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# SUSPENSION AND DELEGATION

Amy Coney Barrett†

*A suspension of the writ of habeas corpus empowers the President to indefinitely detain those suspected of endangering the public safety. In other words, it works a temporary suspension of civil liberties. Given the gravity of this power, the Suspension Clause narrowly limits the circumstances in which it may be exercised: the writ may be suspended only in cases of “rebellion or invasion” and when “the public Safety may require it.” Congress alone can suspend the writ; the Executive cannot declare himself authorized to detain in violation of civil rights. Despite the traditional emphasis on the importance of exclusive legislative authority over suspension, the statutes that Congress has enacted are in tension with it. Each of the suspension statutes has delegated broad authority to the President, permitting him in almost every case to decide whether, when, where, and for how long to exercise emergency power. Indeed, if all of these prior statutes are constitutional, Congress could today enact a law authorizing the President to suspend the writ in Guantánamo Bay if he decides at some point in the (perhaps distant) future that the constitutional prerequisites are satisfied. Such a broad delegation undermines the structural benefits that allocating the suspension decision to Congress is designed to achieve. This Article explores whether such delegations are constitutionally permissible. It concludes that while the Suspension Clause does not prohibit Congress from giving the President some responsibility for the suspension decision, it does require Congress to decide the most significant constitutional predicates for itself: that an invasion or rebellion has occurred and that protecting the public safety may require the exercise of emergency power. Congress made this determination during the Civil War, but it violated the Suspension Clause in every other case by enacting a suspension statute before an invasion or rebellion actually occurred—and in some instances, before one was even on the horizon.*

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## INTRODUCTION

After the Japanese bombed Pearl Harbor, President Franklin D. Roosevelt suspended the privilege of the writ of habeas corpus in Hawaii, thereby empowering authorities to preventatively and indefinitely detain anyone suspected of endangering the public. He relied on a forty-one-year-old statute authorizing the President to suspend the privilege in that territory whenever he determined that a rebellion or an invasion had occurred and that protecting the public safety required it. This statute was a remarkable delegation of authority to the Executive insofar as it enabled him to both trigger and define the scope of his own emergency power. It does not stand in isolation, for the seven federal suspension statutes enacted since the Civil War have all delegated suspension power to the President.<sup>1</sup>

A sweeping assignment of suspension authority to the President sits uneasily with the widespread insistence of scholars and judges that

<sup>1</sup> See Act of Aug. 1, 1950, ch. 512, § 6, 64 Stat. 384, 386 (delegating authority to suspend writ in Guam); Act of June 22, 1936, ch. 699, § 20, 49 Stat. 1807, 1812 (Virgin Islands); Phillipines Organic Act, 32 Stat. 691, 692 (1902) (Philippines); 31 Stat. 77, 81 (1900) (Puerto Rico); Hawaii Organic Act, 31 Stat. 141, 153 (1900) (Hawaii); Ku Klux Klan Act of 1871, 17 Stat. 13, 14-15 (1871) (authorizing a suspension of habeas corpus in areas affected by Ku Klux Klan activity); Habeas Corpus Suspension Act of 1863, 12 Stat. 755, 755 (1863) (granting the President power to suspend habeas corpus during the Civil War).

for formal and functional reasons, suspension is an exclusively legislative task. The chief function of the writ is to protect from executive detention in violation of civil rights. Because a suspension of the writ's privilege grants the executive emergency power to detain in violation of civil rights, giving the President charge of the decision to suspend concentrates tremendous power in his hands. Building on settled English practice, our constitutional tradition has almost unfailingly treated the suspension decision as belonging to the legislature, a body that is more deliberative, more politically representative, and less biased in favor of exercising emergency power in a national security crisis. Broad delegations of suspension authority to the President arguably undercut the protection offered by this institutional arrangement. While there is virtual unanimity in the view that the Constitution vests Congress alone with the power to suspend, the question whether Congress is constrained in its ability to delegate this power is difficult and unsettled.<sup>2</sup>

The Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."<sup>3</sup> A decision to suspend the privilege thus requires two determinations: (1) that a rebellion or an invasion exists, and (2) that protecting the public safety may require the exercise of emergency power. This Article asks whether Congress must itself determine the existence of these predicates to suspension or whether it can delegate either or both of these decisions to the Executive Branch. In so doing, the Article addresses a gap in the scholarly debate about the ways in which the Suspension Clause limits the power of the political branches.

After Part I recounts the rationale for vesting the suspension power in Congress, Part II discusses how legislatures have historically allocated responsibility for the suspension decision. The practice in that regard has varied widely over time. While Parliament and founding-era state legislatures suspended the privilege outright, the Civil War Congress introduced the delegation model in the Habeas Corpus Act of 1863 after President Abraham Lincoln's unilateral and contro-

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<sup>2</sup> See, e.g., Trevor W. Morrison, *Hamdi's Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411, 429 n.106 (2006) ("The scope of Congress's power to delegate suspension authority has never been conclusively determined, and there is considerable variation in the legislation authorizing past suspensions."); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 689–90 (2009) ("Historically and functionally speaking, . . . the executive should not be understood to lay claim to the unilateral power to suspend. But beyond this important premise, many very difficult questions remain. . . . [M]ay Congress delegate the ultimate decision to suspend to the President?"); Developments in the Law, *Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1265 n.14 (1970) [hereinafter *Federal Habeas Corpus*] ("The validity of a delegation [of suspension power] or the terms of a delegation have apparently never been clearly adjudicated.").

<sup>3</sup> U.S. CONST. art. I, § 9, cl. 2.

versial decision to suspend. There was no doubt in 1863 that a rebellion was underway, but in a departure from historical practice, the statute allowed the President to determine whether, when, where, and for how long protection of the public safety required suspension. The 1863 Act was an influential legislative precedent: all subsequent federal suspension statutes followed its delegation model. The Reconstruction Congress authorized President Ulysses S. Grant to suspend the privilege of the writ if he decided that Klan activity in the South rose to the level of a rebellion sufficiently threatening the public safety. A series of twentieth-century statutes enacted outside the context of any particular security crisis conferred still greater power upon the President. In these five statutes, which all governed United States territories, Congress empowered the President to exercise emergency power in response to any invasion or rebellion that might arise in the future. Despite the dominance of the delegation model in the nineteenth and twentieth centuries, a study of history reveals repeated challenges to it on the ground that the Constitution renders the suspension decision wholly nondelegable. Indeed, Part II emphasizes that the separation of powers controversy in this context has been more complicated than the notorious "Lincoln versus Congress" fight about whether Congress alone possesses the power to initiate a suspension. The emergence of the delegation model provoked a recurring debate about whether Congress could empower the President to decide when, where, and for how long to suspend the privilege of the writ. This debate identifies issues that may well arise in the future. For example, could Congress give the President advance authorization to suspend the writ in Guantánamo Bay whenever he concludes that a terrorist invasion of the United States has occurred and that the public safety requires it?

Part III confronts a threshold constitutional objection to delegation in the context of suspension. Congress structured each of the seven federal suspension statutes as a contingent delegation—a statute triggered by the Executive's determination that some condition has been satisfied. Consistent with this contingent format, none of the suspension statutes suspended the writ outright; instead, each gave the President discretion to suspend once he concluded that there was a rebellion or an invasion and that requisite threat to public safety existed. An initial difficulty with these statutes is that they permitted the President to temporarily repeal otherwise binding federal law in violation of Article I, Section 7's requirement of bicameralism and presentment. Part III explains that while this objection is fatal to these statutes as written, the flaw could have been avoided by careful drafting. As far as Article I, Section 7 is concerned, Congress can grant the President what is functionally the authority to repeal statutes

so long as it ensures that the consequence of repeal formally flows from the statute rather than the executive order. In other words, Congress cannot authorize the President to suspend the writ, but it can render suspension an automatic consequence of the President's determination that the conditions for the statute's effectiveness exist. Article I, Section 7 thus does not itself pose an insurmountable barrier to Congress's ability to give the President control of a suspension's timing.

Part IV explores whether the Suspension Clause alters Congress's otherwise broad power to delegate responsibility to the Executive Branch. Contingent delegations are often desirable because they allow Congress the flexibility to provide in advance for events that it cannot foresee. The Suspension Clause, however, establishes an important exception to the general rule permitting contingent legislation. It is well recognized that the Clause serves as a substantive limit describing the circumstances under which Congress can authorize emergency power. Unappreciated is that the Clause also serves as a temporal limit dictating the time at which Congress can enact the authorization. For both historical and functional reasons, its proscription of suspension "unless when in Cases of Rebellion or Invasion the public Safety may require it"<sup>4</sup> is best understood as prohibiting Congress from passing a suspension statute unless the country is actually *in* a state of rebellion or invasion. That said, the Clause does not rule out contingent delegations altogether. By its very terms, Congress need only decide that "the public Safety *may* require [suspension]"<sup>5</sup> before it enacts a suspension statute. Thus, so long as Congress concludes that an invasion or rebellion presently exists and that the public safety is in a precarious state, it can task the President with determining the point at which protecting the public safety actually requires the exercise of emergency power.

While the Suspension Clause limits Congress's ability to employ contingent delegations, Part V maintains that it does not demand that Congress further constrain the President's discretion. Historically, critics of the federal suspension statutes have claimed that Congress can leave the President virtually no discretion in defining a suspension's scope. In particular, they have objected to the omission of restraints traditionally included in parliamentary and early state suspension legislation. Those laws almost invariably contained a sunset clause and a requirement that only a defined set of the highest-ranking executive officials could order preventative arrests. In contrast to these laws, the seven federal statutes have given the President almost total power to define the suspension's terms. Only one

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* (emphasis added).

statute contained a sunset clause, and only two included any sort of geographic limitation. None prohibited the President from subdelegating his power to declare the writ suspended, much less to issue warrants for mere suspects. Yet while these restrictions may be advisable as a matter of policy, nothing in the text of the Clause either expressly or impliedly requires them. The default rule of congressional freedom to implement legislation as it sees fit thus remains in place. History nonetheless reveals the consequences of omitting these kinds of restraints from suspension statutes: broad statutes tend to yield broad executive orders and thus impose a greater cost upon civil liberty.

Scholarly discourse about suspension and separation of powers focuses on whether Congress or the President has the authority to suspend. In that respect, it flows from the argument that Lincoln began when he suspended the writ of his own accord in 1861. The debate, however, should look beyond the terms of that argument to its result. While Lincoln ultimately lost his claim of executive prerogative, his battle with Congress yielded a new statutory model that significantly increased the President's role in the suspension decision. A suspension accomplished by delegation provokes reflection upon precisely what it means to insist that suspension power is exclusively legislative. The answer is not, as members of Congress have sometimes claimed, that the suspension decision is wholly nondelegable, but neither do the default, permissive rules of the nondelegation doctrine apply. Instead, the legislative responsibility is expressed through the temporal limit of the Suspension Clause, which requires Congress itself to decide that a rebellion or an invasion actually exists before it enlists the Executive's assistance in deciding whether suspension is a necessary response to a security crisis.

## I

### THE DELEGATION PROBLEM

#### A. Congress's Exclusive Authority to Suspend the Writ

To understand the significance of the choice to allocate the suspension power to Congress, it is necessary to be clear about the grave consequences of suspension. The writ's core purpose is to safeguard individual liberty against arbitrary executive detention.<sup>6</sup> When a prisoner invokes the privilege, the Executive (or a representative) must explain to a court why detention of the individual is consistent with due process. If the court is not satisfied with the response, it will order the prisoner's release. When the privilege of the writ is sus-

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<sup>6</sup> See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1162 (6th ed. 2009).

pended,<sup>7</sup> however, the Executive is freed from the constraints of the criminal process and courts are powerless to order the release of any prisoner detained pursuant to the suspension.<sup>8</sup> As this design suggests, suspension functions as a grant of emergency power.<sup>9</sup> It enhances the Executive's ability to contain a crisis by withdrawing core protections like the prohibition upon seizure in the absence of probable cause and the right to be released if not charged and tried.<sup>10</sup> The upshot is that the Executive can detain preventatively and indefinitely without affording the detainee any of means of defending herself. The power is so extreme that the Suspension Clause restricts its exercise to a very limited class of emergencies: "when in Cases of Rebellion or Invasion the public Safety may require it."<sup>11</sup>

Scholars and courts have overwhelmingly endorsed the position that, Lincoln's unilateral suspensions of the writ notwithstanding,<sup>12</sup> the Constitution gives Congress the exclusive authority to decide

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<sup>7</sup> Technically speaking, it is the writ's privilege, not the writ itself, that is suspended. See U.S. CONST. art. I, § 9, cl. 2 (providing that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended"). In keeping with the shorthand frequently employed by the cases and literature, see, e.g., FALLON ET AL., *supra* note 6, at 1160 (referring to "a Suspension of the Writ"), I will use the phrases "suspending the writ" and "suspending the privilege of the writ" interchangeably.

<sup>8</sup> See David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 89 (2006) (maintaining that a suspension "frees the Executive from the legal restraints on detention that would otherwise apply"); Tyler, *supra* note 2, at 672–87 (arguing that a suspension relieves the Executive both of the duty to account to a court and the duty to comply with the criminal process). But see Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1575–79 (2007) (arguing that a suspension enables the Executive to detain without answering to a court but does not relieve him of the obligation to comply with the due process rights that the detainee may vindicate when the suspension ends).

<sup>9</sup> See Tyler, *supra* note 2, at 603–04.

<sup>10</sup> Amanda Tyler explains that by the time of the Founding, "the privilege had come . . . to be equated with a host of protections including the rights to presentment or indictment, speedy trial, and reasonable bail where applicable." Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 999 (2012). Suspension is the only mechanism by which those owing allegiance to the United States can be deprived of these protections. See *id.* at 1000. Some contend that a declaration of martial law functions as a de facto suspension of the writ's privilege. See, e.g., JOEL PARKER, *HABEAS CORPUS AND MARTIAL LAW: A REVIEW OF THE OPINION OF CHIEF JUSTICE TANEY, IN THE CASE OF JOHN MERRYMAN* 24 (2d ed. 1862) ("[I]n time of actual war, . . . there may be justifiable refusals to obey the command of the writ without any act of Congress, or any order . . . of the President[;] . . . the existence of martial law . . . is, *ipso facto*, a suspension of the writ."). The effect of a declaration of martial law is a complicated topic beyond the scope of this Article, which deals only with statutes formally authorizing the exercise of emergency power. It is worth observing, however, that even if a situation warranting the exercise of martial law effectively justifies the Executive in detaining mere suspects, his defense in a later civil suit (absent an indemnity statute) would likely be that he violated the law because of necessity—not, as in the case of suspension, that he violated no law. See *infra* notes 34, 281 and accompanying text.

<sup>11</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>12</sup> See *infra* note 110 and accompanying text.



when the predicates specified by the Suspension Clause are satisfied.<sup>13</sup> In other words, the President cannot exercise emergency power unless Congress authorizes him to do so. The presence of the Suspension Clause in Article I is the most important evidence that the decision to suspend rests with Congress. While the Clause, written in the passive voice, does not itself identify who has authority to suspend, its placement in Article I reflects an assumption that Congress is the branch to which the authority belongs.<sup>14</sup>

History strongly supports this interpretation. The Framers' experience as subjects of the King of England left them suspicious of sweeping executive power, and not even the King possessed the power to suspend the writ.<sup>15</sup> Parliament alone possessed the power to sus-

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<sup>13</sup> Chief Justice Taney's opinion in *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) is the seminal defense of this position. See also Stephen I. Vladeck, *The Field Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 80 TEMP. L. REV. 391, 408 (2007) ("[A] number of courts confronted some form of the legal question raised in *Ex parte Merryman*, and virtually all of them reached a similar conclusion—i.e., that Lincoln's extra-legislative suspension of habeas corpus was unconstitutional."); *id.* at 408 n.117 (collecting citations). While these lower court opinions are the only ones that address the question directly, dicta and separate opinions from the Supreme Court are consistent with this view. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting) ("Although [the Suspension Clause] does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood . . ."); *Ex parte Bollman*, 8 U.S. 75, 101 (1807) ("If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so."). For a thorough argument in favor of exclusive congressional suspension power, see Saikrishna Bangalore Prakash, *The Great Suspender's Unconstitutional Suspension of the Great Writ*, 3 ALB. GOV'T L. REV. 575 (2010); see also 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1336, at 208–09 (photo. reprint 1991) (1833) [hereinafter STORY'S COMMENTARIES] (treating the suspension power as exclusively legislative); Shapiro, *supra* note 8, at 71–72 (maintaining that the Constitution gives the power exclusively to Congress); Tyler, *supra* note 2, at 687–89 (arguing that structural, historical, and functional arguments foreclose any claim that the Executive possesses the suspension power); *Federal Habeas Corpus*, *supra* note 2, at 1263–65 (arguing that constitutional history and structure support the proposition that suspension power belongs exclusively to Congress). Some have defended the constitutionality of Lincoln's action. See, e.g., DANIEL FARBBER, LINCOLN'S CONSTITUTION 163 (2003) (asserting that "although the constitutional issue can hardly be considered free from doubt, on balance Lincoln's use of habeas in areas of insurrection or actual war should be considered constitutionally appropriate"); Paul Finkelman, *Limiting Rights in Times of Crisis: Our Civil War Experience—A History Lesson for a Post-9–11 America*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 25, 33–41 (2003) (defending Lincoln's unilateral suspension as constitutional). Delegation obviously poses no problem for those adopting this view.

<sup>14</sup> See Shapiro, *supra* note 8, at 71 (maintaining that given the Clause's placement in Article I, "the inference that the power to authorize belongs to the legislature seems a natural one").

<sup>15</sup> See *Merryman*, 17 F. Cas. at 151 ("If the [P]resident of the United States may suspend the writ, then the constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown . . ."); see also *Federal Habeas Corpus*, *supra* note 2, at 1264 ("[T]he dominant climate at the Convention of fear of executive power renders it improbable that the Constitution gave the President greater powers than the King with respect to habeas." (citations omitted)).

pend,<sup>16</sup> and following suit, newly formed American states treated the power as exclusively legislative.<sup>17</sup> Notes from the convention debates, records of the ratifying conventions, and writings of the first several generations of Americans are virtually unanimous in treating the suspension power as exclusively legislative.<sup>18</sup> Indeed, until the Civil War, there was apparently no serious suggestion that the Executive possesses a unilateral power to suspend the writ.<sup>19</sup>

Allocating the suspension power to Congress has a number of structural implications. First and foremost, locating the suspension power in the legislature provides structural protection from executive excess.<sup>20</sup> A suspension places dramatic power in the President's hands: it essentially permits him to preventatively and indefinitely detain persons he deems dangerous. English kings had abused this power, which is one reason Parliament withdrew it from the Crown.<sup>21</sup>

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<sup>16</sup> See Prakash, *supra* note 13, at 592–93 (describing English history in detail); see also Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 623 (2008) (“Suspension after 1689 was characterized by one feature more than any other: it could only be made by Parliament.”); *Federal Habeas Corpus*, *supra* note 2, at 1264 (“[W]hen the framers looked to practice in England, they saw a system in which exclusive suspension powers resided in Parliament. . . . It seems unlikely that the framers would choose to alter this scheme by granting suspension powers to authorities other than the legislature, and even more unlikely that they would do so without a clear statement.”).

<sup>17</sup> See Jeffrey D. Jackson, *The Power to Suspend Habeas Corpus: An Answer from the Arguments Surrounding Ex parte Merryman*, 34 U. BALT. L. REV. 11, 47 (2004) (“[S]tate constitutions vested the suspension power in their legislatures rather than [in] their executives.”); Prakash, *supra* note 13, at 593–94 (describing early state practice).

<sup>18</sup> See Prakash, *supra* note 13, at 593–97 (describing framing and ratification debates about the Suspension Clause, all of which treated the power as legislative when they discussed a source of authority); *id.* at 597 (pointing out that it never occurred to anyone during the Burr Conspiracy that Jefferson could have suspended the writ himself); *id.* at 597–98 (laying out extensive evidence that nineteenth century “[t]reatise writers referenced the congressional monopoly repeatedly”); *id.* at 598 (“The only Attorney General to opine on the issue prior to the Civil War, Caleb Cushing, noted that in the United States, only legislatures could suspend.”). Prakash notes that then-General Andrew Jackson’s unilateral declaration of martial law in New Orleans, which Jackson treated as a suspension, is the only piece of contrary evidence. *Id.* at 599. But as Prakash observes, the defenses of Jackson are difficult to take seriously. They were not only “mired in partisanship” but also rested on the “fantastic claim that the Constitution authorized every military commander to suspend, a claim never made before or since.” *Id.* at 602.

<sup>19</sup> See Tyler, *supra* note 2, at 688 n.415 (“Notably, to my knowledge, it was not until the Civil War that anyone ever suggested that the power could be wielded unilaterally by the executive.”).

<sup>20</sup> Indeed, the primary function of the writ itself is protecting against executive excess. See Paul Diller, *Habeas and (Non-)Delegation*, 77 U. CHI. L. REV. 585, 590 (2010) (“In the American Colonies as well [as in Britain], the Great Writ was considered a primary safeguard of individual liberty against a tyrannical Executive.”); THE FEDERALIST No. 84, at 512 (Alexander Hamilton) (Jack N. Rakove ed., 2003) (describing the writ “as protection against the pervasive tyranny and illegitimacy of an unchecked executive”).

<sup>21</sup> See Prakash, *supra* note 13, at 592–93 (describing how England’s Habeas Corpus Act of 1679 and its 1689 amendment secured legislative control over suspension). As Justice Taney put it in *Ex parte Merryman*, “no one can believe that . . . [the framers] would have

The gravity of the power and the precedent for its misuse loomed large in the minds of those who framed and ratified the Constitution.<sup>22</sup> To be sure, as Edward Bates, Lincoln's Attorney General, pointed out in Lincoln's defense, the Executive is not the only one capable of abusing the power; it is susceptible to legislative abuse as well.<sup>23</sup> Yet concentrating the power to suspend and the resulting power to preventatively detain in the same hands increases the risk and is in considerable tension with the Constitution's general scheme of separated powers.<sup>24</sup>

One need not envision a tyrannical Executive to appreciate the value of denying the President the suspension power. Giving the decision to Congress checks the judgment of the person most institutionally inclined to think suspension is necessary, even when that person acts upon his good-faith perception of the national interest.<sup>25</sup> The President, as Commander in Chief, is the first responder in the event of an armed conflict on American soil. Because he is in the thick of the conflict and the one with primary responsibility for beating it back, it is natural for him to want to use any tool at his disposal to do so. He would be more likely than Congress to approach the option of emergency power with a bias in favor of its use. Congress, while not a neutral observer in the event of either an internal or external attack on the United States, is institutionally more removed from the situation. Because it will feel the heat of the moment less intensely than the President, putting the suspension decision in Congress's hands creates an opportunity for cooler heads to prevail.

Locating the suspension power in Congress does more than guard against tyranny and offset the risk of institutional bias. Forcing the decision to be made within the procedural confines of the formal legislative process better advances the goal that the writ be suspended as rarely as possible and only after careful deliberation.<sup>26</sup> Consider

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conferred on the [P]resident a power which the history of England had proved to be dangerous and oppressive in the hands of the crown; and which the people of England had compelled it to surrender." 17 F. Cas. 144, 150 (C.C.D. Md. 1861).

<sup>22</sup> See *supra* note 15 and accompanying text.

<sup>23</sup> See *Suspension of the Privilege of the Writ of Habeas Corpus*, 10 Op. Att'y Gen. 74, 84 (1861) ("Why should this power be denied to the President, on the ground of its liability to abuse, and not denied to the other departments on the *same grounds*?") (emphasis in original).

<sup>24</sup> See Tyler, *supra* note 2, at 688.

<sup>25</sup> See Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2068 (2007) ("To put a familiar point bluntly, human nature makes the executive branch all too likely to favor security over liberty in times of crisis.").

<sup>26</sup> See Tyler, *supra* note 2, at 688 ("Not only does the Suspension Clause require the existence of a 'Rebellion or Invasion,' in such circumstances, any decision to suspend must also emerge from the arduous process of bicameralism and presentment, internal checks . . . that ensure careful deliberation on a decision of this magnitude.").

the differences, from a constitutional point of view, in the process that produces an executive order and the process that produces a statute. As a single actor, the Executive is capable of moving quickly. He need not consult other executive officers for advice,<sup>27</sup> nor must he consult or even inform Congress before he acts. At the end of the day, his is the only judgment that counts. Congress, by contrast, is institutionally designed to be slower moving. The decision rests with hundreds of people rather than one. Even putting aside the vetogates erected by the committee process, which is a matter of internal policy rather than constitutional command, the requirement of bicameralism poses a significant barrier to a bill's passage.<sup>28</sup> Either house can kill a bill, and a bill that successfully navigates both houses reflects compromise on the language and scope of the proposed legislation.<sup>29</sup> A President has little incentive to limit the scope of his own emergency power, but the legislative process is likely to yield a statute that imposes at least some restraint upon the Executive.<sup>30</sup> In sum, legislative suspensions are not easy to accomplish, and when they occur, the need to secure majority buy-in inevitably narrows their scope.

Rendering the decision legislative also ensures that a decision to suspend emerges from a process that is relatively more representative of the people whose civil liberties are at stake.<sup>31</sup> The President has a

<sup>27</sup> See U.S. CONST. art. II, § 2, cl. 1 ("The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments . . .") (emphasis added).

<sup>28</sup> See William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1442–43 (2008) ("To become a federal law, a proposal must pass through multiple 'vetogates'—not just adoption by floor majorities in both the House and the Senate and presentment to the President as required by Article I, Section 7, but also those internal vetogates Congress has created pursuant to Article I, Section 5: substantive committees in both chambers, calendar expedition through the Rules Committee (House) or unanimous consent agreements (Senate), and supermajorities if there is a Senate filibuster.").

