



CONSTITUTIONAL CONNECTION

To create a context for this lesson, students complete **Constitutional Connection: War and the Constitution.**

LINCOLN AND HABEAS CORPUS

OVERVIEW

The “Great Writ” or *habeas corpus* has been an essential civil liberty guaranteed since *Magna Carta*. In listing powers denied to Congress, the Constitution notes that “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.” In 1861, Abraham Lincoln invoked this power of Congress—which was not in session—to suspend *habeas corpus* in certain areas. The next year, as he believed the civil justice system was inadequate to deal with the rebellion, he expanded the suspension throughout the United States and established military tribunals to try citizens charged with disloyalty. In this lesson, students explore Lincoln’s suspension of *habeas corpus* and constitutional issues surrounding it.

OBJECTIVES

Students will:

- explore the events that led to President Lincoln’s suspension of *habeas corpus*.
- understand the Supreme Court cases *ex parte Merryman* and *ex parte Milligan*.
- assess the constitutionality of Lincoln’s actions.
- evaluate Lincoln’s attempt to balance liberty and security during the Civil War with his suspension of *habeas corpus* in certain areas and eventually the entire nation.

CRITICAL ENGAGEMENT

QUESTION

Did President Abraham Lincoln have the constitutional power to suspend *habeas corpus* during the Civil War?

MATERIALS

- **Handout A:** Abraham Lincoln and *Habeas Corpus*
- **Handout B:** A Proclamation
- **Handout C:** Excerpts from the United States Constitution
- **Handout D:** Case Briefing Sheet
- **Handout E:** The Ruling

BACKGROUND/HOMEWORK

Have students read **Handout A: Abraham Lincoln and *Habeas Corpus*** and answer the questions.

WARM UP [10 minutes]

- A. Put up an overhead of **Handout B: A Proclamation**. Point out the questions, and have students listen for the answers as you read it aloud. Then go over the answers as a large group.

- B. Point out to students that in 1861, Lincoln suspended *habeas corpus* in some areas. This 1862 suspension of *habeas corpus* covers the entire nation.

ACTIVITY [30 minutes]

- A. Tell students they will now “try” the case of “Mr. Milligan.” Distribute **Handout C: Sections of the United States Constitution**. Read aloud the scenario of Mr. Milligan, who has been sentenced to death for disloyalty by a military court. Divide the class into groups of appropriate size for: attorneys for Mr. Milligan, attorneys for the US, and the Justices of Supreme Court.
- B. Give each group a copy of **Handout D: Case Briefing Sheet**. Have groups complete **Handout D** using **Handouts A, B, and C**.
- C. With about twenty minutes remaining, allow attorneys for the government to make their case, followed by attorneys from Mr. Milligan.
- D. Supreme Court members should then deliberate and announce their verdict.

WRAP-UP [10 minutes]

- A. Tell students that they were debating an actual Supreme Court case from 1866. Using an overhead of **Handout E: The Ruling**, go over the information and ask students if they agree with the Court. Was Lincoln’s action constitutional?
- B. Ask students how they would assess Lincoln’s attempt to balance the “strength” of the government with the “liberties of its people”?

HOMEWORK

Have students make a Venn diagram comparing and contrasting the constitutional issues in *ex parte Merryman* (1861) and *ex parte Milligan* (1866).

EXTENSION

Issues of *habeas corpus* have emerged with the wars in Afghanistan, Iraq, and the War on Terror. Have students research Supreme Court cases involving *habeas corpus* such as *Hamdi v. Rumsfeld* (2004); *Hamdan v. Rumsfeld*, (2006); and *Boumediene v. Bush* (2008).

THE ISSUES ENDURE

Have students read President Barack Obama’s executive order closing Guantanamo Bay. What does Obama say about *habeas corpus*? Do you agree with him? The order can be found at: www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities.

