The Presidential Power to Suspend the Privileges of the Writ of Habeas Corpus

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THE right to the writ of habeas corpus and its privileges is certainly much older than the Philippine Constitutional Convention. Its origin, antedating Magna Carta, is lost in the limbo of history. (People ex rel. Tweed v. Liscomb, 60 N. Y. 559, 565, 19 Am. Rep. 211). The Habeas Corpus Act of May 27, 1697, (3 Hallam Const. Hist. 19) did nothing more, after a long struggle, than to confirm and firmly establish an existing right. (See I Bailey, Habeas Corpus and Special Remedies, 1). The principle migrated with the colonists to America and was inscribed in the Federal Constitution, as being among the immemorial rights which they had inherited from their ancestors. (*Ex parte* Yerger, 8 Wall. 85, 19 L. ed. 322). It was the same right which the Congress of the United States, in various enactments, (Philippine Bill, Sec. 5, par. 7; Philippine Autonomy Act, sec. 3, par. 7; Jones Law, sec. 21) extended to the Philippines as one of our fundamental rights. This same right in turn was written into our Constitution. The continuity of its history is unbroken. The present cannot trifle with a prerogative which, in all times, has been recognized as a fundamental safeguard of human liberty. Its beneficent result was demonstrated when, upon its implantation in the Philippines, it liberated a hundred individuals who were deprived of their liberty. (Malcolm, The Government of the Philippine Islands, p. 579).

Our Constitution provides: "In case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he (the President) may suspend the privileges of the writ of *habeas corpus*." (Article VII, sec. 11, sub-sec. [2]). The law, therefore, recognizes extraordinary circumstances when the privileges of the writ may be suspended. For "more fundamental than the right of the private individual is the right of the public person, the State, and more important than the convenience or even the existence of the citizen are the welfare and life of the civic whole, and thus we find that, fundamentally, no system of political or legal philosophy, save that of pure anarchism, can start with the individual. (II W. F. Willoughby, The Constitutional Law of the United States, sec. 724). This is the basic philosophy of this provision, recognized as well by English law. (1 Blackstone, Commentaries, p. 136).

What seems to be controverted in American law, as to the final repository of the power to suspend the privileges of the writ of habeas corpus is definitely concluded in our case by the same provision that gives the President the chief command of the military and na-

val forces, by stating clearly that he shall have such power. In the United States, while numerous authorities (*Ex parte* Bollman, 4 Cranch 75, 2 L. ed. 554; *Ex parte* Merryman, 17 F. Cas. N. 9487, Taney 246; Story on the Constitution, 5th edition, sec. 1342; Willoughby, *supra;* McDowell v. McCall, 1 Abbott U.S.R. 212; Griffin v. Wilcoz, 27 Ind. 383; In re Kemp, 16 Wisc. 681; In re Murphy, Woolworth, 141) hold that the power resides in Congress, there are also authorities that claim that the President, in fact, possesses the power. (*Ex parte* Field, 9 F. Cas. No. 4716, 5 Blatchf. 63; See also Willoughby, *supra;* 10 Ops. Atty. Gen. 74). And, indeed, in 1861, acting upon the advice of his Attorney-General, President Lincoln ordered the suspension of the privilege of the writ in places both within and without the area of active hostilities. This proclamation evoked a conflict which, in the words of Chief Judge Dunlop, has no "parallel in the judicial history of the United States." So in United States ex rel. Murphy v. Porter, 27 F. Cas. No. 16074a, 2 Hayw. & H. 349, President Lincoln ordered that the process issued by Judge Merrick be not served on his Provost-Marshal, Porter, as the privilege of the writ had been suspended, as regards soldiers in the Army of the United States in the District of Columbia. Chief Judge Dunlop and Judge Morsell filed separate opinions, condemning the usurpation of power by President Lincoln. But they could go only thus far, the former saying: "The issue ought to be and is with the President, and we have no physical power to enforce the lawful process of this court on his military subordinates against the president's prohibition." Thus, we see that, if legal theory and right be left on one side, the question of the depository of the power mentioned is largely decided by the capacity to command the overpowering force of physical power. This applies with special cogency to this case; for "in the division of the powers of government between the three great departments . . the judicial is the weakest of the powers which it exercised." [In re Neagle, 135 U. S. 1, 10 Sup. Ct. Rep. 658, 44 L. ed. 55 (1890); See also Chief Justice Taney's protest (Taney's Reports 246) filed in the case of *Ex parte* Merryman, holding the power to reside in Congress but felt his judicial incapacity to enforce his process against the President]. It is, of course, too much to suppose that, in the land, where freedom and democracy are the highest ideals, the government shall degenerate into anything less than a government of laws and not of men. (See United States v. Lee, 061, U. S. 196, 1 Sup. Ct. Rep. 240, 27 L. ed. 171, where Mr. Justice Miller wrote a classical passage on democratic government. President Lincoln, however, issued two other similar proclamations, one on August 13, 1862 and another on September 24, 1862).

