ESSENTIAL CIVIL WAR CURRICULUM

Civil Liberties During the Civil War

By **Frank J. Williams**

Two hundred and thirty-four years ago the founders created a nation whose citizens would be afforded certain unalienable rights—rights that remain an integral part of America today. Principles of "Life, Liberty, and the pursuit of Happiness,"[1] shaped the bedrock of our democracy. Later, in the Constitution, the founders guaranteed citizens specific civil liberties. One most well-known of the liberties afforded to citizens – the writ of habeas corpus –often is referred to as the "Great Writ of Liberty."[2] Habeas corpus[3] is the constitutionally authorized means by which a court may immediately assume jurisdiction and inquire into the legality of an individual's detention.[4] If a court concludes that an individual has been unlawfully detained, it is empowered to immediately release him or her.[5] Similarly, however, the founders also included in the Constitution numerous protections related to national security. In the end, the representatives of thirteen colonies approved a well-balanced set of guarantees, so that the nation would be safe and secure and so that its citizens would enjoy great liberties.

While all of these guarantees were critically important to the founders of our nation, history has demonstrated that it is not always easy for our nation's leaders to afford all of these guarantees without any restriction.

In April 1861, on the heels of the bombardment of Fort Sumter in Charleston Harbor by Confederate forces, Lincoln called for reinforcements to protect Washington, D.C.[6] Responding to Lincoln's call for state militias, the Sixth Massachusetts Regiment

1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
2. *See* ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 1 (2001).
3. The suspension clause, as set forth in Article I, Section 9, Clause 2 of the Constitution, reads: "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." U.S. CONST. art. I, § 9.
4. FREEDMAN, at 1.
5. *Id.*
6. Abraham Lincoln, Proclamation Calling Militia and Convening Congress (Apr. 15, 1861), *as reprinted in* 4 *The Collected Works of Abraham Lincoln,* 9 vols., eds. Roy P. Basler, at 430; *see also* ABRAHAM LINCOLN: A DOCUMENTARY PORTRAIT THROUGH HIS SPEECHES AND WRITINGS 160-62 (Don E. Fehrenbacher ed., 1964). Responding to the fact that Confederate troops had opened fire on Fort Sumter, Lincoln called out the militia of the several states of the Union and convened a special session

Essential Civil War Curriculum | Copyright 2010 Virginia Center for Civil War Studies at Virginia Tech

arrived in Baltimore, where riots congested the streets and the rioters attempted to prevent troops from reaching Washington.[7] The regiment from Massachusetts forged its way from one railroad station to another, sustaining twelve deaths with several more soldiers being wounded.[8] By then, the Civil War was underway. The nation's capital was in jeopardy, given that it was bordered by Virginia, a secessionist state, and Maryland, whose threats to secede were widely known.[9] Newspaper headlines loudly proclaimed the horror endured by the soldiers passing through Baltimore. Giving America a glimpse of that horror, *The New York Times* reported: "It is said there have been 12 lives lost. Several are mortally wounded. Parties of men half frantic are roaming the streets armed with guns, pistols and muskets . . . a general state of dread prevails."[10] In the days and weeks that followed, the city of Washington was virtually severed from the states of the North.[11] Troops stopped arriving,[12] telegraph lines were slashed,[13] and postal mail from the North reached the city only infrequently.[14]

Lincoln immediately saw the grave danger that the war would be lost if the Confederates seized the capital or caused it to be completely isolated, but he was reluctant to suspend the Great Writ.[15] Finally, prompted by the urging of his Secretary of State, William H. Seward, Lincoln, an attorney, concluded that the suspension of habeas corpus could not wait.[16] Although Congress was in recess, Lincoln, relying on the constitutional authorization that the framers had perceptively included years before, issued a proclamation suspending the writ, believing that his duty to protect the capital and the Union required such an action.[17]

---

of Congress.

7. DANIEL FARBER, LINCOLN'S CONSTITUTION 16 (2003).

8. An April 19, 1861 headline in the *New York Times* read: "Startling From Baltimore: The Northern Troops Mobbed and Fired Upon – The Troops Return the Fire – Four Massachusetts Volunteers Killed and Several Wounded – Several of the Rioters Killed." LINCOLN IN THE TIMES: THE LIFE OF ABRAHAM LINCOLN AS ORIGINALLY REPORTED IN THE NEW YORK TIMES 110-11 (David Herbert Donald & Harold Holzer eds., 2005) [hereinafter LINCOLN IN THE TIMES].

