Civil Rights Act incorporated these features of the 1863 Habeas Corpus Act, and Congress learned then that it was one thing to pass a law and another to make it work.

The 1863 Habeas Corpus Act was a conspicuous example of the difficulty in writing law for a federal system of government, especially in times when the nation was
comfortable with and, indeed, relished diversity in nearly all matters save, perhaps, in commercial affairs. Evidence suggests that little actual need existed in 1863 for such legislation, but the few instances which probably reached Congress's attention demonstrated that a gap existed through which individuals could challenge the nation's authority. And certainly after the War the nation could expect such challenges. Yet providing the protection did not define or command the conditions for its implementation, for implementation depended on the discretion of the officers who executed the law. The 1863 law simply provided another alternative for those officers by allowing them to remove a case if local conditions made traditional alternatives on local levels impossible to follow. The 1863 Act, therefore, recognized diversity, not created the conditions for uniformity and, as such, anticipated the approach Congress took on behalf of equal rights for all men during Reconstruction.

The writ suspension and executive arrests sections of the Act were largely irrelevant not only in terms of Congress's perceptions of current problems, but also in terms of its perceptions of future concerns. The Army disregarded the requirement to provide lists, and Judge Advocate General Joseph Holt's interpretation of the lists section for the most part matched Congress's intentions. Moreover, Congress, except for a brief spasm in 1865,
failed to get excited over the Army's apparent disregard for the law. The writ suspension section became the jurisdictional hook on which the President hanged his September 15, 1863 proclamation suspending the writ of habeas corpus. But the proclamation was largely the result of conditions which developed after the 1863 Act was passed and resulted from draft law matters and not at all from difficulties over political matters.

The post-1863 Act draft law difficulties point up what should have, and perhaps would have, been Congress's chief concern in legislating on the writ-suspension question, had not politics intervened to change the focus of discussion, for from the earliest days of the War, the writ suspension issue in practical terms was identified with the Army's regulation of its personnel, and the Army attempted throughout the War to define its jurisdiction in such matters.
CHAPTER V

THE WRIT'S SUSPENSION, INDEMNITY, AND THE ARMY,
1861-1867

Chief Justice of the United States Salmon P. Chase inquired in his 1866 Ex parte Milligan opinion whether "may it not be said that government [of the Army] includes [its] protection and defence as well as the regulation of [its] internal administration?" Chase's query came a little late, for the Government had answered the question affirmatively early in the War. Congress in its various enactments had provided protection and defense as well as regulation of the Army. The 1863 Habeas Corpus Act was a sample.

Protection and defense of the Army were naturally related to its regulation. Its personnel were also citizens, and contemporaries were not always able to separate a soldier's duty from his responsibilities and rights as a citizen. Furthermore, the Army operated in a federal system where both state and national courts often claimed authority to supervise the regulation of its personnel. Thus a necessary part of the Army's regulation of its internal administration was the definition of the outer limits of its jurisdiction within which such supervision
should not penetrate.

The wartime necessities to draft an Army and to maintain internal security as well as particular deviations of individual soldiers from legal modes of conduct raised tensions in civil-military relationships. Such tensions found expression through court proceedings on and Army responses to writs of habeas corpus, among others. Since the judiciary was the chief organ through which civil concerns were expressed, it produced the major challenges to the Army's authority and fused into one the twin problems of regulation and of defense and protection.

Since the Army was the chief instrument for the enforcement of national authority, such judicial challenges also, therefore, raised objections to the national authority. The Civil War-Reconstruction period is a record of the national government's efforts to close the gaps through which the courts could object to its authority, without at the same time closing off the possibilities for citizens to seek redress for grievances through traditional judicial processes.

Enforcement of national authority changed in meaning during the Civil War, and as it changed, the Army's role changed as well. As the number multiplied of presidential proclamations and congressional enactments covering a broad range of subjects which implied an assertion of national authority, the Army's duties expanded. This
expansion increased the Army's impact on the daily lives of many citizens. Early in the War, the Army's chief duty which touched citizens was its presidentially-authorized responsibility to arrest alleged disloyalists and to counter crimes against the United States. However, after the nation began conscripting civilians into military service in 1862, the Army's contact with civilians greatly increased, and disloyalty was defined in terms of evading, obstructing, or aiding others to evade the draft or for desertion. These duties provided the focus for the writ suspension issue and the reason for the President's suspension of the writ in 1862 and 1863.

Any arrest by military or other authority, whether for evasion of the draft, desertion, or disloyalty, provided occasions for individuals so detained to petition state or national courts for writs of habeas corpus. The manner in which courts handled the writ petitions and in which the military responded to courts' decrees determined major configurations in civil-military relations.

A point often overlooked in assessing the degree of harmony which existed between the Army and the courts is that despite the writ's suspension, even the most fervent champion of executive power never claimed that the President or Congress possessed the power to forbid the writ from issuing on a petitioner's behalf. Suspension of the writ, as the pamphlet debate on the subject made clear
and as most contemporaries agreed, meant suspension of the privilege of the writ. Such a suspension meant that only the petitioner's right to have the writ operate in his behalf was suspended. Therefore, when the court, acting upon the petition, issued a writ and the military officer or other person made a return that the individual was arrested by authority of the President and that the writ was suspended, the court, being so informed of the individual's status, could take no further action to enforce the writ's mandate. Thus the court and the military were not in conflict because the former had issued the writ but because the court, after the return was made, chose to try to enforce its original command when it issued the writ or used its opportunities when it issued the writ to comment unfavorably upon the government's policies.

Two additional points must be kept in mind when assessing the degree of harmony which existed between the Army and the courts. First, the President needed to suspend the writ only when the national courts issued the writ. Because of Taney's opinion in the Ableman v. Booth case, no suspension was necessary for state courts since the Court declared that state forums could not release by means of habeas corpus individuals detained under the national authority. National officers generally followed the Court's instructions stated in the decision and
returned to the writ that the individual was detained by authority of the United States. Such notification obliged the state court to proceed no further. According to the Court, "They [i.e., the state courts] then know that the prisoner is within the dominion and jurisdiction of another Government, and that neither the writ of habeas corpus, nor any other process issued under State authority, can pass over the line of division between the two sovereignties."

These returns generally provided the question to which most state judges addressed themselves in arguing on behalf of their jurisdictions. The state judges made a distinction which historians have emphasized only in the past few years, that Taney's opinion was a brief on behalf of national judicial authority rather than national power per se. ⁴

It appears from a careful reading of the opinion in the Ableman case ⁵ that while Taney's purpose was to uphold national judicial authority he was at the same time most conciliatory concerning the limits of state judicial authority vis-à-vis national authority. As was true in most of the judges who heard habeas corpus cases earlier in the decade in the lower national courts, Taney asserted national authority in such a way as would least impair the functioning of the state's judicial processes. ⁶

Aside from the question of the High Court's own
jurisdiction, the Booth case presented the Supreme Court with the question whether a state court could issue writs of habeas corpus to free individuals detained by federal judicial process. Given the scope of the question presented to the Court, its decision would focus mainly on state-nation judicial relations and only incidentally on the authority of the national government as a whole. Taney's opinion reflected this pattern. He was most vigorous in asserting supremacy of national judicial authority and simultaneously more conciliatory in specifying the jurisdiction within which the state courts could operate.

After disposing of the question of the Supreme Court's jurisdiction Taney went on to discuss the question whether state courts could issue writs against the national government. He stated that the effect of the Wisconsin Supreme Court's issuance of the writ setting aside Booth's conviction was an assertion that the state courts were superior to United States courts. If this were the case, Taney continued, "... no offence against the laws of the United States can be punished by their own courts, without the permission and according to the judgment of the courts of the State in which the party happens to be imprisoned." If the power claimed in this instance by Wisconsin were deemed correct, "... they must have the same judicial authority in relation to any other law of the United States."
Taney inquired where Wisconsin derived such authority as its action presumed it possessed. The Chief Justice noted that the Wisconsin court had received no such authority from either the U.S. or the Wisconsin constitutions, which were the only two possible sources for such a grant of power, "... for no State can authorize one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and independent Government." Although Wisconsin is a sovereign state, Taney continued, the United States Constitution restricts its sovereignty. The United States cannot be touched by a state's judicial process. 7

Taney was establishing the inviolability of the national judicial authority. However, he could not assert judicial superiority without claiming immunity for the national government as a whole. While it is true that in his opinion he equated the authority of the national government with the power of the national judiciary, it is clear that he considered judicial power as only one aspect of the national power. In order to claim the superiority of the part (i.e., the judiciary) he had to claim the superiority of the whole -- the national government. 8 If state courts could interfere with the national government when it exercised any of its powers other than of a judicial nature, state courts interfered with the national judiciary. After all, the national judiciary
decided upon the validity of the powers the other branches of the national government exercised. As Taney pointed out, "If he [a prisoner] has committed an offence against their [the United States'] laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress." ⁹

After Taney completed his analysis of national judicial authority, he outlined the permissible limits of state court jurisdiction by means of habeas corpus. The Chief Justice said that he was not questioning the power of the state courts to issue the writ "... in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States." ¹⁰

In other words, Taney would prohibit the state courts from issuing the writ if it knew that the petitioner is held under authority of the United States. However, the question rose of how the court would know such a fact. The judge as an individual might be fully aware that the person petitioning for the writ is held in United States custody. Yet the judge in a judicial capacity might not be informed of such a fact within the technical meaning of the law. Taney's subsequent remarks make clear that the court could not issue the writ if it were judicially apprised of the fact that the petitioner was held under
national authority. However, such a fact would not likely come before the court until the writ was issued and the national officer returned that the petitioner was so held. Thus Taney gave the state courts great latitude in exercising its authority by means of habeas corpus even if in the end the courts could not enforce its mandate in issuing the writ.

State courts during the Civil War assumed that Taney considered the judicial authority a separate aspect of the national authority. While they accepted the Supreme Court's decision that state courts could not touch individuals detained in consequence of the national judicial process, they assumed that the High Court, declaring that fact, had left to state courts judicial oversight of other aspects of national authority. Thus state judges, citing the Ableman decision, distinguished between national judicial officers and national "ministerial" officers who enforced national law but who were not judicial officers. For example, in 1863 the U.S. District Attorney for the southern district of New York, A. Oakley Hall, reported the decision of a state judge in his district in a habeas corpus proceeding involving a deputy provost marshal. Hall related that the judge "... has substantially held that Ableman v. Booth relates only to a return made by one who holds a prisoner under process or the direction of a judicial or semi-judicial officer of the United States and
not at all to a return by a purely ministerial officer, and who does not act in any wise except under ministerial direction[.]"^{12}

In fact, some state judges cited the Ableman decision to support their contention that the state courts had jurisdiction to issue the writ in instances where individuals were arrested on process issued from federal courts. In 1863 Justice Leonard declared on behalf of the New York Supreme Court that "An arrest, merely, or the holding in custody on process from a federal court, does not oust the state courts of jurisdiction to inquire into the detention, on habeas corpus."^{13}

Not only did the state courts argue in some cases that they possessed jurisdiction to release individuals held by the national authority which was not judicial, but in one or two instances even declared that the return stating that individual was held by the national authority was traversable (i.e., the statement that the national authority detained an individual was a disputable fact).^{14}

The 1863 Habeas Corpus Act apparently did little to settle this question. As already noted, these courts paid little attention to the question whether the President or Congress was authorized under the Constitution to suspend the writ. Since the first section of the Habeas Corpus Act was passed mainly to "settle" this question it had little bearing on settling the question of state court
jurisdiction. However, a decision that the President could suspend the writ would be grounds for the courts' refusal to issue the writ if the national officer returned that under the President's authorization the writ was suspended in the petitioner's case.

The issue whether the President or Congress could suspend the writ was not raised in the state courts; it was seldom raised in the national courts. Prior to the President's September 15, 1863 Proclamation suspending the writ, such presidential authorizations were exceptions rather than rules. Most national court issuances of the writ prior to the Proclamation occurred after the nation began conscripting an Army in March 1863 and were directed to provost marshals who were instructed to honor the writs. Provost Marshal General James B. Fry reported to Stanton in November 1863 that, "The practice [of this Bureau] in regard to those [writs] issued by U.S. Courts has been to obey the writs and abide the judgment [sic] of the Court[s]."  

General George Cadwalader's return to the writ which Chief Justice Taney issued on behalf of John Merryman in 1861 that he "... is duly authorized by the President of the United States in such cases [i.e., as Merryman's] to suspend the writ of habeas corpus for the public safety," set the pattern for responses to the writ's issuance after the September Proclamation.
If conscripting a national army between March and September 1863 prompted issuances from the national courts, it was during this time that the War Department formulated an official policy which its officers could consult when the courts issued their writs.

Of the reported cases arising out of writ petitions, almost all of them concerned individuals who had been arrested for desertion, who wished to evade the draft or whose parents wished to have their sons released from military service. Challenges by means of the writ for these purposes apparently were the greatest threat the government faced in conducting the War. The government met the challenge by suspending the writ.

From the beginning of the War writ petitions by parents and guardians on behalf of their minor children were troublesome problems, not necessarily because of their number but because of the opportunity such petitions provided the courts to decide against the government. Early in the War two adverse decisions in cases involving minors threatened the government's efforts to sustain the Army. A month before Taney's controversial Merryman decision, Judge William Giles of the U.S. District Court, sitting in Baltimore, issued a writ on behalf of John G. Mullen, a minor, whose father sought his release from military duty. Mullen's commanding officer, Major W. W. Morris, refused to release Mullen. Giles castigated
Morris's action: "With no suspension of this great writ by competent authority -- with no proclamation for its suspension by any one claiming to possess such power -- with no such state of affairs existing as would authorize its suspension -- the Court learns with deep regret that an officer of the United States army has thought it his duty to refuse obedience to the writ." Not wishing to aggravate the present situation with forceful action the Court gave the Commanding officer at Fort McHenry four days to show cause why he should not be cited for contempt for refusing to bring Mullen before the Court. "The Court," Giles concluded, "sincerely hopes that in a crisis like the present wiser counsels may prevail at the post, and that no unnecessary conflict of authority may be brought in, between those owing allegiance to the same government, and bound by the same laws."

A few months later, a petition for the release of another minor was presented to the Circuit Judge for the District of Columbia. He issued the writ and subsequently an attachment for contempt against the minor's commanding officer, who then arrested the judge. Such conduct on the part of the military officer in arresting the judge was exceptional at any time during the War.

The War Department and Congress gradually developed a policy regarding the discharge of minors. In September 1861, the Adjutant General, Lorenzo Thomas, issued
General Order No. 73 which among other things declared that, "Hereafter, no discharges will be granted to volunteers in the service of the United States on the ground of minority." Congress followed up this order in February 1862 in an act enrolling volunteers which prohibited the discharge of minors. The 1863 Conscription Act modified this early policy by providing for the draft of individuals twenty years and over. But the Act was unclear on discharge of persons under twenty who had been drafted. Congress partially clarified this question in 1864. It amended the conscription law so that minors under eighteen could be discharged only upon the authorization of the Secretary of War.  

The government hardly would have been justified in taking such stern measures to retain individuals in the Army despite their minority had it not at the same time instituted stringent regulations regarding their enrollment. In General Order No. 104 issued from the Adjutant General's office in December 1861, the recruiting officer was instructed to prevent enrolling minors. A valid record of the person's age was of great value. However, "In a majority of cases the recruiting officer may be justified in recording the age as stated by the person offering to enlist; yet many cases occur in which he should rely more upon his own judgement [sic], and less on the recruit's affirmation, in ascertaining his probable,
if not his actual age." In doubtful cases, the recruiting officer was instructed to use his own judgment in deciding the recruit's age, "... and not in any case to accept a recruit who, under anxiety to enlist, manifestly mistakes his age." Congress in the February 1862 Act prohibited the enlistment of minors "... except with the written consent of their parents, masters, or guardians. Such consent must be taken in triplicate, and filed with triplicate copies of the muster-in rolls."¹⁸

The 1863 Conscription Act lessened the controversy since individuals twenty and over could be drafted thus reducing the numbers of individuals who needed their parents' permission before entering the service.

Deserters formed the other class of individuals whose petitions for the writ threatened the organization and discipline of the Army and thus the conduct of the War.

In their petitions for the writs individuals never disputed the Army's power to try them for their alleged crime but, rather, raised the issue of whether they had been legally enlisted. The courts claimed that they had jurisdiction to review the question of the validity of the enlistment. If the enlistment was invalid the petitioners argued and, in some cases, the courts decided, the military had no jurisdiction to try deserters since they could not desert from that to which they had never legally belonged. The Supreme Court never decided this
question in regard to national court review of enlistments, but in 1871 it declared that the state courts had no jurisdiction by means of habeas corpus to release individuals in national custody, including those held under military authority. In September 1862 the government began the arduous process of systematizing its oversight of the administration of the draft and of its loyalty-security program. In General Order No. 140, Secretary Stanton designated as Provost Marshal General a civilian, Simeon Draper, to supervise and control provost marshals in districts throughout the United States. In March 1863 Congress in the Conscription Act ratified the provost marshal's duties in regard to the arrest and detention of deserters and made the Provost Marshal General's office a military bureau of the War Department. Two weeks after passage of the Act, Colonel James Fry was appointed Provost Marshal General. Congress's action was apparently in response to increased numbers of desertions, giving the force of law to an executive-authorized act which the courts might dispute as valid.

Evidence indicates that by mid-1863 the military's ability to hold individuals for the military offense of desertion despite petitions for the writ to the national courts was a serious problem. Furthermore, state courts continued to nag the Army with writ issuances. Although Congress recognized the President's authority to suspend
the writ in the 1863 Habeas Corpus Act, the President in subsequent months made no public declarations on the subject. In April 1863 Judge Advocate General Joseph Holt advised Stanton that all questions in cases of deserters were to be decided by a military court. Civil authorities, Holt continued, have no jurisdiction in such cases. "If however, from ignorance of duty, or from disloyal sympathies Judges are found who persist in issuing and trying writs of Habeas Corpus, with a view to the discharge of soldiers held in military custody, charged with military crimes, the privilege of the writ of Habeas Corpus should in all such cases be suspended by the President under the recent Act of Congress [i.e., the 1863 Habeas Corpus Act]." If after the President makes such an authorization the officer makes an arrest, he should refuse to obey the writ, seeking military power in support if necessary. The officer should return that the prisoner is held under military charge and that the President suspended the writ. In conclusion, Holt urged, "There should be prompt and decided action on this question, or the arrest of deserters will soon become impracticable." 21

The President apparently decided not to take Holt's advice. However, the War Department in July 1863 issued a circular from the Provost Marshal General's office instructing the procedure provost marshals should follow when state courts issued writs. This circular reflected
the troublesome problems the Army faced in maintaining its own internal administration. It was the first official statement of procedure to be followed when state courts issued the writ on behalf of deserters which the War Department issued during the War -- a striking fact since the War had begun over two years before. The Circular was actually an opinion the Solicitor of the War Department, William Whiting, had written for Stanton. The Circular recited a portion of section seven of the 1863 Conscription Act which enjoined provost marshals to arrest deserters and to take them to the nearest military post or commander. Whiting, in a correct statement of the response a marshal should make if a state court issued the writ, informed them that they could not disregard the court's process and quoted extensively from Taney's Ableman decision regarding the proper return to the writ and the legal effect such a return would have in staying further action of the court. The remaining portion of the Circular outlined the substance of a proper return, and advised provost marshals to resist with force, if necessary, court attempts to enforce its process. 22

In spite of the Circular reports from Pennsylvania and New York in early September indicated that a public declaration from the President was needed. On September 15th the President issued a proclamation suspending the writ of habeas corpus throughout the United States in
regard to individuals who were "... amenable to military law, or the Rules and Articles of War, or the rules or regulations prescribed for the military or naval services... or for resisting a draft..."

Two days prior to Lincoln's issuance of the proclamation, Stanton had written to the President enclosing a letter from the Provost Marshal General, "... asking for instructions in regard to the proceedings by State tribunals in the State of Pennsylvania, in the discharge of deserters and the exercise of jurisdiction over persons held in military custody." Stanton reported that judicial officers in some states were using their powers in ways hostile to the government, "... especially with the view to prevent the operation of the draft and encouraging desertion." [my emphasis] A little over a week before Stanton sent his letter, A. Oakley Hall had written the President concerning a habeas corpus proceeding against an army officer in a Pennsylvania state court, "... over which I respectfully ask your personal direction to your subordinates." Hall stated that his object in writing the President was to seek his instruction in order to avoid "... a possible, or probable conflict of State & Federal jurisdiction..."23

Only passing reference in any of the reports were made to the actions of national judges. The Bureau apparently recognized that short of presidential suspension
the national court writs were to be honored, and as already noted it accordingly directed its officers to honor the writs. The records of the District Court for the Eastern District of Pennsylvania indicate, however, that numerous petitions for the writ were made between March and September 1863 by individuals, who wished to evade the draft or who were minors or deserters, to the courts which honored them in most instances. Thus, the President's proclamation was probably as much if not more the result of the actions of this court and scattered reports of actions in other national courts as of continued state court persistence in issuing and having honored its process. 24

After the President suspended the writ in September the national and state courts ceased generally to issue writs of habeas corpus. A very few post-Proclamation issuances are on record, but the military was uniform in refusing to honor them. 25 The writ's suspension continued in the North until December 1, 1865 when President Johnson issued a proclamation restoring the writ to all the states except those which had seceded and Kentucky. 26 Thereafter, the Army honored writs which national courts issued. 27 On occasion such compliances were embarrassing to the government. 28 In 1867, however, Congress passed the second of two habeas corpus acts which withdrew the writ from individuals who were detained under military authority prior to the passage of the act which provided a
temporary buffer between the Army and the judiciary. 29

The relatively few reported cases arising from petitions for the writ is not a proper index of the degree of discontent which existed over the government's drafting and other homefront war policies. Rather they serve the historian, as they served Lincoln and his subordinates, as demonstrations of the avenues through which the government's authority could be challenged. The existence of such avenues disturbed the government less than the fact that citizens or judicial officials followed them at inappropriate times or in order to frustrate the efficient conduct of the War. As Acting Solicitor of the War Department, Chauncey Smith advised Fry shortly before the 1863 Proclamation, "As long as there is no reason to suppose that the Judge is abusing his power, and issuing writs not in good faith, but for purpose of annoying the Board [of Enrollment] and hindering the draft, the writs must be obeyed, and the Board must respond to them." 30 Apparently, the comparative frequency with which citizens applied for and judges issued the writs in August and September 1863 convinced Lincoln that citizens and judges acted no longer in good faith and directed their efforts to hinder the draft.

Suits for trespass or prosecutions against national officers for actions in the course of performing their duty, like petitions for and issuances of writs of habeas corpus,
could be viewed as challenges to the national authority. However, such suits and prosecutions evoked less such an analysis than the desire to protect national officers for faithful performances of their respective duties. Holt declared in March 1865 that, "This Bureau [i.e., Judge Advocate General's] has had repeated occasion to hold that an Officer, who while acting in good faith and in proper discharge of a public duty, has made an arrest, is entitled to be protected by the Government (upon its being duly notified of the circumstances) from the injurious consequences of his action." 31 Relatively few reports of trespass cases are on record, and the files of the Attorney General's Office and the War Department indicate that only a few more such suits were initiated. However, as in the writ suspension cases, the trespass suits and prosecutions demonstrate that citizens were most aggrieved by the government's drafting and arrest of deserter policies.

By the end of 1865, nearly all of the suits initiated until that time had been brought in northern state courts, and a substantial share of the remainder in the border state of Kentucky. By early 1866, however, suits brought in Kentucky outnumbered a hundredfold the number of such suits brought throughout the North. But when Congress considered amending the 1863 Habeas Corpus Act in 1866 to insure the removal of cases from the state to the national courts and to buttress the defense section
(section four), it had in mind particularly the situation in the North as well as in Kentucky which provided most of the examples for resistance to removals and of the inadequacy of the defense section that Congressmen cited in debates on the legislation.

As the previous chapter discussed, Congress chose to have suits against national officers, initiated in state courts, removed to national courts. The government relied on these procedures to protect its officers, although it did not make removals mandatory in all cases. The War Department generally referred cases reported to it to the Attorney General with a request that the local U.S. district attorney be instructed to defend the suit. Occasionally the Secretary of War in transmitting the records and making his request suggested, per opinions of Judge Advocate General Holt, that the cases in point would be suitable for removal. However, in many cases discretion was left to the district attorneys to handle the suits as they saw fit. Holt reported in March 1865 that, "In the majority of cases [i.e., not in all cases] . . . where such officer has been subjected to a prosecution for false imprisonment, or a suit for damages, it has been advised that the U.S. District Attorney for the District where the arrest occurred should be instructed to appear for and defend him, and to transfer his case to the U.S. Circuit Court, if deemed advisable, under the Act of March 3, 1863, . . ."32
Provost marshals were the objects of most of the suits. However, individuals acting in many types of official capacities were also sued and prosecuted. These included U.S. marshals, employees of the provost marshals' offices, detectives, whom the government employed to ferret out disloyalty, and customs agents.

Typical of the early suits in the North against the provost marshals was that brought against Peter B. Aiken, former deputy provost marshal for the 29th district of New York, by Ambrose Best in the supreme court of New York for alleged false arrest on charges of desertion. The charge of desertion was not proved, and Best sued Aiken. As in Aiken's case, acquittal was apparently an important prerequisite in other instances, following which provost marshals were sued for false arrest. George Eyster, a former provost marshal in the 16th district of Pennsylvania, was sued by Jesse Cain in December 1865. Eyster had arrested Cain for harboring and concealing deserters during 1864. Cain had been tried and acquitted for lack of evidence in March 1865. In one instance a provost marshal was sued by a former subordinate for making him return to the father of an individual whom he had enrolled, the bounty money which the government paid its recruits.

The government's apparent laxity in demanding removal in all cases prevailed for several reasons. First, in
each locality a different set of circumstances existed. In areas friendly to the government, undue government preemption of local judicial processes might cause unnecessary friction when a wise course chosen by the government could mean the accomplishment of its goal in friendly state and local courts which would be disposed to grant a fair (i.e., favorable) hearing of the case. Second, the entrance of the United States district attorneys into the cases on behalf of the defendant-officers created optimism that the government could win its cases in these forums.

In troublesome areas, however, the government was anxious to have cases removed. In 1864 a deputy provost marshal, Robey, was indicted twice in a Maryland court for false imprisonment and for forcible interference with elections. The case was referred to Holt who advised Stanton that the government should defend the case and have it removed to the national courts, "... it being highly probable that in a state Court reported disloyal, and in a region of country notoriously so, the right of officers prosecuted for acts done under the authority of the President ... would not receive protection."36

The apparent awareness of the diversity of sentiments in various parts of the country in regard to the policy of the government, perhaps, explains the anomaly of Congress's preoccupation with conditions in Kentucky when
considering the 1866 Habeas Corpus Act to bolster removals procedures. As the files of the Attorney General's Office and the War Department indicate, trespass suits were a national problem; however, removals problems were confined to particular localities where anti-government feeling was the strongest -- Kentucky being the most prominent example.

When the War Department did insist on removal of a case, however, it brooked no resistance from recalcitrant state courts. The Acting Solicitor of the War Department, Chauncey Smith, advised Fry in August 1863 that, "If disregarding the law of Congress [i.e., section 5 of the 1863 Habeas Corpus Act], the State tribunal causes the party [i.e., the defendant-officer] to be arrested upon execution or warrant, he may be discharged by a writ of Habeas Corpus, from the Courts of the United States under the act of March 2d 1833, . . ."37 Such advice was rare, however, for no other evidence discovered thus far suggests that the government's officers applied for writs under the 1833 Act to the United States courts to be discharged from state custody. Most state court recalcitrance did not occur until early 1866. By that time Congress had under consideration legislation which eventually became the 1866 Habeas Corpus Act that provided other remedies for state court non-cooperation. Furthermore, most of the difficulties the government had in getting cases removed stemmed
from its failure to comply with specific procedures for removal of the case outlined in the 1863 Act. 38

In the removals question, wartime draft problems in the North shaded off into the post-War reconstruction problems in the southern states. Kentucky provided the link between the two worlds. Although her citizens sued for a greater number of types of alleged wrongs, such suits in Kentucky differed only in the magnitude of numbers from like occurrences in northern states. Debates in Congress on legislation which became the 1866 Habeas Corpus Act demonstrated how poignantly Congress was aware of the analogous nature of wartime draft difficulties and post-War reconstruction eventualities.

Moreover, events occurring in 1866 and early 1867 in several of the rebel states themselves suggested to contemporaries that they would follow a similar pattern of numerous suits as that which has been established in Kentucky. 39 Furthermore, the Army worried how to cope with local prejudice against and hostility towards its personnel which was reflected in criminal prosecutions of Union soldiers in state courts. In February 1867, Holt addressed to Stanton a letter enclosing a bill which he proposed the Secretary submit to Congress for its consideration. The bill, according to Holt, provided, "... amendments and additions to the law relative to the practice of courts-martial, which are believed to be most
urgently called for at this time." Section four was the most significant part of the proposed bill. It re-conferred on courts-martial jurisdiction to try soldiers for felonies that section thirty of the 1863 Conscription Act had authorized. Courts-martial jurisdiction to try these offenses, Holt believed, had ceased with the end of the War, but he felt that conditions in the South fully warranted re-authorizing the jurisdiction. The necessity was nearly as great "... for the exercise of this jurisdiction as during the period of active hostilities."

Holt believed that courts-martial jurisdiction was especially needed in cases of crimes which soldier committed against blacks and which black soldiers committed. Pointing up the problem of securing substantial justice which had vexed Congress in its efforts on behalf of Union men in the South, Holt explained why courts-martial jurisdiction in these particular classes of cases was necessary:

In the former instance [i.e., when crimes committed against blacks], in the present state of the law and of public opinion [in the South], the punishment which would be inflicted by a civil court, might often be quite inadequate, and in the latter instance [i.e., trials of black soldiers] much too severe; while in either case a trial by a general court martial would, it is believed, be comparatively impartial, and its sentence, upon a conviction, properly proportioned to the actual criminality of the offender.40
By 1867 the Army, with the help of Congress, had come a long way in rationalizing and bolstering its internal administration and providing itself with protection and defense. Its efforts had been challenged often and hard by citizens and courts alike, but it managed to pick its way through the maze of challenges. In doing so, at the same time, it defined, again, with the help of Congress, the jurisdiction in which its authority was supreme as against civilian challenges -- a jurisdiction which the courts in later periods sustained.

The two areas of its jurisdiction which remained unclear throughout the period were the extent of military arrest and trials of civilians who were not connected with the Army and the degree of responsibility in general its officers possessed for acts done in performance of their duties. Answer to the first question determined the response to the second. During the War Congress drafted its indemnity legislation to shelter its officers from responsibility by removing from the courts' considerations the question of legality of the orders authorizing such actions upon which the question of responsibility would normally hinge. But after the War, state court decisions, particularly in Kentucky, and the Supreme Court's decision in Ex parte Milligan, questioned the sufficiency and the validity of Congress's wartime efforts. The next chapter will outline and analyze Congress's responses, showing how they linked with the general problem of Reconstruction.
CHAPTER VI
SOME RECONSTRUCTION REVISIONS

"As soon as the war begins to subside," Attorney General Edward Bates prophesied in January 1863, "there will be a flood of actions, for real or supposed wrongs; and it always happens, that every period of turbulent agitation, requiring the exercise of unaccustomed powers, is sure to be followed by a reflux in the popular feeling -- a prejudice making it hard to administer even-handed justice, in cases of imputed usurpation & oppression." Bates' flood did not occur until nearly a year after Appomattox. As the War had drawn to a close discontent with the government had found expression in a trickle of cases for "real or supposed wrongs." These early, small rivulets which furrowed lightly criss-crossing indentations across the North between late 1864 to November 1865 indicated that the government's wartime draft activities had been the chief source of complaint for northerners. Thus it seemed as the War closed that the necessity to draft an Army would set the terms for post-War expressions of displeasure with wartime government policy.
However, by early 1866, these early indentations seemed to disappear by comparision with those furrowed by the flood of actions coming from the border states especially Kentucky. Suits were filed there for damages for all types of duties which national officers had performed during the War from arrests to confiscation of property to emancipation of alleged rebels' slaves.

The number of actions alone was not distressing to the government, for Congress in the 1863 Habeas Corpus Act had anticipated such expressions of discontent and provided for them. Suits were distressing, however, if the 1863 Act proved to be inadequate to meet the challenge which the suits posed to the national authority. The implementations of the appropriate sections of the Act to handle these suits were occasions when its defects and shortcomings were brought to light. During the months after the War, the 1863 Act was proved to be an appropriate but not a sufficient measure to meet the challenge. Therefore, a part of reconstruction for Congress in 1866 and 1867 was to shore up its sagging 1863 judicial defense to protect national officers even as it was obliged similarly to protect loyal men -- both white and black.

Protection of loyal men and national officers were twin necessities which complemented each other. The problems in protecting one group, which spurred Congress to provide additional legislation, gave a new dimension
and an additional sense of urgency to protect the other group. The defects in the 1863 Habeas Corpus Act showed Congress where it had left national officers vulnerable. Thus during the first two years of Reconstruction it amended the Act twice. In shoring up protections of national officers through these amendments Congress also tightened its defense of loyal men, for in the 1866 Civil Rights Act Congress incorporated the removals sections of the 1863 Act and any of its amendments.

Reports of the numbers and types of suits against national officers coming from Kentucky during middle and late 1865 amply confirmed Congress's prescience in passing the Habeas Corpus Act in 1863. That Act had conferred protection on government officials for the whole spectrum of duties Congress or the President had authorized or commanded throughout the War.

The effectiveness of that Act in providing protection for national officers depended upon the acceptance of two sets of assumptions. The first set centered on the adequacy of the legal defense an officer could cite to justify his action which made irrelevant court decisions on the wartime acts of Congress and proclamations and orders of the President. Section four of the Act declared that any order of the President was a defense for any action complained of in a suit or prosecution. Such a defense extended only to orders of the President which were
recognized as legal. No illegal order could be pleaded in defense of the officers' actions in performing their respective duties. This principle was well established and understood before 1861. However, Congress constructed section four in such a way as to exclude the question of legality of the order as an issue in the case and conferred on the courts and juries the narrowest fact finding duties. The courts decided only whether the President had issued an order covering the particular action complained of. Thus while the legality of an order was an important prerequisite to deciding the validity of the defense, Congress excluded this question from the courts' cognizance and therefore considerably narrowed the path along which court challenges to the government's policies could proceed.

Proof of the effectiveness of Congress's strategy is visible in the fact that the Supreme Court's decision in 1866 in Ex parte Milligan was the first high court veto of the government's wartime policies, and the Court's decision stemmed from a type of proceeding the Act's defense and removals sections did not cover. However, state courts found ways to frustrate the Act's defense by promulgating strict rules of evidence for determining whether the action complained of was defensible under section four. Thus the courts demanded that the defendant produce the actual written order authorizing the specific
action facing complaint. 3

The second criterion upon which the effectiveness of the 1863 Act depended was assuring the actual removal of cases from the state to the United States circuit courts. Removal was not mandatory. But cases which the government thought best to have transferred from state to national courts required an effective removals procedure. Employments of the procedures quickly demonstrated the defects in the machinery Congress had constructed in the 1863 Act. The Act required the defendant to petition for removal at the same term of court in which the appearance was scheduled. Petitioners generally failed to note this requirement. Consequently, they were unable to have their cases removed. In addition to this technical defect in the Act, state courts, particularly in Kentucky, declined to allow the case to be removed by refusing to accept the sureties which the Act required the petitioner to file. The courts also declared the Act unconstitutional and thus refused to allow removal of the case.

Post-War congressional attempts to buttress the 1863 Act centered on curing the deficiencies in these two areas -- the legal defense and the removals procedures. The 1866 Habeas Corpus Act, its 1867 Amendment, and the 1867 Indemnity Act were attempts to remedy the defects in the legal defense. The 1866 Habeas Corpus Act and the first 1867 Habeas Corpus Act were similar attempts
on behalf of removals. In both instances, it was evident Congress was sensitive to the need to respond to compelling events which challenged its authority.⁴

The reports coming to Congress in late 1865 and 1866 from Kentucky stressed the sorry plight of loyal Kentuckians who were assaulted by rebel elements. The chorus of reports swelled as they recited the total lack of protection which the state courts in Kentucky provided Union men and attributed such a lack to the courts' rebel sympathies. Former Major General James J. Brisbin in November 1865 stated that, "since the abrogation of Martial Law in Kentucky a most determined effort is being made to revive slavery -- to punish and impoverish Union men -- to ruin citizens lately in the [Union] Army by draging [sic] them before disloyal [state] Courts for acts done while in the Military Service -- to persecute the freedmen until they will return to bondage and labor without pay. All these things and many others are now being done in Kentucky."⁵

Martial law in Kentucky ceased by presidential proclamation in October 1865, but the writ of habeas corpus was not restored until 1866. The continued suspension of the writ did little to diminish hostilities which many Kentuckians had nurtured throughout the War. Once martial law ended, citizens resorted to the courts.

The situation in Kentucky presented Congress with a
major dilemma. While Kentucky had never seceded she had retained strong sympathies with southern states with whom she shared strong social, cultural, and political bonds, including slavery. Yet because in technical constitutional terms Kentucky had remained loyal during the War she could not be subjected to military control of political affairs. The President had expressed this estimation in his October proclamation, and Congress was constrained by its assumptions about the Constitution to act through non-war power modes to deal with the situation in Kentucky. Protection through the national courts was the only alternative, the Kentuckian Green Clay Smith told the House in March 1866: "I believe this [i.e., the 1866 Habeas Corpus Act] is the only remedy we have. We have no martial law in Kentucky."

The President had declared that the military had no further role in states which had not been in rebellion. Yet contemporaries perceived in Kentucky sentiments similar to those existing in the southern states. Thus the state became a test case for judging what the condition in the South would be if no military control were exerted. Republican Representative Burton C. Cook, author of the amendment to the 1863 Habeas Corpus Act, specified the lesson Kentucky posed for Congress and the nation in reconstructing the South: "It is not a question affecting Kentucky only or mainly; when the military
control shall be withdrawn in every southern State, the same question will arise." Union men who had served their country could not live in southern states without the government's protection. "All such suits are promptly disposed of by the military in those States now." Cook continued, "But the magnitude of the question may be understood from the fact that in Kentucky, where the military cannot interfere with the courts because the State government has not been overthrown by the rebellion . . . thirty-five hundred suits have been brought against men for acts done under military orders." 8

By mid-January 1866 members of Congress were receiving reports of the crisis in judicial affairs in the border state. A government agent, William Rankin, wrote to Smith, who became a leading supporter of the 1866 amendment to the 1863 Habeas Corpus Act that, "You know as well as I do, that in the Courts of the State with rebel and 'Copperhead' officers & jurors, they can expect nothing but the worst vindictive prosecution. The Act of Congress authorising the transfer of such cases to the District [sic] Courts is decided by the State Courts 'Unconstitutional' & disregarded." Five days later Smith referred the letter to House Judiciary Committee Chairman James F. Wilson, with the request that, "The parties of whom he [i.e., Rankin] makes mention are much harassed and it is due to them that the Government take some
action in the premises. It is therefore requested that this matter have immediate attention."^9

Wilson shortly received directly a report from a sympathetic Kentucky lawyer, Harvey Myers, about the critical condition of affairs in the state. This report delved into the ineffectiveness of the 1863 Act in greater detail than Rankin's had done, but its message was essentially the same. ^10

Several members of Congress had evidenced their concern for the protection of officers from such suits by introducing appropriate bills, ^11 but the bill which eventually became the 1866 Habeas Corpus Act was not introduced until February 19th when Cook introduced his bill. ^12 The earlier proposals had languished in the Judiciary Committee with little apparent effort to get them before the House. Cook's bill seemed headed for a similar fate; however, three weeks after he introduced his bill, he reported it on March 13th from committee as a substitute for another bill introduced early in the session. Once the bill was reported the House soon gave it consideration. Exactly a week after it was reported the House passed it and sent it over to the Senate. ^13

Debate on the bill in both Houses brought forward no substantial changes. The Senate was the only House in which attempts were made to change the bill in substantial particulars. But such attempts failed. On the whole,
the legislative history of the bill, therefore, demonstrated a remarkable unity among the majority of the Republican members of Congress on the issues which the bill was put forward to solve.

The attempts to amend Cook's bill and the objections put forward to its passage offered members opportunities to outline their respective thoughts on the issues. The bill provided remedies for two deficiencies in the 1863 Act. The first concerned the adequacy of the defense national officers could plead to justify the action complained of in the suit. Discussion of the proposed 1866 remedy for this deficiency monopolized most of the debate on the bill in both houses of Congress. The second deficiency was in the removals procedures. Congress in 1863 had specified the mode of removing the case but had not provided means to enforce removal of the case from the state to the national courts.

In congressional consideration of the remedy which the bill provided for the first deficiency three strains of opinion were evident. The first position, which the majority of Republicans shared, was that a defense of the nature specified in the bill and, indeed, the bill itself, was necessary as a matter of national trust and honor. "It is a bill, sir," Kentucky Representative Samuel McKee informed his colleagues, "to give them [i.e., officers] that protection which the Government owes to them. I say
that the Government is worthless unless it protects those men to whom it intrusted [sic] its own protection, and who saved it from the deadly stroke of treason." 14

Protection from local prejudice was the chief concern. State courts had been demonstrating their unwillingness to provide the proper protection. Furthermore, Congress had to be wary of the local jury. Jacob M. Howard told his Senate colleague, George F. Edmunds, that he could not vote to ". . . turn over an innocent officer or soldier of the Union, who has done such acts as are contemplated by this bill, to the verdict of a local jury." To expose national officers to such juries ". . . would be to expose defendants in all such cases to the political prejudices and personal prejudices which might happen to exist in the particular locality against the person who happened to be a defendant." 15

Such hostile actions by local juries was not mere possibility but actual fact. Smith reported that a jury in Kentucky composed of individuals ". . . all of them secessionists, all of them rebels, some of them having been in the rebel army . . ." fined Union officers large sums for arresting a man who had been charged as being a guerilla. In another county of the state, Smith related, the grand jury indicted "every Union judge, sheriff, and clerk of the election of August, 1865." Smith cited other examples as well. In another district, every
Unionist was indicted who had been in the Union Army and under orders of his superiors had taken a horse. Yet when Union men made similar complaints and "... offered their witnesses, not a single case was called, not a single indictment was found." 16

The initiation and prosecution of suits was the most potent and telling evidence of lingering rebel sympathies. As New Hampshire Senator Daniel Clark put the matter, "Let me say, Mr. President, none but a rebel or a rebel sympathizer would sue one of these men who has thus been serving his country." Furthermore, for Congress to fail to provide protection would be the most obvious indication that rebel sympathies still prevailed. 17

The second and third strains of opinion on the bill were closely related. Conservative Republicans and Democrats generally supported one or the other position. Members of Congress who supported the second position agreed with their Republican colleagues that the bill was necessary, that national officers should be protected, but believed that such protection should be extended only to officers who were being sued in areas which had been under martial law during the War.

This position was supported almost exclusively in the Senate, where Vermont Republican George F. Edmunds was the chief advocate. He believed that in areas under martial law where military force provided the only law,
the order was completely justified and needed no act of
Congress to confirm it. The bill only acknowledged some-
ting which he believed was already legal. However, he
could not support a proposition which went a step further
and provided a defense in court for all acts done in
peaceful areas of the country where martial law had not
prevailed, where the civil courts had been uninterrupted,
and where armies had not confronted one another. Such a
provision invaded "... what have always been considered
the fundamental private rights of every member of organized
society."

Edmunds received little support for his position. On
April 18th he sponsored an amendment to section one of the
bill to exclude from the defense provisions of the section
any act done in the states which had remained loyal during
the War and where martial law had not been declared.
Such an amendment would have excluded national officers
who were being sued in all of the loyal states except
Maryland, Kentucky, and Missouri from using as their
defense in court the order of the President or of their
commanding officer. Much of the debate in the Senate
centered on this proposition. When the vote was finally
taken two days later Republicans joined together to over-
whelm the amendment, 10-29. 18

The third strain of opinion on the bill was followed
by those who opposed the bill altogether. Supporters of
this position, like those of the second, justified their opposition on the grounds that the bill provided a defense for illegal orders or unwarranted exercise of force or invasion of person and property. Edmunds and Edgar Cowan had raised this objection, but they differed from outright opponents of the bill inasmuch as the latter group opposed absolutely any such defense anywhere in the country. The scope rather than the territorial operation of the proposed act provided the chief objection. Furthermore, the bill was objectionable because it greatly extended the defense provided in the 1863 Act from an order of the President to any superior officer who ordered the action complained of in the suit.

Opponents of the bill hammered the theme that the defense included unnecessary force. Kentucky Representative Aaron Harding catalogued for the House in exhaustive detail and length instances when Union soldiers mistakenly or maliciously arrested, assaulted, or murdered individuals who were alleged or mistaken for rebels. Under the proposed bill, Harding moaned, the plaintiff would be wasting his time trying to demonstrate the wantonness of or the lack of probable cause for the act of which he complained. "If the defendant can show any general or special order from any commanding officer, captain,
lieutenant, corporal, verbal or written, no matter what number of soldiers he shall command, such order, by this bill, is made of itself a complete and unanswerable defense."^19

Republican supporters rejected absolutely any contention that the defense should not operate in states where martial law had not been declared or that it protected excessive, wanton, or malicious action. Democratic Senator Thomas A. Hendricks immediately before the Senate passed the bill succeeded in having adopted on roll call 18-16 an amendment which he believed excluded from the defense actions that were cruel, malicious or wanton. Republicans opposed the amendment because they believed it was unnecessary. Hendricks' victory was only temporary, for the committee of conference on the bill deleted the amendment.^20

The conservative Republicans and the Democrats were raising an old issue in arguing on behalf of the excessive force principle. During the debate on the 1863 Act the Democrats had tried in vain to persuade their colleagues with similar arguments. They failed in 1866 as they had done in 1863. If 1866 Democratic efforts were a rerun of 1863 the notion impresses that the latter efforts were not meant to be anything more. Democrat and conservative Republican performances in debate seemed only half-hearted and lacked conviction borne of foreknowledge of
sorts that their arguments would fall on deaf ears. Such an attitude was not unjustified, for Republicans were little disposed to listen to them when reports came in almost daily of the growing numbers of suits throughout the nation. 

