

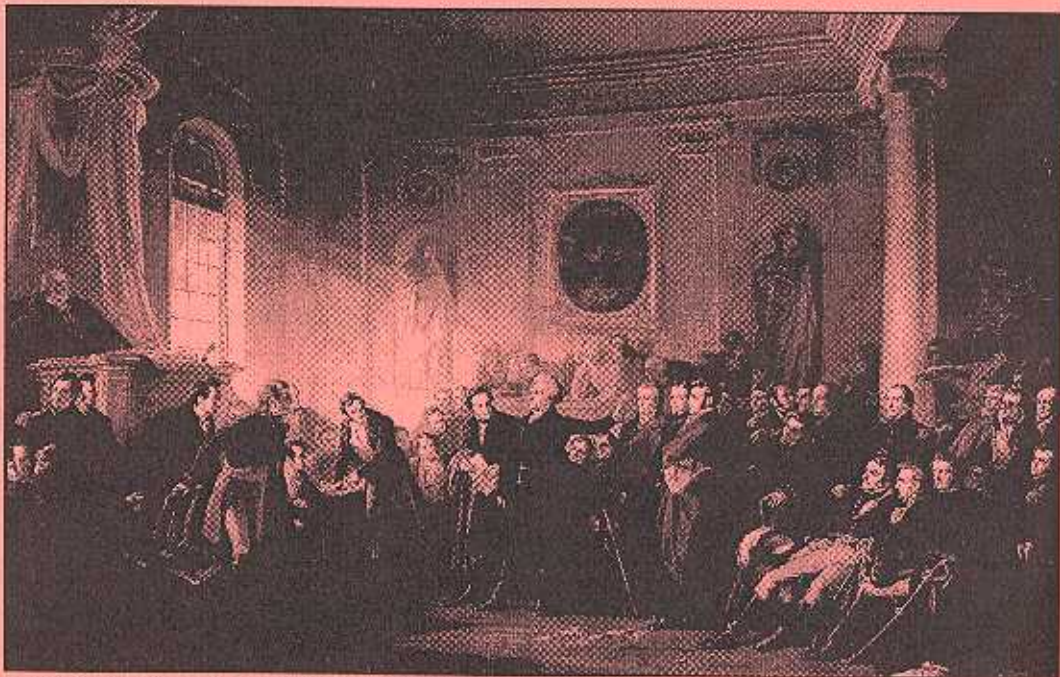
A Brief History of Civil Liberties in the United States

- ❖ 1805-1807 – The Burr Conspiracy – Aaron Burr’s attempt to raise an army and take New Orleans. His ultimate goal is to separate the new south western portion of the U.S.
- ❖ Suspension of the Writ of Habeas Corpus – Article 9, Section 2 of the Constitution: “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.”
- ❖ 1807 -- *Ex Parte Bollman & Swartwout* – The Supreme Court determines that only the legislature can suspend the Writ of habeas Corpus.
- ❖ Dec. 2, 1807 – March 1, 1809 -- The Embargo Act – President Thomas Jefferson imposes an embargo which closes all U.S. ports to foreign shipping and makes it illegal for U.S. vessels to trade with foreign nations. This is done in an attempt to force England and France, who are engaged in the Napoleonic War, to respect American neutrality. The Embargo Act necessitates the Congress to pass a series of search and seizure laws that are in clear violation of the Constitution.
- ❖ Dec. 16, 1814 -- March 13, 1815 – Andrew Jackson imposes martial law on the city of New Orleans. He has no constitutional right to do so. This is the first time in U.S. history that the Writ of Habeas Corpus is suspended and that martial law is put in place.
 - When Jackson first contemplated imposing martial law he requested the legal opinions of two leading New Orleans attorneys, both of whom acted as aides to the general. Jackson’s advisors, Edward Livingston and Abner Duncan, ultimately concluded that martial law suspended all civil functions and placed every citizen under military control. The lawyers disagreed, however, on the legality of the proclamation. Livingston believed that it was “unknown to the Constitution or Laws of the U.S.” and thus “justified only by the necessity [sic] of the Case and that therefore the General proclaims it at his own risque [sic] and under his responsibility.” Taking a decidedly different view, Duncan insisted that the constitutional provision authorizing suspension of the writ of habeas corpus impliedly permitted the operation of martial law and that it was the “guardian of the Public safety” who is “to judge of those cases provided for by the Constitution.”
 - Jackson’s definition of martial law:

“Martial law, being established, applies, as the commanding general believes, to all persons who remain within the sphere of its operations, and claims exclusive jurisdiction of all offences [sic] which aim at the disorganization and ruin of the army over which it extends. To a certain extent it is believed, it makes every man a *soldier*; to defend the spot where chance or choice has placed him, and to make him liable for any misconduct calculated to weaken its defence...Decide with the accused, no army can be safe, no general can command.

Disaffection and disobedience, anarchy and confusion, must take the place of order and subordination--defeat and shame, of victory and triumph."

- Jackson maintains martial law for some three months, even after the major Battle of New Orleans on January 8, 1815 and after the British withdrawal from the area on January 18th. While martial law is in place he ultimately arrests a state senator, Louis Louaillier, and a federal judge, Domick Hall, who issues a Writ of Habeas Corpus for Louaillier's release.
- When news of the Treaty of Ghent arrives, which ends the War of 1812, Jackson lifts martial law and subsequently called before the Judge Hall's court and fined \$1000 for contempt of court.