<sup>29</sup> See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2409–19 (2003) (explaining that a bill cannot survive the complexities of the legislative process unless legislators compromise on its terms).

<sup>30</sup> For example, both the Civil War and Reconstruction statutes imposed a cap on the length of time that the President could hold detainees without charging them. See *infra* notes 82–83, 136 and accompanying text. Lincoln's unilateral order, by contrast, contained no limitations upon his ability to detain. See *infra* note 110 and accompanying text.

<sup>31</sup> Cf. William L. Sharkey, *Essay on Habeas Corpus* (June 1933) (printed in F. Garvin Davenport, *The Essay on Habeas Corpus in the Judge Sharkey Papers*, 23 MISS. VALLEY HIST. REV. 243, 245 (1936)) ("When the writ of Habeas Corpus is to be suspended, we have a right to be heard and to decide whether the public safety requires it. The people did not confide this delicate duty to the President, they hold their representatives responsible for its exercise."). Of course, the benefit of electoral accountability inures only to those entitled to vote, a category excluding noncitizens, among others. While citizens living in American territories are not directly represented by members of Congress, they do typically have at least some voice in the legislative process. Nonvoting delegates have represented territories in Congress since 1787, and they have sat in the House of Representatives since 1794. See BETSY PALMER, CONG. RESEARCH SERV., R40555, *DELEGATES TO THE U.S. CONGRESS: HISTORY AND CURRENT STATUS* 1, 4 (2011). Their ability to serve on and vote in

national constituency; members of Congress represent regional interests.<sup>32</sup> Because the need for suspension is likely to be keenest in the geographic area invaded or under the sway of rebellion, the interests of those most affected will be best expressed by their senators and representatives. The ability of senators and representatives to participate in debates about and cast votes on the suspension decision gives regional interests a voice in the process. They have no similar influence over the Executive's decision-making process; indeed, they may not know that the President is considering suspension until a decision has already been made. Nor will they necessarily be able to hold the President accountable after the fact at the ballot box. The region might not control enough electoral votes to have a significant impact on the next presidential election, and in any event, the President responsible might not run. The lack of term limits in Congress makes it reasonably likely that the prospect of reelection will force a member of Congress to take the interests of her constituents into account. If a President is in his second term, he may have party loyalty, but he has no electoral accountability.

One might reasonably resist the proposition that suspensions must be accomplished by statute. Lincoln did. The Commander in Chief power commits battlefield decisions to the President precisely because they require quick, decisive action by either one person or the military officials accountable to him. Because suspension is a means of defending the country in a national security crisis, it bears some resemblance to the package of decisions the President will simultaneously make with respect to military strategy. But for better or worse, the fact that the Constitution does not vest this power in the President reflects a judgment that this decision—one with a dramatic impact on domestic civil liberties—ought not be included in this package. Moreover, it is not as if the suspension power is a lone exception to an otherwise absolute power of the President to make decisions regarding the defense of the country when it is under attack. On the contrary, decisions about military conflict are decisions that the President and Congress share. For example, Article I gives Congress the authority to declare war, and Congress's appropriations power gives it

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committees has varied over time, but today, all delegates and Puerto Rico's resident commissioner "shall be elected to serve on standing committees in the same manner as Members . . . [and] may be appointed to any select committee and to any conference committee." JOHN V. SULLIVAN, RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 111-157, at 376, 378 (2011).

<sup>32</sup> Committing the decision to Congress rather than the President is also more protective of small states because their equal representation in the Senate gives them "disproportionate power, relative to their populations, to defeat legislation that promotes the interests of the larger states at their expense." John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 76 (2001).

tremendous influence over the conduct of military operations.<sup>33</sup> Responsibility for military decisions is coordinated, with the President bearing primary responsibility for some and Congress bearing it for others. Suspension is one that falls on the congressional side of the ledger. As Saikrishna Prakash has observed, the suspension power is one “given to Congress because of a sense, borne out by history, that vesting such powers with the Executive might prove dangerous to civil liberties. Though that cautious approach to executive authority has its costs, there will be drawbacks associated with any allocation of power.”<sup>34</sup>

In sum, the heavy weight of commentary and public opinion for several hundred years is at odds with Lincoln’s view that the President should be “the sole judge, *both* of the exigency which requires him to act, and of the manner in which it is most prudent for him to employ the powers entrusted to him.”<sup>35</sup> To better protect civil liberty, the Constitution commits to Congress the decision whether a rebellion or an invasion exists and so threatens the public safety that the exercise of emergency power is warranted.

## B. Delegation

This, at least, is the theory. We have tended to approach the problem of suspension power as an either–or question, presumably because Lincoln’s infamous unilateral suspensions framed it that way: either the President has the authority to suspend or the authority belongs exclusively to Congress. The reality that emerged after Lincoln’s claim, however, is more complex.

Congress enacted the first federal suspension statute, the Habeas Corpus Act of 1863, in the wake of Lincoln’s aggressive claim of inherent executive authority to initiate a regime in which he could detain indefinitely on mere suspicion. Given this context, it was inevitable that the statute be written as a broad delegation of the authority to suspend. Lincoln’s unilateral orders were still in effect when the statute was enacted, and even those congressmen protective of legislative power in this area were careful to avoid the appearance of reprimand-

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<sup>33</sup> Other relevant Article I powers include Congress’s power to “raise and support Armies,” “provide and maintain a Navy,” “make Rules for the Government and Regulation of the land and naval Forces,” and “to provide for organizing, arming, and disciplining, the Militia.” U.S. CONST. art I, § 8.

<sup>34</sup> Prakash, *supra* note 13, at 611 (emphasis omitted). There may be extreme circumstances in which the President might be justified in detaining suspects in the absence of a suspension. If so, however, he would have to rely on a necessity defense or a later-passed indemnity statute if a detainee later sued him for violating her civil liberties. He could not, as in the case of suspension, maintain that he had violated no law. See *supra* note 10 and *infra* note 281 and accompanying text.

<sup>35</sup> Suspension of the Privilege of the Writ of Habeas Corpus, *supra* note 23, at 84 (emphasis added).

ing Lincoln while the nation was at war. The statute was therefore deliberately drafted so that it could be read either as authorizing Lincoln to act or approving what he had already done.<sup>36</sup> The only language in which that could be accomplished was the language of delegation—and an extraordinarily broad one at that.<sup>37</sup>

This delegation model was a significant departure from the history that has otherwise influenced our approach to suspension under the U.S. Constitution: parliamentary practice during the seventeenth and eighteenth centuries and state practice in the late eighteenth century. Neither Parliament nor early state legislatures assigned the king or governor the task of determining whether the time was ripe for the exercise of his emergency power. The legislature itself made that judgment and when it concluded that suspension was necessary, directly authorized the king or governor to detain those he deemed dangerous. These statutes, moreover, typically cabined the executive authority by including a sunset clause and giving only high-ranking officials the authority to detain. The 1863 Act, by contrast, allowed the President not only to decide when suspension was warranted but also to define the scope of his own power. He could subdelegate both the suspension decision and the detention power to inferior officers, and because the statute contained no sunset clause, the suspension of basic criminal process rights continued for as long as he deemed it necessary.

Lincoln may have lost his argument that the President possesses inherent authority to suspend, but his battle with Congress yielded a model that greatly enlarged the Executive's traditional role in the suspension decision. The 1863 Act has been an influential legislative precedent. Expressly invoking its example, Congress in 1871 empowered Ulysses S. Grant to suspend the writ of habeas corpus as part of his effort to suppress the Ku Klux Klan.<sup>38</sup> In the twentieth century, Congress delegated to territorial governors and the President the authority to suspend the writ in five American territories.<sup>39</sup> The territorial delegations were particularly sweeping insofar as they were passed entirely independently of any event that might have justified suspension. The statute justifying suspension in the Philippines was enacted three years before the administration of Theodore Roosevelt invoked it,<sup>40</sup> and the statute that Franklin Delano Roosevelt invoked to suspend the

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<sup>36</sup> See *infra* notes 87–89 and accompanying text.

<sup>37</sup> See *infra* note 80 and accompanying text.

<sup>38</sup> See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 483 (1871) (statement of Rep. Wilson) (characterizing the 1871 Act as following the “distinguished precedent” of the 1863 Act insofar as it delegated to the President the authority to suspend).

<sup>39</sup> See *infra* Part II.C.4.

<sup>40</sup> See *infra* notes 160–62 and accompanying text.

writ in Hawaii during World War II was enacted forty-one years before the Japanese bombed Pearl Harbor.<sup>41</sup>

The “suspension by delegation” model presents a more nuanced question than that posed by the starker “President versus Congress” debate. On the one hand, the modern nondelegation doctrine imposes few limits upon Congress’s ability to shift policymaking discretion to the Executive. The 1863 Act and its successors may well be consistent with this vein of authority. On the other hand, our tradition has placed particular emphasis on the importance of the Constitution’s choice to give this emergency power to Congress. Delegating too much discretion to the Executive risks undermining the structural protections built into this design.

The ensuing Parts consider how well the “suspension by delegation” model fits into the constitutional structure. It is worth keeping in mind that even if suspension is a political question,<sup>42</sup> the constitutionality of delegation in this context is not likely immune from judicial review. During the Civil War, courts willingly reviewed both Lincoln’s assertion of inherent executive authority to suspend<sup>43</sup> and the constitutionality of Congress’s delegation of that authority to him.<sup>44</sup> Courts might be ill-equipped to review political-branch judgments about the existence of a rebellion, an invasion, and the threat to the public safety, but analyzing the Constitution’s distribution of responsibility between branches is a traditional judicial task.

## II

### OUR HISTORICAL EXPERIENCE WITH EMERGENCY POWER

Parliament and founding-era state legislatures accomplished suspensions outright rather than by delegation. As Sections A and B of this Part recount, the legislature decided that current circumstances rendered suspension necessary and authorized the king or governor, effective immediately, to detain anyone suspected of posing a threat to the public safety. The imprisonment of a suspect pursuant to any of these statutes, then, was the result of two public safety determinations: the legislature determined that the situation was dangerous enough to require suspension, and the king or governor decided which persons to detain in order to protect the public safety. The executive thus had significant discretion at the second step but very little discretion in making the initial decision that he should be vested with emergency power. Beginning in the Civil War, the United States Congress gave

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<sup>41</sup> See *infra* notes 168–69 and accompanying text.

<sup>42</sup> See Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 351–62 (2006) (describing the conventional view that the decision to suspend is nonjusticiable).

<sup>43</sup> See *supra* note 13.

<sup>44</sup> See *infra* notes 111–17 and accompanying text.



the President the responsibility for making both public safety determinations: it charged him with deciding not only whom to arrest, but also whether the overall threat to public safety justified his possession of emergency power in the first place. In all but one instance, Congress also gave the President the authority to decide whether the requisite "invasion or rebellion" had occurred. Section C describes these statutes, the vehement objections their delegation model generated, and the scope of the executive orders they yielded.

#### A. Parliamentary Practice in the Seventeenth and Eighteenth Centuries

When Parliament suspended the writ during the seventeenth and eighteenth centuries, it did so outright by legislative enactment rather than by granting suspension authority to the king.<sup>45</sup> Accordingly, each suspension responded to a current security crisis. Consistent with the view that suspension authorizes detention upon mere suspicion rather than simply removing a judicially enforceable remedy, these statutes directly "empower[ed] His Majesty to apprehend and detain such Persons, as he shall find Cause to suspect are conspiring against His Royal Person and Government."<sup>46</sup> The acts reflected Parliament's judgment that a threat to public security made expansion of the king's detention power necessary<sup>47</sup> and left the king to decide whom to detain.

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<sup>45</sup> For a comprehensive list of seventeenth and eighteenth century English suspension statutes, see Halliday & White, *supra* note 16, at 617 n.116. English suspension practice greatly influenced the American practice. See *id.* at 580–81 ("The Supreme Court . . . has consistently maintained that the contemporary constitutional jurisprudence of habeas corpus needs to be informed by the legal and constitutional history of the 'Great Writ,' both in England and in the framing period of the Constitution."). That said, it must be considered advisedly given the differences between English and American governmental structure.

<sup>46</sup> *Id.* at 618 (describing language in English statutes passed prior to the Revolutionary War). The Revolutionary War suspension, enacted in 1777 and renewed five times, see *id.* at 617 n.116, 645 n.207, is similarly entitled "An act to impower [sic] his Majesty to secure and detain persons charged with, or suspected of, the crime of high treason . . . ." See 17 Geo. 3 c. 9 (1777).

<sup>47</sup> Halliday and White explain that "necessity" was the "principal justification for suspension[]" and "[t]he necessity rationale operated when, in *Parliament's estimation*, the subjects' liberties could only be protected by temporary, carefully contained limits on a writ that had come to be associated with those liberties." *Id.* at 624 (emphasis added). Parliament watered down the necessity standard during the Revolutionary War by justifying suspension with reference to the "inconven[ience]" of trying colonists for treason "forthwith" and the "evil example" of permitting them to remain at large. *Id.* at 645 (quoting 17 Geo. 3, c. 9). Americans resented the Revolutionary War suspensions, and their ratification of a constitutional provision limiting suspension to "when in cases of rebellion or invasion the public safety may require it" adopted "suspension usage in England between 1689 and 1747, while rejecting the novel terms of suspension that Americans endured starting in 1777." PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 253 (2010).

Paul Halliday and G. Edward White group the parliamentary suspensions into two groups: those enacted between 1689 and 1747, and those enacted during the Revolutionary War.<sup>48</sup> They describe those in the former group as having a “formulaic quality.”<sup>49</sup> All specified who could be imprisoned: those suspected of treason or “treasonable practices.”<sup>50</sup> All provided that only “specific officials—six members of the Privy Council and eventually either of the two secretaries of state—could exercise the suspension power to imprison without review by the judiciary.”<sup>51</sup> And all ran for a fixed period: some for as little as one month and only one for more than a year.<sup>52</sup> The Revolutionary War suspension, enacted in 1777 and renewed five times, followed this formula with the exception of the requirement that only high-ranking officials could exercise the authority to detain.<sup>53</sup> That statute, which was controversial in both England and America,<sup>54</sup> permitted detention by “any magistrate having competent authority.”<sup>55</sup>

As we will see, the early state statutes closely tracked the traditional English formula, but beginning with the Civil War suspension, federal suspension statutes departed in significant respects from it. They delegated the suspension decision to the Executive, they did not always have finite duration, they did not always specify the category of people subject to the detention power, and they did not limit the officials who could exercise the detention power.

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<sup>48</sup> There are twelve statutes in the former group and six in the latter. See Halliday & White, *supra* note 16, at 617 n.116.

<sup>49</sup> *Id.* at 617, 644–45.

<sup>50</sup> See *id.* at 618–19.

<sup>51</sup> *Id.* at 619.

<sup>52</sup> See *id.* at 617 n.116. Note that while all but one suspension statute ran for one year or less, suspensions were often renewed upon their expiration. See *id.*

<sup>53</sup> Like the earlier acts, they specified who could be imprisoned, see *id.* at 644, and contained sunset clauses, see *id.* at 617 n.116, 645 n.207.

<sup>54</sup> Many criticized the statute for deviating from the traditional “necessity” justification. See *supra* note 47. They also objected to the fact that it drew distinctions between subjects. Unlike past suspensions, it rendered access to the privilege dependent upon the place of capture. Only those taken in America or on the high seas for treason or piracy could be preventatively and indefinitely detained; the privilege remained intact in England. See *infra* note 308. For a description of the controversy surrounding the 1777 Act, see Halliday & White, *supra* note 16, at 646–51 and HALLIDAY, *supra* note 47, at 252.

<sup>55</sup> 17 Geo. 3, c. 9.

## B. Early State Practice

Several states passed legislation suspending the writ of habeas corpus during the Revolutionary War.<sup>56</sup> Massachusetts,<sup>57</sup> Pennsylvania,<sup>58</sup> Maryland,<sup>59</sup> South Carolina,<sup>60</sup> and Virginia<sup>61</sup> each suspended the writ, and with the exception of the Maryland legislation, these statutes followed the traditional English pattern. Each suspended the writ outright rather than delegating the suspension decision to the governor. Each contained a sunset provision.<sup>62</sup> Each

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<sup>56</sup> See Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1920–21 (2009) (discussing the Maryland statute); Tyler, *supra* note 2, at 622–27 (gathering statutes from Massachusetts, Pennsylvania, South Carolina, and Virginia). New Jersey also suspended the writ, see Tyler, *supra* note 2, at 623 n.102, but its statute is distinguishable from the others discussed in this section insofar as it did not authorize preventative detention. The New Jersey act made it a crime to, among other things, cross enemy lines without a license to do so. See Act of Dec. 22, 1780, ch. 5, § 1, 1781 N.J. Laws 11, 12 (identifying this and other means of abetting the enemy as grounds for being “legally convicted on Indictment before any Court of Justice holding Jurisdiction in criminal Causes”). Section 9 of the New Jersey act then provided that the privilege of the writ of habeas corpus was suspended for any person jailed pursuant to a warrant “setting forth that the Prisoner was apprehended for” committing one of the crimes specified in section 1. *Id.* ch. 5, § 9, at 15.

<sup>57</sup> Act of May 9, 1777, ch. 45, *reprinted in* 5 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS 641 (Boston, Wright & Potter Printing Co. 1886). Its preface noted the legislature’s finding that “the Public Enemy have [sic] actually invaded some of our neighbouring States, and threaten an Invasion of this State, the Safety of the Common-Wealth requires that a Power somewhere be lodged to apprehend and imprison any Persons whose Enlargement is dangerous to the Community.” *Id.* at 641.

<sup>58</sup> Act of Sept. 6, 1777, ch. 762, 1777 Pa. Laws 138. The preface of the statute contained two notable findings. First, the General Assembly noted that “the preservation of this state . . . at the time of an . . . invasion may require the immediate interposition of the supreme executive council when the judicial powers of the government cannot in the ordinary course of the law sufficiently provide for its security.” *Id.* Second, it noted that “for this important purpose the supreme executive council of this commonwealth have lately at the recommendation of Congress taken up several [dangerous] persons[,] . . . and it is apprehended that there are still more such persons among us, who cannot at this juncture be safely trusted with their freedom without giving proper security to the public.” *Id.* at 138–39.

<sup>59</sup> Act of Apr. 20, 1777, ch. 20, § 12, 1777 Md. Laws 19, 21.

<sup>60</sup> Act of Oct. 17, 1778, No. 1109, S.C. Stat. 458 (1833), *reprinted in* 4 THE STATUTES AT LARGE OF SOUTH CAROLINA 458–59 (Thomas Cooper ed. 1838). The statute’s preface explained that “it is necessary in this time of public danger, when this State is threatened with an invasion by the enemy, that the hands of the executive should be strengthened.” *Id.*

<sup>61</sup> Act of May 1781, ch. 7 *reprinted in* 10 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 413–16 (William W. Hening ed., 1822). The preface explained that the measure was necessary “in this time of public danger.” *Id.* The statute made no mention of invasion.

<sup>62</sup> The Massachusetts statute expired one year after its effective date. See Act of May 9, 1777, ch. 45. The Pennsylvania legislation remained in force until the “first sitting of the next general assembly of the commonwealth and no longer.” Act of Sept. 6, 1777, ch. 762, § 3. The Virginia statute similarly lasted “until the end of the next session of assembly, and no longer.” Act of May 1781, ch. 7. The South Carolina statute “continue[d] in force until

specified who could be detained.<sup>63</sup> And each of these statutes vested the authority to decide whom to preventatively detain in a high-ranking executive official who could not delegate that discretion to sheriffs or other subordinates.<sup>64</sup> Any warrant had to be signed by one or more of the high-ranking officials identified in the statute. None of these statutes, including Maryland's, contained a geographic limitation, although the authority necessarily existed only within the state's borders.

The Maryland legislation varied slightly from this pattern. It had no sunset provision, and unlike the suspension legislation in other states, it did not take immediate effect. It authorized preventative arrests "in case this state shall be invaded by the enemy," which required the governor to make the predicate determination of when said "invasion" occurred.<sup>65</sup> But the fact of invasion did not trigger executive authority to decide whether to suspend; suspension followed automatically. In other words, the governor was not left to decide whether the ensuing threat to public safety warranted his assumption of emergency power. He had only to decide whether the exercise of that power was warranted in any individual case. It is noteworthy that in Maryland, as elsewhere, the authority to dispense with due process in any individual case was given only to high-ranking officials. Once the British were in Maryland, "the governor and council" could arrest or order the arrest of "all persons whose going at large the governor and council shall have good grounds to believe may be dangerous to the safety of this state"<sup>66</sup>

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ten days next after the meeting and sitting of the next General Assembly, and no longer." Act of Oct. 17, 1778, at 459.

<sup>63</sup> The Pennsylvania and Virginia acts referred specifically to those suspected of treasonous activity. See *supra* notes 58–61. The Massachusetts, Maryland, and South Carolina acts defined the class of the detainable much more broadly, as anyone dangerous to the state. See *supra* notes 57, 60.

<sup>64</sup> The Massachusetts act provided that "the Council may from Time to Time issue their Warrant . . . signed by the President of the Council for the Time being, and directed to any Sheriff or Deputy Sheriff within this State, or to any other person by Name, to command and cause to be apprehended and Committed to any [jail] . . . any Person" who the Council judged to be a threat to public safety. See Act of May 9, 1777, ch. 45. (emphasis added). The Pennsylvania act provided that only "the president or vice-president and the members of the supreme executive council of this state or any two of them" could direct an arrest. Act of Sept. 6, 1777, ch. 762, § 1. The Virginia statute authorized "[t]he governor, with the advice of council" to arrest those "whom they may have just cause to suspect." Act of May 1781, ch. 7. The South Carolina statute authorized the "President or Commander-in-chief[,] . . . by and with the advice and consent of the Privy Council, by warrant under his hand and seal, to arrest" persons endangering public safety. Act of Oct. 17, 1778, No. 1109 at 458.

<sup>65</sup> Act of Apr. 20, 1777, ch. 20, § 12, 1777 Md. Laws 19, 21.

<sup>66</sup> *Id.* (specifying that "during any invasion of this state by the enemy, the *habeas corpus* act shall be suspended, as to all such persons arrested by the order of the governor and council." (second emphasis added)).

At the time these Revolutionary War-era acts were passed, none of these states had constitutions with clauses limiting the circumstances in which the writ could be suspended. Massachusetts was the first state to include a suspension clause in its constitution.<sup>67</sup> It enacted its constitution in 1780 and suspended the writ two years later in response to the Ely riots.<sup>68</sup> The statute, which suspended the writ outright, empowered the governor, with the advice of the Council, "to apprehend and secure in any [jail] in this Commonwealth without Bail or Mainprize, any Person or Persons whose being at large may be judged by His Excellency and the Council, to be Dangerous to the Peace and Well-being of this or any of the United States."<sup>69</sup> Again, the decision to preventatively detain any individual had to be made by the governor himself (with the advice of the council) rather than by a subordinate acting on the governor's behalf. The Act contained a sunset provision.<sup>70</sup> In 1786, the Massachusetts legislature again suspended the writ outright, this time in response to Shay's Rebellion.<sup>71</sup> This legislation, like the earlier statutes, required the governor himself to sign the warrant for the arrest of any person deemed deserving of detention under the statute.<sup>72</sup> The Act expired roughly eight months after its passage.<sup>73</sup>

### C. Federal Suspensions

Congress has debated whether to suspend the writ of habeas corpus on three occasions: in response to the Burr Conspiracy, the Civil War, and Klan violence during Reconstruction. On the latter two occasions, it passed suspension legislation. There have been two other suspensions at the federal level: one in Hawaii after Pearl Har-

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<sup>67</sup> See Dallin H. Oaks, *Habeas Corpus in the States—1776–1865*, 32 U. CHI. L. REV. 243, 247 (1964); see also MASS CONST. pt. II, ch. VI, art. VII (providing that "the writ of habeas corpus . . . shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time not exceeding twelve months").

<sup>68</sup> Act of June 27, 1782, ch. 2, 1782 Mass. Acts 6, 6–7. For discussion of this suspension, see Tyler, *supra* note 2, at 624.

<sup>69</sup> Act of June 27, 1782, ch. 2, at 6–7.

<sup>70</sup> It expired in six months. After its expiration, it was renewed for another four months. See Act of Feb. 5, 1783, ch. 1, 1783 Mass. Acts 207.

<sup>71</sup> Act of Nov. 10, 1786, ch. 10, 1786 Mass. Acts 510. For a discussion of this suspension, see Tyler, *supra* note 2, at 624–27.

<sup>72</sup> [T]he Governour, with the advice and consent of the Council, be, and hereby is authorized and empowered, by warrant, under the seal of the Commonwealth, by him subscribed, and directed to any Sheriff, Deputy-Sheriff, or Constable, or any other person, by name, to command, and cause to be apprehended, and committed to any [jail] . . . any person or persons whatsoever, whom the Governour and Council shall deem the safety of the Commonwealth requires should be restrained of their personal liberty . . .

Act of Nov. 10, 1786, ch. 10, at 510.

<sup>73</sup> The Act expired on July 1, 1787. *Id.*

bor and one in the Philippines during a 1905 insurrection. Congress itself did not consider whether the exercise of emergency power was warranted in either of these two instances. Both of these suspensions were initiated by territorial governors under the supervision of the President, acting under statutory delegations of authority that Congress enacted long before the provoking events. Congress included delegations of suspension authority in three other territorial statutes—those of Puerto Rico, Guam, and the Virgin Islands—but none of these were ever invoked. My research did not disclose a suspension provision in any other statute governing a U.S. territory.