9. Frank J. Williams, *Abraham Lincoln and Civil Liberties: Then and Now – The Southern Rebellion and September 11*, 60 N.Y.U. ANN. SURVEY OF AM. LAW 466 (2004); *see also* MICHAEL LIND, WHAT LINCOLN BELIEVED: THE VALUES AND CONVICTIONS OF AMERICA'S GREAT PRESIDENT 174 (2004).

10. *Startling From Baltimore: The Northern Troops Mobbed and Fired Upon – The Troops Return the Fire – Four Massachusetts Volunteers Killed and Several Wounded – Several of the Rioters Killed*, N.Y. TIMES, Apr. 19, 1861, *as reprinted in* LINCOLN IN THE TIMES, at 110-11.

11. Williams, at 466.

12. Michael Lind, What Lincoln Believed: The Values and Convictions of America's Great President 174 (2004).

13. *Startling From Baltimore*, at 110-11.

14. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 22 (1998); *see also* Abraham Lincoln, Annual Message to Congress (Dec. 1, 1862), *as reprinted in* 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 518, 524 (Roy P. Basler ed., Rutgers University Press, 1953).

15. At one point, Lincoln ruminated that bombarding cities in Maryland would be a preferable alternative to suspending the writ of habeas corpus. *See* Abraham Lincoln, Order to General Winfield Scott (Apr. 27, 1861), *as reprinted in* 4 COLL. WORKS, at 344.

16. REHNQUIST, at 23 (quoting A Day with Governor Seward at Auburn, *as reprinted in* F.B. Carpenter, Seward Papers, No. 6634 (July 1870)).

17. On April 27, 1861 Abraham Lincoln reluctantly ordered General Winfield Scott to suspend habeas corpus where necessary to avoid the overthrow of the government and to protect the nation's capital:

To The Commanding General of the Army of the United States:

Lincoln's unilateral suspension of habeas corpus between Washington and Philadelphia was instrumental in securing communication lines to the nation's capital.[18] The effect was to enable military commanders to arrest and detain individuals indefinitely in areas where martial law had been imposed.[19] Many of those detained were individuals who attempted to halt military convoys.[20] Lincoln saw that immediate action and a declaration of martial law was necessary to divest civil liberties from those who were disloyal and whose overt acts against the United States threatened its survival without the rights explicit in our usual judicial process.[21]

Nevertheless, Lincoln's actions did not go unchallenged; criticism was not lacking. Despite the urgent situation that warranted Lincoln's suspension of habeas during the Civil War, his critics bemoaned his decision as an act of civil disobedience,[22] and they deemed his actions illegal.[23] Lincoln himself responded to such criticism in a message to a special session of Congress on July 4, 1861. In Lincoln's words:

> The provision of the Constitution that "the privilege of habeas corpus, shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it," is equivalent to a provision - is a provision - that such privilege may be suspended when, in cases of rebellion, or invasion, the public safety does require it. It was decided that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made. Now it is insisted that Congress, and the Executive, is vested with this power. But the Constitution itself, is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed that the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very

---

You are engaged in suppressing an insurrection against the laws of the United States. If at any point on or in the vicinity of any military line which is now or which shall be used between the city of Philadelphia and the city of Washington 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 the writ.
ABRAHAM LINCOLN.
Abraham Lincoln, Order to General Winfield Scott (Apr. 27, 1861), *as reprinted in* 4 COLL. WORKS, at 344.

18. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 146 (1980).
19. LIND, at 174.
20. *See* LINCOLN IN THE TIMES, *a*t 117.
21. POSNER, at 45.
22. *See* Mark E. Neely, Jr., The Fate of Liberty: Abraham Lincoln and Civil Liberties 235 (1991), at xvi; POSNER, at 85-86 (describing civil disobedience as an act of a private individual who feels a moral obligation and duty to disobey a particular positive law).
23. B.F. McClerren, Op-Ed, *Lincoln's Actions May Apply Today*, TIMES-COURIER, Nov. 19, 2001.

> assembling of which might be prevented, as was intended in this case, by the rebellion.[24]

Lincoln explained that his actions were not only justified, but were required of him pursuant to his oath to preserve, protect, and defend the Constitution of the United States.[25] In August 1861, Congress ratified the President's actions in all respects.[26]

To Lincoln, there was no tolerable middle road. He was very much aware that some citizens would criticize him for suspending the Great Writ. The alternative, however, was far worse in his estimation. In Lincoln's judgment nothing would be worse than allowing the nation to succumb to Confederate forces. Even some of those who deemed Lincoln's actions unconstitutional have noted the real-world emergency with which he was faced. Today, many recognize that "Lincoln's unconstitutional acts during the Civil War show that even legality must sometimes be sacrificed for other values. We are a nation under law, but first we are a nation."[27]

1. *The Case of John Merryman*

Only a month after Lincoln's proclamation, Captain Samuel Yohe, empowered by Lincoln's suspension of habeas, entered the Baltimore home of John Merryman, a discontented American who had spoken out vigorously against President Lincoln and had actively recruited a company of Confederate soldiers. He arrested Merryman for various acts of treason, including his leadership of the secessionist group that conspired to destroy and ultimately did destroy railroad bridges after the Baltimore riots.[28] The government believed that Merryman's decision to form an armed group to overthrow the government was an act far beyond a simple expression of dissatisfaction, which would be protected under the Constitution.

