

Background: Originating in England, and later adopted and written into The United States' Constitution, *habeas corpus* has always been viewed as a tool in checking abusive government action. The right to be brought before a judge to contest one's detention is a fundamental right of our judicial system. During times of war, the right to habeas corpus has been considerably restrained. This lesson explores the extent and controversy surrounding wartime restraint and suspension of habeas corpus.

Source A: Rights of the Accused: American Government Macgruder's. (2005) pg. 576-7

The writ of habeas corpus, sometimes called the writ of liberty, is intended to prevent unjust arrests and imprisonments. It is a court order directed to an officer holding a prisoner. It commands that the prisoner be brought before the court and that the officer show cause-explain, with good reason-why the prisoner should not be released.

The right to seek a writ of habeas corpus is protected against the National Government in Article I, Section 9 of the Constitution. That right is guaranteed against the States in each of their own constitutions.

The Constitution says that the right to the writ cannot be suspended, "unless when in Cases of Rebellion or Invasion of the public Safety may require it." President Abraham Lincoln suspended the writ in 1861. His order covered various parts of the country, including several areas in which war was not then being waged. Chief Justice Roger B. Taney, sitting as a circuit judge, held Lincoln's action unconstitutional.

Taney ruled that the Constitution gives the power to suspend the writ to Congress alone. Congress then passed the Habeas Corpus Act of 1863. It gave the President the power to suspend the writ when and where, in his judgment, that action was necessary. In *Ex parte Milligan*, 1866, the Supreme Court ruled that neither Congress nor the President can legally suspend the writ where there is no actual fighting nor the likelihood of any.

Source A Questions for Consideration:

1. What is the writ of habeas corpus intended to do? Cite evidence from the text.
2. What reasons are giving for including the writ of habeas corpus in the United States' Constitution? List them below.
3. What branch of government has the power to suspend habeas corpus?
4. Based on the text, would you describe the constitutional authority to suspend habeas corpus as clear, murky, definitive, or interpretable? Use evidence from the text to support your answer.
5. Explain the significance of the Supreme Court decision *Ex parte Milligram* in 1866? Be specific.

Source B: President Lincoln's Proclamation 104- Suspending Habeas Corpus Throughout the United States. September 15, 1863

By the President of The United States

Proclamation

Whereas the Constitution of the United States has ordained 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; and

Whereas a rebellion was existing on the 3d day of March, 1863, which rebellion is still existing; and

Whereas by a statute which was approved on that day it was enacted by the Senate and House of Representatives of the United States in Congress assembled that during the present insurrection the President of the United States, whenever in his judgment the public safety may require, is authorized to suspend the privilege of the writ of *habeas corpus* in any case throughout the United States or any part thereof; and

Whereas, in the judgment of the President, the public safety does require that the privilege of the said writ shall now be suspended throughout the United States in the cases where, by the authority of the President of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy, or officers, soldiers, or seamen enrolled or drafted or mustered or enlisted in or belonging to the land or naval forces of the United States, or as deserters therefrom, or otherwise amenable to military law or the rules and articles of war or the rules or regulations prescribed for the military or naval services by authority of the President of the United States or for resisting a draft, or for any other offense against the military or naval service:

Now, therefore, I, Abraham Lincoln, President of the United States, do hereby proclaim and make known to all whom it may concern that the privilege of the writ of *habeas corpus* is suspended throughout the United States in the several cases before mentioned, and that this suspension will continue throughout the duration of the said rebellion or until this proclamation shall, by a subsequent one to be issued by the President of the United States, be modified or revoked.

Source B Questions for Consideration:

1. What do you learn about this source from the title information in the top two lines?

2. How does President Lincoln draw his justification for suspending habeas corpus? Cite Lincoln's reasons.

3. When Lincoln issued this suspension, the military campaigns in Civil War were limited to a small number of states. What reasons does he consider for expanding the suspension to the entire United States.

4. What conditions must occur for the suspension to be lifted?

5. Why do you think, in times of crisis, power tends to concentrate in individual leaders rather than elected bodies (Congress)?

6. Did the conditions at the time justify Lincoln's actions? Justify your answer.

Source C: From Chief Justice Roger Taney’s Decision in *Ex Parte Merryman 1861*

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.”