As already noted the bill passed both houses with no substantial changes save for the Senate's amendment to the first section that the defense would not cover officers for any acts done after the passage of the Act. When the Senate returned the bill to the House for its concurrence in this amendment and other minor changes the House stood by its own work. Both houses went to conference where the Senate amendment was retained and other differences smoothed.

The Supreme Court's decision in Ex parte Milligan was announced on April 3. There is very little evidence to indicate that Congress believed the decision in any way diluted the Act. When the decision was announced the House had already passed the bill and had sent it to the Senate where debate did not commence until April 11th, more than a week after the decision. There is evidence in form of a speech by Reverdy Johnson on April 20th -- two-and-one-half weeks after the decision was announced -- which suggests that Congress believed the Act would cover officers who participated in military commission trials which the Milligan decision had outlawed.
Johnson was one of the few Democrats in either House who wholeheartedly supported efforts to provide protection for national officers. His speech came at a crucial point in the debate on the bill's removals sections. Democrats and conservative Republicans had put up a spirited resistance to sections of the bill which compelled state judicial officials to allow the case to be removed on pain of liability in civil suits for damages for refusing to do so. Johnson tailored his remarks to present broad constitutional arguments for why Congress had the power to pass such removal legislation. Nevertheless, his belief in the sufficiency of the defense provisions to cover the Milligan decision is unmistakable.

Johnson based his argument on two assumptions, one which he stated explicitly and the other implicitly. His explicit assumption was that the judicial department was coordinate and co-extensive with the legislative department, "... that is to say, the former department should be able to decide upon all questions which may arise upon the legislation of the legislative department of the Government." Deciding all questions arising from the legislation of Congress meant deciding upon the validity of the laws which it passed and also upon exercises of authority under such laws. But the fifth section of the 1863 Act had left unprovided for cases when a final judgment had been rendered in the state court before
removal of the case to the national courts had been petitioned for. Thus under the current law the defendant had no remedy for a decision rendered in a state court which had disallowed the defense on the grounds that the law or order under which the defendant-officer acted was unconstitutional.

Johnson believed that the national courts should have jurisdiction of such cases to check the possibility for adverse decisions from state courts. He assumed implicitly that the officers would be protected in the national courts, not because those forums would be more inclined to decide the case in favor of the defendant, but because national courts would properly execute the law which specified a defense to the action complained of. The defense rested on two assumptions which the courts were bound to recognize, Johnson stated. "It assumes, as you are obliged to assume in the particular case, that the statutes of the United States already upon your statute-book are valid laws; it assumes that your officers, the President of the United States and those acting in subordination to the President of the United States, have done nothing that the laws of the United States or the Constitution . . . will not protect them in" [my emphasis].

Having outlined the general principles and assumptions upon which he believed the power to provide for removals after final judgment in the state court rested, Johnson
went on to discuss particular conditions in the country which made the law necessary. Among the conditions he cited was the Supreme Court's decision in Ex parte Milligan. Johnson was not under the impression that the military commission proceeding in Milligan's particular case was unconstitutional as one might who had only read the decision and had no other information. According to Johnson, the justices "held at the last term of the court that the whole proceeding was illegal, that there was no authority either by a court-martial or by a military commission to try a civilian, unless he happened to be a spy, and that brought him within the scope of military law." Johnson avowed that he was unwilling to leave officers without protection in the state courts by failing to provide a removal procedure to get the case into the national courts. 24

Johnson's remarks are important for two reasons. First, although his statement of what the Court had decided in the Milligan case was not correct, it does indicate that he knew that the decision had reached far beyond the facts of Milligan's particular trial to decide upon general principles concerning military trial of civilians. 25 This point is striking because Chase's announcement of the decision was worded in a way to suggest that the decision turned on the particular facts in Milligan's case rather than on the broad construction of the Constitution which Johnson suggested. 26
This discrepancy between what the Court seemingly had announced and the Maryland Senator's description of the decision leads to the second reason for why his remarks were important. Johnson's statement is evidence that Congress considered its 1866 Habeas Corpus Act amendment provisions sufficient to cover any situation despite the fact that rumors were afloat that that situation included a Supreme Court decision which had declared illegal military trial of civilians. Thus Congress assumed that the defense provisions which it had constructed confined courts to a narrow fact-finding role concerning whether the order was issued and to a limited exercise of discretion in determining whether the order encompassed the action complained of and barred the plaintiff from pleading and the court from deciding that the order itself was not authorized by law or the Constitution and therefore no defense to the act complained of.

By 1867 when the second session of the 39th Congress met, however, Congress apparently backtracked on its assumption of the sufficiency of its 1866 handiwork, for it passed an act to buttress the defense and evidentiary sections -- sections one and two -- of the 1866 Act.27

Congress's 1867 effort did four things. First, it declared to be legal all orders and proclamations of the President authorizing courts-martial and military commission trials and arrests of persons for acts which aided
the rebellion committed between March 4, 1861 and July 1, 1866. Second, it prohibited civil courts from reviewing the proceedings and decisions of military forums. Third, it declared that no officer could be held to answer for any acts done under the orders and proclamations specified in the first clause of the act. Last, it declared that any acts done in pursuance of such orders and proclamations were to be held primae facie as authorized by the President. 28

The Act represented more than the necessity Congress perceived to shore up a leaky legal defense, for Justice David Davis, who wrote the Court's opinion in the Milligan case, directly challenged Congress's legislative authority in the opinion. Davis stated that not only was Milligan's trial by military commission illegal, but also Congress had no power to authorize military commission trial of civilians in Indiana where the civil courts were always open and uninterrupted. 29

This point of the opinion was the most controversial among members of Congress, and it was the point which members felt most demanded a response. James F. Wilson reacted strongly. He stated that Davis's announcement was "... a piece of judicial impertinence which we are not bound to respect. No such question was before the court in the Milligan case, and that tribunal wandered beyond the record in treating of it." 30 Senate Judiciary
Committee Chairman Lyman Trumbull, on the other hand, took the same position on the Milligan case which many Republicans before the War had taken on the Dred Scott decision. He believed that the decision pertained only to the facts in Milligan's particular case and had no application beyond the decision. 31

Whatever his beliefs Trumbull advocated congressional passage of the act and the court's duty to decide what the Milligan decision was all about and, consequently, pass upon the constitutionality of the act. A determination upon the scope of the Milligan decision affected the constitutionality of the Act because, as Wilson pointed out, 32 "It is true that a majority of the court ... declares that Congress could grant no power to try, in the State of Indiana, a citizen in civil life, in nowise connected with the military service, by a court-martial or military commission, and in so far as this goes the court stands in opposition to this bill." 33

The portion of the Act, itself, which raised the greatest doubts was that which forbade civil courts from reviewing military commission and courts-martial proceedings. Some members feared that this clause denied due process to individuals who had been tried in those forums by preventing civil courts from reviewing the regularity of proceedings in the military courts. Reverdy Johnson raised this issue in the Senate and moved to strike out
that clause as well as the remaining two clauses of the bill. Johnson noted, "It [i.e., the Act] therefore assumes, by prohibiting [civil court review], that there might be cases which the courts would hold were not justified by any orders of the President, because there was not authority to issue such orders, or in cases in which there would be no justification under the orders, because of the manner in which the orders had been carried out." 34

Minnesota Senator Daniel S. Norton shared Johnson's doubts and pressed Trumbull hard to explain this feature of the bill. Trumbull failed to clarify the issue for Norton, for Norton voted in favor of Johnson's deletion amendment and against the passage of the Act. Trumbull failed to convince Norton because he confined his generalizations as to the effect and scope of the Act to only one of two possible proceedings in which the regularity of the commission could be made an issue.

The first type, concerning which Trumbull made his remarks, was a private suit for trespass which he believed the Act regulated. By prohibiting the court from going behind the conviction or otherwise reviewing the decision of the commission the Act allowed the court no discretion in determining the validity of the proceedings upon which would hinge the sufficiency of the defense the defendant-officer put forward. Norton failed to see that Trumbull
had ruled out such a review only in suits for trespass, but he wanted the Illinois Senator to clarify for him whether the clause affected a proceeding -- the second type -- where an individual's liberty was at issue.

"Allow me to ask if this [clause] does not really go further, and go to the extent of preventing a court from reviewing a judgment of a military commission when a person may perhaps be suffering imprisonment under the sentence of a military commission?"

Try as he might Norton could not get Trumbull to distinguish the trespass suit from the other type of proceeding until their exchange had continued for some time. In a last effort to make his point, Norton hypothesized "that a person in prison under sentence of a military commission applies to a court or a judge for a writ of habeas corpus to test the legality of his imprisonment; the question I put to the Senator from Illinois is whether that court under this provision would not at once refuse the writ, giving effect to this provision, because Congress had deprived the court of jurisdiction of a proceeding or an action which should reverse proceedings of that military commission?" This time Trumbull understood what Norton had been asking him. His response made clear why he had been so slow to understand the Minnesota Senator's question. Said Trumbull, "I understand that no court has ever had authority to revise the proceedings
of a court-martial [or military commission] and discharge the person."

Trumbull was qualifiedly correct. Congress had never conferred any such authority on the courts. The Supreme Court before the Civil War had decided that it had jurisdiction to review courts-martial when they violated the rules of proceeding which Congress had established in the Rules and Articles. However, Congress in late January 1867 passed two habeas corpus acts, the second of which denied the writ to individuals who were detained by military authority "... charged with any military offense, or with having aided or abetted rebellion against the Government of the United States prior to the passage of this act." Therefore, Congress had withdrawn the only remedy by which individuals whom the military arrested and tried in its forums could raise the issue that Norton was so anxious to preserve from the prohibitions of the indemnity act. Norton, and presumably, Reverdy Johnson therefore had raised a false issue.

* * * * * * *

The second deficiency in the 1863 Act which Congress attempted to cure in its post-War legislation was in the removals section procedures. Sections three through five specified remedies for the defect in the 1863 Act by requiring state judicial officials to allow the case to be removed and providing the penalty in form of liability
for damages for failure to comply with the Act's requirements. Congress left one aspect of the defect unattended, however, in failing to provide a procedure by which custody of the defendant officer could be transferred from state to national courts. Congress remedied this defect in the first February 5, 1867 Habeas Corpus Act.

The remedies which Cook's bill specified for curing the second deficiency stated in the 1863 Act -- provoked a more spirited attack by the Democrats than they had mustered on the defense sections. The issue was made on April 20th in the Senate on Delaware Democrat Willard Saulsbury's motion to strike out section four of the bill. Section four required state judges to proceed no further in a case when all the requirements for removal had been complied with and held liable for damages the judge or other state officials or parties who continued the case thereafter. Democrats tried to confuse the issue of compulsion with the power of Congress to authorize removals. Hendricks stated that the removals procedures specified in the Act presented squarely to the state judge the question "... whether a case can be transferred to the Federal court. ..." The judge had the right to decide the issue and to refuse to allow the case to be removed if he thought the act authorizing it was unconstitutional. Democrats and their conservative Republican allies pointed up what they believed to be the unprecedented nature of
the provision which they argued penalized state judges for their exercise of judicial functions. "It is a novel thing in the history of the United States," Wisconsin's James R. Doolittle told his colleagues, "to make the judges of a State court, who are acting judicially upon their responsibility as judges, and judging upon the validity of laws, responsible."37

The Democrats had raised a false issue on two counts of which supporters of the bill were quick to dispose. First, the question of the constitutionality of removals legislation had been long settled. Fifty years before the debate had occurred the Supreme Court had decided the validity of such congressional authorizations in favor of the power. Thus there was no "question" of constitutionality of the provision which would arise on presentation of the petition requiring state court judges to act in a "judicial capacity."38 Second, the proposition that judges be held responsible for their judicial acts was not novel or unprecedented. Trumbull, who put forth the argument, cited state statutory provisions requiring judges to issue writs of habeas corpus when they were legally applied for. Doolittle argued that Trumbull's citation was not a valid precedent since judges had no discretion in issuing the writ, the proceeding on which was not a cause within the technical legal meaning, and thus were acting in a ministerial, not a judicial, capacity.
Trumbull quite correctly told Doolittle he was wrong, for he pointed out that judges and courts did act in a judicial capacity because they could hold a hearing to inquire whether if the writ were issued the petitioner would be remanded to jail.39

The Senate refused to endorse Saulsbury's amendment and other opposition efforts to change the bill to remove the coercive features, which became part of the Act the President signed on May 11th.40 Some members of the House began to worry by the end of the session that the legislation so far enacted had not removed from state jurisdiction the most important part of the case -- the defendant. On June 11th John M. Broomall introduced a bill to remedy the defect. The bill, which did not become law until February 1867, specified that in any case which the defendant was authorized to have removed under the 1863 Habeas Corpus Act or its 1866 Amendment and where all requirements for the removal had been complied with and the defendant was still in custody of the state, the clerk of the U.S. circuit court to which the case had been removed was commanded to issue a writ of habeas corpus cum causa.

Six weeks later the House passed the bill and sent it to the Senate which declined to consider it until the second session when the Senate also passed it. There was virtually no debate in either House. What little occurred
suggested that members were concerned less with dealing with situations actually existing in the country than with remedying a procedural deficiency in previous legislation for which Congressmen-lawyers' penchants for legal exactness and comprehensiveness of procedures demanded a supplement.\textsuperscript{41}

The Act was evidence that Congress was aware of the defect and is a testament to their legal acuity. However, the remedy it chose -- habeas corpus \textit{cum causa} -- brings into questions its members legal exactness. Habeas corpus \textit{cum causa} literally translated means "to have the body with the cause". Legal experts likened this writ to a proceeding in which the petitioner asked for the writ of habeas corpus \textit{ad subjiciendum} and a writ of certiorari to bring up the record of the case from the lower court. The main point of such a proceeding was to inquire into the legality of the petitioner's confinement. As part of such an inquiry was the petitioner's wish that the reviewing court investigate the record of the proceedings leading to commitment in the lower court for which purpose the writ of certiorari to bring up the record was issued.\textsuperscript{42}

However, in the 1867 Act the clerk could issue the \textit{cum causa} writ only when all requirements for removing the case had been completed or when the case had already been removed. Thus under the Act habeas corpus \textit{cum causa} was designated to remove the person because the case was
removed rather than the person with the cause which was needed to determine the validity of his confinement.

** * * * * * * *

Congress's post-War efforts to protect national officers for faithful service during the War indicate that it desired to continue to work upon the same principles it had acted upon in 1863. Congress's 1863 Act had been a response to early-War challenges to its authority and a prediction by anticipation of future challenges which the post-War world amply validated. Although the reasons which prompted such challenges had changed during the course of the War from "illegal" arrests to discontent with the draft to the politically motivated desire to harass the government's officers, the challenges took the similar forms of suits and prosecutions. Because such challenges, Congress felt, took legitimate forms, even if they did not have legitimate content, they demanded a response. And because Congress distinguished between the form and the content it proceeded as it did rather than annulling suits outright. This congressional penchant for such distinctions, however, was part of a general tendency it exhibited throughout early-Reconstruction. It would make the same distinction in its legislation of protections for Union men, at first through the Civil Rights and Freedmen's Bureau Amendment acts and later through the Military Reconstruction Act. As events moved from
1866 into 1867 the content rather than the form of the protections Congress provided in the interest of justice for that class would become its overwhelming preoccupation, and its success depended upon its assertion of its power to decide the course and to set the terms for Reconstruction. Attention will now be directed to this aspect of the question.
CHAPTER VII

CONGRESS, THE SUPREME COURT, AND EX PARTE MILLIGAN

In the 1867 Military Reconstruction Act Congress specifically re-authorized the Army to try civilians by military commission.¹ It had by implication authorized such trials in the July 1866 Freedmen's Bureau Act. The 1867 authorization was striking less because Congress had duplicated its 1866 legislation on this matter than because it still believed apparently that citizens' rights could be secured in those forums when the state courts could not or would not safeguard rights. Congress's 1866 authorization had resulted from its assessment of conditions in the South and the President's April peace proclamation in which he withdrew authorization of such trials. Johnson, in his veto of the July bill, took issue with Congress's power to authorize such military jurisdiction. He made his hostility to the exercise of such jurisdiction in his proclamation on Texas in August, his specific refusals to allow the Army to try civilians by commissions, and his disapproval of the proceedings in trials which had already been completed.²

The Supreme Court's 1866 Milligan decision sustained Congress's position. Justice David Davis in his opinion
for the Court did so by excluding from application to the
insurrectionary states the general principles which he laid
down governing his decision while affirming that Congress
possessed the power to authorize military commissions to
try civilians. Chief Justice Salmon Chase in his opinion
presented a lengthy discussion of Congress's power to
legislate on the subject of military commissions and found
permission in the war powers. However, both he and Davis
failed to offer opinion concerning when the insurrection
ended. Thus Congress could follow the high court's
injunction to found commissions upon a legislative base pro-
vided it believed (it did) that the insurrection continued.

The common belief among congressional Republicans
during Reconstruction was that the Constitution prescribed
when a civil war ended. Although hostilities had ceased in
April 1865, the War continued because usual relations
between the nation and states had not been restored through
admission of representatives and senators to Congress.
Only when normal federal relations were restored upon con-
ditions which Congress imposed would the nation be at
peace. Even the President accepted the admission of rep-
resentatives as the standard for restoration of peace. He
declared that Congress should admit representatives since
the states had complied with his conditions for restoration. 3

Congress demonstrated amply during the second session
of the 39th Congress, when the opinions in the Milligan
case were read, how well it understood the decision. Not only did Congress legislate into existence military commissions in the Reconstruction Act, which the entire Court agreed was Congress's duty, but also it passed an indemnity act which declared legal all presidential orders and proclamations issued before July 1866 authorizing such commissions and which prohibited civil judicial forums from reviewing the proceedings and decisions of such commissions (see Chapter 6, supra).

Congressional restoration as opposed to the presidential version did not begin in 1867 with the Military Reconstruction Act. Rather it was part of a process ongoing since early 1866. This process was the transfer of initiative in reconstruction policy-making from President to Congress. Congress's legislation closed the gap in national efforts to keep the peace and provide justice which the President's constricted interpretation of conditions in the South and of his powers created. Military commissions had been the exceptions which proved the rule. By the time of the Milligan decision, they were the only aspect of the reconstruction effort which did not have legislative authorization, and the two opinions, particularly Chase's, ratified Congress's interpretation of its duty and power in reconstructing the South.

* * * * * * *

During the Civil War contemporaries recognized two
types of military jurisdiction. The first was that which Congress conferred by statute on courts-martial which tried offenses that Congress statutorily defined. Offenses not defined by statute, which Francis Lieber termed "the common law of war", composed the second type which military commissions exercised. Military commissions generally followed the rules of proceeding for courts-martial.

The jurisdiction for courts-martial was prescribed in the Rules and Articles of War for the government of the Army and in miscellaneous statutes. Congress never recognized by statute the existence of military commissions until 1867; however, custom was well established by the Civil War, and commissions were accepted as a necessary part of the wartime system of military justice. As Judge Advocate General Joseph Holt reported on September 8, 1862, "These 'commissions' would seem to have existed too long in the service, and to be too essential to its wants and emergencies, to be now ignored. Long and uninterrupted usage has made them as it were part and parcel of the common military law."  

Although Congress set forth the Rules and Articles to regulate the Army, certain classes of civilians who provided services for or travelled with it were subject to courts-martial. Trials by military commissions were reserved for citizens and military personnel who committed
an offense not specified in the Rules and Articles or other statutes which threatened the order and discipline of the Army or which was inconsistent with military necessity during wartime. Civilians in no way connected with the Army who committed offenses which threatened the military war effort were also tried by military commission.

During the Civil War there were two theories which contemporaries used to justify trials of civilians by such commissions. The first theory most clearly departed from tradition and ironically was asserted in order to justify trials in the North. It claimed that often in times of war offenses which in peaceful times were civil offenses became military ones which were triable by military tribunals, even when and where the civil tribunals were open. "Many offences," Holt explained to the President in 1865, "defined in penal statutes enacted by the Federal Legislatures are [an]nounced as such, and penalties are affixed under the theory that they are committed in time of peace, but it does not follow that they are to be similarly treated when perpetrated in time of War. . . ." Such offenses, when committed by a public enemy, whose motive and legal status were entirely different from individuals who committed them in peaceful times, became "... violations of the laws of War, or crimes cognizable by military tribunals." This "military necessity" theory
claimed no authority to usurp absolutely civil authority but could be implemented only when the military organization or the war effort were threatened. "This principle," Holt informed the Judge Advocate of the Indianapolis conspiracy trials in December 1864, "has been followed by the government in a great number of cases; and offences aimed at impairing the efficiency of the service, or the efforts of the government to suppress the rebellion, and committed in localities within our military lines, and in the theatre of military operations . . . have been repeatedly brought to trial by military commissions during the present war."6

The second theory was based on a different necessity, occurring when the civil courts were either closed or without jurisdiction to try a particular offense. When the courts were open and possessed jurisdiction to try offenses (and presumably when no military necessity was evident), military commanders were instructed to turn individuals accused of such offenses over to the civil authorities. However, Holt advised Secretary of War Stanton in March 1864, unless it was clearly demonstrable that "... the ordinary State Courts are regularly open and fully adequate to pass properly upon these offenses . . ." such individuals should be tried by military commission. The Department Commander was to be the judge of whether the courts were fully open and adequate to
conduct the trials. 7

This theory apparently was implemented in the border states during the War and in the South prior to the President's April 2, 1866 proclamation of peace. In both areas the disorganization of civil affairs was so great that the courts were closed or were so threatened by civil commotion that it was at best uncertain that justice could be administered through regular judicial forums.

In the South the necessity to try individuals by military commission was evident because the courts were closed. As Major General Joseph Osterhaus described the situation in Mississippi in September 1865 in reporting a case in which a white man murdered a black, "It was not practicable to turn the case over to a civil tribunal for trial, as no civil tribunals competent to try the case were at the time organized, or even in process of organization, in the State... In the County of Warren (Vicksburg) only a Judge had been provisionally appointed by Hon. W. L. Sharkey, provisional Governor..." Holt, who endorsed the General's remarks and approved the trial of the white man by military commission in a letter to President Johnson, pointed out why such trials were necessary: "A stern enforcement of the death-sentence in this and similar cases, is believed to be by far the most effective means in the possession of the Government for extending to the recently emancipated black race protection
against cruelty, oppression, and outrage at the hands of their late masters."

Although courts in the South were organized late in 1865, military commissions continued to try civilians for offenses against the local laws. Justification for such trials increasingly came to rest on the theme of protection of blacks and of the necessity to provide them with justice. Evidence that justice was not served was found in form of black codes and of the failure of southern states to amend their constitutions' judicial provisions to put blacks on an equal footing with whites before state courts, particularly in regard to allowance of Negro testimony.

Freedmen's Bureau Commissioner O. O. Howard issued Circular Number 5 on May 30, 1865 which instructed the Assistant Commissioners to adjudicate "all difficulties arising between negroes themselves, or between negroes and whites or Indians, ..." However, this authority was confined to minor difficulties, and blacks were left without protection when they were accused of more serious offenses. Holt advised Stanton that conditions in Tennessee with "... its present attitude of antagonism to the expressed will of the government, in its refusal to extend to the freedman his clear and undeniable right ... entitled [the Negro] to the protection of the military force of the government, -- a protection which
can be effectually extended only by allowing him a hearing before a military court in which the truth will be alike respected, whether spoken by a white or colored witness.⁸

In his suggestion that blacks should be tried by a military court in the interest of justice, Holt was in advance of Congress, the President, and many of his Army colleagues. On April 2, 1866 Johnson issued his proclama-
tion of peace, which declared an end to the insurrection in all of the defeated southern states except Texas. One provision declaring standing armies, military occupation, martial law, military tribunals, and habeas corpus writ suspensions "... dangerous to public liberty, incompati-
ble with the individual rights of the citizen, con-
trary to the genius and spirit of our free institutions, and exhaustive of the national resources, and ought not, therefore, to be sanctioned or allowed except in cases of actual necessity for repelling invasion or suppressing insurrection or rebellion ..." immediately caused confu-
sion and uncertainty within the Army in the South. Army officials in several southern departments requested instructions and pending such advice curtailed or sus-
pended their arrest and other administrative or judicial activities regarding civilians.⁹

In one sense the resulting confusion over this portion of the proclamation is mystifying. Having
stated in a proclamation which declares an end to insurrection, that military tribunals, etc. were incompatible with security to the rights and liberties of citizens during peacetime and thus should be allowed only "... in cases of actual necessity for ... suppressing insurrection ..." it would seem logical that Johnson had restored the writ, abrogated martial law, and forbade military trials of citizens. The resulting confusion, however, suggests that the problem was less one of logic than of understanding.

Congress, during the War, had left the exercise of martial law and employments of military commissions to the President's discretion in exercise of his war powers. It had provided some regulation in the 1863 Habeas Corpus Act of the President's discretion in suspending the writ of habeas corpus. With the end of the War, however, Congress increasingly relied on the Army and the national courts as the chief instruments to accomplish reconstruction goals. Provisions of the Civil Rights and Freedmen's Bureau Acts offer samples of this congressional reliance. Using the Army as an administrative or enforcement arm of Congress's will meant that Congress increasingly legislated the terms and conditions under which military authority could, would, or should be exercised. Such legislation greatly reduced the amount of discretion the President had previously commanded in exercise of
his commander-in-chief powers, but since the President in his April 2 proclamation had constricted his war power authority, Congress's legislation in effect increased his executive authority.

The only substantial area of military conduct Congress had not authorized by the spring of 1866 was trial of civilians by military commission. Such an oversight was a glaring mistake at a time when contemporaries were defining constitutional conduct vis-à-vis the South in terms of what Congress in its legislation declared that conduct should be and when the President seemed bent on restricting the Army's role in southern affairs at precisely the points events indicated its participation was most needed. Congress in the July 1866 Freedmen's Bureau Amendment partially remedied its error by authorizing the Army to extend military jurisdiction and protection to individuals who were deprived of their rights or to persons who violated the rights of others. However, Congress still continued the President's discretion to implement such military jurisdiction. Congress remedied this error in 1867. This change from presidential to congressional authority over military activities in the southern states underscored the change which was occurring in martial law concepts which resolves the apparent inconsistency of the President's April 2 peace proclamation with continued military activity thereafter.
The writ suspension clause of the Constitution and martial law provided during the War the authority for military oversight of civil affairs. In some quarters legal experts believed that martial law under the Constitution derived from the suspension clause since, they argued, suspension of the writ of habeas corpus suspended civil process, and martial law was the suspension of and substitution of the laws of war as laid down by the military commander for civil law. Most legal experts rejected the link between the suspension clause authorization for martial law because they recognized that suspension of the writ did not suspend civil process and, therefore, establish martial law. Suspension and martial law were two separate powers having separate authorizations under the Constitution [see Chapter 1].

Of the two, martial law was the more difficult to certify as having the Constitution’s authorization. However, during the War the traditional definition of martial law as the will of the military commander -- a definition which placed it outside of the Constitution’s mandate, contemporaries felt -- was modified and brought within the Constitution. The starting point for the argument which developed during Reconstruction was a redefinition of the term martial law which infused it with its literal meaning -- i.e., the "law of war". William Whiting in 1863 defined martial law in this way: “Martial Law
consists of a system of rules and principles regulating or modifying the rights, liabilities, and duties, the social, municipal, and international relations in time of war, of all persons, whether neutral or belligerent. 10

Such rules and principles divided into two types. The first type lay under the heading of military law which governed the organization and conduct of individuals in the military service. Under the Constitution, Congress possessed the power to provide such rules and regulations. Thus Congress through its legislation enacted one aspect of martial law.

The second type of rules and principles which constituted martial law governed civilians and was established by the President who as commander-in-chief was responsible for the prosecution of the War. The President's regulation of these rules and principles depended upon two considerations -- military necessity and practical necessity. Francis Lieber defined military necessity in General Orders 100 as "... the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war." Military necessity did not sanction unlimited force but only so much as necessary to accomplish the goal for which the war was being fought. Unnecessary force was unlawful and not protected under the law of war. 11
The second type of consideration, practical necessity, resulted from the destructive effects of war upon civil institutions. As Whiting explained, "Since war destroys or suspends municipal laws in the country where hostilities are carried on, no government is left there but such as is derived from the laws of war [i.e., martial law]. All crimes must be restrained or punished by belligerent law, or go unwhipped of justice. Hence, every case of wrong must be dealt with by force of arms, or must be disposed of by tribunals acting under sanction and authority of military power."\textsuperscript{12}

Note here the additional sense in which Whiting used the term. Martial law was not only a system of rules and regulations for government during wartime, but also a government provided and administered by military authority as distinguished from civil authority as the necessity of condition required. Martial law not only denoted the system of laws which existed during wartime but also distinguished the forum which administered them.

By Appomattox, martial law signified the forum rather than the system of laws. The Army, rather than civil authorities, administered civil laws as the necessity to maintain law and order required. Practical necessity, therefore, most clearly described the situation in the South after Appomattox. While state governments were being reorganized the Army was the chief peace-keeper and
dispenser of justice. It arrested and tried civilians by military commissions for breaches of local laws.

The Army derived its legal authority for its actions in the South from the technical existence of insurrection which the formal ending of hostilities at Appomattox did not thereby abolish. Since martial law derived its justification from the existence of a state of war, the Army's functions in the South after Appomattox were placed under the rubrics of martial law or the President's war power. Therefore, when the President declared peace in his April 2 proclamation presumably a state of war no longer existed and martial law was thereby ended. But three days after the Proclamation was issued the Acting Adjutant General, E. D. Townsend on behalf of Secretary of War Stanton wired the Georgia department commander in response to a request for clarification of the Proclamation, informing him that "... the President's Proclamation does not remove martial law...".\(^{13}\)

Given the legal relationship between martial law and the existence of insurrection (a technical state of war), Stanton's instruction expressed an incorrect statement of the law unless it can be demonstrated that war technically existed despite the President's proclamation or that he used the term in an entirely different sense which implied a change in the legal authority from which martial law derived. In fact, Stanton did use the term
in an untraditional legal sense yet in a sense which was derived from traditional understandings of its function. In addition, although the President declared peace in the Proclamation, it was an open question as to what was the legal effect of his proclamation. As Congress increasingly came to rest the authority for its Reconstruction program on its war powers, it insisted on its power to declare when peace existed and therefore, when the insurrection had ended.

Clues can be found in the Circular itself which indicate Stanton's position and earlier thinking on martial law helps provide the transition. Previous developments in martial law concept referred to the "practical necessity" aspect on which a decision to invoke martial law rested. To invoke martial law as the only alternative to no law admitted or implied that a basis other than military necessity existed for its institution. That basis can be characterized as the necessity to maintain law and order. The maintenance of law and order suggested a readily available and identifiable body of laws must be at hand by which men could judge whether law and order had in fact been established and was being maintained. Since local laws fit the requirements, law and order was maintained according to the standards of local laws. The adoption of local laws as the basis for the administration of law and order meant that the Army played no
law-making role but that its role was confined to being strictly an administrative or enforcement agency. Thus martial law was the enforcement of civil laws when civil authorities did not exist or would not enforce them.

But, can martial law be invoked when civil authorities do exist, but cannot or will not enforce the law? As long as a state of war existed the answer was yes, since the Army could invoke military necessity under the President’s war power to justify its role in enforcing the law and since a state of war authorized martial law. Once peace was declared, however, the legal basis for the existence of martial law changed. The shift emphasized the transition from alleged military wartime requirements for its imposition to the purely administrative and enforcement nature of martial law arising from practical necessity. First, the authority for but not the direction of military administration of the civil affairs in the South shifted from the President to Congress. Military necessity as the justification for martial law was untenable in presidentially-declared peaceful times, but the continuance of the Army’s administration of local affairs according to congressionally-defined policy in the interest of law and order was perfectly feasible under Congress’s war power if Congress continued, despite the President’s proclamation, to recognize the existence of insurrection.

Chief Justice of the United States Salmon P. Chase
had reached this conclusion implicitly by May 1866 and specifically in the Milligan decision. Early in Johnson's presidency Chase played an active political role in advising the President on reconstruction matters, urging Johnson to allow blacks to take an active part as voters in the restoration process. As Johnson in subsequent months demonstrated that he did not accept the Chief Justice's counsel, Chase's support lessened, and he began to support congressional plans for reorganization (see below, pp. 218-220). Chase did not completely abandon the President, however, for the dignity of the national judiciary in the South depended upon the President's discretion in restoring the writ and abrogating martial law at least as far as it applied to the national courts.

Chase's concern for the judiciary's dignity exhibited itself in October 1865 when Johnson queried the Chief Justice when he would hold circuit courts in the South. Chase replied that he or his colleagues would not sit on those courts at the next term because they were scheduled to convene only one week before the regular session of the Supreme Court, and therefore no business could be transacted. In any event, Chase declared he would not hold court until the writ was restored and martial law abrogated. Martial law and the writ's suspension, Chase felt, meant that the judiciary was subject to military authority, an improper situation for the judges of the
highest court in the land. 16

When the President issued his April 2nd peace proclamation the Chief Justice supposed that he had received his wish. However, the "clarifying" orders from the War Department in the next few weeks cast doubt on the proposition, and once again Chase began to urge the President to issue another proclamation specifically pertaining to those two matters. Chase's urgings did not commit him completely to the presidential view of reconstruction, for he did not believe that complete restoration was necessary before martial law was abolished or the writ restored. "When I hold a Court the Military must be in proper relations to the judicial authority," Chase told Gerrit Smith in May 1866, "aids, if needed to the execution of its process, but not powers, authorities to direct the discharge of its [duties]." Complete restoration was not necessary for the civil jurisdiction to act, unmolested from military control. "Such complete restoration will be accomplished only when the states are again represented in Congress & are in the actual possession of their duties as members of the Union." Chase believed the President could issue another proclamation regarding habeas corpus and martial law ". . . in all cases where the National Courts have jurisdiction & as to all the proceedings & processes of those courts." 17

Chase thought this mode of proceeding on the subject
"The shortest, easiest & in my poor judgment, the wisest way to the proper trial of important causes by the National Courts in the rebel States. . . ." However, there were other alternatives open to the government. Circuit courts were composed of two judges -- the district judge and one of the justices of the Supreme Court. The circuit court could still be held despite the absence of the justice. However, such a court with martial law in force and the writ suspended would be a "quasi Military Court", Chase told Horace Greeley in June, "... but no question can be made of the regularity of the trial."

Another alternative existed. The states could accede to terms of restoration which Congress established. Therefore, "... order & peace may be so clearly re[-]established as to justify the Courts in declaring the Habeas Corpus restored & the Martial Law abrogated, and all proceedings under the martial law effecting civilians are unwarranted & null. In such circumstances also it would be my duty to hold the Courts & enforce the supremacy of [national] Civil [over] military authority, & I should do it."18

By June 1867 Chase was holding court and enforcing the supremacy of national civil authority. Such action indicated he believed martial law had been abrogated and the writ restored at least in so far as they affected the national courts. As Chase told the Richmond bar that
month when he opened court, he believed these two requirements for his holding court had been complied with. The April and August peace proclamations had meant restoration and abrogation, and he would have held court sooner but for Congress's failure to provide legislation authorizing allocation of the circuits. However, the most significant portion of his remarks dealt with civil-military relations in the South since the August proclamation. The full implications of the transformation of Chase's thinking were evident on the subject of the legal authority for and essential difference in meaning of martial law. After noting the impropriety of justices holding court in areas under military control, Chase stated that such conditions no longer existed. He conceded that military force was still exercised in the South, "... but not now, as formerly, in consequence of the disappearance of local authority, and in supervision or control of all tribunals, whether State or national." Military supervision had been limited in two ways. First, and most important, "It is now used under acts of Congress, and only to prevent illegal violence to personal property, and to facilitate the restoration of every State to equal rights and benefits in the Union." [my emphasis]. What Chase had only implied the year before he now stated specifically. Second, Chase pointed out that this congressionally authorized military authority did not extend over the
national courts. Thus Congress had not only granted the authority but also had declared the conditions and extent of the martial law the President could declare.\textsuperscript{19}

Chase did not equate abolition of martial law and restoration with complete restoration. Restoration would occur only when Congress decided and declared it. Furthermore, implicit in Chase's thinking was the assumption that martial law, and presumably, habeas corpus were subjects which Congress defined as being within its power to regulate the President's discretion in exercise of his power as commander-in-chief. Congress usurped no power of the President. He could still impose martial law and suspend the writ, but Congress claimed the right to narrow his discretion in such presidential exercises of power by imposing the terms and conditions under which such powers would be exercised.

In prescribing the terms and conditions Congress had changed the meaning of the term martial law from unbridled exercise of military discretion in control of local civil affairs, to military supervision of certain intrastate civil affairs in order to assure that such affairs would be conducted the "right way." Chase looked two ways at this latter role, both emphasizing the military's administrative or enforcement rather than policy-making role. The first saw the military as only an adjunct of state civil authority, enforcing state laws when civil authorities
could not or would not do so. The second way placed the Army in a federal context by making it an adjunct of the national judicial authority within the states, enforcing its process when ordinary modes of enforcement were insufficient.

Congress included elements of both aspects in its reconstruction policy. Elements of the second aspect were evident, for example, in sections four, eight, and nine of the Civil Rights Act which enjoined the Army to aid marshals and district attorneys in the apprehension of individuals who violated the Act. The first aspect can be found in the Reconstruction Act which permitted military commanders to try civilians when the state authorities evidenced they would not give justice to all of its citizens.

Army policy in the South had congressional authorization per the Chase formula by the time Congress adjourned in July 1866. However, no limitation regarding military interference with national courts was specified. The President through Stanton had clarified in general order No. 26 dated May 1st the proclamation's statement on military commission trials, declaring that all military trials of civilians were forbidden except those which Congress by statute had authorized courts-martial to try. Little if any evidence exists to suggest that Congress
viewed the proclamation or the general order as threatening its hopes for Reconstruction. In fact, the general order recognized congressional authority since the President only forbade trials which Congress had not authorized by statute.  

Like the general order, Stanton's April 9th circular recognized congressional authority in his instruction that the Civil Rights and Freedmen's Bureau Acts conferred ample authority for continued military oversight of affairs in the South despite the apparent limitations the proclamation and general order imposed. Such apparent affinity for congressional definitions of the military's role in the South was less hostility to Johnson's recent declarations, as some scholarship has suggested, than the result of a lack of alternatives on which to base a continued, active military role in the southern states. It is, at least, arguable whether Stanton's April 9th interpretation undercut the President. However, it should be noted that the Proclamation did not subvert already established policy in the South regarding civil-military relations, save for trials of civilians in military courts. And such trials might have been the point over which Johnson was most disturbed, for it was the most glaring and direct affront to his program for restoration of civil rule. Congress's position in this regard might not have been too different since its theretofore
expressed policy had been to give state civil authorities first crack at properly administering the law with the Freedmen's Bureau (under the 1865 law) and U.S. courts held in reserve if the states failed to do their respective duties.24 But Congress clearly worried the practical necessity of maintaining law and order in the South. The jurisdiction which the February Freedmen's Bureau bill would have conferred, had it survived the veto, on the Army and the Bureau judicial forums was the clearest indication of its concern. Congress acquiesced between April and July in the President's judgment that such jurisdiction was unnecessary. However, section 14 of the July Freedmen's Bureau bill reestablished military jurisdiction, but the President's August proclamation limited implementation of jurisdiction in much the same way that his April proclamation had constricted his war power authorization of such jurisdiction.

Despite the administration's attempts to clarify the April proclamation, military commanders had remained hesitant and confused in their oversight of civil affairs in the former rebel states.25 This disorientation became even more apparent with the announcement of the Milligan decision on April 3, 1866. The Proclamation of April 2nd presumably forbade trials by military commission after the Proclamation was issued. However, the Milligan decision which was announced the following day appeared
to cast doubt on the legality of military commissions to try civilians before the proclamation was issued. This development added to the confusion of military commanders in the South since they believed that such trials held or in process of being held when the Proclamation was issued were not affected by the Proclamation.\textsuperscript{26} Despite the confusion in the South, Congress was little disturbed by the decision. It had just passed the Civil Rights bill and was about to re-pass it over the President's veto. At this stage Congress was confident that it had legislated the appropriate means of protecting blacks by checking state judicial systems through the national courts.

The Milligan decision\textsuperscript{27} blazed no new intellectual trails in American thinking about civil-military relations and the civil liberties of citizens. It was consistent with explanations of the President's April 2nd Proclamation in form of the general orders which Stanton, Canby, and others issued in April and May 1866 and with the June "Report" of the Joint Committee of Fifteen on Reconstruction.

The decision resulted from a petition for a writ of habeas corpus from Lambdin P. Milligan to the circuit court of Indiana in January 1865. The circuit court could come to no decision on the questions which Milligan's petition raised, and it, therefore, certified the questions to the Supreme Court. The circuit court asked the Supreme Court to decide three questions. First, on
the basis of the facts given in the petition, should the writ of habeas corpus be issued? Second, should Milligan be discharged from military custody? Third, did the military commission which tried Milligan have legal jurisdiction to try and sentence Milligan?²⁸

Preliminary to deciding any of the questions certified to it, the Court had to determine whether it possessed jurisdiction to hear the case, which it decided affirmatively (see p. 353, infra). The Court decided on the first two questions presented to it that Milligan was entitled to have the writ issued on his behalf and that upon the writ's issuance he should be discharged. Justice David Davis, who wrote the opinion for the majority, stated that decision on the third question -- the legality of the military commission in trying Milligan -- controlled its decision of the first two points.

The third question, being the most important, received Davis's greatest attention. The Court decided that the military commission had exceeded its jurisdiction in trying Milligan. The majority and minority, led by Chief Justice Chase, agreed on this point; however, they differed over the reason for the commission's illegality. This difference provided the chief reason for separate concurring opinions by members of the Court.²⁹

At first reading, Davis's opinion seemed to threaten
congressional Reconstruction efforts in the South. If recourse to military tribunals to enforce the civil law when civil courts would not provide justice was prohibited, then the national government was powerless, short of a resumption of hostilities, to check hostile treatment of negroes and loyal Unionists in the South. After a more careful reading of the opinion, however, a conclusion is warranted that Davis excluded the southern states from application of the general principles which he laid down governing the decision. A reader who failed to perceive Davis's intention as many contemporaries did, might reasonably conclude that his remarks included the southern states when in fact Davis considered them a separate question.

There are two reasons for confusion over the scope of Davis's opinion. First, Davis relied heavily on the assumption that there was no such thing as one law for peace and another law for war. "The 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." However, other than to exempt certain situations from the applicability of his principles, Davis failed to make clear how the fact that the courts were closed in a particular locality during wartime affected the absolute guarantees of the Constitution.
Therefore, at bottom, Davis's opinion rested on a contradiction. While he put forward the Constitution as absolute in time of war as well as of peace he implicitly recognized a distinction by excluding from his mantle of general principles situations which arise in certain types of warfare like civil war.

Second, despite the contradiction implicit in the decision the fact remains that Davis did exclude the "insurrectionary states" from the applicability of the general principles he laid down. Yet he failed to discuss general principles which he believed should govern government policy in those states. Admittedly, such a discussion would have been pure dictum; however, because he made an exception to the general principles upon which the Court founded its decision such a discussion was in order in the interest of clarity.

What little Davis did say about the exclusion still seemed to threaten congressional reconstruction. He recognized that there were occasions when martial law could properly be declared. It "cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration. . . . As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated,
it is a gross usurpation of power. Martial rule can
never exist where the courts are open, and in the proper
and unobstructed exercise of their jurisdiction. It is
also confined to the locality of actual war." Since
when the decision was rendered most of the courts in the
southern states were open a conclusion might be warranted
that martial law could no longer be in existence. How-
ever, according to the requirements of the decision, the
courts must not only be open but unobstructed in their
jurisdiction, which was not a fact but a matter of inter-
pretation and which provided Congress with the opening to
act.32

By contrast, the separate concurring opinion which
Chief Justice Chase penned to express disagreement with
Davis's argument that Congress could not have authorized
trial of citizens by military commission in Indiana was
most instructive on the power of Congress to provide for
such trials. Chase argued that when a state of war
existed and some portions of them were invaded or were
threatened with invasion Congress possessed the power to
authorize trials of civilians by military commissions.
Such commissions were authorized for two purposes which
Chase classified as "... for the trial of crimes and
offences against the discipline or security of the army
or against the public safety."

Chase found the power to authorize trials under
Congress's powers to raise and support armies and navies
and to provide rules and regulations for their governance. Providing such rules, Chase pointed out, "... includes protection and defence as well as the regulation of internal administration." Thus persons not in the service who might obstruct the draft could be subject to trial by military commission if Congress so provided.\footnote{33}

Congress's power to make and to conduct war provided the authority also for trials. Congress's war power "extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns."\footnote{34}

While Chase positively affirmed that Congress had the power to authorize military commission trials of civilians, he tied such authorizations firmly to war powers and to the existence of a state of war. Such a tandem between Congress's war powers and military commissions seemingly threatened congressional reconstruction, as Davis's opinion for different reasons also had.

The perplexing aspects of the Milligan opinions, which left unresolved the Court's attitude toward congressional reconstruction, was the Court's failure or unwillingness to discuss the issue of when the insurrection ended. Because Davis excluded from conformity to his general principles the southern states, this question seems less important. But in the sketchy remarks he made
on the subject he equated the existence of insurrection with the overthrow of civil government and closed courts which justified imposition of martial law. Yet, two months later he wrote to a friend that "The power [to try civilians by military tribunals] is conceded in insurrectionary states, . . ." If the power were conceded in the insurrectionary states where the courts were open when Davis wrote his opinion, then Davis either did not intend to equate the end of insurrection with the reopening of the courts or did not believe when he wrote his friend that the courts though open were in "unobstructed exercise of their jurisdiction."

Because Chase gave more attention to the question congressional authorization of military commissions his opinion requires closer scrutiny. However, because he gave no attention whatever to the question of when insurrection ended, one must look elsewhere for clues to his thinking as well as measure the effects of his opinion on Congress.

The matter of when the insurrection legally ended and whether and by what mode the President or Congress declared that fact, had large implications for constitutionalism and for the direction and content of the Reconstruction after Appomattox. While the War raged this issue had no impact on men's considerations of the proper conditions under which the conquered portions of the southern states should be reconstructed. Their views
as to whether the President or Congress lawfully possessed the power to impose conditions for restoration depended upon their political views and consequently upon which branch most closely represented their views. In 1862 Chase, in harmony with the leading radicals in Congress, supported establishment of civil provisional governments organized under Congress's authority to military provisional governments organized under presidential authority.36

However, by 1865 with the end of the War and Lincoln's assassination, Chase's views had changed. Believing as did most congressional radicals shortly after the assassination, that at last they had a president who concurred in their views,37 Chase urged the President to include Negroes as part of the electorate which would reorganize the southern states preliminary to their restoration.

