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The Evolution of the Suspension Clause at the Constitutional Convention

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Convention

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The Habeas Corpus Suspension clause of the Constitution states

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.¹

In 1861 in *Ex Parte Merryman* Chief Justice Taney, sitting as a Circuit Court judge, held
that President Lincoln’s suspension of habeas corpus was invalid. According to Taney
only Congress has the power to suspend habeas corpus.

Taney began his argument by asserting

The clause in the Constitution which authorizes the suspension of the privilege of
the writ of habeas corpus is in the ninth section of the first article. This article is
devoted to the Legislative Department of the United States, and has not the slightest
reference to the Executive Department.²

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¹ Art. I, sect. 9, cl. 2.

² *Ex parte Merryman*, 17 F. Cas. 144, 148 (1861), emphasis added. In 1861
Taney was mistaken.\(^3\)

- Four state constitutions explicitly limited the suspension power to their legislatures. (The Connecticut constitution of 1818, art. I, sec 14, cl. 2, Francis Newton Thorpe, ed, 1 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* (Government Printing Office 1909) at 538); the Massachusetts constitution of 1780, ch. 6, sec. 7, 3 Thorpe at 1910; the New Hampshire constitution of 1792, sec. 91, 4 Thorpe at 2488; and the Rhode Island constitution of 1842, art. I, sec. 9, cl. 2, 6 Thorpe at 3223).
- Two state constitutions unconditionally banned the suspension of habeas corpus. (The Virginia constitution of 1850; art. IV, sec. 15, cl. 1, 7 Thorpe at 3860); and the Vermont Constitution, amend. XII, 6 Thorpe 3774).
- Two state constitutions lacked any statement concerning habeas corpus. (The Maryland constitution of 1851, see 3 Thorpe at 1712-1741; and the North Carolina constitution of 1776, see 5 Thorpe at 2787-2794).
- The remaining 26 state constitutions allowed for the suspension of habeas corpus without explicitly locating the power to suspend it.

\(^3\) Chief Justice Marshall was also mistaken when he asserted that *only* the Congress has the power to suspend habeas corpus. (“If at any time the public safety should require the suspension of the [habeas corpus] powers vested by this [Judiciary] act [of 1789] in the courts of the United States, it is for the legislature to say so.” *Ex parte Bollman*, 8 US 75,101 (1807).) Chief Justice Marshall was undoubtedly influenced by the Ninth Congress’s recent consideration and rejection of an act to suspend habeas corpus in
The Evolution of the Suspension Clause at the Constitutional Convention

- Article I is not exclusively concerned with the legislative branch. (Nor is Article I the sole locus for the enumeration of Congressional powers.)

- As originally proposed to the Constitutional Convention, the text of the Suspension clause would have limited the power of suspension to Congress. The Convention eliminated this limitation between August 20 and 28, 1787.

- The Suspension clause only found its home in Article I during the last week of the Convention.

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Although Article I is largely concerned with the legislative branch it is not exclusively concerned with that branch.\(^4\) Article I, Section 10 places three prohibitions on the states.

\(^4\) Nor is Article I the source of all Congressional powers. Other sources of Congressional power include:

- specifying presidential succession beyond the Vice President (Art. II, sect. 1, cl. 6),

- specifying which inferior appointments may be made without Senate ratification (Art. II, sect. 2, cl. 2),

- specifying exceptions to Supreme Court appellate jurisdiction (Art. III, sect. 2, cl. 2),

- specifying the place of trial for crimes allegedly not committed within any state (Art. III, sect. 2, cl. 3),

response to Burr’s rebellion. (For the Congress’s consideration of habeas corpus suspension see David P. Currie, *The Constitution in Congress: the Jeffersonians, 1801-1829* at 131-3 (Chicago 2001).)
The Evolution of the Suspension Clause at the Constitutional Convention

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility. No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

- declaring the punishment of treason (Art. III, sect. 3, cl. 2),
- specifying general laws to prescribe the manner by which acts, records, and proceedings shall be proved to ensure that states give full faith and credit (Art. IV, sect. 1),
- admitting new states (Art. IV, sect. 3, cl. 1),
- making rules and regulations respecting the territory or other property belonging to the United States (Art. IV, sect. 3, cl. 2),
- proposing amendments to the Constitution for ratification by the states (Art. V).
Notice that the last two of these clauses provide for exceptions “with the consent of [the]
Congress”. However, the first clause provides a list of absolute prohibitions on the states
for which Congress has no power to make an exception. Clearly, this clause has nothing
to do with Congress beyond the implicit assertion that Congress lacks the power to make
any exceptions.