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 [seized] 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.

Source C Questions for Consideration

1. What do you learn about this source from the title information in the top two lines?
2. What does Taney charge has been violated in this particular case?
3. Does Taney believe the writ of habeas corpus can be suspended? Cite evidence to support your position.

4. Why doesn't Taney believe his ruling will impact the suspension of the writ of habeas corpus? Justify your response with the text.

5. Based on these documents, what is the conflict between Taney and Lincoln's interpretation of the suspension of the writ of Habeas Corpus?

Source D: Excerpt of *Justice David Davis' Opinion in Ex Parte Millgan, 1866.*

It is the birthright of every American citizen when charged with crime, to be tried and punished according to law.... By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people.

Civil liberty and ... martial law cannot endure together...in the conflict, one or the other must perish.

The nation...has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this [broad power of martial law] be conceded, the dangers to human liberty are frightful to contemplate.

Source D Questions for Consideration:

1. What kind of source is this? How much time has passed between the decision made in Source C and this source?
2. What phrases in this passage explain that the court did not rule in favor of the Lincoln Administration? Cite line numbers.
3. According to Davis how are people protected from tyrannical rulers? Cite line numbers.
4. When was this ruling? How does this add to your understanding of habeas corpus?
5. How did early courts deal with idea of martial law and the suspension of habeas corpus? Did this deter the Lincoln administration? What does this say about executive power in times of war?

Source E: Excerpt of Justice O'Connor's opinion in *Hamadi V. Rumsfeld, 2004*

At this difficult time in our Nation's history, we are called upon to consider the legality of the Government's detention of a United States citizen on United States soil as an "enemy combatant" and to address the process that is constitutionally owed to one who seeks to challenge his classification as such. The United States Court of Appeals for the Fourth Circuit held that petitioner's detention was legally authorized and that he was entitled to no further opportunity to challenge his enemy-combatant label. We now vacate and remand. We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker...

The threshold question before us is whether the Executive has the authority to detain citizens who qualify as "enemy combatants." There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such...

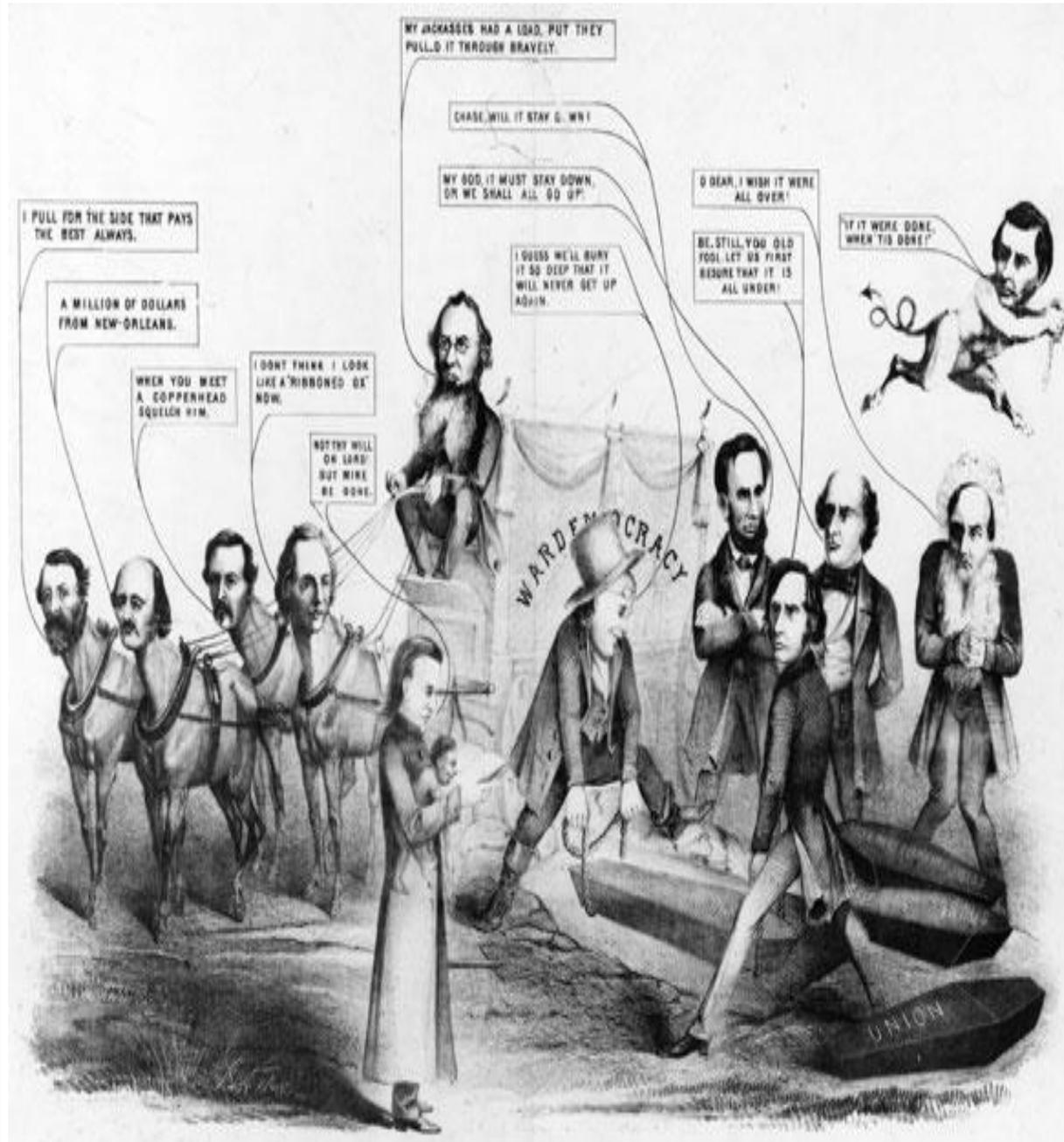
The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not reach the question whether Article II provides such authority, however, because we agree with the Government's alternative position, that Congress has in fact authorized Hamdi's detention, through the AUMF.

