

The Precedent of Power

Ex parte Merryman and the Boundaries of Executive Authority During the Civil War

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Interpretive Essay Submission

Featured Primary Source: Chief Justice Roger B. Taney's opinion in Ex parte Merryman
992 words

In April 1861, as seven Southern states seceded from the Union and Confederate sympathizers in Maryland threatened to sever the rail line to Washington, D.C., President Abraham Lincoln took a momentous step. He suspended the writ of habeas corpus along the Baltimore-Washington rail line, authorizing Union officers to detain suspects without judicial oversight to preserve national unity and protect public safety during an existential crisis.¹ Lincoln framed the rebellion as an “insurrection” threatening the heart of the republic, arguing that immediate action was necessary to prevent those in rebellion from undermining the war effort. However, this essential action vastly increased the power of the president to act unilaterally. And that, of course, led directly to fierce constitutional controversy. In *Ex parte Merryman* (1861), Chief Justice Roger B. Taney issued a defiant opinion that disputed Lincoln's authority. The ruling insisted that only Congress—and not the President—had the power to suspend the writ of habeas corpus.² Lincoln's strategy for dealing with Taney's rebuke was to rewrite the debate and set a controversial precedent for future presidential authority in times of crisis.³

On May 25, 1861, Union troops seized John Merryman, a Maryland planter alleged to have assisted the Confederacy by tearing up rail tracks, and detained him without charges at Fort McHenry.⁴ Merryman petitioned for a writ of habeas corpus that reached Chief Justice Taney,

¹ Abraham Lincoln, *Proclamation to Suspend Habeas Corpus Along Military Lines*, April 27, 1861, in *The Collected Works of Abraham Lincoln*, vol. 4, ed. Roy P. Basler (New Brunswick: Rutgers University Press, 1953), 430.

² *Ex parte Merryman*, 17 F. Cas. 144, 147–48 (C.C.D. Md. 1861).

³ Mark E. Neely Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York: Oxford University Press, 1991), 9.

⁴ *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861).

sitting as a circuit judge in Baltimore. He, in turn, issued a writ demanding Merryman's production. The military commander refused, citing Lincoln's order. In a landmark ruling on May 28, 1861, Taney declared that “the privilege of the writ could not be suspended, except by act of Congress” and underscored that “this article is devoted to the Legislative Department... and has not the slightest reference to the Executive Department.”⁵ Chief Justice Taney traced to English tradition, pointing out Parliament alone could suspend habeas corpus, and warned that if the President could suspend it at will, “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.”⁶ Emphasizing fundamental rights such as trial by jury and due process being overridden, Taney criticized Lincoln for exceeding constitutional bounds.⁷ Lacking a framework to enforce the decision, Taney sent the opinion to Lincoln, underscoring a deeply felt constitutional clash between the judiciary's rule-of-law principle and the executive's claim to wartime necessity.⁸

Rather than complying, Lincoln publicly defended his suspension. In his “Message to Congress” on July 4, 1861, he admitted the suspension but asked whether “all laws but one [should] go unexecuted, and the Government itself go to pieces, lest that one be violated?”⁹ According to Lincoln, the Suspension Clause’s failure to specify “which or who” could suspend

⁵ *Ex parte Merryman*, 17 F. Cas. 147-48.

⁶ *Ex parte Merryman*, 17 F. Cas. 152.

⁷ *Ex parte Merryman*, 17 F. Cas. 152-53.

⁸ *Ex parte Merryman*, 17 F. Cas. 153-54.

⁹ Abraham Lincoln, “Message to Congress in Special Session,” July 4, 1861, in *The Collected Works of Abraham Lincoln*, vol. 4, ed. Roy P. Basler (New Brunswick: Rutgers University Press, 1953), 430.

the writ, combined with the nation's urgent danger, made it all right for him, as Commander-in-Chief, to act without waiting for Congress, which was out of session.¹⁰ Attorney General Edward Bates reinforced this view, asserting that the President's war powers justified detaining those whose actions imperiled public safety.¹¹ Lincoln framed his choice as a necessary but reluctant break from peacetime practices to fulfill his constitutional obligation to "take care that the laws be faithfully executed."

Reactions were mixed within Lincoln's party. Many moderate Republicans accepted his necessity argument but expressed concern about the authority that was not checked. In August 1861, Senator Lyman Trumbull introduced a bill to the Senate that would authorize and regulate the suspension of habeas corpus, requiring military authorities to report detainees to federal courts within ten days and release any not indicted by a grand jury.¹² Trumbull's goal was to provide legal justification for Lincoln's earlier acts, and while doing so, he wanted to impose some judicial oversight. This reflected the desires of the moderate Republicans to find a balance between the necessary wartime acts and the preservation of constitutional rights.¹³ Nevertheless, the bill stalled because of worries that explicit congressional action might have sent the message that Lincoln had acted without authority initially. One contemporary observer put it this way:

¹⁰ Lincoln, "Message to Congress," 430-31

¹¹ Edward Bates, Opinion on the Suspension of the Privilege of the Writ of Habeas Corpus, July 5, 1861, in *Official Opinions of the Attorneys General of the United States*, vol. 10 (Washington: U.S. Government Printing Office, 1868,) 74-76.