### 1. *The Burr Conspiracy*

The first congressional debate about whether to suspend the writ of habeas corpus occurred in 1807, when the Jefferson Administration asked Congress to suspend the writ in connection with the Burr Conspiracy.<sup>74</sup> The Senate responded to this request on the same day with a bill suspending the writ for three months as to “any person or persons, charged on oath with treason, misprision of treason, or other high crime or misdemeanor.”<sup>75</sup> The bill authorized arrest by order of the President, by anyone acting under his authority, and by the Chief Executive Magistrate of any State or Territorial Government. Permitting arrests by someone other than the President and high-ranking federal officers was a feature of the bill that Representative Dana found “highly objectionable” and “without precedent.”<sup>76</sup> Like other suspension statutes of the time, it suspended the writ outright, providing that “the privilege of the writ of *habeas corpus* shall be, and the same *hereby* is suspended.”<sup>77</sup> The House voted overwhelmingly against the bill three days later after a debate in which many representatives questioned both whether the conspiracy amounted to a rebellion and

<sup>74</sup> See WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 135 (1980).

<sup>75</sup> 16 ANNALS OF CONG. 402 (1807) (Joseph Gales & William W. Seaton eds., 1852). Senator James Bayard, who cast the only dissenting vote, did not “think the public safety at this time requires this measure.” WILLIAM PLUMER’S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE 1803–07, at 587–88 (Everett S. Brown ed., 1923) (emphasis omitted). Interestingly, James Bayard was the first in a line of prominent opponents of suspension legislation. His son, Senator James Asheton Bayard, Jr., was one of the most vocal opponents of the Civil War suspension, see *infra* note 92 and accompanying text and notes 95–97, and his grandson, Senator Thomas Francis Bayard, was a similarly strong opponent of the Reconstruction suspension, see *infra* note 141 and accompanying text.

<sup>76</sup> 16 ANNALS OF CONG., *supra* note 75, at 424 (“There is another principle, which appears to me highly objectionable. It authorizes the arrest of persons, not merely by the President, or other high officers, but by any person acting under him. I imagine this to be wholly without precedent. If treason was marching to force us from our seats, I would not agree to do this.”).

<sup>77</sup> *Id.* at 402 (second emphasis added); see also DUKER, *supra* note 74, at 136 (“Note, the suspension bill did not seek to delegate power to suspend to the President, but provided directly for that suspension.”).

whether the threat to public safety warranted such an extreme measure.<sup>78</sup>

## 2. *The Civil War*

The Habeas Corpus Act of March 3, 1863, is the first federal suspension statute.<sup>79</sup> It provides in relevant part “[t]hat, during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof.”<sup>80</sup> Thus, while Congress determined the existence of a rebellion for itself (a point on which there was no dispute), it empowered the President to decide whether, for how long, and where the public safety required suspension. This stands in contrast to earlier parliamentary and state suspension statutes in which the legislature not only made the public safety determination but also specified the duration of the emergency power.<sup>81</sup> The

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<sup>78</sup> The House refused the Senate's request that it too conduct its deliberations in secret and instead “threw open its doors and on the first reading rejected the bill 113–19.” DUKER, *supra* note 74, at 137; *see also* 16 ANNALS OF CONG., *supra* note 75, at 424 (recording that the bill was rejected by a vote of 113–19). Many were skeptical that Burr led a rebellion within the meaning of the Suspension Clause. *See, e.g., id.* at 414 (statement of Rep. Varnum) (“I think it does not deserve the name of a rebellion; it is a little, petty, trifling, contemptible thing, led on by a desperate man, at the head of a few desperate followers . . .”); *id.* at 419 (statement of Rep. Randolph) (characterizing affair as “nothing more nor less than an intrigue”); *id.* at 422 (statement of Rep. Smilie) (“I really doubt whether either [a rebellion or sufficient threat to public safety] exist.”). Even among those who accepted the existence of a rebellion, many were skeptical that the public safety was sufficiently endangered. *See, e.g., id.* at 406 (statement of Rep. Burwell) (asserting that the supposed rebellion was “not accompanied with such symptoms of calamity as rendered the passage of the bill expedient”); *id.* at 406–07 (statement of Rep. Elliot) (insisting that the writ cannot be suspended “in any and every case of invasion and rebellion,” but only “with a view to national self-preservation,” a situation he did not believe existed here); *id.* at 411 (statement of Rep. Eppes) (“I cannot, however[,] bring myself to believe that this country is placed in such a dreadful situation as to authorize me to suspend the personal rights of the citizen, and to give him, in lieu of a free Constitution, the Executive will for his charter.”).

<sup>79</sup> The Confederate Congress enacted a series of suspension statutes during the Civil War, the first several of which authorized the President of the Confederate States to suspend the privilege of the writ. Delegation of suspension authority was as controversial in the Confederacy as it was in the United States. *See* David P. Currie, *Through the Looking-Glass: The Confederate Constitution in Congress, 1861–1865*, 90 VA. L. REV. 1257, 1327–33 (2004) (describing the controversy). In response to criticism of the delegation model, the Confederate Congress ultimately abandoned it and suspended the writ outright. *See id.* at 1331.

<sup>80</sup> Act of Mar. 3, 1863, ch. 81, 12 Stat. 755.

<sup>81</sup> *See supra* Part II.B. The Maryland statute was the exception insofar as it lacked a sunset provision. *See supra* note 65 and accompanying text. Note that the 1863 Act also differs from the bill passed by the Senate during the Burr Conspiracy. While that bill contained no geographic limitation, it expired after three months and applied only to those suspected of crimes related to treason. *See supra* note 75 and accompanying text. The 1863 Act, by contrast, was not only open-ended but also permitted detention in “any case.” *See supra* note 80 and accompanying text.

absence of any limitation on the officials who could exercise the emergency detention power was also a contrast to prior statutes. Historically, only specific, high-ranking officials could make arrests; the 1863 Act permitted anyone acting under Lincoln's authority to do so.

While the statute provided little limit on the President's power to suspend the writ, it did contain a significant restriction on his power to detain once the emergency power was activated. Section 2 of the Act required the Secretaries of State and War to provide federal judges with a list of all prisoners who were "citizens of states in which the administration of the laws has continued unimpaired in the said Federal courts."<sup>82</sup> These lists limited the detention authority as follows:

[If] a grand jury, having attended any of said courts having jurisdiction in the premises . . . after the furnishing of said list . . . has terminated its session without finding an indictment or presentment . . . it shall be the duty of the judge of said court forthwith to make an order that any such prisoner desiring a discharge from said imprisonment be brought before him to be discharged.<sup>83</sup>

Those officers of the United States who refused to "immediately . . . obey and execute" such orders were subject to fine and imprisonment.<sup>84</sup> As it happened, however, section 2 had little practical effect; the Lincoln Administration blatantly ignored the provision despite repeated congressional entreaties that it comply.<sup>85</sup>

Given Lincoln's multiple, unilateral suspensions of the writ before 1863, it was inevitable that Congress would structure the 1863 Act as a delegation. These suspensions were extremely controversial, and there had been a years-long, heated debate about whether Lincoln had acted unconstitutionally.<sup>86</sup> The statute was drafted carefully to gloss over that controversy so that both supporters and opponents of Lincoln's pre-statute proclamations could vote for it.<sup>87</sup> As Senator Doolittle explained:

[T]hose persons who conscientiously maintain that under the Constitution the President is clothed with power without any legislation of Congress, can vote for this section upon the ground that this section is merely declaratory of a power which inheres in him under

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<sup>82</sup> § 2, 12 Stat. 755. Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See Tyler, *supra* note 2, at 651–52 nn.246–50 and accompanying text (detailing the Lincoln administration's failure to comply with section 2 of the 1863 Act).

<sup>86</sup> See generally George Clarke Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by Congress*, 1 BULL. U. OF WIS. 213 (1907) (providing an account of this debate).

<sup>87</sup> See FARBER, *supra* note 13, at 159 (explaining that the statutory language was deliberately "ambiguous about whether Congress was conferring the power to suspend the writ or merely recognizing its existence in the hands of the president").



the Constitution itself; and those who maintain that it is to be derived from an act of Congress can sustain this section upon the ground that it is an enacting clause which gives him the power.<sup>88</sup>

Had the statute suspended the writ outright, it could not have been interpreted as "merely declaratory of a power which inheres in him under the Constitution itself."<sup>89</sup> On the contrary, a straightforward assertion of legislative power would have strongly implied that Congress believed the President's earlier proclamations to be unlawful. If language susceptible of both interpretations was necessary for the statute's passage, it is difficult to imagine how that could have been accomplished in language other than that of delegation.

That said, structuring the statute as a delegation was controversial.<sup>90</sup> Throughout the debates, critics repeatedly argued that the momentous decision to suspend was one committed exclusively to legislative discretion.<sup>91</sup> Senator Bayard's argument is representative:

[I]f there ever was a case to which the *delegatus non potest delegari* applied, it is precisely this case with those who believe that in Congress is vested the sole power to suspend the writ of *habeas corpus* . . . . The decision as to the public safety, the extent to which the right is to run, the duration of time during which the suspension is to last, are all matters for legislation, and legislation alone, and you have no authority to delegate your legislative powers to the Executive of the United States.<sup>92</sup>

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<sup>88</sup> CONG. GLOBE, 37th Cong., 3d Sess. 1092 (1863).

<sup>89</sup> See *id.*

<sup>90</sup> Objections to delegation were voiced primarily by those who thought that the suspension power was legislative. Some who thought that the power was executive, however, also spoke against it. For example, Senator Lane argued that if the power was, as he believed, an executive one, the statute was "an improper interference with the duties and powers of the executive office." *Id.* at 157. And if Congress possessed the power, as his opponents claimed, he asserted that it would be "clearly unconstitutional" for Congress "to bestow [that power] upon another department." *Id.*; see also *id.* at 216 (statement of Sen. Field) ("I hold that the Constitution of the United States confers upon the President, and not upon Congress, the power of suspending the privilege of the writ of *habeas corpus*; but if mistaken in this, I hold that Congress has no authority to delegate to the President the exercise of such a power.").

<sup>91</sup> There were three suspension bills introduced in the 37th Congress: S. 33, H.R. 362, and H.R. 591. See Sellery, *supra* note 86, at 231-63. All three bills delegated suspension authority to the Executive. S. 33 was short-lived. See *id.* at 231-34, 239 n.1 (explaining that the bill died two weeks after its introduction in the first session, and that the Judiciary Committee recommended its indefinite postponement in the second). H.R. 362 and H.R. 591 passed both houses, and the Habeas Corpus Act, while formally passed as H.R. 591, was a fusion of the Senate version of both bills. *Id.* at 261-63. Because H.R. 362 and H.R. 591 are the bills that contributed to the Habeas Corpus Act, this section will focus on them. The debate about delegation was the same with respect to each; thus, for simplicity's sake, this section will not, as a rule, specify the bill to which a comment about delegation was addressed.

<sup>92</sup> CONG. GLOBE, 37th Cong., 3d Sess. 1094 (1863); see also *id.* at 111 (statement of Sen. Powell) ("I do not believe that we have the right to delegate to any person the power to suspend the writ of *habeas corpus*."); *id.* at 1204 (statement of Sen. Saulsbury) (arguing

In other words, the “public safety” prong of the Suspension Clause required Congress, as guardian of the emergency power, to judge whether, where, and for how long the privilege of the writ should be withdrawn. The bill abdicated this responsibility by leaving these matters entirely to the President’s judgment. Indeed, the legislation was so broadly drawn that it permitted the President to impose a nationwide suspension of unlimited duration if he saw fit to do so.<sup>93</sup> Some argued that there was little difference between this bill and “that political heresy that the right to suspend the writ exists in the President of the United States, and not in Congress.”<sup>94</sup> Bayard and others complained that the bill concentrated too much power in the hands of the Executive.<sup>95</sup> While the power to arrest belonged to the President, the power to suspend belonged to the legislature; giving both to the President created the risk of abuse that the separation of powers was designed to minimize.<sup>96</sup> Those advancing this argument insisted that they were not accusing Lincoln of readiness to abuse the authority but rather resisting the delegation of such sweeping power to any man.<sup>97</sup> As Senator Powell asserted:

I would not confer it on any man, I care not how great, how good, how wise, how virtuous he may be, and I do not concede that those who are the real and true friends of constitutional and civil liberty ever will part with this power. They should exercise it themselves.<sup>98</sup>

Powell and others invoked history in support of their position, pointing out that Parliament had never given suspension authority to the

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that H.R. 362 was unconstitutional because “it proposes to delegate [the suspension] power to the President of the United States”). On December 22, 1862, thirty-six members of the House—a substantial minority—submitted a protest against H.R. 591, challenging, among other things, the constitutionality of the delegation. The protest was tabled by a vote of 75–41. *See id.* at 165–66.

<sup>93</sup> The potential for such a sweeping suspension was a feature that opponents of the suspension legislation found particularly offensive. *See infra* note 109 and accompanying text.

<sup>94</sup> CONG. GLOBE, 37th Cong., 3d Sess. 1462 (1863) (statement of Sen. Wall); *see also id.* at 1195 (statement of Sen. Carlile) (characterizing delegation as a variant of the argument that the “the power to suspend this writ [is] in the Executive of the United States”).

<sup>95</sup> Senator Bayard argued the Executive ought not decide whether the primary safeguard against abuse of executive discretion should be removed. He characterized the writ “as the sole security of every citizen of the United States against executive oppression” and asserted that “[w]hether the oppression is intended or not is not the question.” *Id.* at 1094; *see also id.* at 111 (statement of Sen. Powell) (“I do not think a more dangerous power [than the ability to suspend the writ nationwide] could be committed to the hands of an Executive.”).

<sup>96</sup> *Id.* at 1095 (statement of Sen. Bayard) (arguing that the legislation “merges the legislative and executive power in one”).

<sup>97</sup> *See, e.g., id.* at 1094 (statement of Sen. Bayard) (“Now, sir, it is not a question of whether the President will abuse the power you so delegate . . . . The precedent is such that it gives a power which I would yield to no man . . . .”).

<sup>98</sup> *Id.* at 1192.

Crown but had rather authorized the Crown to arrest and detain for some limited period of time—typically one year.<sup>99</sup>

Defenders of delegation viewed the blending of legislative and executive power in the suspension decision as a virtue, for neither Congress nor the President alone suspended the writ. Instead, “the united power of both” was brought to bear.<sup>100</sup> They also claimed that delegation of the suspension power was no different than the many other instances in which Congress transfers responsibility to the Executive. When asked why it is constitutional for Congress to grant this power to the President, Representative Bingham responded: “I say that this form of legislation is not new, that our statute-books abound in precedents of this sort, which leave the exercise of a discretion in the Executive of the United States . . . .”<sup>101</sup> Senator Trumbull argued that authorizing the Executive to suspend was no different than authorizing him to grant letters of marque and reprisal or to call out the militia, both of which Congress had done.<sup>102</sup> The latter case, in particular, involved a similar judgment insofar as the President’s statutory authority was triggered by his determination that an insurrection existed.<sup>103</sup> Moreover, supporters claimed, treating suspension as delegable made sense. Assessing the public safety “would be practicable and easy” for the President but “would be impracticable” for Congress.<sup>104</sup> “In the ever-changing circumstances which grow out of a war, and a gigantic war like this,” Senator Doolittle argued, “who can judge two months or six months beforehand the places where it will be necessary that this writ shall be suspended?”<sup>105</sup> These arguments did not persuade critics of the bill, who remained firm in the belief that suspen-

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<sup>99</sup> See, e.g., *id.* (statement of Sen. Powell) (“[I]t has been the immemorial practice of Parliament to prescribe the time during which and the localities in which it shall be suspended. They perform the whole function themselves. They leave nothing to the executive, except to see that the law is executed.”); *id.* at 1094 (statement of Sen. Bayard) (pointing out that Parliament suspended directly rather than authorizing the king to do it).

<sup>100</sup> *Id.* at 1194 (statement of Sen. Doolittle).

<sup>101</sup> *Id.* at 1192; see also *id.* at 1185 (statement of Sen. Trumbull) (“[Y]ou could not carry on this Government a day unless the powers which are vested in Congress could be exercised and carried out by instrumentalities other than Congress itself.”).

<sup>102</sup> *Id.* at 1185.

<sup>103</sup> *Id.*; see also *id.* at 1194 (statement of Sen. Doolittle) (invoking the Calling Forth Act as authority for the proposition that Congress can “delegate to the President the power to judge of the exigency upon which the exercise of [the suspension] power shall depend”). Senator Carlile, an opponent of delegation, conceded that Congress could identify a “given and fixed” event that would enable the President to declare war but argued that the determination of where and when the threat to public safety warranted suspension was one Congress alone could make. *Id.* at 1187.

<sup>104</sup> *Id.* at 1188 (statement of Sen. Howard). He pointed out that the Executive, unlike Congress, is never in recess. Moreover, it is possible for the writ to be suspended only as to designated individuals or localities, and it is impractical for Congress to legislate at that level of specificity. *Id.*

<sup>105</sup> *Id.* at 1194.

sion was distinguishable from the analogies that the bill's supporters invoked. Issuing letters of marque and reprisal, calling out the militia, and declaring war were "war measures," Senator Powell insisted, and "there is a marked difference . . . between authorizing the President [to take a war measure], and authorizing him to suspend the functions of a great remedial civil writ."<sup>106</sup>

It is noteworthy that the pro- and antidelegation camps disagreed not only on the question of delegation but also on the scope of the Suspension Clause itself. Those opposed to delegation generally took a narrow view of the Clause. For them, a rebellion in one part of the country did not justify suspension in another, nor did a threat to public safety in one location justify suspension in regions beyond it.<sup>107</sup> The Clause permitted the writ to be suspended only so far as is necessary, and Senator Bayard and his allies did not expect the President to make fine-tuned judgments in that regard. They knew that the suspension would have no geographic or temporal limits unless Congress imposed them. Senator Trumbull and his allies, by contrast, took a broader view of the Clause.<sup>108</sup> Tellingly, they did not defend delegation on the ground that the President was likely to suspend with the precision that Bayard and others thought the Clause required; on the contrary, they were comfortable on both constitutional and policy grounds with the prospect of a nationwide suspension. The stakes of

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<sup>106</sup> *Id.* at 1192 ("One is military, purely military; the other is civil."). This distinction echoes one drawn in the case law. In areas in which the President possesses inherent authority—like his authority as Commander in Chief—the Court has allowed particularly broad delegations. See *infra* notes 213 and 286. The fact that Congress may delegate particularly broad authority to the President with respect to the conduct of war, then, does not necessarily support the argument that it may do so with respect to the decision to revoke civil rights.

<sup>107</sup> See, e.g., *id.* at 1104 (statement of Rep. Wickliffe) (arguing that insurrection in one part of the country does not justify suspension in another); *id.* at 1094 (statement of Sen. Bayard) (insisting that a suspension statute "must . . . describe where and in what part of the country, in your solemn judgment, the public safety requires that this writ should be suspended."); *id.* at 1187 (statement of Sen. Carlile) ("It cannot and it will not be contended that an invasion or rebellion existing in a particular section of the country would authorize an entire suspension of this writ all over that portion of the country where there was no rebellion or invasion, and where the public safety was not threatened."); *id.* at 1199 (statement of Sen. Henderson) (objecting to suspension in loyal states); *id.* at 1204 (statement of Sen. Saulsbury) (objecting that the Constitution did not permit suspension in states unaffected by the rebellion). Some appeared to characterize this as a prudential rather than constitutional constraint on the exercise of the power. See, e.g., *id.* at 111 (statement of Sen. Powell) ("[I]f it should be necessary to suspend the writ of *habeas corpus*, I trust [Congress] will exercise the power with circumspection, and only cause it to be suspended in certain States and in certain localities where it becomes necessary that it should be suspended, and not throughout the whole country.").

<sup>108</sup> *Id.* at 1185 (statement of Sen. Trumbull) ("It is entirely competent for Congress to authorize the President to suspend the writ of *habeas corpus* during this rebellion throughout the United States.").

delegating the suspension decision to the President, therefore, were considerably lower for them.

On September 15, 1863, six months after Congress passed the Act, Lincoln suspended the writ nationwide as to a broad class of prisoners.<sup>109</sup> This order did not dramatically change the status quo, for many of those to whom it applied were already subject to detention under earlier suspensions that Lincoln had instigated without Congress's permission.<sup>110</sup>

Those earlier orders had provoked challenge, most famously in *Ex parte Merryman*, on the ground that the power to suspend belonged exclusively to Congress.<sup>111</sup> The new orders provoked challenge on the ground that Congress could not delegate that power. In *In re Oliver*, the Wisconsin Supreme Court acknowledged the general proposition that the legislature has broad authority to delegate policymaking authority to the other branches of government.<sup>112</sup> Nonetheless, the court opined, suspension is different: "[T]he power to determine whether the emergency has arrived, when, under the constitution, the privilege may be suspended, seems one of those essential trusts confided to the legislature which cannot be delegated."<sup>113</sup> Indeed, the court found the language in the 1863 Act so broad that it could be interpreted as "an attempt to transfer bodily to the [P]resident the entire legislative function upon this subject."<sup>114</sup> The court avoided its serious doubts about the statute's constitutionality by interpreting the statute as "an expression of the legislative judgment that the time has already arrived when the public safety requires the legislature to provide for a suspension."<sup>115</sup> In other words, it interpreted the statute as an outright suspension that left the President to execute the law by

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<sup>109</sup> 8 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3372 (James D. Richardson ed., 1897) [hereinafter MESSAGES AND PAPERS].

<sup>110</sup> I say "instigated" because Lincoln did not himself suspend the writ in all of the pre-1863 orders. Most often, he delegated the suspension authority to his subordinates. He authorized subordinate military commanders to suspend the writ between Philadelphia and Washington on April 27, 1861, *id.* at 3219; along portions of the Florida coast on May 10, 1861, *id.* at 3217-18; as to one Major Chase on June 20, 1861, *id.* at 3220; between New York and Washington on July 2, 1861, *id.* at 3220; between Bangor, Maine, and Washington on October 14, 1861, *id.* at 3240; in Missouri on December 2, 1861, *id.* at 3300; and in Baltimore on April 5, 1862, *id.* at 3313. On at least three occasions, Lincoln suspended the writ himself rather than authorizing a military commander to do so. On November 11, 1861, he "direct[ed] that the writ of habeas corpus be suspended" as to U.S. military personnel and "marshals and their deputies within the State of New York." An order dated August 8, 1862, "hereby suspended" the writ as to draft-dodgers. *Id.* at 3322. Another dated September 24, 1862, suspended it as to all the disloyal and their abettors. *Id.* at 3299-300.

<sup>111</sup> 17 F. Cas. 144 (C.C.D. Md. 1861).

<sup>112</sup> 17 Wis. 681, 682-84 (1864).

<sup>113</sup> *Id.* at 685.

<sup>114</sup> *Id.* at 685-86.

<sup>115</sup> *Id.* at 682, 686.

deciding whether to exercise the emergency power in any particular case.<sup>116</sup> In a different case, the Supreme Court of the District of Columbia agreed with the Wisconsin Supreme Court that the statute would almost surely be unconstitutional if it delegated suspension power to the President.<sup>117</sup> Rather than interpreting it as an outright suspension, however, the District of Columbia court interpreted it as a (proper, in its view) recognition of the President's inherent authority to suspend.<sup>118</sup>

Interestingly, both pre- and post-1863 cases expressed concern not only about the division of power between the Legislative and Executive Branches but also about the President's ability to redelegate suspension power to his subordinates within the Executive Branch. As one court put it:

[E]ven if the [P]resident possessed the delicate and dangerous power of suspending the writ of habeas corpus, it will hardly be claimed that he could delegate it to all or any of his subordinates, to be exercised when, in their discretion, the 'public safety' might require it, any more than he could delegate the veto power.<sup>119</sup>

Nor, once the writ was suspended, were courts comfortable with the President broadly delegating emergency detention power to his subordinates. Recall that the state suspension statutes required detention orders to be signed by a high-ranking executive official, either the governor himself or a member of his council.<sup>120</sup> The 1863 Act contained no such limitation; instead, it authorized imprisonment "by order *or authority* of the President of the United States or [the Secretaries of State or War]."<sup>121</sup> The Circuit Court in the District of California observed:

If every officer in the United States, during the suspension of the habeas corpus, is authorized to arrest and imprison whom he will, as 'aiders and abettors of the enemy,' without further orders from the [P]resident, or those to whom he has specially committed such au-

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<sup>116</sup> See *id.*

<sup>117</sup> *In re Dugan*, 6 D.C. 131, 137 (1865) (asserting that if the suspension power belonged to Congress, the Act would be "a perfect and complete abnegation of that power" if Congress attempted to delegate the power to the President).

<sup>118</sup> *Id.* at 146 (characterizing the statute as "enacted from 'abundant caution' to justify such exercise of authority if, as claimed by some, the provision should be finally declared to be a grant of legislative power").

<sup>119</sup> *Ex parte Field*, 9 F.Cas. 1, 5 (D. Vt. 1862); see also *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (Taney, C.J.) (expressing surprise that the "[P]resident not only claims the right to suspend the writ of habeas corpus himself, at his discretion, but to delegate that discretionary power to a military officer").

<sup>120</sup> See *supra* Part II.B.

<sup>121</sup> Act of Mar. 3, 1863, ch. 81, § 2, 12 Stat. 755 (emphasis added).

thority, the state of things that would follow can be better imagined than expressed.<sup>122</sup>

Entrusting the President with the authority to suspend or the power to detain was one thing; entrusting that power to every man in the field was another.