He also suggested that "...the rebels are disarmed only, not reconciled, hardly acquiescent, and there are no State Governments to prevent outbreaks. Military supervision for the present, therefore, is indispensable." But the ideal form of supervision should "...be exercised in a mode as nearly analogous to that of State Government as possible." Chase recommended that each state be made a Military Department whose commander would be a military governor, "...in name as well as in fact: with a distinct declaration that the arrangement is
temporary and only auxiliary to reorganization."

Once these military governors were installed, Chase believed, reorganization would be "easy", for they could then order that boards of enrollment be established composed of provost-marshal or preferably loyal citizens who would register loyal white or black citizens under procedures which the boards prescribed. These enrolled citizens "should then be invited to vote for delegates to form a new Constitution or [to] amend the old; and the new amended constitution should be submitted to them for ratification or rejection." In the event of ratification the election and/or appointment of state officials under the new constitution could be held the completion of which would constitute reorganization. Upon reorganization "... all the political functions of the Military Commander would cease and his duties would be confined to the repression of disorder in aid of the State Authorities; and the whole machinery of the National and State Governments would be once more fully restored and in practical operation."38

Chase's suggestions indicate that he believed satisfactory reconstruction could be accomplished under presidential authority without congressional intervention. They were based upon the assumption that Andrew Johnson fully concurred in his views and thus would put reorganization upon a "proper" basis using powers which the
Constitution fully authorized him to exercise. However, over the next few months as Johnson indicated through his proclamations that he intended to follow a different course, Chase, though not abandoning Johnson, began to show signs of supporting reorganization based on congressional authority.39

As reorganization under presidential authority continued throughout the summer and fall of 1865 the matter of holding district and circuit courts in the southern states assumed practical importance for the enforcement of national law. This question forced Chase to define and refine his concepts of constitutional premises on which reconstruction was based in order to harmonize them with his views of his judicial responsibilities and desire to uphold judicial dignity. The result by May 1866 was that the Chief Justice found a convenient half-way house between the President and Congress which endorsed presidential power in so far as the President could abrogate martial law and restore the writ of habeas corpus yet which defined the end of insurrection as being when Congress readmitted southern representatives and senators to its membership (see pp. 202-08, supra). His definition of when the insurrection ended coincided fully with that of the congressional Republicans as expressed in the "Report of the Joint Committee on Reconstruction" which was issued in June.
The "Report" was not as explicit as Chase in making the equation between the end of insurrection and admittance of representatives. Maine Senator William Pitt Fessenden, who authored the report, apparently preferred to settle Congress's power to declare the terms of reconstruction on its power to admit representatives and to guarantee republican forms of government to each of the states. The former power was Congress's way of defining when reliance on the latter power would cease. However, although the guarantee clause authorized Congress to reconstruct the states, it did not specify the character of the powers which Congress could employ to the end of guaranteeing republican forms of government. As long as Congress limited itself to enacting civil rights acts under auspices of the 13th Amendment and proposing constitutional amendments under procedures clearly specified in the Constitution, this question of the character of the powers exercised in pursuance of guaranteeing the states republican forms of government was of little importance. However, when Congress passed freedmen's bureau bills and military reconstruction acts this question assumed grave importance. Congress passed the freedmen's bureau bill in July under authority of its war power which assumed that it believed the insurrection continued. It passed the Military Reconstruction Act in March 1867 on the authority of the guarantee clause, but the
character of the powers it conferred on military commanders had been classified by the Milligan decision as war powers. Thus it seems that although Congress relied on the guarantee clause for its authority, the mode of carrying out its authority was ground in its war powers.

The "Report" of the Joint Committee makes it clear that Congress defined its authority in this fashion. It argued that the southern states prosecuted a war against the United States which did not cease until they were defeated and occupied by the Union Army. The people were "reduced to the condition of enemies conquered in war, entitled only by public law to such rights, privileges, and conditions as might be vouchsafed by the conqueror." Their status as public enemies would cease when their states were admitted to representation in Congress, an occurrence which depended upon their states proving "... that they have established, with the consent of the people, republican forms of government in harmony with the Constitution and laws of the United States, that all hostile purposes have ceased, and [giving] adequate guarantees against future treason and rebellion -- guarantees which shall prove satisfactory to the government against which they rebelled, and by whose arms they were subdued."  

Connecticut Representative Augustus Brandegee put the issue squarely before the House on February 7, 1867. He
observed that "The restoration of peace . . . begins at
the point where Grant left off the work, at Appomattox
Court-House, and it holds those revolted communities in
the grasp of war until the rebellion shall have laid down
its spirit, as two years ago it formally laid down its
arms." Congress's power to restore peace was clear. On
the same day that Brandegee spoke John A. Bingham expressed
a similar opinion and stated the theory under which Con-
gress was authorized to restore the states. When the
southern states rebelled, Bingham argued, "... the
unlimited power for the common defense throughout their
limits was exercisable by Congress by virtue of the very
terms and intendment of the Constitution, and this power
may be exercised by Congress until the time when those
people return to their loyalty and fealty in such a
manner as shall satisfy the people of the United States,
duly organized and represented in Congress, of their fitness
to be restored to their full constitutional relations."41

If Congress believed, therefore, that the insurrec-
tion legally continued until the southern states were
readmitted to representation in Congress then the Milligan
decision assumed little practical importance for it in
determining its reconstruction policy. Rather the
decision had looked backward in time, before Congress had
granted permission in July 1866 for such trials, to show
Congress that its error had been one of omission rather
commission. By omitting to legislate into existence military commission trials of civilians, Congress left national officers vulnerable to allegations of overstepping their authority and thus to suits for trespass to which the officers could not assert as a defense, that he acted under an order of the President. 42

Yet the requirement that military commissions could derive their existence, hence their validity, from congressional legislation was only one aspect of the general movement away from presidential discretion in the conduct of war towards a legislative prescription of conditions under which the power could be exercised. The President's actions throughout 1866 had aided and abetted this movement. Such a movement meant a sharpening distinction between Congress which makes of the laws and the President who executes those laws. This movement did not begin with the Military Reconstruction Act but rather had begun in 1866 in passage of Freedmen's Bureau and Civil Rights Acts. Therefore "Congressional Reconstruction" began in 1866, not in 1867. The Milligan decision was not a roadblock in Congress's pursuit of its goals but was, rather, a leading, if coy, testament to the directions Congress's purpose was taking the Constitution.
CHAPTER VIII
SETTING THE STAGE

Wartime suspensions of the writ of habeas corpus demonstrated not how little the government respected the writ of habeas corpus but how much it venerated it as the writ of liberty. Suspension was the index of contemporaries' estimations of the writ's effectiveness in securing the liberty of citizens whether disloyal or loyal. Wartime discussions of the writ question had centered almost exclusively on the writ as a personal right. Contemporaries gave hardly any attention to the ways which the writ served as an instrument of the courts to assert their respective jurisdictions on behalf of petitioners. Yet in 1867 Congress passed an act which extended the national courts' habeas jurisdiction to any case in which any individual's liberty was at issue because of national or state ordered detentions or criminal convictions.¹

Congressional silence on a measure which seemingly had such revolutionary implications for the federal system suggested, first, that Congress understood how the writ would operate between the two jurisdictions of the
federal system. In fact, as the introduction discussed, pre-Civil War writ developments included national judges' habeas review of state ordered confinements of national officers for acts performed in the course of doing their duty under section 7 of the 1833 Force Act. The extension of the remedy in 1867 from national officers to all persons deprived of their liberty did not change the way the writ operated. But potentially it vitally affected national-state configurations for the administration of criminal justice. Second, lack of congressional discussion of the 1867 Act suggested that Congress understood why the Act was necessary. Congress had passed the Act to change those configurations, not in spite of the unwanted changes that might result.

These configurations had undergone revision the year before as a result of the Civil Rights Act. That Act allowed a defendant to have his case removed for trial from the state to the national court before conviction or for retrial after conviction in the state court. The object of the removal had been to provide the defendant with a forum in which he could receive a fair trial. However, during the months after the Act's passage, implementation proved ineffectual. National courts could not take jurisdiction because they could not find error in the state court proceedings which would have provided grounds for the defendant to have his case removed from the state
to the national courts. In addition, juries were little inclined to give proper weight to the evidence before them and, consequently, shaped their verdicts to favor white parties or to penalize blacks.

Congress, in its debates on the 14th Amendment, the Civil Rights and Freedmen's Bureau Acts, demonstrated its awareness of the problem of obtaining justice at the local levels. Through its legislation, Congress implied that local forums were the proper arenas for the administration of justice. It acted on the assumption that a national statement of standards for justice which these local forums were to follow, would secure justice. By 1867 Congress was disabused of that notion. It saw that justice was a separate proposition from establishment of the framework in which that justice would be achieved. Justice depended not only upon having the right laws. It also depended upon the willingness of the people to grant it. By examining the assumptions about the federal system, the operation of the political system at the national and local levels, and the individual's place in each of these systems on which Congress based its reconstruction legislation, an understanding can be reached of Congress's growing distinction between the legal framework and justice. Thus the reasons why Congress passed the 1867 Habeas Corpus Act and the result it thereby hoped to accomplish can be understood.
* * * * * * *

The Civil War left basically intact a state-oriented view of the federal system which had characterized pre-War political and constitutional analyses. The War had interrupted the normal intercourse among citizens in various parts of the country, but it had not altered the basic outlook on the Constitution as a Union of states.² Both the President and most members of Congress acted on this assumption from the earliest days of the War in order to assert their respective jurisdictions to fight the War and to determine the conditions under which reconstruction should occur.

At one time or another during the War Congress relied on three theories for asserting its jurisdiction in the reconstruction process. Congress derived the first theory from Article four, section four of the Constitution which enjoined the national government, specifically Congress, to see that each state had a republican form of government. This theory implied that states were still members of the Union although not in their normal constitutional relations to it. At the early stage of the War Congress interpreted this clause conservatively. It provided Congress with the authority to assert the power of the government to subdue the southern states and to provide the conditions of law and order in which states implemented their governmental machinery to hold elections to send
representatives and senators to Congress. Congress gradually expanded its interpretations of this theory to mean that it could set standards of what in fact a republican form of government in the southern states was.

Territorialization was the second theory. This theory actually consisted of many variations on a common theme that states because of their secession had reverted to a territorial condition. Congress could provide them with governments and establish the terms and conditions under which they would be re-admitted to the Union. This theory received its greatest support in Congress during 1862 but was abandoned thereafter as the republican form of government argument gained popularity.

Congress at times used the third theory in conjunction with the republican form of government theory. This theory was that Congress could regulate the time, manner, and place of holding elections as authority for determining conditions by which southern states would be reconstructed. This theory had two aspects -- a positive and a negative. In its positive aspect, Congress joined this theory with the republican form of government argument to determine conditions for reconstruction of the southern states. Congress could regulate the time, manner, and place of holding elections in order to guarantee to each state a republican form of government. This connection between the two theories existed when the
development of the guarantee argument was in rudimentary stage. The negative aspect of the theory was that Congress could use it as a means of checking upon conditions in the southern states which existed under presidential reconstruction. Congress relied on this aspect of the theory in 1864-5, as example, in the absence of any congressionally-defined program for specifying the terms and conditions under which the southern states were readmitted. Refusing to admit senators and representatives from states reorganized under the President's program provided the ultimate check upon his reconstruction thrusts in the South.

None of these theories was radical. The territorialization theory was radical only in its argument that states no longer existed under the Constitution but had reverted to a territorial condition. However, it, like the guarantee and regulation of elections arguments, was conservative because the conditions which it authorized Congress to demand of the states ("territories") were found in state ("territory") law rather than written into the national law. All of these wartime theories, therefore, assumed a basically traditional view of the federal system where, by implication, fundamental guarantees of human liberty and civil and political rights were proclaimed and guaranteed by states' constitutions and laws.

This Wartime pattern with a few variations carried
over into the post-War world. Congress, as it had during the War, legislated to require states to adopt standards which it declared were fundamental to a state's membership in the Union. However, the problem of congressional definition of such standards was radically different from the Wartime problem because the character of the requirements it demanded then differed from what it came to demand after the War. The major Wartime demand had been that the southern states abolish slavery as a condition to Congress's re-admittance of their senators and representatives. Congress by mid-1865 recognized that making states prohibit slavery was ineffectual without making them provide positive guarantees for sustaining freedom, the condition that obtained when slavery was removed. This realization raised the basic question of what was freedom. No one then, as now, could answer the question satisfactorily, but everyone knew and could agree that white men were free. Therefore, giving the black man the same rights as white men was the solution, but only a partial solution. The federal system posed a difficulty, for the laws and conditions of freedom for white men differed from state to state. How could Congress pick and choose among the differing standards? It would not have to if it defined freedom in terms of the rights each state permitted and guaranteed its white men.\(^5\) This course was fraught with problems, however, because it raised the question whether
black men should have only some or all of the civil rights guarantees that white men had or should have the same civil and political rights as their white counterparts. Determination of this question depended heavily on the laws and conditions of freedom in northern states as well as on those states' citizens' commitment to equality before the law for all men regardless of their color. This link between northern states' standards and Congress's reconstruction program resulted from the fact that the War and Reconstruction was and had been the "northernization" of southern politics.  

Secession had delimited the Union and Constitution to what the North was willing to send its men off to fight and die for. Although the reason for which the North fought changed over four years of war from preserving the Constitution as it is and the Union as it was to emancipation of slaves in areas not under Union control to abolition of slavery by the War's end, the facts remained that this changing concept of War aims was northern. It summed up what the North believed the Union and Constitution must be if it were to survive and thus established the norms for state practice and law under the Constitution to which all states must conform.

Congress reconstruction efforts during the War were based on the assumption that incorporation of this norm by southern states into their constitutions, hence their
legal systems, eliminated the deviant aspects of southern affairs which had been reflected in her political behavior on the national level. Incorporation, therefore, brought her states into conformity in law, hence in politics, with the rest of the (i.e., northern) states of the Union.

Conflict within the Republican party existed over whether in fact the measures promulgated to effectuate this norm were sufficient. The North's commitment to abolition of slavery as the War closed, which stated the norm all states were to conform to, was implemented in Congress's and the President's requirement in 1864 and 1865 that the southern states amend their constitutions to abolish slavery. A legal system which did not sanction slavery was the norm. Requiring the states to abolish slavery within their own jurisdictions was the measure or the means of establishing the norm. The more advanced wing of the Republican party believed the means would not accomplish the goal. Their position raised implicitly the practical question of the meaning of the abolition of slavery. Republican exploration of this question was pre-empted, however, because radicals proposed additional means -- civil rights for and enfranchisement of southern blacks. Thus the question became by the end of the War not what abolition meant but whether the means proposed were sufficient, whether the alternative measures proposed would serve any better, and, by implication, whether Congress
should have a more dynamic role in the Reconstruction process. 7

As events in the South during the last half of 1865 demonstrated the insufficiency of Andrew Johnson's program for securing the South's reconstruction, congressional Republicans reached fundamental agreement that Congress should take an active role in determining the means for assuring reconstruction. This necessity to adopt adequate means to effectuate the norm found expression in appeals to northern people that more stringent measures were needed to provide for the future welfare, permanency, and safety of the Union. The norm -- abolition of slavery -- was the measure by which the North would know when that future welfare, that permanency, and that safety would be ensured. But the plea for more stringent measures implied that previous means had been inadequate which necessarily raised the question of abolition's meaning. Lincoln and Johnson had built their reconstruction policies in part on the abolition of slavery. Yet even with the southern states' adoption of this requirement, which presumably put them in harmony with northern states which did not allow slavery, southern affairs still seemed fundamentally opposed to the aims and purposes of the rest of the Union. Some segments of the Republican party in Congress during the second session of the 38th Congress, forecasting these developments, had proposed that
blacks would not be free until states were required to grant them political as well as civil rights. Such propositions implied that freedom was more than an absence of slavery, but since slavery and not freedom had been the problem, most members of Congress felt removing slavery created the conditions for freedom. Most men were not ready to consider that freedom was more than an absence of slavery until events in the South during the latter half of 1865 demonstrated it was.

Northern politics became a vital element in determining what men's conclusions about freedom would be, for the standards for measuring southern states' loyalty to the Union and Constitution were northern standards. And Congress's decisions on what ways and how much it reconstructed southern states, therefore, depended heavily on the decisions northern states made about civil and political rights. If southern affairs required more vigorous standards than northern politics permitted, Republicans had to change their tactics and conduct vigorous campaigns in the North to change its standards.

Only recently have historians come to appreciate the interconnections between northern politics and reconstruction, the basically state-oriented view of the federal system which the reconstruction program exhibited, and the good intentions and often high idealism of Republicans in legislating a reconstruction program.
Recent scholarly efforts have been made to revise distortions in earlier work. These efforts have been made largely within the same framework as laid out by Dunning, Rhodes, and other pioneer scholars. While the results of these investigations have been truly rewarding, the framework has constricted consideration of particular aspects of the Reconstruction problem which need attention in order to understand and to appreciate fully Republican politics, principles, and prejudices. Historians generally have let the end of the story of Johnson's conflict with Congress -- impeachment -- govern their selection of the pertinent elements which begin and compose the middle of it. Therefore, since impeachment resulted from the Radicals' impatience with Johnson on suffrage extension in 1865, with Johnson's failure to sign first the Freedmen's Bureau Amendment bill and then the Civil Rights bill, and later with his shoddy direction of the Army in the South in 1867 and 1868, historians have been little motivated to look at other elements of Reconstruction politics which might help primarily to explain Republican politics, principles, and prejudices and only secondarily contribute to a basic understanding of the reason for and the nature of the Republican conflict with the President. In addition, many historians, for a variety of reasons, have been interested only in a particular phase of Reconstruction concerning civil rights and the passage of the 14th Amendment.
Other important aspects in defining ultimate Republican criterion for a decent Reconstruction have been left out or given only little attention.

One such neglected aspect has been the Republican position(s) on suffrage extension during the early Reconstruction period. The Republican opinions on suffrage extension were developed at length, if in veiled terms, during the last half of 1865 and during the first session of the 39th Congress. Many congressional Republicans had reached a similar conclusion in the summer and fall of 1865 that suffrage should be given to blacks. Republicans presented several reasons ranging from the humanitarian to the party's and the nation's self-defense. But it is difficult, if not impossible, to measure precisely the party's position on the subject because the political situation required it to discuss reconstruction policy within the general framework President Johnson's reconstruction program had created. Neither the 1865 elections nor the President's refusal to endorse suffrage-extension changed Republican opinion on the necessity for giving blacks the vote. Rather, Johnson's course and the 1865 elections, together with the Democrats' political efforts, told Republicans they must change their strategy in such a way that their proposal on the suffrage-extension neither exhibited fundamental divergence from Johnson's program nor went beyond what northern states
required in their voting qualifications. The precise configurations of reconstruction policy which resulted from this changed strategy would be defined in Congress during the months after it met.

The fear which Republicans felt for the future of their party and which forced them to pull together for the sake of their party was fortuitous. It meant that Republicans of many diverse views could be, must be, more flexible in shaping a program, especially when virtually all of them agreed that Congress should be the forum in which such reconstruction policy decisions were made. Suffrage and civil rights protections could be seen as complementary rather than as antagonistic modes of accomplishing the same goal -- security for the future of the Union and the Republican party. How best to accomplish the goal would be limited by considerations of what Congress alone could or could not do rather than by arguments of whether the President or Congress possessed the power to determine reconstruction policy. Moreover, the peculiar configurations of northern politics during the summer and fall of 1865 dictated that Congress proceed on the assumption that it must be cautious in implementing new principles through traditional means lest it broke with Johnson. Such a break meant that the party and, therefore, any hope for the future of the Union was lost.

* * * * * * *
When the 38th Congress closed in March 1865 the best guess was that Republicans who advocated civil and political rights for blacks would have a hard fight in the next Congress to prevent the southern states for being re-admitted with other than the minimal guarantees for their future good conduct and the abolition of slavery.\textsuperscript{11} When Andrew Johnson succeeded to the presidency upon Lincoln's death, these Republicans, whom contemporaries and scholars called the "Radicals," congratulated themselves on obtaining such a valuable ally, although they regretted the circumstances which presented Johnson to them.\textsuperscript{12} With Johnson on their side, these Republicans thought they could bring the rest of the party around to their reconstruction views.\textsuperscript{13} The fight would still be hard, but they thought they had a chance of winning. During the next month, however, these Republicans began to have their doubts about Johnson. Although he endorsed voluntary southern efforts to extend the votes to blacks he did not require it. As early as May 10 Thaddeus Stevens believed "... the President is precipitating things. Virginia is recognized? I fear before Congress meets he will have so be-deviled matters as to render them irreversible." The May 29 North Carolina proclamation convinced many Republicans, who had recently believed Johnson was with them, that the President was going astray. The proclamation posed, as Benjamin Loan wrote Sumner
shortly after its issuance, "... an important question to decide as to what course is best for the radicals under the circumstances to adopt. Shall we acquiesce in the policy of the administration or shall we adhere to our former views that Congress alone is authorised to deal with the subject of reconstruction and that our safety and the peace of the country require us to disfranchise the rebels and to enfranchise the colored citizens in the revolted states and thereby confide the political power therein to loyal and therefore safe hands[?]"14

Loan believed it would be more disastrous for the country to acquiesce in the President's policy than to take issue with him. Sumner seemingly agreed. He and his friends in Massachusetts and in other states began vigorous efforts to mobilize public opinion calling "... for reorganization on the basis of the Declaration of Independence." During the summer, Sumner wrote frantically to his friends around the country, urging them to speak and asking them for their opinions: to Ohio's Senator, Ben Wade, on June 9, "What say you? What can be done? Let me know your views"; to Stevens on July 12, "What can you do in Pennsylvania? One thing at least. You can make a speech or write a letter. Our front must be broadened."; to Carl Schurz on June 15, "Where is your speech? It is evident that we must create a public sentiment which shall insist upon just safeguards for the future."15
The replies that Sumner received indicated that his political friends were trimming as early as mid-June from challenging the President directly on the issue of Negro suffrage. The impulse was to retain their principles but refashion their strategy to prevent a division in the party which pushed Johnson into the arms of the Democrats and allowed the latter party to pre-empt the Republican position as the party of the Union in northern opinion. "The copperheads are aiming to swallow Johnson," Michigan Republican Senator, Jacob M. Howard, wrote Sumner on June 22. "Let him beware & remember John Tyler. I do." "I do not think," former Maryland congressman, Henry Winter Davis, told Sumner two days earlier, "they [i.e., the Republicans] can either coax or compel Prest. Johnson to change his course. They can drive him to Tylerise the party -- but that is no remedy." The chief disposition was "... to treat the President tenderly & to avoid a break. ..." Sumner summarized, "I trust there will be prudent counsels on both sides. He is our Presdt, & we must keep him ours unless he makes it impossible to go with him."16

Instead of meeting the Negro suffrage issue squarely, as some Republicans advocated, the argument should rest on the danger to the country of allowing the political affairs in the South to go back to the exclusive control of former rebels. As Davis pointed out, "The only
possible mode of arresting this headlong rush to ruin is to meet the question [of black suffrage] in its practical shape for the eyes of the country not on the rights of the negro -- nor the general requirement of justice & humanity -- they are vague generalities that solve nothing -- but on the direct & practical consequences of allowing the rebel States to go into the exclusive control of the men who led or the men who followed in the rebellion -- for us equally fatal." Admitted into Congress, such men could frustrate legislation to pay interest on the debt, to assess a direct tax, to exclude rebel officers from participating in the restoration process, or to secure the black man's freedom -- "... unless the whole mass of the Negro population vote." In July, Howard similarly argued, "We ought so far as practicable, to leave out of view the humanitarian argument, & to put it [i.e., black suffrage] on the ground of public safety & necessity."

The key to success was to delay restoration, by refusing to admit Senators and Representatives, and to develop arguments which asserted Congress's power and duty with the President to determine the conditions upon which reconstruction should occur. The strategy stressed the area of agreement between the radicals, a designation which by early summer included nearly all congressional Republicans, and the President. Like the radicals, the President wished to "reconstruct" southern affairs with
firm guarantees for the future security of the Union, as opposed to the Democrats who wished merely to "restore" the southern states once they had re-established their governmental operations sufficiently to hold elections for representatives. "I would have the north & west stand firm & demand 'reconstruction' so as to put the South in harmony with the Nation, but carefully avoid creating an issue with the Prest. now." Lot M. Morrill recommended. To 'restore states; on the basis of 'state rights' is to concede the power of the rebellion & to bring back to place & power its authors & leaders, to incite fresh disorders & to oppress the freedmen."18

This distinction between "restoration" and "reconstruction" was the clearest indication of the Republicans' concern about the Democrats' efforts to revive their party by claiming Johnson as their man.19 The Comms have convincingly depicted the efforts of the Democrats and the Blairs to bring Johnson into their camp as soon as he became President in 1865 by contesting with Seward and Weed for the leadership of the conservative and moderates in the country, particularly in New York, and by replacing Seward's influence over the President with that of Montgomery Blair.20

Like the radicals, however, the moderates and some of its conservative members perceived the Democrats' intentions and moved in the direction of pulling the
Republican party together.

The Democrats' efforts can be cited as the reason for Republican unity, but events in the South, account for moderate and some conservative movement towards the suffrage extension issue. In July, Maine's Republican Senator, William Pitt Fessenden, asked his colleague, Iowa Republican James W. Grimes, what he thought of "Andy's reconstruction schemes. It strikes me that matters are getting complicated, and that the rebels are having it all their own way." It was all the Blairs' doing, and therefore, they must be put aside. Two months earlier, Republican John Sherman of Ohio had chided his brother, William, for the too generous surrender terms he had offered Johnston. "The recognition of the Rebel State organizations now completely in the hands of the worst men of the South, will not answer. They could perpetuate their sway & we would inevitably have new difficulties." Sherman was not yet sure that making blacks voters would be any solution, for he believed they were not ... intelligent enough to vote, but some body must vote their political representation in the States where they live, & their representation is to be increased by their being free." The question became, therefore, who would exercise this increased political power. "Shall the rebels do so? If yes, would they not now in effect restore Slavery? Will they not oppress the Negroes? Is it not hard to turn
these negroes over to the laws made by the very men who endeavored to overthrow the Government[?] After all how much more ignorant are these classes than the uneducated white People down South[?]" By June, Sherman's doubts were resolved; blacks should vote.

Many other Republicans of all persuasions were agonizing over the same questions and arriving at the conclusion that Sherman refrained from reaching in May -- blacks should vote. "The people stand solid for the suffrage." Sumner jubilated in late June. "Old conservatives help swell our ranks -- feeling that the suffrage is essential in self-defense." But what type of suffrage and on what basis was the question. Sumner the politician and not the man of principle was speaking here, for the man of principle would have found unacceptable the motivation of self-defense. Yet Sumner was a politician, and self-defense was the common ground on which all shades of Republicans could agree.

Because of the Democrat's challenge Republicans were prevented from fully exploring their differences on the issue or fully articulating their support for suffrage extension except in the context of providing for the future welfare, permanency, and safety of the Union. Gideon Welles told Sumner at the end of June, "Our friends entertain widely differing views on the question of suffrage in the rebel states, and the authority of the
federal government over it. . . ." Therefore, much as the radicals had done throughout the summer, the moderates and conservatives (by then "radicals" per Johnson's definition) were forced to trim their more advanced positions in favor of general avowals of support for the President while urging the open-ended proposition that Congress possessed concurrent jurisdiction with the President in regulating the reconstruction process.

The net effect of the Democrats activities as well as of the impact southern affairs had in changing the less radical segments of the party towards a more favorable position on suffrage extension can be found in the resolutions which state Union conventions all over the North passed during the summer of 1865. The party chose the comparatively safe course of standing on its record as the party of and for the Union. Like Andrew Johnson, Republicans insisted that they would not rest until the Union was safe and that, therefore, Reconstruction would not be complete until adequate guarantees for the future peace, welfare, and safety of the Union were established.

Having thus stood squarely with the President the Republicans at the same time argued on behalf of Congress's role in the reconstruction process, not as a check upon the President but as a complementary body which shared the same objectives as the President. Yet some form of suffrage statement was included in the resolutions of
nearly all the state Union conventions.

"By his bold denunciation of traitors at the outbreak of the rebellion, by his devotion to the Union through its severest trials, and by his conduct in the discharge of duties imposed upon him," New Jersey Republicans "cheered," the President "has secured our highest confidence; and we cordially commend the policy of his administration, thus far indicated, and pledge to him our cheerful and united support. . . ." His policy, Ohio Republicans applauded, looked "... to the restoration of peace and order in the so-called seceded States. . . ." To New York Republicans approval of the President extended to his efforts not only to restore peace and order but also to exclude slavery and to fulfill "... the constitutional obligations of the national authority, to 'guarantee to every State a republican form of government,' ..." For such patriotic service, California Republicans recognized Johnson as the "... worthy successor of Lincoln; like him, the representative of our free and beneficent republican institutions; and that to him we transfer, with undoubted faith, the allegiance of hope and love which we bear to the beloved institutions of our country."

Minnesota Republicans voted down a resolution supporting Johnson. Underscoring the tender position Republicans thought themselves to be in by September 1865,
Massachusetts Republican Senator Henry Wilson, whose state convention subsequently did not pass a resolution of support for the President, thought that the Minnesota convention's action had "harmed us." "We are in a critical position, and must commit no false step. While we stand firm as a Rock for Suffrage for the Negro, we must not weaken our cause -- the cause of the poor and the oppressed [---] by saying or doing imprudent things.

"We have a president who does not go as far as we do in the right direction, but we have him and can not change him, and we had better stand by the administration and endeavor [sic] to bring it right." 25

Congress, with the President, was commanded to oversee the task of Reconstruction, these Union conventions resolved. California Republicans believed that it was "... the duty of all Union men to oppose the restoration of civil power in the rebellious States until the President and Congress are satisfied that it will be wielded by truly loyal majorities therein." Republicans in Maine urged Congress to amend the Constitution "... so as to secure equality and uniformity of rights of representation of States in Congress." Wisconsin differed with Minnesota over the basis of representation. Wisconsin supported "... legally qualified male electors in such states." Minnesota believed legal voters should be the basis.
Vermont Republicans advocated a more extended role for Congress. If states failed to "... blot out forever from their statutes all laws pertaining to the late condition of slavery, and to concede to all of their native and naturalized citizens, by constitutional guaranty, equality of civil and political rights..." Congress should "... use all its constitutional powers, so as to secure a republican government, both in form and essence, to the people of such State."

Massachusetts Republicans called upon Congress to take the "whole question of reconstruction the southern community..." under consideration in order to guarantee the safety of loyal people, both white and black, before restoring to southerners their "forfeited rights." They had "no theories to promulgate in relation to the right of suffrage..." But they declared that as long as the issues of the nation's peace and security and the extirpation of slavery remained, any "test" excluding loyal men while admitting rebels was unconscionable. "Congress should rectify the abuse and maintain the public faith towards the freedman, while it provides for the peace, solvency, and security of the country."

Massachusetts and Vermont Republican positions on suffrage were the most explicit challenges to the President's program. However, both of these declarations came from two of the five northern states which had impartial
suffrage. In other states where blacks were excluded from voting, suffrage statements were vaguer and therefore offered Republican politicians considerable latitude in electioneering before the voters. New York Republicans, in whose state the Democrats challenge was the strongest in 1865, conditioned reconstruction of the southern states on "... the elevation and preparation for the free rights of citizenship of all their people -- inasmuch as these are principles which constitute the basis of our [r]epublican institutions." New Jersey Republicans believed that the War had "... awakened us to a new sense of the value of fundamental principles of freedom and equality in shaping political action. ..." Quoting Jefferson, New Jerseyites affirmed that in order to secure the rights of life, liberty, and the pursuit of happiness "... governments are instituted among men, deriving their just powers from the consent of the governed," [which] are no longer 'glittering generalities,' but are immutable truths."

Republicans in Minnesota concurred in citing political rights as in keeping with the genius and spirit of republican institutions. They were more explicit, however, in characterizing what that spirit and genius meant: "... the measure of a man's political rights shall be neither his religion, his birthplace, his race, his color,
nor any merely physical characteristic. . . ." Both the form and the spirit of those institutions would be subverted if any portion of the population were left ".... in a degraded and abject caste, taxed to support and compelled to obey a Government in which they have no voice, and whose whole machinery may be directed to their destruction." 24

The results of the 1865 elections demonstrated the wisdom of the party's course. Unionist candidates won convincingly all over the North. Although the efforts in Minnesota, Wisconsin, and Connecticut to drop the word "white" from their respective constitutions' suffrage sections failed, the margin of defeat in each state was small. In addition, these votes indicate only the degree of support (or lack of support) for impartial suffrage and not the positions on the suffrage issue per se. 25

Howard told Sumner in November 1865 that the late elections meant "more vigor, more rigor, less coquetry -- more manhood, a higher appreciation of the COST of the triumph! We must have better security than the word of traitors & perjurers." 26 That the majority of Congress shared this assessment was evident in its unified spirit and determination when it met in December to carve out its own jurisdiction in order to provide security for the future without breaking with the President. "The first thing," Rutherford B. Hayes confided to his diary, "is to
keep together, united and harmonious. I am glad to see that this duty is generally recognized."27 Meanwhile, Congress "... should assume," Representative James A. Garfield told a friend early in the session, "that he [i.e., the President] is with us, treat him kindly, without suspicion, and go on in a firm calmly considered course, leaving him to make the breach with the party if any is made."28

The important objective was for Congress to assert its jurisdiction. "One person will reach this point by one road and another by another road," Sumner told Schurz, "Provided it is reached, it is not of much importance how this is accomplished. ... I feel sure a large majority will concur in asserting Congressional jurisdiction; and this is the main thing."29

Thus, while Republicans wished to avoid difficulty with the President, they were determined that Congress should follow its own course in deciding reconstruction policy. "The action of Congress so far," Schurz wrote home in early December, "is sharp and decisive and the spirit of our party is fine." Garfield similarly reported about the House: "We appear to have a very robust House and indications thus far show it to be a very sound one." Republicans worried that the President's message might cast a shadow on Congress's plans. But as Schurz noted, "The message of the President is openly calculated to
avoid a struggle with Congress -- and Congress will do as it
pleases."\(^{30}\)

Schurz was right. Congress intended to do as it pleased. But it would do so within limits which the
political configurations of the previous few months and
its views of the federal system imposed. Republicans,
generally, were convinced that the months after Lincoln's
death were perilous ones for their party. They had to
pull together, stand beside the President, lest the Demo-
crats pre-empted Union candidates, stood on the Presi-
dent's policy, and separated the President for the rest
of the party. The party was crucial, most Republicans
believed, during the latter half of 1865, for without the
party there could be no decent and safe Reconstruction.
This conviction grew in intensity as most congressional
Republicans came to insist on increasingly more vigorous
measures for and rigorous requirements of the southern
states.

And, indeed, by the time the 39th Congress met in
December 1865, these Republicans had come a long way in
their respective views on reconstruction. When the 38th
Congress had closed it seemed unlikely that the next Con-
gress would take active part in determining a Recon-
struction policy which demanded more rigorous requirements
than those President Lincoln had demanded of Louisiana.
The return of former rebels to power in the southern states
and the generally shaky condition of freedom for blacks in those states under the generous and indulgent Reconstruction policy of Andrew Johnson that required little of the South and seemed indifferent to blacks convinced congressional Republicans that Congress must act when it met in December.

This conviction was the chief victory that the more advanced members of the party like Sumner, Wade, Howard, Ashley and Stevens had achieved. Ironically, although they had been the chief advocates of a rigorous congressional role, their activities had little to do with this victory, for the aforementioned conditions in the South and Andrew Johnson's tooth-less program brought most other members of the party to their position. Civil and political rights for blacks, disfranchisement of former rebels, a change in the basis of representation, non-payment of the rebel debt, and other solutions to the Reconstruction problem were proposed in one combination or another as proper congressionally imposed requirements for re-admittance of the southern states to the national political counsels. The precise mixture of these solutions to form Congress's Reconstruction policy could be determined only once Congress met in December, when its unity of purpose promised good tidings for a safe and decent Reconstruction.
CHAPTER IX
FOR ALL IMMEDIATE PURPOSES

One of Thaddeus Stevens' Pennsylvania political allies, A. K. McClurg, in January 1866 urged Stevens ". . . not [to] let the power pass away. . . . If our friends do not unite, Johnson, the Copperheads & the rebels will in the end do the work for you, & then there will be no conditions, & the condition of the slave will be worse than before, & the South will rule as before."¹ McClurg's appeal expressed perfectly sentiments which Republicans of all shades of opinion had endorsed over the previous few months before Congress had met. Therefore, they determined to take a forthright stand on Reconstruction. But the united party included Andrew Johnson. When Johnson's veto of the Civil Rights bill indicated that he was not united with the party on the highest level -- that of principle -- Republicans chose principle confident that northern people supported them. Prior to the break, however, when congressional Republicans attended to the practical matter of legislating a reconstruction "program," they had to enact one with
which they were satisfied without fundamentally contradicting what the President had already done. Therefore, the problem was to strike a balance between two seemingly conflicting goals. In the meantime, the southern states would not be admitted before Congress could take action. The party caucus, which met before Congress opened, had agreed unanimously not to admit those states.\textsuperscript{2}

Republicans set for themselves two tasks. The first was to provide an immediate antidote for the unequal statutory status which the southern states' legislatures had conferred on blacks during the previous fall. The second task was to formulate terms and conditions under which the southern states could be brought into their regular constitutional relations within the Union. The first task implied that Republicans intended to establish an intermediate framework, with some aspects to be permanent, others temporary. Both of these aspects would create the framework Republicans intended the terms and conditions, the settlement of which was the second task, for bringing back the southern states would sustain after Reconstruction was completed. This intermediate framework, therefore, implied that immediate steps Republicans took to create a framework of law could accomplish the goal of guaranteeing law and order within the southern states while they formulated permanent terms and conditions under which the southern states were re-admitted and which those southern states and the rest of the Union
adopted. The first and second tasks, therefore, mirrored one another. One looked to immediate results while the other sought to insure that these results would not be lost once Reconstruction was completed.

Prior to President Johnson's March 27 veto of the Civil Rights bill the difference between the Republicans' conception of insuring a permanent Reconstruction, and implementing measures that had immediate effect on the conditions in the South was not the difference between passing resolutions to amend the Constitution and passing acts which the Army and the national courts enforced. It became so after the President vetoed the bill, for the President made one aspect of Reconstruction -- civil rights -- a political issue to which Republicans had assumed their party was committed in principle. Prior to the veto Republicans approached the question of a permanent Reconstruction through avenues which northern politics allowed and party necessity dictated. Thus they blended constitutional amendments and legislative acts according as their views of Congress's constitutional authority and of politics permitted them to shape their program.

The Civil Rights bill was considered as part of both the intermediate and the final framework. Before the veto, the Freedman's Bureau and Civil Rights bills were the major elements of the intermediate framework while the Civil Rights bill was also considered together with
the proposals emanating from the Joint Committee on Reconstruction as providing the permanent framework for Reconstruction. After the veto the Civil Rights bill was considered exclusively as part of the intermediate framework while section one of the 14th Amendment stated in permanent form the civil rights guarantees which Congress had provided in the bill.

The elements of congressional Republicans' permanent Reconstruction program issued from different sectors of Congress during the five months of the session. Congress did little during the first month since the usual efforts to organize its committees cornered its attentions, and the Christmas recess intervened. Soon after the New Year began the Senate's Judiciary Committee and the Joint Committee on Reconstruction became the two major sources for permanent reconstruction proposals. The early efforts of the Joint Committee centered on finding some formula for changing the basis of representation which directly related representation both to voting and to civil rights. The Committee wished to make it to the states' advantage to extend the franchise to blacks and to protect those citizens equally with whites in their civil rights. Voting rights "guarantees" more than civil rights clearly concerned the Committee. Committee consideration of civil rights protections of proposals were insurance in addition to that which the Senate Judiciary Committee offered in
form of the Civil Rights Act. Thus the proposals the Committee considered in the early part of January joined political and civil rights to representation. By the middle of January the Committee focused its representation amendments on political rights alone, and by the time it agreed on a proposal to send to the Congress, the elective franchise alone was joined to the basis of representation.

Civil rights guarantees were of less concern to the Committee except as it listened to one of its most important members, John A. Bingham of Ohio, who argued that the Constitution conferred on Congress no power to pass a civil rights bill. Bingham's proposal received little attention until Andrew Johnson's veto brought the Committee to consider permanent guarantees through the amendment process for civil rights. Permanence rather than doubts about Congress's civil rights legislation constitutionality brought the Committee to recommend and the Congress to adopt a fourteenth amendment, section one of which provided the necessary permanent guarantees for civil rights for all citizens of the United States.

The thesis of this and the next chapter is that the congressional Republicans were fundamentally in agreement over the general goals of and modes for carrying out Reconstruction. Northern politics during the months before Congress met in December 1865 presented Republicans with the major configurations within which they had to
work in devising a Reconstruction policy. A direct statement on civil rights was permissible both from the standpoint of defining ultimate requirements for southern states' reconstruction and of immediate measures necessary to protect loyal men in those states. A direct statement on suffrage was impossible both from the standpoint of a permanent guarantee through constitutional amendment and of immediate imposition of a direct congressional requirement on the southern states by legislative enactment. Minnesota, Wisconsin, and Connecticut voters' failure to endorse black suffrage the previous fall indicated the fate of any proposed constitutional amendment which directly forbade the states to distinguish between voters on the basis of their color. The necessity for maintaining the party's harmony with Andrew Johnson, who during the previous few months had not required the southern states to extend to its black citizens the right to vote, further dissuaded Congress from dictating directly such a requirement lest it contradict Johnson and undermine the Republican party.

The precise form a statement of ultimate Republicans' reconstruction goals took during the months after the session began, therefore, depended greatly upon the success with which they could implement their intermediate structure which defined the contours of their conceptions of law and order in the South as well as upon
the course the President followed. The final statement relied on changing congressional conceptualizations of intransigence at the local level as well as of the President's willingness to implement the machinery it designed to cope with local diffidence. Congressional Republicans split with Johnson over the veto of the Civil Rights bill. The split indicated a fundamental difference in principle between Johnson and the party. The split grew wider as Johnson only lukewarmly executed the policy Congress dictated. The more pronounced the split became the more Republicans came to rely on their December 1865 conceptualizations of northern political opinion in determining a permanent Reconstruction policy. They also legislated in more direct fashion to cope with local intransigence, first by increasingly limiting the discretion the President possessed in exercising his powers, and then in 1867, by end-running the President and ordering directly his subordinates to execute the policy Congress prescribed. And, second, congressional Republicans pre-empted to a degree local judiciaries through the instrumentality of the Army and the national courts to secure fair and impartial justice for all men regardless of color.

The President had outlined his Reconstruction program in proclamations he issued during the spring and summer of 1865 for organizing each of the southern states. In the May 29 North Carolina Proclamation, which
contained the same formula subsequently used in the rest of the southern states, Johnson appointed a provisional governor whose duty was "... to prescribe such rules and regulations as may be necessary and proper for convening a convention composed of delegates ... for the purpose of altering or amending the constitution [of the state], and with authority to exercise within the limits of said State all the powers to enable such loyal people of the State of North Carolina to restore said State to its constitutional relations to the Federal Government and to present such a republican form of State government ..." which entitled the state and its people to be protected by the United States. Delegates were to be chosen only by loyal persons whom Johnson defined as being anyone who had previously taken the oath of amnesty he set forth in a proclamation the same day and who were qualified to vote under the state's constitution and laws in May 1861.

Johnson left to the legislature to determine the qualifications of electors and eligibility of persons to hold office under the state's constitution and laws "... a power the people of the several States composing the Federal Union have rightfully exercised from the origin of the Government to the present time." Johnson required the states to ratify the 13th Amendment and to confer on blacks civil rights protections. Other than these requirements and a general endorsement of Freedmen's
Bureau activities in those states, Johnson left to the
state governments to decide what, how, and how much pro-
tection they would provide for blacks. 3

Any program congressional Republicans adopted, there-
fore, if it wished to maintain its stance of supporting
Johnson had to: leave intact the governments Johnson had
created; not disfranchise anyone not disfranchised in
Johnson's amnesty proclamation; not include blacks as
voters. However, they could encourage the states to
enfranchise blacks. Because Johnson demanded the states
ratify the 13th Amendment and required some civil rights
protections for blacks Republicans believed they could
legislate on that question without upsetting what the
President had already done. 4

* * * * * * *

Although congressional Republicans maintained a
public stance of unity with the President, many rumors
circulated privately that some quarters of the party were
anxious to quarrel with the President and that conflict
was inevitable. When the session opened Sumner, Boutwell,
"and some more of that class are full of alarm -- less,
however, than when they first came," James A. Garfield
wrote home in mid-December. Their alarm had lessened
because they were convinced that Congress intended to
take an independent course about which they had had doubts
during the previous fall. "Some foolish men among us,"
Garfield reported (his adjective describing what his own position was not), "are all the while bristling up for a fight and seem to be anxious to make a rupture with Johnson."  

These rumors became more numerous towards the end of January and on the eve of the President's veto of the Freedmen's Bureau bill. Ohio Representative Rutherford B. Hayes anxiously wrote on the last day of January that "There are dangers all around us. The extremes of both wings ultra Radicals and ultra Conservatives, act as if they wished a rupture - the body of the Union men and, I think, the President himself, wish to avoid it. I think we shall get through." Indiana's George Julian predicted that "The President is going to betray the country & what the end will be no one knows." Nine days before Johnson vetoed the Freedmen's bill, John Sherman wrote one of his political allies in Ohio that "We must no longer conceal from each other the imminent danger of an open break between the President & 9/10 of the Union members of Congress."

Sherman believed that "The next ten days will determine events," and feared that the President would veto the Freedmen's Bureau bill. Sherman was half right: the President did veto the bill, but no break occurred. Although by his veto Johnson seemed to some Republicans to have gone over to the Democrats yet his actions in the next few days convinced them that Johnson was attempting
to correct the impression. However, the period between the two vetoes was a period primarily of great uncertainty and confusion about what posture Republicans, both in Congress and at the local level, should maintain. The chief hope among Republicans, Hayes told a friend a few days after the veto, was "If without such sacrifice of essentials we can keep together it ought surely to be done, & this is the feeling of a majority." Thus maintenance of party unity which included Johnson still seemed uppermost in congressional Republican circles despite doubts about Johnson.

