

Writ Large: the History of Habeas Corpus

Chief Judge Ann Bailey Smith

Habeas corpus has made its way into the news recently. In regard to immigration, there have been rumors that the president is considering suspending the writ of habeas corpus. Kristi Noem, the Secretary of Homeland Security, was asked during a Senate hearing to define habeas corpus, and she replied that it was the constitutional right of the president to remove people from this country. Habeas corpus is a Latin phrase, however, which means to produce the body in a court of law. The writ of habeas corpus is used to bring a detained person into court for the person's custodian to present proof of lawful authority to continue the detention of that person. Article 1, Section 9 of the United States Constitution, which primarily consists of limitations upon the power of Congress, includes the Suspension Clause, which reads:

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.

This is the only mention of habeas corpus in the Constitution.

President Lincoln suspended the privilege of the Writ of Habeas Corpus when he issued the following proclamation:

The Commanding General of the Army of the United States:

You are engaged in suppressing an insurrection against the laws of the United States. If at any point on or in the vicinity of any military line which is now or which shall be used between the city of Philadelphia and the city of Washington you find resistance which renders it necessary to suspend the writ of habeas corpus for the public safety, you personally, or through the officer in command at the point where resistance occurs, are authorized to suspend the writ.

The lead up to this action by President Lincoln began when he learned of an assassination plot against his life as he travelled to Washington, D.C. for his inauguration; then the firing upon Ft. Sumpter; and finally the State of Maryland's decision to destroy bridges within its boundaries so as to interfere with the president's decree to send federal troops to defend Washington by way of Baltimore. There had been anti-Union riots in Baltimore which resulted in the loss of lives and, as a result, with the approval of Maryland's governor, railroad bridges into Baltimore were burned to keep federal troops from entering the city.

General Ambrose Burnside, after being relieved of his post as Commander of the Army of the Potomac by President Lincoln, was named Commander of the

Department of the Ohio in March 1863. He became concerned about people who were disloyal to the Union cause yet were living in Union states. In April, he issued General Order No. 38 which read in part:

The habit of declaring sympathies with the enemy will no longer be tolerated in this department. Persons committing such offenses will be at once arrested with a view to being tried as above stated or sent beyond our lines and into the lines of their friends.

This Order was the basis for the arrest of a man named Clement Vallandigham, a lawyer from Ohio who had political ambitions. He had served in the state legislature and was later elected to the United States House of Representatives. He opposed Abraham Lincoln as president and rejected the views of the abolitionists. Vallandigham was defeated for reelection in 1862, primarily because of his insistence that fighting the Civil War was a mistake. He had hoped to be nominated as the candidate for governor by the Ohio Democratic Party but was rejected by party leaders.

In a speech at a Democratic rally in Columbus, Vallandigham criticized General Burnside's Order No. 38 by stating that citizens should be able to assemble to hear Lincoln's policies debated. Additionally, he was critical of the government's proclamation that citizens could be tried before military commissions. Burnside got word of Vallandigham's speech, so he had observers present when Vallandigham gave his next speech; they took notes and reported to Burnside. An observer later reported to General Burnside that Vallandigham had concluded one of his speeches by urging listeners to vote to "hurl King Lincoln from his throne." As a result, Vallandigham was arrested in the middle of the night in his home in Dayton, Ohio on May 5, 1863. His home was broken into by dozens of men to secure his arrest which was done without a warrant.

Vallandigham was put on trial the following day, not before a court but before a military commission, even though he was not in the military, for sympathizing with the Confederates, a violation of General Order No. 38. He protested to the presiding officer that the military had no authority to try him as he was a civilian. The trial went forward and he was found guilty on May 7. The commission sentenced him to imprisonment for the remainder of the war.

Two days later, Vallandigham's attorney sought a Writ of Habeas Corpus in the United States District Court for the Southern District of Ohio. His lawyer argued that habeas corpus had not been suspended in Ohio based on President Lincoln's

proclamation which had only delineated a specific area where suspension could occur. The lawyer for the government took an opposing view and the judge ruled for the government.

President Lincoln did not learn of Burnside's charge against Vallandigham until after the fact. The president and some members of his Cabinet were wary of the legality of Burnside's action but did not want to back down. Instead, President Lincoln amended the sentence from imprisonment to banishment beyond the Union lines into the Confederacy. General Burnside protested, but the amended sentence was carried out and Vallandigham was delivered to the Confederates in Tennessee. Vallandigham sought review by the United States Supreme Court but was refused as the Court held that it had no jurisdiction to review the decision of the military commission.

Vallandigham escaped from the Confederate states, took a boat to Canada, and settled in Windsor, Ontario, across the Detroit River from Detroit. He eventually returned to Ohio, where he continued mak-

ing political speeches while being ignored by the United States government until his death in 1871.

The takeaway from this historical incident is that a speech which included words critical of the president resulted in a man's home being broken into in the middle of the night, his arrest without a warrant, a trial within one day of his arrest by a military tribunal even though he was a civilian, his imprisonment even though he had broken no laws enacted by any legislature, and his eventual banishment from his home state. The suspension of habeas corpus resulted in martial law being defined by General Burnside, purportedly acting for the president of the United States.



Chief Judge Ann Bailey Smith presides in Division 13 of Jefferson Circuit Court. ■

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