The suspension of the privileges of the writ is a power that addresses itself to the vital right of individual liberty. The English and American peoples, to whom liberty is a priceless heritage, have given the power to suspend to their legislative bodies. (The opinion of both courts and distinguished jurists is in favor of Congressional authority. Indeed, Congress, realizing its power, passed a

law on March 3, 1863, providing that the President during the then existing rebellion, "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." It, thus, saw fit to authorize the President, rather than have him suppose that the power dwells in him by constitutional authority. On the Parliamentary power to suspend the privilege of the writ, (Wade and Philipps, Constitutional Law, 2nd. edition, pp. 365-366). In the hands, indeed, of a designing and tyrannical Magistrate, the exercise of said power may be attended with gross excesses and abuses to individual freedom. In times of stress, real or claimed to be so by the President, individuals, specially those against whom the President may have grievances or from whom he has reason to fear the exercise of an influence that tends to weaken his command of the social force, may not even so much as hope for a feeling of mental security. When that happens, then the President has dealt a telling blow against all principles of constitutional government, as we understand it. As Wilson said: "None the less, vague talk and ineffectual theory though there be, the individual is indisputably the original, the first fact of liberty. Nations are made up of individuals, and the dealings of government with individuals are the ultimate and perfect test of its constitutional character. A man is not free through representative assemblies, he is free in his own action, in his own dealings with the persons and powers about him, or he is not free at all. There is no such thing as corporate liberty. Liberty belongs to the individual, or it does not exist at all." (Wilson, Constitutional Government in the United States, p. 16). During those times contemplated in our Constitution, when the President has suspended the privileges of the writ the processes of the courts cannot effectuate their release.

The grant of power in our Constitution is contained in a few clauses, but their emanations shed into the massive sanctuary of civil liberty. The exercise of power is not attended with so much magnitude and pomp as readily will catch the eye or excite the imagination; but where such power is directed against the spiritual forces that compose the nation, then such power really is more commanding than that which directs the operations of the machinery of the government. And this properly is the correct view of the important power lodged in the hands of the Executive. It is probably, because of this that the American Constitution has seen fit to give the power to Congress, or that English law has confided it upon Parliament. Some States of the American Union even prohibit its suspension. (State ex rel. Barker v. Wurdeman, 254 Mo. 561; *Ex parte* Sullivan, 16 Ann. Cas. [Okla.] 719).

There was not a unanimity of opinion, even in the Constitutional Convention, as to the proper instrumentality that should wield this power. The Act of July 1, 1902, gave the power to the American President, or to the Governor-General with the approval of the Philippine Commission. (Sec. 5, par. 7 provides: "That the privilege of the writ

of *habeas corpus* shall not be suspended, unless in cases of rebellion, insurrecction, 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 with the approval of the Philippine Commission, whenever during such period the necessity for such suspension shall exist."). The Jones Law, however, provided for a radical departure by giving the Governor-General the exclusive power. (Sec. 21 provides: " . . and he (the Governor-General) 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 . . "). Largely guided by the decision of the Philippine Supreme Court in the case of Barcelon vs. Baker, (5 Phil. 87) Delegate Araneta presented the following provision: "In case of rebellion, insurrection, or invasion, when the public safety requires it, the National Assembly may suspend the privileges of the writ of habeas corpus. In case the National Assembly is not in session, the President may suspend the privileges of the writ of habeas corpus with the consent of the majority of the Supreme Court, but this suspension of the privilege of the writ of habeas corpus will be considered revoked if the President does not call a special session of the National Assembly within 15 days from the decree suspending the writ of habeas corpus or if the National Assembly fails to confirm the action of the President within 30 days." (Aruego, The Framing of the Philippine Constitution, Vol. 1, pp. 430-432). Here, indeed, is a provision that fully comprehends the scope and magnitude of this power and has provided for many bristling safeguards against its misuse. The Convention, however, more influenced by the Jones Law than by the case above cited, voted down the Araneta amendment and gave the power to the President.

The provision of our Constitution (Article VII, sec. 11, sub-sec. [2]) finds justification in the effort of the Convention to create a strong Executive. Much may be said against a strong Executive; but I still adhere to the sound and practical philosophy of Alexander Hamilton, whose writings still constitute a catechism of the American Federal Constitution. Said Hamilton: "A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill-executed, whatever it may be in theory, must be, in practice, a bad government." (The Federalist, No. LXIX, "Unity of the Executive Desirable). Like the powers of chief command of the military and naval forces and to declare martial law, the power to suspend the privilege of the writ of habeas corpus is an aid and an important implement in the proper execution of the laws. This obligation and power to execute the laws can be easily frustrated and rendered nil, if the judiciary, due to lack of power in the President, can issue writs of habeas corpus and liberate those whom the President confined as being dangerous to the public safety and peace. (Barcelon vs. Baker, *supra*).