But several Republicans, who voted to override the first veto, feared that Johnson would use the patronage against them. Others felt that it would not be desirable to hold office under the administration if Johnson went over to the Democrats. Johnson's veto had raised the dilemma of which was the "true" Republican party for Republicans outside of Congress. Party organization centered around Johnson who controlled the patronage, but many Republicans felt that Congress represented the party in principle. To support Congress jeopardized the political interests of party members since to support Congress implied that they did not support the President. The President controlled patronage, therefore, controlled the party organization, which meant he could penalize those who acted or spoke contrary to his position. Republicans
who supported the Republican party in principle were hesitant about what position they should adopt towards Johnson because they feared the reprisals Johnson might take through distribution of patronage.

This dilemma was particularly acute for the Republican press. Pennsylvania newspaperman and politician Thomas E. Cochrane wrote Stevens for advice two days after the veto. He believed that the relations between the President and Congress which the veto established "... awaken ... concern in the minds of the republicans, and seem to me to call for a comparison of views." The condition of affairs required that local Republicans and "the friends of the Country there [i.e., in Washington] needed to be harmonized." Cochrane's specific point of inquiry was what posture should the Republican press adopt. Cochrane was not sure that there was complete unanimity within press ranks. He noted that some men stood by Johnson and believed that "All the mercenary and purchaseable material will take that course." The problem was, however, that "The press is nearly every where hampered with official connexions. ... I have been writing for the Republican. The brother-in-law of its owner is in the Custom House at Philadelphia. My own brother-in-law is there also, and I have been told that the fact of my writing for the paper, connected with an allegation that it was not friendly to Johnson ... has
been used to his injury."¹⁰

With all this uncertainty and confusion, Republicans awaited anxiously Johnson's disposition of the Civil Rights bill which Congress sent to him towards the end of March. On March 22, Hayes wrote that "Just now the worry is, will he veto, or not, the Civil Rights Bill? If not the Breach is narrowed, otherwise widened --"¹¹ When the veto came in, Republican response was predictable. President of the Senate Lafayette Foster declared that the breach was widened to an "impassible gulf." Fessenden feared that Johnson was "beyond hope." Trumbull regretted the President's veto "... because it is calculated to alienate him from those who elevated him to power, and would gladly have rallied around his Administration to sustain him in the principles upon which he was elected." With the veto Republicans regained the political initiative they had lost in 1865. Johnson had taken issue with Congress, not Congress with the President, and had created an issue that Republicans could place before the country, confident that the people would sustain them. Fessenden stated the case precisely when he told a friend that "As things are, we must hold on, and make an issue upon which we can go the country." Indiana Representative Godlove Orth affirmed that the President "failed to crush Congress, and of course he will fail to crush the party."¹²

Spurred by the obsession that the future of the country
depended upon and was the Republican party, congressional Republicans prior to the veto of the Civil Rights bill had stressed their fundamental unity in principle with the President even as they adopted "more vigorous" measures to secure and to make more certain the peace.

Republicans' actions did not mean that they had placed party mechanism above party principle but rather that they believed they could not maintain their principles without the mechanisms of the party. The fact that Congress acted at all other than to re-admit southern states under Johnson's program while continuing professions of unity with the President indicated that mechanisms and principle were inseparably intertwined but that principle was the more important of the two to most of them. Republicans stood with Johnson throughout the summer and fall of 1865, pledging the party to insure the future welfare, safety, and permanence of the Union through redirection of southern affairs in such a way that slavery -- the rock over which the Union broke -- could never be re-established and therefore threaten the Union again.

President Johnson's vetos of the Freedmen's Bureau bill in February and especially the Civil Rights bill a month later outraged Republicans not only because they evidenced his insensitivity and hostility to the need to protect blacks but also because Johnson had broken the
party faith. Party mechanisms had enabled Republicans to garner northern votes even when northern opinion was less than enthusiastic, but Republicans confident that northern opinion sustained them, chose to base their party solely on principle if need be without mechanisms which patronage made work when Johnson's veto created the breach.

Johnson's veto, therefore, represented to congressional Republicans more than differing views on particular modes of securing the peace. It represented a fundamental division over what kind of peace should be secured, what kind of Union would be the product of those troubled and tormented times. "It seems to me that he draws a sharp and distinct line -- builds up 'a wall of partition' between himself and the majority of Congress -- the whole policy which our friends there have approved, and of which a part was reduced to practical form in the Freedmen's Bureau bill," Cochrane said of the President's veto of the Freedmen's Bureau bill. "His 'objections' are not merely to the details, or special provisions of the bill, but go beyond even its general principle, to set forth a course of conduct to be pursued in the immediate restoration of the rebel states, . . ." This observation was even more applicable to his veto of the Civil Rights bill.¹³

Republicans' actions prior to the break demonstrated the interconnectedness of party and principle. Their actions after the break, in continuing to follow the same
strategy developed earlier, indicated the degree to which their principles had been colored and determined by the conceptions and pre-conceptions of the federal system as well as how diligently they sought to reflect the temper of northern politics.

Although Johnson broke with the Republican party over the Civil Rights bill veto, he and Congress continued to function together on an institutional level. Congress's Reconstruction legislation since the beginning of the session had, in effect, limited the President's discretion in the use of his war powers to reconstruct southern governments, but Congress's purpose had actually been to make more effectual law enforcement efforts in the South. Although Johnson's veto damaged his relations with the main portion of the congressional Republicans, as President he apparently still retained Congress's confidence. In other words, congressional Republicans believed that Johnson was not with the party in principle, but that he would not shirk his duty as President to execute the law. Only in 1867 did Congress come to the conclusion that he would not even execute the law.

Amidst the crisis of the Republican party and Congress's difficulties with the President congressional Republicans during the first session of the 39th Congress laid down an intermediate framework of and permanent plan for Reconstruction. Attention must now be given to
outlining the lineaments and purpose of the intermediate framework which the Freedmen's Bureau and Civil Rights bill provided in order to understand Republican hopes for Reconstruction and their disappointment with Johnson.

* * * * * * *

"These two bills," Kentucky's Democratic Senator Garrett Davis said of the Freedmen's Bureau and Civil Rights bills in January 1866, "like the Siamese twins, came into the world together, and they were connected together by something like the umbilical cord that connected those two denizens of Asia who have taken up their residence upon the western continent." Davis said that if the cord connecting the twins were severed they would die but that unlike the twins' connection the two bills were not to be permanently connected. Most members of Congress whether they were Republican or Democrat agreed with Davis's assessment. Illinois Senator Lyman Trumbull had introduced both bills back to back earlier in the month. And he had told the Senate that the Freedmen's Bureau bill, unlike the Civil Rights bill, was only a temporary measure. They were both designed for the same purpose. Trumbull wrote a few days after he introduced the bills, in order to "... fully protect the Negro in all his civil rights, which is as far as the country will go at the present time, & the very thing it [i.e., the country] is asking for."
Although it is obvious that these bills were designed for achieving the same purpose, less obvious is how these bills worked together in providing the protections Trumbull intended them to provide. These bills were complementary in two ways. First, the judicial features of both bills provided a system of justice which essentially oversaw and checked local judicial processes. Thus the black man and other victims of war could protect themselves through legal processes while through other provisions outlined in the Freedmen's Bureau bill and the Act which it amended he was fed, clothed, educated, and leased or sold property or worked for wages, while, in other words, he was fitted for citizenship in condition although he was recognized as such in law. Despite the obvious elements of paternalism inherent in this type of governmental approach to the protection of black men, Congress was less concerned with being paternalistic than with dealing with the desperate plight of much of the population in the South.¹⁶ But the measures the bill provided also fulfilled common 19th century notions of prerequisites for exercising the full rights of citizenship which meant the right to vote and, perhaps to hold office and serve on juries. Thus it served immediate purposes and put the black man on a footing for voting. But in terms of immediate purposes, the system was administered by men who, presumably, were sympathetic to the people whom the
system served -- as if the people had elected these men to operate the system which served them. 17

The second way the Civil Rights and Freedmen's Bureau bills complemented each other in protecting civil rights was in the judicial features. The Civil Rights bill in section one declared that all persons born or naturalized in the United States were citizens. It listed the rights to which persons regardless of color were entitled and declared that they "... shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." The remaining sections of the act outlined procedures for enforcing the first section. They included conferring jurisdiction exclusively on the United States district courts to try persons who violated the Act and concurrently with the circuit courts to try all causes both civil and criminal in which a person claimed that he could not get justice in the state courts. The procedures these persons were to follow to have their cases removed from the state to the national courts were those outlined in the 1863 Habeas Corpus Act and any of its amendments. Trials in the national courts were to be conducted and the verdicts of such trials enforced according to the laws of the United States or, if they were found insufficient or inappropriate, according to the common law as modified by the laws of the state from
which the case was removed. Other sections required the marshals, district attorneys, and officers of the Freedmen's Bureau to arrest persons who violated the Act. The Act commanded marshals and their assistants on pain of punishment to execute warrants and other processes issued under its provisions. It also specified a fee that district attorneys and other officers of the court received for their services. The President was authorized as the occasion required to send judges, district attorneys, and other officers of the court to various districts to insure the arrest and speedy trial of individuals who violated the Act and to call out the militia or the Army to aid the civil authorities in enforcing the Act. 18

The "judicial" features of the Freedmen's Bureau bill were stated in sections seven and eight. Section seven authorized the President through the Commissioner of the Bureau in areas where judicial proceedings had been interrupted "... to extend military protection and jurisdiction over all cases ..." in which state or local laws or regulations denied to any person his civil rights or whose administrators subjected him to different punishments than those assessed whites for commission of the same offenses. Section eight authorized Bureau officials to take jurisdiction under rules and regulations the President through the War Department prescribed of all cases in which any person deprived "... any negro,
mulatto, freedman, refugee, or other person, on account of race or color, or any previous condition of slavery or involuntary servitude, or for any other cause..." of his civil rights or subjected him to different punishments than those prescribed for whites.

Section eight also stipulated that the Army and the Bureau could exercise such jurisdiction only in states which had been in rebellion. The jurisdiction would cease once those states had been restored "... in all [their] constitutional relations to the United States..." and when their courts and national courts within those states were "... not disturbed or stopped in the peaceable course of justice." Jurisdiction could cease before these two requirements were met if "... the discrimination on account of which it is conferred ceases,..."19

The successful operation of the Civil Rights bill depended upon the national courts being open. Conditions in the southern states remained disorganized despite Johnson's glowing reports to Congress. The national courts in many of the southern states were not open in January when Trumbull introduced the two bills, and as it turned out, some of them would not be open until near year's end.20 If the national courts were not open, blacks and other persons deprived of their rights in local forums had no remedy after the President's April 2 peace proclamation unless Congress gave the Army jurisdiction to perform
similar checking functions as those which the national courts would have provided had they been open.

Thus Trumbull in his two bills envisioned two duties for the Army in the southern states. The Civil Rights bill assigned the Army and the Bureau a support role in helping national civil authorities enforce civil processes the bill required them to enforce.\textsuperscript{21} The Freedmen's Bureau bill conferred on the Army and the Bureau duties analogous to those which national courts would perform if they were open. The national courts and the Army and the Freedmen's Bureau worked in two separate spheres but performing similar functions. Military jurisdiction would not be exercised when the national courts were open and unobstructed in their operation. When those courts were open the Army's and the Bureau's functions were to enforce national courts' processes as specified in the Civil Rights Act.

The essential similarity in purpose for which Trumbull's two bills assigned jurisdiction to the Army, the Freedmen's Bureau, and the national courts has been obscured because of the dissimilarity in modes of proceeding of military and civil courts. Writs were the lubricants for making the federal judicial system work, for by these writs courts within the same jurisdiction and between the national and state jurisdictions addressed one another on matters of law. These civil courts could
also use writs to reach into the military's jurisdiction to review its proceedings in particular cases. However, military courts possessed no such modes of proceeding. They possessed no writs to reach into civil jurisdictions. They only way they could proceed was to authorize their officers to arrest individuals who were in the process of being or had already been tried in state courts and then retry the case, following their own modes of proceeding.

These arrest and trial features tainted their proceedings with the scent of arbitrariness. Furthermore, as Andrew Johnson asserted in his message vetoing the bill, it violated 19th century notions of due process which meant (civil) judicial process.22 To Trumbull, however, this last point seemed an absurdity since there could be no due process where the national courts were not open. Thus military tribunals were the only alternatives.

Enforcement of the law in the South worked under "... an old adage, that the law never requires impossibilities," Trumbull told the Senate. The Illinois Senator was incredulous that anyone should seriously argue that when the civil courts were closed or overwhelmed "... no person can be tried or punished for any offense by the military power, which is the only power in existence at the time." Trumbull believed that all parts of the Constitution worked together and should be construed in harmony with one another. Thus although one part of the
Constitution guaranteed the rights of citizens to trial by jury on presentment by a grand jury for criminal offenses, "... manifestly these clauses of the Constitution apply to a condition of things where it is possible to have a court, to have a grand jury and a petit jury impaneled, and to bring the offender to justice before the civil tribunals." The same Constitution, Trumbull continued, which guaranteed that citizens shall have the rights of indictment or presentment by a grand jury and trial by jury in peaceful areas where the courts were open and unobstructed in the exercise of their jurisdiction "... contains also a clause authorizing the calling out of the militia to enforce the laws of the Union and to put down insurrection and rebellion; and when this army is called forth it operates, Mr. President, not as civil tribunals through juries and courts, but it operates as armies operate." 23

However, the Army and the Bureau under the Freedmen's Bureau bill were to perform functions other than those which were analogous to national court jurisdiction as specified in the Civil Rights bill, for the Civil Rights bill itself outlined a broad range of law enforcement functions for national officials. If the latter bill ordered district attorneys, marshals, and other civil officials to arrest persons who violated the provisions of the bill -- who violated the rights of freedmen
as detailed in section one -- the Freedmen's Bureau bill also ordered Bureau officials and the Army to arrest and try individuals who violated freedmen's rights, when the courts were not open to initiate the process. If the Civil Rights bill ordered national civil officials, with the help of the Army (if the President judged such help to be necessary) to act when states did not do so, the Freedmen's Bureau bill required Bureau officers and the Army to do the same. The existence of a technical state of war described only the territorial boundaries within which the Army and the Bureau could exercise such judicial functions. Within this territory the nature of military authority depended on the condition of local affairs, especially as to the organization of the national courts. If the national courts were open and in full operation, the military would act in subordination to those courts performing whatever law enforcement duties those courts required of it. If the national courts were not open the military would be the substitute for the national courts and enforce the law to the extent that state officials' unwillingness or inability to do so dictated it must.

In setting forth the duty of the Army and the Bureau in maintaining the rights of blacks and other persons Trumbull believed Congress was not giving any new duties to them but rather was giving the force of law to duties which they already performed under presidential authority.
This factor more than any other probably explains why Congress made no concerted effort to pass another bill after the President vetoed the Freedmen's Bureau bill on February 19 and the Senate failed to repass it. Only once Congress estimated that the Civil Rights bill, which became law six weeks later, was ineffective in accomplishing the purpose of preserving rights in the absence of broad, presidentially-sanctioned military authority to arrest and try individuals who violated blacks' civil rights, which the President took away in his April 2 proclamation of peace, did it again pass the Freedmen's Bureau bill.

This second bill, Trumbull told his wife in July, did "... not differ from the first one vetoed, ..." And it did not. It required the same duties of Bureau officials and the Army as the January bill had done in the enforcement of rights. Even more important, it left to the President the discretion as to when and under what rules military jurisdiction would be extended over the administration of justice in the southern states. The President had stated his estimation of the conditions in his April 2 proclamation as to trials by military commission which also implied its ability to arrest individuals for criminal offenses. The President's April 2 proclamation meant that the Civil Rights bill was the only legal authority for continued military oversight of the administration of justice in the South. In the August 20
proclamation the President restated this estimation which severely curtailed any disposition the Army might have had to assert itself vigorously to maintain law and order under authority the second Freedmen's Bureau Act conferred. 26

The President's April 2 proclamation meant that the Civil Rights Act and the 1865 Freedmen's Bureau Act were the only legal authorities for continued military oversight of the administration of justice in the South. But these two Acts left significant gaps in the administration of criminal justice in the South. They provided national oversight and remedy when national courts and its officers were open and fully organized to take jurisdiction of cases in which state authorities failed to provide adequate remedies or when the cases involved minor contractual difficulties between parties. But no nationally guaranteed remedy existed in fact when national courts were not open or fully organized. The President's April 2 proclamation took away any authority under his war powers the Army might have drawn upon, in absence of congressional legislation to fill in that gap, through trials by military commission.

And between April and July events in the South demonstrated that such military authority was sorely needed. The Civil Rights Act did not reach all cases. On May 19, four days before Freedmen's Affairs Committee
Chairman Thomas D. Eliot reported the second Freedmen's Bureau bill, House Ways and Means Chairman Justin A. Morrill received a report from a South Carolina unionist reciting the need for protection of Union men and blacks. "Now is there not some way in which we can have the protection of the military, and not be left to the mercies of these local laws, and their administration against Northern men? . . . We are told that the Civil Rights bill does not, -- at present, at least, reach our case --" The national courts in South Carolina were not fully open, and nobody in South Carolina, Commander of the Department of the Carolinas General Daniel Sickles told Stanton three days after the veto of the July Freedmen's Bureau bill, could "confirm the assertion of the President in his recent veto Message that the Civil tribunals of the South are open to all, without regard to color or race, -- affording ample redress for all private wrongs, whether to the person or property of the Citizen, without denial or unnecessary delay."27

The situation in South Carolina was merely less spectacular than Tennessee's recalcitrance. That state was the center of northern attention during the first three-quarters of 1866. In addition to being President Johnson's home state, she was likely to be the first rebel state whose representatives and senators Congress most likely would readmit. Tennessee's Attorney General
Wallace declared vociferously in public soon after Congress passed the Civil Rights Act that he would not enforce the Act. In late April a brutal riot occurred in Memphis, killing a number of persons, most of whom were Negroes. After the riots Wallace was true to his word. Negroes were butchered, Elihu B. Washburne, Chairman of the House select committee to investigate those riots, told Stevens confidentially in late May. "And yet no steps whatever have been taken to bring the murderers to justice."

As Congress adjourned in July the Committee filed its report which amplified Washburne's May comments. The report stated that there would be "... no safety to loyal men, either white or black, should the troops be withdrawn and no military protection afforded." The conditions in Memphis were only a specimen of the disregard for law. "The civil-rights bill," the report continued, "so far as your committee could ascertain, is treated as a dead letter." And, therefore, "The hopes based upon this law that the colored people might find protection under it are likely to prove delusive; for where there is no public opinion to sustain law, but, on the other hand, that public opinion is so overwhelmingly against it, there is no probability of its being executed." In view of such poor prospects for justice, the Committee recommended that the duty of the government should be "... to arrest, try, and punish the offenders [i.e., those who committed
outrages] by military authority," since public sentiment in Memphis prohibited civil authorities from punishing such individuals.\textsuperscript{29}

Congress, no doubt, was well aware of the results of the Committee's investigations in Memphis before the Committee filed its report, and surely the riots provided the most important reason for why the July Freedmen's Bureau bill was passed. This implied causal link between the riot and the bill is not to say that Congress passed the bill specifically to deal with the conditions in Memphis. A week after Congress passed that bill it agreed to a resolution re-admitting Tennessee's senators and representatives which terminated any Bureau or Army judicial functions in that state.

Rather, the Memphis riots served as a disquieting symbol of the fundamental disregard for law and order as Congress conceived it which still existed in the South. The fact that the riot occurred in a state on the eve of reinstatement of its regular constitutional relations with the Union, where the courts were presumably open and unobstructed in the exercise of their respective jurisdictions, probably should have caused Congress in 1866 to re-think its approach to creating the conditions of law and order in the South. But such a re-evaluation did not occur simply because events had not then transpired to demonstrate to a majority of Congressmen that the laws
they had passed were defective. The Civil Rights Act was ineffective not because it provided insufficient mechanisms for law enforcement officers to work with but because law enforcement officers had not implemented the powers which the Act had provided them and because individuals had not had the opportunity in some cases to use the remedies which the law provided. Washburne's report noted that the hopes that the Civil Rights Act provided the means by which blacks could secure their rights "were likely to prove delusive" not "they had proved delusive." The South Carolina Unionist pointed out that the Civil Rights Act did not yet reach his case.

Congress in 1866 worked under the assumption that if the civil courts could not enforce the law, the Army could -- and should. Section 14 of the second Freedmen's Bureau Amendment supplied to the Army the jurisdiction. According to Eliot, who managed the bill in the House, that selection "... embodies the provisions of the civil rights bill, and gives to the President authority, through the Secretary of War, to extend military protection to secure those rights until the civil courts are in operation. When the civil courts shall again be in operation the whole jurisdiction hereby conferred ceases. Before that time [i.e., the restoration of civil courts] there is no jurisdiction any where except in the military. Until that time there can be no redress of grievances and no
administration of the rights which under the law are now possessed by the freedmen but by military aid."30

Two features of congressional attempts to deal with the immediate situation in the South between January and July may be noted. First, Congress conceptualized a continuum which proceeded upward along a scale from utter disorder to complete order. The judicial sections of the Freedmen's Bureau bills dealt with conditions at the lower end of the scale. The Civil Rights Act worked amid conditions at the middle and upper portions of the continuum. They worked together to create a uniform administration of the law. The law declared that on all levels of government blacks should have the same treatment as whites before law. In the Civil Rights Act Congress had employed its traditional powers of creating and conferring jurisdiction upon courts in order to make effectual its declaration of a national citizenship which entitled persons of such a status to rights which states' laws and practices could not abridge or deny. By means of the Freedmen's Bureau bill it had made the Army and the Bureau part of this national judicial enforcement apparatus. Whether these military agencies were to serve in place of or as adjunct of national civil judicial authorities depended upon the condition of judicial affairs and of law enforcement in general in the South.

The second feature of Congress's actions between
January and July was the mode it chose to put into effect this military authority. Congress implemented this military enforcement of national law through traditional means which left intact presidential initiative for executing the law. What had changed materially was the legal authority under which the President would exercise his initiative. Since the President had declared that peace existed in the southern states, he had declared, in effect, that military functions in the South which existed under authority of his war powers were ended. Congress accepted this proclamation only as a statement which affected the legal authority for his use of his war powers, not Congress's. Thus Congress, recognizing a different condition of affairs in the South, could continue to legislate under its war powers and the Constitution's command that it guarantee to each state a republican form of government to give legal authority under the laws it passed to the President to continue the same functions previously sanctioned under his war powers. In this change of legal authority Congress fell back on the traditional constitutional position that the President executed the laws which Congress enacted. In taking this position, Congress assumed that it restricted the President's discretion, but it assumed correctly only if it equated execution of the law with the President's recognition that conditions required him to act "more vigorously" in order
to execute the law. The President could claim that he was executing the law, but that it was a matter of discretion -- of judgment of conditions -- as to whether he would use all of the authority the law conferred in furtherance of his duty. In effect, this is precisely what the President claimed in his April 2 and August 20 proclamations and in his second Annual Message as well as in his refusal during the last quarter of 1866, for example, to permit General Schofield to try Dr. Watson by military commission in Virginia for the murder of a black man.\(^31\) The logical extension of regulation of the President's discretion was to give him no discretion whatever as it did in 1867 in the Tenure of Office and the Military Reconstruction Acts and the rider to the Army Appropriations Act.

The major adjustments which occurred between President and Congress in 1866 were political. By March Congress was disabused of any notion that the President shared the same Reconstruction goals or even similar views on conditions in the South. Thus congressional Republicans, assuming the President was not with them, sought to stand on the political position they had carved out for themselves through their legislation, confident that the people would ratify it through their votes in the forthcoming elections. And the North did ratify that position, Republicans felt, showing Congress that its people
preferred Congress's not the President's view of Reconstruction imperatives.

Congress continued to legislate in 1867 much as it had done in 1866, transferring legal authority for Army and national court duties in the South from presidential to congressional war powers. The 1866 legislation in one sense, had, in effect, limited the President's discretion in the exercise of his powers, but in another sense had given the President authority to act since he had terminated his own authority in his April and August peace proclamations. In 1867 Congress conferred the authority the President would not exercise in 1866 on his subordinates whom it commanded to act.
CHAPTER X
FOR ALL PERMANENT PURPOSES

Constrained by political considerations and by preference for a state-oriented federal system, Congress took a cautious approach in 1866 towards legislating an intermediate structure which expressed its hopes for Reconstruction. Its most vigorous efforts were on behalf of equal civil rights for all persons. It made efforts on behalf of political rights only by implication through the Freedmen's Bureau which fitted blacks for political rights by educating them and creating, if imperfectly, an economic base for them through ownership or the lease of lands or through employment.

Congress evidenced similar constraints in formulating a permanent Reconstruction program embodying certain standards within the Constitution to which the southern states must conform once they returned to their normal relations within the Union. However, Congress was more forthright in advocating suffrage for blacks as part of the permanent framework than was true of its legislative efforts even if the means it chose in creating the intermediate framework were indirect. 1865 northern politics
and the Constitution, which left to states to decide their respective electoral requirements, dictated the course Congress followed in 1866. Northern politics made it impossible to change the Constitution in electoral matters, and Republican politics dictated early in the session that Congress must not challenge Johnson's policy of reorganization. Congress, therefore, had to come up with a plan including suffrage extension which made it to the South's advantage to extend the vote to black men. The only proposal which satisfied all these requirements was changing the basis or representation. As the last chapter noted, how Congress blended this element of their reconstruction plan with other elements, specifically those regarding civil rights, depended greatly on Andrew Johnson.

The elements of Congress's Reconstruction program were blended in the 14th Amendment which it passed and sent out to the states in June 1866. Sections one and two are of chief concern. Section one of the Amendment declared that all persons born or naturalized in the United States were citizens of the United States and prohibited states from abridging the privileges and immunities of citizens and from depriving all persons of due process and of equal protection of the laws. Section two "changed" the basis of representation. While it left the Constitution's original basis for apportionment of
representation intact, it declared that any state which denied the elective franchise for any reason to any male over twenty-one years of age would lose representation.

Section two, which Thaddeus Stevens considered the most important section of the Amendment, had a long and complex legislative history which reached back to the early days of the session. The Joint Committee on Reconstruction had proposed a similar measure as its first proposal for a 14th amendment; however, it did not pass the Senate. As finally adopted in the amendment which Congress sent out to the states, section two qualified section one, which the Joint Committee had also proposed in similar form earlier in the session as yet another amendment to the Constitution.

The earlier legislative history of section one makes clear why Congress believed the second section should qualify the first. Instead of prohibiting the states from abridging citizens' privileges and immunities and depriving persons of equal protection, the first section's antecedent had expressly granted Congress the power to legislate on behalf of equal protection, due process, and privileges and immunities, which included political as well as civil rights. In fact, the early version of section one distinguished citizens from persons in order to separate classes of persons who should be guaranteed both political and civil rights from those who should be
guaranteed only civil rights.3

This construction of the early version of section one offers evidence that Congress considered privileges and immunities, due process, and equal protection to have similar meanings. And the investigations of the foremost expert on the 14th Amendment, Howard Jay Graham, offers additional evidence that these three phrases meant essentially the same thing -- equal civil rights for all individuals regardless of their legal status as citizen or as person. According to Graham, the section's author, Ohio Representative John A. Bingham, had developed arguments in the antislavery debates of the 1850s on privileges and immunities, due process, and equal protection which attempted to render irrelevant court distinctions between the status of individuals as persons or as citizens in law upon which the courts could discriminate in the civil rights in which they were obliged to protect the individual. By proclaiming that no state could deny the privileges and immunities of citizens of the United States the clause created a national citizenship which entitled individuals of that status to be protected by the states equally with citizens of the respective states in the rights which they guaranteed to their citizens. States could not deny such rights to persons without denying due process and equal protection of the laws, which the section forbade the states to do.4
Recent scholarship has emphasized this last point. Professor Harold Hyman has argued convincingly that national citizenship did not imply uniformity of rights for all citizens and persons throughout the United States but meant, rather, that each state was bound to protect national citizens or persons within its borders equally in rights guaranteed and protected by the state to its own citizens. Professor Hyman's insight emphasizes contemporaries' conceptualization of the complex nature of the federal system which permitted diversity between nation and states and among states themselves. Moreover, it highlights the degree to which contemporaries employed state and local government operations to attend to the needs, wants, and rights of individuals.\(^5\)

Beyond Professor Hyman's explicit argument is the implicit assumption that equality of rights within each of the states and not the rights themselves was the major object of Congress's energies to secure, for by securing equality of rights, the rights themselves would be secured.\(^6\) National citizenship, Republicans argued, had always entitled persons of that status to equal rights, but equality had never been established in fact because the nation, they alternatively contended, had never enforced or had never had the power to enforce the privileges and immunities clause of the Constitution.\(^7\) Once equality was created by the nation's commitment to forbid states
from treating its citizens unequally, little else would need to be done since it would be absurd for a state to deny to its citizens or for citizens to allow their respective states to deny to them rights in order to deny the same rights to unpopular minorities or strangers.

Emphasizing the equality of rights rather than the rights themselves makes less important, if not irrelevant, the theoretical question of cataloging the privileges and immunities of citizens of the United States. National citizenship did not become the hinge on which national enforcement of all civil rights depended. Rather, national citizenship was a rationale for the nation's implementation of its jurisdiction to secure all persons equality before a state's law, and privileges and immunities obtained relevance only as they were practical measures for deciding whether a state's conduct met the test of providing equal protection and due process for all persons within its jurisdiction. 8

Chairman of the House Judiciary Committee, James F. Wilson of Iowa, stated the case precisely in response to Henry J. Raymond's objection to the Civil Rights Act that it gave the government the power to protect citizens in certain rights and remedies "within state jurisdiction." Wilson declared the government could not protect citizens in their rights without going into state jurisdictions, for "A citizen of the United States is always a citizen
of the state in which he resides; and the rights which he possesses as a citizen of the United States can only be secured to him by laws which operate within the State in which he resides."

Prior to the President's veto of the Civil Rights bill in March the Joint Committee had given relatively little attention specifically to defining national citizenship or to enacting permanent civil rights guarantees. The predominant judgment among Republicans was that Trumbull's bill filled the gap and that section one of his bill declared existing law, providing, in effect, a preamble for the rest of the bill which enforced the first section. The early efforts of the Committee were directed towards formulating proposals which "encouraged" the states to extend suffrage. These proposals centered on changing the basis of representation. During consideration of these proposals, Ohio Representative John A. Bingham early in January presented to the Committee an amendment which gave Congress the power to protect all persons in their rights of life, liberty, and property. This proposed amendment was referred to a subcommittee of five which had been appointed to recommend a proposal changing the basis of representation. Bingham had offered his amendment because he was convinced that while the 13th Amendment had made blacks citizens it had given no authority to Congress to legislate civil rights for them
or anyone. An effort to remedy the defect in congressional authority, his amendment emerged from the subcommittee on January 20 substantially altered by an addition which empowered Congress "to secure to all citizens of the United States, in every state, the same political rights and privileges, . . ." This form of the amendment was the first version in which the distinction between citizen and person occurred. Congress was empowered to protect all persons (some of whom were citizens) in their rights of life, liberty, and property and all citizens additionally in their political rights and privileges.

At the next session on January 24, the Committee briefly debated the proposal and decided to refer it to another subcommittee which reported on January 27 an amendment which re-phrased the original amendment but did not substantially alter its meaning. This rephrased proposal clarified the framers' purposes. It declared that Congress shall have the power to secure to all persons their rights of life, liberty, and property and to citizens the same "immunities" as those it secured to persons as well as "equal political rights and privileges." This amendment, therefore, empowered Congress to protect citizens and persons equally in the same civil rights and to secure to citizens their political rights and privileges. This proposed amendment was the clearest indication that the distinction between citizens and persons was based on
political rights. On February 3 the Committee brought forward Bingham's amendment for discussion. Bingham immediately moved a substitute which declared that Congress shall have the power to enforce the privileges and immunities section of the Constitution (Article four, section 2) and the due process clause of the Fifth Amendment. Although the text of the proposed amendment did not indicate that the distinction between citizens and persons was based on political and civil rights guarantees for citizens and civil rights guarantees for all persons, Bingham's explanation of the amendment's purpose to the House suggests strongly that the amendment's distinction between citizens and persons was made on that basis. 11

Congress debated Bingham's amendment relatively little, and its consideration occurred at an unpropitious time in the session for its enactment. The President had just vetoed the Freedmen's Bureau bill. Congress was in a turmoil over exactly what the President's veto indicated about his position on Reconstruction. Congress still based its major reconstruction thrusts on the Civil Rights bill which most of its Republican members believed Congress had the power to enact. That bill expressed Congress's judgment that civil rights protections requirements of states were all that was politically possible at the moment. Bingham's proposed amendment merely conferred on Congress the power which it believed it already
possessed. Further, the Ohioan's amendment seemingly granted much broader authority to regulate political rights which states jealously guarded as one of their sacred prerogatives. The temptation would be to confuse the amendment's grant of power with implementation of that power to regulate state political affairs. At the same time, the doubt arose that the amendment served no practical purpose, for implementation of the power depended upon the political complexion of Congress. Majorities unsympathetic to equality of civil and political rights could block implementation of the power the amendment conferred on behalf of equal rights. Twelve days after the President vetoed the Freedmen's Bureau bill, Roscoe Conkling moved successfully that Bingham's amendment be postponed until the first week in April.¹²

The President's veto of the Civil Rights bill on March 27 intervened before the appointed time arrived to renew consideration of Bingham's amendment. Among the grounds which the President cited for vetoing the bill were that Congress had no power to declare who shall be citizens of the United States and that it had no power to enact civil rights guarantees.¹³ The President's arguments justifying his position left Congress unconvincing. They did demonstrate that men of different principles who possessed different opinions of the constitutionality or wisdom of the civil rights law might repeal
it, if they gained political power. Thus little permanence lay in legislative enactments which were not securely and unmistakably founded in the fundamental law of the Constitution. 14

The House did not resume consideration of Bingham's amendment at the appointed time in April, but the Joint Committee when it met on April 16 for the first time since the President's veto, began consideration of several propositions regarding civil rights, suffrage, non-payment of the rebel debt, and proscription of rebels from office-holding and voting which it intended to formulate into an amendment to the Constitution that expressed Congress's plan for reconstruction.

On April 25 Bingham succeeded in having the committee adopt as a fifth section what in the amendment's final form was section one (save for the citizenship clause). This section was deleted temporarily but re-instated as section one at a later session after section two of the final amendment was added changing the basis of representation. 15

The development of section one during the course of the session demonstrates two basic factors in Congress's consideration of permanent reconstruction guarantees. First, national citizenship for blacks was irrelevant in terms of the operation of section one of the amendment. Congress was concerned with equal protection to all
persons in the civil rights a state guaranteed its citi-
zens. Regardless of whether a state recognized blacks as
citizens, it was obliged to protect them equally with
its own citizens in civil rights because of the due pro-
cess and equal protection clauses. The citizenship clause
was added only as a response to the challenge which
Andrew Johnson had made in his veto of the Civil Rights
Act. Johnson's veto had not initiated the controversy.
Democrats and some Republicans had argued that the 13th
Amendment did not confer citizenship on blacks, and that,
therefore, Taney's Dred Scott opinion controlled the
question of citizenship. Trumbull's Civil Rights bill
section one declaration that birth and naturalization con-
ferred national citizenship responded to this argument as
a declaration of what the Illinois Senator believed the
13th Amendment had signified. 16

The second basic factor was that Congress was
interested neither in creating a national standard for
rights nor in working a great social revolution throughout
the country. Trumbull's statement of rights in section
one of the Civil Rights Act included the irreducible
minima that he believed all free governments guaranteed
and protected their citizens in. This declaration, there-
fore, implied uniformity of rights insofar as the nation's
practice was concerned within its own jurisdiction. But
as far as a state's practice went the declaration's main
thrust was towards equal protection of the law. The character of the rights which Trumbull's bill had listed primarily referred to rights within the judicial system. The rights to inherit, lease, sell, hold, and purchase real estate were the major exceptions to the general character of rights for which the bill provided, but they did not affect the social organization, for the bill did not require individuals to lease to, to sell to, or to will property to people whom they did not wish to do so. Thus the Civil Rights Act and section one of the 14th Amendment were designed to create the conditions for equality before the law at the local level while leaving untouched a prescription for conditions of social equality. 17

But this strategy was only one part of their design which included suffrage-extension which reinforced the state-based strategy for civil rights guarantees. Suffrage extension was also an important part of Congress's consideration, and like civil rights, suffrage extension was advocated within the context of state extension of the right to vote.

Because of the aforementioned political considerations, the suffrage-extension issue was cloaked in the garb of changing the basis of representation. Constitutional amendments to change the basis of representation were proposed earliest to be part of any permanent program for Reconstruction which Congress should adopt. It placed
Republicans' plans for suffrage extension on northern alarm over the prospect of southern states re-entering the national counsels with increased political power. Northern alarm had begun to grow in 1864 when the opinion became firmly set that slavery would be a casualty of the War.

The South's political power, therefore, would grow since each former slave no longer would be counted as three-fifths of a man but as one man in apportioning representation among the states. Moreover, the prospect seemed unjust since without national requirements the southern states made the decisions on their respective electoral qualifications and most likely would continue to disfranchise its black populations, which in two southern states composed over fifty percent of the population. The notion obtained that political power in the national counsels should be proportionate to the numbers of persons that each state allowed to participate in its political process. This sentiment found expression in the resolutions of the Union conventions in Minnesota and Wisconsin which called for Congress to change the basis of representation from population to voters. Since the basis of representation determined how political power would be apportioned among the states, Republicans hoped to use it as a lever for forcing the southern states to grant blacks the vote -- an act they believed would
redirect southern political affairs to bring them in harmony with the nation (i.e., the North). 18

However, when Congress met, it soon became evident that considerable diversity of opinion on the subject existed among the members of the Joint Committee which was charged with developing a permanent plan and which first discussed the subject, and later, in Congress. The Joint Committee of Fifteen grew out of a resolution a committee of seven proposed to the December 2 Republican caucus. Thaddeus Stevens championed adoption of the resolution before the caucus and later before the House. The resolution creating the Committee commanded it to investigate conditions within the southern states to see if they were entitled to representation in Congress "... with leave to report at any time by bill, or otherwise. ..." The resolution implied that the Committee's findings on conditions in the South would determine what proposals it made in form of legislation to Congress. Instead of beginning its investigative activities right away, the Committee put the cart before the horse and considered proposals for constitutional amendments which changed the basis of representation. 19

Stevens led off on January 9 by proposing a joint resolution basing representation on legal voters. The amendment declared that no one could be considered a legal voter who was not a born or naturalized citizen of
the United States and not twenty-one years old. The second section of the amendment authorized Congress to provide for taking a census of the number of voters. The Committee devoted the remainder of the day's session to discussing Stevens' proposal. It amended the proposal to make the basis male citizen voters and rejected an amendment to tack on a literacy qualification.

The next session of the Committee on January 12 produced proposals for changing not only the basis of representation but also the basis of taxation. The House's Justin S. Morrill of Vermont proposed that representation and taxation be based on the total number of persons within each state "... deducting therefrom all of any race or color, whose members or any of them are denied any of the civil or political rights or privileges." Oregon Senator George H. Williams gave notice of his intention to offer a substitute which, like Morrill's, based representation and taxation on population but excluded Negroes, Indians, Chinese, "and all persons, not white, who are not allowed the elective franchise by the Constitutions of the States in which they respectively reside." Conkling gave similar notice to offer a plan which was the version the Committee eventually reported to Congress for its consideration and adoption. It based representation and taxes on population, as the other proposals had done, on the condition that when a state abridged because of race
or color civil or political rights, "all persons of such race or color shall be excluded from the basis of representation or taxation." Massachusetts' George S. Boutwell, like Conkling, proposed to base representation and taxation on population but preferred to declare outright that no state could "... make any distinction in the exercise of the elective franchise on account of race or color."²⁰

All of these proposals represented the multitude of competing opinions on affixing the basis of representation. However, they were virtually unanimous, save for Williams' proposal, in linking the basis of representation with what the state did in protecting both civil and political rights. The major differences were over the correct basis for changing representation and how representation would be adjusted when states denied equal rights. Should representation be based on the number of voters, of citizens of the United States, or of persons? Should the amendment actually only change the basis of representation without offering states "incentive" to extend suffrage or equal civil rights by excluding Negroes and other non-whites from the basis of representation? Should the states be penalized for refusing to confer equal civil and political rights on persons of a particular race or color by reducing the state's representation equal to the percentage of persons of such race or color to the total population of the state? Should the
amendment declare directly that no state shall make a distinction because of race or color in the elective franchise?

The Committee quickly answered part of the first question. Reverdy Johnson proposed a resolution which declared that the basis of representation be legal voters. The vote was close, 6-8, in favor of rejecting the resolution. But since opinion was so divided, Morrill proposed and the Committee agreed that a subcommittee of five members including the chairmen on the part of the respective houses be appointed "... with instruction to prepare and report to this Committee a proposition upon that subject." Although the subcommittee was created to receive and to recommend only proposals for changing the basis of representation, Bingham moved that a proposal he offered conferring Congress with the power to protect all citizens equally "... in their rights of life, liberty, and property," be referred to the subcommittee, to which the Committee agreed.

The subcommittee did not report until January 20 when Fessenden, on its behalf, recommended three propositions, "... the first two as alternatives[s] ... one of which, with the third ... to be recommended to Congress for adoption." The first two proposals concerned the basis of representation and taxation. The first most closely resembled Boutwell's, for it based each state's representation and taxation on the number of citizens of the
United States within its borders and declared that all states' laws or constitutional provisions were inoperative and void which distinguished between citizens, according to race, creed, or color, in political or civil rights.  

The second alternative, like the first, based representation and taxation on citizenship but proposed to reduce a state's representation in proportion to the numbers of a particular race, creed, or color whose members were denied the elective franchise. This alternative differed from the proposal Conkling had offered in that it did not include denial of civil rights as cause for reduction of representation.

The third proposition, which the subcommittee recommended be sent to Congress with one of the other two, was Bingham's. It contained the important addition that Congress have the power "... to secure to all citizens of the United States, in every State, the same political rights and privileges."

As its first motion, the Committee entertained and adopted, when it began discussion of the proposals, Stevens' recommendation to separate the third alternative from whichever of the others it adopted and consider it separately. Two-thirds of the Committee agreed, with dissents from Fessenden, Harris, Howard, and Grider. As was true during most of the Committee's sessions, Reverdy Johnson was absent. Stevens then moved again to adopt
the second of the alternatives as the basis for the Committee's action. The motion succeeded with Harris joining the majority leaving Fessenden, Howard, and Grider in the minority. 22

Between the first and second alternatives, the second was the least radical. Both proposals were alike in basing representation and taxation on the number of citizens. However, the first was much more radical than the second in that it declared all states' laws void which made a distinction in political or in civil rights because of race, creed, or color. The second proposal simply declared that a state's representation would be reduced by excluding all persons of a race, creed, or color whose members had been denied the elective franchise. The first proposal was more radical than the second because it forbade discrimination in political rights and privileges which included not only voting but also office-holding and jury service. The second proposal, on the other hand, covered only the right to vote. The second alternative, therefore, was the least radical of the two, and certainly less radical than Bingham's proposition, both from the standpoint of the powers it conferred on the national government and the limitations it placed upon the states in regulating suffrage extension.

Before the Committee ordered Fessenden and Stevens to recommend the proposal to Congress, it adopted a
Conkling amendment changing the basis from citizens to persons, "... excluding Indians not taxed," and a Morrill amendment deleting "creed" as one of the distinctions for which the penalty of reduction of representation would be invoked. The third proposal, Bingham's, remained in committee where it underwent discussion and substantial revision during the next three weeks. Stevens reported to the House the Committee's recommendation on changing the basis of representation on January 22. He preferred quick action on the measure since twenty-two state legislatures were then in session, some of which would adjourn within the next two or three weeks not to meet again for another two years.

Opposition quickly developed among Democrats and some Republicans. Debate commenced and continued for the next week. The debate demonstrated that while virtually all Republicans supported the basic goal of "encouraging" the states to extend the franchise to blacks, division existed over how to accomplish that goal as well as over whether the Committee's recommendation would achieve the goal.

Another objection to the Committee's proposal rested on its retention of persons in fixing the distribution of a direct tax whom it had removed from the basis of representation if their states had excluded them from voting on the basis of their race or color. But the
most serious reservation some Republicans had to the proposed amendment, which could be applied with equal force to other proposals, was that it penalized states only if they discriminated on the basis of color or race. No penalty would be invoked if states required, for example, property ownership for voting and then denied blacks the right to own property. Such state evasion was not an unlikely possibility in the absence of civil rights legislation requiring the states to treat blacks in the same manner as they treated whites in the rights they conferred or denied. And developments in the previous fall in the southern states demonstrated that those states had no intention of making blacks equal with whites in civil rights.  

This possibility for evasion was the major weakness in the proposed 14th Amendment and offered a compelling reason for Republicans to support civil rights legislation. Events in the South prior to the meeting of Congress obviated the necessity for civil rights legislation; Republication hopes to make the South "voluntarily" extend suffrage commanded it, and the ratification of the 13th Amendment in December 1865 made such legislation possible. The legislation forthcoming the next few months required the states to confer on and to protect blacks equally with whites in their civil rights, but like the apportionment amendment, it left to the states to make the guarantees
effective. Both the apportionment amendment and civil rights legislation provided remedies for denial through national action. In the former case the nation would act to reduce a state's representation for its failure to treat blacks equally with whites in its voting requirements. The latter allowed individuals to appeal to the national government when a state denied to them equal protection of the law.

Amidst this diversity of opinion on the merits of the proposal the House voted on January 30 to send it back to the Joint Committee without instruction. Next day Stevens brought it to the Committee's attention. The Committee's only alteration was to drop the reference to direct taxes in the first clause. The same day Stevens again brought it before the House, where it passed with virtually no discussion.29

Republicans were willing to pass the measure despite their opinions of its shortcomings because they believed it was not a self-sufficient measure. As Minnesota's Ignatius Donnelly described it, the amendment was not conceived "... as a finality, but as a partial step, as one of a series of necessary laws; not, as I have heard it termed, as a 'compromise.'"30 Although it was not a compromise, it surely was a round about way of accomplishing what most congressional Republicans desired -- a constitutional amendment which forbade states from denying the
right to vote on the basis of race or color.