Our analysis on that point, set forth below, substantially overlaps with our analysis of Hamdi's principal argument for the illegality of his detention.

Source E Questions for Consideration:

1. What kind of source is this? How much time has passed since Source D was written?
3. What issue is the Supreme Court ruling upon in this decision?
4. How did the Supreme Court rule regarding due process? Cite examples from the text.
5. According to the Supreme Court who has the authority to suspend habeas corpus? Cite evidence from the text.

Source F: *The Grave Of The Union Political Cartoon.* Bromley and Co. New York, 1964



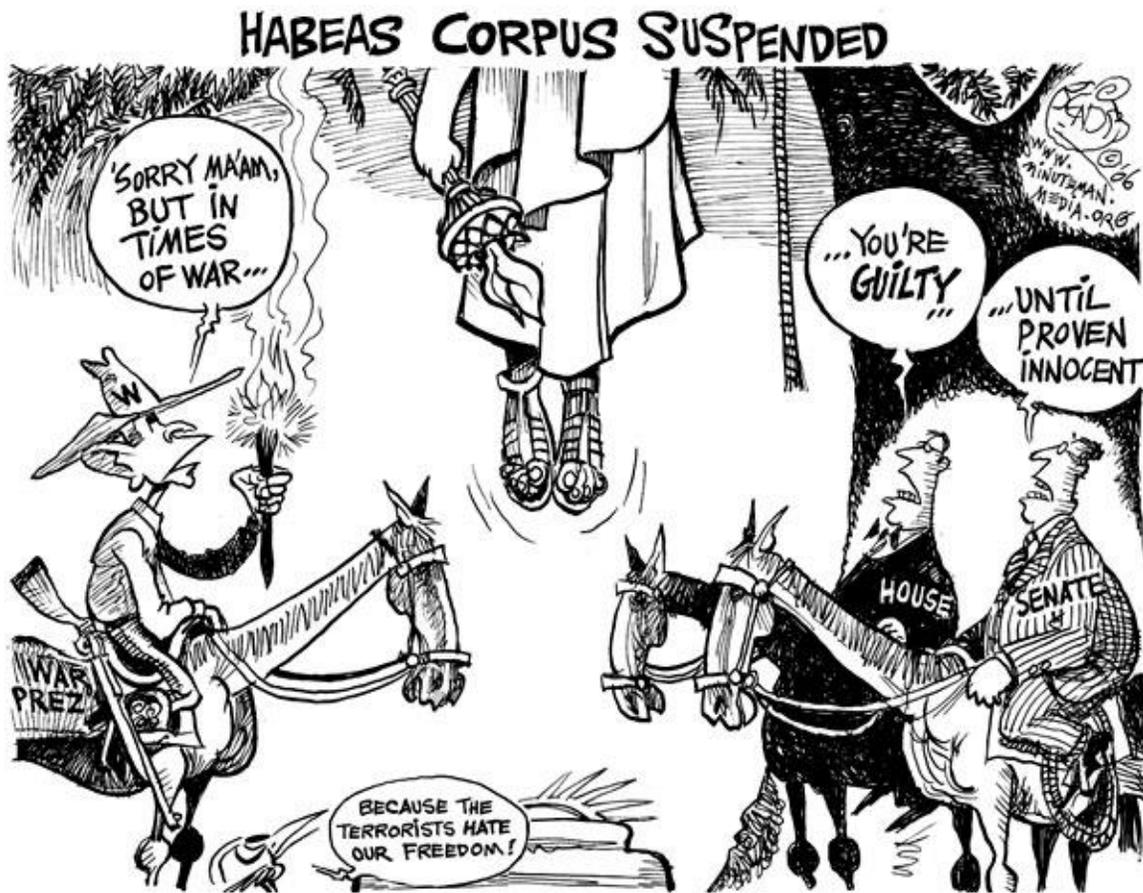
Notes for students: The first in four anti-Lincoln satires published by Bromley & Co. in New York. In 1862, Lincoln unhappy with Attorney General Edward Bate's slow enforcement of the Conspiracies Acts, Lincoln issued a proclamation, "directing trial by court martial or military commissions of all persons who impeded the draft, discouraged enlistments or committed other disloyal acts." In doing so he arrested approximately thirty-eight thousand people, denied prisoners habeas corpus, and held them in jail until trial. The cartoonist depicts Lincoln and his administration burying the Constitution. Secretary Stanton is shown driving a hearse "War Democracy" drawn by four horses with the heads of war-time Democrats (left to right): John Cochrane, Benjamin F. Butler, Thomas Francis Meagher, and Daniel S. Dickinson. Journalist Horace

Greeley and Massachusetts senator Charles Sumner bury a casket labeled "Constitution." Three other caskets, "Union," "Habeas Corpus," and "Free Speech Charge Express," wait near their feet. Lincoln watches with folded arms, asking, "Chase will it stay down?" Treasury Secretary Salmon P. Chase replies, ". . . It must stay down. Or we shall all go up!" Abolitionist preacher Henry Ward Beecher presides over the ceremony with a black child in his arms, exclaiming, "Not thy will oh Lord! But mine be done." Above them Secretary of War Edwin M. Stanton, who is drawn as a devil with a knife, cries, "If it were done, when 'tis done."