While the Habeas Corpus Act of 1863 did not delegate to the President the question whether a rebellion existed at the time the statute was passed, it did leave him to determine when the rebellion ended.<sup>123</sup> President Andrew Johnson's judgment in this regard is open to question.<sup>124</sup> Robert E. Lee surrendered at Appomattox on April 9, 1865,<sup>125</sup> and the last Confederate army of any substance surrendered on May 26 of that year.<sup>126</sup> Yet Johnson did not fully revoke Lincoln's 1863 order instituting a nationwide suspension until August 20, 1866.<sup>127</sup> He thus left the suspension in place for more than a year after fighting had ceased. And while he did gradually narrow the scope of the suspension over the course of that year, his orders in that regard do not reflect a decision to target only those regions under

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<sup>122</sup> *McCall v. McDowell*, 15 F. Cas. 1235, 1247 (C.C.D. Cal. 1867); see also *Ex parte Benedict*, 3 F. Cas. 159, 162 (N.D.N.Y. 1862) ("Could it have been intended that military officers of every grade, and policemen of every class, throughout the loyal states, acting upon their own suspicions . . . should be authorized to arrest and imprison any citizen, without the possibility of a judicial investigation?"); CONG. GLOBE, 38th Cong., 2d Sess. 320 (1865) (statement of Rep. Davis) (lamenting the fact that arrests under the act were not being made by the President or heads of departments but by lieutenants, provost marshals, and sometimes "by a person calling himself a provost marshal"); *id.* at 1373 (statement of Sen. Trumbull) ("[W]hen I voted for that law, I did not expect that the writ of *habeas corpus* was to be regarded as suspended by all the subordinate officers throughout the land. I did not suppose that every provost marshal in the land would be at liberty to arrest whom he pleased, and keep him in confinement.").

<sup>123</sup> The statute permitted the President to suspend only "during the present rebellion." Thus, by the terms of the statute, the President's authority to exercise emergency power ceased when the rebellion ceased. Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755.

<sup>124</sup> Andrew Johnson became President after Abraham Lincoln was assassinated on April 14, 1865. JAMES M. MCPHERSON, *ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION* 520–21 (3d ed. 2001).

<sup>125</sup> *Id.* at 519.

<sup>126</sup> *Id.* at 530. The very last Confederate surrender of the war was the surrender of the C.S.S. *Shenandoah* in England on November 6, 1865. JOHN BALDWIN & RON POWERS, *LAST FLAG DOWN: THE EPIC JOURNEY OF THE LAST CONFEDERATE WARSHIP* 315–20 (2007).

<sup>127</sup> On June 13, 1865, he issued an order lifting certain restrictions on previously disloyal states but emphasized that the nationwide suspension remained in place. 8 MESSAGES AND PAPERS, *supra* note 109, at 3516 (emphasizing that "nothing herein contained shall be considered or construed . . . as impairing existing regulations for the suspension of the *habeas corpus*"). On December 1, 1865, Johnson revoked the suspension everywhere except "the States of Virginia, Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas, and Texas, the District of Columbia, and the Territories of New Mexico and Arizona." *Id.* at 3531. On April 2, 1866, he revoked the suspension everywhere except Texas upon a finding that the insurrection was "at an end" in those states. *Id.* at 3630. He proclaimed the insurrection "completely and everywhere suppressed and ended . . . in the said State of Texas" and ended the suspension there on August 20, 1866. *Id.* at 3635–36.

particular threat. For example, Johnson deliberately left the suspension in place even in the northern states until December 1, 1865.<sup>128</sup> Moreover, this December order—the first to narrow the suspension—included Kentucky and Tennessee on a list of states singled out for continued suspension despite the fact that Johnson had earlier declared the insurrection successfully suppressed in both states.<sup>129</sup>

### 3. *Reconstruction*

The Ku Klux Klan Act of 1871 authorized the President to suspend the writ of habeas corpus in order to put down Klan uprisings in the South.<sup>130</sup> The Civil War statute had delegated to the President only the authority to determine when the public safety required suspension. There was, of course, no dispute in that circumstance that a rebellion was underway, and Congress said as much in the statute itself. The Reconstruction statute, by contrast, required the President to decide not only what the public safety demanded but also when a rebellion existed—a question hotly debated in Congress.<sup>131</sup> In tasking the President with this decision, Congress laid down specific guide-

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<sup>128</sup> See *supra* note 127.

<sup>129</sup> The December order left the suspension intact in Tennessee, see *supra* note 127, despite the fact that Johnson's order of June 13, 1865, specifically declared the insurrection suppressed in that state. 8 MESSAGES AND PAPERS, *supra* note 109, at 3515 ("I am satisfactorily informed that dangerous combinations against the laws of the United States no longer exist within the State of Tennessee; that the insurrection heretofore existing within said State has been suppressed; that within the boundaries thereof the authority of the United States is undisputed, and that such officers of the United States as have been duly commissioned are in the undisturbed exercise of their official functions . . ."). Similarly, Johnson declared on October 12, 1865, that "the danger of insurgent raids . . . has substantially passed away" in Kentucky, *id.* at 3530, but Kentucky was also included in the list of states that Johnson singled out for continued suspension in his December 1, 1865 order. See *supra* note 127.

<sup>130</sup> See Tyler, *supra* note 2, at 655–62 (describing the context of this suspension).

<sup>131</sup> See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. app. 160 (1871) (statement of Rep. Golladay) ("[F]or however the friends of this measure may insist, they can never convince any sane man that a few outrages committed by bad men, and not sanctioned by law or the community, constitute a rebellion."); *id.* at 368 (statement of Rep. Sheldon) ("I have no doubt of the existence of outrages in certain localities in the South, and of an aggravated and, perhaps, of an alarming character; alarming because they forebode anarchical tendencies, and a growing disposition to ignore and overturn social securities. . . . But bad as the condition is, or may have been, I have never believed, and do not now believe, that there is any purpose on the part of the responsible and influential people of the South to make another attempt to become independent of the Government of the United States."); *id.* at 373 (statement of Rep. Archer) ("This is magnifying individual quarrels, individual trespasses to rebellion against the Government, although the parties concerned may have had no idea, no desire to jeopardize the existence of the Government."). Notably, Senator Lyman Trumbull, the architect of the 1863 suspension statute, was among those in the 42nd Congress who thought the statute authorized suspension in circumstances that fell short of "rebellion." See *id.* at 582 (urging the "impropriety of authorizing the suspension of the writ of *habeas corpus* because of the existence of an unlawful combination armed and powerful, and that has done nothing whatever").



lines for determining what constituted a rebellion and concomitant threat to public safety:

[W]henever in any State or part of a State the unlawful combinations [of those who obstruct the execution of the law so as to deprive any class of people their civil rights] shall be organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or set at defiance the constituted authorities of such State, and of the United States within such State, or when the constituted authorities are in complicity with, or shall connive at the unlawful purposes of, such powerful and armed combinations; and whenever, by reason of either or all of the causes aforesaid, the conviction of such offenders and the preservation of the public safety shall become in such a district impracticable, *in every such case such combinations shall be deemed a rebellion against the government of the United States . . .*<sup>132</sup>

This ability to determine when violence escalated to the level of a rebellion was the only respect in which the 1871 Act was broader than the 1863 Act. In every other respect, the authority it conferred was markedly narrower. It was geographically limited: the President could suspend the writ only “within the limits of the district which shall be so under the sway thereof.”<sup>133</sup> It was temporally limited: the authorization expired “after the end of the next regular session of Congress.”<sup>134</sup> It was also subject to conditions. The President could suspend the writ only if he first issued a proclamation “commanding such insurgents to disperse.”<sup>135</sup> Furthermore, once a suspension was in effect, detentions were subject to the same limitations imposed by the 1863 Act with respect to furnishing lists of prisoners to the courts and discharging those who were not prisoners of war and whom the grand jury did not indict.<sup>136</sup>

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<sup>132</sup> Ku Klux Klan Act of 1871, ch. 22, § 4, 17 Stat. 13 (emphasis added). This statute bears some resemblance to the 1777 Maryland statute, which provided for suspension once the governor determined that an “invasion” had occurred. See *supra* note 65 and accompanying text. The difference between the two is that suspension automatically followed in the Maryland case, while the Ku Klux Klan Act made suspension contingent upon the President’s determination that the public safety required it. Once the President determined that a rebellion existed, the Ku Klux Klan Act provided “that it shall be lawful for the President of the United States, when in his judgment the public safety shall require it, to suspend the privileges of the writ of habeas corpus, to the end that such rebellion may be overthrown.” The different format of the 1871 Act is constitutionally significant. Ku Klux Klan Act of 1871, at § 4, 17 Stat. 15; see also *infra* Part III.

<sup>133</sup> § 4, 17 Stat. at 15.

<sup>134</sup> *Id.* Congress passed the Act on April 20, 1871, and the next session of Congress ended on June 10, 1872, giving the Act a lifespan of almost fourteen months. See *House History*, OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, [http://artandhistory.house.gov/house\\_history/Session\\_Dates/40to59.aspx](http://artandhistory.house.gov/house_history/Session_Dates/40to59.aspx) (last visited Nov. 11, 2013).

<sup>135</sup> Ku Klux Klan Act of 1871, ch. 22, §4, 17 Stat. 13.

<sup>136</sup> *Id.*

As it had during the Civil War, delegating suspension authority to the President generated controversy. Many of the arguments levied against delegation echoed those made in the context of the 1863 Act, which opponents of the current legislation characterized as bad precedent that ought not be followed.<sup>137</sup> Critics insisted that the Constitution required Congress to exercise its own judgment about what the public safety required.<sup>138</sup> They contended that concentrating the suspension and detention powers in the hands of the Executive was both dangerous and in violation of the separation of powers principle.<sup>139</sup> And they pointed out that once the power was treated as delegable, there was no reason why Congress could not give it to someone lower ranked and perhaps less able than the President.<sup>140</sup>

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<sup>137</sup> See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 373 (1871) (statement of Rep. Archer) (insisting that the 1863 Act is a bad precedent because the suspension power cannot be delegated); *id.* at 411 (statement of Rep. Van Trump) (arguing that the 1863 act was “absolutely null and void” insofar as it delegated suspension power to the President). Senator Vickers made the same point in a debate about whether to extend the Ku Klux Klan Act. CONG. GLOBE, 42d Cong., 2d Sess. 3715 (1872) (“But I do not think that Congress even [in 1863] had any authority to invest the President with the power.”).

<sup>138</sup> See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 411 (1871) (statement of Rep. Van Trump) (describing the public safety determination as a discretionary judgment that is Congress’s alone to make); *id.* at 479 (statement of Rep. Leach) (“[I]f the legal principle of *delegatus non delegare* holds good, as it does, where matters of even little importance are involved, how much more so in that most delicate question and great inalienable right, the liberty of the citizen?”); *id.* at app. 160 (statement of Rep. Golladay) (“But this bill, sir, attempts to shirk the question [whether the exigency has arisen] and confer the power on the President. This cannot be done.”); *id.* at app. 222 (statement of Sen. Thurman) (asserting that the point of making the suspension power legislative is for Congress to judge whether the grounds for suspension exist); *id.* at app. 260 (statement of Rep. Holman) (arguing that the decision to suspend is entrusted to Congress alone, yet this bill “make[s] the President of the United States the sole judge of the conditions on which these vast and final powers of absolute government shall be assumed”).

<sup>139</sup> See, e.g., *id.* at app. 260 (statement of Rep. Holman) (arguing that vesting the President with this power disturbed the Constitution’s finely wrought separation of powers); *id.* at 399–400 (statement of Rep. Kinsella) (objecting to the danger of vesting one man, particularly one of military background, with the discretion to suspend habeas corpus); *id.* at 479 (statement of Rep. Leach) (“God never made any one man that I would trust with such a high prerogative . . .”). Senator Hamilton made the same point in the debate about whether to extend the suspension provision of the Ku Klux Klan Act. See CONG. GLOBE, 42d Cong., 2d Sess. 3724 (1872) (asserting that he would clothe no man, not even George Washington, with the power to suspend the writ); see *id.* at app. 510 (statement of Sen. Stevenson) (“I tell the Senator that the pending proposition to invest the President with the power of a Roman dictator over the liberty of the citizen is forbidden alike by law and fact. The Constitution forbids it, because it is an exclusive legislative trust, which Congress cannot redelegate.”).

<sup>140</sup> See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 352 (1871) (statement of Rep. Beck) (contending that “[i]f Congress can thus shift the responsibility, it can confer it on . . . the General of the Army, or an executive committee sitting during recess, or on any man or set of men it pleases, and the carefully guarded provisions of the Constitution may thus be set at naught”).

New, however, was the argument that even if the public safety determination was delegable, the question whether a rebellion or an invasion existed was not. Senator Bayard protested:

[A rebellion] cannot be contemplated in advance. . . . Now, Congress not only has sought to delegate to the President of the United States the exercise of a power confided to its discretion alone, but it has gone further, and authorized him to suspend this writ of right in a case where Congress itself has not the power constitutionally to do it.<sup>141</sup>

In other words, an active rebellion or invasion had to exist in order to justify any sort of suspension statute, including one that gave the President the authority to suspend when he judged it necessary for the public safety. Of course, not everyone saw the existence of an active rebellion or invasion as an immovable requirement. Anticipating the open-ended delegations Congress later enacted with respect to U.S. territories, Representative Sheldon of Louisiana opined that Congress had "the authority to place upon the statute-book a permanent law empowering the President to suspend the privileges of the writ of *habeas corpus* whenever in his judgment a case of rebellion or invasion exists."<sup>142</sup> And here, the law was not so abstract as the one Representative Sheldon described. It was tied to current events, and it gave the President detailed guidelines to apply in determining whether the contingency had come to pass.<sup>143</sup> The bill's supporters contended

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<sup>141</sup> *Id.* at 245; see also, e.g., *id.* at 367 (statement of Rep. Arthur) (objecting on the ground that "Congress alone can rightfully suspend the privilege of [habeas corpus], and only in time of rebellion or invasion" and "Congress cannot devolve it upon the capricious will of the Executive, to do with as he may in contingencies"); *id.* at 479 (statement of Rep. Leach) (arguing that Congress cannot authorize the President to decide when public safety warrants suspension, much less to decide when "insurrection or war exists"); *id.* at app. 754 (statement of Rep. Wood) (objecting that the President "is to be the sole and exclusive judge of what constitutes a rebellion . . . . He may construe the assembling of two or more men in a bar-room fight as constituting that condition of things as under the bill would justify him in assuming that that kind of 'combination' or conspiracy or rebellion existed which warranted the full exercise of all the power granted"); *id.* at 352 (statement of Rep. Beck) ("The people have a right to have the action of their Representatives, under all their responsibilities, acting on the existing facts; and there is no warrant anywhere for the transfer of that authority to the President to act on such facts as may arise hereafter . . . .").

<sup>142</sup> *Id.* at 368. He added that it would be "impolitic and dangerous" to do so. *Id.*

<sup>143</sup> See, e.g., *id.* at 483 (statement of Rep. Wilson) ("[The bill] does not make the President the sole and exclusive judge of what constitutes a rebellion. The bill specifies what facts shall be deemed a rebellion, and allows the President to judge when those facts exist."); *id.* at 698 (statement of Sen. Edmunds) (supporting delegation on the ground that Congress "delegate[s] powers constantly; not legislative powers, but powers to act in a contingency which the Legislature prescribes or provides for or defines in advance").

that Congress's act of empowering the President served as the necessary exercise of legislative authority.<sup>144</sup>

Six months went by before President Ulysses S. Grant exercised the authority given him by the 1871 Act. On October 17, 1871, Grant suspended the writ in nine South Carolina counties after declaring that a rebellion existed as defined by the statute and that "the public safety especially requires that the privileges of the writ of *habeas corpus* be suspended."<sup>145</sup> The 1871 Act, like the 1863 Act, did not restrict the exercise of detention authority to high-ranking officials, and Grant delegated it to a range of subordinates: the U.S. marshal, any of his deputies, any federal military officer, and "any soldier or citizen acting under the orders of said marshal, deputy, or such military officer within any one of said counties."<sup>146</sup> Just over two weeks later, Grant revoked the suspension in one county.<sup>147</sup> On November 10, 1871, he suspended the writ in another county after finding the requisite rebellion and threat to public safety.<sup>148</sup> These suspensions remained in place until the statute expired on June 10, 1872.<sup>149</sup> A bill extending the President's authority to suspend was proposed, but Congress did not enact it.<sup>150</sup> Interestingly, the 1871 Act appears to be the only fed-

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<sup>144</sup> See, e.g., *id.* at 698 (statement of Sen. Edmunds) (agreeing that the power is legislative but maintaining that Congress's delegation to the President was the required exercise of legislative authority).

<sup>145</sup> 9 MESSAGES AND PAPERS, *supra* note 109, at 4091–92 (Proclamation of Oct. 17, 1871).

<sup>146</sup> *Id.* at 4091. Major Lewis Merrill and his troops "responded with a massive round-up of suspects." Tyler, *supra* note 2, at 660 (quoting Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871–72*, 33 EMORY L. J. 921, 925 (1984)).

<sup>147</sup> 9 MESSAGES AND PAPERS, *supra* note 109, at 4093 (Proclamation of Nov. 3, 1871).

<sup>148</sup> *Id.* at 4094–95 (Proclamation of Nov. 10, 1871).

<sup>149</sup> Section 4 of the statute states that "the provisions of this section shall not be in force after the end of the next regular session of Congress." § 4, 17 Stat. at 15. The next session began on December 4, 1871, and ended on June 10, 1872. See *House History*, OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, [http://artandhistory.house.gov/house\\_history/Session\\_Dates/40to59.aspx](http://artandhistory.house.gov/house_history/Session_Dates/40to59.aspx) (last visited Nov. 11, 2013).

<sup>150</sup> See S. 656, 42d Cong. (1872) (proposing to extend the President's emergency power through the end of the next regular session of Congress, which concluded on March 3, 1873); see also CONG. GLOBE, 42d Cong., 3d Sess. 2111 (March 3, 1873) (noting that the bill proposing to extend the Act had been tabled in the House and had now been "superseded by time"). The constitutional arguments against delegation were renewed when the extension was proposed. See, e.g., CONG. GLOBE, 42d Cong., 2d Sess. 3714 (1872) (statement of Sen. Vickers) ("It is among the legislative powers of Congress, and belongs exclusively to it. It is impossible from the nature of the power that it can be conferred upon another."); *id.* at 3719 (statement of Sen. Hamilton) ("[A] bill cannot be defended in any way, by any mode of argument, which proposes to invest the President of the United States with the authority to determine when the public safety requires suspension of the writ."); *id.* at 4373 (statement of Sen. Saulsbury) (arguing that only Congress can judge whether the requisites for suspension have been met); *id.* at app. 665 (statement of Sen. Thurman) (complaining that in the bill to extend the Act, as in the original, "Congress, instead of deciding itself whether the state of case *exists* which authorizes the suspension of

eral suspension statute whose constitutionality was not challenged in court.

While the Lincoln Administration had refused to comply with the report-and-release provisions included in section 2 of the 1863 Act,<sup>151</sup> the Grant Administration obeyed those same statutory requirements.<sup>152</sup> And in addition to turning over lists of prisoners to the courts, Grant gave Congress an account of the detentions made pursuant to the suspension order. In his annual message to Congress on December 4, 1871, Grant reported "many arrests" in two of the counties where he had suspended the writ<sup>153</sup> but noted that "several hundred" had been released because their "criminality was ascertained to be of an inferior degree."<sup>154</sup> The most recent count reflected that 168 remained in custody.<sup>155</sup> He asserted that "[g]reat caution has been exercised in making these arrests, and, notwithstanding the large number, it is believed that no innocent person is now in custody."<sup>156</sup> Shortly after Grant delivered this message, Congress asked him to submit a formal report detailing both the arrests made under the Act and the basis for his decision to suspend the writ in the first place.<sup>157</sup> Grant responded within three months with a report identifying the basis of his decision to suspend as information gathered by his attorney general, along with:

information of a similar import from various other sources, among which were the Joint Select Committee of Congress upon Southern Outrages, the officers of the State, the military officers of the United States on duty in South Carolina, the United States attorney and marshal and other civil officers of the Government, repentant and abjuring members of those unlawful organizations, persons spe-

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the writ, undertakes to devolve the decision of that question upon the President of the United States").

<sup>151</sup> See *supra* note 85 and accompanying text.

<sup>152</sup> See, e.g., JOURNAL OF THE JOINT SELECT COMM. TO INQUIRE INTO THE CONDITION OF THE LATE INSURRECTIONARY STATES, S. REP. NO. 41-1, at 624 (1872) (noting that the clerk of the circuit court of the United States at Columbia, South Carolina, had provided it with the "number of indictments, [sic] found at the late term" and an "official copy of the presentment of the grand jury at the late term").

<sup>153</sup> 9 MESSAGES AND PAPERS, *supra* note 109, at 4096, 4105 (Third Annual Message).

<sup>154</sup> *Id.* at 4105.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> A House Resolution adopted on January 25, 1872, pursuant to the advice of the Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States requested that the President communicate to the House "all information in his possession upon which he acted in exercising the powers conferred upon him by [*inter alia*, the suspension provision] of the [Ku Klux Klan Act]." See CONG. GLOBE, 42d Cong., 2d Sess. 596 (1872) (setting forth the text of the resolution); *id.* at 598-99 (recording House approval of it).

cially employed by the Department of Justice to detect crimes against the United States, and from other credible persons.<sup>158</sup>

A detailed report prepared by the attorney general detailed the number and names of those arrested and the disposition of those cases.<sup>159</sup> This transparency was a check on executive excess, and it also gave Congress information relevant to deciding whether further legislation, including an extension of the suspension provision, was necessary to restore order.

#### 4. *Territorial Suspensions*

On January 31, 1905, the territorial governor of the Philippines, Luke Edward Wright, suspended the writ in response to the "open insurrection" of violent bands of robbers who so terrorized the people of the Cavite and Batangas provinces that it was "impossible in the ordinary way to conduct preliminary investigations before justices of the peace and other judicial officers. . . ."<sup>160</sup> Wright, who had been appointed by Theodore Roosevelt,<sup>161</sup> issued the order pursuant to the territory's organic act, which provided:

[T]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the governor, with the approval of the Philippine Commission, wherever during such period the necessity for such suspension shall exist.<sup>162</sup>

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<sup>158</sup> CONDITION OF AFFAIRS IN THE SOUTHERN STATES, H.R. EXEC. DOC. No. 268, at 2 (2d Sess. 1872).

<sup>159</sup> *Id.* at 3–19.

<sup>160</sup> *Fisher v. Baker*, 203 U.S. 174, 179–80 (1906) (quoting order).

<sup>161</sup> Wright, who succeeded William Howard Taft in the post, was appointed by Roosevelt and confirmed by the Senate in 1904. See *Luke Edward Wright*, U.S. ARMY CENTER OF MILITARY HISTORY, <http://www.history.army.mil/books/Sw-SA/Wright.htm> (last visited Nov. 11, 2013); see also Act of July 1, 1902, ch. 1369, § 1, 32 Stat. 692 (providing that the President would appoint all civil governors of the Philippines, as well as all members of the Philippines Commission, with the advice and consent of the Senate). Like Taft, Wright went on to become Secretary of War. See *Luke Edward Wright*, *supra*.

<sup>162</sup> Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 691, 692. In 1916, Congress passed a new organic statute for the Philippines. Act of Aug. 29, 1916, ch. 416, 39 Stat. 545. That statute contained a similar delegation of suspension authority; the primary difference was that the Philippines Commission no longer had a role in the process. See *id.* at 546 ("[T]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the Governor General, wherever during such period the necessity for such suspension shall exist."). The constitution of the Philippines, adopted pursuant to congressional authorization in 1935, superseded the Act. See CONSTITUTION OF THE PHILIPPINES (Feb. 8, 1935). The Philippines became independent of the United States in 1946, see Treaty of General Relations, U.S.-Phil., Jul. 4, 1946, 61 Stat. 1174.

Finding the conditions for suspension satisfied, the Philippines Commission, members of which had also been appointed by Roosevelt, adopted a resolution authorizing the governor to suspend the writ, which he did in two provinces on the very same day.<sup>163</sup> Wright revoked the suspension nearly ten months later.<sup>164</sup>

Congress's delegation of suspension authority to the Executive Branch drew constitutional challenge. In *Fisher v. Baker*, a prisoner held pursuant to the January 31 order contended that the order was invalid because "[u]nder the Constitution, the power to suspend the privilege of the writ of *habeas corpus* rests in Congress, and cannot be delegated to the Philippine Governor and Commission."<sup>165</sup> The Solicitor General of the United States countered that the Constitution left Congress free to delegate the suspension power to the Executive.<sup>166</sup> Because the Supreme Court dismissed the case on jurisdictional grounds, it did not resolve the question.<sup>167</sup>

The writ was suspended for a second time in a U.S. territory on the day Japan bombed Pearl Harbor. On December 7, 1941, Joseph Poindexter, the territorial governor of Hawaii, issued an order "hereby suspend[ing] the privilege of the writ of *habeas corpus* until further notice."<sup>168</sup> Poindexter, who had been appointed by Franklin

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<sup>163</sup> *Fisher*, 203 U.S. at 179–80.

<sup>164</sup> *Id.* at 181.

<sup>165</sup> *Id.* at 176. He also argued that the order was invalid because "[i]nsurrection is necessarily political," but ladorism (robbery), the stated basis for the suspension, "is [a] mere common law crime." *Id.* at 175 (internal quotation marks omitted). He pointed out, moreover, that the Suspension Clause did not authorize suspension in cases of "insurrection," as opposed to cases of "rebellion." *Id.* at 176 ("The attempted inclusion of 'insurrection,' as a ground of suspension, is unconstitutional and void. 'Insurrection' is not synonymous with rebellion."). As this argument reflects, the petitioner took the position that the protection of the Suspension Clause extended to the Philippines, a position with which the United States disagreed. *Id.* at 178 (argument of the Solicitor General) (asserting that "the act for the Philippines . . . is not subject to the precise limitations of the constitutional provision").