In adopting this course Republicans had measured northern politics and found there insufficient support at that time for making a strong and direct statement on suffrage extension. Illinois's Henry Bromwell correctly described the situation when he pointed out that one thing could become part of the Constitution and quite another would satisfy Republican members of the House. However, "Yielding that point," as Maine's F. A. Pike told the House, "half-way measures are to be adopted, something in the nature of dodges are to be incorporated into the Constitution, and the question is narrowed down to the consideration of what kind of one we shall put in." 31

In passing the first version of the 14th Amendment, the House, therefore, had yielded the point that Congress through the Constitution could not directly prohibit the states from basing the right to vote on race or color and resorted, therefore, to some sort of "dodge" for accomplishing indirectly what it could not do directly. It had narrowed the question to what sort of dodge it would insert into the Constitution. Perhaps more important for the future, it recognized that this statement on suffrage extension was only temporary. Republicans would make more vigorous efforts later, although the norm they took and the degree of vigor with which Republicans advocated them depended heavily on future political developments.
When the proposed amendment reached the Senate it underwent similar scrutiny. As in the House, the Senate's members offered many alternative proposals for affixing the basis of representation. Voters, male citizens of the United States, and electors of the most numerous branch of the state legislature were moved as alternatives to the Joint Committee's proposal.\textsuperscript{32} Other amendments suggested that the Committee's basis of population standard be kept but that a state's representation be reduced in proportion the number of voters, electors, or citizens denied the vote on the basis of race or color, or of any basis, save for participation in rebellion or other crime, bore in proportion to the total number of male voters, electors, or citizens qualified under the laws of the state to vote.\textsuperscript{33} Other Senators offered proposals forbidding the states to discriminate on the basis of race or color in affixing its voting requirements.\textsuperscript{34}

After debating these proposals for over a month the Senate decided on March 9 to report the Joint Committee's proposal from the Committee of the Whole to the Senate and there to take a vote.\textsuperscript{35} The Senate failed to pass the amendment but such failure indicated less the lack of support for the techniques of attempting to secure suffrage extension through changing the basis of representation than the considerable diversity over the precise form the technique should take. The Senate voted with
the understanding that a motion to reconsider the vote would be made, which the Senate agreed to adopt providing the amendment did not pass, in order to put the proposal again before the Senate so that still other propositions to amend the Committee's proposal could be made. John B. Henderson of Missouri, who favored a direct statement prohibiting the states from affixing voting qualifications on the basis of race or color, stated that he would vote against the Joint Committee's amendment in order to move the reconsideration. The vote was 25-22 against adopting the resolution. Henderson, true to his word, voted in the negative and moved reconsideration to which the Senate agreed. Six other Republicans (excluding Cowan, Dixon, Doolittle, and Willey who voted fairly consistently with the Democrats) also voted against the amendment. Four of these Republicans, like Henderson, had favored a direct statement prohibiting the states from discriminating on the basis of race or color in their voting requirements. The two other Republicans, Stewart and Lane of Kansas, had never voted in favor of such an amendment, but they voted against the Joint Committee's amendment with the understanding that the vote would be reconsidered and on the assumption, therefore, that if the amendment failed they would get a chance to vote on a proposal which James R. Doolittle intended to put forward after the vote was taken and a motion to reconsider made and adopted.
Shortly after the Senate again opened the floor to amendments, it postponed further consideration of the constitutional amendment until the following week when it took up the debate once more for a day and thereafter dropped further consideration. Nothing more was heard of the amendment in the Senate until the Joint Committee in April proposed and the House modified, adopted and sent to the Senate another proposal for a fourteenth amendment which included a section to change the basis of representation.

The version which Congress eventually adopted as section two of the 14th Amendment which it sent out to the states in May demonstrated by its differences from the original proposal how far the debates had taken Congress. Agreement had taken nearly five months. The proposal reflected a compromise among the various proposals which had been offered to "dodge" the original question of the extension of suffrage. Section two based representation on the basis of population, as had the Joint Committee's original proposition. Unlike the Committee's version, however, the section declared that when any state denied to any male citizen of the United States the right to vote for any reason other than for participation in rebellion or other crime in any state or national election, its representation would be reduced in proportion to the number such male citizens so denied bore to the total
number of male citizens of the state.

Basing representation on voters, citizens, or electors had received the strongest support because they offered the simplest way of making a state's political power in the national forums conform to the numbers of voters, citizens, or electors within the state in relation to all other voters, citizens, or electors of all other states. These propositions had problems. First, no one was represented who could not vote. This meant that not only unenfranchised men but also women, children, and foreigners were unrepresented. But the Constitution's provision that direct taxes be based on population was left intact. Thus, Republicans felt, one of the cardinal principles of the Republic that there shall be no taxation without representation was abridged. This was the main arguments some Republicans used against these propositions. Basing representation on voters also was unpopular among New England's representatives since, they argued, the numbers of voters there was proportionately lower to the total population than was true of the western states. Furthermore, some members argued that the proportion of voters in the North to the total population in that section would be lower to that of the southern population since in the North foreigners were represented but could not vote.

A convenient solution to these problems was to base
representation on population but to reduce representation in proportion that the numbers of male citizens whom the state denied the vote for any reason save for participation in rebellion or other crime bore to the total number of male citizens within the state. This course continued the Constitution's original basis of representation but made a state's political power the proportion of the number the voting citizens within her state to the rest of the voters in the nation, meant that states could not deny the right to vote to any citizen for any reason without losing representation, removed the border states' objection to such a proposal by allowing disfranchisement for participation in rebellion, and, most important, tied citizenship to voting.

All the proposals for changing the basis of representation to encourage the southern states to extend suffrage had one major weakness. They provided no remedy if those states decided to forego enhancing their political power in national forums in order to control politics at the local level. This objection was raised often in the course of debates on the amendment; however, most Republicans rejected it since current events suggested the southern states were most anxious to resume participation in the national counsels. If the South exhibited such anxiety to participate she would be equally anxious to enhance her power.42
There was another reason why Republicans were not too concerned about this weak spot in their amendment. While they were most anxious to complete Reconstruction as quickly as possible, they were unwilling to sacrifice sound and permanent guarantees for the future welfare and safety of the Union to a hasty restoration. In their minds, the welfare and safety of the Union were tied directly to the welfare and safety of blacks in particular and loyal Unionists -- both black and white -- in general. The logical capstone of such permanent guarantees was a national declaration of universal suffrage. In the meantime a four-pronged effort would have to be made: to educate the North as to the benefits of allowing black men to vote, which made a national declaration possible; to educate blacks which was the fundamental prerequisite for their exercising the franchise; to limit the South's political power in proportion to the numbers of voters she allowed to participate in her political processes; and to protect blacks in their civil rights through the instrumentality of the national authority.\textsuperscript{43}

Suffrage and civil rights suggested two differing, if complementary, modes of how the black man could be protected in his rights. Although both modes emphasized that blacks were free men and therefore responsible before law, they differed in one important respect. Conferring civil rights meant that a person possessed the means of
protecting his life, liberty, and property within the existing legal structure. It meant not only that he could protect himself to the extent that he knew how to operate within the system on his own behalf but also that the state as the chief guardian of the legal system was bound to recognize his rights to the extent of providing the individual with the same guarantees as it gave to other individuals who claimed similar protections. Two features of protecting individuals through civil rights grants, therefore, can be noted. First, the burden of protection rested with the individual in his ability to protect his liberties through the courts and with the state to see that uniformity in the rights thus conferred prevailed. Second, civil rights grants allowed the individual to protect himself within the existing legal system but allowed him no means of changing the system to conform with his own desires, purposes, and needs.

Conferring suffrage, on the other hand, meant that the individual was given the means of protecting himself, for he not only possessed the power to change the existing legal system to suit his needs but also could elect individuals who operated the institutions which composed the system. Thus individuals who possessed the franchise had a say in determining the liberties he possessed and how those liberties would be guaranteed.

New Hampshire Republican Senator Daniel Clark expressed
the difference between the two modes in February 1866: "You may open the courts to him by law, you may make him a competent witness, you may give him land for a house, you may sweep away all distinction by law between him and others, and leave him at liberty to go and to come, to sue and be sued, to contract and labor when and where and how he pleases. . . ." Congress could go further. It could give the black man schools and education and command the Freedmen's Bureau to protect him, ". . . and still, in my judgment, you will have failed to do what most of all you need to do -- put the black man in a position to protect himself." Congress in doing everything but conferring the vote ". . . will have fitted him to use his weapon, but not have supplied him with the weapon. To do this fully you must give him the ballot, make him a part of the Government, . . . Arm three or four million people with this weapon, and they will protect themselves and teach their oppressors caution and respect."44

Implicit in the theme of protecting one's self through voting as with civil rights was a conceptualization of politics and law working at the most local level, what might be called an inductive view of the political and legal systems. Blacks, the overwhelming majority of whom shared a common experience and background (i.e., were victims of slavery) could be expected through voting to make choices which rejected the worst features of political
life in the South and of their states' legal systems. These choices would be reflected in the individuals whom they chose to represent them in their city, state, and national offices. These individuals would make and administer the laws according to the wishes of the people who elected them. While the greatest benefit to blacks would accrue at the local levels in the proper administration of the laws, choices of representatives made in legislative districts would aid the nation since blacks would reject individuals who spoke for the old slave system which had brought the nation near disaster in 1861.45

While the view was naive the logic was compelling. It was based on the assumption that voting power was not only political power but also social power, for voting was the only way an individual together with his fellows expressed the will of the communities in which they resided. No individual could be taken for granted, for factions which contested over differing views of what the community's aims or interests ought to be had to persuade, convince, and organize as many members of the community as possible to endorse through votes their respective positions in order to achieve victory. "But give him [i.e., the black man] the ballot, and he will have plenty of white friends," Nevada Senator William Stewart told his colleagues in May 1866, "for the people of the United States love votes and office more than they hate [N]egroes."46
Moreover the theme of protection through suffrage, like civil rights protections, was the product of an intensely conservative view of the role of the national government, for if blacks were able to take care of themselves, either by voting or through exercising their civil rights, little need existed for the national government to do anything on their behalf. Suffrage extension, unlike civil rights guarantees, was radical from the local point of view, however, both because it critically affected the future course of local political and social affairs and because it implied that the selection of who could take part in the political life of the community was removed from control of entrenched local politicos. For these reasons the North resisted suffrage extension and for the same reasons it believed it to be the ultimate solution for the South.

The net effect of congressional Republicans' efforts on behalf of civil and political rights in 1866 was to reinforce the basic state-oriented configurations of the federal system. Congress correctly recognized that the condition of affairs at the local level would ultimately determine the outcome of Reconstruction. Yet insuring permanence had meant passing constitutional amendments which affected the entire nation, and for that reason such amendments expressed what Congress felt was politically possible in the North, not what the conditions in the
South required. By 1867, conditions in the South vindicated Congress's 1866 judgment of what remedies the conditions in the South required but had been politically impossible to achieve. And freed of the political constraints of maintaining accord with Andrew Johnson for the sake of the Republican party, Congress brought the nation's power more directly to bear on local southern conditions to change their political configurations. These changed configurations, Congress believed, would make possible the establishment and maintenance of the conditions of law and freedom as Congress saw it. The 1867 Habeas Corpus Act fitted into this pattern as one aspect of the effort to constrain the deleterious effects of local officials who observed the form of the law but not its spirit.
CHAPTER XI

'THE FRIGHTFUL CARNIVAL OF BLOOD NOW RAGING IN THE SOUTH SHALL CONTINUE NO LONGER'*

By the time the 39th Congress convened for its second session in December 1866, four months had passed during which events transpired to indicate the success of its 1866 Reconstruction efforts. Republicans noted that northerners overwhelmingly endorsed Congress's program. However, Republicans looked with much less satisfaction to the South to find salutary effects of their program in that section of the country.¹

By 1867 Congress faced two problems its solutions to which determined the ultimate success of Reconstruction. The first problem was Andrew Johnson. By the new year the difficulty between Johnson and Congress was not primarily political but constitutional. Congress's 1866 Freedmen's Bureau Amendment and Civil Rights legislation had failed in part to remedy conditions in the South because Johnson, viewing conditions there from a different perspective, had refused to use the powers which that legislation had

*Congressional Globe, 39th Cong., 2nd sess., 1104 (Garfield) (February 8, 1867).
given him. This failure was particularly evident in his checkrein control of the Army's military court jurisdiction over civilians. The result of Johnson's course was that Congress's 1866 legislation had never been fully implemented. Thus its efforts during the second session would be directed in part toward wresting administrative control away from the President and placing it with the President's subordinates, who, Congress felt, would exercise the power which Congress conferred upon them.  

The second problem the 39th Congress faced during its second session was southern recalcitrance. This resistance took two forms, The first was political. Southern state legislatures refused during the fall and winter of 1866 to ratify the proposed 14th amendment. These rejections expressed the southern states' boldest and most direct statement of continuing resistance to the national government. The refusals to ratify combined with the second type of southern resistance -- outrages against blacks -- brought forth from Congress the Military Reconstruction Act. Rather than a sharp departure from Congress's efforts during the previous session, this Act continued the two major, interconnected thrusts which had distinguished its 1866 Reconstruction program -- redirection of political affairs and the maintenance of equal and ordered liberty under law. In order to secure these
thrusts, Congress, in the first Military Act, divided the southern states into military districts in the manner that they had been divided in establishing the Freedmen's Bureau. Local civil tribunals still exercised jurisdiction in the trial of cases subject to the decision of the military commander that such exercise of jurisdiction was consistent with securing justice. The Army was given discretion in trying individuals by military commission if the commander thought that justice could not be obtained in state courts. Appeal routes from the state courts to the national courts were left open, although it was not clear that an individual tried by a military commission could appeal the commission's decision to the national courts. 

In section five of the Act, Congress did directly what it had attempted to do indirectly in 1866 -- to confer suffrage on blacks. This Act did not abolish the Johnson governments. But through orderly constitutional processes in which a changed and enlarged political constituency expressed its will, the Johnson governments were to be superseded. The new governments, Congress hoped, would express the will of a majority that accepted the basic principles of the 14th amendment and would enforce those principles in the day-to-day administration of the state and local law. 

The Act gave military commanders authority to try
civilians, a fact of basic interest to historians who wish to understand Congress's 1867 conceptualization of the problems of the administration of justice in the South. First, the section more precisely defined the jurisdiction Congress had granted the Army the previous year in section 14 of the Freedmen's Bureau amendment. That section had conferred jurisdiction on the Army to extend military jurisdiction and protection over "all cases and questions" concerning civil rights. As Chapter 9 discussed, the congruence of the Civil Rights and Freedmen's Bureau Acts suggested that the jurisdiction the Army exercised under the latter Act would be implemented when the national courts were not open or able to take jurisdiction. The 1867 Act specifically limited military jurisdiction to administration of local law. Section three ordered the military commander "to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals. . . ." This restriction to enforcement of local laws implied that the national courts were organized and in operation. Yet that such jurisdiction was granted at all supports the fundamental proposition that Congress conceived the problem of securing justice in the South as hanging on what happened at the local level and that such a problem still remained.
At that level by 1867 not only was enforcement of the law a problem but also traditional procedural aspects of due process were abused. Southern courts followed the forms of justice but not the substance. This latter aspect of maintaining law and order in the southern states together with the necessity to prevent outrages probably was most important in accounting for the jurisdiction Congress granted the Army in the Military Reconstruction Act. Moreover, for the same reason Congress had passed a month before the second Habeas Corpus Act of the session.

It is difficult, if not impossible, to explain why Congress passed the second 1867 Habeas Corpus Act solely from examining its legislative history. The Act was debated very little in Congress. Its origins lay in the previous session when Ohio Representative Samuel Shellabarger introduced a resolution the day after the 13th Amendment became part of the Constitution, requesting the Judiciary Committee to draw up legislation to secure to blacks their freedom. In early January House Judiciary Chairman, James F. Wilson of Iowa introduced a bill extending the privilege of the writ to all persons and conferring on national courts jurisdiction by means of the writ to inquire into all questions affecting the liberty of individuals. This bill, in slightly amended form, became the second 1867 Habeas Corpus Act. The
House passed the bill. The Senate let it carry over to the next session, when in late January it too passed the bill, and the President signed it into law.\textsuperscript{7}

The 1867 Act, most historians of the writ have agreed, marked a watershed in the writ's development.\textsuperscript{8} The Act changed fundamentally, so the story goes, the writ from being a pre-trial remedy only within the national court jurisdiction by which the petitioner could have tested the legality of his commitment to a pre- and post-trial remedy by which national courts could review state court decisions to commit for trial or to convict for crime. As the introduction discussed, prior to 1867 only national officers who had been arrested by state authorities for offenses allegedly committed in the performance of their duties could apply for the writ. The 1867 Act extended this remedy to all persons who claimed a right or title under the Constitution, its laws, or treaties. Moreover, the Act did not change the character of the writ from primarily a pre-trial to a post-conviction remedy. Rather subsequent Supreme Court constructions of the Act were responsible for the change which resulted from its use between the two jurisdictions of the federal system. While the national courts' post-conviction review of states' administration of criminal law by means of habeas corpus was potentially revolutionary, it could not compare with pre-trial review
which altogether aborted state criminal processes.

The Supreme Court began transformation of the writ into a post-conviction remedy nearly twenty years after Congress passed the Act. But the context of events in which Congress passed the Act in 1867 suggests that it conferred the post-conviction jurisdiction as a remedial measure in order to allow the national courts to reach cases already completed in state courts during the previous year which could not be removed for one reason or another from those courts to the national courts under section three of the Civil Rights Act and in order to provide a means of checking on the fundamental fairness of state judicial systems.

The thrust of the Civil Rights Act removal section, and the entire Act, had been to provide a national judicial remedy when individuals were denied their rights in state courts because of unequal state laws. In 1865-6 the prohibition or proscription of Negro testimony was the most conspicuous example of unequal state legislation which affected the rights of Negroes in state courts. Some southern leaders in late 1865, Carl Schurz had reported to President Johnson, were totally opposed to the admission of Negro testimony. However, southerners, anxious to remove Negroes from jurisdiction of the Freedmen's Bureau and to bring them within the jurisdiction of state courts, dropped their opposition to the admission
of Negro testimony "... and endeavored to make the admission of negro testimony in the State courts palatable to the masses by assuring them that at all events it would rest with the judges and juries to determine in each case before them whether the testimony of negro witnesses was worth anything or not." Few states in 1866 corrected their laws to allow Negroes the same rights as whites to testify, but such formal correction was unnecessary because of the Civil Rights Act. And most states apparently acquiesced to permit Negroes the same right as whites to testify in their courts.10

However, the Act did not take into account a situation where a black man could testify but the jury disregarded his testimony. Such situations were predictable. Schurz had reported that he had queried southerners, "'Do you think a jury of your people would be apt to find a planter who has whipped one of his negro laborers guilty of assault and battery?' The answer almost invariably was, 'You must make some allowance for the prejudices of our people.'"11 Plainly Negroes could expect small measures of justice in southern courts from prejudiced juries. Schurz might be accused of having an acute case of vindictive and cynical radicalism had not evidence forthcoming from the Joint Committee on Reconstruction, the Assistant Commissioners of the Freedmen's Bureau throughout 1866 and early 1867 amply confirmed his observations.
Witnesses before the Joint Committee testified that blacks were not likely to receive justice from juries and that Union men and northerners could expect the same treatment. Moreover, the question of the probable disposition of southern juries to give fair verdicts was impressed upon Congress as a result of the problem of what to do about Jefferson Davis and other rebel leaders. Witness after witness from Virginia before the Joint Committee replied negatively when queried as to whether a jury in that state could be empanelled which would convict a rebel leader for treason. U.S. District Judge John C. Underwood's response was representative: "It would be perfectly idle to think of such a thing. They [i.e., Virginians] boast of their treason, and ten or eleven out of the twelve on any jury, I think would say that [Robert E.] Lee was the noblest man in the state. . . ." Other witnesses added that any jury which convicted Davis would have to be packed.

Members of Congress received reports other than those presented in the testimony before the Joint Committee that members of any jury which convicted the former President of the Confederacy would jeopardize their personal safety. Thus individual prejudices and community sentiment joined to contaminate the traditional system of justice and to raise doubts in the minds of several Congressmen, at least, as to the integrity of the state and local legal systems in the South.
A perplexing question is why Congress did not take direct action in 1866 to counteract the threat of biased juries to the administration of fair and impartial justice in state courts. Some members of Congress and of the administration debated whether Davis could be tried in the District of Columbia or by military commission for treason, or, alternatively, for complicity in Lincoln's murder in order to avoid the Constitution's requirement of a jury trial. But as for the major problem Congress faced for securing the safety of and justice for Union men and blacks in the South the question what to do about prejudiced juries was not central to Congress's considerations during 1866 of legislation to provide the requisite protections for these two classes of persons.

Yet to fault Congress for its focus ignores two basic considerations. First, while Congress likely was aware that juries were key elements to be taken into account in any plan to secure justice, it was by no means clear on exactly how to nullify likely jury prejudice. Second, how Congress chose to solve the problem of biased juries depended upon its assessment of the alternatives it possessed as well as of the appropriateness of its alternatives to the general condition of affairs in the South.

Furthermore, the problem of biased juries was a question of guaranteeing substantial -- i.e., fair and
impartial -- justice. However, Congress during the first session was preoccupied with establishing the framework which would secure justice. It was apparent that Congress perceived that no substantial justice could be insured without the framework, yet it was not clear to Congress that the framework did not necessarily guarantee substantial justice. In other words, during the first session, Congress equated the establishment of a series of remedies which the Civil Rights Act exemplified, by which the individual could secure his rights, with securing the substantial guarantee of those rights. By 1867 Congress would be fully aware of the fallacy of its assumption. The second 1867 Habeas Corpus and the Military Reconstruction bills were enacted to insure not only the forms but also the substance of the law.

Short of allowing -- i.e., requiring? -- blacks to sit on juries Congress possessed only two alternatives in 1866 to control the effects of biased juries.\textsuperscript{16} The alternative it chose only in part was to exempt blacks from jury trials.\textsuperscript{17} This choice was manifested in the Freedmen's Bureau Amendment which provided for the establishment of Bureau courts when it was evident that blacks could not get justice in state courts. This was only a partial solution. An important segment of southern society -- loyal whites -- would still have to face hostile juries which as evidence indicated penalized the
Union man for his sympathies, and neither Bureau courts nor the Army possessed jurisdiction in the absence of President Johnson's authorization to try individuals for serious crimes or to litigate conflicting claims over large sums of property. Furthermore, this solution was partial because it was conceived as being only temporary. In the absence of Bureau courts -- the case throughout 1866 when Bureau courts were being abolished -- the black man would have to face southern juries.

The alternative which Congress chose as a "permanent" solution was the removal of cases where a right or title was claimed under the Constitution, laws, or treaties of the United States. The Civil Rights Act expressed this alternative. The right or title which the individual could claim as the reason for removal was expressed in section one of the Act. The procedures for removal were stated in section three. Since the Constitution specified that in the trial of all crimes juries would have to be drawn from the locality in which the crime had been committed, the problem of biased juries would exist even though the case was removed to the national courts. However, Congress apparently had great faith in the ability of national judges to control these juries -- provided the defendant could convince the national court it possessed jurisdiction to authorize the case to be removed. In other words, since the procedures by which
the trial would be conducted and the make-up of the jury were essentially the same in both state and national courts, Congress must have seen the judge as the crucial factor in guaranteeing the justice in national courts which could not or might not be secured in the state courts. However, it did not take into account the degree of difficulty in the defendant's proving his case was entitled to be removed.

By the time Congress reconvened for the second session in December 1866 serious doubts began to overtake its members about the sufficiency of the civil rights legislation to cope with injustices to Union men. As early as July 1866 some members of Congress in the wake of the Memphis riots had raised doubts about the Civil Rights Act. Its doubts were based on how it believed the Act was likely to be implemented through the courts not on its demonstrated ineffectiveness.20

In December 1866 General O. O. Howard, Commissioner of the Freedmen's Bureau, submitted a report to Stanton for transmission to Congress in response to a resolution calling for the Assistant Commissioners' reports and a synopsis of local laws respecting freedmen. His report supported the select committee's prediction. Howard observed that the Assistant Commissioners' reports "... contain evidence that the manner of executing the laws on the part of magistrates and jurors in some parts
of the South has worked great injury to the freed people. . . . It will be seen from these reports that the machinery of the Civil Rights Bill is not in full operation in some portions of the South, for many criminals that ought to be brought to trial under that bill are at large." [My emphasis] 21

A little less than a month later Howard again reported to Stanton, this time about his recent tour of the southern states. He made one of the most astute observations he ever made as Commissioner of the Bureau. Said Howard: "In several of the States which I visited, the laws have been so modified as to make no distinction between whites and blacks in the mode of trial and degree of punishment inflicted, but still I am satisfied that impartial justice is seldom administered." What had brought Howard to such a conclusion? Judges were generally inclined to deal fairly with blacks, Howard observed, "... but it is notorious that he stands but little or no chance with his white competitor before a jury or magistrates of inferior jurisdiction. The slightest possible weight seems to be given to the evidence of colored witnesses. Flagrant crimes against the persons and property of freedmen go unpunished."

According to Howard, the Civil Rights Act provided ample protection when it was equitably administered; however,
... its objects are defeated, not so much so by absolute 

denials of the rights which it is designed to secure to 
them, as by the temper of the juries and 
magistrates before whom their cases are 
tried in State Courts, but when granted, 
it is too often a mere matter of form. 
[And yet] To give the Federal Courts juris-
diction, this law requires a denial by the 
State tribunals of 'the rights secured or 
protected by the Act.' It is difficult 
to prove actual 'deprivation' of justice 
in such a manner as to remove the cause 
to the U.S. District or Circuit Court. 
Practically where the Judge of the United 
States Court is desirous to do any thing 
in his power to secure justice to the 
poor freedman, he affirms that he can do 
nothing under the Civil Rights Bill, until 
the local Courts shall have been tested. 22

Thus in his January 1867 report to Stanton, Howard 
succinctly capsulized the two halves of the problem Con-
gress faced in 1867 in trying to secure for blacks equal 
rights equitably enforced. On the one hand, when blacks 
were the victims of crime, they received no justice either 
because the civil authorities were unwilling to act, or 
because southern juries were inclined to give little or 
no weight to blacks' testimony. On the other hand, when 
blacks themselves were brought to the bar of justice to 
answer for crimes they allegedly committed, they were 
accorded the forms but not the substance of justice 
because of the aforementioned attitudes of southern white 
juries which state judges were little inclined to control.

On July 6, 1866 General of the Army Ulysses S. Grant 
issued General Order No. 44 instructing military commanders
to arrest individuals for crimes against loyal men when the civil authorities failed to act.\textsuperscript{23} Grant was trying to insure blacks who were victims of crime a measure of justice. The First Military Reconstruction Act was a formalization and an elaboration of Grant's order and was an attempt to provide a remedy for blacks and Unionists who were victims of crime. The second 1867 Habeas Corpus Act was an effort to solve the other half of the problem, for it was a summary procedure for removing the question of the legality of the detainment of an individual from state to national court jurisdiction. The Act entered the breach at precisely the point at which, as Howard pointed out, the Civil Rights Act had failed. The comprehensive removals provisions of the Civil Rights Act had theoretically taken care of biased judges, but though the case could be removed to the national courts for retrial, juries would still have to be drawn from the locality in which the crime was allegedly committed. Furthermore, as Howard pointed out, proving that bias existed in state court proceedings which would constitute sufficient grounds for removal was difficult.

Missouri's Republican Senator James B. Henderson confirmed Howard's observations. He told his colleagues in February 1867 that he had believed when the Civil Rights bill was under consideration it would protect no one:
Is that so? I thought last year that that would be the result. . . . We say civil rights shall be given to individuals; and we say if the State courts do not administer justice to the negroes and the Union men they shall have the right to appeal to the Federal courts. They have appealed to the Federal courts; but we cannot do away with the right of trial by jury under the Constitution of the United States. We insist that the negro shall be a witness in court under the civil rights bill. That is right; that right out to be guarantied [sic]; but how can it be accomplished? A case is tried in a southern court -- a State court; a negro is brought forward to testify for one of the parties; his testimony is refused; the case then goes to the United States court, and the negro testifies there under the civil rights bill; but how much good does it do the man for whom he testifies, provided the jurors turn their backs upon the negro's testimony? That is the truth of the matter; they do not believe a word he says; and they discard his testimony in finding a verdict. . . . We have accomplished very little by the administration of the civil rights bill; and let me tell you I know the fact, living in what was once a slave-holding community; and the parties who thus believed, believe so still.

Henderson pointed to the one weakness in the general Republican effort to provide justice for all men through traditional procedural rights. While the forms of the law might be followed its substance was not.

Moreover, this evasion of the principle of equal justice for all men was demonstrated in another way. The states themselves in the course of re-writing their Constitutions were imposing obstacles which prevented
defendants from having their cases removed. If jury trials proved the bane of justice, their absence prevented appeal of the case. Southern vagrancy, contract, and apprentice laws were enforced in county courts which under revised state constitutions were not courts of record. Thus decisions of these courts could not be appealed. In November 1865 Benjamin Butler wrote Stevens enclosing a bill which set forth his plan of reconstruction. He outlined what he intended the bill to accomplish. Section two guaranteed blacks jury trials for alleged breaches of vagrancy laws. Butler noted that "Upon examination of the proposed amended black codes preparatory to reconstruction at the South, it will be seen that they all provide that vagrancy or indisposition of a negro to work is a crime for which the negro shall be sold in servitude as a punishment, by the decision of a petty magistrate or Justice of the Peace."

"To give a jury trial to the negro in such cases will throw an impediment in the way of these codes, which in my judgment, in practice will be insurmountable." 25

Although the Civil Rights Act swept away all distinctions between blacks and whites in the manner of punishment, it specified no requirement that blacks be tried by jury. Yet the state vagrancy laws imposed the type of controls on blacks which most nearly recreated his slave status, and under the existing appeal structure,
blacks had no remedy through the national courts. Beyond requiring that the states pass laws which applied equally to whites and to blacks, Congress dictated no requirement that the law actually operate equally on both races or that the states elaborate upon their criminal judicial appeal system in a particular manner.

National review of state criminal systems was a novel proposition in 1867 just as it was within the national jurisdiction itself. Prior to the Civil War the only form of Supreme Court review of inferior court criminal justice within the national jurisdiction lay in writ petitions. The criminal law was little developed on the national level, and no elaborate form of review was needed in order for the Supreme Court to superintend the lower courts.

The Civil Rights Act was the first time that Congress created a criminal appeal system which reached into state jurisdictions and which offered the citizen another forum in which to seek his rights. However, the forms of proceeding and the laws governing its decisions were those belonging to the states. These two conditions reinforce the notion that the national courts were essentially appeals courts although they were creatures of a separate jurisdiction. And when that system failed to operate because of prejudiced juries or state rendition of criminal offenses to forums that were not courts of
record, the writ of habeas corpus seemed the most fitting and traditional remedy for correcting denials of justice that might result. In the latter case no other remedy but habeas corpus existed. In the former case anyone seeking a writ of habeas corpus could be promised a full inquiry into the cause of commitment whether the writ eventually was issued on the petitioner's behalf. This inquiry meant the national courts would hear testimony in order to ascertain the facts of the case and to determine whether the facts warranted the state court's decision to commit or to convict.

Moreover, this remedy seemed appropriate since the assumption obtained that prejudice existed and that, therefore, the black defendant could not get a fair trial. In such conditions, where the past included a system of servitude predicated not only on alleged economic necessity and operated on the principle that blacks had no rights a white man was bound to respect, the assumption was natural. The situation required a rule similar to that which Chief Justice of the United States Warren Burger announced in the April 1971 school desegregation case that where a system of de jure segregation had prevailed it was incumbent upon the school board to prove that school districting patterns did not sustain segregation. Such a rule in 1867 for the states' criminal judicial systems would have placed the burden on the state
to prove that no prejudice existed rather than on the defendant to prove prejudice and, therefore, that he had been denied justice.

Although such a rule seems fitting today for judging school re-districting plans to end segregated education, even now it would shock if applied to the states' administration of criminal justice. Unable and unwilling to pass such a law today, Congress could not essay it during Reconstruction.

Congress during the Civil War had demonstrated its reverence for the state oriented federal system. The Civil Rights Act and 14th Amendment debates showed that it continued to do so. However, much of its legislation was based on what could or should be rather than what was. The removals section of the 1863 Habeas Corpus Act was a prime example. Not thousands, not hundreds, not even many suits had been or were about to be commenced when Congress passed that Act. One suit would have demonstrated the necessity for the law in order to uphold the nation's right to exist. And events after the War demonstrated that the same necessity to protect national officers existed for all persons. Congress, therefore, worked on the assumption that no right existed where there was no remedy by which it could be maintained.

In expanding the jurisdiction of the nation's courts, Congress gave little thought to whether such jurisdictional
increments would overburden those courts, for if such expansion offered the individual another alternative to secure justice, it informed the states that the nation would dispense justice if they refused. And Congress assumed that states, which relished self-government, especially in their administration of criminal justice, would choose to secure justice rather than let the national government do it for them. Therefore, the nation’s courts would need to do little once the states, adopting the correct principles, did their job.

Creating alternatives in this fashion, attempting to institutionalize an idea in law, was Congress’s way of telling the nation (and the President) what should be. Whether the President needed Congress’s authority to suspend the writ of habeas corpus ceased to be an issue before the first half of the War was concluded. Yet in 1871 Congress passed the Ku Klux Klan Act, which among other things authorized the President to suspend the writ. This authorization was made as much because Congress believed that the President should follow such a course as because it believed he needed Congress’s permission.

But ideas are fragile, and the institutional frameworks which give effect to those ideas often develop styles of their own long after the ideas giving them life have passed from men’s consciousness. Thus Congress could not foresee that little more than a year after it
passed the 1867 Habeas Corpus Act, it would hasten to repeal part of it which conferred habeas jurisdiction on the Supreme Court lest that Court cast negative judgment on Congress's Reconstruction policy of which the 1867 Habeas Corpus Act was one part. Nor could it predict that within twenty years the high court would announce a doctrine which required a defendant to exhaust all state remedies and appeal to the Supreme Court before he could seek habeas relief. 29

But twenty years after Congress passed the Act, there was not the concern over the integrity of the states' administration of their criminal judicial systems that there had been in 1867. In the course of twenty years, the federal system had settled down into a comfortable routine which still resembled its pre-War state-based ancestor. During the early Reconstruction years, Congress had built many bridges across the interstices of the federal system, but two factors governed whether they would serve the purposes Congress intended them to fill. The first was the degree to which individuals were aware of or able to seek the remedies for wrongs through the judicial system. In the criminal justice system the additional factor existed of the state's willingness or ability to redress wrongs against persons or property. Reconstruction problems in the southern states demonstrated to Congress that those states neither were
willing nor, often, able to provide protections for its citizens.

The second factor was in the manner the law was executed, whether by the marshals or in the courts. Subsequent implementations of these remedies suggests that success depended less on the appropriateness of the law than on its execution. This gap between passing a law and executing it exists in any legal system, but in a federal system this gap is (and was) especially large, for the national government had no on-hand bureaucratic enforcement agency save for the Army. During the Civil War, stereotypes of the military as agents of force rather than maintainers of law and order intruded to obscure its police role. Other than using the Army, the nation had to rely on local officials who often were caught up in local antagonisms and shared local prejudices which conflicted with their duty to the nation.

Moreover, the nation's judicial system was bound by tradition which emphasized state judicial processes. Chief Justice of the United States Roger B. Taney's 1859 Auleman opinion construction of the dual sovereignty of the nation and the states had never been achieved in operation. Separate sovereignties implied separate judicial and law enforcement agencies which enforced separate codes of laws. This was never true of the federal system, for the nation and the states had divided their law-keeping
responsibilities in such a way that states provided the criminal legal systems in which law and order was maintained among the several segments of society. Without creating a separate code of laws or bureaucratic agencies to enforce the code, the nation's commitment to equal rights, to which Congress committed the nation in 1866, still depended on what states did, and the national courts were too tradition bound to be receptive to attempts to implement the enforcement of the law at the first instance in their own courts or by their own officers.

Thus using the writ of habeas corpus as a pre-conviction remedy in the federal system would have been revolutionary innovation in 1867, for it would have preempted the state processes and upset the traditional federal system that law and judicial custom for the previous eighty years had constructed. And that same custom explains why the writ never developed as a pre-conviction remedy but on the contrary -- and reluctantly -- as a post-conviction device.

Congressional efforts on behalf of law and order in the South might be construed as attempts to revolutionize the federal system were it not for the fact that it relied so heavily on working within the traditional system to support traditional values. The Declaration of Independence had proclaimed that all men were created equal, and the Constitution defined the contours within which
that equality would be sustained. Congress sought to create and sustain equality by passing laws granting to individuals the greatest number of alternatives for them to obtain justice through judicial processes.

When traditional alternatives did not work, Congress was often constricted in the number of other alternatives it could provide. Secretary of War Edwin M. Stanton spoke for it in January 1867 when Maine's F. A. Pike asked him to suggest a remedy if the courts of the south failed to protect freedmen. Stanton declared that he knew "of but two tribunals that can punish crime or afford protection -- one civil, and the other military. If the civil tribunals fail, I do not know of any other remedy than military tribunals. I never heard of any intermediate tribunals between those two." 30

In resort to military tribunals and to a summary writ, Congress in 1867 perceived fully that providing the alternatives did not create the conditions for their implementation. All individuals charged with execution of the laws Congress passed did not share the outlook or were hostile to or did not have the intentions of its Republican members who authored the statutes. Republicans looked at the problem of securing justice substantively and observed as did Kansas Republican Senator Samuel C. Pomeroy in March 1866 that, "I am not a stickler for the form of the law[.] I care more for the substance[.] I
want the result[.] I am contented with any laudable means."^{31}

Republicans believed that they could use -- had to use -- the military and summary judicial procedures to enforce the law not because rebels had no liberties but because liberties for all men existed only to the degree that someone was willing to guarantee them. In the end, to many people, Republicans' response represented merely an exercise of force when the traditional legal framework had failed, but more appropriately, their response represented an extension, by necessity, of the concept of fair and impartial justice, in short, equality before law -- the pre-eminent Republican moral commitment during the War and Reconstruction years.
EPILOGUE

Conclusions about Congress and the writ of habeas corpus during the Civil War and early Reconstruction years are difficult to make. Lincoln's suspension of the writ had presented Congress with a fait accompli, and Congress, more concerned with upholding the nation's authority in those troubled, uncertain, early months of the War than with defending its own prerogatives, silently endorsed the President. No final decision was ever made concerning suspension except by constitutional commentators as to whether the President or Congress possessed the power to suspend. Yet Lincoln provided a precedent for future executives to follow.

A more vexing question proved to be the extent to which civil courts could review cases of military trial of civilians. While Justice Davis's opinion in Ex parte Milligan has been recognized as an enduring answer to this question and as a brief on behalf of individual liberty during wartime, actually it left the military wide discretion in such trials. Moreover, the Milligan decision did little to advance traditional arguments which
attempted to distinguish between occasions when the military had jurisdiction of particular cases and when the civil courts did.

More important, the decision left intact congressional oversight of Reconstruction. The writ of habeas corpus received special treatment in the Milligan opinion, for Davis minimized its role in the judicial system as a summary writ which reached corollary questions that had nothing to do with the merits of the case. Instead, he defined the issues which were raised in a petition for the writ as presenting a case within the meaning of the 1789 Judiciary Act. This construction meant the lower courts' refusal or inability to agree to issue the writ was appealable other than by another habeas petition to the high court. Unclear, except by implication, was the question to what extent the civil courts could use habeas corpus to review decisions of military tribunals.

In matters where the writ had traditionally been used by the civil courts to reach into military jurisdictions -- to review the military's treatment of its own personnel -- the suspension of the writ proved an effective bar against such review. Moreover, prior to suspension, the courts showed that they were not inclined to expand their cognizance over cases which they had traditionally not reviewed. Therefore, the Army's drafting and treatment of deserters continued to be the two classes of cases
the courts reviewed.

The Civil War effectively put an end to state court habeas jurisdiction over military matters. From the earliest days of the War, the Army, citing Ableman v. Booth, refused to honor state court writs of habeas corpus, and the Supreme Court in the next decade supported its refusals.

While the state courts were thus barred, Congress granted the national courts jurisdiction by means of habeas corpus to reach into state jurisdictions. However, time demonstrated that the national courts were reluctant to use the augmented jurisdiction. Pre-trial review of state criminal cases across the federal gap was a revolutionary step which the federal judges were hesitant to make. The few cases in which the lower national courts used the writ in this manner occurred in the 1870s. They excited so much adverse comment from the state bars and judiciaries that Congress restored the jurisdiction to the Supreme Court that it had taken away in 1868 to check the lower courts, and the high court promptly turned the writ into a post-conviction remedy, which made the writ a remedy of the last resort rather than the first.

To see congressional pronouncements regarding the writ of habeas corpus apart from its legislation on other aspects of the judicial system, or set off from the political and military context of the War and Reconstruction,
is to view it too narrowly. Congress's acquiescence in the writ's suspensions resulted from the necessity to prevent the Army from demoralization and disorganization which hampered the War effort. Moreover, it points to the substantive character of Congress's view of that effort. In peaceful times Congress believed individuals should have the writ of habeas corpus to protect their liberties. But during wartime Congress saw such resorts to the writ as resistance to the national authority or disrespect for the Union. During a war for the Union, individuals were expected -- and thousands had -- to subordinate personal convenience or political conviction to the nation's survival.

This substantive view carried over into Reconstruction when the War of arms was continued as a war of ideas. During those post-War years, the nation's survival was equated with the liberty of all men -- black and white. Congress acted in order to provide individuals with the greatest number of opportunities to secure their freedom through courts -- whether civil or military tribunals. Congress depended upon the conditions at the local level and the judgment of men who lived amidst those conditions to determine how and in what combination those alternatives would be implemented.

Resort to the nation's tribunals, therefore, rested on what occurred at the local level. Thus Congress
extended a system of appeals it and the nation's courts had developed over the previous eighty years to handle a rather narrowly defined set of federal questions to review cases which came under a considerably broadened concept of what constituted a federal question. When this appeal structure could not reach cases in which the question of the fundamental fairness of a state's criminal proceeding was raised, or when a state structured its legal system so that cases which most vitally affected the liberty of an individual could not be appealed, Congress expanded the national courts' habeas jurisdiction. In 1867, Congress made the habeas jurisdiction co-extensive with the power the Constitution conferred upon the courts. When the integrity of the state's judicial system was most suspect, resort to the summary judicial processes such as a writ of habeas corpus seemed entirely fitting. When states did their job -- provided justice equally for all its citizens -- more traditional modes of proceeding between the two jurisdictions was in order.

Perhaps the most important lesson to be learned from the study of the writ of habeas corpus -- the archetype of so many criss-crossing themes during the Civil War and early Reconstruction years -- was the degree to which Congress attempted to work within traditional concepts of the federal system. Its debates and legislation on
protection of national officers, on civil rights, on amendments to the Constitution, and on suffrage extension provide an integrated and cohesive typology of the 19th-century legal mind which preferred a state-based federalism as much as it came to prefer, if temporarily, justice for all men.
NOTES

INTRODUCTION

18 U.S. 75 @ 93-4 (1807). 1 Statutes at Large 73 @ 81-2 (hereafter cited SAL). The privilege of the writ of habeas corpus and the writ of habeas corpus refer to two distinct matters. The privilege of the writ is the personal right that an individual has to have benefit of the writ. The writ is the means by which a court asserts its jurisdiction. Civil War legal commentators and other individuals used suspension of the writ and suspension of the privilege of the writ interchangeably. When they referred to suspension of the writ they were actually referring to suspension of the privilege of the writ. I will follow their pattern of usage throughout the dissertation.

2As example, see Joseph Story, Commentaries on the Constitution of the United States: With a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution., II (2nd ed., Boston, 1851), 196-7; Martin v. Mott, 12 Wheaton 19 (U.S., 1827).

3Dynes v. Hoover, 61 U.S. 65 (1857). The Court in Ex parte Vallandigham, 68 U.S. 243 (1863), followed tradition and refused to review the case. It also refused to treat the question of military trial of civilians. Ex parte Milligan, 71 U.S. 2 (1866).

4For example see Marshall's opinion in Ex parte Watkins, 28 U.S. 193 @ 202 (1830).

5Marshall's exposition of the writ's role as part of the appellate power of the Court preliminary to issuing the writ on behalf of Bollman and Swartout is a good example. He disposes of the question of the circuit court's jurisdiction in one sentence, noting that he accepted the arguments at bar on this point. 8 U.S. 75 @ 100.

610 U.S. 51 (1810).
7. U.S. v. Hudson and Goodwin, 11 U.S. 32 @ 34 (1812).

8. Specifically affirmed in Ex parte Dorr, 44 U.S. 103 (1845).


10. SAL 530

11. Ex parte Bollman and Swartwout, 8 U.S. 75 (1807); Ex parte Kearney, 20 U.S. 38 (1822); Ex parte Watkins, 28 U.S. 193 (1830); Ex parte Watkins, 32 U.S. 567 (1833); In the matter of Nicholas Lucien Mêtzger, 46 U.S. 175 (1847); In re Kaine, 55 U.S. 103 (1852); Ex parte Wells, 59 U.S. 307 (1855). On this score, Professor Wieck's assertion in a recent article that the writ "... could be used only to question the legality of detention by executive officials," needs reconsideration since the cases coming before the high court before the Civil War turned on lower court detentions, convictions, or refusals to grant the writ. Wieck seems to contradict himself since he points out elsewhere in his article that "... federal habeas relief was available only when the petitioner had been confined by an order of a federal court. ..." William Wieck, "The Great Writ and Reconstructions: The Habeas Corpus Act of 1867," Journal of Southern History, XXXVI (November 1970), 531, 534.