Charles Schiessle, "Andrew Jackson Before Judge Hall," Gilcrease Museum, Tulsa, OK.

- In the aftermath of the martial law episode, President Madison, via the Secretary of War, Alexander Dallas, writes Jackson expressing concern over martial law: "representations have been recently made to the President, respecting certain acts of military opposition to the civil magistrate, that require immediate attention, not only in vindication of the just authority of the laws, but to rescue your own conduct from all unmerited reproach."
- Dallas ultimately makes a clear statement regarding the legality of martial and the force of the Constitution, but neither he nor President Madison want to pursue the matter:

"The military power is clearly defined, and carefully limited [sic],

by the Constitution and laws of the United States; but the experience of the best regulated Governments teaches us, that exigencies may sometimes arise, when (as you have emphatically observed) 'Constitutional forms must be suspended, for the permanent preservation of Constitutional rights'....To enforce the discipline and to ensure the safety of his garrison, or his camp, an American Commander possesses indeed, high and necessary powers; but all his powers are compatible with the rights of citizens, and the independence of the judicial authority. If, therefore, he undertake to suspend the writ of Habeas Corpus, to restrain the liberty of the Press, to inflict military punishments upon citizens who are not military men, and generally to supersede the functions of the civil magistrate, he may be justified by the law of necessity, while he has the merit of saving his country, but he cannot resort to the established law of the land, for the means of vindication."

- ❖ March 1842 – February 1844 – The Congress engages in a two year, three session debate over returning Andrew Jackson's \$1000 contempt fine with interest. The debate engages the legality of martial law, its definition, and the concept of necessity in times of national emergency.
- ❖ Jackson's fine is ultimately returned, but the bill doing so does not make any statement about the serious legal and ideological issues related to his proclamation of martial law. Still, American legal and military treatises begin including a new definition of the term. Whereas it had always been strictly recognized a code of conduct for the military, martial law now becomes recognized as something more extraordinary. It is now an emergency power that can be used to control civilians.
- ❖ April 27, 1861 – Civil War has begun. Abraham Lincoln sends the following communiqué to General Winfield Scott and is subsequently transferred to other generals in the army:
 - You are engaged in repressing an insurrection against the laws of the United States. If at any point on or in the vicinity of the military line which is now used between the city of Philadelphia via Perryville, Annapolis City and Annapolis Junction 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 that writ.
 - John Merryman, a Maryland citizen accused of destroying railroad bridges and preparing men to travel south and join the Confederate army, is arrested. Apprehended on May 25, Merryman quickly petitioned Chief Justice Taney, on circuit as a federal district judge, for a Writ of Habeas Corpus. The writ issued by Taney, done so as a Supreme Court justice from chambers, was promptly disobeyed by the commanding general, George Cadwalader, who cited Lincoln's order of April 27.
 - April Term 1861 – Chief Justice Roger Taney delivers *Ex Parte Merryman*.

"A military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offense against the laws of the United States, except in aid of judicial authority, and subject to its control; and if the party be arrested by the military, it is the duty of the officer to deliver him over immediately to the civil authority, to be dealt with according to law. . . . The military in this case has gone far beyond the mere suspension of the privilege of the writ of habeas corpus. It has, by force of arms, thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place. . . . I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found."

- Abraham Lincoln continues the suspension of the Writ of Habeas Corpus and allows the imposition of martial law throughout the north. In 1863 he issues a letter to Erastus Corning in which the president defends his arrest of an Ohio congressman, Clement Vallandigham. Lincoln specifically cites Andrew Jackson's use of martial law to defend his own actions:

After the Battle of New Orleans and while the fact that the treaty of peace had been concluded was well known in the city, but before official knowledge of it had arrived, General Jackson still maintained martial or military law. . . . It may be remarked— first, that we had the same Constitution then as now; secondly, that we then had a case of invasion, and now have a case of rebellion; and, thirdly, that the permanent right of the people to public discussion, the liberty of speech and of the press, the trial by jury, the law of evidence, and the *habeas corpus* suffered no detriment whatever by the conduct of General Jackson, or its subsequent approval by the American Congress.

- ❖ Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties*, concluded:

"If a situation were to arise again in the United States when the writ of habeas corpus were suspended, government would probably be as ill-prepared to define the legal situation as it was in 1861. The clearest lesson is that there is no clear lesson in the Civil War—no neat precedents, no ground rules, no map. War and its effects on civil liberties remain a frightening unknown."

- ❖ Subsequent examples of civil liberty violations and imposition of martial in the United States:
 - Martial Law is imposed on a number of occasions in the late 19th century due to labor unrest.
 - World War I – Woodrow Wilson enacts the Espionage Act and Sedition Act.

- World War II – Franklin Delano Roosevelt’s Supreme Court condoned act of imprisoning Japanese-Americans.
- The War on Terror – President George W. Bush enacts the Patriot Act in the aftermath of the September 11th attacks on the World Trade Center. He later engages in internal and domestic telephone wire tapping without a court order. Law cases regarding these violations of the fourth amendment are currently pending in U.S. courts.
- Speaking to Sen. Arlen Specter of the Senate Judiciary Committee on Jan. 17, 2007, Attorney General Alberto Gonzales asserted that “The Constitution doesn’t say every individual in the United States or every citizen is hereby granted or assured the right of habeas corpus.”