<sup>166</sup> The Solicitor General claimed that "[i]t has been decided" that Congress could leave the "public safety" determination to the President's discretion and that "[i]t has not been decided that, so authorized, he may not determine whether the exigency of invasion or rebellion has arisen." *Id.* For the former proposition, he cited *In re Oliver*, 17 Wis. 681 (1864), which upheld the Habeas Corpus Act of 1863 against a delegation challenge. *Fisher*, 203 U.S. at 177. As discussed above, that opinion does not hold it permissible for Congress to give the President the authority to decide the public safety issue. On the contrary, the Wisconsin Supreme Court's serious constitutional doubts about whether Congress could do so prompted it to avoid the question by construing the 1863 Act as an outright suspension. See *supra* notes 112–16 and accompanying text.

<sup>167</sup> *Fisher*, 203 U.S. at 181–82.

<sup>168</sup> Garner Anthony, *Martial Law, Military Government and the Writ of Habeas Corpus in Hawaii*, 31 CALIF. L. REV. 477, 507 (1943) (reprinting order in Appendix I). The Hawaiian Organic Act provided that the territorial governor "shall be appointed by the President by and with the advice and consent of the Senate of the United States, and shall hold office for four years . . . unless sooner removed by the President." See Act of Apr. 30, 1900, ch. 339, § 66, 31 Stat. 141, 153.

D. Roosevelt, acted pursuant to the Hawaiian Organic Act, in which Congress included the following authorization:

[The governor] may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known.<sup>169</sup>

Governor Poindexter cabled President Roosevelt on December 7 to inform him that he had both imposed martial law and suspended the privilege of the writ.<sup>170</sup> Roosevelt approved this decision two days later.<sup>171</sup> The suspension remained in effect for almost three years; Roosevelt restored the privilege on October 24, 1944.<sup>172</sup> Some contended that the suspension had continued long after both the threat to public safety and the risk of another invasion had diminished.<sup>173</sup>

While the Philippines and Hawaii are the only territories in which the writ was actually suspended, the organic acts of the Virgin Is-

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<sup>169</sup> Act of Apr. 30, 1900, ch. 339, § 67, at 153. The lack of a comma after the phrase "martial law" makes it possible to read the statute as giving the President power to override the territorial governor only with respect to the declaration of martial law and not to the suspension of the privilege of the writ. This ambiguity was corrected in Guam's later-enacted statute, which employed nearly identical language but included a comma to make clear that the "presidential notification" clause applied to both the suspension and martial law decisions. See *infra* note 176. Hawaii's territorial law was superseded after Hawaii became a state in 1959. See Act of Mar. 18, 1959, Pub. L. No. 86-3, § 15, 73 Stat. 4, 11 (providing that "[t]erritorial law enacted by the Congress shall be terminated two years after the date of admission of the State of Hawaii into the Union or upon the effective date of any law enacted by the State of Hawaii which amends or repeals it, whichever may occur first").

<sup>170</sup> See Anthony, *supra* note 168, at 478 ("I have today declared martial law throughout the Territory of Hawaii and have suspended the privilege of the writ of habeas corpus.").

<sup>171</sup> See *id.*

<sup>172</sup> Proclamation No. 2627, 3 C.F.R. § 41 (Oct. 19, 1944).

<sup>173</sup> In July of 1943, the district court of the Territory of Hawaii held in an unpublished opinion that detainees could invoke the privilege because Hawaii was no longer in imminent danger of invasion after the Battle of Midway. Anthony, *supra* note 168, at 486-87; see also *Ex parte* Spurlock, 66 F. Supp. 997, 1004 (D. Haw. 1944) (asserting that "[t]he privilege cannot remain suspended by fiat after all reason for its suspension has passed"). The Ninth Circuit took the position that in the face of conflicting evidence about the necessity of continued suspension, a federal court could not substitute its judgment for that of military authorities. See *Duncan v. Kahanamoku*, 146 F.2d 576, 581-83 (9th Cir. 1944), *rev'd on other grounds*, 327 U.S. 304 (1946).



lands<sup>174</sup> and Puerto Rico<sup>175</sup> also contained at one point a delegation of suspension authority identical to that contained in the Hawaiian organic statute. The Organic Act of Guam had a nearly identical suspension provision.<sup>176</sup> None of these delegation provisions remains in effect today.<sup>177</sup>

The delegations in these five territorial statutes were sweeping. In contrast to the Civil War and Reconstruction statutes, they were not enacted in response to events that arguably justified suspension. In Puerto Rico, the Virgin Islands, and Guam, such events never in fact arose. The Philippines suspension provision was enacted in 1902; the events giving rise to its exercise did not occur until three years later. The time lag is even more extreme in the case of Hawaii: the governor exercised the suspension authority forty-one years after Congress delegated it.

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<sup>174</sup> See Act of June 22, 1936, ch. 699, § 20, 49 Stat. 1807, 1812. This provision also appeared in the 1954 Revised Organic Act of the Virgin Islands. See Act of July 22, 1954, ch. 558, § 11, 68 Stat. 497, 503. A 1968 amendment to this section omitted the reference to suspension, while retaining the governor's authority to declare martial law. See Act of Aug. 3, 1968, Pub. L. No. 90-496, § 4, 82 Stat. 837, 838. The original organic act providing a temporary government for the Virgin Islands contained no suspension provision; however, that omission is unsurprising given the skeletal nature of the statute which simply vested "all military, civil, and judicial powers" in a governor appointed by the President. Act of Mar. 3, 1917, ch. 171, § 1, 39 Stat. 1132, 1132.

<sup>175</sup> See Jones Act, ch. 145, § 12, 39 Stat. 951, 955 (1917) (authorizing the governor "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it [to] suspend the privilege of the writ of habeas corpus, or place the island, or any part thereof, under martial law until communication can be had with the President and the President's decision therein made known"). The Jones Act was Puerto Rico's second organic statute. Its first did not contain a suspension provision. See Act of Apr. 12, 1900, ch. 191, § 17, 31 Stat. 77, 81. The Act of July 3, 1950, which allowed Puerto Rico to draft its own constitution, repealed the suspension provision of the Jones Act. See Act of July 3, 1950, ch. 446, § 5(2), 64 Stat. 319, 320.

<sup>176</sup> That statute provided that "[the governor] may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place Guam, or any part thereof, under martial law, until communication can be had with the President and the President's decision thereon communicated to the Governor." Act of Aug. 1, 1950, ch. 512, § 6, 64 Stat. 384, 386. Note that this statute supplies a comma after the phrase "martial law," making clear that it extends the power of presidential override to the suspension of habeas as well as to the declaration of martial law. See *supra* note 169. The 1960 version of the Act retained the suspension provision, see § 6(b); the 1968 version eliminated the suspension authority but retained gubernatorial authority to declare martial law, see Act of Sept. 11, 1968, Pub. L. No. 90-497, § 1, 82 Stat. 842, 843.

<sup>177</sup> See *supra* notes 162, 169, 175, 176, and 176. The legislative history of the statutes regarding Puerto Rico and Guam, which remain U.S. territories, suggests that Congress withdrew the suspension power from the territorial governor when he became an elected official not subject to the supervision of the President. See, e.g., H.R. REP. NO. 89-1520, at 7 (1966) (explaining that the territorial governor's power to suspend the writ of habeas was removed under the revised organic acts of Guam and the Virgin Islands because that power is "inappropriate for an elected local official, not supervised by the President or his designee").

Congress's rationale for vesting these territorial governors with suspension authority may have been the distance of these territories from the mainland. A House report on the bill that became the 1900 Hawaiian Act noted that:

The governor of the Territory of Hawaii . . . is given authority to suspend the privilege of the writ of habeas corpus, and to place the Territory under martial law when such course is required by the public safety. These provisions are necessary in view of the distance of the islands and the nature of existing means of communication and transportation.<sup>178</sup>

That said, Congress did not consistently delegate suspension authority to every governor of a distant territory.<sup>179</sup> Its inclusion of such provisions in territorial statutes was sporadic rather than systematic.

In contrast to the Civil War and Reconstruction statutes, delegation in the territorial context apparently generated no controversy in Congress. It is impossible to say why, although some have speculated that the inattention may be partly explained by contemporary doubts about whether the Constitution—and thus the protection of the Suspension Clause—applied in American territories.<sup>180</sup> Whatever as-

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<sup>178</sup> H.R. REP. NO. 55-1808, at 2 (1899).

<sup>179</sup> For example, both the Organic Act of Hawaii, adopted in 1900, and the Organic Act of the Philippines, adopted in 1902, vested the territorial governor and commission with such power, *see supra* note 162, but the first Puerto Rican Organic Act, adopted in 1900, did not. Congress added the Puerto Rican suspension provision in 1917. *See supra* note 175. Moreover, the acts governing the territory of Alaska, passed in the same period, did not grant suspension authority to the Alaskan governor. *See* Act of May 17, 1884, ch. 53, § 2, 23 Stat. 24, 24; *see also* Act of Aug. 24, 1912, ch. 387, 37 Stat. 512. Delegations of suspension authority were also absent from acts establishing territories located in the mainland United States but far enough away from the capital so as to render the exchange of information difficult given then-existing means of transportation and communication. Historically, most territorial statutes have incorporated by reference the Northwest Ordinance, which rendered the territorial governor the “commander-in-chief of the militia,” but said nothing about either martial law or the suspension of habeas. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51. Current territorial statutes typically grant the territorial governor the power to impose martial law but not to suspend the privilege of the writ. *See supra* note 177.

<sup>180</sup> *See* Diller, *supra* note 20, at 598 n.66 (positing that the “rather unbridled discretion Congress gave territorial governors to suspend habeas in the Philippine and Hawaiian Organic Acts is likely a result of Congress not initially viewing those territories as fully protected by the United States Constitution”) (internal citations omitted). The question whether the Constitution was understood to apply to these territories in the early twentieth century is a complicated one. *See* Andrew Kent, Boumediene, Munaf, and the Supreme Court’s Misreading of the Insular Cases, 97 IOWA L. REV. 101, 127–32 (2011) (describing political controversy at the turn of the twentieth century about whether the Constitution “followed the flag” to newly acquired American territories); Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 874–78 (1990) (describing the evolution of Supreme Court doctrine between 1901 and 1922 on this question). The answer, moreover, may not be the same for each territory. Hawaii, as an incorporated territory, was one to which the Constitution was thought to extend of its own force, *see* Kent, *supra*, at 108–09 (describing the doctrine of territorial incorporation), and even if it did not, Congress had rendered it almost fully applicable by statute. *See* Act of Apr. 30, 1900,

sumptions Congress may have made at the time, these statutes provoke the question whether Congress could employ the same open-ended model again. Indeed, recall that during the Reconstruction debates, Representative Sheldon contended that Congress had the authority to pass just that sort of statute with respect to the United States proper.<sup>181</sup> These statutes and the suspensions resulting from them offer concrete examples of what such an assertion of authority might look like and a means of considering whether such broad delegations adequately preserve the benefits of locating the suspension power in Congress.

### III

#### CONTINGENT SUSPENSION AND CANCELLATION AUTHORITY

This history makes clear that the separation of powers debate surrounding suspension has been more complicated than the stark “Lincoln versus Congress” dispute about whether Congress alone possesses the power to initiate a suspension. The emergence of the delegation model provoked a serious debate about whether Congress has to make the “invasion or rebellion” and “public safety” determinations itself or whether it can vest the President with authority to make those judgments at some later date. While critics of the statutes did not frame the argument quite this way, the claim is essentially that contingency format delegations are unconstitutional in this context.

Contingent legislation—legislation taking effect upon satisfaction of some condition rather than a date certain—is a standard means by which Congress delegates discretion to the Executive Branch.<sup>182</sup> As Gary Lawson has observed, “Normally, a statute’s effective date will be

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ch. 339, § 5, 31 Stat. 141, 141–42 (“[T]he Constitution, and . . . all the laws of the United States . . . not locally inapplicable, shall have the same force and effect within the said Territory [of Hawaii] as elsewhere in the United States.”). Unincorporated territories like the Philippines, Guam, Puerto Rico, and the Virgin Islands enjoyed the protection of only the Constitution’s “fundamental rights”; the question whether the protection afforded by the Suspension Clause qualified as one of those rights was apparently unsettled. *See supra* note 165. As a matter of modern doctrine, the Suspension Clause applies not only to territories over which the United States is formally sovereign but also to those over which it exercises *de facto* control. *See Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (holding that the Suspension Clause “has full effect at Guantánamo Bay”).

<sup>181</sup> *See supra* note 142 and accompanying text.

<sup>182</sup> Laurence Tribe has explained that statutes delegating authority to the Executive Branch fall into two broad categories: (1) contingent legislation, which “condition[s] the operation of legislation upon an administrative agency official’s determination of certain facts” and (2) legislation authorizing interstitial administrative action, which sets forth a broad policy directive and charges an administrative agency to “fill up the details.” LAURENCE H. TRIBE, 1 *AMERICAN CONSTITUTIONAL LAW* 979 (3d ed. 2000) (citations omitted). Kevin Stack has observed that “[w]hile these contingency format delegations are no longer the standard form of delegations to agencies, Congress still regularly employs them when it delegates power directly to the President.” Kevin M. Stack, *The Reviewability of the President’s Statutory Powers*, 62 VAND. L. REV. 1171, 1174 (2009).

a calendar date, but there is no evident reason why that effective date cannot be determined by some event other than celestial motions—such as legislation that takes effect only upon occurrence of natural disasters.”<sup>183</sup> Delegation is what makes contingent legislation possible, for Congress must rely upon executive or judicial agents to determine when the conditions rendering the statute effective are satisfied.<sup>184</sup> Congress has passed contingent legislation since the early days of the Republic,<sup>185</sup> and the Court has held that refusing Congress this ability would “rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know.”<sup>186</sup> So long as Congress lays down an “intelligible principle” to guide the determination of when the conditions rendering the statute are satisfied, contingent legislation is permissible.<sup>187</sup>

One difficulty with the use of contingent legislation in this context relates to the particular kind of authority the federal suspension statutes have conferred. The statutes passed thus far have granted the President so-called cancellation authority—that is, the authority to cancel the operation of other then-effective laws upon the occurrence of a stated contingency. Once the President determined that the statutory prerequisites of “invasion or rebellion” and “threat to public safety” had been met, each statute permitted him to cancel statutes granting federal courts jurisdiction to order the release of prisoners, statutes granting various procedural rights, and even some of the pro-

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<sup>183</sup> Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 364 (2002); see also *Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1474 (1998) (observing that “[t]he Court frequently has upheld Congress’ delegation of responsibilities to the Executive through contingent legislation requiring an executive agent to take some action upon the finding of specified conditions”).

<sup>184</sup> See Lawson, *supra* note 183, at 387 (“[T]here is no reason why Congress cannot entrust executive and judicial agents with the implementational task of determining whether those specified events have occurred.”).

<sup>185</sup> For example, the Calling Forth Act of 1792, a version of which remains in the United States Code today, see 10 U.S.C. §§ 331–332 (2012), provided that “whenever the United States shall be invaded, or be in imminent danger of invasion . . . it shall be lawful for the President . . . to call forth such number of the militia of the state or states . . . as he may judge necessary to repel such invasion.” Calling Forth Act of 1792, ch. 28, § 1, 1 Stat. 264, 264. In the event of insurrection, the statute authorized the President “to call forth such number of the militia of any other state or states . . . as he may judge sufficient to suppress such insurrection.” *Id.* For a comparison of the President’s power to call forth the militia and his power to suspend, see *infra* notes 211–14 and accompanying text.

<sup>186</sup> *Field v. Clark*, 143 U.S. 649, 694 (1892); see also *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 407 (1928) (“Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive . . .”).

<sup>187</sup> See *J. W. Hampton*, 276 U.S. at 409 (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

cedural guarantees enshrined in the Bill of Rights. Congress assuredly has the power to repeal statutes either temporarily or permanently and, by virtue of the Constitution's emergency power, to suspend temporarily some of the procedural protections of liberty guaranteed therein.<sup>188</sup> But the temporary repeal accomplished pursuant to these statutes was effected by executive order rather than by legislation. Contingent legislation does not always or even often include cancellation authority.<sup>189</sup> When it does, however, such legislation is susceptible to the objection that it permits the President to repeal law outside the process of bicameralism and presentment.

The Court has sent mixed signals about the validity of statutes that vest the Executive with contingent authority to revive or cancel statutes. In two leading nineteenth century cases, the Court upheld such legislation. In *The Brig Aurora*, the Court held constitutional a statute providing that if either Great Britain or France violated the neutral commerce of the United States, the President could revive by

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<sup>188</sup> See *supra* notes 9–10 and accompanying text. The Suspension Clause is not itself the source of Congress's authority to suspend, for it is phrased as a restraint upon power rather than a grant of it. But see Diller, *supra* note 20, at 602 (proposing that the Suspension Clause itself impliedly authorizes Congress to suspend the writ). While the Court has never addressed the issue, scholars and legislators have proposed a number of theories about the source of congressional power. One is that the power to suspend emanates from Congress's power to regulate the federal courts. This proposition, however, "is in significant tension with the very plausible understanding of the Suspension Clause as designed, at least in part, to restrain Congress from suspending habeas corpus in the state courts." *Id.* at 602 n.94. Another leading scholar has posited that the "federal power to suspend the writ . . . must be deduced as an ancillary power to implement one of Congress's substantive powers that is relevant to the particular emergency." Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555, 600 (2002). Candidates include the War Power (if war is declared); the Militia Clause (if the Militia is called to suppress the rebellion or repel the invasion); the Guarantee Clause (when suspension offers protection from invasion or when the state seeks assistance in suppressing domestic violence); and the Commerce Clause (when the invasion or rebellion threatens interstate commerce). See *id.* There are still other clauses that may justify suspension in particular situations. For example, the Reconstruction Congress, which suspended to subvert the Ku Klux Klan, identified Section 5 of the Fourteenth Amendment as the source of its power. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. app. 75 (1871) (statement of Rep. Wood) (asserting that suspension of the writ, among other things, is "proposed to be . . . authorized by the fourteenth amendment to the Constitution of the United States."). When it comes to U.S. territories, Article IV, Section 3, cl. 2 of the Constitution, which grants Congress plenary authority to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," might empower Congress insofar as suspension may be a "needful Rule" under this Article. Perhaps most attractive, however, is to simply say that whatever the particular circumstance, a suspension carries into execution all powers vested in the government of the United States by helping to "ensure the continued execution of governmental laws and [to] sustain[ ] the Constitution's ultimate authority." Prakash, *supra* note 13, at 592 (offering further detail as to why suspensions are both "necessary" and "proper" to furthering this aim).

<sup>189</sup> For example, the Calling Forth Act of 1972, ch. 28, § 1, 1 Stat. 264, one of the earliest examples of contingent legislation, gave the President authority to call out the militia upon satisfaction of certain conditions but did not confer cancellation authority.

proclamation a then-expired law imposing trade restrictions on the offending country.<sup>190</sup> In *Field v. Clark*, the Court upheld a statute providing that if the President deemed duties imposed on products exported from the United States to be “reciprocally unequal and unreasonable,” it was his “duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such [items produced by that country], for such time as he shall deem just.”<sup>191</sup> The appellants in both *The Brig Aurora* and *Field* argued that authorizing the President to render a law effective or ineffective by proclamation violated Article I, Section 7’s requirement of bicameralism and presentment.<sup>192</sup> The Court maintained, however, that enactment satisfied the legislative process and the President merely executed the law. As the Court put it in *Field*, “[t]he legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.”<sup>193</sup> In support of its conclusion, the Court cited a string of statutes, dating from 1798, authorizing the President to either impose or lift statutory trade restrictions when he judged that doing so would be in the interest of the United States.<sup>194</sup>

One might have thought the Court settled the validity of this kind of contingent legislation—legislation empowering the Executive to render expired statutory provisions effective or otherwise applicable ones ineffective—after cases like *The Brig Aurora* and *Field*. The Court more recently suggested, however, that cancellation statutes like the one upheld in *Field* may be exceptional. In *Clinton v. City of New York*, the Court held that the Line Item Veto Act, which permitted the President to cancel spending provisions,<sup>195</sup> authorized the President “to effect the repeal of laws . . . without observing the procedures set out in Article I, Section 7.”<sup>196</sup> The Court distinguished *Field* and the statutes it approvingly cited for two reasons. First, those statutes all dealt

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<sup>190</sup> *Cargo of the Brig Aurora v. United States (The Brig Aurora)*, 11 U.S. 382, 388 (1813) (“[W]e can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct.”).

<sup>191</sup> 143 U.S. 649, 680 (1892).

<sup>192</sup> See *The Brig Aurora*, 11 U.S. at 386 (“To make the revival of a law depend upon the President’s proclamation, is to give to that proclamation the force of a law.”); *Field*, 143 U.S. at 681 (“The plaintiffs in error contend that this section, so far as it authorizes the President to suspend [certain] provisions of the act . . . is unconstitutional, as delegating to him both legislative and treaty-making powers . . .”).

<sup>193</sup> *Field*, 143 U.S. at 694 (internal quotation marks omitted).

<sup>194</sup> *Id.* at 684–90.

<sup>195</sup> 524 U.S. 417, 436 (1998) (noting that “[t]he Line Item Veto Act [gave] the President the power to ‘cancel in whole’ three types of provisions that have been signed into law”).

<sup>196</sup> *Id.* at 445.

with foreign trade, an area in which the President's inherent authority over foreign affairs increases the discretion he may exercise.<sup>197</sup> Second and more important, the cited statutes imposed a *duty* upon the President to suspend the operation of a particular statute when he found the condition satisfied rather than leaving the decision to his discretion.<sup>198</sup> The *Field* Court had itself emphasized the importance of this factor insofar as it insisted that "[n]othing involving the expediency or the just operation of [the Customs Administration Act] was left to the determination of the President," for Congress prescribed the conditions that would trigger a suspension of free trade, and once the President ascertained the existence of those conditions, it "became his duty to issue a proclamation declaring the suspension."<sup>199</sup> As a legal matter, then, the statute itself temporarily repealed the free trade provisions, and the President's proclamation merely recognized that fact. Had Congress authorized the President to suspend when he saw fit, the temporary repeal would have resulted from the executive order rather than the statute, and that would have been impermissible.<sup>200</sup>

The suspension statute the Maryland legislature enacted during the Revolutionary War is an example of the sort of contingent legislation that the Court approved in *Field* and *Clinton*. Once the governor determined that an "invasion" had occurred, suspension automatically

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<sup>197</sup> See *id.* at 444–45.

<sup>198</sup> *Id.* at 445 (emphasizing that in the statutes discussed in *Field*, "Congress itself made the decision to suspend or repeal the particular provisions at issue upon the occurrence of particular events subsequent to enactment, and it left only the determination whether such events occurred up to the President").

<sup>199</sup> *Field*, 143 U.S. at 693. The statute at issue in *The Brig Aurora* operated the same way insofar as it provided that the President "shall declare by proclamation" when either France or Great Britain ceased unfair trade practices, at which point restrictions imposed by that statute "shall . . . cease and be discontinued" as to that nation, and provisions of another statute imposing restrictions "shall . . . be revived[ ] and have full force and effect" as to the other if that nation did not cease unfair practices within three months. 11 U.S. at 384 (emphases added) (internal quotations omitted); see also *Field*, 143 U.S. at 682. In upholding the Act, the Court apparently accepted counsel's argument that the statute, rather than the executive order, accomplished the repeal of one law and revival of the other, as Congress "only prescribed the evidence which should be admitted of a fact, upon which the law should go into effect." 11 U.S. at 387 (argument of counsel).

<sup>200</sup> While the statute at issue in *Field* imposed a duty on the President, not all of the statutes cited approvingly in *Field* did. As Justice Breyer noted in the dissent, "some of the statutes imposed no duty upon the President at all," and "[o]thers imposed a 'duty' in terms so vague as to leave substantial discretion in the President's hands." *Clinton*, 524 U.S. at 493 (Breyer, J., dissenting) (citations omitted). For example, a statute passed in 1799 permitted the President to suspend statutory restrictions on trade with France "if he shall deem it expedient and consistent with the interest of the United States," and to reimpose them "whenever, in his opinion, the interest of the United States shall require." See *Field*, 143 U.S. at 684 (quoting statute) (emphasis omitted). The *Clinton* majority responded that insofar as any of the statutes cited in *Field* could be interpreted as giving the President discretion to cancel or revive statutes, the Court had never passed on their constitutionality. See 524 U.S. at 444 n.36.

followed.<sup>201</sup> All of the federal suspension statutes, however, have given the President the discretion, rather than the duty, to suspend the writ. Both the Civil War and Reconstruction statutes authorized, but did not require, the President to suspend the privilege of the writ when he judged the public safety to require it,<sup>202</sup> and the five territorial statutes each provided that the President, or the governor subject to his supervision, “may” suspend the privilege upon finding the statutory conditions satisfied.<sup>203</sup> If, as the *Clinton* Court contends, a statute giving the President the discretion to suspend other statutes upon the occurrence of some contingency violates Article I, Section 7, then all of the federal suspension statutes passed thus far fail on that basis.