Turning our focus to Article I, Section 9 we see that once again it is largely concerned
with limiting the powers of Congress. Although some of the clauses can only be
interpreted as being concerned with Congress, only two of the clauses explicitly mention
Congress by name. The first clause prevents Congress from prohibiting the importation
of slaves before 1808. The other mention of Congress comes in the second part of the
eighth clause

No title of nobility shall be granted by the United States: and no person holding
any office of profit or trust under them, shall, without the consent of the Congress,

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5 Although Article I, Section 8 is largely concerned with enumerating the powers of
Congress, it contains one clause delineating the balance of power between Congress and
the states. Article I, Section 8, clause 15 states “To provide for organizing, arming, and
disciplining, the militia, and for governing such part of them as may be employed in the
service of the United States, reserving to the states respectively, the appointment of the
officers, and the authority of training the militia according to the discipline prescribed by
Congress”.

6 For example, the third clause, which states, “No bill of attainder or ex post facto Law
shall be passed.” must be about Congress since all legislative power is vested in
Congress.
accept of any present, emolument, office, or title, of any kind whatever, from any
king, prince, or foreign state.

Once again we see a prohibition with exceptions allowed.

The Suspension clause has a similar structure.

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.

The major difference, of course, is that the Suspension clause does not specify what part
or parts of the government have the power to suspend Habeas Corpus.

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When the Convention met in 1787 two state constitutions made statements about habeas
corpus. The Massachusetts constitution of 1780 stated

The privilege and benefit of the writ of habeas corpus shall be enjoyed in this
commonwealth, in the most free, easy, cheap, expeditious, and ample manner; and
shall not be suspended by the legislature, except upon the most urgent and
pressing occasions, and for a limited time, not exceeding twelve months.7

The New Hampshire constitution of 1784 similarly stated

The privilege and benefit of the habeas corpus, shall be enjoyed in this state, in
the most free, easy, cheap, expeditious, and ample manner, and shall not be

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7 MA Const Ch VI. art VII (3 Thorpe at 1910) This text has remained in the
Massachusetts constitution verbatim and in place since 1780.
suspended by the legislature, except upon the most urgent and pressing occasions, and for a time not exceeding three months.\(^8\)

Neither of these state suspension clauses appeared in a portion of the state constitution devoted to the legislature.\(^9\)

As originally proposed to the Constitutional Convention the Suspension clause followed the Massachusetts and New Hampshire clauses and specified what part of the government had the suspension power. The Suspension clause makes its first appearance in the records of the Constitutional Convention in Pinckney’s Plan presented to the Convention at the end of May 1787. The penultimate clause of Section 6 of the Pinckney plan\(^{10}\) stated

\(^8\)NH Const of 1784 Part II (4 Thorpe at 2469) The New Hampshire constitution of 1792 moved this text verbatim to section 91 (id at 2488) where it remains to this day.

\(^9\)Chapter VI of the 1780 Massachusetts constitution was titled “OATHS AND EXCLUSIONS; INCOMPATABILITY OF AND EXCLUSION FROM OFFICES; COMMISSIONS; WRITS; CONFIRMATION OF LAWS; HABEAS CORPUS; THE ENACTING STYLE; CONTINUANCE OF OFFICERS; PROVISION FOR A FUTURE REVERSAL OF THE CONSTITUTION, ETC”. (3 Thorpe at 1910) Part II of the 1784 New Hampshire constitution was titled “OATH AND SUBSCRIPTIONS; EXCLUSION FROM OFFICES; COMMISSIONS; WRITS; CONFIRMATION OF LAWS; HABEAS CORPUS; THE ENACTING STILE; CONTINUANCE OF OFFICERS; PROVISION FOR A FUTURE REVISION OF THE CONSTITUTION, &C” (4 Thorpe at 2469)