Source F Questions for Consideration:

1. List at least ten details you notice in this cartoon.
2. What do the coffins read? What is being put to death?
2. What is the attitude of the cartoonist? How can you tell? Justify your response.
3. Do you recognize any of the other characters in the cartoon? How does the cartoonist position them or represent them? What does this tell you?
4. What is Secretary of the Treasury implying with his words to President Lincoln?

Source G: Danville Vermont Historical Society Cartoon, post September 11, 2001



Source G Questions for Consideration:

1. List at least 10 details you notice in this cartoon.
2. What is the topic of this cartoon?
3. How is the cartoonist portraying executive power during times of war? Justify your response?
4. What is cartoonist suggesting about the relationship between the branches and civil liberties during wartime?

Writing Task

Informational Prompt: Rewrite the section “Habeas Corpus” in your textbook, to include a more detailed and nuanced description of the controversies surrounding suspension of habeas corpus and wartime powers of an executive. Include evidence from sources B-G to cite evidence, providing the reader with a more complete and organized analysis of the history and controversy surrounding habeas corpus and civil liberties in the history of the United States. Your entry should be a half page to a page in length, (250-500 words).

Alternate Prompt: Take a position on the suspension of Habeas Corpus. Use either Lincoln or Taney’s position, using document citation to support your response.