In re Kemp
16 Wis. 382 (1863)

This Civil War-era case provides another example of the state Supreme Court observing the rule of law at a time when that was very difficult. In this case, the Court unanimously ruled that President Abraham Lincoln could not suspend the writ of habeas corpus *(which preserves one's right to due process) for civilians when marshal law was not in effect. Separate opinions were written by each justice: Chief Justice Luther S. Dixon, Justice Byron Paine and Justice Orsamus Cole.*

In this case, the Wisconsin Supreme Court faced a crisis, for the justices were loyal to the Union but also bound to observe the rule of law. In the end, they decided that President Lincoln could not be given any special wartime powers, even if it meant losing the war.

Here are the facts: On November 10, 1862, with the Civil War dragging on and casualties mounting, Wisconsin witnessed its worst draft riot. On the day set for the draft, Nicholas Kemp and a large mob attacked and destroyed federal draft headquarters and prevented the draft from taking place. The mob assaulted and stoned federal officials and rampaged through Port Washington's (Ozaukee County) streets, leaving behind fires and destruction.[*]

Governor Edward Salomon requested that military troops seize the men involved. Two days later, Kemp was arrested and imprisoned at Camp Randall.

On December 4, the Wisconsin Supreme Court issued a writ of *habeas corpus* to General W. L. Elliot, commander of the Northwest Department, ordering him to bring Kemp before the Court on December 16. The Court said that Kemp's "riotous behavior," if proven, violated state law and therefore, only a civil or criminal tribunal could order his detention—making Kemp's military imprisonment illegal.

Elliot responded by saying he held the prisoner by order Number 141,[**] issued by Lincoln, which declared all those offering "resistance to volunteer enlistments or militia draft" subject to martial law and made legal the suspension of the writ of *habeas corpus*. The U.S. attorney general also wrote a letter to the Court supporting Elliot's position.

Kemp, the petitioner, was represented by Attorney Edward G. Ryan (who later joined the Wisconsin Supreme Court and served as chief justice from 1874-1880). The respondent chose not to appear before the Court.

The Court addressed three main points in this case:

- the legality of a suspension of *habeas corpus;*
- state of law in Wisconsin (was martial law declared?) and
- the president's power to change law.

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[*] From articles by Joseph A. Ranney.

[**] Order 141 (issued on September 24, 1862) said: "all persons discouraging volunteer enlistment, resisting militia drafts, or guilty of any disloyal practice affording aid and comfort to rebels against the authority of the United States, shall be subject to martial law, and liable to trial and punishment by courts martial or military commissions. Second, that the writ of *habeas corpus* is suspended in respect to all persons arrested, or who are now or hereafter during the rebellion shall be imprisoned in any fort, camp, arsenal, military prison, or other place of confinement. By any military authority, or by sentence of any court martial or military commission."

Addressing the first issue, Chief Justice Dixon referred to Article I, Section 9 of the Constitution[***] which states that a writ of *habeas corpus* cannot be suspended "unless when in Cases of Rebellion or invasion the public Safety may require it." He said that Kemp's actions did not endanger public safety, thus the suspension was illegal.

Justice Cole acknowledged that the president, by order of Chapter 201, Laws of the United States, could call a militia draft, but could not declare "the act of discouraging enlistments or resisting militia draft" subject to martial law. He further stated that allowing military jurisdiction and suspending *habeas corpus* in this circumstance would "render void all the guaranties of personal rights secured by the Constitution."

Because of Wisconsin's geographic distance from the "theater of war" and because civil authorities were able to preserve the order, the Court unanimously agreed that the state was not under martial law. Since this was the case, military commanders had no authority to imprison Kemp.

The Court also found that the president's order, Number 141, changed the existing laws. Paine wrote: "The power to issue the writ is given by law. It requires a law to change a law, and the president cannot make a law." The responsibility to change and write law rested then, as it does today, in Congress; the president's charge was to execute existing law, a distinction which applied even in war time.

In his opinion, Paine also considered justifications made by the U.S. attorney general, who argued that the president had the "political power" to "arrest those whom he believes to be friends of and accomplices in the insurrection." The attorney general wrote that the judicial branch, having no "political power," could not "take cognizance of the political acts of the president, or undertake to reverse his 'political decisions.'" Paine responded:

> On the contrary, that matter [the writ of *habeas corpus*] was deemed of such vital importance that the people regulated it in the fundamental law of their politics, and provided that "no person shall be deprived of his life, liberty or property without *due process of law*." The constitution knows no "political" process, no political cause of imprisonment. There must be "a process of law," a legal cause of restraint. And the power to determine what is a legal imprisonment, and to discharge from any that is illegal, is, except when the writ is suspended, a power conferred on the judicial department.

While the Wisconsin Supreme Court ruled that the writ of *habeas corpus* could not lawfully be suspended, they did not free Kemp. Hoping to avoid a clash between state and federal government they instead issued their opinion, believing, as Cole stated: "They [federal authorities] will undoubtedly review their action, or take such steps in the premises as may be consistent with justice and public tranquillity."

Lincoln, deeply concerned about Dixon's decision and having doubts about whether the U.S. Supreme Court would reverse the Wisconsin decision, decided nonetheless to risk an appeal. Before it was filed, however, Congress (in March 1863) authorized him to suspend *habeas corpus*.[****]

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[***] U.S. Constitution, Article I: "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."

[****] From articles by Joseph A. Ranney.