12. SAL 632 @ 634-5; Ableman v. Booth, 21 Howard 506 (U.S., 1859).


14. Ex parte Jenkins et al., 13 F. C. 445 @ 447.

15. Ibid. @ 452; see also Ex parte Robinson, 20 F. C. 965 @ 968-9. Rollin C. Hurd, who, prior to the Civil War, wrote the only treatise on habeas corpus in America, summarized parallel developments in state courts within state jurisdictions: "Where the return shows a detainer under legal process, the only proper points for examination are the existence, validity and present legal force of the process; except where, in commitments for criminal or supposed criminal matters, the court or officer hearing the habeas corpus is invested with a revisory or corrective jurisdiction also over the offence or subject matter of the commitment, in which case the facts constituting the grounds of commitment may be reviewed." [my emphasis] in A Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus and the Practice Connected With It: With A View of the Law of Extradition of Fugitives. (Albany, 1858), 289-90, 332. Nevertheless, national judges
in these cases were insistent, as District Judge Leavitt pointed out in an 1857 Ohio case, that "[the proceeding] . . . does not imply any invasion of the sovereignty of the state, whose process is thus treated. Nor is it based on any assumption or claim that a federal court or judge has any jurisdiction to revise or set aside, the judgments of the courts or magistrates of the State." Leavitt stressed that the power national judges were exercising was merely to inquire into the cause of imprisonment, "... and if such cause is within the contemplation of the act [i.e., the 1833 Force Act], to grant an order for the discharge of the imprisoned party."

16 Ibid.

17 Ibid. @ 448; Ex parte Robinson, 20 F. C. 965 @ 969; Ex parte Robinson, 20 F. C. 969 @ 971-2; and Ex parte Sifford, 22 F. C. 105 @ 109. This opinion was forthcoming from cases in which marshals had been arrested and sentenced to prison by state courts for contempt (generally considered a final judgment or conviction in most courts) for failing to make a return to the writ or to bring the body of the fugitive before the court, but it was advocated generally in all opinions of the courts on this subject.

18 Ex parte Jenkins et al, 13 F. C. 445 @ 451.

19 14 SAL 385, ch. 28.

NOTES
CHAPTER I

See James D. Richardson (comp.), A Compilation of the Messages and Papers of the President, VII (N.Y., 1897), 3214-5, 3217-20. On October 14, 1861, Lincoln authorized Commander of the Army, Winfield Scott, to suspend the writ along the military line between Bangor, Maine and Washington. Ibid., 3240. On December 2nd, Lincoln authorized General Henry Halleck, Commander of the Department of Missouri, to suspend the writ of habeas corpus and to declare martial law "... as you find it necessary in your discretion to secure the public safety and the authority of the United States." in Arthur Brooks Lapsley (ed.), The Writings of Abraham Lincoln, V (N.Y. and London, 1906), 381-2.

On May 26th Taney confronted Lincoln over the President's authorizations of the suspension of the writ of habeas corpus. He used as his vehicle for confrontation the petition for a writ of habeas corpus from John Merryman, a Marylander who advocated secession and resistance to the national government. Merryman had been arrested by military authorities in Maryland and confined at Fort McHenry in Baltimore. Taney issued the writ to which the commander of the Fort, General George Cadwalader, returned that the writ was suspended under Lincoln's authorization, and that he requested the Chief Justice to suspend further proceedings. Taney, after issuing an attachment for contempt against Cadwalader, stated that he had exhausted his authority and would set forth in writing his opinion of the provisions of the Constitution bearing upon the case. Taney's opinion during the succeeding weeks was widely circulated throughout the country. It excited many comments from quarters of the war-excited society. For Merryman's petition for the writ, Taney's orders, Cadwalader's return, and other affidavits, see The American Annual Cyclopaedia and Register of Important Events of the Year 1861, I (N.Y., 1870), 354-6. The opinion is reported (without comment) in American Law Register (hereafter cited Am. L. Reg.), IX (July 1861), 524-38. For other documents concerning the Merryman case

3 See below, note 16.

4 See below, note 37.

5 A remedy for a violation of a civil right against being unjustly imprisoned which abridged the civil liberty of individual freedom.

6 The rule of military necessity during war which suspends civil rights to whatever degree necessary to conduct war.

7 Anna Ella Carroll of Maryland in her pamphlet, The War Powers of the General Government: Who Made the War? . . . (Washington, 1861), 19, was the only one of the 1861 writers who explicitly attempted to answer the question: "For, can it matter, in view of the Constitution, in what part of the United States the 'public safety' may require the writ of habeas corpus to 'be suspended,' provided the necessity results from a case of 'invasion' or 'rebellion,' waged anywhere against the national flag? Or can it matter, according to the laws of war, in what locality, an adherent of the public enemy may choose to carry on the work of a common hostility? If a foe taken on the battlefield in Virginia may be imprisoned, during the war, what rule of natural justice shall exempt, from a like fate, the friend of treason, who is sending to its aid arms or information from Maryland? Is the character of a rebel spy more sacred than that of a rebel soldier? . . . It is as clear as sunlight to all who are willing to see, that the same provisions of the Constitution, and the same laws of civil war, which justify the Government in imprisoning its foes taken in open fight, will equally justify it in the capture and detention, not only of those who may be secretly preparing to raise the colors of the enemy on any part of the national territory. And this latter was the precise predicament of the persons arrested and detained under the order of the President, in the State of Maryland, and elsewhere.

8 Am. L. Reg., IX, 527-8. Taney was incorrect as to the suspension clause's placement in section 9. It was placed second, not first.
Ibid., 528-9. Taney's unwillingness to trust the executive contrasted quite strikingly with his position in Luther v. Borden, 7 Howard 1 @ 44 (U.S., 1849): "It is said that this power [i.e., to be judge of the facts as to the existence of rebellion] in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. When citizens of the same State are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a willful abuse of power as human prudence and foresight could well provide. At all events, it is conferred upon him by the Constitution and laws of the United States, and must therefore be respected and enforced in its judicial tribunals."

Ibid., 528-9.

Ibid., 536-8. Nearly two years after Taney filed his opinion he wrote a correspondent enclosing a portion of the opinion, which especially bears on this point, that had inadvertently been left out of the reported version. In the omitted portion, Taney cited one of the reasons for the American Revolution as stated in the Declaration of Independence was that "'He (the king) has affected to render the military independent and superior to the civil power.'" He also cited President of Congress Thomas Mifflin's salute to George Washington when the latter resigned as commander-in-chief of the American Army in 1783. Mifflin praised Washington for his respect of civil authority during the Revolution. Taney said in conclusion: "Such was Washington through all the disasters and changes of a seven years' war, while combating invasion from abroad and disaffection at home; and such the men who declared and achieved independence and formed the Constitution of the United States. They mark with emphasis his invariable respect for the civil power; and show that they regarded it as one of his strongest claims to the confidence and gratitude of his countrymen. . . . But I may say to you [i.e., his correspondent], how finely and nobly Washington's conduct contrasts with the military men of the present day, from the Lieutenant-General [Winfield Scott] down." Taney to Conway Robinson,

127 Howard 1 @ 44-5 (U.S., 1849). Taney in this case followed Justice Joseph Story's opinion in Martin v. Mott, 12 Wheaton 19 (U.S., 1827), which set forth the President's powers and responsibilities under the 1795 Act: "He [the President] is necessarily constituted the judge of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law; . . . The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it. When a statute gives a discretionary power to any person, to be exercised by him, upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. And, in the present case, we are all of opinion that such is the true construction of the 1795 Act."

13 Said Taney: "It is true that in the cases mentioned [i.e., of rebellion or invasion], Congress is, of necessity, the judge of whether the public safety does or does not require it; and its judgment is conclusive. But the introduction of these words [i.e., "except when in case of rebellion or invasion the public safety may require it"] is a standing admonition to the legislative body of the danger of suspending it, and of the extreme caution they should exercise before they give the Government [the President?] of the United States such power over the liberty of a citizen." *Am. L. Reg.*, IX, 527-8.


14 Taney stated: "But the documents before me show that the military authority in this case had gone far beyond the mere suspension of the privilege of the writ of habeas corpus. It has by force of arms thrust aside
the judicial authorities and officers to whom the Constitution has confided the power and duty of interpreting and administering the laws, and substituted military government in its place, to be administered and executed by military officers. For at the time these proceedings were had against John Merryman, all resided in the city of Baltimore, a few miles only from the home of the prisoner. Up to that time there had never been the slightest resistance or obstruction to the process of any court or judicial officer of the United States in Maryland, except by military authority. . . . There was no danger of any obstruction, or resistance, to the action of the civil authorities, and therefore no reason whatever for the interposition of the military." [My emphasis]. Am. L. Reg., IX, 536-7.

15See below, note 34.

16Abstract of the Lecture [on Martial Law and Habeas Corpus]" was published in the Daily National Intelligencer, June 7, 1861. It was written by a Harvard Law School professor, Theophilus Parsons. But because it was written before the writ suspension question arose, I have not included Parsons in the discussion of the 1861 writers. Parsons argues that in England and in America martial law is suspension of the writ of habeas corpus. Ordinarily, any person who is arrested by any authority can have the writ; thus the civil power is supreme over the military and martial power. Therefore, no person could be subjected effectually to martial law unless the writ was suspended. Suspension of the writ and martial law were the same thing. The power to declare martial law is derived from the suspension clause. Parsons believed that no doubt existed that Congress is authorized under the suspension clause to suspend the writ, but the question is, can the President. The only grounds permitting the President to suspend was necessity, where delay would be disastrous. There were two qualifications upon the power: impeachment; and the President's own discretion in its use. Citations for the writers mentioned in the text are: Parker, "Habeas Corpus and Martial Law," North American Review (hereafter cited NAR), XCIII (October 1861), 471-518; Johnson, "Power of the President to Suspend the Habeas Corpus Writ," in "Documents and Narratives," The Rebellion Record: A Diary of American Events. . . ., Frank Moore (ed.), II (N.Y., 1862), 185-93; Bates to Lincoln, July 5, 1861, in Opinions of the Attorney General (hereafter cited OAG), I (Washington, 1868), 74-92; Binney, "The Privilege of the Writ of Habeas Corpus Under the Constitution," in Union Pamphlets of the Civil War, 1861-1865, Frank Freidel (ed.), I (Cambridge, 1967), 201-52.
17 Parker, "Habeas Corpus and Martial Law," 490.


19 Bates set forth the distinction between suspending the privilege and suspending the writ: "The power to issue a writ can hardly be called a privilege; yet the right of an individual to invoke the protection of his government in that form may well be designated by that name. . . . If by the phrase the suspension of the privilege of the writ of habeas corpus, we must understand a repeal of all power to issue the writ, then I freely admit that none but Congress can do it. But if we are at liberty to understand the phrase to mean that, in case of a great and dangerous rebellion, like the present, the public safety requires the arrest and confinement of persons implicated in that rebellion, I as freely declare the opinion, that the President has lawful power to suspend the privilege of persons arrested under such circumstances. For he is especially charged by the Constitution with the 'public safety,' and he is the sole judge of the emergency which requires his prompt action." OAG, 89-90.

20 Binney, "The Privilege of the Writ of Habeas Corpus," 205-7. Binney was correct in that national courts' writ proceedings were stayed when the courts were apprised that citizens were held under state authority. However, the national courts did have jurisdiction of state detention of national officers for actions in the performance of their duty under section 7 of the 1833 Force Act. 4 Statutes at Large (hereafter cited, SAL) 632 @ 634-5.

21 Johnson, "Power of the President," 187; Binney, "The Privilege of the Writ of Habeas Corpus," 228, 244.

22 Parker, "Habeas Corpus and Martial Law," 477-86.

23 Binney, "The Privilege of the Writ of Habeas Corpus," 208-19. Binney was wrong in two respects: the character of the presidency was by no means settled by the time the habeas corpus clause was considered; at that point he was not considered weak, nor were the framers satisfied when the work was completed because they had created a weak executive. See Max Farrand, The Framing of the Constitution of the United States (New Haven and London, 1913), ch. 11.

Binney stressed that suspension was not allowable during all wars but only in cases of invasion by a foreign enemy or of rebellion, which he defined as a complete renunciation of all fealty to the government. "War, beyond the limits of a country," Binney concluded, "leaves the courts and the laws of the country in full operation; but invasion by a foreign army, or rebellion against the government, overthrows or disturbs both the courts and the execution of the laws. In such cases the personal liberty of the freemen of a country became secondary to the public liberty of the nation, and must yield for the time to a higher interest and a higher principle, the public safety." Binney, "The Privilege of the Writ of Habeas Corpus," 221.

Binney based this argument on the fact that the Convention substituted for an earlier clause, which specifically conferred upon Congress the power to suspend the writ, a clause which was indefinite in its reference to suspension -- the clause which was subsequently adopted as part of the Constitution. Ibid., 222-6.

Bates to Lincoln, July 5, 1861, OAG, X, 82-3.


1 SAL 424. This statute was not the first one on the subject. In 1792 Congress had passed a similar statute requiring the President before he could call out the militia to be notified by a district judge or a justice of the Supreme Court that the laws were obstructed. The 1794 Whiskey Rebellion in western Pennsylvania highlighted the impracticality of the measure. Thus during the session of Congress following the rebellion, Congress repealed the 1792 Act, replacing it with the law under which the President acted in 1861. See Binney, "The Privilege of the Writ of Habeas Corpus," 239-40; 1 SAL, 264.

31 Binney, "The Privilege of the Writ of Habeas Corpus," 205. He believed the clause in the Constitution was elliptical. "When the ellipsis is supplied, it reads thus: 'The privilege of the Writ of Habeas Corpus shall
not be suspended unless when in cases of rebellion or invasion, the public safety may require it; and then it may be suspended.'"

32 Johnson, "The Power of the President."


34 Johnson, "Power of the President," 190. One writer implicitly disagreed strongly with Johnson on this point. Tatlow Jackson was not certain that the national government could declare martial law, but "if this right [to declare martial law] be similar and incidental to the right to declare and carry on war, the Constitution has delegated it to Congress in Section 8 of Article I. . . . if so, to make martial law effective, it would be requisite to suspend the privilege of the Writ of Habeas Corpus, to have authority to do which the contingencies mentioned in the second clause of Section 9, Article I., must arise," in Martial Law: What is it? And Who Can Declare It? (Philadelphia, 1862), 18. One other writer published a pamphlet the same year in which he explicitly denied that martial law could be declared under the Constitution: "It scarcely requires the citations we have made from the Constitution, to prove that martial law cannot consist with it. It is manifest that an instrument designed to be the supreme law of the land cannot require any law above it; and that that which assumes to be above it [i.e., martial law], is treason." Robert L. Breck, The Habeas Corpus, and Martial Law. (Cincinnati, 1862), 38.

35 This fact was precisely the point Parker wished to make. It was only because the military was subordinate to the civil authority that Parker could justify martial law under the Constitution. This view of martial law was followed in practice during Reconstruction. The military interjected itself into the government of the southern states only as much as necessary to secure justice for blacks and loyal whites. Most subsequent writers who disagreed with Parker overlooked this one, essential modification of the traditional concept of martial law. For example see, Bullitt, A Review of Mr. Binney's Pamphlet, 51-2.
The 1863 Habeas Corpus Act was passed in part precisely because Congress recognized that whatever responsibility military officers possessed for their actions was a judicial question. Furthermore, although Parker recognized that martial law did not exempt all military conduct from civil suits, he failed to realize the importance of such a fact in a federal system. Whatever degree the national government might excuse military conduct, its action did not govern states' law on military responsibility. Events were to prove that citizens were free, and in some cases as Kentucky after the War, were encouraged to have prosecuted and to bring suits against army personnel in state courts. For a brief discussion of military responsibility during wartime, see, Garrard Glenn, The Army and the Law (rev. & enl., N.Y., 1967), ch. 9; see also, Randall, Constitutional Problems Under Lincoln, ch. 9. And see below, chs. 5 and 6.


For example, see, Bullitt, A Review of Mr. Binney's Pamphlet, 10-11, 43-9.
39[Brown], Reply to Horace Binney, 19; Jackson, Authorities, 8; Wharton, Remarks on Mr. Binney's Treatise, passim; Bullitt, A Review of Mr. Binney's Pamphlet, 10-11.


41Ibid., 9-37.

42Jackson doubted even if the Congress could delegate the power to the President to suspend: "It seems to me like the delegation of trustee powers." Jackson, Authorities, 8. See also, [Montgomery], The Writ of Habeas Corpus, 3-24.

43Binney, Second Part, 38.

44Bullitt, A Review of Mr. Binney's Pamphlet, 26-8; Jackson, Authorities, 3-7; Johnston's remarks were typical of the writers' position on this point: All the state ratifying conventions agreed "... that Congress alone had the power to suspend the privilege; and those objections were to entrusting that power even to Congress. It was this universal understanding and supreme consciousness of the fact, that Congress alone had the power to suspend, which accounts for the fact, that neither in the Federal or in any of the State Conventions, was there a question raised as to which department of Government had the power..." The Suspending Power, 39.


47B. R. Curtis, Executive Power. (Boston, 1862); Joel Parker, The War Powers of Congress, and of the President. An Address Delivered Before the National Club of Salem, March 13, 1863. See also, [Charles Ingersoll], An Undelivered Speech on Executive Arrests. (Philadelphia, 1862), in which the war power of the government, including Congress's, is denied, yet in which he states that "The difference between Mr. Lincoln's right to pass over the body of Congress to reach his ends, and his right to imprison a bank-teller is nothing but a question of discretion in the use of usurped authority." (p. 96)
The thrust of his lengthy discussion is towards condemning the President's September 24th proclamation and Secretary of War Stanton's August 8, 1862 order authorizing state officers to arrest and prosecute individuals suspected of "disloyal practices."


49 For details of the wartime antislavery struggle, see James M. McPherson, The Struggle for Equality: Abolitionists and the Negro In the Civil War and Reconstruction (Princeton, 1964), chs. 1-5.

50 Writers on both sides of the question illustrated this one characteristic. Gardner was an outstanding example on the pro-emancipation, pro-war powers side. After a brief discussion of the legal authorities showing that "Our government, like every other, has a plenary power of self-preservation, by aid of the courts civil in peace, and by martial power in war," [my emphasis] he discusses the right of the government to decree emancipation as a military measure. (He believed emancipation had already been accomplished prior to the President's September proclamation because of secession, by which the states had reverted to a territorial condition, and Congress's 1862 statute abolishing slavery in the territories.) Slaves, once freed, could be enrolled in the army to fight a war of freedom on behalf of their fellow oppressed blacks and whites -- "Five millions of 'white trash,' sand-hillers and clay-eaters in the Southern slave States, degraded, poor, ignorant, brutal and wicked, [who] must be separated from the small 350,000 slave-oligarchy that oppresses them, and, by the sword of freedom, they must be brought up to the standard of intelligence [sic] and moral freemen." in A Treatise on the Law of the American Rebellion, 5, 11-7. Parker illustrated the same tendency, although he was on the other side of the argument. In one passage he pointed out: "There are very honest persons, doubtless, who failed to see any violation of the Constitution, in an
assumption of power on the part of the President, to emancipate all the slaves by a proclamation, coupled with a pledge of all the power of the Executive and of the army and navy, to sustain and enforce that emancipation; a great portion of which must take effect, if it ever takes effect, in time of peace, after the rebellion is suppressed; and this, notwithstanding it has been admitted for half a century, that there was no authority, on the part of the United States, to abolish or regulate slavery in the States." Parker makes much the same point in regard to the suspension of the writ and the declaration of martial law. In the very next passage he states: "They [those who, according to Parker, believe the President possesses the power to perform these acts] know that all this is done on the general allegation that the President may do whatever is required by any military necessity, and that he is the sole judge when such necessity arises, and what it demands. . . ." [my emphasis]. In the first quote, Parker asserted that some individuals believed the President could decree emancipation not merely as a way to win the war but as a right to exercise a power to free slaves which the Constitution authorized, an argument which he rejected. Yet in the second quote he claimed that the President's supporters justified emancipation on the grounds of military necessity -- in other words, they believed emancipation was a valid means of prosecuting the war. The fact that Parker treated the President's supporters' contentions as "allegations" indicated that he rejected military necessity as a justification for emancipation as means because he rejected any argument that the Constitution sanctioned emancipation -- failed to provide any powers by which it could be abolished. Later in the pamphlet, Parker made a statement which clarified the distinction implicit in all these writers during the period: "I believe that there is constitutional power enough to accomplish all that can be accomplished. Let that power be brought into exercise, and made effectual. . . . If there must be acts which transcend constitutional power, it were immeasurably better that they should be placed on this basis, so that those who commit them will stand responsible . . . to maintain the necessity and the exigency, rather than have them set up as constitutional; and justified as an exercise of a lawful right under a construction of the Constitution which makes that instrument like the apples of Sodom, fair to look upon, but within are dust, and ashes, and bitterness, and disappointment." [my emphasis], Parker, War Powers of Congress, and of the President, 57, 59-60.

51 Curtis, Executive Power, 14.
In 1865 Binney published a third pamphlet which discussed "... the nature, extent, and range of the power of [presidential] suspension." Binney felt this aspect of the question needed attention since the question under discussion in 1861 was whether the President possessed the power and not the limits of the power which he possessed. Binney was concerned that his earlier arguments might be construed as a brief against personal liberty and the integrity of judicial processes, and, thus, he endeavored in his third offering to set the record straight. [Horace Binney], Third Part. The Privilege of the Writ of Habeas Corpus under the Constitution (Philadelphia, 1865), 73.
NOTES

CHAPTER II


3 The text of the original bill is printed in George Clarke Sellery, Lincoln's Suspension of Habeas Corpus as Viewed by Congress (Madison, 1907), 224-5.

4 Cong. Globe, 37th Cong., 1st sess., 2, 16 (July 4 and 6, 1861).


6 Cong. Globe, 37th Cong., 1 sess., 40-1 (Clark and Wilson), 45-7 (King, Fessenden, Wilson and Trumbull) (July 10, 1861); James Grimes stated his opposition to the President's acts in this matter prior to the opening of the session. On May 12, 1861, he wrote Fessenden: "It is quite evident to my mind that this great rebellion is to be suppressed; but, in the effort, it occurs to me that we are about to encourage precedents that will be very dangerous to the rights of the States, and to the liberties of the people. This attempt of Mr. Lincoln to add ten legions to the regular standing army, each legion to equal in size three regiments, without any authority of law, and against law, is the most extraordinary assumption of power that any President has attempted to exercise. . . . Mr. Lincoln is not content with violating that law, and calling for volunteers for three years, making them in effect a standing army subject to his will, but he goes away beyond that, and more than doubles the standing army, and issues commissions to offices which
are not authorized by law. Where is this to stop? Will he be content with ten legions? ... "'n' Grimes reiterated the same theme in another letter to Fessenden on June 6th: "'n' ... Was it not possible to wait until the 4th of July, to let the constitutional authority speak on that subject? The precedent is the thing that troubles me. Will it not justify the next President in doing the same thing, and if so, how extensive must the insurrection be that will justify him? Where is this thing to stop?" in William Salter, The Life of James W. Grimes, Governor of Iowa, 1854-1858; A Senator of the United States, 1859-1869 (N.Y., 1876), 140-1.

7 Cong. Globe, 37th Cong., 1st sess., 48 (Folk), 67-8 (Folk), 138-40 (Breckinridge), 333-4 (Pearce), Appendix, 14-20 (Bayard) (July 10, 11, 16, 19, and 30, 1861). Some Republicans, notably Sherman and Howe, doubted the legality of the President's suspension power, see Cong. Globe, 37th Cong., 1 sess., 393 (Sherman), 395 (Howe) (August 2, 1861).

8 Ibid., 336 (July 30, 1861). S. No. 33, Bills and Resolutions, 37th Cong., 1st sess. This bill in part seemed to be a response to a request Secretary of War Cameron made for legislation to supplement provisions for trial of civilians by courts-martial for crimes not defined in the Articles of War. See Ibid., Appendix, 11-2.

9 Ibid., 338 (Trumbull) (July 30, 1861).


12 James D. Richardson (comp.), A Compilation of the Messages and Papers of the Presidents ... (hereafter cited M&P), VII (N.Y., 1897), 3226.


15 Cong. Globe, 342-3 (Ten Eyck) (July 30, 1861). But see Ibid., 372 (Harris) (August 1, 1861).
16 Ibid., 376 (Trumbull) (August 1, 1861). Virginia Senator Carlile supported Trumbull's position and presented a cogent statement of what was intended to be accomplished through the bill: "I believe, with the Senator from Illinois, that some legislation should be had limiting the exercise of arbitrary power on the part of those who are in command of the armies of the United States. . . . An exercise of arbitrary power, regulated by no rule whatever, is obnoxious to every idea that I have ever entertained of liberty regulated by law; . . . We find ourselves now without any law of Congress regulating the manner in which the Government shall maintain itself against a rebellion organized for its overthrow. . . . If this war is conducted by one commander according to his discretion; by another according to his arbitrary will, there will be no rule; there will be no regularity; there will be nothing to which the citizens can appeal."
Ibid., 381.

17 Ibid., 373 (Trumbull) (August 1, 1861).
18 Ibid., 340 (Cowan), 372 (Bayard), 374-5 (Collamer).
19 Ibid., 340 (Cowan) (July 30, 1861).
20 Ibid., 337-8 (Trumbull), 341 (Cowan) (July 30, 1861).
21 Ibid., 340 (Cowan) (July 30, 1861).
22 Ibid.
23 Ibid., 342 (Trumbull) (July 30, 1861).

24 After Cowan finished his remarks, New Hampshire Republican Senator Daniel Clark moved to table the bill, a motion, which this late in the session would have killed it. The motion was defeated on roll call, 15-27, three Republicans (Clark, Cowan and Fessenden) joining thirteen Democrats and Unionists in favor. Thereupon, the bill was made a special order for the following day, when it came up for debate an hour and a half after the hour originally set for its consideration. Bayard, anxious to kill the bill and scheduled to speak on it, used the delay as an excuse for postponing it for yet another day. On roll call, his motion was sustained, 22-18, ten Republicans joining twelve Democrats and Unionists in favor of the motion. When the bill again came up for consideration on the following day, August 1st, debate continued, but the question of postponement, this time until the next session, again arose. Ira Harris, Republican from New York, moved the postponement, which was defeated on roll
call, 16-28, with five Republicans (Collamer, Cowan, Doolittle, Harris, and Howe) joining eleven Democrats and Unionists in the effort. Debate then recommenced, but no agreement was reached. The Senate finally voted 21-16 to go into executive session which killed the bill for the rest of the session. *Ibid.*, 342, 343, 364, 380, and 382 (July 30 and 31, August 1, 1861).


26 *Ibid.*, 373 (Baker) (August 1, 1861), for example: On the August 1st motion to postpone the bill, until the next session Howe voted in favor of the motion because more time was needed to mature a bill since so much uncertainty existed on the subject. "In the mean time, it is true that where war in fact shall exist, of necessity these rules [for conducting the military effort] will depend upon the Commander-in-Chief." *Ibid.*, 380.

27 For example, Ten Eyck, a member of the committee, in debate on the bill on July 30th stated that "This bill was reported by the Committee on the Judiciary, and I must say that there was a disagreement in the minds of the members of that committee as to its merits. ... I confess that I, myself, was not in favor of all the provisions of the bill, but I thought we should report some bill on the subject, and the Senate could amend it according to their enlightened judgment." *Ibid.*, 342.

28 There were two roll calls on the resolution late in the session. The first vote was on Wilson's motion to take up the resolution for debate. Seventeen Republicans joined eleven Democrats favoring the motion. All the negative votes, eleven, were cast by Republicans. When the bill was thus taken up, Doolittle moved to refer it to the Judiciary Committee on the supposition that the Committee on Military Affairs was not "... the committee to whom constitutional questions specifically belong. It should go to the Committee on the Judiciary; and a question of such importance as this ought not to be pressed upon the Senate until it has been considered by the Judiciary Committee, and fully considered, too." Doolittle's motion failed, 17-23, with fifteen Republicans voting in the majority and twelve Republicans opposed. *Ibid.*, 392-3.

30 Apparently just this type of allegation was being made. Grimes wrote to Barnes in response to such an allegation in order to set the record straight. In the first paragraph of his letter, Grimes quoted portions of the letter Barnes had written him, inquiring into the matter: "Your letter of the 13th instant, in which you say, "Ever since Breckinridge made his treasonable speeches in the United States Senate, it is being constantly reiterated that President Lincoln has violated the Constitution, and, as evidence of the fact, it is asserted that the Senate refused to ratify his acts;" and in which you ask me "to state whether the charge that Congress did refuse to sustain the acts of the President is true or not," has come duly to hand." Salter, Grimes, 150.

31 The rider had been originally brought before the Senate just a few minutes before consideration of the pay of the troops bill as a separate bill. Wilson had introduced it for immediate passage, hoping to be able to have the rule waved requiring the bill to lie over a day after introduction. But successively, Pearce, Saulsbury, and Powell objected to its second reading, thus forcing the bill to lie over. Wilson was not through, however. He then called up the pay of the troops bill, made the approval bill an additional section of this bill, and put it upon its passage. The bill was passed on roll call, 33-5. Cong. Globe, 37th Cong., 1st sess., 441-2; 452-3 (McDougall) (August 5 and 6, 1861). In the House an effort was made to strike out the rider, but it was defeated on roll call, 19-74. Ibid., 449 (August 5, 1861). The bill was then passed.

32 Salter, Grimes, 150-1.

33 Cong. Globe, 37th Cong., 1st sess., 441 (Fessenden) (August 5, 1861).

34 Secretary of State William Seward in middle or late 1861 declared that "the habeas corpus will be suspended anywhere, on its being shown that it is necessary to prevent disorganization or demoralization of the national forces." This expression of determination, however, hardly represented the reality. Although Lincoln suspended the writ in September 1862 and again in 1863 because writ employments were "demoralizing the national forces" the writ was only infrequently resorted to this early in the War. Seward to S. G. Andrews, [1861], in Frederick W. Seward, Seward at Washington, as Senator and Secretary of State. A Memoir of His Life, With a Selection From His Letters, 1846-1861, II (N.Y., 1891), 608-9.
NOTES

CHAPTER III


2 As example, see Frank L. Klement, The Limits of Dissent: Clement L. Vallandigham & the Civil War (Lexington, Kentucky, 1970), ch. 20; Randall, Constitutional Problems, 193.


4 War Department, Office of the Adjutant General, Letters Received, Main Series. 1861-1870, 879 B 1861, RG 94, microcopy 619, roll 8, National Archives. Harold M. Hyman, Era of the Oath: Northern Loyalty Tests During the Civil War and Reconstruction (Philadelphia, 1954), ch. 4.

5 War Department, Office of the Adjutant General, General Orders, No. 140, September 24, 1862, RG 94, National Archives.

6 I base this analysis on the records of the Old Capitol Prison for the period September 24, 1862 (when it first began listing charges against state prisoners) and March 3, 1863 (when the Habeas Corpus Act was signed into law). I used the Old Capitol Prison because it contained the most complete records. Of the 339 individuals arrested during the period the reason for arrest was given in 243 instances. Of those 243, 13S were arrested for offenses statutorily defined. 19 individuals were held for the military offense of spying. 89 individuals fell into a miscellaneous category which included charges which were not statutorily defined or were vague: i.e., murdering a picket, disloyalty, held as a witness,
refugees, former rebels, aiding deserters, resisting or helping others to resist the draft. In this last category -- i.e., resisting or helping others to resist the draft -- 9 individuals were listed, and as a result of the 1863 Conscription law, this offense became statutorily defined. Only 10 individuals were arrested for disloyalty, and this number is suspect since in one or two instances "disloyalty" or "disloyal practices" meant "defrauding the government" a statutorily defined offense. See, Office of the Adjutant General, Turner-Baker Papers, "Prisoners of State, Old Capitol [Prison]," Parts 1 and 4, January 14 to December 30, 1862 and January 11, 1863 to October 2, 1863, RG 94, National Archives.

As example, the United States District Attorney for Indiana, John Hanna, wrote to Senator Henry Lane on November 28, 1864 and enclosed a bill to authorize district judges to call special sessions. He explained the situation: "Unfortunately under existing laws, we can have no session of the District Court until next May without the passage of this act. There is a pressing public necessity for a term of Court at an early day, as a number of persons are confined in jail on charges which have been preferred against them and they should have a speedy trial. . . . There should be a general section of this bill passed to meet future contingencies. This is the third time, that I have been under the necessity of appealing to Congress to pass acts providing for special sessions owing to the death of our Judges. The law, as it now stands is simply this[:] In case of a vacancy at the time a regular term should commence, all pending business goes over to the next regular term. This is the third time that vacancies have existed in this District at [sic] the Commencement of a regular term since I have been District Attorney, and this accounts for the request heretofore, to pass Acts authorizing special sessions. I have learned from experience that in the unsettled condition of the Country, it is well, that the district Judge should be empowered to order special sessions as provided in the last section. . . . I have written to [Godlove] Orth [an Indiana Representative] and request him to see that the Act is promptly put through the house. The members of the Bar, having business in the Federal Courts, have joined me in the request. . . ." Hanna to Lane, November 28, 1864, Senate, Committee papers, Judiciary Committee, 38th Congress, 38A-E6, RG 46, National Archives. And see, R. G. Samuel to W. T. Otto, November 8, 1864, Justice Department, Records Relating to Judicial Accounts, Kentucky, no. 254, RG 60, National Archives; A. T. Ballard to James Speed, May 24, 1866, Ibid., no. 181.
8 Statutes at Large (hereafter cited SAL) 92, 93;
4 SAL 278.
9 12 SAL 285.

10 Bates to Asa S. Jones, June 18, 1861 and July 1,
1861, Attorney General's Office, Letters Sent, vol. B-2, RG 60,
microcopy 699, roll 5, National Archives; Bates to George
A. Coffey, August 19, 1861, Ibid.; Bates to D. L.
Phillips, May 18, 1861, Ibid.; Bates to James C. Van Dyke,
October 2, 1861, Ibid., vol. B-4; Bates to James Brodhead,
April 10, 15, and 16, 1862, Ibid., vol. B-5,
nos. 77, 84, 86 microcopy T-969, roll 3; Bates to Ben-
jamin H. Smith, May 7, 1862, Ibid., no. 96; Bates to
William Price, January 6, 1863, Ibid., no. 323.

11 Until December 1862 Bates declined to allow his
district attorneys to appoint assistants except in Boston
and Philadelphia where maritime cases abounded. At the
end of the year, however, he relented and allowed the
district attorney in Wheeling, Virginia to appoint one.
Bates to George A. Coffey, August 19, 1861, Attorney
General's Office, Letters Sent, vol. B-2, RG 60, micro-
copy T-969, roll 1, National Archives; J. B. Kerr to
Benjamin H. Smith, September 9, 1862, Ibid., vol. B-5,
no. 209; T. J. Coffey to Smith, October 4, 1862, Ibid.,
nos. 239; Bates to the Secretary of the Interior, December
30, 1862, Ibid., 324; Bates to Smith, Ibid., no. 325; and
see Coffey to Joshua Tevis, November 30, 1863, Ibid.,
vol. C; T. J. Coffey to L. Weldon, January 15, 1864,
Ibid.; Bates to the Secretary of Interior, January 22, 1864,
Ibid.; Coffey to the Secretary of the Interior, February 20,
1864, Ibid.; Coffey to Rufus Waples, March 2, 1864, Ibid.;
Bates to John D. Cogswell, April 21, 1864, Ibid.; Coffey
to Flamen Ball, May 7, 1864, Ibid.; Bates to Edward Jordan,
May 11, 1864, Ibid.; J. Hubley Ashton to Flamen Ball,
December 28, 1864, Ibid., vol. D.

12 Bates to William Meade Addison, May 10, 1861,
Attorney General's Office, Letters Sent, vol. B-2, RG 60,
microcopy 699, roll 5, National Archives; Bates to George
A. Coffey, June 4, 1861, Ibid.; and Bates to James W.
McDonald, June 8, 1861, Ibid.

13 Bates to Asa S. Jones, July 1, 1861, Attorney
General's Office, Letters Sent, vol. B-2, RG 60, micro-
copy 699, roll 5, National Archives; Chandler Robbins to
Seward, December 8, 1862, Seward Papers, Rush Rhees
Library, Rochester, New York; and see note 10, supra.
Asa S. Jones to Edward Jordan, June 10, 1861, Attorney General's Office, Letters Received, Missouri, box 1, file 1, RG 60, National Archives; Jones to Bates, August 5, 1861, ibid.; and see William Meade Addison to Bates, July 11, 1861, ibid., Maryland, box 1, file 1; J. Hubley Ashton to Bates, October 8, 1861, ibid., Pennsylvania, box 2, file 1.


See Chapter I.


December 8th Dispatch (December 9, 1862).


Presented here are charts showing the number within each party who served in the 37th Congress but were not reelected to the 38th Congress and showing for each state holding elections in 1862 the number of representatives holding seats in the 37th Congress who were re-elected to the 38th Congress. Data for these charts was compiled from the Tribune Almanac for 1863 and 1864 and from biographical data compiled by the Inter-university Consortium for Political Research, Ann Arbor, Michigan.
Chart 1: Number of Members by Party in 37th Congress Who Failed to be Re-Elected in 38th Congress

<table>
<thead>
<tr>
<th>Party (No. in 37th)</th>
<th>Not re-elected (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Democrats (48)</td>
<td>**19 (40%)</td>
</tr>
<tr>
<td>Republicans (106)</td>
<td>60 (57%)</td>
</tr>
<tr>
<td>Unionists (17)</td>
<td>*** 3 (18%)</td>
</tr>
</tbody>
</table>

** Includes William A. Richardson of Illinois who took his seat in the Senate on January 30, 1863. He stood for re-election to his House seat but failed to be re-elected.

***Includes Richard Harrison of Ohio and Benjamin F. Thomas of Massachusetts whom the Tribune Almanac listed as Unionists.

Chart 2: Number by Party and by State Who Served in the 37th Congress and Achieved Re-Election to the 38th Congress from States Holding Elections in 1862

<table>
<thead>
<tr>
<th>State (*)</th>
<th>Number re-elected (Party Comp. in 38th Congress)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Delaware</td>
<td>(1) OD, - , - (1R)</td>
</tr>
<tr>
<td>Illinois</td>
<td>(9) 3D, 3R, - (9D, 5R)</td>
</tr>
<tr>
<td>Indiana</td>
<td>(11) 4D, 2R, - (7D, 4R)</td>
</tr>
<tr>
<td>Iowa</td>
<td>(2) - , 1R, - (6R)</td>
</tr>
<tr>
<td>Kansas</td>
<td>(1) - , OR, - (1R)</td>
</tr>
<tr>
<td>Maine</td>
<td>(6) - , 2R, - (1D, 4R)</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>- , 6R, OU (10R)</td>
</tr>
<tr>
<td>Michigan</td>
<td>(2) - , 2R, - (1D, 5R)</td>
</tr>
<tr>
<td>Minnesota</td>
<td>(2) - , 1R, - (2R)</td>
</tr>
<tr>
<td>Missouri</td>
<td>(6) 0D, 1R, 2U** (4D, 5R)</td>
</tr>
<tr>
<td>New Jersey</td>
<td>(5) 2D, 0R, - (4D, 1R)</td>
</tr>
<tr>
<td>New York</td>
<td>(33) 4D, 5R, - (17D, 14R)</td>
</tr>
<tr>
<td>Ohio</td>
<td>(21) 5D, 1R, OU (13D, 6R)</td>
</tr>
<tr>
<td>Oregon</td>
<td>(1) 0D, - , - (1R)</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>5D, 4R, - (12D, 12R)</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>(3) - , 1R, - (3D, 3R)</td>
</tr>
</tbody>
</table>

*Number of seats permitted each state in 37th. Does not match total for "Party Comp. in 38th Congress" because of reapportionment resulting from 1860 Census.

(-) indicates that no members of the respective party had been elected from that state to serve in 37th Congress.

**Were Unionists in 37th Congress but were re-elected to 38th as Democrats.


George H. Pendleton to Alexander Long, December 7, 1862, Long Papers, Cincinnati Historical Society, Cincinnati, Ohio.

As early as March 1862 in a special message to Congress Lincoln advocated compensated emancipation. In the message, Lincoln proposed a resolution stating that the national government ought to cooperate with any state including rebel states in adopting compensated emancipation on a graduated basis. States would have discretion in compensating their citizens for inconveniences both "... public and private, produced by such change of system." If Congress and the country agreed as to the appropriateness of the resolution, Lincoln continued, the states should be notified so that consideration as to accepting or rejecting the proposition could occur. Lincoln was quick to state his strategy:

The leaders of the existing insurrection entertain the hope that this government will ultimately be forced to acknowledge the independence of some part of the disaffected region, and that all the slave States north of such part will then say, 'The Union for which we have struggled being already gone, we do not choose to go with the Southern section.' To deprive them of this hope substantially ends the rebellion, and the initiation of emancipation completely deprives them of it as to all the States initiating it. The point is not that all the States tolerating slavery would very soon, if at all, initiate emancipation; but that, while the offer is equally made to all, the more northern shall by such initiation make it certain to the more southern that in no event will the former ever join the latter in their proposed confederacy.
Lincoln stressed "initiation" because he believed gradual rather than immediate emancipation was more satisfactory. He also pointed out that the money then being spent to conduct the War would be more than enough to offer financial assistance to states initiating emancipation. In addition, he stressed that the national authority did not presume to dictate to the states what their policy should be since their decision would be entirely voluntary.

But his suggestions fell on deaf ears. A few months later, however, in his December message to Congress, Lincoln again broached the compensated emancipation scheme. At this time his plan had much more of a chance to succeed. The Emancipation Proclamation had effectively excluded the South from any chance for compensation. By 1863, strong emancipation efforts in Missouri and Maryland were underway. Furthermore, border states now recognized that slavery was doomed. Lest they hold out any longer and lose compensation altogether, accepting the President's plan seemed the only reasonable course to follow.

Republicans adopted the compensated emancipation scheme for political reasons. By 1863, as already noted, emancipation was the bedrock of Republican policy. For all intents and purposes, emancipation had been equated with punishment for secession, for disloyalty. Republicans could hardly expect the people of the border states to endorse the emancipation policy knowing that an end of slavery in rebeldom, should the Union succeed in subduing the wayward slave states, meant an end to slavery in their own states as well. Therefore, Republicans adopted compensated emancipation in principle if not in precise policy as a way out of this sticky dilemma. Richardson, M&P, VII, 3269-70; 3335-43. For abolitionists' attitudes towards compensated emancipation, see McPherson, Struggle for Equality, 93-7. For conditions in the border states, see William E. Parrish, Turbulent Partnership: Missouri and the Union, 1861-1865 (Columbia, Missouri, 1963), 135-6; Charles Lewis Wagandt, The Mighty Revolution: Negro Emancipation in Maryland, 1862-1864 (Baltimore, 1964), 82-3.

26William B. Hesseltine, Lincoln and the War Governors (N.Y., 1955), 273. Hesseltine points out that the 1862 elections illustrated state governors' inability to control politics and raise men for the army.
The bill Stevens introduced originally explicitly stated in the first section that black men were needed in the Army because "... the term of enlistment of a large number of our soldiers will soon expire, ..." Consequently replacements were needed "... whose con- stitutions peculiarly fit them for a southern cam- paign, ..." The first section of the Act authorized the President to recruit and provision 150,000 black soldiers. White officers would be appointed to command the regiments, but Negro officers could be appointed at the company level. The second section stated that slaves as well as free men might be enlisted. Slaves by virtue of their service were freed. More strikingly, slaves who belonged to loyal masters could be enlisted, and the United States would compensate loyal masters. Because of strong opposition from border state representatives, these provisions were weakened in the final bill which passed the House. The national government had to obtain the permission of the governors of loyal states in order to recruit blacks. White officers only would be appointed to command at all levels within black regiments, and a specific provision was added to insure that black regi- ments would be organized separately from white regiments. Cong. Globe, 37th Cong., 3rd sess., 282, 690, 924 (January 12, 1863), February 2 and 13, 1863), 12 SAL 597 @ 599.

12 SAL 597.

John G. Sproat, "Blueprint for Radical Recon- struction," XXIII, JSH (February 1957), 32-3. Harold Hyman in "Reconstruction and Political- Constitutional Institutions: The Popular Expression," has noted the novelty of national presence in the minds of citizens who, prior to civil war, were unaccustomed to seeing national officers of any sort. In Hyman (ed.), New Frontiers of the American Reconstruction (Urbana, 1966), 11-14. See Whiting, War Powers Under the Constitution (43rd ed., N.Y., 1871), 376-7 for opinion that 1863 Act was intended to close gaps in national administration of justice for the Army. See McPherson, The Struggle for Equality, Ch. 9, for abolitionists' role in recruiting Negroes during the Civil War.

Herman Belz, Reconstructing the Union (Ithaca, N.Y., 1969), 100-1.


32 Whiting, War Powers, iv.
33 Belz, Reconstructing the Union, 100 ff.

34 The most conspicuous example of the vulnerability of national officers to suits prior to the passage of the 1863 Habeas Corpus Act was a suit against Simon Cameron, Lincoln's first Secretary of War, whom an irate Pennsylvanian sued in early 1862. In late 1862, Henry D. Barrows, United States Marshal at Los Angeles, reported an individual had initiated a suit against him. See T. J. Coffey to Barrows, December 22, 1862, Attorney General's Office, Letters Sent, vol. B-5, no. 310, RG 60, microcopy T-969, roll 3, National Archives.

35 See Chapter VI, infra.
NOTES

CHAPTER IV

1 In the absence of legislation nullifying suits or declaring the defense for the national officer's action, the constitutionality of the act under which the officer derived his authority to act would be an important question on which the officer's defense would hinge.


4 I have put the word "indemnity" in quotes here for good reason. While it is true that in a general sense to indemnify someone means to afford him protection for his acts, in a historical context, "indemnity" has a specific meaning. In England, the King's officers were indemnified for their actions in performing their duties after periods of unrest. Indemnification meant that all suits for trespass were nullified or forbidden and that citizens who felt they were wronged had to place their claims with the government. Congress during the Civil War never adopted any such policy. It allowed suits to continue with the option that the officers could have them removed from the state courts where they began to the national courts which would conduct the trial. Citizens, however, could institute suits in the Court of Claims which meant they were instituting suits against the government. The only relief aside from removals the government provided its officers was in assigning the District Attorneys in the districts where suits were brought to handle the officers' defenses in the state courts and subsequently in the national courts if the cases were removed. See the Act of March 3, 1863 which

5 12 SAL 755.