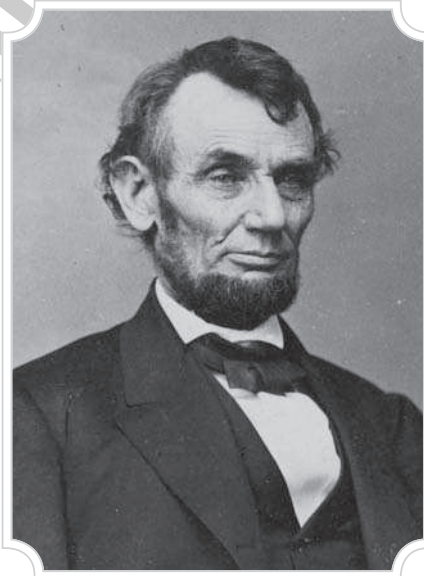
A ABRAHAM LINCOLN AND HABEAS CORPUS

President Abraham Lincoln said in 1864, “It has long been a grave question whether any government, not too strong for the liberties of its people, can be strong enough to maintain its existence in great emergencies.” Leading the United States through civil war, Lincoln had to negotiate this eternal tension between liberty and order.

HABEAS CORPUS AND THE CONSTITUTION

One key safeguard for liberty is the privilege of *habeas corpus*. *Habeas corpus* is the power of a judge to demand the government show cause for putting someone in jail. In other words, *habeas corpus* is what prevents the government from arresting people who have not committed crimes and locking them up without having to answer to anyone. A writ of *habeas corpus* requires that the Executive Branch bring the arrested person to court—literally, the phrase is Latin for “you shall have the body to be subjected to examination” (*habeas corpus ad sub-jiciendum*). *Habeas corpus* has also been called “the Great Writ,” and has its roots in the *Magna Carta* of 1215.

The Founders knew *habeas corpus* was not only a traditional privilege, but also an essential safeguard of freedom. The Constitution guarantees that “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 provision appears in Article I, Section 9, which lists limits on the powers of Congress.



HABEAS CORPUS AND THE CIVIL WAR

By the spring of 1861, South Carolina, Virginia, North Carolina, Tennessee, and the rest of the Confederacy had seceded from the Union. Maryland, which was also a slave state, seemed ready to join the Confederacy as well. If Maryland seceded, the US capital would have been surrounded by the Confederate States of America.

President Lincoln, believing that the existence of the United States was in danger, suspended writs of *habeas corpus*. The suspension only applied within Maryland and parts of Midwestern states. Congress was not in session. But Lincoln believed that his authority to suspend the writs came from his power as Commander in Chief of the military. Article II, section 2 of the Constitution states, “The President shall be commander in chief of the Army and Navy of the United States.”

Lincoln gave the following instructions to the Commanding General Army of the United States:

“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... 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 of Maryland was arrested for being “an active secessionist sympa-

thizer.” He was also charged with communication with the Confederates and with treason. Merryman wanted to be removed from prison and charged in open civilian court.

The case, *ex parte Merryman* (1861), came before Supreme Court Justice Roger Taney, sitting as a circuit court judge. (The Supreme Court was not in session.) Taney’s strongly worded opinion asserted two things. First, only Congress, and not the President, had the power to suspend *habeas corpus*. Secondly, even if the privilege of the writ of *habeas corpus* had been suspended by act of Congress, only someone in the military could be held and tried by a military commission.

Taney asserted that the power to suspend *habeas corpus* was not given to the President, and could not be inferred from any of the President’s listed duties. Instead, the conditions for its suspension were listed in Article I, which deals with the powers of Congress. Taney quoted past Supreme Court Justices who had written that the power to suspend *habeas corpus* belonged to Congress. Taney believed that Lincoln was violating the Constitution’s provisions, guarantees, and checks and balances.

He wrote, “[I]f the authority which the Constitution has confided to the judiciary department and judicial officers[to judge the legality of imprisonments], 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...”

PRESIDENT LINCOLN’S RESPONSE

President Lincoln disregarded Taney’s order and continued ordering suspensions in additional areas. He claimed that his oath to preserve, protect, and defend the Constitution required him to take these actions. Speaking before Congress on July 4, 1861, Lincoln asked ironically, “Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?”

On Sept. 24, 1862, Lincoln suspended *habeas corpus* throughout the nation. Anyone rebelling against the US would be jailed, denied a jury trial, and tried in military court instead. In March of 1863, two years after Lincoln’s first suspension order, Congress formally suspended *habeas corpus* with the passage of the *Habeas Corpus Act*.