\(^{10}\)Section 6 of the Pinckney plan is largely concerned with enumerating the powers of Congress. However, it also contains a precursor to the Treason clause (Article III, Section
The Evolution of the Suspension Clause at the Constitutional Convention

The United States shall not grant any title of Nobility -- -- The Legislature of the United States shall pass no Law on the subject of Religion, nor touching or abridging the Liberty of the Press nor shall the Privilege of the Writ of Habeas Corpus ever be suspended except in case of Rebellion or Invasion.\(^\text{11}\)

Unlike the Massachusetts and New Hampshire clauses, the Pinckney proposal did not include a time limit.

The Suspension clause does not appear again in Farrand’s records until August 20 when the Convention’s Journal records the following proposition (and others) to be referred to the Committee of Detail.\(^\text{12}\)

> The privileges and benefit of the writ of habeas corpus shall be enjoyed in this government in the most expeditious and ample manner: and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding [SPACE] months.\(^\text{13}\)

The Convention had added a subclause limiting suspension to an as yet undetermined interval, perhaps influenced by the Massachusetts and New Hampshire clauses.

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\(^{3}\) and the Supremacy clause (Article VI, clause 2). (See Max Farrand, ed, 3 The Records of the Federal Convention of 1787 at 598-9, (Yale, rev. ed. 1937)

\(^{11}\) 2 Farrand at 599.

\(^{12}\) Madison’s notes record the same proposal verbatim with the SPACE in the phrase “exceeding [SPACE] months”. Id at 341.

\(^{13}\) Id at 334.
Taney’s opinion that only Congress has the power to suspend habeas corpus would have been on solid ground had this text survived to the final version of the Constitution. It did not. When the committee reported back on August 28 the Convention’s Journal records

It was moved and seconded to add the following amendment to the 4 sect. 11 article

"The privilege of the writ of Habeas Corpus shall not be suspended; unless where in cases of rebellion or invasion the public safety may require it."

which passed in the affirmative [Ayes--7; noes--3.]

The committee eliminated the text limiting the power of suspension to Congress and it also eliminated the provision for a time limit!

Madison’s notes on that day’s debates indicate that Pinckney, Rutledge, Morris, and Wilson each commented on the power to suspend habeas corpus, but none of them commented on the elimination of an explicit placement of that power or the elimination of any provision for a time limit.

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14 Id at 435.

15 Here are there comments.

Mr. Pinkney, urging the propriety of securing the benefit of the Habeas corpus in the most ample manner, moved "that it should not be suspended but on the most urgent occasions, & then only for a limited time not exceeding twelve months"

Mr. Rutlidge was for declaring the Habeas Corpus inviolable-- He did <not> conceive that a suspension could ever be necessary at the same time through all the States--

Mr. Govr Morris moved that "The privilege of the writ of Habeas Corpus shall not be suspended, unless where in cases of Rebellion or invasion the public safety may
What might have motivated the elimination of the text limiting the suspension power and the delegates’ lack of comment?

* *

Once the Convention settled on the length of Congressional terms it had to decide how often the Congress would be required to meet. This was the focus of much of the debate on August 7.\(^\text{16}\) Some of the comments seem extremely quaint to a modern reader.

Madison recorded Gouverner Morris commenting

> It was improper to tie down the Legislature to a particular time, or even to require a meeting every year. The public business might not require it.\(^\text{17}\)

Madison further noted

> Mr. King could not think there would be a necessity for a meeting every year. A great vice in our system was that of legislating too much.\(^\text{18}\)

At the end of the debate the Convention voted that

> The Legislature shall meet at least once in every year, and such meeting shall be on the 1st. monday in Decr. unless a different day shall be appointed by law\(^\text{19}\)

\(^\text{16}\) Id at 197-201, 206.