This defect, however, is one of form rather than substance, and accordingly, it should not give us great pause. To the extent that the suspension-by-delegation model employed thus far has permitted the amendment or repeal of statutes outside of the Article I, Section 7 process, that flaw could be remedied. Consider that the effectiveness of the line-item veto lay in the very structure of the innovation.<sup>204</sup> In the case of suspension statutes, however, the structure of the suspension—i.e., whether the legal consequence of repeal flows from the statute or the executive order—should be a matter of indifference to Congress. Congress could have rewritten any of the seven federal suspension statutes to provide that when an invasion or a rebellion occurs, and when the public safety requires it, the President shall notice the same by proclamation, at which point the privilege of the writ of habeas corpus shall be suspended. That formulation does not change the substance of the President’s responsibility, but it avoids the objection that the order, rather than the statute itself, has the legal effect of suspending other laws. So long as Congress ensures that the President acts as a fact-finder rather than a law-repealer, it observes the requirements of the lawmaking process.<sup>205</sup> It is thus unnecessary to examine the soundness of the Court’s reasoning in *Clinton* or to settle conclu-

<sup>201</sup> See *supra* note 65 and accompanying text. The rebellion prong of the Reconstruction statute functioned similarly. When the President determined that the conditions Congress described existed, the statute provided that “such combinations *shall* be deemed a rebellion.” Ku Klux Klan Act of 1871, ch. 22, § 4, 17 Stat. 13 (emphasis added). It was the public safety prong on which he had discretion. *Id.*; see also *supra* note 132 and accompanying text.

<sup>202</sup> See *supra* notes 80–132 and accompanying text.

<sup>203</sup> See *supra* note 169 and accompanying text and notes 174–76.

<sup>204</sup> *Clinton*, 524 U.S. at 497 (Breyer, J., dissenting) (characterizing the mechanism of the line-item veto as “an experiment that may, or may not, help representative government work better”). The value of the one-house veto—another delegation that ran afoul of Article I, Section 7—similarly lay in its very structure. See *INS v. Chadha*, 462 U.S. 919, 972 (1983) (White, J., dissenting) (characterizing the one-house veto as “an important[,] if not indispensable[,] political invention”).

<sup>205</sup> Note that the structure of such a statute would track almost exactly the structure of the statute approved in *Field v. Clark*. As the Court there put it,



sively whether that case applies here, for its holding poses no absolute bar to contingency format delegations of what is functionally, if not formally, cancellation authority.<sup>206</sup>

To be sure, the proposition that Congress can accomplish something as serious as suspension on a contingent basis is unsettling, for such a statute relinquishes Congress's ability to assess the need for suspension when the events provoking it actually arise. That determination is left instead to the President, who is more likely to value security over liberty in a time of crisis.<sup>207</sup> Because, however, the Constitution does not generally prohibit contingent cancellation legislation, any objection to Congress's leaving the need for suspension to the President's judgment must rest on the Constitution's specific treatment of suspension. The next Part considers whether the Suspension Clause itself imposes any limits.

#### IV

#### THE SUSPENSION CLAUSE AS A LIMIT UPON CONTINGENT LEGISLATION

This Part explores whether the Suspension Clause limits Congress's ability to pass contingent suspension legislation in a class of cases that may or may not arise. As explained above, the Necessary and Proper Clause generally permits Congress to pass statutes whose effectiveness hinges upon events that may occur soon, in the distant future, or not at all. Conditional grants of authority thus give the legislature great flexibility to provide for the future, and Congress has taken advantage of that flexibility in the suspension statutes, which have varied widely in their relationship to specific events. Congress

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[l]egislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. . . . He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.

*Field*, 143 U.S. at 693.

<sup>206</sup> That said, *Clinton* does suggest in passing that contingent delegations of cancellation authority might be confined to the context of foreign trade, which is the only context in which the Court has upheld contingent cancellation statutes. See 524 U.S. at 445 (emphasizing that the contingent cancellation statutes cited approvingly in *Field* "all relate to foreign trade, and this Court has recognized that in the foreign affairs arena, the President has 'a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved'" (citation omitted); cf. *id.* at 464-65 (Scalia, J., concurring in part and dissenting in part) (rejecting the argument that the power to cancel an item of spending is wholly nondelegable but suggesting that the nondelegation doctrine may impose "much more severe limits" on cancellation statutes than on other kinds of statutes). Because its scope extends far beyond the context of suspension, I will not pursue the Court's suggestion in this Article. If, however, the Court is correct, there may be reasons wholly apart from the Suspension Clause to treat these delegations differently.

<sup>207</sup> See *supra* note 25 and accompanying text.

enacted the Civil War statute after the start of a rebellion. But it passed the the Reconstruction statute before it was ready to say that Klan violence constituted a rebellion, and it passed the territorial statutes prior to any anticipated, much less imminent, rebellion or invasion. Congress passed all seven of the statutes before it was certain that emergency power was necessary to protect the public safety.

This Part argues that only the Civil War suspension was constitutional. The Suspension Clause requires two findings before a suspension can be imposed: first, that a rebellion or an invasion exists and second, that the public safety may require it.<sup>208</sup> This Part explains that Congress must make both findings itself, as it did in the Habeas Corpus Act of 1863. It emphasizes, however, that the Clause requires only a tentative finding on the public safety prong. Once Congress determines that a rebellion or an invasion exists and that protecting the public safety *may* require suspension, it can task the President with the responsibility of deciding when and where the threat to public safety is severe enough to require suspension. In other words, the Clause limits, but does not entirely rule out, contingency format delegations to the Executive. So long as Congress makes the threshold findings that the Clause demands, Congress can condition the suspension's effectiveness upon the Executive's determination that the public safety actually requires the exercise of emergency power.

This interpretation of the Suspension Clause is consistent with its language and history but is rendered particularly compelling by a functional analysis. While Congress has significant leeway to act independently of triggering events in the context of social and economic regulation and in areas of inherent executive authority, the Suspension Clause limits Congress's freedom to do so when it empowers the Executive to deploy emergency power.

#### A. The Text and Background Assumptions of the Clause

The Suspension Clause provides in full: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."<sup>209</sup> It thus requires two determinations: first, that a rebellion or an invasion exists and second, that protecting the public safety may require suspension. The question whether Congress can task the President with making the first determination—that an invasion or rebellion exists—is a diffi-

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<sup>208</sup> The "invasion or rebellion" determination and the "public safety" determination cannot be collapsed into a single step; rather, there is work for Congress to do on both prongs of the analysis. Recall, for example, that during the Burr Conspiracy debates, some congressmen conceded the existence of a rebellion but refused to suspend on the ground that the rebellion did not sufficiently endanger the public safety. *See supra* note 78 and accompanying text.

<sup>209</sup> U.S. CONST. art. I, § 9, cl. 2.

cult one on which the language of the Clause is inconclusive. The issue is presented by the Reconstruction statute, which left the President to determine when Klan violence matured into a rebellion, and by all five territorial statutes. On the one hand, the Clause's provision that Congress can suspend the privilege of the writ only "when in Cases of Rebellion or Invasion" could mean that Congress can act only when the country is actually *in* a state of rebellion or invasion—and thus that Congress must make a real-time determination itself rather than leaving that question to the President. On the other hand, one could take the phrase "when in" to refer to general circumstances rather than a specific event. This interpretation would permit Congress to enact a suspension statute in advance, leaving the President to decide when an invasion or rebellion and sufficient threat to public safety activated his authority to preventatively and indefinitely detain. The word "cases" in the Clause is similarly ambiguous. It can be understood to mean action on a case-by-case basis, but it could also describe all "cases" of a particular type. Thus, it cannot be said, based on the text alone, that the existence of actual invasion or rebellion is a prerequisite to legislative action.

Nor is the history conclusive. Those discussing the Clause in the eighteenth and early nineteenth centuries did not expressly address whether Congress could make a suspension of the writ contingent upon a rebellion or an invasion that might arise sometime in the (perhaps distant) future. Yet they did firmly believe both that Congress was the department with authority to suspend the writ and that Congress should be severely limited in its ability to do so. These two widely accepted principles are at least some evidence that those in the founding generation took the phrase "when in Cases of Rebellion or Invasion" as a temporal constraint permitting Congress to enact an authorization of emergency power only when then-existing facts put it on the table. This understanding is consistent with the way Parliament and state legislatures acted in the eighteenth and early nineteenth centuries and indeed with the way the United States Congress acted until the twentieth century. Some of those statutes were passed when invasion was imminent rather than actual,<sup>210</sup> but none was passed in total isolation from any provoking event.

Late-eighteenth-century Americans were familiar with open-ended contingency format delegations. One of the best known examples is the Calling Forth Act of 1792, which empowered the President to call forth state militia "whenever the United States shall be invaded,

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<sup>210</sup> This was true of the 1777 Massachusetts suspension, *see supra* note 57, as well as the 1777 Maryland statute, *see supra* note 65 and accompanying text. Neither Massachusetts nor Maryland was bound by a constitution that specifically restricted suspension to rebellion or invasion.

or be in imminent danger of invasion from any foreign nation or Indian tribe.”<sup>211</sup> One might view the Calling Forth Act as precedent supporting Congress’s power to employ the contingent format in the suspension context. This statute has a long historical pedigree, is uncontroversial, and requires the President to make a judgment similar to that involved in a decision to suspend the writ. As a result, advocates of broad congressional authority to delegate suspension power to the President have sometimes invoked the Calling Forth Act as evidence that open-ended grants of contingent authority are permissible in the suspension context as well.<sup>212</sup> The analogy, however, is inapposite. The limitation upon a contingent delegation of suspension authority derives from the Suspension Clause, which is inapplicable to statutes delegating power to call out the militia.<sup>213</sup> Indeed, rather than imposing a temporal limitation, the Constitution’s Calling Forth Clause, which authorizes Congress to “*provide for calling forth the Militia*,”<sup>214</sup> contemplates that Congress will equip the President with authority on a contingent basis. Early Americans knew how to confer open-ended contingent authority, yet they did not do so in either the state suspension statutes or the bill considered during the Burr Conspiracy.

Contingency format legislation gives Congress the flexibility to provide in advance for events that it cannot foresee, but those who framed and ratified the Suspension Clause were not interested in legislative flexibility. Instead, they sought to restrain Congress by reserving the exercise of emergency power for the most extreme

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<sup>211</sup> Act of May 2, 1792, ch. 28, §§ 1–2, 1 Stat. 264, 264. The current version of the statute confers similar authority. See 10 U.S.C. § 332 (2012) (providing that “[w]henver the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion”).

<sup>212</sup> See *supra* notes 102–05 and accompanying text; cf. Prakash, *supra* note 13, at 612 (“In the first Militia Act, Congress exercised its authority to provide for calling for the militia to execute the laws by specifying conditions in which the President might summon the militias. Similarly, the Congress might use the Necessary and Proper Clause to specify the circumstances in which the President might suspend habeas corpus.”).

<sup>213</sup> The delegation in the Calling Forth Act is also distinguishable from that in the suspension statutes because of the kind of power it confers. The Court has consistently held that the Constitution permits particularly sweeping delegations in areas in which the Executive possesses some authority in his own right. See *supra* note 106 and *infra* note 286. The President’s power as Commander in Chief coincides with his power to call out the militia. See U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief . . . of the Militia of the several States, when called into the actual Service of the United States . . .”). The President possesses no inherent authority, however, to suspend the privilege of the writ. See Prakash, *supra* note 13, at 602–04 (explaining why neither the Commander in Chief clause nor the grant of executive power gives the President inherent authority to suspend); *supra* note 13 and accompanying text.

<sup>214</sup> See U.S. CONST. art. I, § 8, cl. 15 (emphasis added).

circumstances.<sup>215</sup> It would be somewhat odd for those intent on severely restricting Congress to believe simultaneously that the Clause allowed Congress to unleash emergency power more easily by providing for it in advance. Interpreting the phrase "when in Cases of Rebellion or Invasion" to require contemporaneous legislative evaluation of security crises on a case-by-case basis is more consistent with the posture of the founding generation toward the authorization of emergency power. On this reading, the phrase specifies not only the circumstances under which Congress can authorize emergency power but also the time at which Congress can enact the authorization.

Neither the Clause's text nor its history conclusively establishes that those in the founding era believed that the Suspension Clause precluded Congress from authorizing emergency power contingent upon a later rebellion or invasion. Evidence for this proposition is embedded in the view that suspension power belongs to the legislature, which is itself a background assumption of the Clause.<sup>216</sup> Nonetheless, it seems probable that those who deemed legislative supremacy in suspension important agreed with Blackstone, who observed:

[T]he happiness of our constitution is, that it is *not left to the executive power to determine when the danger of the state is so great*, as to render this measure expedient. For the parliament only, or legislative power, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing.<sup>217</sup>

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<sup>215</sup> The state constitutions authorizing suspension reserved it for the "most urgent and pressing occasions." MASS. CONST. of 1780, pt. II, ch. VI, art. VII; N.H. CONST. of 1784 pt. II, art. XCI. In narrowing those occasions to "invasion" or "rebellion," the U.S. Constitution went even further in protecting individual liberty. Commentators were clear that the Clause was designed to restrict powers that Congress might otherwise possess. See, e.g., R. Carter Pittman, *Jasper Yeates's Notes on the Pennsylvania Ratifying Convention, 1787*, 22 WM. & MARY Q. 301, 307 (1965) (describing James Wilson's characterization of the Clause as "restrictive of the general Legislative Powers of Congress"); see also The Massachusetts Convention, in 6 RATIFICATION OF THE CONSTITUTION BY THE STATES: MASSACHUSETTS 1107, 1358-59 (John P. Kaminski et al. eds., 2000) [hereinafter *The Massachusetts Convention*] (recounting Judge Sumner's assertion to the Massachusetts Convention that the Clause "was a restriction on Congress"); The Election of Convention Delegates, in 9 RATIFICATION OF THE CONSTITUTION BY THE STATES: VIRGINIA 561, 1002 (John P. Kaminski et al. eds., 2000) (remarks of George Nicholas) ("[I]n every other case [apart from rebellion or invasion], Congress is restrained from suspending it. In no other case can they suspend our laws—and this is a most estimable security."); cf. 1 BLACKSTONE, *infra* note 217 at \*132 (observing that "this experiment [of suspension] ought only to be tried in cases of extreme emergency").

<sup>216</sup> See *supra* Part I.A.

<sup>217</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*132 (emphasis added). Blackstone further linked the legislative power with current events by observing that English practice mimicked that of Rome, whose Senate resorted to the establishment of "a magistrate of absolute authority, when *they judged* the republic in any imminent danger." *Id.* (emphasis added). The view that the legislature should assess current circumstances was also evident

In other words, the very benefit of entrusting the power to the legislature was so that it, rather than the Executive, would make the real-time judgment about whether individual liberty should be sacrificed. Permitting Congress to suspend the privilege contingent upon the later occurrence of rebellion or invasion is inconsistent with the proposition that evaluating current events is the essence of the legislative task.<sup>218</sup>

That said, the Clause does not altogether rule out contingency format suspension. It provides that Congress can suspend the privilege "when in Cases of Rebellion or Invasion the public Safety *may* require it."<sup>219</sup> Contrary to arguments of those who opposed delegation during the Civil War and Reconstruction debates,<sup>220</sup> Congress need not wait until it is certain about the threat to public safety to authorize emergency power. Once Congress concludes that an invasion or rebellion has occurred and that the resulting threat to public safety is serious enough that suspension might be warranted, it may pass a statute whose effectiveness depends upon the President's judgment. The Clause may well treat the determination whether a *particular* security crisis is likely to require the exercise of emergency power as a matter that the legislature must decide, but the Clause contemplates that the decision about whether and when the public safety ultimately reaches that point is a matter that Congress can leave to the President.<sup>221</sup> Permitting Congress flexibility in this regard is protec-

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in early nineteenth century England. See, e.g., J. L. DE LOLME, *THE CONSTITUTION OF ENGLAND* 304 (1821) (explaining that when the writ was suspended in England, "the executive power did not thus of itself stretch its own authority; the precaution was *deliberated upon and taken by the representatives of the people*") (emphasis added). Chief Justice Marshall's opinion in *Ex parte Bollman* can be read to take a similar approach: he asserts that the decision to authorize emergency power "depends on political considerations, on which the legislature is to decide." 8 U.S. 75, 101 (1807). The political considerations surrounding a decision to suspend most naturally refer to the benefits and detriments that would result from the execution of emergency power in a particular situation.

<sup>218</sup> This is the position the Wisconsin Supreme Court took in its review of the Habeas Corpus Act of 1863. See *In re Oliver*, 17 Wis. 681, 685–86 (1864). The court accepted the general legitimacy of contingent legislation, *id.* at 685, but said that in the context of suspension, the legislature "must itself judge when the emergency had arrived which justified" suspending the privilege of the writ. *Id.*; cf. STORY'S COMMENTARIES, *supra* note 13, § 1336, at 208–09 ("[A]s the power is given to congress to suspend the writ of habeas corpus in cases of rebellion or invasion, that the right to judge, whether exigency had arisen, must exclusively belong to that body." (citation omitted)); Tyler, *supra* note 2, at 689 (arguing that the power to suspend belongs to Congress, which "must, at a minimum, timely declare that current circumstances constitute a Rebellion or Invasion").

<sup>219</sup> U.S. CONST. art. I, § 9, cl. 2 (emphasis added).

<sup>220</sup> For examples of such arguments, see *supra* notes 92, 103, 138 and accompanying text.

<sup>221</sup> Cf. *Wayman v. Southard*, 23 U.S. 1, 43 (1825) (distinguishing "those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details").

tive of civil liberty, for the Executive may be better suited than Congress to making fine-tuned judgments about the state of public safety in a particular location.<sup>222</sup> After Congress makes its threshold determinations, it can equip the President to respond with speed and require him to do so with geographical precision.<sup>223</sup>

## B. Functional Analysis

A functional analysis cuts heavily in favor of reading the Clause to restrict Congress's ability to enact contingent suspension legislation. As Part I describes, allocating suspension power to the legislature guards civil liberty by checking executive excess; promoting transparent, vigorous, and representative debate; and harnessing the benefits of legislative compromise. Using our historical experiences with suspension as case studies, this subpart considers whether we still realize these structural benefits when Congress suspends the writ on a contingent basis.

Before this subpart begins, a caveat is in order. It is clear in what follows that a statute like the 1871 Act, which was connected to the then-current threat of the Ku Klux Klan, largely preserves those structural benefits. While that connection underscores the importance of timing in preserving those benefits, consistency with constitutional structure does not trump consistency with constitutional text. A statute coincident with an imminent rebellion may preserve the benefits of allocating the decision to Congress, but the Suspension Clause prohibits Congress from passing a suspension statute until invasion or rebellion actually occurs.<sup>224</sup> The framers of Article I, Section 9, Clause 2

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<sup>222</sup> For example, it would have been cumbersome for Congress itself to attempt to suspend the writ on a county-by-county basis in South Carolina during Reconstruction. Relying on President Grant to make county-by-county judgments, however, enabled Congress to confine the scope of the suspension. See Tyler, *supra* note 2, at 689 ("Permitting such fine-tuning by the executive and his officials on the ground . . . ultimately might lead to lesser infringements on liberty interests than forcing Congress to define the scope of the suspension being authorized at the outset, when Congress might err on the side of overinclusiveness."); see also *supra* note 104 and accompanying text.

<sup>223</sup> Note that while Congress can include a geographical restriction in a suspension statute, as it did in the Ku Klux Klan Act, the Clause does not require it to do so. See *infra* notes 304–10 and accompanying text.

<sup>224</sup> See U.S. CONST. art. I, § 9, cl. 2 (forbidding suspension "unless when in Cases of Invasion or Rebellion the public Safety may require it"). Note that the requirement of actual invasion or rebellion is relevant even to those who might disagree that this language imposes a temporal restraint upon Congress. Even if the phrase is only a substantive limit, it would prevent Congress from authorizing the President to suspend when invasion or rebellion was imminent rather than actual. This was another flaw in the statutes governing Hawaii, Puerto Rico, Guam, and the Virgin Islands, which authorized the President to suspend "in case of rebellion or invasion, or *imminent danger thereof*." Act of Apr. 30, 1900, ch. 339, § 67, 31 Stat. 141, 154; Act of June 22, 1936, ch. 699, § 20, 49 Stat. 1807, 1812; Act of Aug. 1, 1950, ch. 512, § 6, 64 Stat. 384, 386; Act of Mar. 2, 1917, ch. 145, § 12, 39 Stat. 951, 955 (emphasis added); see Act of July 1, 1902, ch. 1369, 32 Stat. 691, 691–92 (permitting

made an apparently deliberate choice to specify the circumstances justifying emergency power even more narrowly than did the Massachusetts clause they used as a model,<sup>225</sup> which limited the exercise of emergency power to “the most urgent and pressing occasions.”<sup>226</sup> Interpreting the Clause to permit suspension in the face of imminent rebellion or invasion would disrupt that choice. Thus—perhaps ironically—the 1871 Act illustrates why temporal proximity is crucial as a matter of constitutional structure despite the fact that the Act runs afoul of the precisely written constitutional text.

### 1. *Checking the Executive*

Recall that the primary rationale for allocating the suspension power to Congress is the desire to check both executive excess and the Executive’s institutional bias in favor of the power’s exercise.<sup>227</sup> Requiring the support of three institutional actors—the President, the Senate, and the House—ensures that suspensions will occur more rarely than they would if accomplished by executive order. Thomas Jefferson’s failed request for suspension in the Burr affair illustrates this check at work. Had Jefferson been able to unilaterally suspend, he presumably would have done so; the need to seek legislative permission checked his judgment and halted the process. Indeed, the need for the concurrence of both houses was an additional check on that proposed suspension, for while the Senate quickly passed it, the House summarily rejected it. Abraham Lincoln, of course, refused to acknowledge congressional authority, but the Reconstruction Congress did check Ulysses Grant. Had it been his choice, Grant presumably would have preferred to extend the suspension provision of the Ku Klux Klan Act beyond its expiration date of June 10, 1872, as the suspension orders he had issued under the original statute were still in place when the sunset date arrived.<sup>228</sup> But a bill to extend that provision—which, like its predecessor, operated by giving the President conditional authority to suspend based on his judgment about whether a rebellion existed and whether the public safety required it—passed the Senate but died in the House.<sup>229</sup>

When a contingent suspension is removed in time from the events that provoke the exercise of emergency power, Congress’s role

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suspension in the Philippines “in cases of rebellion, *insurrection*, or invasion”) (emphasis added). The Clause carefully limits suspension to an extant invasion or rebellion, and a functional analysis cannot expand either its temporal or substantive constraint.

<sup>225</sup> See Neuman, *supra* note 188, at 564 (explaining that the Suspension Clause in the U.S. Constitution was most directly modeled on the Massachusetts clause).

<sup>226</sup> MASS. CONST. pt. II, ch. VI, art. VII.

<sup>227</sup> See *supra* notes 19–25 and accompanying text.

<sup>228</sup> See *supra* note 150 and accompanying text.

<sup>229</sup> See *id.*



as a check on the Executive is far less effective. Consider the territorial statutes. In a very general sense, the requirement of some legislative involvement made suspension less likely in any of those five territories; if Congress had failed to include a delegation of authority in the relevant organic statute, the Executive could not have suspended the writ. At the same time, inclusion of blanket suspension authority removed in time from the provoking event does not make suspension less likely in *any specific case*. Once Congress vested the President with the authority to suspend the writ in the Hawaiian territory, suspension was just as likely after the Japanese bombed Pearl Harbor as it would have been in a constitutional system where the President could unilaterally suspend. The point is even clearer when put in the context of a suspension that did not happen: had Congress enacted a statute in 1790 authorizing the Executive to suspend whenever, in his judgment, an invasion or rebellion and the concomitant threat to public safety required it, Jefferson probably would have suspended seventeen years later when confronted with the Burr Conspiracy. Once passed, "blank check" delegations of the territorial variety remove the brake that the requirement of legislative involvement otherwise puts on the Executive's response to a particular security threat. The institutional bias that naturally tilts toward suspension in close cases is left free to operate.<sup>230</sup>

To be sure, the territorial suspension statutes are extreme. Congress not only passed them independently of any provoking event but also gave the President and territorial governors literally no guidance in determining what constituted an invasion, a rebellion, or a requisite threat to public safety.<sup>231</sup> Whether a particular set of events constitutes a rebellion or an invasion is a matter on which reasonable people often disagree.<sup>232</sup> Recall the disagreement in Congress about

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<sup>230</sup> Congress's ability to pass legislation overriding the suspension does not provide the same kind of brake on executive action. Rather than working against the imposition of a suspension, the force of legislative inertia will work against an override. See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1388 (2001) ("[O]nce Congress delegates power to the executive, it can reclaim its authority only if it can overcome the substantial impediments built into the lawmaking process (including a potential presidential veto) and enact further legislation." (citations omitted)); see also *Clinton v. City of New York*, 524 U.S. 417, 451–52 (1998) (Kennedy, J., concurring) ("It is no answer . . . to point out that a new statute, signed by the President or enacted over his veto, could restore to Congress the power it now seeks to relinquish."); Diller, *supra* note 20, at 647 (arguing that "Posner and Vermeule's 'political correction' argument against the nondelegation doctrine underestimates just how hard it is for a later Congress to reverse broad delegations by an earlier Congress").

<sup>231</sup> This lack of guidance means that they are problematic even under the Court's conventional nondelegation doctrine, which requires Congress to articulate an intelligible principle to guide a statute's execution. See *infra* notes 289–92 and accompanying text.

<sup>232</sup> Consider that the similar question whether a particular military engagement amounts to "hostilities" requiring congressional sanction under the War Powers Act is one that has provoked dispute even among able lawyers within the Executive Branch. See

whether the Burr Conspiracy was a rebellion,<sup>233</sup> as well as the heated dispute about whether Klan uprisings satisfied that definition.<sup>234</sup> The question whether an invasion or its threat continued in Hawaii after the Battle of Midway was disputed,<sup>235</sup> and Johnson's implicit decision that a rebellion continued for more than a year after the Confederate surrender was questionable.<sup>236</sup> A statute that specifically described Congress's view of the events that constitute an invasion or a rebellion and a necessary threat to public safety would better constrain the President insofar as it would narrow the circumstances in which he could declare the privilege suspended. Even so, leaving the President alone to judge how those standards apply to events at hand limits Congress's ability to check the Executive's reaction to any specific case.

