

## Handout C: Milligan and the Constitution

**Directions:** Read the scenario below. Even though Congress authorized the President to suspend *habeas corpus* with the passage of the *Habeas Corpus Act* in 1863, did the President have the power to hold Mr. Milligan and try him in a military court? Use the documents below, along with information from **Handouts A and B**, to prepare an argument for or against the President.

Focus  
Question

FOR AND AGAINST

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 U.S.; 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 U.S. 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.



## Handout 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 subjiciendum*). *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 sympathizer.” 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

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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*.

## Handout B: Chief Justice Taney and the *Merryman* Ruling

**Directions:** Read the excerpt below of Taney’s opinion in the case and then answer the questions that follow.

**Background:** John Merryman was a prominent Baltimore-area planter and First Lieutenant in the Baltimore County Horse Guards. Maryland Governor Thomas Hicks had ordered Merryman to aid in the destruction of several bridges north of Baltimore to prevent troops from Pennsylvania from marching through Baltimore and inciting riots. Merryman was arrested in May, 1861, for being “an active secessionist sympathizer.” He was also charged with communication with the Confederates and with treason, and he was held, without a warrant, at Fort McHenry near Baltimore. Merryman wanted to be removed from prison and charged in open civilian court, and he quickly filed a petition for a writ of *habeas corpus* with Supreme Court Chief Justice Roger Taney, sitting as a circuit court judge. (The Supreme Court was not in session.)

Deciding the case, *ex parte Merryman* (1861) Taney issued the writ of *habeas corpus* and ordered General Cadwalader of Fort McHenry to appear in the circuit courtroom with Merryman in order to explain why he should remain in custody.

Cadwalader refused to appear, saying that Merryman was charged with treason, had admitted being ready to cooperate with those in rebellion against the United States, and that President Lincoln had suspended *habeas corpus* because it was necessary to do so for the public safety.

### Chief Justice Taney’s opinion

As the case comes before me, therefore, I understand that the President not only claims the right to suspend the writ of *Habeas Corpus* himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey Judicial process that may be served upon him.

No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the President claimed this power, and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise. For I had supposed it to be one of those points of constitutional law upon which there was

no difference of opinion, and that it was admitted on all hands that the privilege of the writ could not be suspended, except by act of Congress...

The Constitution provides, as I have before said, that “no person shall be deprived of life, liberty, or property, without due process of law.” It declares that “the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

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It provides that the party accused shall be entitled to a speedy trial in a court of justice.

And these great and fundamental laws, which Congress itself could not suspend, have been disregarded and suspended, like the writ of *habeas corpus*, by a military order, supported by force of arms. Such is the case now before me, and 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.

In such a case my duty was too plain to be mistaken. I have exercised all the power which the Constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible, that the officer, who has incurred this grave responsibility, may have misunderstood his instructions, and exceeded the authority intended to be given him. I shall, therefore, order all the proceedings in this case, with my opinion, to be filed, and recorded in the Circuit Court of the United States for the District of Maryland, and direct the clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer, in fulfillment of his constitutional obligation to "take care that the laws be faithfully executed," to determine what measures he will take to cause the civil process of the United States to be respected, and enforced.

### Critical Thinking Questions – Answer These.

1. In what ways did Chief Justice Taney charge that President Lincoln had disregarded rights guaranteed to Merryman?
2. According to Taney, who has the power to suspend *habeas corpus*?
3. Put this passage from Taney's opinion in your own words: "[I]f 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."
4. What did Taney order the clerk of the Circuit Court to do, and why?
5. In your own words, sum up the best argument you can to support President Lincoln's suspension of *habeas corpus*. Then, sum up the best argument you can to support Taney's position in *ex parte Merryman*. With which position, if any, do you agree? Explain your position.

## Handout E: 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."