\(^\text{17}\) Id at 198.

\(^\text{18}\) Id at 198.

\(^\text{19}\) Id at 438.
It seems reasonable to suppose that the committee had a fresh memory of the August 7 debate as they revised the Suspension clause between August 20 and August 28.

When the full Convention referred the Suspension clause to the committee on August 20 it also referred out a clause limiting the length of military appropriations to *no more than one year at a time*.

The military shall always be subordinate to the civil power, and no grants of money shall be made by the Legislature for supporting military land forces for more than one year at a time.\(^{20}\)

Madison’s notes for September 5 report

Mr. Brearley from the Committee of Eleven made a farther report as follows

…

(2) To add to the clause "to raise and support armies" the words "but no appropriation of money to that use shall be for a longer term than two years"\(^{21}\)

Brearley’s committee had raised the time limit from one year to two years. Madison’s notes further record that during the debate that followed

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\(^{19}\) *Id* at 200. This text was subsequently revised to “The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.” (Art. I, sec. 4, cl. 2)

\(^{20}\) *Id* at 334.

\(^{21}\) *Id* at 508.
The Evolution of the Suspension Clause at the Constitutional Convention

To the (2) clause Mr. Gerry objected that it admitted of appropriations to an army. for two years instead of one, for which he could not conceive a reason.\(^{22}\) to which

Mr Sherman remarked that the appropriations were permitted only, not required to be for two years. As the Legislature is to be biennially elected, it would be inconvenient to require appropriations to be for one year, as there might be no Session within the time necessary to renew them.\(^{23}\)

Clearly, Brearley’s committee and the full Convention were concerned for the continuing operation of the new government while Congress was out of session. That seems a reasonable explanation for the elimination of the text that limited the habeas corpus suspension to power Congress.

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The Convention’s Journal entry (and Madison’s entry) for August 20 did not suggest a location for the Suspension clause in the text of the Constitution. Brearley’s committee made a specific proposal. They located the Suspension clause in Article XI! It remained there until the Constitution as a whole was referred out to the Committee of Style on September 10.

The original Constitution that Taney knew and that we know has only seven articles. To use Taney’s language from Merryman, to what subject was Article XI of the August 28 draft devoted?

\(^{22}\) Id at 509.

\(^{23}\) Id, emphasis added.
In the draft of the Constitution referred to the Committee of Style on September 10, Article XI was devoted to the Judiciary! Here is the full text.

Sect. 1. The Judicial Power of the United States both in law and equity shall be vested in one Supreme Court, and in such Inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States.

Sect. 2. The Judges of the Supreme Court, and of the Inferior courts, shall hold their offices during good behaviour. They shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Sect. 3. The Judicial Power shall extend to all cases both in law and equity arising under this Constitution and the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting Ambassadors, other Public Ministers and Consuls; to all cases of Admiralty and Maritime Jurisdiction; to Controversies to which the United States shall be a party, to controversies between two or more States (except such as shall regard Territory and Jurisdiction) between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens or subjects. In cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all other cases beforementioned the Supreme Court shall
have appellate jurisdiction both as to law and fact with such exceptions and under such regulations as the Legislature shall make.

Sect. 4. The trial of all crimes (except in cases of impeachments) shall be by jury and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State then the trial shall be at such place or places as the Legislature may direct.

The privilege of the writ of Habeas Corpus shall not be suspended; unless where in cases of rebellion or invasion the public safety may require it.

Sect. 5. Judgment, in cases of Impeachment, shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honour, trust or profit under the United States. But the Party convicted shall nevertheless, be liable and subject to indictment, trial, judgment and punishment, according to law. 24

The Suspension clause appears here as the second clause of Section 4 whose first clause provides for in-state trial by jury for federal crimes. Had this been the final text of the Constitution it would certainly be incorrect to assert that only Congress has the power to suspend habeas Corpus. A Taneyesque analysis based on the location of the Suspension clause would have concluded that only the Judiciary had the power to suspend Habeas Corpus! Has anyone ever argued for that?