Imagine that Congress passed a statute providing that "the privilege of the writ of habeas corpus is hereby suspended whenever the United States or any of its territories is invaded by foreign terrorists using a weapon of mass destruction and the exercise of emergency detention authority is necessary to protect the public safety." In the abstract, there is likely to be agreement that this is the kind of scenario in which suspension may well be warranted. But there is likely to be disagreement about whether the statute justifies suspension in any particular case. Reasonable people can reach different conclusions on the same set of facts about how a statutory standard applies. Who counts as a "terrorist"?<sup>237</sup> What counts as an "invasion"?<sup>238</sup> What

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Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 65 (2011) (describing conflict between lawyers in the White House, the State Department, and the Department of Justice about whether military intervention in Libya amounted to "hostilities" under the Act). The question whether a given military intervention constitutes a war can be similarly controversial. See, e.g., Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327, 330–34 (1995) (describing controversy about whether military interventions in Haiti, Korea, and Bosnia, among others, amounted to "wars" requiring congressional authorization under the Constitution's Declare War Clause).

<sup>233</sup> See *supra* note 78 and accompanying text.

<sup>234</sup> See *supra* note 131 and accompanying text.

<sup>235</sup> See *supra* note 173 and accompanying text.

<sup>236</sup> See *supra* notes 124–29 and accompanying text.

<sup>237</sup> Cf. William Schinkel, *On the Concept of Terrorism*, 8 CONTEMP. POL. THEORY 176, 178 (2009) ("The main problem in defining or conceptualizing terrorism is political in nature. That is to say that what counts as terrorism and what does not fall under its heading is subject to political pressure and consequence."); see also *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002, 1012 (N.D. Ill. 2001) ("Attempts to reach a fixed, universally accepted definition of international terrorism have been frustrated both by changes in terrorist methodology and the lack of any precise definition of the term 'terrorism.'" (quoting *Flatow v. The Islamic Republic of Iran*, 999 F. Supp. 1, 17 (D.D.C. 1998))).

<sup>238</sup> For example, one can imagine disagreement about whether or not a cyberattack constitutes an "invasion." Cf. Shapiro, *supra* note 8, at 74 (questioning whether Congress could treat illegal immigrants crossing the border from Mexico into the United States as an "invasion").

counts as a “weapon of mass destruction”?<sup>239</sup> How seriously must the public safety be threatened before civil liberties are suspended?<sup>240</sup> When a statute is passed months or years in advance of any identifiable crisis, Congress plays no role in making even preliminary factual findings on these questions, thereby leaving unchecked the Executive’s incentive to interpret the statutory definitions aggressively. Certainly, contingent statutes unconnected to an actual (or even imminent) rebellion or invasion would do a better job of restraining the Executive if they contained more detail. But the check on the Executive is still weak when he need not secure congressional authorization for proceeding in any particular case.

While open-ended grants of contingent suspension authority handicap Congress’s ability to check the Executive before a suspension is put in place, they do not in theory undercut Congress’s ability to institute the back-end control of congressional oversight. Recall the statutory report-and-release requirements that the Civil War and Reconstruction Congresses put in place to supervise the President’s exercise of detention power.<sup>241</sup> In theory, Congress could exercise this sort of oversight function even when a statute is passed far in advance of any crisis. As I explain below, however, Congress’s lack of information about the nature of the threat makes it unlikely to include rigorous report-and-release requirements in statutes containing open-ended grants of contingent suspension authority.<sup>242</sup> The effectiveness of oversight mechanisms is thus likely to be a moot point in the case of abstract suspension statutes. But even when report-and-release requirements are present, they take effect after a suspension is in place and preventative arrests have already been made. Congress’s most important role as the gatekeeper of emergency power is to check its unleashing rather than to oversee its exercise. Congress’s ability to impose back-end controls on an open-ended, contingency format suspension does not compensate for its near abandonment of front-end controls on the President’s exercise of authority.

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<sup>239</sup> See W. SETH CARUS, DEFINING “WEAPONS OF MASS DESTRUCTION” 6 (2012), available at <http://wmdcenter.dodlive.mil/files/2006/01/OP8.pdf> (asserting that there are “more than 50 definitions [of the term ‘weapon of mass destruction’] with some official standing in the United States and elsewhere”).

<sup>240</sup> For example, both Thomas Jefferson and the Senate concluded that the Burr Conspiracy sufficiently threatened the public safety for purposes of the Suspension Clause. The House of Representatives questioned—and ultimately rejected—that judgment. See *supra* note 78 and accompanying text.

<sup>241</sup> See *supra* notes 82–85, 136 and accompanying text.

<sup>242</sup> See *infra* 267–68 and accompanying text.

## 2. *Transparent, Vigorous, and Representative Debate*

As discussed in Part I, another benefit of allocating suspension authority to Congress is that the legislative process is more likely to generate vigorous, transparent debates that account for a range of views about whether suspension is required to handle a given security crisis. Compare the process of executive decision making. It is unclear how much internal Executive Branch debate preceded Lincoln's unilateral decision to empower military subordinates to suspend the writ shortly after the Civil War's start.<sup>243</sup> Even if he consulted with his closest advisers, that group was both more limited in number than the hundreds of members of Congress and more monolithic in its political views.<sup>244</sup> At the end of the day, moreover, Lincoln's judgment was the only one that mattered; he was not bound to accept the counsel of his advisers. By contrast, a decision subjected to the legislative process must command the support of a majority in both houses where both political parties, along with their internal factions, are represented. It is also a process in which regional interests have both a voice and a vote. The first location in which Lincoln unilaterally suspended the writ was Maryland. Shortly thereafter, Senator Kennedy of Maryland complained that he was "not informed of the reasons upon which this writ has been suspended in any particular case in the State of Maryland" and that "[i]n [his] judgment, there was no immediate necessity" for Lincoln's suspension of the writ in his state.<sup>245</sup> Many Marylanders surely shared this sentiment, but it was not an argument Kennedy was able to make before the fact.<sup>246</sup>

The Burr Conspiracy suspension debates were vigorous, representative, and at least partially transparent.<sup>247</sup> Indeed, disagreement between the House and Senate about both predicates—whether a rebellion existed and whether the public safety required it—caused

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<sup>243</sup> Confederate forces attacked Fort Sumter on April 12, 1861. McPHERSON, *supra* note 124, at 158. Fifteen days later, Lincoln issued an executive order authorizing General Winfield Scott or his officer in command to suspend the writ between Philadelphia and Washington. See 8 MESSAGES AND PAPERS, *supra* note 109, at 3219. David Herbert Donald notes that when Lincoln suspended the writ nationwide on September 24, 1862, "[t]o the President this seemed such a routine matter that he did not even mention it to the cabinet. . . . Lincoln's proclamation was simply designed to codify . . . War Department rules." DAVID HERBERT DONALD, LINCOLN 380 (1995).

<sup>244</sup> Even if they were a "team of rivals," see DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN (2005), the members of Lincoln's Cabinet still shared his party affiliation.

<sup>245</sup> CONG. GLOBE, 37th Cong., 1st Sess. 42 (1861).

<sup>246</sup> Cf. Clark, *supra* note 230, at 1374 (emphasizing that the nondelegation doctrine "not only furthers the separation of powers, but also safeguards federalism" insofar as it ensures that states are represented in the legislative process).

<sup>247</sup> The debates were only partially transparent because, while the House proceedings were open to the public, the Senate conducted its discussion in closed session.

the measure to fail.<sup>248</sup> The 1863 and 1871 statutes similarly provoked intense debates in which members of Congress voiced a variety of political and regional views about whether suspension was the appropriate constitutional response to the crisis at hand.<sup>249</sup> The 1871 debates are a particularly good example because the existence of a presidentially imposed suspension order did not taint them. Members of Congress engaged in a heated argument about whether Klan activity constituted a rebellion, expressing a range of conflicting views on the question.<sup>250</sup> They also closely considered whether Klan violence posed a sufficiently serious threat to warrant suspension. Because the statute embodied a preliminary legislative judgment that suspension was likely to be necessary, Grant's suspension orders certainly did not represent "the judgment of one" on the matter.<sup>251</sup>

Again, however, the abstract delegations of authority to the President in the territorial statutes eliminated the benefit of legislative deliberation about whether suspension was an appropriate response to a crisis. At the time Congress enacted the organic statutes, it could have debated (although apparently did not debate) the abstract question whether it is constitutional or even wise to give the President the ability to suspend concomitant with constitutional limits. But that discussion would have resembled one that framers of a constitution might have about whether the executive or the legislature should possess the authority to suspend. It would not have been a deliberation about whether a particular circumstance warranted the exercise of emergency power. Roosevelt's decision to suspend in Hawaii was, for all practical purposes, like Lincoln's judgment in 1861—the judgment of one man.

### 3. *Legislative Compromise*

A unilateral executive order may reflect a relatively unfiltered policy impulse, but a bill cannot successfully run the gamut of bicameralism and presentment without being subjected to the tempering effect of legislative compromise.<sup>252</sup> In the context of suspension, the need for compromise tends to narrow a suspension's scope. Both the Habeas Corpus Act of 1863 and the Ku Klux Klan Act of 1871 reflect this disciplining influence.

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<sup>248</sup> See *supra* note 78.

<sup>249</sup> See Part II.C.2–3.

<sup>250</sup> See *supra* note 131 and accompanying text.

<sup>251</sup> As explained above, however, while enactment at the threshold of a crisis may preserve many of the benefits of the constitutional structure, the language of the Clause nonetheless requires Congress to stay its hand until actual rebellion or invasion occurs. See *supra* notes 224–26 and accompanying text.

<sup>252</sup> See *supra* notes 26–30 and accompanying text.

The Habeas Corpus Act of 1863 was a fusion of two bills: H.R. 362 and H.R. 591.<sup>253</sup> As initially introduced, neither bill had a sunset provision, and both bills gave the President the authority to suspend the writ nationwide if he saw fit.<sup>254</sup> Efforts to impose temporal and geographic restrictions on the President's suspension authority failed,<sup>255</sup> and the enacted statute gave the President the same broad authority to define the contours of the suspension. Thus, the statute reflected no compromise on the scope of the President's authority to suspend, and in this respect it manifested the distorting influence of Lincoln's existing suspension order. If the statute was to avoid condemning Lincoln's asserted authority, it could not give him less than he had already assumed. That said, the 1863 Act reflected some accommodation of competing views insofar as sections 2 and 3 of the Act imposed significant restrictions on the Executive's ability to detain once the writ was suspended. The House appeared ambivalent about the importance of these provisions for prisoner release. On the one hand, the provisions that became sections 2 and 3 of the Act initially appeared in H.R. 362.<sup>256</sup> On the other hand, H.R. 591, which contained

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<sup>253</sup> Both H.R. 362 and H.R. 591 passed the House and Senate. The Committee of the Conference on H.R. 591 essentially fused the Senate's versions of these two bills into H.R. 591, which, as passed, became the Habeas Corpus Act of 1863. See Sellery, *supra* note 86, at 262. The Senate version of H.R. 362 was close to the House version; it was ultimately reflected in sections 1 to 3 of the 1863 Act, those dealing with the President's suspension and detention power. The Senate version of H.R. 591 differed significantly from the House version insofar as it deleted the suspension provision and rendered the bill exclusively about the regulation of judicial proceedings against federal officers for extraordinary arrests. Sections 4 to 7 of the 1863 Act essentially codified these changes. See *id.* at 262. For a description of the modifications the Senate made to the regulation of such suits, see *id.* at 253–55.

<sup>254</sup> H.R. 362 provided, in relevant part:

That during the existence of this rebellion the President shall be, and is hereby, invested with authority to declare the suspension of the privilege of the writ of habeas corpus, at such times, and in such places, and with regard to such persons, as in his judgment the public safety may require.

*Id.* at 248. H.R. 591 provided, in relevant part:

That it is and shall be lawful for the President of the United States, whenever, . . . in his judgment, by reason of 'rebellion or invasion the public safety may require it,' to suspend by proclamation the privileges of the writ of *habeas corpus* . . . throughout the United States or in any part thereof . . . .

*Id.* at 243–44.

<sup>255</sup> For example, Representative Biddle proposed amending H.R. 362 to limit any suspension to "the period of twelve months, or until the next meeting of Congress" and to those areas "wherein the laws of the United States are by force opposed, and the execution thereof obstructed." *Id.* at 241. In the Senate, Senator Cowan proposed amending H.R. 362 to authorize the President to suspend only when Congress was not in session and only until Congress next met. *Id.* at 243–44.

<sup>256</sup> See H.R. 362, 37th Cong. §§ 1–2 (1862). The only significant change made to these sections in the enacted statute was the addition of a proviso conditioning release under the act on an oath of allegiance to the United States. See Act of Mar. 3, 1863, ch. 81, § 2, 12 Stat. 755.

no restrictions of any kind on the President's authority, sailed through the House, passing on the same day it was introduced.<sup>257</sup> In the Senate, by contrast, Lyman Trumbull, the driving force behind the legislation in that chamber, emphasized the release provisions as an important counterbalance to the suspension provision.<sup>258</sup> These significant restrictions on the Executive's detention power did not drop out of the Senate version of the bill despite the fact that a majority of the Republicans in the Senate objected to them on the ground that "political prisoners might secure their liberation too quickly for the good of the country."<sup>259</sup> It seems safe to say that these restrictions were a concession necessary to the statute's passage.

The Ku Klux Klan Act of 1871 also reflected compromise, and because a unilateral executive order did not distort the process, this Act provides a better case study for how the legislative process can narrow the scope of a suspension bill. Significantly, the bill was amended to tighten its definition of a rebellion. The bill as reported from the committee provided that the violence must "set at defiance the constituted authorities of such State."<sup>260</sup> A House amendment added the requirement that the violence must defy not only state authorities but also federal authorities present in the district. As Representative Shellabarger, the bill's sponsor, explained, this amendment "widen[ed] the state of violence and of danger required before the [suspension provision] can be resorted to"<sup>261</sup> and accommodated "the views of members desirous of effecting legislation of this kind."<sup>262</sup> Another important amendment incorporated the limitations of the section 2 of the 1863 Act—those relating to the discharge of prisoners

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<sup>257</sup> See Sellery, *supra* note 86, at 251 (recounting that the bill was both introduced and passed on December 8, 1862, making it "the most expeditious passage that a habeas corpus bill ever had during the civil war"). Thaddeus Stevens, a Republican whom Sellery characterized as "the aggressive and radical leader in the House," sponsored H.R. 591. *Id.* at 247.

<sup>258</sup> CONG. GLOBE, 37th Cong., 3d Sess. 1092 (statement of Sen. Trumbull) (defending the bill on the ground that the prisoner "is not to be left there without remedy, but is to have an opportunity, at the very first term of the court, to obtain his discharge, unless the facts are such as to warrant further proceedings against him").

<sup>259</sup> Sellery, *supra* note 86, at 259. Sellery explains that Senator Collamer moved to strike out the last two sections and that his effort "would have succeeded had not the Democrats and Unionists rallied to the assistance of Trumbull. The motion failed by the close vote of 18 to 20." *Id.* at 260.

<sup>260</sup> H.R. 320, 42d Cong. § 4 (1871).

<sup>261</sup> CONG. GLOBE, 42d Cong., 1st Sess. 478 (1871). Representative Shellabarger went on to observe that the violence "must be so very imposing as to defy both the authority of the State and the authority of the United States; that is, of the marshals of the United States present in the district." *Id.* That same amendment also narrowed the authority conferred by omitting language from the initial bill that would have authorized the President not only to suspend the writ of habeas corpus but also to declare martial law. See *id.*

<sup>262</sup> *Id.*

other than prisoners of war—into the current bill.<sup>263</sup> The Reconstruction Congress, like the Civil War Congress before it, recognized that these restrictions significantly curtailed the President's suspension authority but considered their addition crucial to securing the bill's passage.<sup>264</sup>

The need to ensure majority buy-in drives not only specific concessions made along the way but also how the bill is initially framed. In the context of Reconstruction, where there was no existing suspension order and a vigorous discussion about whether a rebellion existed at all, it would have been impossible to pass a delegation statute as broad as that contained in the 1863 Act. The starting proposal was not, as it had been for the 1863 Act, to give the President the "authori[ty] to suspend the privilege of the writ . . . in any case throughout the United States" for as long as he deemed it necessary.<sup>265</sup> Instead, the starting—and ending—point was permitting Grant to suspend only within the limits of the district "under the sway of rebellion," and even then only after commanding insurgents to disperse. His authority to suspend lasted for just over a year.<sup>266</sup>

Open-ended assignments of contingent decision-making authority, like those in the territorial statutes, are relatively insulated from the narrowing influence of compromise. It is impossible to know why Congress granted such sweeping suspension authority in the territorial statutes. Even though Congress passed them in the abstract, it could still have included a restriction like a sunset clause. More specific compromises, however, like concessions made on the definition of an invasion or a rebellion or the suspension's geographic scope, are difficult to reach in a situation where Congress's goal is to draft legislation broad enough to capture a range of events, some foreseen and some unimagined, that might occur in the future.<sup>267</sup> When it comes

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<sup>263</sup> On April 6, 1871, the House agreed to an amendment proposed by Representative Garfield of Ohio that would render the section of the 1863 Act relating "to the discharge of prisoners other than prisoners of war, and to the penalty for refusing to obey the order of the court, shall be in full force so far as the same are applicable to the provisions of this section." *Id.* at 521. This language remained in the enacted statute. See Ku Klux Klan Act of 1871, ch. 22, § 4, 17 Stat. 14.

<sup>264</sup> Senator Edmunds, explaining the bill after it emerged from the Judiciary Committee, observed that "[i]n substance and fact it leaves a Federal *habeas corpus* in effect, although not in precise form, still operating for a limited time. . . . About all that we do is to authorize him to proclaim that he has suspended it, and then, as soon as he has caught anybody, to report him and hand him over to the Federal judge." CONG. GLOBE, 42d Cong., 1st Sess. 568 (1871). Edmunds himself would have preferred to give the President more power but said that the Committee did not think it prudent to change the House's language. See *id.*

<sup>265</sup> Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755.

<sup>266</sup> See Ku Klux Klan Act of 1871, ch. 22, § 5, 17 Stat. 14–15.

<sup>267</sup> Cf. *Boumediene v. Bush*, 553 U.S. 723, 793 (2008) (observing that in the age of terrorist attacks, "[t]he ways to disrupt our life and laws are so many and unforeseen that the Court should not attempt even some general catalogue of crises that might occur").



to compromise, the devil is often in the details. For example, it was knowledge that the rebellion at issue during Reconstruction was aimed at the overthrow of both state and federal authority that enabled those desirous of a narrower suspension to successfully "widen[ ] the state of violence and of danger required before the . . . [suspension provision] can be resorted to."<sup>268</sup> It is also unclear that Congress would have included report-and-release provisions in either the Civil War or Reconstruction statutes if it had lacked information about the nature of the threat. Understanding the threat permits Congress to determine whether publicly disclosing the names of the detained would compromise national security; the wisdom of requiring the quick release of those not charged similarly depends upon the kind of danger they pose. For example, Congress may be less willing to order the release of a member of a sophisticated organization intent on further attack than someone from a looser-knit group with members whose loyalty is more easily broken. Nor is compromise on the geographic limits of a suspension, like that reached in the Reconstruction statute, possible when the nature and location of an invasion or a rebellion are unknown.<sup>269</sup> In sum, compromise is far less likely to narrow the scope of a statute passed in the abstract than one passed in response to a specific event. And because the scope of an order issued pursuant to a suspension statute tends to track the authority granted by the statute itself,<sup>270</sup> the consequence of a more

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<sup>268</sup> See *supra* note 261 and accompanying text.

<sup>269</sup> That said, the Philippines Organic Act contained at least a soft geographic restriction insofar as its language authorized suspension "wherever during such period the necessity for such suspension shall exist." See Philippines Organic Act, ch. 1369, § 5, 32 Stat. 691, 692 (1902) (emphasis added). While this language left room for a territory-wide order (as opposed to the stricter district-by-district limitation of the Reconstruction statute), it did instruct the territorial governor and the President to consider carefully the regional scope of any suspension imposed.

<sup>270</sup> The delegation to Lincoln was extraordinarily broad and so was the suspension order issued under it: nationwide and of indefinite duration. Johnson finally withdrew it more than three years after Congress had passed the Act and more than a year after the rebellion had been suppressed. See *supra* note 127 and accompanying text. President Franklin D. Roosevelt approved a suspension in Hawaii that was as broad as the statute permitted it to be: it covered the whole Hawaiian territory and was of indefinite duration, ultimately lasting almost three years. See *supra* notes 169–72 and accompanying text. The Philippines Organic Act, by contrast, was more restrictive and accordingly yielded a narrower executive order. The Act permitted suspension "wherever during such period the necessity for such suspension shall exist," see Philippines Organic Act, 32 Stat. 691, 692 (emphasis added), and the order approved by Roosevelt suspended the writ in only two provinces. See *supra* notes 160–62 and accompanying text. The Reconstruction statute was even more specific insofar as it contained a sunset clause and authorized suspension only in districts where the Klan had effectively taken control. Consistent with the statute, Grant suspended the writ in nine counties, and those orders stayed in place no longer than nine months because that is when their statutory authority expired. See *supra* notes 133, 144 and accompanying text. This is not to say that the Executive never shows self-restraint: Grant revoked one of his suspension orders two weeks after issuing it. See *supra* note 147 and accompanying text. The historical pattern nonetheless strongly suggests that the prospect

broadly worded statute is a broadly worded order and thus a greater infringement upon civil liberty.

#### 4. *Structural Benefits the Constitution Forgoes*

Those who defended delegation during the Civil War and Reconstruction debates asserted that giving the decision to the President preserved the effectiveness of emergency power. They echoed many of the same arguments made by those who supported Lincoln's assertion of inherent suspension authority. Defenders of delegation argued that it would be impractical for Congress to assess the public safety because the President was better situated to gather and respond to that information.<sup>271</sup> They pointed out that quick action may be necessary to contain a crisis and the Executive can act more quickly than the legislature. And while Congress is not always in session, the Executive is always available.<sup>272</sup> In short, they maintained that empowering the Executive in advance to suspend the privilege of the writ arms him with the authority that national security may demand as soon as a crisis hits.

Congress's hands are not tied as firmly as this argument suggests. Those in the antidelegation camp insisted that Congress alone could make the decision about what the public safety required. The Clause, however, allows Congress some flexibility. Congress need only decide that the public safety "may require" suspension; the Clause permits Congress to leave the final decision in that regard to the President.<sup>273</sup> Thus, Congress can capture at least some of the Executive's speed and proximity to the crisis by delegating contingent authority on that question. Nonetheless, it is undeniable that requiring Congress to decide that an invasion or a rebellion has occurred and to reach a tentative conclusion about the seriousness of the threat to public safety does make for a slower process than one entrusted entirely to the Executive. Given that the Executive's institutional capacity for speed is the most compelling argument in favor of giving the President a leading role, it should be taken seriously.

The primary—though perhaps to some unsatisfactory—response is that the Constitution does not place a premium on speed in the decision to suspend the civil rights of those within the protection of U.S. law. Rendering the decision legislative reflects a constitutional preference for the constraints of the legislative process despite the at-

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of a limited suspension order is far greater when limitations are imposed by statute, as Executives are prone to exercise the full authority granted them.

<sup>271</sup> See *supra* note 104–05 and accompanying text.

<sup>272</sup> See *supra* note 104 and accompanying text.

<sup>273</sup> See *supra* notes 220–22 and accompanying text.

tendant delay.<sup>274</sup> The point is to check the Executive, and loosening his hand runs at cross-purposes to that aim. Congress may be able to give the Executive open-ended contingent authority—or he may possess inherent authority—to use other tools, like the deployment of troops, to respond immediately to an attack on American soil.<sup>275</sup> Suspending civil liberties, however, falls into a different category.<sup>276</sup>

History blunts at least somewhat the concern about the consequences of this choice, for experience does not indicate that committing the decision to the legislature inevitably stymies resort to emergency power. We can surmise that Parliament in the seventeenth and eighteenth centuries and founding-era state legislatures acted with sufficient speed in suspending the writ, as there was apparently no discussion of reallocating the power to the king or governor to preserve suspension's effectiveness. On the contrary, there was firm resolve during that period to reserve the power entirely to the legislature. We also know that Congress has demonstrated the ability to quickly refuse a suspension request. Jefferson asked the Senate for a suspension on January 23, 1807, to address the Burr Conspiracy. The Senate passed a bill on the same day, and the House roundly rejected it three days later.<sup>277</sup> One might be tempted to point to the two-year debate about whether to authorize Lincoln to suspend the writ as evidence of Congress's excessive slowness. Given, however, that the President had already suspended the writ of his own accord, there was no particular reason for Congress to rush. The Reconstruction Congress, which was not acting in the shadow of an existing suspension order, moved much faster. Grant requested emergency legislation on March 23.<sup>278</sup> A bill including a suspension provision was introduced in the House five days later,<sup>279</sup> and the resulting statute, the Ku Klux Klan Act of 1871, became law on April 20.<sup>280</sup> The process took twenty-eight days from start to finish, and given that Grant did not exercise the suspension authority for another six months, swifter action was presumably unnecessary. Of course, it is impossible to say how quickly

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<sup>274</sup> See *supra* notes 20–35 and accompanying text.