6 On October 27, 1862 Ohio Representative Samuel Shellabarger reported to Seward: "I find a most fierce, simultaneous and concerted attack upon the gov. by all the successful democratic candidates for Cong., which indicates a determination on their part to wholly [sic] withdraw from the Administration all support from that one half of the men of the No[r]th who are carrying the fall elections. Indeed they declare from the stump now, since the elections, that not a man or dollar will be voted to the war. One chief point of attack they make the arrest of political prisoners." [my emphasis] October 27, 1862, Seward Papers, Rush Rhees Library, Rochester, N.Y. This letter does not indicate any public support for the Democrats. Shellabarger reported that Democrats were taking this position only since the elections, but it does indicate that Democrats were trying desperately to sustain the issue. As Democratic Representative Joseph A. Wright of Indiana noted in a candid moment, "We cannot, if we could conceal the fact that much capital has been made by politicians out of arrest which have been directed by the President." Cong. Globe, 37th Cong., 3rd sess., 200 (January 6, 1863).


8 2 SAL 231; 4 SAL 632.
I have chosen to distinguish between the British and American traditions by referring to proposals which follow the British tradition, such as Stevens' December 1862 bill annulling suits against national officers as "indemnity" legislation, and to those which allowed removal of suits from state to national courts, such as the Senate's substitute for Stevens' bill, which ultimately became sections 4 through 7 of the law, as "removals" legislation.

Congress was silent about speculating on what the Supreme Court would decide regarding the legal nature of the War and of Congress's and the Administration's conduct of the War thus far. However, rumors continually flowed throughout the country about supposed Democrats' "conspiracies" with the high court to declare congressional legislation and various executive activity illegal. For example, Trumbull received a letter from a worried correspondent reporting that, "In a recent conversation with a prominent 'democrat' he told me it was the intention of leading men of that party, so soon as Congress adjourns, to make up cases under the various Emancipation & Confiscation acts of this Congress, & under some of its military acts, & also under the President's Proclamation of Freedom, and have them pushed forward in the Courts below so that they could be heard at the bar of the Supreme Court during its present session (if possible), but at all events, upon its assembling in December next. He told me that a majority of the bench (as now constituted) was known to hold irrevocably to the opinion that these confiscation acts & the Proclamation would certainly be adjudged unconstitutional & void."
F. B. Stanton to Trumbull, January 26, 1863, Trumbull Papers, LC (microfilm, Illinois State Historical Library).


Cong. Globe, 37th Cong., 3rd sess., 20-1 (December 8, 1862). Stevens had introduced the same bill during the second session but nothing had come of it.

In mid-March 1862, Henry May reported from the House Judiciary Committee a bill for the discharge of state prisoners, which was read a first and second time, ordered to be printed, and recommitted to the Committee.
Nothing more was heard of it until July 3rd when the bill was again reported with an amendment in the form of a substitute. The substitute differed from the original according to John A. Bingham of Ohio, Chairman of the Judiciary Committee, in "... striking out of what relates to persons held and charged for military offenses, and the appending to the bill of an additional section, which has relation to the suspension of the privilege of the writ of habeas corpus, ..." The substitute in sections one and two required the Secretaries of State and War to furnish lists of any detained persons in areas of the United States where the administration of justice was not impaired to judges of federal courts who would order the release of such prisoners. These two sections also provided fines against any national officer who failed to comply with the judges' orders and specified further that in cases where individuals were indicted the judges were to accept bail for their release pending trial. In addition, if the Secretaries of State or War "for any reason" failed to provide lists of detained persons within five days after passage of the Act, the detained individual could petition for his release providing the judge deemed his release to be consistent with the public interest.

The appended third section declared "That it is and shall be lawful for the President of the United States" to suspend the writ of habeas corpus throughout the United States whenever in his judgment the public welfare demanded it and forbade judges in areas where the writ was suspended to issue the writ. The substitute was adopted, and the House passed the bill on July 8, 1862. Cong. Globe, 37th Cong., 2nd sess., 1228, 3105, 3106 (Bingham), 3183 (Bingham), 3184 (March 14, 1862; July 3 and 8, 1862).

14 Ibid., 3177, 3359, 3360, 3392 (July 8, 15, and 16, 1862). Several Senators objected to its provisions for release of prisoners and believed that by their action they might be implying that the President's authorizations of writ suspension and executive arrest activities were illegal -- essentially the Senate's position during the first session.

15 Two Senators echoed Wilson's judgment. When the bill came before the Senate for debate, Sumner withdrew his amendment because he ". . . supposed it would bear specially on certain cases which were then pending; but there has been a change of facts since then, as the Senator from Illinois will remember; a great many prisoners
have been discharged." In a similar vein, Republican Henry B. Anthony of Rhode Island observed, "... I have been assured upon the highest authority that there is not, and has not been for months, any person confined without process who could not release himself by taking the oath of allegiance, except some contractors who are charged with enormous frauds upon the Government. ... " Cong. Globe, 37th Cong., 3rd sess., 102 (Sumner), 204 (Wilson), 235 (Anthony) (December 16, 1862; January 6 and 8, 1863); see also exchange with Trumbull, Ibid., 1186 (February 23, 1863). Very early in 1862 Lincoln had directed that all state prisoners be released upon an oath professing loyalty, except those captured as spies or those who threatened the public security and declared that any further arrests would be made solely by the military authorities. In a subsequent order, Lincoln appointed John A. Dix and Edwards Pierrepont to head a commission to examine cases of individuals who still remained in military custody and to decide if they should be released. On August 8, 1862 Secretary of War Stanton by direction of the President issued "An Order to prevent evasion of military duty and for the suppression of disloyal practices" which forbade individuals subject to the draft to leave the country, authorized civil and military officers of the United States to arrest such persons who attempted to leave the United States or the state in which they resided, and suspended the writ of habeas corpus to such individuals and for those arrested for "disloyal practices". On the same day Stanton issued another order requiring U.S. marshals and local police officials to arrest "... any person or persons who may be engaged, by act, speech, or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or in any other disloyal practice against the United States." Exactly a month later Stanton qualified the orders so that future arrests would thereafter "... be made only upon my express warrant, or by direction of the military commander or Governor of the State in which such arrests may be made, and restrictions upon travel imposed by those orders are rescinded." Lincoln upgraded these orders in his September 24, 1862 proclamation suspending the writ of habeas corpus and declaring martial law throughout the United States for individuals connected with draft evasion, which meant individuals so arrested could be tried by military commission. Two months after the issuance of these proclamations Stanton ordered that all persons who had been arrested for resistance or counselling resistance to the draft, or "for otherwise giving aid and comfort to the enemy, in States where the draft has been made, or the quota of volunteers and militia has been furnished shall

16 Collamer was in the middle of his introduction when the morning hour expired and the hour previously agreed upon for a special order arrived. As a measure of the importance of Collamer's bill Trumbull requested the special order set for that time be postponed until Collamer finished his remarks which was agreed to. *Cong. Globe*, 37th Cong., 3rd sess., 247 (January 9, 1863).


19 When the bill reached the House, Stevens followed the usual practice and immediately advocated non-concurrence, but since several members wished to speak on both bills, Stevens withdrew the previous question on concurrence. After several days of debate, Stevens again advocated non-concurrence and renewed the previous question. The House, following Stevens' lead, non-concurred on roll call, 35-114. *Ibid.*, 1107 (February 19, 1863).

20 *Ibid.*, 1094 (Bayard) (February 9, 1863).


22 See Chapter III.

23 Article III, section 2 and the 6th Amendment.

24 In late 1862 former Supreme Court Justice, Benjamin R. Curtis (1851-1857), wrote a pamphlet which argued in strong terms against executive power to issue the
September proclamations and order. Curtis's pamphlet is illustrative of the confusion that gripped men at this juncture of events. He granted that in exceptional cases exercise of such powers as the proclamations and order set forth might be necessary, but he pointed out that they did "... not relate to exceptional cases -- they established a system. They do not relate to some instant emergency -- they cover an indefinite future. They do not seek for excuses -- they assert powers and rights. They are general rules of action, applicable to the entire country, and to every person in it; or to great tracts of country and to the social condition of their people; and they are to be applied whenever and wherever and to whomsoever the President, or any subordinate officer whom he may employ, may choose to apply them." Thus Curtis argued in almost one breath that the President could use his powers in exceptional cases, which implied that such powers were merely instruments -- means of accomplishing a goal. Yet in the very next instant Curtis claimed that Lincoln's use of those powers had established a system throughout the entire country which implied a result, a goal, a judgment as to what type of Union the country had become, was becoming, or would become in the future. Curtis betrays his confusion in claiming that the proclamations and order asserted both "powers [the means, the mode of acting, the authority to act] and rights [the reason for acting, the result, that for which a power was exercised]." Curtis, *Executive Power* (Boston, 1862), 14.

25 12 SAL 755 @ 756.

26 See, for example, Eifort v. Bevins, 64 Kty 460 (1866); Short v. Wilson, 64 Kty 350 (1866); Griffin v. Wilcox, 21 Ind. 370.

27 2 SAL 231 @ 233-4. The 1833 Force Act also provided a precedent. See 4 SAL 632 @ 633-4.


29 Martin v. Hunter's Lessee, 1 Wheaton 304 (U.S. 1816); and see Cohen v. Virginia, 6 Wheaton 264 (U.S. 1821).

30 As example see Chief Justice Joseph Story's opinion in *Ex parte Kearney*, 7 Wheaton 38 (U.S. 1822). And see cases, note 29.
31 Sal 73 @ 92; 1 Sal 93; 1 Sal 275 @ 276; 4 Sal 278.


33 Ibid., 546, 554 (January 27, 1863).

34 Apparently in making this change the Committee wished to avoid the issue of motivation which Cowan's defenses of probable cause and acting in good faith raised. An order of the President presented purely factual matters for the courts to consider.


36 As example, see Martin v. Hunter's Lessee, 1 Wheaton 304 (U.S. 1816).

37 Cong. Globe, 37th Cong., 3rd sess., 539 (January 27, 1863). This extension of the removal tradition to post-conviction cases resulted from the fact that Congress considered this question two years after the War began. It was an attempt in other words to provide an ex post facto remedy for suits against national officers already begun and completed rather than a device for checking state court processes at every stage of its proceedings. For the same reason, Congress in 1867 probably conferred post-conviction habeas corpus jurisdiction on the national courts in the second habeas corpus act of that year.

38 Ibid., 539 (January 27, 1863).

39 On June 9, 1863 Holt sent to Stanton a lengthy report which enclosed a list of political prisoners that section 3 of the 1863 Habeas Corpus Act required the Secretary of War to submit. In his report Holt outlined the criteria he had used for defining political prisoners. Holt pointed out that the Act was difficult to interpret and that no charges were listed on the rolls for many prisoners. Holt did not list prisoners held for purely military offenses or those who had already been tried by military commission or court-martial for such offenses. Holt did list those individuals for whom no charge had been given or the charge given was vague "... as by the words rebel, disloyal, &c. ..." The lists also included those who were held as hostages or as refugees. OR, series II, vol. 5, 765-6.
The occasion for debate in the 38th Congress was provided by a rider which Maryland Representative Henry Winter Davis introduced to a miscellaneous appropriation bill which forbade trials by courts-martial or military commission of all individuals except those mustered into the service of the Army or Navy or those captured as spies in areas where the courts were open. Although the question nominally was the extent of military jurisdiction to try civilians, many members of Congress confused that question with the Army's failure to provide lists of political prisoners per the requirements of the 1863 Habeas Corpus Act. Because the two Houses could not agree on the wording of the rider the entire bill failed. For an account of these events, see Charles Fairman, Reconstruction and Reunion, 1864-88, part 1 (N.Y. and London, 1971), 185-91.
NOTES

CHAPTER V

1Ex parte Milligan, 71 U.S. 2 @ 138-9 (1866).

2See ch. 1. The Courts themselves had discretion as to whether they would issue the writ. If upon the facts stated in the petition the court judged that the petitioner would be remanded after the writ issued and a hearing were held, the Courts could refuse to issue the writ. Ex parte Watkins, 28 U.S. 192 (1830); Ex parte Vallandigham, 68 U.S. 243 (1863).

3During the first months of the War, the lower national courts led the resistance, in which the state courts participated, to presidential proscriptions of their jurisdictions. Ex parte Merryman, American Law Register, IX (July 1861), 524-38; In the matter of John G. Mullen, reported in the Baltimore Sun, May 4, 1861, a clipping of which is in Papers of the Attorney General, Letters Received, War Department, Maryland, box 5, file 3, RG 60, National Archives; In re Murphy, discussed in The American Annual Cyclopaedia and Register of Important Events of the Year 1861, I (N.Y., 1870), 356-7. But see, In re McDonald, Fed. Cas. No. 8,751 (1861).


5Sherman Booth had been arrested by the U.S. Marshal in Wisconsin for his actions in helping a fugitive slave escape to Canada. An indictment under the 1850 Fugitive Slave Act was brought against him in the U.S. Circuit Court where he was tried and convicted. After his conviction, he petitioned the Wisconsin Supreme Court for a writ of habeas corpus which issued the writ and ordered his release. The government applied to the U.S. Supreme Court for a writ of error to review the Wisconsin court's action in releasing Booth. Ableman v. Booth, 21 Howard 506 (U.S. 1859). Alfred H. Kelly and Winfred A. Harbison, The American Constitution: Its Origin and Development (4th ed., N.Y. 1970), 343, 379-80.
6 These cases arose under section 7 of the 1833 Force Act which permitted U.S. circuit or district judges to issue writs of habeas corpus on behalf of national officers who were detained under state authority for acts done in the performance of their duty. 4 Statutes at Large (hereafter cited SAL) 632 @ 634-5; Ex parte Jenkins et al, Fed. Cas. No. 7259; Ex parte Robinson, Fed. Cas. No. 11,934; Ex parte Robinson, Fed. Cas. No. 11,935; Ex parte Sifford, Fed. Cas. No. 12,848.

7 Ableman v. Booth, 21 Howard 506 @ 514-6 (U.S. 1859).

8 For example, after Taney outlined the separate nature of the state and national sovereignties, pointing out that a state's judicial process could not be enforced outside of its own jurisdiction, he declared: "Nor is there anything in this supremacy of the General Government, or the jurisdiction of its judicial tribunals, to awaken the jealousy or offend the natural and just pride of State sovereignty. The Constitution of the United States, with all the powers conferred by it on the General Government, and surrendered by the States, was the voluntary act of the people of the several States, deliberately done, for their own protection and safety against injustice from one another." [my emphasis]. Ibid., 524.

9 [my emphasis]. Ibid., 523.

10 Ibid., 523.

11 It is clear that Taney believed that the state judge would be judicially apprized once the return to the writ was made. As he pointed out, "... after the return is made, and the State judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another Government, and that neither the writ of habeas corpus, nor any other process issued under State authority, can pass over the line of division between the two sovereignties." [my emphasis]. Ibid., 523.
Courts in other states issued similar opinions. In an opinion arising from a petition for the writ the Pennsylvania Supreme Court pointed out, "In the case at the bar, Bressler [the petitioner] was not committed for trial for any offence against the law, nor was he held by final process of any court, but was held by an officer whose duties are purely ministerial, on a military warrant or order of the provost marshal. It will be seen that there is not an element in the case . . . in common with the case of Ableman v. Booth. Hall to the President, September 4, 1863, Attorney General's Office, Letters Received, The President, box 3, file 3, RG 60, National Archives; Commonwealth ex rel. Bressler v. Gane, 3 Grants Cas. 457 (Pa., 1863); In re Barrett, 42 Barb. 479 (N.Y. 1863); Ex parte Anderson, 16 Iowa 595 (1863).

In re Barrett, 42 Barb. 479 (N.Y. 1863); and see People v. Gaul 44 Barb. 98 (N.Y. 1865).

See for example, In re Spangler, 11 Mich. 298 (1863); Hall to the President, September 4, 1863, Attorney General's Office, Letters Received, The President, box 3, file 3, RG 60, National Archives.
Fry to Stanton, November 17, 1863, Provost Marshal General's Office, Reports and Decisions of the Provost Marshal General, 1863-1866, Reports, RG 110, microcopy 621, National Archives. Fry reiterated the same point in his final report on the operations of the Bureau in 1866. Fry to Stanton, March 17, 1866, Ibid.

The Merryman, Vallandigham, and Milligan cases have taken historians' attentions away from this aspect of the writ suspension question. The courts' challenges to the military detention of individuals was not strongest in cases of arrest for military offenses in areas under military control. Thus Professors Randall's and Donald's judgment that, "The prominence of the Vallandigham and Milligan cases should not obscure the fact that these prosecutions were exceptional. In other words, the military trial of citizens for nonmilitary offenses in peaceful areas was far from typical," is well-taken. J. G. Randall and David Donald, *The Civil War and Reconstruction* (2nd ed., rev. and enl., Lexington, Massachusetts, 1969), 307.

17 12 SAL 597, 731; 13 SAL 379 @ 380; War Department, Adjutant General's Office, Headquarters of the Army, General Orders No. 73, September 7, 1861, RG 94, National Archives.

18 War Department, Adjutant General's Office, General Orders, No. 104, December 3, 1861, RG 94, National Archives; Ibid., No. 68, June 18, 1862.

In *re Tarble*, 80 U.S. 397 (1871); *In re Antrim*, Fed. Cas. No. 495, decided in the District Court for the Eastern District of Pennsylvania in 1863 is an example of how judges construed their jurisdiction to review questions of military enlistments. For the Provost Marshal General's reaction to this decision, see Fry to Stanton, September 13, 1863, Provost Marshal General's Office, Reports and Decisions of the Provost Marshal General, 1863-1866, Reports, RG 110, microcopy 621, National Archives. Also see, Fry to Stanton, November 17, 1863 and March 17, 1866 [Annual Report for 1863 and Final Report], Ibid. The Courts and the Army did vie with each other over their respective jurisdictions to try individuals in military service for offenses which both authorities defined as such. The Army maintained throughout the War that the civil and military jurisdictions in such cases were concurrent. Thus jurisdiction to try such individuals fell to whichever forum began proceedings first.

20 War Department, Adjutant General's Office, General Orders, No. 140, RG 94, National Archives; 12 SAL 731 @ 732.
21[my emphasis]. Holt to The Secretary of War, April 18, 1863, Office of the Judge Advocate General, Letters Sent, Record Book 2, pp. 190-1, RG 153, National Archives; and see Holt to J. D. Cox, June 30, 1863, Ibid., Record Book 3, pp. 103-4; and Holt to Col. J. B. Fry, August 22 and 27, September 8, 1863, Ibid., pp. 457, 578.


23James D. Richardson (comp.), A Compilation of the Messages and Papers of the Presidents . . . (hereafter cited M&P), VII (N.Y. 1897), 3371-2; Stanton to the President, September 13, 1863, Stanton papers, Letter Book, vol. 41, Library of Congress; A. Oakley Hall to the President, September 4, 1863, Attorney General's Office, Letters Received, President, box 3, file 3, RG 60, National Archives. As the citation for the Hall letter indicates, it was referred to the Attorney General whose endorsement reads: "Recd from the Prest Sept 7. needs no official action." The endorsement suggests that the President was planning to take some action of his own which would have precluded any action by the Attorney General to whom the President and the Secretary of War usually referred such matters. The letter from the Provost Marshal General which Stanton apparently referred to was dated September 13, 1863 and discussed two cases in which a state court in Pennsylvania had issued the writ and attachments for contempt when the provost marshals refused to comply. Fry to Stanton, September 13, 1863, Provost Marshal General's Office, Reports and Decisions of the Provost Marshal General, 1863-1866, Reports, RG 110, microcopy 621, National Archives.

24Fry to Stanton, September 14, 1863, Provost Marshal General's Office, Reports and Decisions of the Provost Marshal General, 1863-1866, Reports, RG 110, microcopy 621, National Archives; Chauncey Smith to [Fry], August 27, 1863, Ibid., Decisions. In the district court records for the Eastern District of Pennsylvania, see, for example: U.S. ex rel Yeager v. Hubbell; U.S. ex rel Philip Stoll v. Captain Brault; U.S. ex rel Sylvanus Auble v. Capt. Finney and Captor Lieutenant Jack;
W.S. ex rel James Carr v. Captain Jack; U.S. ex rel Thompson v. Dr. Lewis Taylor; and at least twenty-four more cases. U.S. District Court, Eastern District of Pennsylvania, Habeas Corpus Records, box 1, RG 21, Federal Records Center, Suitland, Maryland.


26Richardson, N&P, VIII, p. 3531.

27For example of such instructions, see Holt to Assistant Adjutant General Sherburn [telegram], January 26, 1866, Judge Advocate General’s Office, Letters Sent, Record Book 19, pp. 377-8, RG 153, National Archives.

28Such occasions usually involved the military’s detention and trial of civilians for military offenses. See for example, the case in late 1866 stemming from the murder of Union soldiers in South Carolina which is reported in detail in H. Report No. 23, 39th Congress, 2nd session, “Murder of Union Soldiers.”, serial set 1305.

2914 SAL 385, ch. 28.

30Chauncey Smith to [Fry], August 27, 1863, Provost Marshal General’s Office, Reports and Decisions of the Provost Marshal General, 1863-1866, Office, Decisions, RG 110, microcopy 621, National Archives.

31Holt to Fry, March 30, 1865, Provost Marshal General’s Office, Reports and Decisions of the Provost Marshal General, 1863-1866, Decisions, RG 110, microcopy 621, National Archives.

32[my emphasis]. Holt to Fry, March 30, 1865, Provost Marshal General’s Office, Reports and Decisions of the Provost Marshal General, 1863-1866, Decisions, RG 110, microcopy 621, National Archives; and see Holt to Fry, September 14, 1865, January 27 and 29, 1866, Ibid.

33J. Hubley Ashton to William A. Dart, May 27, 1865, Attorney General’s Office, Letters Sent, vol. D, RG 60, microcopy T-969, roll 4, National Archives; Edwin M. Stanton to James Speed, December 9, 1865, Attorney General’s Office, Letters Received, War Department, box 7, file 1, RG 60, National Archives. And for other examples
of suits against provost marshals, see Stanton to Speed, November 27, 1865, January 23 and 30, 1866, February 1, 6, and 19, 1866, *Ibid.*, file 1; Stanton to Henry Stanbery, October 6, 1866, *Ibid.*, file 3; and see J. Hubley Ashton to J. B. D. Cogswell, April 6, 1865, Attorney General's Office, Letters Sent, vol. D. RG 60, microcopy T-969, roll 4, National Archives; also Speed to Stanton, April 10, 1865, *Ibid.*; and Ashton to Joshua Tevis, April 10, 1865, *Ibid.* All of these letters were requests from the War Department to the Attorney General to instruct his district attorneys to defend the individuals being sued or prosecuted, were acknowledgments from the Attorney General's Office to the War Department that its requests had been honored, or were instructions to the district attorneys to take charge of the cases.

34 William F. Johnston to Brevet Maj. Gen. James B. Fry, December 29, 1865, enclosed in Stanton to Speed, January 4, 1866, Attorney General's Office, Letters Received, War Department, box 7, file 1, RG 60, National Archives.

35 U.S. District Attorney John Hanna, reported success in the defense of a case in a state court in Indiana and attributed it to the fact that the government through him had entered the case. Hanna's report was summarized by the Assistant Attorney General, J. Hubley Ashton, in a letter to Stanton, May 1, 1866, Letters Sent, vol. E. RG 60, microcopy T-969, roll 4, National Archives.

36 Holt to Stanton, March 2 and 15, 1864, Judge Advocate General, Letters Sent, Record Book 8, pp. 51, 108, RG 153, National Archives. In Holt's first letter to Stanton on the case he had apparently forgotten about the remedy the 1863 Habeas Corpus Act provided, for he advised that "... the prosecution should be defended by the United States; and in case of conviction, that the Governor of Maryland should be requested immediately to pardon Mr. Robey. Then should the executive of that State refuse to pardon him, it will devolve upon the government of the United States, by force as may be needful, to promptly release him from the custody of the state authorities and set him at liberty." [my emphasis] While a show of force was usually commanded in resisting the processes of state courts which issued and tried to enforce it writs of habeas corpus when the writ was suspended, such a course was exceptional when suits or prosecutions in unfriendly areas in hostile courts were at bar.
37 Chauncey Smith to Fry, August 3 and 5, 1863, Provost Marshal General's Office, Reports and Decisions of the Provost Marshal General, 1863-1866, Decisions, RG 110, microcopy 621, National Archives.

38 See for example, Holt to Stanton, March 13, 1866, Ibid.

39 For example, see report of conditions in South Carolina, J. Hubley Ashton to D. H. Starbuck, October 3, 1866, Attorney General's Office, Letters Sent, vol. F, RG 60, microcopy T-969, roll 5, National Archives.

40 Holt to Stanton, February 11, 1867, in Committee Papers, Senate, Military Affairs Committee, 39th Congress, 2nd session, 39A-E7, RG 46, National Archives. See also John Robinson to Holt, December 9, 1866 and Holt to Robinson, December 4, 1866, Ibid.
NOTES

CHAPTER VI


2 Yet because the Court declared that the President had been without authority to order military commission trials of civilians doubt arose whether his orders so authorizing them could be cited as a defense for officers who had in any way participated in such trials. Therefore, such officers were left without any protection whatsoever. Congress removed this doubt in 1867 by passing an act which retroactively made legal all presidential proclamations and orders regarding military commissions, courts-martial, and arrests, declared that all acts performed in the course of such proceedings were to be held prima facie as authorized by the President, and declared that no officer acting under such orders could be held criminally responsible. 14 Statutes at Large (hereafter cited SAL) 432.

3 In the committee papers of the House Judiciary Committee for the 39th Congress is a draft memorandum which analyzes the shortcomings of the 1863 Act using a particular case as an example. (The author of this memorandum is probably Burton C. Cook who introduced the bill which became the 1866 Habeas Corpus Act. A handwritten draft of Cook's bill is in the committee papers, and the memorandum is written in the same hand as the draft bill.) The memorandum cites the case of one Gassaway who was appointed provost marshal by an unidentified military commander of an unidentified department. The military commander issued a special order to Gassaway "to arrest and send to Camp Chase a few of the most violent and rabid secessionists, . . ." Gassaway arrested thirty persons, an undetermined number of whom subsequently initiated suits for trespass against Gassaway and individuals whom he had called upon to assist him. Gassaway relied on the removals section of the 1863 Habeas Corpus Act to have his case removed to the circuit court. The
memorandum writer noted three difficulties in preparing the defense of the provost marshal's case which pointed to shortcomings in the 1863 Act. The first difficulty noted was "in connecting Gassaway or the arrests made by him or by his order, with the President so as to show that he or they [i.e., Gassaway and his assistants], acted under color of authority from the President. All we can do is to show that he was appointed Provost Marshal by the Military Commander of the department -- and made the arrests under his orders." The second difficulty was that in all but one of the suits against Gassaway, application for the removal was not made until after the defendants had made their appearances before the state courts. Since the 1863 Act specified that such applications had to be made before the appearance was entered removal of the cases could not be effected. The memorandum writer thought it "very desirable to have an amendment of the Act of 1863 so as to allow the removal notwithstanding the defect has entered his appearance & filed his plea." The third difficulty was that in the one case in which the application had been filed in time, the state judge "... has refused to allow it on the ground that the act is unconstitutional. Is any further legislation necessary to meet such a case -- or will the usual remedy by mandamus from the U.S. Cir. Court be sufficient?" H.R. Committee Papers, 39th Congress, 1st sess., Committee on the Judiciary, "Protection of Federal Officials, Including Members of the Provost Marshal General's Office, from Local Vindictiveness," 39A-F13.7, RG 233, National Archives.

4See note 3, supra.

5Brisbin to Edwin M. Stanton, November 5, 1865, Stanton Papers, vol. 29, Library of Congress. See also, Brisbin to Stanton, May 30, 1865, E. M. Stanton Papers, vol. 27, Library of Congress; W. H. Randall to Brisbin, October 21, 1865, Ibid., vol. 29; B. H. Bristow to James Speed, February 9, 1866, Attorney General's Office, Letters Received, Kentucky, box 1, file 1, RG 60, National Archives.

Such problems in the Bluegrass state, if disquieting, surprised no one in Washington. Since the beginning of the War Kentucky had been a problem to the Government. She had oscillated from "neutrality" during the secession crisis and early months of the War to declaring for the Union in late 1861 in face of Confederate invasion to hostility to the Union late in the War which prompted President Lincoln in July 1864 to issue a proclamation putting the state under martial law. E. Merton Coulter,
The Civil War and Readjustment in Kentucky (Chapel Hill, 1926), passim. James D. Richardson (comp.), A Compilation of the Messages and Papers of the Presidents . . . (hereafter cited M&P), VII (N.Y., 1897), 3420-2.

Richardson, M&P, VIII, 3529-30.


Cong. Globe, 39th Cong., 1st sess., 1529 (Cook) (March 20, 1866); 2062 (Johnson) (April 20, 1866).


For the introductions of the other bills see Cong. Globe, 39th Cong., 1st sess., 196 (Walker), 644 (Wilson), and 919 (Moulton) (January 11, February 5 and 19, 1866).

The "Index" to the Congressional Globe for the first session of the Thirty-Ninth Congress is misleading in its citation on this point. The Globe "Index" lists a bill introduced by Martin Welker, a Ohio Republican, on January 11th as the original H.R. 298. In reality, Cook's bill which he introduced on February 19th was the original bill, and it was offered as a substitute for Welker's bill when the Committee reported to the House on March 13th. Cong. Globe, 39th Cong., 1st sess., 196, 919, 1367 (January 11, February 19, March 13, 1866).

Cong. Globe, 39th Cong., 1st sess., 1368, 1530 (March 13 and 20, 1866).

Cong. Globe, 39th Cong., 1st sess., 1526 (McKee), 1527 (Garfield and Smith), 1529 (Cook) (March 20, 1866); 1880 (Clark), 1983 (Trumbull), 2023 (Howard), 2052 (Clark), 2061 (Johnson) (April 11, 17, 18, and 20, 1866).

16 Ibid., 1527 (McKee) (March 20, 1866).

17 Ibid., 2022 (Clark) (April 18, 1866).

18 Ibid., 2018, 2019 (Edmunds and Cowan), 2052 (April 18 and 20, 1866).

19 Ibid., 1388-9 (Harding), 1524 (Rogers), 1528 (Ross) (March 14 and 20, 1866).

20 Ibid., 2066 (Hendricks, Trumbull and Clark) (April 20, 1866).

21 On January 6, 1866, the Provost Marshal General, James B. Fry, reported to Stanton that, "the Officers and Employees [sic] of this Bureau are being subjected to civil prosecution for Acts done in their official capacity. In the States of New Hampshire, Vermont, New York, Pennsylvania, Indiana, Illinois, Kentucky, and Wisconsin, Actions of this character have been commenced, numbering more than Sixteen (16) cases; in Twelve (12) of which, the Attorney General of the United States has been requested to instruct the proper District Attorney to conduct the defence; I am advised that a great number of other cases may be expected. In each of these cases, application has been or will be made to this Bureau, for reimbursement of Expense incurred in defending them, and the payment of Judgments and Costs. I present the subject for such action as you may deem proper, respectfully submitting that Officers and Employees [sic] of the Government, who have faithfully discharged their duties, ought not to be subjected to harassing litigation and Costs for their proper official acts.

"So far as I have been able to ascertain, the mischief here complained of is prompted mainly by that class of persons, which labored to embarrass this Bureau and the Department in the efforts to raise troops, during the War, protect the honor and welfare of the Army, and prevent the practice of wrong and fraud upon the Recruits joining it."

Fry did not forward his report until January 19th, and Stanton waited nearly a month before sending it to Congress. Fry to Stanton, January 6, 1866, H.R., Committee Papers, 3rd Congress, 1st sess., Committee on the Judiciary, "Protection of Federal Officials, Including Members of the Provost Marshal General's Office, from
Local Vindictiveness," 39A-F13.7, RG 233, National Archives; Fry to Stanton, January 27, 1866, Provost Marshal General's Office, Reports and Decisions of the Provost Marshal General, 1863-1866, Reports, RG 110, microcopy 621, National Archives; Stanton to Trumbull, February 19, 1866, Office of the Secretary of War, Reports to Congress From the Secretary of War, vol. 10, p. 326, RG 107, microcopy 220, roll 5, National Archives.

22 Cong. Globe, 39th Cong., 1st sess., 2134, 2147, 2161, 2303, 2384 (April 24 and 25, May 1 and 4, 1866).


24 Ibid., 2061-2 (Johnson)(April 20, 1866).

25 Justice Stephen J. Field wrote Chief Justice Chase in June 1866 about Reverdy Johnson's speculations on the as yet undecided Missouri test oath cases. Justice Miller believed Johnson had confused the test oath case with the military commissions case and speculated that Justice Nelson was his source. Field to Chase, June 30, 1866, Chase Papers, series I, vol. 97, Library of Congress; Miller to Chase, June 30, 1866, Ibid.; and see J. F. Asper to Chase, June 18, 1866, Ibid. See also Charles Fairman, Mr. Justice Miller and the Supreme Court, 1862-1890 (N.Y., 1939), 132-4. And also see James G. Randall (ed.), The Diary of Orville Hickman Browning, II (Springfield, Illinois, 1933), 69.

26 Chase's announcement implied that the Court had based its decisions on the narrow grounds of particular facts and circumstances of Milligan's case. He declared, "That on the facts stated in said petition and exhibits . . ." the writ should issue on Milligan's behalf and he should be discharged. On the third point regarding the legality of the military commission which tried Milligan, Chase prefaced his announcement with the same clause but added in reference to the military commission the words, "mentioned therein" which seemingly further constricted the effect of the decision to that one commission which had tried Milligan. [my emphasis]. 71 U.S. 2 (1866).

27 Apparently Congress was fairly well-informed as to the substance of the opinion by the time it met in December 1866, for John A. Bingham introduced this bill in the House on December 10, fully one week before Davis and Chase read their opinions. Cong. Globe, 39th Cong.,
2nd sess., 47 (December 10, 1866). Consideration was delayed because the Judiciary Committee had made special orders on other bills which took precedence.

28 14 SAL 432.
29 71 U.S. 2 @ 122 (1866).
31 Ibid., 1962 (Trumbull) (March 2, 1867).
32 Ibid., 1964 (Trumbull) (March 2, 1867).
33 [my emphasis]. Ibid., 1484 (Wilson) (February 22, 1867).
34 Ibid., 1959 (Johnson) (March 2, 1867).
37 Cong. Globe, 39th Cong., 1st sess., 2052 (Salsbury), 2054 (Hendricks), 2055 (Doolittle), 2057-8 (Cowan) (April 20, 1866).
38 Ibid., 2060 (Howard), 2061 (Johnson) (April 20, 1866).
39 Ibid., 2055-6 (Trumbull), 2059 (Doolittle) (April 20, 1866).

40 Doolittle moved to strike out "judges" from the fourth sections thus exempting that class of officials only from liability to civil suits. His amendment was defeated. Ibid., 2055, 2063 (April 20, 1866).
41 Ibid., 3086, 4096, 4116 (June 11, July 24 and 25, 1866); Ibid., 39th Cong., 2nd sess., 729 (January 25, 1867).
NOTES
CHAPTER VII

14 Statutes at Large (hereafter cited SAL), 428.

Although Congress duplicated its authorization in its 1866 and 1867 legislation, it did not in the 1867 Military Reconstruction Act rehearse the mode by which its authorization would be implemented. In the Freedmen's Bureau Act discretion was left to the President. In the 1867 Act, Congress conferred authority directly on the military commanders. SAL 428. James D. Richardson (comp.), A Compilation of the Messages and Papers of the Presidents ..., (hereafter cited M&P), VIII, 3629-30, 3636. Eric L. McKitrick, Andrew Johnson and Reconstruction (Chicago, 1960), 458-9.

3See, for example, Johnson's first Annual Message of December 1865 and his message vetoing the Civil Rights bill. Richardson, M&P, VIII, 3551-70, 3603-11.

4War Department, Adjutant General's Office, General Orders, No. 100, April 24, 1863, para. 13, p. 3, RG 94, National Archives; 2 SAL 359; and also see, for example, 12 SAL 731, 13 SAL 330, 356, and 379. "Report on the Case of Sely Lewis," September 8, 1862, War Department, Bureau of Military Justice, Letters Sent, Record Book 1, pp. 343-4, RG 153, National Archives.


7Holt to General W. W. Morris, January 20, 1864, War Department, Bureau of Military Justice, Letters Sent, Record Book 7, pp. 20-1, RG 153, National Archives; Same to the Secretary of War, March 26, 1864, Ibid., Record Book 8, p. 153.
Holt to the President, October 20, 1865, War Department, Bureau of Military Justice, Letters Sent, Record Book 20, pp. 54–7, RG 153, National Archives; Same to the Secretary of War, January 18, 1866, Ibid., Record Book 18, pp. 326–7; Same to Captain H. C. Blackman, January 9, 1866, Ibid., Record Book 19, 319. War Department, Bureau of Refugees, Freedmen, and Abandoned Lands, Circulars, No. 5, May 30, 1865, RG 105, National Archives.


Whiting, War Powers, 269–74. General Orders 100, para. 14, pp. 3–4. Whiting enumerates several provisions of the Constitution which allows the President to institute martial law in particular and military government in general. The provisions include the clauses investing executive power in the President, naming him Commander-in-Chief, requiring the United States to guarantee republican forms of government to the states, and commanding him to take care that the laws be faithfully executed. Of these provisions, the Commander-in-Chief clause is his chief source of authority: "There can be no reason to doubt that the army is placed under the supreme command of the Chief Magistrate for all purposes for which offensive or defensive war may be justly waged. If he has authority to commit any act of hostility for the suppression of rebellion or the repelling of invasion, he has a right to commit all acts of hostility which may in his judgment be required to secure success in his military operations; and he has, therefore, the same right to erect a military government in hostile territory, under circumstances justifying it, as to perform any other military act. The [subject] of a public enemy in time of war, is an act of war; it is, in fact, continuing against them a species of hostility without the use of unnecessary force. It is a mode of retaining a conquest, of continuing custody and supervision over an unfriendly population, and of subjecting malcontent non-combatants to the will of a superior force so as to prevent them from engaging in hostilities or inciting insurrections or breaches of the peace, and from giving aid and comfort to the enemy. Large numbers
of persons may thus be held in subjection to the moral
and physical force of comparatively few military men. . . .
If the Constitution allows the President to go to war and
to conquer the public enemy, the greater power must
include the less; the power to make a conquest must include
the authority to keep and maintain possession of it, while
war continues." (272-3).

12 Ibid., 262.

13 Quoted in Sefton, The United States Army, 78. This
telegram was issued as a circular on April 9th.

14 Whiting implies a distinction between two types of
martial law -- a "rigid" type which puts the inhabitants
under complete military domination and a "relaxed" type
by which the military enforces local law.

"No one would doubt our right to occupy a hostile dis-
trict of country by military posts, or by soldiers sta-
tioned in commanding positions, or to enforce upon all its
inhabitants the right rule of martial laws.

"How then can the right be questioned to hold the
same territory by a small number of soldiers, administering
the same law, under the same authority, whether these
military men be called their ordinary titles, or be styled
provost marshals or military governors?

"If the humanity of the conqueror allows the rigid
rules of martial law to be relaxed, and permits the forms
of local jurisprudence to be continued under the same
authority, so far as it may be done consistently with the
security of the conquest, on what principle can his right
do so be denied?" Whiting, War Powers, 273.

15 The Joint Committee on Reconstruction which pub-
lished its report in June 1866 based Congress's recon-
struction power on the guarantee clause. While the
Committee made this claim it never discussed the character
of the powers Congress could exercise in carrying out
the clause's mandate. However, during the second session
in debates on the Military Reconstruction bill, Congress made
clear that the powers it exercised were war powers. In
the "Report", however, the Committee discussed in detail
the President's power in the reconstruction process. It
defined the President's role in two ways. First, as
President, he was commanded to "... enforce existing
national laws, and to establish, as far as he could, such
a system of government as might be provided for by existing
national statutes." Second, as Commander-in-Chief, his
duty was "... to restore order, to preserve property,
and to protect the people against violence from any
quarter until provision should be made by law for their
government. In both cases, Congress was the final authority. In the former case, the President executed the laws which Congress made. In the latter case, any discretion which the President exercised in performance of his duty was strictly provisional until Congress through legislation declared the policy the President was to carry out. The "Report" went into at length the discretion the President could exercise as Commander-in-Chief: "He might, as President, assemble Congress and submit the whole matter to the law-making power; or he might continue military supervision and control until Congress should assemble on its regular appointed day. Selecting the latter alternative, he proceeded, by virtue of his power as commander-in-chief, to appoint provisional governors over the revolted States. They were regularly commissioned, and their compensation was paid, as the Secretary of War states, 'from the appropriation for army contingencies, because the duties performed by the parties were regarded as of a temporary character, ancillary to the withdrawal of military force, the disbandment of armies, and the reduction of military expenditure, by provisional organizations for the protection of civil rights, the preservation of peace, and to take the place of armed force in the respective States.' It cannot, we think, be contended that these governors possessed, or could exercise, any but military authority. They had no power to organize civil governments, nor to exercise any authority except that which inhere in their own persons under their commissions. Neither had the President, as commander-in-chief, any other than military power. But he was in exclusive possession of the military authority. It was for him to decide how far he would exercise it, how far he would relax it, when and on what terms he would withdraw it. He might properly permit the people to assemble, and to initiate local governments, and to execute such local laws as they might choose to frame not inconsistent with, nor in opposition to, the laws of the United States. And, if satisfied that they might safely be left to themselves, he might withdraw the military forces altogether, and leave the people of any or all of these States to govern themselves without his interference. . . . All this was within his own discretion, as military commander. But it was not for him to decide upon the nature or effect of any system of government which the people of these States might see fit to adopt. This power is lodged by the Constitution in the Congress of the United States, that branch of the government in which is vested the authority to fix the political relations of the States to the Union, whose duty it is to guarantee to each State a republican form of government, and to protect each and all of them against foreign or domestic violence, and against each other." [my emphasis] "Report of the Joint Committee
on Reconstruction." in Report of the Joint Committee on Reconstruction, at the Thirty-Ninth Congress. (Washington, 1866), viii-ix.

16 Johnson to Chase, October 2, 1865 and Chase to Johnson, October 12, 1865, Senate Executive Document, No. 19, serial set 1237, 39th Congress, 1st session; J. W. Schuckers, The Life and Public Services of Salmon Portland Chase, United States Senator and Governor of Ohio; Secretary of the Treasury and Chief-Justice of the United States. (N.Y., 1874), 535-43.

17 Chase to Nettie Chase, [May 1866], Chase Papers, series I, vol. 96, Library of Congress; Chase to J. W. Schuckers, May 15, 1866, and Chase to Gerrit Smith, May 31, 1866, Ibid., series II, vol. 3; Chase to Flamen Ball, May 12, 1866, Chase Papers, Cincinnati Historical Society, Cincinnati, Ohio.

18 Chase to Horace Greeley, June 5, 1866, Chase Papers, series I, vol. 97, Library of Congress.


20 Richardson, M&P, 3638-40. I cite the general order as expressing Johnson's position because of a letter his private secretary, Edward Cooper, wrote to North Carolina's Governor, William Worth, a few days before the order was issued: "I am directed by the President to inform you that by his proclamation of 2nd April 1866, it was not intended to interfere with military commissions at that time or previously organized; or trials then pending before such commissions unless by special instructions the accused were to be turned over to civil authority. ... There has been an order this day prepared and will soon be issued which will relieve and settle all embarrassments growing out of a misconstruction of the Proclamation of which I will send you a copy." Edward Cooper to Gov. William Worth, April 27, 1866, Andrew Johnson Papers (microfilm), Library of Congress (my thanks to Mr. Donald Nieman for providing me with a copy of this document).

21 See Benjamin P. Thomas and Harold Hyman, Stanton: The Life and Times of Lincoln's Secretary of War (New York, 1962), 478.

22 In the August 20th Proclamation Johnson endorsed "... military orders to enforce the execution of the acts of Congress, aid the civil authorities, and secure obedience to the Constitution and laws of the United States within the State of Texas if a resort to
military force for such purpose should at any time become necessary." Texas had been a problem child. Civil authority had been the most difficult to re-establish and was still tenuous when he issued his August proclamation. The above statement clearly indicates that military authority would be resorted to only when civil authority broke down.

President Johnson in his message vetoing the Freedmen's Bureau Amendment in July 1866 cited the Civil Rights Act removals provisions and section one rights guarantees as providing ample protection for blacks which made unnecessary the "military" courts specified in the Freedmen's Bureau Amendment. "By the provisions of the act full protection is afforded through the district courts of the United States to all persons injured, and whose privileges, as thus declared, are in any way impaired; and heavy penalties are denounced against the person who willfully violates the law. I need not state that that law did not receive my approval; yet its remedies are far more preferable than those proposed in the present bill -- the one being civil and the other military." Richardson, M&P, VIII, 3623. Thomas and Hyman, Stanton, 478.

Brock makes this point quite well. On the Civil Rights bill Brock argued, "But for most Republicans the decisive argument was the necessity for protection; for them the choice was not between leaving the status of the negro to be defined by State or by national power, but between continuing military protection or replacing it with civil machinery." W. R. Brock, An American Crisis: Congress and Reconstruction, 1865-1867 (London, 1963), 112-3.

See note 2, supra; Sefton, The United States Army, 78-82.

General Canby, Commander of the Department of the Gulf, issued a General Order explaining the Proclamation to his subordinates. On the question of military trials of civilians before the Proclamation's issuance, Canby stated, "It does not affect the jurisdiction of military tribunals over offences committed prior to its promulgation, and which then came legitimately within their jurisdiction; but in all cases where arrests have been made or proceedings instituted for offences committed subsequent to its date, the case will be dismissed and the accused parties discharged from custody and turned over to the
appropriate civil authority." Army and Navy Journal, III
See note 20, supra.