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The Committee of Style reorganized much of the Constitution between September 10 and September 12. It dispatched the parts of Article XI as follows.

24 Id at 575-6.
The Evolution of the Suspension Clause at the Constitutional Convention

- What had been Article XI, Section 1 through Section 4, Clause 1 became what we know as Article III, Sections 1 and 2.\(^{25}\)

- The Suspension clause, which had been Article XI, Section 4, Clause 2, became Article I, Section 9, Clause 2.\(^{26}\)

- The clause limiting judgment for impeachment, which had been Article XI, Section 5, became Article I, Section 3, Clause 7.\(^{27}\)

One part of what we now know as Article III remains unaccounted for: the Treason clause that now forms Article III, Section 3.

Between August 28 and September 10, while the Suspension clause lived in an article largely devoted to the Judiciary, the Treason clause lived in Section 2 of Article VII,\(^{28}\) an article concerned with the powers of Congress!

- Section 1 of this draft article\(^{29}\) enumerates the powers of Congress and is a direct precursor to what we know as Article I, Section 8.

- Section 3 of this draft article\(^{30}\) required taxation to be in proportion to state populations (according to the three-fifths rule). It is a direct precursor to Article I, Section 9, Clause 4.

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\(^{25}\) Id at 600-1.

\(^{26}\) Id at 596.

\(^{27}\) Id at 592.

\(^{28}\) Id at 571.

\(^{29}\) Id at 569-570.

\(^{30}\) The proportions of direct taxation shall be regulated by the whole number of free citizens and inhabitants, of every age, sex, and condition, including those bound to
The Evolution of the Suspension Clause at the Constitutional Convention

• Section 4 of this draft article
  
  o prohibited taxation of interstate exports,
  
  o forbade Congress from prohibiting the import of slaves prior to 1808,
  
  o prohibited Congress from preferring the ports of one state to another’s.

These are direct precursors to Article I, Section 9, Clauses 5, 1, and 6.

Section 2 of this draft article combined the Treason clause with the Bill of Attainder and Ex Post Facto clause.

  Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. The Legislature shall have power to declare the punishment of treason. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court. No attainder of treason shall work corruption for a term of years, and three fifths of all other persons not comprehended in the foregoing description, (except Indians not paying taxes) which number shall, within three years after the first meeting of the Legislature, and within the term of every ten years afterwards, be taken in such manner as the said Legislature shall direct. (Id at 571)

31 No tax or duty shall be laid by the Legislature on articles exported from any State. The migration or importation of such persons as the several States now existing shall think proper to admit shall not be prohibited by the Legislature prior to the year 1808 -- but a tax or duty may be imposed on such importation not exceeding ten dollars for each person. Nor shall any regulation of commerce or revenue give preference to the ports of one State over those of another, or oblige Vessels bound to or from any State to enter, clear, or pay duties in another. (Id.)
of blood, nor forfeiture, except during the life of the person attainted. The Legislature shall pass no bill of attainder nor any ex post facto laws.\textsuperscript{32}

Perhaps the placement of the Treason clause in an article with these contents reflected the Convention’s understanding that defining treason in the Treason clause prohibits Congress from defining treason by statute.

The Committee of Style separated these clauses, relocating the Treason Clause to Article III, Section 3\textsuperscript{33} and the Bill of Attainder and Ex Post Facto clause to Article I, Section 9, Clause 3.\textsuperscript{34}

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Reviewing the evolution of the Suspension clause at the Constitutional Convention we see that the Convention removed text explicitly limiting the power of suspension to the Congress and also a provision that would have limited the length of any particular suspension. These changes were made shortly after the Convention debated the frequency of Congress’s convening. As they were made the Convention also raised the time limit on military appropriations from one year to two years with a concern that “there might be no Session with [a year]” explicitly voiced by Roger Sherman.\textsuperscript{35} It seems reasonable to infer that the same concern motivated the change to the Suspension clause the reserved that power to the Congress.

\textsuperscript{32} Id.

\textsuperscript{33} Id at 596.

\textsuperscript{34} Id at 601.

\textsuperscript{35} Id at 509.