<sup>275</sup> See, e.g., Act of May 2, 1792, ch. 28, §§ 1–2, 1 Stat. 264 (authorizing the President to call forth the state militia “whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe”).

<sup>276</sup> Cf. Hamburger, *supra* note 56, at 1911 (noting that historically, “even in the most alarming circumstances, an executive could not detain persons who were within protection unless it had legislative authorization and suspension”).

<sup>277</sup> See *supra* notes 75–80 and accompanying text.

<sup>278</sup> 9 MESSAGES AND PAPERS, *supra* note 109, at 4081–82 (Letter from Ulysses S. Grant to the Senate and House of Representatives, March 23, 1871). He did not ask explicitly for a suspension; he asked for “such legislation as in the judgment of Congress shall effectually secure life, liberty, and property and the enforcement of law in all parts of the United States.” *Id.* at 4081.

<sup>279</sup> H.R. 320, 42d Cong. (1871).

<sup>280</sup> Ku Klux Klan Act of 1871, ch. 22, § 4, 17 Stat. 14.

Congress would have acted if Grant had asked for an immediate suspension, just as it is impossible to say how quickly Congress would have responded to a similar report from Roosevelt during World War II. Legislatures may have responded effectively in the past to occasions warranting emergency power, but there is no guarantee that they will always do so.

In the end, one can say only that as between the risks of infringing civil liberties too easily and not easily enough, the Constitution assumes the latter risk. In considering the extent of that risk, it is worth observing that the President might not be wholly without recourse during an emergency when Congress is unable to meet. He may have the option of acting first and asserting a necessity defense or seeking indemnity later.<sup>281</sup>

### C. Summary

The Suspension Clause curbs Congress's ability to give the President contingent power. Both the historical backdrop of the Clause and the structural values at stake militate in favor of interpreting it to permit Congress to pass a suspension statute only when an invasion or rebellion actually occurs. The core role of Congress is that of making the preliminary judgment whether suspending the privilege of the writ is a necessary response in the circumstances surrounding a *particular* instance of alleged invasion or rebellion. Sweeping contingent delegations like those found in the territorial statutes undercut every structural benefit that the constitutional allocation of authority is designed to achieve.

To be sure, this means that the Suspension Clause stands as an exception to the nondelegation doctrine, which emphasizes the extremely broad leeway that Congress enjoys in assigning responsibilities to the Executive Branch. The lion's share of both cases and academic debate about that broad leeway, however, has occurred in the context of statutes that charge administrative agencies with executing routine

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<sup>281</sup> See *supra* note 10; see also J. G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 147 (rev. ed. 1951) ("If a commander disregards the usual guarantees, making summary seizures, arrests, and imprisonments, his proceedings may, indeed, ultimately be held justifiable, but he takes a risk. His action is reviewable by the courts, and in case of any infringement upon private rights beyond the point reasonably warranted by the necessities of the situation, he may be held liable in a civil or even in a criminal action."); cf. *Moyer v. Peabody*, 212 U.S. 78, 85–86 (1909) (holding that necessity excused a governor from civil liability for preventatively detaining suspects in order to put down an insurrection); *Ex parte Milligan*, 71 U.S. 2, 36–37 (1866) (argument of counsel) (maintaining that whenever any person, including a military commander, invokes necessity to justify otherwise illegal acts, "[t]he correctness of his conclusion must be judged by courts and juries, whenever the acts and the alleged necessity are drawn in question"); Shapiro, *supra* note 8, at 72 n.53 (expressing "little doubt" that the President would act in the face of necessity when Congress was not in session and that "Congress would later seek to ratify his action").

social or economic policies.<sup>282</sup> The Court's reluctance to second-guess Congress's judgment about how much authority to grant the Executive in the formation of social and economic policy is similar to its reluctance to second-guess Congress's judgment about the content of social or economic policy. In the context of the Due Process and Equal Protection Clauses, rationality review reflects the Court's conclusion that so long as a statute does not employ suspect classifications or restrict fundamental rights, the choice of legislative means and ends belongs almost entirely to Congress.<sup>283</sup> In the delegation context, Congress's freedom to act on a contingent basis<sup>284</sup> and the notoriously lax "intelligible principle" test<sup>285</sup> reflects the Court's conclusion that the decision of how to carry out routine social and economic policy belongs almost entirely to Congress. Taken together, these two lines of cases underscore that the Constitution generally entrusts Congress with the primary responsibility not only for formulating social and economic policy but also for deciding how much to rely on other branches for its implementation.

Yet the fact that Congress enjoys broad leeway in most cases does not mean that this freedom applies across the board. The analogy to due process and equal protection review is instructive. In that context, certain types of laws—namely those restricting fundamental rights or employing suspect classifications—merit heightened scrutiny because of the particular constitutional guarantees they implicate. Just as the Fifth and Fourteenth Amendments (among others) limit Congress's otherwise expansive power to shape the content of legislation, certain constitutional provisions might limit Congress's otherwise expansive power to implement legislation as it sees fit.<sup>286</sup>

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<sup>282</sup> Representative cases in this line address the regulation of foreign trade, *see* *Field v. Clark*, 143 U.S. 649, 690–92 (1892), setting war-time price ceilings for commodities, *see* *Yakus v. United States*, 321 U.S. 414, 421, 426–27 (1944), promulgating sentencing guidelines for federal criminal offenses, *see* *Mistretta v. United States*, 488 U.S. 361, 413–15 (1989), and setting national ambient air quality standards for ozone and particulate matter, *see* *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 475–76 (2001).

<sup>283</sup> *See* Manning, *supra* note 29, at 2447–48 (describing the “very strong presumption of validity” that the Court applies to such statutes and its refusal either to question legislative ends or to “insist[ ] on a substantial means-ends fit”).

<sup>284</sup> *See* *The Brig Aurora*, 11 U.S. 382, 388 (1813) (“[W]e can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct.”).

<sup>285</sup> *See* *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 407 (1928). The Court has held statutes unconstitutional for violating the nondelegation doctrine only twice. *See* *Diller*, *supra* note 20, at 588 (referencing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935) and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935)).

<sup>286</sup> Arguments for a more demanding nondelegation doctrine have been made in a variety of contexts, including Congress's power to declare war, *see* *N.J. Peace Action v. Obama*, 379 F. App'x 217, 220 (3d Cir. 2010), to render conduct criminal, *see* *Touby v. United States*, 500 U.S. 160, 165–66 (1991), and to develop an adequate substitute for habeas review of executive detention, *see* *Diller*, *supra* note 20, at 588. The Court has re-

The Suspension Clause is such a provision. As recounted in Part I, the Constitution allocates suspension authority to Congress both out of fear that the Executive would abuse it and because the gravity of a suspension's impact upon civil liberty renders the safeguards of the legislative process particularly important. The Constitution's wariness of executive power, combined with the relatively exacting approach traditionally taken to statutes affecting fundamental rights, support a more demanding application of the nondelegation doctrine in this context than in the vast field of social and economic legislation in which the Necessary and Proper Clause gives Congress the authority to implement its Article I powers as it sees fit. This approach to the Clause does not challenge the premise of the nondelegation doctrine; rather, it fits into the well-established distinction between routine legislative policy choices and legislation affecting fundamental rights.

## V

### SUSPENSION AND SPECIFICITY

The Suspension Clause severely limits the circumstances under which Congress can initiate a regime of emergency power. Part IV argued that this limit is partly expressed in the Clause's requirement that Congress act only "when *in* Cases of Rebellion or Invasion" rather than in anticipation of them.<sup>287</sup> One might also insist, as many did in the nineteenth century, that the unique nature of emergency power requires Congress to give the President relatively detailed guidance with respect to a suspension's scope. This argument is not directed at

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jected the claim that taxing authority is an area in which a more demanding standard should govern delegation. See *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 221 (1989). It has reserved the question whether "something more than an 'intelligible principle' is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions" because "regulations of this sort pose a heightened risk to individual liberty." See *Touby*, 500 U.S. at 165–66. It has not addressed arguments pressed in other areas. The Court has, however, expressly held that a more lenient standard applies when the delegation coincides with an area in which the Executive possesses some inherent authority. See, e.g., *Loving v. United States*, 517 U.S. 748, 768–69 (1996) (holding that the President's authority as Commander in Chief made it permissible for Congress to give him unusually wide discretion in the context of a court martial); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 324 (1936) (holding that where foreign affairs are concerned, Congress may "either leave the exercise of the power to [the President's] unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs"). If the scale can slide down in areas in which the Constitution renders the Executive particularly powerful, it might slide up in areas in which the Constitution's allocation of authority reflects particular wariness of executive power; cf. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801*, at 247 (1997) (opining that "it may be that delegation is more suspect, and must accordingly be more narrowly defined, when the authority in question is one the Framers specifically meant to keep out of executive hands"). But cf. Diller, *supra* note 20, at 635 ("The intriguing notion of a sliding scale of delegable powers, with some powers ranking lower on the scale of delegability, has received only limited attention.").

<sup>287</sup> U.S. CONST. art. I, § 9, cl. 2 (emphasis added).

Congress's ability to legislate on a contingent basis. It is instead a claim that something more than the standard "intelligible principle"<sup>288</sup> must confine the Executive's discretion in this context, regardless whether a statute suspends the writ outright or in advance. This Part argues that no such heightened standard applies.

At the outset, it bears emphasis that the standard "intelligible principle" test does impose some limit, even if a modest one, upon the scope of suspension legislation. Delegations as sweeping as those found in the territorial statutes—delegations passed outside the context of any particular crisis and that gave the President literally no guidance in deciding when the prerequisites for suspension were met—likely fail even that forgiving test.<sup>289</sup> In other words, these statutes should trouble even those who reject Part IV's argument for a timing requirement. The breadth of such legislation has the effect of resetting the constitutional baseline by statute. The Constitution gives Congress the authority to suspend the writ in the event of a rebellion or an invasion when the public safety requires it. A delegation like those in the territorial statutes effectively says the opposite: that the President shall have the authority to suspend the writ in the event of a rebellion or an invasion when the public safety requires it. Such a statute is the equivalent of one that says, in total, "the President shall have the power to regulate commerce among the several states"<sup>290</sup> or

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<sup>288</sup> See *supra* note 187 and accompanying text.

<sup>289</sup> Gary Lawson has argued that the nondelegation doctrine does not apply to Congress in its regulation of territories and federal property because the separation of powers principle enforced by that doctrine derives from Article I's requirement that legislation passed under it be not only necessary but also proper. See Lawson, *supra* note 183, at 392–93. Article IV imposes no requirement that legislation enacted pursuant to it be proper; thus, it does not incorporate the background norms of constitutional structure into territorial legislation, *id.*, instead giving Congress "a free hand with respect to the structure of the territorial governments it creates." Lawson, *supra* note 180, at 876. Congress's freedom in this regard means, among other things, that it can pass "laws instructing executive agents to make rules unconstrained by meaningful standards." Lawson, *supra* note 183, at 393; see also DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 187 (1993) (suggesting that Article IV's location "outside the first three Articles of the Constitution, which focus on separation of powers," provides some support for the proposition that the Constitution does not impose the same limits on Congress's ability to delegate when acting under the Territories and Property Clause). A full exploration of the nature of Congress's unique authority over territories, federal property, and the District of Columbia is beyond the scope of this Article. For present purposes, it is sufficient to flag the issue and to observe that the "intelligible principle" test would limit Congress's ability to enact similarly sweeping delegations of authority to suspend the writ within the boundaries of the fifty states. It is also worth noting that even if the standard nondelegation doctrine does not constrain Congress in its regulation of federal territories, the Suspension Clause does. See *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (holding that the Suspension Clause "has full effect at Guantánamo Bay"). Thus, the Clause's proscription of suspension legislation in the absence of actual invasion or rebellion, see *supra* Part IV, applies to federal territories and property.

<sup>290</sup> See U.S. CONST. art. I, § 8, cl. 3.

"the President shall have the power to declare war."<sup>291</sup> Despite its leniency, the nondelegation doctrine does not maintain that Congress can change the constitutional allocation of power by shifting the sum of its power in a particular area to the Executive.<sup>292</sup> This legislation is problematic, therefore, even assuming that Congress's ability to legislate on a contingent basis is unfettered.<sup>293</sup>

Assume, however, a statute that would survive a standard nondelegation analysis. Does the Suspension Clause require Congress to curb the President's discretion in ways that the bare separation of powers principle would not? Specific questions surfaced repeatedly in congressional debates. Must Congress confine the President's suspension decision (and concomitantly his detention authority) by imposing a sunset clause or geographic limits?<sup>294</sup> Must it prohibit the President from subdelegating the authority to declare a suspension effective?<sup>295</sup> Must it limit the grant of preventative detention authority under a suspension statute to the President and members of his cabinet, or may it permit any executive official, state or federal, to detain prisoners indefinitely on mere suspicion?<sup>296</sup> Of the seven federal statutes, only the one passed during Reconstruction contained a sunset clause, and only that statute and the Philippines Organic Act contained any geographic restriction on the President's power to proclaim and exer-

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<sup>291</sup> See *id.* at art. I, § 8, cl. 11.

<sup>292</sup> See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (stating that the Constitution "permits no delegation of [legislative] powers"). To be sure, the words "invasion," "rebellion," and "public safety" might be thought to give the President at least some guidance. But even apart from the fact that they confer the sum total of Congress's constitutional power, the scope of these statutes is reason to expect substantial guidance from Congress. See *id.* at 475 ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred. While Congress need not provide any direction to the EPA regarding the manner in which it is to define 'country elevators' . . . it must provide substantial guidance on setting air standards that affect the entire national economy." (internal citations omitted)).

<sup>293</sup> The Supreme Court has observed that context can render permissible even a broadly worded statute. See, e.g., *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943) (summarily rejecting the contention that a public interest standard was so "vague and indefinite" as to violate the nondelegation doctrine given that it was modified by the purposes, requirements, and context of the statute); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 25 (1932) (upholding the "public interest" standard because it "is not a concept without ascertainable criteria, but has direct relation" to the purposes, requirements, and context of the act). This is no less true in the case of suspension. For example, the suspension provision in the 1871 Act did not expressly connect Klan activities to the "rebellion" with which the statute was concerned. But the statute's popular title ("The Ku Klux Klan Act") and the context in which Congress passed it (hearings about Klan violence in the South) made clear that the power granted to the President was to address that particular uprising. Proximity to a crisis can be important, therefore, even in a standard nondelegation analysis.

<sup>294</sup> See *supra* notes 99, 108 and accompanying text.

<sup>295</sup> See *supra* notes 119, 140 and accompanying text.

<sup>296</sup> See *supra* notes 76, 120–22 and accompanying text.



cise emergency detention authority.<sup>297</sup> None of the statutes prevented subdelegation of either the suspension or detention power. These omissions were controversial, but they are only fatal if the Suspension Clause requires their presence. And in contrast to the timing requirement, which has textual support,<sup>298</sup> the Clause is devoid of any language requiring any of them.

Eighteenth-century parliamentary and state suspension statutes almost always included sunset clauses.<sup>299</sup> The Massachusetts Constitution, the first to contain a Suspension Clause, memorialized this requirement by providing that the writ could be suspended "for a limited time, not exceeding twelve months."<sup>300</sup> Despite the fact that it was modeled on the Massachusetts provision,<sup>301</sup> the federal Suspension Clause contains no such limitation.<sup>302</sup> That is not to say that Article I, Section 9 of the Constitution permits indefinite suspension. When either the invasion or rebellion ends or the threat to public safety ceases, the warrant to suspend does as well.<sup>303</sup> It permits suspension only during a rebellion or an invasion and while the public safety requires it; thus, once the rebellion or invasion ends, or the threat to public safety diminishes, the warrant for suspension ceases. Indeed, even if an outright suspension contained a sunset clause, Congress would be obligated to rescind the statute if any of the conditions justifying suspension ceased before the statute expired. A sunset clause might be a prudent measure insofar as a statutory cap sets the force of inertia against rather than for suspension—inaction, the course of least resistance, results in expiration. But regardless

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<sup>297</sup> The bill proposing suspension in response to the Burr Conspiracy contained no geographic restriction but did expire after three months. See *supra* note 75 and accompanying text.

<sup>298</sup> See *supra* note 209 and accompanying text.

<sup>299</sup> See *supra* notes 52, 62 and accompanying text. The 1777 Maryland statute is an exception. See *supra* note 65 and accompanying text.

<sup>300</sup> MASS. CONST. pt. II, ch. VI, art. VII.

<sup>301</sup> See Neuman, *supra* note 188, at 564.

<sup>302</sup> The Framers considered and rejected a proposal that the Suspension Clause contain a time limit. 1 1787 DRAFTING THE U.S. CONSTITUTION 976 (Wilbourn E. Benton ed., 1986). When asked why the Suspension Clause in the United States Constitution did not have a time limitation like that of the Massachusetts clause, Judge Dana responded that "he did not see the necessity or great benefit of limiting the *time*" because Congress, like the state legislature, could renew the suspension year after year. The Massachusetts Convention, *supra* note 215, at 1359. The "safest and best restriction," he pronounced, was empowering Congress to suspend only in cases of rebellion or invasion. *Id.* For "whenever these shall cease to exist, the suspension of the writ must necessarily cease also." *Id.*

<sup>303</sup> The endpoint of suspension under the Clause is unclear. Many have assumed, both at the Convention, see *supra* note 302 and accompanying text, and the years since, see *supra* note 173 and accompanying text, that the Clause itself permits suspension only so long as rebellion or invasion lasts. One might also argue, however, that the Clause permits suspension so long as the threat to public safety lasts, even once the rebellion or invasion has ended. It is unnecessary to resolve that issue here. Thanks to Sai Prakash for drawing the question to my attention.

whether it is wise to omit an expiration date, Article I, Section 9 does not prevent Congress from doing so. Congress can direct the President to gauge the lifespan of his authority according to a standard (such as the phrase “during the present rebellion”) rather than by a firm date.

There is a similar lack of textual basis for geographic restrictions. One strand of the argument for geographic limits maintains that a suspension must be confined to location of the rebellion or invasion.<sup>304</sup> As David Currie observes, however, this argument “miss[es] the mark.”<sup>305</sup> “Rebellion” and “invasion” are conditions that trigger the possibility of emergency power, not descriptions of the power’s geographic reach. The Clause permits suspension “when the public Safety may require it,” and it is sensible to interpret this phrase as permitting suspension wherever the public safety requires it, even if that means detention in an area outside the battle zone.<sup>306</sup> That is not to say that the public safety prong of the Clause itself requires a suspension statute to specify where the President may exercise emergency power. The Suspension Clause speaks to when the writ may be suspended,<sup>307</sup> but it is silent as to where. That is perhaps because it does not always make sense to think of emergency power in terms of fixed geographic limits. The danger to public safety lies with those intent on inflicting harm, and their location will not necessarily coincide with the region hit. For example, the architects of an attack may have worked remotely, and those who are on location can move quickly to avoid detection or strike a new area. Preventative detention is aimed at people, not places. It is instructive in this regard that early state suspension statutes, as well as the bill proposed during the Burr Conspiracy, defined the Executive’s emergency power according to the category of people he could detain rather than the place where he was likely to find them.<sup>308</sup> To be sure, Congress can include a geo-

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<sup>304</sup> See *supra* note 107; see also Shapiro, *supra* note 8, at 94 (suggesting that the Clause authorizes suspension only in the location where a rebellion or an invasion occurs); Tyler, *supra* note 2, at 692 (opining that “the existence of a rebellion in one part of the country is not . . . a justification for suspending the writ in another part of the country”).

<sup>305</sup> David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1161 (2006).

<sup>306</sup> See *id.* (asserting that “so long as an insurrection [is] in progress, the Constitution permit[s] suspension whenever and wherever the public safety require[s],” not only in the areas where rebellion is occurring). Consider, for example, that damage inflicted by a terrorist attack on Manhattan might render a larger geographic area unstable, endangering the public safety in, say, New Jersey or Connecticut.

<sup>307</sup> See U.S. CONST. art. I, § 9 cl. 2 (prohibiting suspension “unless *when* in Cases of Rebellion or Invasion the public Safety may require it” (emphasis added)).

<sup>308</sup> Some defined the category as those suspected of treason; others defined it as anyone dangerous to the state. See *supra* notes 63, 69, 72, 75 and accompanying text. The English suspensions enacted between 1689 and 1747 did not contain geographic restrictions, but the Revolutionary War suspension did: it applied only to those taken for treason or piracy in America or on the high seas. See 17 Geo. 3 c. 9 (1777); HALLIDAY, *supra* note

graphic restriction in a suspension statute, just as it can include a sunset clause. It did so in the Ku Klux Klan Act, which authorized the President to suspend the writ only "within the limits of the district which shall be so under the sway [of rebellion]."<sup>309</sup> Such a provision is protective of civil liberty insofar as it cabins the President's emergency power, and its inclusion may be prudent when the risk to public safety is concentrated in a particular area. But the Clause does not *require* Congress to impose geographic limits upon either the power to detain or the authority to declare a suspension effective. It is agnostic on the question, thereby leaving the matter to the political process.<sup>310</sup>

As to whether subdelegation is permissible with respect to the decisions to suspend or arrest: the parliamentary and state suspension acts almost always provided that only the king or chief executive and the equivalent of cabinet-level officials could sign warrants issued pursuant to the emergency power granted by the legislation.<sup>311</sup> The reasons for such a limitation are clear. It is, first and foremost, a means of quality control: high-ranking executive officials are more accountable to the public for abuses of the power, and their selection for office is at least some indication that they possess good judgment. It is also a means of quantity control: when fewer people have the power to preventatively detain, fewer arrests will be made. Notwithstanding the long tradition of including such a restriction in suspension statutes, however, none of the proposed or enacted federal statutes included it. To be sure, that omission was controversial. The fact that the suspension statute proposed during the Burr Conspiracy did not so limit exercise of the detention power was one of the stated reasons for its rejection.<sup>312</sup> During both the Civil War and Reconstruction, critics insisted that the President should not be able to delegate either the decision to suspend or the decision to detain to low-ranking officers.<sup>313</sup> But the Clause does not address the matter either expressly

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47, at 249 ("Until 1777, suspensions made no distinction among law's subjects by nationality or by place of capture or detention."). This geographic restriction was one of the more controversial aspects of the act. See Halliday & White, *supra* note 16, at 646–51. Some claimed that the regional limitation protected liberty by reducing the number affected, see *id.* at 645, but others, including Edmund Burke, thought it better to suspend uniformly, for "[p]eople without much difficulty admit the entrance of that injustice of which they are not to be the immediate victims." See *id.* at 650 (quoting *A Letter from Edmund Burke, Esq. . . on the Affairs of America* 15 (2d ed. London 1777)); see also *id.* ("Liberty, if I understand it all, is a *general* principle, and the clear right of all the subjects within the realm, or of none.").

<sup>309</sup> See Ku Klux Klan Act of 1871, ch. 22, § 4, 17 Stat. 13. (1871).

<sup>310</sup> During that process, regional interests can lobby for the inclusion of such restrictions. See *supra* note 32 and accompanying text.

<sup>311</sup> See *supra* notes 51, 64 and 66. The suspension enacted and repeatedly extended by Parliament during the Revolutionary War did not include such a limitation. See *supra* note 55 and accompanying text.

<sup>312</sup> See *supra* note 76 and accompanying text.

<sup>313</sup> See *supra* notes 119–22, 150 and accompanying text.

or impliedly. The default presumption in administrative law, captured by statute, is that the President can enlist the aid of subordinates in the discharge of his statutory duties.<sup>314</sup> While Congress can clip that authority by statute,<sup>315</sup> it is difficult to argue that such a limit is constitutionally required. Like sunset clauses and geographic restrictions, any prohibition of subdelegation is a matter of prudence rather than constitutional constraint.

### CONCLUSION

The Necessary and Proper Clause grants Congress broad authority to implement legislation as it sees fit. In the normal course, Congress may pass statutes that are effective on a contingent basis, leaving the President to determine when conditions triggering the statute are satisfied. The Suspension Clause, however, creates an important exception to that rule. Its command that “[t]he Privilege of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it,” describes not only the circumstances under which Congress can authorize emergency power but also the time at which Congress can enact the authorization. Congress cannot pass any suspension statute until it concludes that an invasion or a rebellion exists and that the accompanying threat to public safety *may* require it. Only at that point may it capitalize upon the President’s ability to react quickly by charging him to make the ultimate determination whether and when maintaining security requires the exercise of emergency power. While Congress has significant leeway to act independently of triggering events in the context of social and economic regulation and in areas of inherent executive authority, the Suspension Clause limits Congress’s freedom to do so when it suspends civil liberties.

This approach to the Suspension Clause captures more precisely what it means for the suspension power to be legislative. Giving the power to the legislature means more than that the President’s power to act must derive from a statute. It means that Congress must assess a current security crisis to determine whether it requires the exercise of emergency power. There are times of “extreme emergency” in which

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<sup>314</sup> See 3 U.S.C. § 301 (2012) (authorizing the President to “empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification, or other action by the President . . . any function which is vested in the President by law”); see also 3 U.S.C. § 302 (2012) (acknowledging that the President may have an “inherent right . . . to delegate the performance of functions vested in him by law”).

<sup>315</sup> Cf. 1 RICHARD J. PIERCE, JR. *ADMINISTRATIVE LAW TREATISE* § 2.7 at 126 (5th ed. 2010) (“Sometimes [Congress] chooses [to prohibit or limit subdelegation] because it considers a function so important that it wants that function performed only by a high ranking official.”).

“the nation parts with its liberty for a while, in order to preserve it forever.”<sup>316</sup> Entrusting the legislature with the power to determine when those times arrive is one of the safeguards of our liberty, and its role in that regard is embedded in the Clause itself.

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<sup>316</sup> 1 BLACKSTONE, *supra* note 217, at \*132.