COMPREHENSION AND CRITICAL THINKING QUESTIONS

1. What is *habeas corpus*?
2. What does the Constitution say about *habeas corpus*?
3. What were the facts of the case in *ex Parte Merryman*?
4. How did Justice Taney rule? Do you agree with his ruling?
5. When Lincoln asked, “Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?” what did he mean?



A PROCLAMATION

Directions: Read President Lincoln's proclamation and answer the questions that follow.

A PROCLAMATION, SEPTEMBER 24, 1862

Whereas, it has become necessary to call into service not only volunteers but also portions of the militia of the States by draft in order to suppress the insurrection existing in the United States, and disloyal persons are not adequately restrained by the ordinary processes of law from hindering this measure and from giving aid and comfort in various ways to the insurrection;

Now, therefore, be it ordered, first, that during the existing insurrection and as a necessary measure for suppressing the same, all Rebels and Insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to Rebels against the authority of United States, shall be subject to martial law and liable to trial and punishment by Courts Martial or Military Commission:

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 the sentence of any Court Martial or Military Commission.

In witness whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed.

Done at the City of Washington this twenty fourth day of September, in the year of our Lord one thousand eight hundred and sixty-two, and of the Independence of the United States the 87th.

ABRAHAM LINCOLN

1. Who wrote this document, and when was it written? _____

2. What two legal measures does this document announce? _____

3. What two reasons does Lincoln give for the measures? _____



SECTIONS OF THE UNITED STATES CONSTITUTION

Directions: Read the scenario below. Does the President have the power to suspend *habeas corpus* throughout the entire nation, hold Mr. Milligan, and try him a military court? Use the documents below, along with information from Handouts A and B, to prepare an argument for or against the President.

It is 1866. Mr. Milligan has been charged with conspiracy against the United States government; affording aid and comfort to rebels against authority of the US; inciting insurrection; disloyal practices; and violation of the laws of war.

Mr. Milligan is a private citizen living in Indiana. He is not connected with military service, and had not been a resident of any of the states in the rebellion or a prisoner of war. He was not participating in hostile activities against the US when he was captured.

Mr. Milligan has petitioned the Supreme Court for a writ of *habeas corpus*.

SECTIONS OF THE UNITED STATES CONSTITUTION (1787)

Article I, Section 8. The Congress shall have power to ... provide for the common defense and general welfare of the United States...

Article I, Section 9. ...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.

Article II, Section 2. The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states...

Article II, Section 3. [The President] shall take care that the laws be faithfully executed...

Amendment VI (1791). In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.



CASE BRIEFING SHEET

Directions: Use the chart below to help you prepare to try the case of Mr. Milligan.

WHO ARE YOU? (*circle one*)

Attorney for Mr. Milligan
(arguing NO)

Attorney for the US
(arguing YES)

Supreme Court Justice
(deciding the case)

CONSTITUTIONAL QUESTION

Does the President have the constitutional power to suspend *habeas corpus* throughout the entire nation, hold Mr. Milligan, and try him a military court?

DOCUMENT/EVENT	DOES THIS SUPPORT MY CASE? WHY OR WHY NOT?
<i>Article I, Sections 8 and 9</i>	
<i>Article II, Section 2</i>	
<i>Article II, Section 3</i>	
<i>The Sixth Amendment</i>	
<i>Other information:</i> e.g. history, precedent	



THE RULING

In *ex parte Milligan* (1866), the Supreme Court ruled that the President could not create military tribunals to try citizens as long as civil courts were operational. Mr. Milligan had the right to be tried by a jury in a civil court.

The Court noted the government's power to suspend *habeas corpus* in rebellion or invasion, but pointed out that the citizens' Sixth Amendment right to trial by jury needed to be preserved.

The Court reasoned that the Founders knew that "trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right [*habeas corpus*], and left the rest to remain forever inviolable."

The ruling also defined conditions for martial law and asserted the civilian power over the military. "Martial law [military control of the justice system] cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.... Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."