27 From the early days of the War rumors of plots to
separate the Northwest from the Union and alternately to
set up a separate confederacy or to join it with that of
the rebels crisscrossed the country. Behind this alleged
plot was a super-secret organization known under various
names such as the Mutual Protection Society, the Circle of
Honor, the Knights of the Mighty Host, and most popularly,
the Knights of the Golden Circle. The government actively
investigated this organization and its efforts culminated
in the organization of a military commission under Special
Orders No. 129 issued by General Alvin P. Hovey, Commander
of the District of Indiana, on September 17, 1864. Under
this order, Milligan and a number of other individuals
were brought to trial before the commission. For this
order, the proceedings of the commission, Judge Advocate
General Joseph Holt's report to Stanton on the govern-
ment's investigation of the society, see Benn Pitman (ed.),
The Trials for Treason at Indianapolis, Disclosing the
Plans for Establishing a Northwestern Confederacy... (Cincinnati, 1865), 9, 74-7, 323-39. The train of events
which culminated in the Supreme Court's decision of Ex
parte Milligan began on October 5, 1864. On that day Lamdin
P. Milligan, an active member of an allegedly disloyal
organization, the Order of the Sons of Liberty, was
arrested at his home in Huntington, Indiana and taken to
Indianapolis where he was tried along with several other
individuals by a military commission on charges of con-
spiring against the U.S. government, giving aid and com-
fort to rebels, inciting insurrection, disloyal prac-
tices, violating the laws of war. Milligan was con-
icted and sentenced to be hanged. On January 2, 1865 the
U.S. Circuit Court for Indiana met and empanelled a grand
jury to inquire whether U.S. laws had been violated and
if so, what indictments should be brought. The Court
adjourned after dismissing the grand jury which had not
found an indictment. On May 10, Milligan petitioned the
Circuit Court for a writ of habeas corpus as provided for
under sections 2 and 3 of the 1863 Habeas Corpus Act.
71 U.S. 2 @ 107-9 (1866).

28 David Davis, who wrote the Court's opinion in the
case, was the circuit justice on the court which certified
the case to the Supreme Court. For background, see
Willard L. King, Lincoln's Manager, David Davis (Cam-
bridge, 1960), 250-3.
The division of the Court on this point was 5 to 4: Justices Grier, Field, Nelson, and Clifford endorsed Davis's position, and Justices Wayne, Swayne, and Miller concurred with the Chief Justice who wrote the separate opinion.

71 U.S. 2 @ 120-1 (1866).

The illogical aspect of his argument is evident on p. 126 where he excluded situations when the courts are closed from the question to which he was addressing himself. Yet in the next sentence he asserted that "The jurisdiction claimed [in Milligan's case] is much more extensive."

Ibid., 126.

In fact, Chase argued that the 1863 Habeas Corpus Act indicated that Congress had prohibited military commission trials of civilians in the states where the courts were open and unobstructed. He pointed out that sections two and three of the Act required the Secretaries of State and War to provide the civil courts with lists of prisoners so that those forums if the evidence warranted could bring indictments and try the detained individuals. Ibid., 136, 141.

Ibid., 137-41.

David Davis to Rockwell, February 24, 1867, David Davis Papers, Illinois State Historical Library, Springfield, Illinois.

Chase to William P. Mellen, March 26, 1862, Chase Papers, series 1, Cincinnati Historical Society, Cincinnati, Ohio.


Chase to the President, May 4, 7, 8, 12, 17, and 23, 1865, copies, Chase Papers, series 2, Cincinnati Historical Society, Cincinnati, Ohio.
On June 19, shortly after Johnson issued the Mississippi proclamation, Chase wrote his daughter that the proclamation, "disappointed me greatly. I shall be very glad if it does not do a great deal of harm. I shall stick to my own principles." Two weeks later he was even more blunt to Sumner: "I come home profoundly impressed with the conviction that President Johnson makes a great mistake in refusing to recognize the colored citizens as part of the people with which in each state, he thinks himself not only authorized but bound to [announce] the conditions of restoration. It is a moral, political, & financial mistake." Not only was Chase disappointed because Johnson failed to grant blacks suffrage, but he was irritated because of the fallacy he perceived in Johnson's position. As he wrote J. W. Schuckers on July 7, "Mr. Johnson's mistake I think is in looking to the Constitution of the States to ascertain the rights of citizens any more than the rights of men. The war has made all men free & the war has made all men citizens. His duty is to look at actual relations now -- not at legal relations five years ago. He has no right to say that the loyal blacks are not a part of the people. In saying that the loyal people constitute the state & must reorganize it & then saying that the loyal blacks shall have no part in the reorganization he seems to me to contradict himself." In a July letter to Schuckers, Chase for the first time mentions Congress's role in the reconstruction process on which he bases his hopes for an agreeable result: "But my hope is that all will come right. Mr. Johnson will hardly interfere with Congress & Congress can pass [an] ample law of reorganization providing for the enrollment of all loyal citizens." Despite his disappointment with Johnson's policy, Chase continued to urge the President to adopt his views on suffrage. Chase to Kate Chase Sprague, June 9, 1865, Chase Papers, Pennsylvania Historical Society, Philadelphia; Chase to Charles Sumner, June 25, 1865, Chase Papers, series 2, vol. III, Library of Congress; Chase to Schuckers, July 7, 1865, Ibid.; Chase to Sumner, August 20, 1865, Ibid.; Chase to William Sprague, September 6, 1865, Ibid.; and see Chase to Rev. R. R. Aydelott, September 16, 1865, Chase Papers, Pennsylvania Historical Society, Philadelphia; Chase to Sumner, October 20, 1865, Ibid.; Chase to Hon. Hobart Beman, February 5, 1866, Ibid.; Chase to John C. Hamilton, February 18, 1866, Ibid.; Schuckers, Chase, 525-6.

Congress provided indemnity for these officers by passing an act during the 2nd session of the 39th Congress prohibiting prosecutions against national officers who had arrested or participated in trials of civilians by military commission before the passage of the act (see Chapter 6, supra). As a measure of its understanding of the Milligan decision, Congress declared all acts done under presidential authorization in the aforesaid cases to be legal as if they "... had been done under the previous express authority and direction of Congress ... and in pursuance of a law thereof previously enacted and expressly authorizing and directing the same to be done." Thus Congress learned much from the Milligan decision, although it might not have liked what it learned. [my emphasis]. 14 SAL 432.
NOTES
CHAPTER VIII

14 Statutes at Large 385, ch. 28.


3 The best discussions of Wartime congressional Reconstruction efforts are found in Herman Belz, Reconstructing the Union: Theory and Practice During the Civil War (Ithaca, N.Y.) and especially, Michael Les Benedict, "The Right Way: Congressional Republicans and Reconstruction, 1863-1869" (PhD diss.: Rice University, 1970), chs. 1-5.

4 As example, see the Wade-Davis bill.


6 As distinguished from the "northernization" of the southern legal systems, for equality before the law for blacks would reference what southern states permitted their white citizens.

7 Congressional debates on Louisiana during the second session of the 38th Congress demonstrate that the question was drawn along these lines. See Benedict, "The Right Way," ch. 4-5; Belz, Reconstructing the Union, ch. 9.
Until about twelve years ago, Reconstruction scholarship was mired in assumptions popularized in southern lore and by Democratic commentators on Reconstruction. Eric McKitrick's penetrating study, *Andrew Johnson and Reconstruction*, and John and LaWanda Cox's brilliant reinterpretation of the rift between President Johnson and Congress in 1865 and 1866 in *Politics, Principle, and Prejudice* changed Reconstruction scholarship which has since been amplified by equally able and insightful scholars as William R. Brock, John Hope Franklin, Stanley Kutler, David Donald, James McPherson, Harold Hyman, Kenneth Stampp, and Hans Trefousse.

Aside from studies of the Reconstruction process in individual states, most scholarly attention in recent years has been directed towards analyzing the nature and content of political interplay between Congress and the President, which began in 1865 in apparent consensus, progressed with rapid disparity and disillusionment, and culminated in an unbridgeable political chasm and the President's impeachment. Before McKitrick and the Coxes this story had been weighted heavily in favor of the President and had emphasized, as the Coxes aptly expressed it, the principles of the President and the politics of the Republicans (Congress). Recent scholarship, to paraphrase the Coxes again, has studied the principles of the Republicans, the various shades of politics and principles existing within the Republican party, and the politics of the President. And it has traced Reconstruction through the War years.


More recent efforts which concentrate on the factions within the Republican party are Benedict, "The Right Way";
Larry L. Kincaid, "The Legislative Origins of the Military Reconstruction Act, 1865-1867" (PhD diss.: Johns Hopkins University, 1968); Belz, Reconstructing the Union. Stanley Kutler has revised the long-accepted opinion of the Supreme Court as timid and cowering before the onslaught of the Radicals. He has shown not only that the Court was more vigorous during the period than was previously thought but also that there was no Radical onslaught. Kutler, Judicial Power and Reconstruction Politics (Chicago and London, 1968); and see, William Michael Wiecek, "The Reconstruction of Federal Judicial Power, 1863-1875," American Journal of Legal History, XIII (October 1969), 333-59; the best surveys of Reconstruction historiography are Harold M. Hyman, "Introduction," in The Radical Republicans and Reconstruction, 1861-1870, ed. Hyman (Indianapolis, 1967), xvii-lxviii; Bernard A. Weisberger, "The Dark and Bloody Ground of Reconstruction Historiography," Journal of Southern History, XXXV (November 1959), 427-47. Larry Kincaid, "Victims of Circumstance: An Interpretation of Changing Attitudes Toward Republican Policy Makers and Reconstruction," Journal of American History, LVII (June 1970), 48-66.

9Fifteen years after the 14th Amendment became part of the Constitution Roscoe Conkling, a member of the Joint Committee on Reconstruction which proposed the Amendment, argued before the Supreme Court that the Committee had drafted the third clause of section one, forbidding states from depriving persons of life, liberty, or property without due process and of equal protection, in order to protect corporations. Charles and Mary Beard, thirty years later, used Conkling's argument as evidence in proposing "the conspiracy theory" regarding the Amendment which asserted that the Committee in the guise of protecting human rights had conspired to protect business interests. A lively historical debate ensued over the Beards' contentions which have since been discredited.

Just as this debate subsided two events in the last twenty-five years occurred to re-ignite controversy over the Amendment. The first occurred in 1947 when Supreme Court Justice Hugo Black in a dissenting opinion in Adamson v. California argued that the intention of the framers of the Amendment had been to incorporate the Bill of Rights into the prohibitions stated in section one of the Amendment. Scholars, notable among them Charles Fairman, took positions on either side of Black's argument and a fresh re-examination of the history of the Amendment was underway. The inquiry was given new significance and impetus as a result of the Civil Rights Revolution which began in 1954 with the Supreme Court's

While most scholars have noted that some quarters of the party advocated Reconstruction upon the basis of black suffrage they have failed to grant its significance in elucidating Republican hopes and fears, limitations and perspectives regarding the final outcome of Reconstruction. Most scholars who have considered the subject at all have assumed that the Republican party did not concern itself with the issue in Congress until the 1867 Military Reconstruction bill, when Congress inaugurated its program of Reconstruction by calling for and prescribing the qualification of voters in southern state constitutional conventions. In a recently completed, brilliantly argued, and thoroughly researched dissertation, Michael Les Benedict has argued that the radicals in early 1865 began a strong offensive to get the Republican party to endorse reconstruction on the basis of black suffrage. The radicals would have succeeded, Benedict argued, but for Andrew Johnson's refusal to demand the southern states to make blacks voters in the state reorganization process. Moderate and some conservative Republicans who had come around by mid-1865 to endorsing black suffrage, in face of Johnson's refusal, changed their minds and therefore made impossible radical efforts to make black suffrage a test of party loyalty in the 39th Congress.

Of all the scholars who have studied Reconstruction, Benedict has come the closest to granting suffrage
extension its proper place in that historiography. However, Benedict has misinterpreted the aims of the radicals in 1865, overestimated the degree to which Johnson cowed the rest of the Republicans on suffrage extension, and underestimated the effect the Democratic party's efforts had on Republican political strategy to bring Andrew Johnson into its fold. All these factors affected Republicans' perceptions of their party's future, hence the future of Reconstruction. Benedict, "The Right Way," ch. 6; and see LaWanda Cox and John H. Cox, "Negro Suffrage and Republican Politics: The Problem of Motivation," Journal of Southern History, XXXIII (August 1967), 303-30, for a discussion of the historiography and cites to the scholarship.

11 Benedict, "The Right Way," ch. 5; Belz, Reconstructing the Union, ch. 10.


14 Stevens to Sumner, May 10, 1865, Sumner Papers, Houghton Library, Harvard; Loan to Sumner, June 1, 1865, Ibid.; Boutwell to Sumner, June 12, 1865, Ibid.; James Harlan to Sumner, June 15, 1865, Ibid.; Jacob M. Howard to Sumner, June 22, 1865, Ibid.; E. D. Morgan to Sumner, July 21, 1865, Ibid.; Sumner to Schurz, June 19, 1865, Ibid.; Sumner-Schurz Correspondence; Sumner to Wade, June 9 and 12, 1865, Wade Papers, vol. 11, Library of Congress; Sumner to Stevens, June 19, 1865, Stevens Papers, box 17, Library of Congress.

15 Sumner to Wade, June 12, 1865, Wade Papers, vol. 11, Library of Congress; Sumner to Stevens, June 19 and July 12, 1865, Stevens Papers, box 17, Library of Congress; Sumner to Schurz, June 15 and 19, 1865, Sumner Papers, Sumner-Schurz Correspondence, Houghton Library, Harvard. John Murray Forbes to N. M. Beckwith, June 25, 1865 in Letters and Recollections of John Murray Forbes, ed. Sarah Forbes Hughes, II (Boston and N.Y., 1900), 143-4.

16 Jacob M. Howard to Sumner, June 22, 1865, Sumner Papers, Houghton Library, Harvard; Henry Winter Davis to Sumner, June 20, 1865, Ibid.; E. D. Morgan to Sumner,


18 Morrill to Sumner [July 1865], Sumner Papers, Houghton Library, Harvard; and see McKitrick, Andrew Johnson, 64.

19 As example, see [Thaddeus Stevens], *Reconstruction. Speech of the Hon. Thaddeus Stevens, Delivered in the City of Lancaster, September 7th, 1865.* (Lancaster, Pennsylvania, 1865).


23 Welles to Sumner, June 30, 1865, Sumner Papers, Houghton Library, Harvard.

24 The texts of these resolutions can be found in *The Tribune Almanac and Political Register for 1866* (N.Y., 1866), 43-6; Henry Wilson to Sumner, September 9, 1865, Sumner Papers, Houghton Library, Harvard.

25 In each of these three states the vote against impartial suffrage was small: in Connecticut, which held its election on October 2, the majority against was slightly less than 6300 votes out of a total vote of 60,700; in Wisconsin, which voted on November 7, the majority against was 9000 out of a total vote of 102,000; in Minnesota, which also voted on November 7, the majority against was 2700 out of a total vote of 26,900. Impartial suffrage was only one form which the suffrage issue took. It meant that whatever requirements a state imposed for voting applied equally to all persons regardless of color.
Impartial suffrage represented a middle position between universal suffrage and restricted suffrage. Universal suffrage meant that all men should have the right to vote without any qualifications. Some advocates of this position also supported women's suffrage. Restricted suffrage advocates supported qualifications for blacks which they would not require for whites. The returns for the Wisconsin, Connecticut, and Minnesota elections can be found in The American Annual Cyclopaedia and Register of Important Events of the Year 1865, V (N.Y., 1869), 304, 577, 823. And see Cong. Globe, 39th Cong., 1st sess., 3037 (Yates) (June 8, 1866).

26 Howard to Sumner, November 12, 1865, Sumner Papers, Houghton Library, Harvard.

27 December 12, 1865 in [Rutherford B. Hayes], The Diary and Letters of Rutherford Birchard Hayes, Nineteenth President of the United States, ed. Charles Richard Williams, III, (Columbus, 1924), 10; Hayes to S. Birchard, December 11, 1865, Ibid., 10. And see Hayes to Warner Bateman, December 4, 1865, Bateman Papers, Western Reserve Historical Society, Cleveland, Ohio; Henry S. Lane to A. H. Blair, December 2, 1865, Lane Papers, Smith Library, Indiana State Historical Society, Indianapolis; James A. Garfield to Crete, December 3, 1865, Garfield Papers, series III, box 2, Library of Congress.


29 Sumner to Schurz [December 25, 1865], Sumner Papers, Sumner-Schurz Correspondence, Houghton Library, Harvard.

NOTES

CHAPTER IX

1A. K. McClurg to Stevens, January 13, 1866, Stevens Papers, box 18, Library of Congress.

2[Rutherford B. Hayes], Diary and Letters of Rutherford Birchard Hayes, Nineteenth President of the United States, ed. Charles Richard Williams, III ([Columbus], 1924), 7-8; [Gideon Welles], Diary of Gideon Welles, Secretary of the Navy Under Lincoln and Johnson, II (Boston and N.Y., 1911), 388.

3James D. Richardson (comp.), A Compilation of the Messages and Papers of the Presidents . . . (hereafter cited M&P), VII (N.Y., 1897), 3510-2.


6Hayes to Warner Bateman, February 27, 1866, Bateman Papers, Western Reserve Historical Society, Cleveland; George W. Julian to Laura Giddings Julian, January 31, 1866, Julian Papers, Indiana Division, Indiana State Library, Indianapolis; John Sherman to Warner M. Bateman, February 10, 1866, Bateman Papers, Western Reserve Historical Society Library, Cleveland [my thanks to Dr. Roger Bridges for this document]; Charles Sumner to Charles A. Dana, Dana Papers, Massachusetts Historical Society, Boston; A. K. McClurg to Stevens, January 13, 1866, Stevens Papers, box 18, Library of Congress. Garfield to Hinsdale, February 13, 1866 in Garfield-Hinsdale Letters, 78-9.
Hayes to Warner Bateman, February 27, 1866, Bateman Papers, Western Reserve Historical Society Library, Cleveland. Hayes to S. Birchard, March 4, 1866 in [Hayes], Diaries and Letters, III, 19. Hayes to Colonel Russel Hastings, March 4, 1866, Hayes Papers, Rutherford B. Hayes Library, Fremont, Ohio [typescript].

Ibid.; Hayes to C. D. Coffin, March 22, 1866, Hayes Papers, Rutherford B. Hayes Library, Fremont, Ohio [typescript of original in Chicago Historical Society]; and see, Hayes to Mother, March 22, 1866, Ibid. [typescript of original in Rutherford B. Hayes Library].

George W. Julian to Mrs. Child, February 20 and 24, 1866, Julian Papers, Indiana Division, Indiana State Library, Indianapolis; William P. Nixon to Frederick Hassaurek, February 23, 1866, Hassaurek Papers, Ohio Historical Society, Columbus; John Wentworth to [Haines], March 7, 1866, Wentworth Papers, Chicago Historical Society [my thanks to Edward Weisel for this document].

Cochrane to Stevens, February 21, 1866, Stevens Papers, box 6, Library of Congress. On this score, Gideon Welles betrayed the confusion of many individuals in 1866 who were nominally members of the Republican party yet who supported Andrew Johnson. His remarks on Seward and the political situation in Connecticut betray his perplexity. Seward was loyal to Johnson, Welles, felt, but party politics in New York required him to adopt a different posture. In Connecticut, his political friends supported the radical candidate for Governor who supported Johnson less enthusiastically than the Democrats' candidate who supported Johnson. Welles, Diary, II, 425-6, 452, 456-60.

Hayes to C. D. Coffin, March 22, 1866, Hayes Papers, Rutherford B. Hayes Library, Fremont, Ohio [typescript of original in Chicago Historical Society]; and see Hayes to Mother, March 22, 1866, Ibid. [typescript of original in the Rutherford B. Hayes Library]. John Wentworth to [Haines], March 7, 1866, Wentworth Papers, Chicago Historical Society.

Lafayette Foster to Anna Foster, April 17, 1866, Foster Papers, Massachusetts Historical Society, Boston; William Pitt Fessenden to J. S. Pike, April 6, 1866, Roger B. Taney Papers, box 1, Library of Congress; Cong. Globe, 39th Cong., 1st sess., 1755 (Trumbull) (April 4, 1866); Godlove Orth to [Stephen] Neal, April 29, 1866, Orth Papers, Indiana Division, Indiana State Library, Indianapolis. Trumbull to Wife, May 8, 15, 20, 27, and 29, 1866, Trumbull Papers, Illinois State Historical

13 Cochrane to Stevens, February 21, 1866, Stevens Papers, box 6, Library of Congress.

14 Cong. Globe, 39th Cong., 1st sess., 129, 297 (Stewart), 523 (Davis), 319 (Trumbull) (January 5, 18, 19, and 31, 1866).


16 Cong. Globe, 39th Cong., 1st sess., 936 (Trumbull) (February 20, 1866).

17 See Daniel Clark's comments, quoted below p. 375 For cite to his comments, see ch.10, n. 44; Cong. Globe, 39th Cong., 1st sess., 378 (Donnelly), 385 (Farnsworth), 429 (Bingham) (January 23, and 25, 1866).

18 14 Statutes at Large (hereafter cited SAL), 27.


21 Cong. Globe, 39th Cong., 1st sess., 605-6 (Trumbull) (February 2, 1866); 1153 (Thayer) (March 2, 1866).

22 James D. Richardson (comp), A Compilation of the Messages and Papers of the Presidents . . . (hereafter cited M&P), VIII (N.Y., 1897), 3597, 3621.

23 Cong. Globe, 39th Cong., 1st sess., 938 (Trumbull) (February 20, 1866).

Trumbull to Wife, July 17, 1866, Trumbull Papers, Illinois State Historical Library, Springfield.

Richardson, M&P, VIII, 3629-30, 3636.

A. Webster to Justin S. Morrill, May 19, 1866, House of Representatives, Committee Papers, Committee on Ways and Means, Paper of Justin S. Morrill, Chairman, 39th Congress, 39A-F27.4, RG 233, National Archives. And see documents, note 20, supra.


Richardson, M&P, VIII, 3643-7.
NOTES

CHAPTER X

1 Congressional Globe (hereafter cited Cong. Globe), 39th Cong., 1st sess., 2459 (Stevens), 2510 (Miller) (May 8 and 9, 1866).

2 Ibid., 2542 (Bingham) (May 10, 1866).

3 Justice Bushrod Washington’s opinion in Corfield v. Coryell, which Reconstruction contemporaries so often cited as summarizing the privileges and immunities of citizens of the United States, included suffrage as one of the privileges and immunities. Moreover, it summarizes rights which states confer upon their citizens. Fed. Cas. No. 3,230 (E.D. Pa., 1823). And see, Cong. Globe, 39th Cong., 1st sess., 475 (Trumbull), 3031-3 (Henderson) January 29 and June 8, 1866). When the House considered the Civil Rights bill Bingham moved to delete from section one “and there shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory of the United States on account of race, color, or previous condition of slavery,” because he believed the clause would prevent states from discriminating on the basis of color in office-holding and voting. Ibid., 1291 (Bingham) (March 9, 1866).


6 Cong. Globe, 39th Cong., 1st sess., 1291 (Bingham), 2459 (Stevens), 2766 (Howard), 2961 (Poland), 3037 (Yates) (March 9, May 8 and 23, June 5 and 8, 1866).

7 For example, compare Bingham’s position with Shellabarger’s and James F. Wilson’s, Ibid., 1291-95 (March 9, 1866).
Ibid., 599-600 (Trumbull) (February 2, 1866).

Ibid., 2512 (Raymond), 2513 (Wilson) (May 9, 1866).

Ibid., 574 (Trumbull), 1152 (Thayer), 2505 (Wilson) (February 1, 1866; March 2 and May 9, 1866).

Benj. B. Kendrick, The Journal of the Joint Committee of Fifteen on Reconstruction: 39th Congress, 1865-1867 (N.Y., and London, 1914), 46, 51, 54-8, 60-1. Bingham originally reported the amendment to the House on February 13, but because of objection to the third reading, Stevens prevailed upon him to recommit it in order to expedite its consideration since it was a privileged matter. The amendment was not reported again until February 26. Cong. Globe, 39th Cong., 1st sess., 813, 1033, 1088-94 (Bingham) (February 13, 26, and 28, 1866).

Cong. Globe, 39th Cong., 1st sess., 1063 (Hale), 1095 (Hotchkiss) (February 27 and 28, 1866).

James D. Richardson (comp.), A Compilation of the Messages and Papers of the Presidents ..., VIII (N.Y., 1897), 3603-6.

Cong. Globe, 39th Cong., 1st sess., 2459 (Stevens), 2462 (Garfield), 2498 (Broomall), 2511 (Eliot), 2896 (Howard) (May 8, 9, and 30, 1866).


As example, see Cong. Globe, 39th Cong., 1st sess., 1757 (Trumbull) (April 4, 1866).

Robert Kohl in a recent article argues to the contrary. He asserts that Congress in the Civil Rights Act of 1866 meant to reach private discrimination in the form of private land developers' refusals to sell property to Negroes. However, it is more correct to argue that Congress was much more concerned with private violence against whites and Unionists than whether the former class could purchase land from prejudiced whites. Congress took steps through the Freedmen's Bureau Act rather than through the Civil Rights Act to nullify blacks' inability to purchase lands because of local prejudice by making public lands available to them for purchase and by securing them, albeit temporarily, in leases of abandoned lands on the Sea Islands and elsewhere. Robert L. Kohl, "The Civil Rights Act of 1866, Its Hour Come Round At Last: Jones v. Alfred H. Mayer Co.", Virginia Law Review, LV (March 1969), 272-300.

[Rutherford B. Hayes], Diary and Letters of Rutherford Birchard Hayes: Nineteenth President of the United States, ed. Charles Richard Williams, III (Columbus, 1924), 7; Cong. Globe, 39th Cong., 1st sess., 6 (December 4, 1865).


Ibid., 45-6, 50.

Ibid., 50-1.

Ibid., 52.

See note 11 and text, supra.


Republican Representatives Robert A. Schenck and Samuel Shellabarger of Ohio and Pennsylvania Representative Henry Bromwell offered alternative proposition which based representation on the number of voters or electors of the most numerous branch of the state legislatures. Cong. Globe, 39th Cong., 1st sess., 405 (Shellabarger), 407 (Schenck), 409 (Bromwell), and 535 (Schenck), (January 24 and 31, 1866).

Cong. Globe, 39th Cong., 1st sess., 353 (Rogers), 377 (Blaine), 378 (Sloan), 405 (Lawrence) (January 22, 23, and 24, 1866).


Cong. Globe, 39th Cong., 1st sess., 378 (Donnelly), 385 (Farnsworth), 429 (Bingham) (January 23 and 25, 1866).
31Ibid., 407 (Pike), 410 (Bromwell) (January 24, 1866). The Baltimore American reported on January 2, 1866 that "we are informed that all the Republican and Union members of both Houses of Congress, of the various shades of opinion -- as well those known as Radicals as those known as Conservatives -- are united as to the propriety and necessity of this [reapportionment] amendment, and that it is to be regarded as a party test question. If such be the case, and the President gives it an earnest support, we do not see how it can fail of success." Ohio's John Sherman told a friend in February that it was "... absolutely indispensable that we change in some way the basis of Representation or extend suffrage[.]. I greatly prefer the former - leaving the question of suffrage to be settled hereafter by each State. ... My own conviction of the necessity of a change in the basis of representation is so strong that I would attempt it against the Administration[.]" John Sherman to Warner M. Bateman, February 10, 1866, Bateman Papers, Western Reserve Historical Society, Cleveland. In May, Trumbull's conviction on suffrage-extension was so great that he was thinking of offering a constitutional amendment to elect the President by a direct vote of the people. Trumbull to Wife, May 27, 1866, Trumbull Papers, Illinois State Historical Library. The evidence is overwhelming that Congress felt severely constrained by public opinion in constructing the Amendment. Repeatedly members of Congress in the course of debate declared that the Amendment or various parts of it were all the people would accept. Cong. Globe, 39th Cong., 1st sess., 2459 (Stevens), 2462 (Garfield), 2498 (Broomall), 2509 (Spalding), 2511 (Eliot), 2539 (Farnsworth), 2536 (Longyear), 3148 (Stevens) (May 8, 9, and 10 and June 13, 1866); 2766 (Howard), 2798 (Stewart), 2963-4 (Poland), 2964 (Stewart), 2986 (Sherman) (May 23 and 24, 1866 and June 5 and 6, 1866).

32As example, see Cong. Globe, 39th Cong., 1st sess., 673 (Doolittle), 1284 (Clark), 1321 (Wilson) (February 6 and March 9 and 12, 1866).

33As example, see Ibid., 1321 (Sumner) (March 12, 1866).

34As example, see Ibid., 702 (Henderson), 1287 (Poland) (February 7 and March 9, 1966).

35Ibid., 1287-88 (March 9, 1866).

36The four Republicans were: B. Gratz Brown of Missouri, Samuel Pomeroy of Kansas, Charles Sumner of Massachusetts, and Richard Yates of Illinois.
37 Cong. Globe, 39th Cong., 1st sess., 1288 (Stewart and Lane) (March 9, 1866).

38 Most of the proposals offered for changing the basis of representation recommended one of these bases. Sherman presents the classic argument on their behalf. Ibid., 2986 (June 6, 1866).

39 See note 27, supra.

40 As example, see Cong. Globe, 39th Cong., 1st sess., 705 (Fessenden), (February 7, 1866).

41 As example, see Ibid., 537 (Stevens) (January 31, 1866).

42 Ibid., 2459 (Stevens) (May 8, 1866).

43 The relation between education and suffrage in the 19th-century "mind" needs further study, especially as it bears on contemporaries' attitudes toward giving the black man the vote. J. Miller McKim declared in late 1866 that "For at the base of all efforts at re-construction of the South -- social, civil & individual -- lies this work of education. Democracy without the school-mentor is an impossibility. Universal suffrage without universal education would be universal anarchy. "What I mean to say is that impartial suffrage (for which we contend to the death) supposes impartial education." McKim to Salmon P. Chase, October 15, 1866, Chase Papers, series I, vol. 97, Library of Congress. As example of the debates in Congress, see, Cong. Globe, 39th Cong., 1st sess., 536-7 (Stevens), 739-40 (Lane of Indiana) (January 31 and February 7, 1866).

44 Cong. Globe, 39th Cong., 1st sess., 834 (Clark), 3035 (Henderson) (February 14 and June 8, 1866); 2462 (Garfield) (May 8, 1866).

45 Ibid., 2802 (Stewart), 3035 (Henderson) (May 24 and June 8, 1866).

46 Ibid., 2800 and 2802 (Stewart) (May 24, 1866).
NOTES

CHAPTER XI

1 Democrats and Republicans alike agreed that the 1866 elections meant repudiation of Johnson's push for immediate restoration. Johnson supporters like James R. Doolittle believed the setback was only temporary. He based future hopes on the southern and border states' refusals to ratify the 14th Amendment which would result in the Republican party's insistence on reorganizing the southern states on the basis of Negro suffrage. Doolittle believed that the plan would pass Congress but not over the veto, and "That will present the issue squarely of forcing negro suffrage upon the South, and upon that we can beat them at the next Presidential election if we act wisely, and do not suffer from the indiscretion of our friends [like Andrew Johnson]."

Republicans looked on the election in two ways. The first was a mandate for adoption of the 14th Amendment, and the second as endorsing congressional efforts that might be made to restrain Johnson. Republicans from all quarters of the party believed that the people firmly supported their efforts. Doolittle to Orville Hickman Browning, November 8, 1866, Browning Papers, Illinois State Historical Library, Springfield; Justin S. Morrill to James G. Blaine, October 29, 1866, Blaine Papers, box 12, Library of Congress; Henry S. Lane to Aaron H. Blair, November 30, 1866, Lane Papers, Smith Library, Indiana State Historical Society, Indianapolis; John Sherman to Warner Bateman, December 3, 1866, Bateman Papers, Western Reserve Historical Society, Cleveland; Benjamin F. Wade to Bellamy Storer, December 17, 1866, Wade-Storer Correspondence, Cincinnati Historical Society, Cincinnati.


3 14 Statutes at Large (hereafter cited SAL), 428.
The second 1867 Habeas Corpus Act, which was signed into law on February 5, included a proviso attached to the second section which stated that the "act shall not apply to the case of any person who is or may be held in custody of the military authorities of the United States, charged with any military offense, or with having aided or abetted rebellion against the government of the United States prior to the passage of this act." Denied these remedies, individuals had no other remedy, and, therefore, the civil and military jurisdictions were isolated from each other. Only persons who were arrested after the Act was passed were entitled to the benefit of the Act. Thus while the Army's arrest activities were subject to civil review, its past efforts were not.

The important point here is not that Congress imposed more stringent requirements for Reconstruction than it had done in 1866 but that it imposed more stringent requirements in order to make effectual the policy, which the 14th Amendment expressed, that it had settled on in 1866. In other words, Congress had changed its tactics but not its policy.

Congressional Globe (hereafter cited Cong. Globe), 39th Cong., 1st sess., 87 (Shollabarger), 135 (Wilson), 4150-1, 4229-30 (December 19, 1865; January 8 and July 25 and 27, 1866); Ibid., 2nd sess., 790 (January 28, 1867).

In 1885 Congress restored the jurisdiction to the Supreme Court to review directly by habeas corpus state court convictions. It had taken away the jurisdiction in 1868 in order to prevent the high court from reviewing McCordle's case in which, Congress feared, the Court might cast negative judgment on its Reconstruction program. 15 SAL 44; 23 SAL 437. Ex parte Royall, 117 U.S. 241 (1886); Ex parte McCordle, 7 Wallace 506 (U.S., 1869).


[Schurz], Speeches, 348.


Ibid., part II, 7, 17, 29, 33.

Lyman Trumbull to Wife, May 21, 1866, Trumbull Papers, Illinois State Historical Library, Springfield. And see note 15, infra.

Charles Sumner told a friend in July 1865 that "A single copperhead on a jury might defeat the govt. in a case as clear as that of J. D. To my mind it is important that the govt. in such a case should not expose itself to any such defeat, & thus become ridiculous. . . . Of course, if J. D. could be tried for assassination or for cruelty to prisoners that would justify special proceedings; but they should not be by a jury; so it seems to me." After his capture in May 1865, Davis was confined at Fortress Monroe in Virginia until the government decided the proper course to take. When Congress met in December 1865 the Judiciary Committee in the House initiated an investigation on the Davis case, gathering evidence to indicate the feasibility of trying him for treason and alternatively for complicity in Lincoln's
murder. Indictments were brought against him for treason in the District of Columbia and in Virginia. Opinion was against trying him in the former jurisdiction, and by late 1866 the Secretary of War still believed that the evidence supporting the indictment in the latter jurisdiction was insufficient. During the summer of 1865 Attorney General James Speed appointed William Evarts of New York and John Clifford of Massachusetts as special counsel to assist the government in the prosecutions. By August 1866, Clifford expressed doubts about the wisdom of trying Davis before a jury and withdrew from the case. In June 1867 Clifford explained to Boutwell that he had withdrawn from the case in... simply because I was satisfied that his trial before any jury in Virginia would only result in the humiliation of the Govt., with entire impunity to the prisoner. . . . I was not disposed to participate in the enactment of a judicial farce, the result of which was a foregone conclusion." Charles Sumner to William Greene, July 7, 1865, Greene Papers, Cincinnati Historical Society, Cincinnati; House of Representatives, 39th Congress, Committee Papers, Committee on the Judiciary, "Trial of Jefferson Davis for Treason," 39A-F13.10, RG 233, National Archives; Edwin M. Stanton, "Memorandum" of cabinet meeting of October 5, 1866, Stanton Papers, vol. 31, Library of Congress; H.R.Doc. No. 65, 55th Congress, 3rd session, The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies. (Washington, 1899), series II, vol. viii, 843-5, 847-69, 898-9, 921-3, 931, 962-4; William M. Evarts to Henry Stanbery, August 14, 1866, John Clifford Papers, Massachusetts Historical Society, Boston; John Clifford to Stanbery [August 14, 1866], Ibid.; Clifford to Boutwell, June 30, 1867, Ibid. And see, Boutwell to Benjamin Butler, April 20, 1865, Butler Papers, box 35, Library of Congress; B. Stanton to Joseph Holt, June 7, 1865, Holt Papers, vol. 92, Library of Congress.

16 A federal statute permitting blacks to sit on juries would have been impracticable since juries were selected generally from the rolls of voters, and Congress had not yet required the southern states to permit blacks to vote.

17 14 SAL 173 @ 176-7, section 14.

18 14 SAL 27 @ 27-8, section 3.

19 Article III, section 1; the Sixth Amendment.

20 See Chapter 9, supra.
21 Howard to Stanton, December 21, 1866, in War Department, Bureau of Refugees, Freedmen, and Abandoned Lands, Letters Sent, vol. II, no. 903, RG 105, National Archives.

22 Howard to Stanton, January 12, 1867, Ibid., vol. III, no. 56.


26 Cohens v. Virginia, 6 Wheaton 264 (U.S. 1821) and Worcester v. Georgia, 6 Peters 515 (U.S. 1832) might be cited as exceptions; however, these cases came to the Supreme Court on writ of error to review the law in the federal questions that were raised in the cases. The review did not reach the merits of the two cases, although in each case, the determination of the federal question made any determination of the merits unnecessary.

27 General Rufus Saxton, Assistant Commissioner for the Freedmen's Bureau in South Carolina, told the Joint Committee on January 15, 1866 that "The late slaveholders of South Carolina still believe that the loyal black man has no rights that they need respect, and have not been taught that hard lesson for them to learn: that they must treat those they once owned as free men and deal justly with them; that exact justice to all men, of whatever color or condition, is the wisest expediency and the truest policy, and that educated free labor is the most profitable." Report, part II, 222.


29 See note 9, supra.


31 Cong. Globe, 39th Cong., 1st sess., 1183 (Pomeroy) (March 5, 1866).
BIBLIOGRAPHY

This compilation of sources lists not only those which I cited in the notes but also those which I did not. Most of the sources that were not cited in the notes reinforce arguments for which documentation was given, and their inclusion, therefore, would have been needlessly repetitious.

Primary Sources

A. Unpublished Government Documents.


U.S. Attorney General's Office. Letters Received. The Secretary of War, 1861-1868. RG 60. National Archives.

U.S. Attorney General's Office. Letters Received. The President, 1861-1868. RG 60. National Archives.


U.S. Attorney General's Office. Records Relating to Judicial Accounts. Letters Received, 1861-1866. By State. RG 60. National Archives. (These records formerly part of Department of Interior files.)


U.S. War Department. Secretary of War. Reports of the Secretary of War to Congress, 1861-1866. RG 107. National Archives.

B. Published Government Documents.


U.S. Statutes at Large.

U.S. Supreme Court. Records and Briefs.

U.S. Supreme Court. United States Supreme Court Reports.

C. Manuscript Collections.


Warner Bateman Papers. Western Reserve Historical Society, Cleveland.


John A. Bingham Papers. Ohio Historical Society, Columbus.

John A. Bingham Papers. Rutherford B. Hayes Library, Fremont, Ohio.


Orville Hickman Browning Papers. Illinois State Historical Library, Springfield.


Salmon P. Chase Papers. Cincinnati Historical Society.


Salmon P. Chase Papers. Library of Congress.


Salmon P. Chase Papers. Ohio Historical Society, Columbus.


Schuyler Colfax Papers. Indiana Division, Indiana State Library, Indianapolis.

Schuyler Colfax Papers. Library of Congress.

Schuyler Colfax Papers. Rush Rhees Library, University of Rochester.

Schuyler Colfax Papers. Rutherford B. Hayes Library, Fremont, Ohio.


Chas. A. Dana Papers. Massachusetts Historical Society, Boston.


Henry Winter Davis Papers. Eleutherian Mills Historical Library, Wilmington, Delaware.


Hugh, Philemon, and Thomas Ewing Papers. Ohio Historical Society, Columbus.


LaFayette E. Foster Papers. Massachusetts Historical Society, Boston.


James A. Garfield Papers. Ohio Historical Society, Columbus.

James A. Garfield Papers. Rutherford B. Hayes Library, Fremont, Ohio.

Joshua Giddings - George Julian Correspondence. Library of Congress.

Ulysses S. Grant Papers. Rutherford B. Hayes Library, Fremont, Ohio.


Horace Greeley - Schuyler Colfax Correspondence. New York Public Library, New York City.

Rutherford B. Hayes Papers. Hayes Library, Fremont, Ohio.


Timothy O. Howe Papers. Wisconsin State Historical Society Library, Madison.


Andrew Johnson Papers. Rutherford B. Hayes Library, Fremont, Ohio.


George W. Julian Papers. Indiana Division, Indiana State Library, Indianapolis.

Henry S. Lane Papers. Smith Library, Indiana State Historical Society, Indianapolis.

Abraham Lincoln Papers. Rutherford B. Hayes Library, Fremont, Ohio.


William L. McMillen Papers. Ohio Historical Society, Columbus.


Godlove Orth Papers. Indiana Division, Indiana State Library, Indianapolis.


Albert Gallatin Riddle Papers. Western Reserve Historical Society, Cleveland.


John Sherman Papers. Ohio Historical Society, Columbus.

John Sherman Papers. Rutherford B. Hayes Library, Fremont, Ohio.

Henry Stanbery Papers. Ohio Historical Society, Columbus.


Thaddeus Stevens Papers. Library of Congress.


Charles Sumner Papers. Massachusetts Historical Society, Boston.

Charles Sumner - Bellamy Storer Correspondence. Cincinnati Historical Society.

Lyman Trumbull Papers. Illinois State Historical Library, Springfield.

Lyman Trumbull Papers. Library of Congress.

Richard W. Thompson Papers. Indiana Division, Indiana State Library, Indianapolis.


Ben Wade - Bellamy Storer Correspondence. Cincinnati Historical Society.


Thurlow Weed Papers. Rush Rhees Library, University of Rochester.


D. Published Reminiscences, Letters, and Diaries.


---

E. Treatises, Addresses, Pamphlets, and Articles, and Miscellaneous Document Collections.


---


Bundy, J. M. Are We a Nation: The Question Before the War. New York: Putnam, 1870.


Johnson, Reverdy. "... Argument in Favor of the Right of President as Commander-in-Chief to Suspend Habeas Corpus." *Daily National Intelligencer*, June 22, 1861.


Maury, W. A. "The Late Civil War: Its Effects on Jurisdiction, and on Civil Remedies Generally." *American Law Register, XXIII* (March 1875), 129-52.

---


---


---


Pitman, Benn (ed.). *The Trial for Treason at Indianapolis*, Disclosing the Plans for Establishing a North-Western Confederacy. . . . Cincinnati: Moore, Wilstach & Baldwin, 1865.


**Secondary Sources**

A. *Biographies.*


Seward, Frederick W. Seward at Washington, as Senator and Secretary of State. A Memoir of his Life, With a Selection from his Letters, 1846-1861. 3 vols., New York: Derby and Miller, 1891.


B. **Monographs and Articles.**


"Limitations on the Doctrine of Governmental Immunity from Suits." Columbia Law Review, XLI (November 1941), 1236-47.


Carpenter, A. H. "Habeas Corpus in the Colonies." American Historical Review, VIII (October 1902), 18-27.


Moore, Frederick W. "Representation in the National Congress from the Seceding States, 1861-65." *American Historical Review,* II (January-April 1897), 279-93, 461-71.


"The American Civil War Considered as a Crisis in Law and Order." To be published in the *American Historical Review* (October 1972).


Sproat, John G. "Blueprint for Radical Reconstruction." *Journal of Southern History*, XXIII (February 1957), 25-44.


ACKNOWLEDGMENTS

The most pleasing part of completing this dissertation is thanking those institutions and individuals that helped make this dream become reality.

To the History Department of Rice University go thanks for the generous financial assistance for the past four years in form of fellowships, summer stipends, and travel grants which permitted me to complete my graduate education and this dissertation. Also, the State University of New York, College at Fredonia provided research assistance to me while I spent a pleasurable summer there teaching.

Many historical societies, archives, and libraries around the country provided valuable assistance in helping me uncover manuscripts and government archives. Thanks to the staffs of: the National Archives; Manuscript and Reader Services divisions of the Library of Congress; the Chicago Historical Society; the Illinois State Historical Library; the Indiana Historical Society; the Cincinnati Historical Society; the Ohio Historical Society; The Rutherford B. Hayes Library; the Western Reserve Historical
Society; the Rush Rhees Library, University of Rochester; the New York State Library, Albany; the New York Public Library; the New York Historical Society; the Pennsylvania Historical Society; the Eleutherian Mills Historical Society, Wilmington, Delaware; the Maryland Historical Society; Houghton Library, Harvard University; and the Massachusetts Historical Society. Special thanks go to Dr. Roger Bridges, Director of Research of the Illinois State Historical Library, who not only assisted me with research but also, with his wife, Karen, extended warm hospitality to me while I visited Springfield.

Special thanks must also go to the Reference and Inter-Library Loan staffs of the Fondren Library, Rice University, particularly to Ms. Ferne Hyman, Ms. Monica Orr, and Messrs. Ted Dyson and Dick Perrine, who assisted me in innumerable ways in gathering materials for this dissertation.

Many friends, old and new, opened their homes to me while I traveled around the country researching this study. In addition to Roger and Karen Bridges, thanks to Karen and Les Benedict in Columbus, Dorothy and Rick Young in Rochester, Mr. and Mrs. George Libertow in Boston, Betty and Bill Slaughter in Montgomery, and my extended family in Washington.

The seminar for the past two years has patiently endured early drafts of this study. Special thanks go to
Don Nieman, who not only listened to but also read drafts and offered valuable criticisms of my ideas. Moreover, to Don and Linda go my everlasting gratitude for making Gethsemane bearable.

Several persons are due special thanks for encouraging and guiding me during my graduate career. Dr. Robert McColley of the University of Illinois, Urbana, guided me into graduate study while I was an undergraduate. To him my thanks for his good advice and interest over the years. To Drs. Roger Daniels of the State University of New York, College at Fredonia, Stanley Kutler of the University of Wisconsin, and Francis Loewenheim go my thanks for their encouragement. I wish to thank Drs. Joseph Cooper and Martin Wiener for reading and suggesting improvements in this study.

Above all others, I am indebted to Professor Harold M. Hyman who directed this dissertation and guided me through graduate school. A scholar and mentor without peer and a man of indefatigable energy, generosity, dedication, and integrity, Professor Hyman receives my deepest and sincerest respect, admiration, and thanks. He and Ferne have been unfailingly kind in extending to me their hospitality, and I shall always remember Lil with fondness.
Sylvia Ross did yeoman service in deciphering the often undecipherable in the course of typing the final draft of this dissertation. A warm and generous woman, Sylvia is as good a friend as she is a typist, and on both counts I owe her my deepest thanks.

Finally, my Mother has never been anything other than a source of inspiration and support. If my Father were alive he would know that I have kept the promise I made him long ago. To my parents this dissertation is dedicated with love.
Sylvia Ross did yeoman service in deciphering the often undecipherable in the course of typing the final draft of this dissertation. A warm and generous woman, Sylvia is as good a friend as she is a typist, and on both counts I owe her my deepest thanks.

Finally, my Mother has never been anything other than a source of inspiration and support. If my Father were alive he would know that I have kept the promise I made him long ago. To my parents this dissertation is dedicated with love.