Conformably to the Constitution, two requisites are required for the exercise of this power, first, that there exists an "invasion, insurrection, or rebellion or immi-

nent danger thereof" and; secondly, that "the public safety requires it." The second when the first exists, is one as to which the executive decision must, of necessity be final. In the case of Murbury v. Madison, 1 Cranch 137, 164, Mr. Chief Justice Marshall declared: "By the Constitution of the United States the President is invested with certain important political powers, in the exercise of which he has to use his own discretion, and is accountable only to his country in his political character, and to his own conscience

The subjects are political: they respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive." The decision of the Executive as to the existence of the first, again, is conclusive. Thus, in Barcelon vs. Baker, a petition for the writ of habeas corpus, was presented for the first time the questions as to whether the decision of the Governor-General, exercised pursuant to the provisions of the Philippine Bill, was final. In fine, the question was the alleged power of the courts, claimed by the petitioner, to inquire into the facts necessitating the suspension of the privilege of the writ. The Supreme Court denied the petition and refused to inquire into the existence or nonexistence of the facts, both by reason of the classical theory of the separation of powers and of the practical policy necessary in the execution of the laws. On the latter point, the Court said: "It is the duty of the Governor-General to take such steps as he deems wise and necessary for the purpose of enforcing such laws. Every delay and hindrance and obstacle which prevents a strict enforcement of laws under the conditions mentioned necessarily tends to jeopardize public interests and the safety of the whole people. If the judicial department of the Government, or any office of the Government, has a right to contest the orders of the President or of the Governor-General under the conditions above supposed, before complying with such orders, then the hands of the President or the Governor-General may be tied until the very object of the rebels or insurrectos or invaders has been accomplished." (5 Phil. 95).

The Constitution provides, it should be observed, not for the suspension of the writ itself, but only of its privileges. (Ferris, The law of Extraordinary Legal Remedies, sec. 60; *Ex parte* Milligan, 4 Wallace 2, 131, 18 L. ed. 281: *Ex parte* Vallandigham, 1 Wallace 243; 17 L. ed. 589). What, therefore, it may be asked, are the privileges of this writ? This question was squarely presented in the petition for habeas corpus in the case of In re Fagan. (8 F. Cas. No. 4604, 2 Spr. 91). The writs were issued on September 14, 1863. Returns were made on the 15th and 16 of the same month and year, while a proclamation, suspending the privilege of the writ, was issued on September 15, 1863. The petitioners claimed that the writs, having been issued before the proclamation and served and returned, became *functus officio* and would, thus, no longer be suspended by the proclamation. The court, therefore, inquired into what the proclamation suspended. "Is it merely the privilege of having judicial inquiry made into the causes of imprisonment, and a discharge, if the detention be found to be unlawful? " The court

said: "I am constrained to believe that if the president's proclamation has suspended the privilege of the writ of habeas corpus in the cases now before me, I ought not to proceed further, being precluded from granting the privilege, benefit, or relief which they ask." The suspension of the privilege is an absolute denial of the right to demand an investigation into the cause of the detention. (State v. Towery, 143 Ala. 48, 39 S. 309; Macready v. Wilcox, 83 Conn. 321). The privileges were denied and the petition was consequently denied.

The suspension of the privilege of the writ does not deprive the courts of the right to issue it. It merely furnishes a legal ground for a refusal to obey it. (*Ex parte* Vallandigham, 1 Wallace 243; 17 L. ed. 589). The case of In re Fagan further states that the certificate, on oath, of the officer holding the prisoner in restraint, stating the cause of detention, shall be conclusive upon the courts. It seems that the officer may even refuse to give the reason for the detention. (*Ex parte* Milligan, 4 Wallace 2).

The suspension of the privilege, however, is limited to the refusal to obey the writ and, therefore, does not authorize an illegal arrest nor does it validate an arrest illegally made. (Pomeroy, Constitutional Law, sec. 708; *Ex parte* Milligan, *supra*). The operation, therefore, of the suspension is to enable the executive agents "to cause the arrest and detention of obnoxious or suspected persons, without regular process of law, and to deprive those persons of the right to an immediate hearing and to be discharged if the cause of their arrest is found to be unwarranted by law." (Black on Constitutional Law, 4th. edition, sec. 267). The persons executing the illegal arrest will be responsible criminally or civilly for their acts. (Willoughby, *supra*). This practically is the only remedy against the arbitrary exercise of this power, and only after the mischief has been committed and the individual right to liberty outraged.

The suspension of the privilege comes as a result, usually, of the declaration of martial law, about which we reserve another discussion. Both these powers—to suspend the privilege of the writ of habeas corpus and to declare martial law—are subject to the control of the American President during, at least, the Commonwealth period.

We thus, see the searching extent of this power, which is necessary in the proper execution of the laws, and is, and can be to a considerable extent, destructive of personal freedom in the hands of a tyrant. The Filipino people have voted for a strong Executive, vouchsafed to be more consonant with our traditions than a weak one would be. We realize that there is no power at the disposal of the government which cannot be misused or abused. In the administration of the government, therefore, we rely upon the checks which all governments, whatever may be their form, have provided; we rely, as all free peoples must rely, upon what Wilson calls, "the atmosphere of opinion," upon which alone can safely rest all kinds of government. When all finical definitions of power and the attempts to create a perfect governmental machine, were it possible, have failed, we can cling safely still upon the moral and spiritual forces that compose the nation.