¹² U.S. Congress, *Congressional Globe*, 37th Cong., 2nd Sess., August 1861, 220-27.

¹³ *Ibid.* 223-27

"Congress hesitated to deny the President's right, yet sought to temper it," illustrating deep ambivalence.¹⁴

Democrats and civil libertarians were far less forgiving. Ohio Congressman Clement L. Vallandigham condemned the administration's "repeated and persistent arbitrary arrests... the violation of... due process, trial by jury, and trial at all... all went down at a blow."¹⁵ Arresting Vallandigham and putting him on military trial for criticizing Lincoln only intensified the worries that permanent repression was afoot and highlighted the way emergency powers could be used to suppress dissent.¹⁶

In March 1863, after almost two years of unofficial practice, Congress enacted the Habeas Corpus Suspension Act, giving the President the power to suspend the writ retroactively and protecting Union officials from responsibility for any detentions that had taken place before the law's passage.¹⁷ The statute also required that detained persons be reported and that such detentions be subject to judicial review—a compromise intended to restore the constitutional order without infringing on needful wartime security. Lincoln signed it but continued to assert his inherent authority, reflecting the unresolved ambiguity over the scope of executive power in emergencies.¹⁸

¹⁴ George C. Sellery, "Lincoln's Suspension of Habeas Corpus as Viewed by Congress," *University of Wisconsin Bulletin, History Series* 1, no.3 (1907): 223.

¹⁵ Clement L. Vallandigham, "Speech on the War and Its Conduct," January 14, 1863, in *Congressional Globe*, 37th., 3rd Sess.

¹⁶ Vallandigham's military trial: see Neely, *Fate of Liberty*, 12-14.

¹⁷ Habeas Corpus Suspension Act, 12 Stat. 755. (March 3, 1863).

¹⁸ Amanda L. Tyler, *Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay* (Oxford: Oxford University Press, 2017), 32.

The suspension of habeas corpus by Lincoln was a necessary overreach to protect the Union, but it also reshaped the balance of constitutional powers. His strict measures helped secure troop movements, suppress subversion, and preserve the nation. Yet the Ex parte Merryman confrontation and subsequent legislative debates revealed deep concerns about executive prerogative. This dual legacy lives on: subsequent presidents, from Roosevelt's wartime internments to post-9/11 detentions, would call on Lincoln's precedent to justify emergency powers, while scholars and jurists would invoke Taney's warning to guard against an excessive concentration of power. When we consider Lincoln's audacious leadership during wartime and Taney's constitutional critique, we find ourselves in a perpetual American tension—how far must we stretch the law to save our democracy, and who will watch the watchmen when our very liberties hang in the balance?

Bibliography

Primary Sources

Ex parte Merryman, 17 F. Cas. 144 (Circuit Court, D. Md. 1861). Featured Primary Source: Gilder Lehrman Institute Collection #GLC00833. New York, NY: The Gilder Lehrman Institute of American History. Accessed June 4, 2025.

<https://www.gilderlehrman.org/collection/glc00833>

Abraham Lincoln. "Message to Congress in Special Session," July 4, 1861, in *The Collected Works of Abraham Lincoln*, vol. 4, ed. Roy P. Basler (New Brunswick, NJ: Rutgers University Press, 1953), 430. New Brunswick, NJ: Rutgers University Press, 1953. Accessed June 4, 2025.

<https://teachingamericanhistory.org/document/message-to-congress-in-special-session>

Clement L. Vallandigham. "Speech on the War and Its Conduct," January 14, 1863. In *Congressional Globe*, 37th Cong., 3rd Sess. Accessed June 4, 2025.

<https://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=035/llcg035.db&recNum=118>

Secondary Sources

Bates, Edward. *Opinion on Suspending the Privilege of the Writ of Habeas Corpus*, July 5, 1861. In *Official Opinions of the Attorneys General of the United States*, vol. 10, 74–76. Washington, DC: U.S. Government Printing Office, 1868.

Neely, Mark E., Jr. *The Fate of Liberty: Abraham Lincoln and Civil Liberties*. New York: Oxford University Press, 1991.

Rehnquist, William H. *All the Laws But One: Civil Liberties in Wartime*. New York: Alfred A. Knopf, 1998. Accessed Jun 4, 2025

Sellery, George Clarke. "Lincoln's Suspension of Habeas Corpus as Viewed by Congress." *University of Wisconsin Bulletin*, History Series 1, no. 3 (1907): 213-85.

Tyler, Amanda L. *Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay*. Oxford: Oxford University Press, 2017.

United States. *Habeas Corpus Suspension Act*, 12 Stat. 755 (March 3, 1863)