Merryman's attorney sought a writ of habeas corpus,[29] directing his petition to

---

24. Abraham Lincoln, Speech to Special Session of Congress (July 4, 1861), *as reprinted in* 4 COLL. WORKS, at 430.

25. *Id.* (Lincoln's actual words were: "Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?"). *See also* JAMES M. MCPHERSON, THIS MIGHTY SCOURGE: PERSPECTIVES ON THE CIVIL WAR 211 (2007) (noting that Lincoln's oath imposed a larger duty that "overrode his obligation to heed a lesser specific provision in the Constitution").
The oath that every president must take before entering on the execution of that high office is explicitly set forth in Article II, Section 1 of the Constitution. It should also be recalled that the Preamble to the Constitution specifically states that providing "for the common defence" and "securing the blessings of liberty" are among the goals which the Constitution is intended to serve.

26. Act of August 6, 1861, ch. 63, Sec. 3, 12 Stat. 326. Although this language did not expressly ratify the President's suspension of habeas corpus, it was widely understood as having done so. *See* BRIAN MCGINTY, LINCOLN AND THE COURT ch. 3, 29 (forthcoming Harvard University Press Feb. 15, 2008).

27. Richard A. Posner, *The Truth about our Liberties*, *in* RIGHTS VS. PUBLIC SAFETY AFTER 911: AMERICA IN THE AGE OF TERRORISM 27 (Amitai Etzioni & Jason H. Marsh eds., 2003).

28. *Id.*

29. Ex parte Merryman, 17 F. Cas. 144, 147 (C.C.D. Md.1861).

Supreme Court Chief Justice Roger Brooke Taney.[30] Lawyers for Merryman suspected that Chief Justice Taney would entertain the petition in Washington,[31] but because he was then assigned to the Circuit Court sitting in Maryland,[32] he took up the matter in Baltimore and granted the writ.[33] Despite Chief Justice Taney's demand to have Merryman brought before the court, the commander of the fort where Merryman was detained, George Cadwalader, respectfully refused, relying on President Lincoln's suspension of habeas corpus.[34] Outraged, Chief Justice Taney authored *Ex parte Merryman*, opining that Congress alone had the power to suspend the writ of habeas corpus.[35]

Unfortunately for Chief Justice Taney, his words carried no precedential value as an in chambers opinion. Chief Justice Taney recognized this but forwarded his in chambers opinion to President Lincoln. Ironically, it was Taney who, only a month before, had administered the President's oath,[36] which the President now relied upon to justify his actions.

If one thing is certain, it is that Chief Justice Taney's opinion did not deter Lincoln. Rather, Lincoln turned to Attorney General Edward Bates for confirmation that his decision to suspend habeas corpus was within his authority.[37] Bates responded as follows:

---

30. Interestingly, Merryman's attorney filed the writ with Chief Justice Taney, not as a circuit judge but in his capacity as Chief Justice of the Supreme Court. Some historians believe this decision was made because Merryman's counsel sought to circumvent the Circuit Court, whose writs of habeas corpus had been ignored by military commanders in another case. Michael Stokes Paulsen, *The* Merryman *Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 90-91 n.27 (1993) (citing 5 CARL B. SWISHER, THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 842 (1974)).

31. *See, e.g.,* Arthur T. Downey, *The Conflict Between the Chief Justice and the Chief Executive:* Ex parte Merryman, 31 JOURNAL OF SUPREME COURT HISTORY 262, 262-78 (2006).

32. Apart from their duties on the Supreme Court, it was customary at that time for Supreme Court justices to work also as Circuit Court justices. Each Supreme Court justice was assigned to one of the seven circuits. District Court judges in the area were paired with the Supreme Court justice assigned to that circuit and would hold Circuit Court together. If a Supreme Court justice was unable to attend, in some instances, a District Court judge would hold Circuit Court alone. 5 CARL B. SWISHER, THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 248 (1974). Circuit justices were responsible for disposing of applications arising in cases from state and federal courts within that circuit. These applications included requests for bail, certificates of appealability, extensions of time, injunctions, stays, writs of habeas corpus, and writs of error or appeal. Cynthia J. Rapp, *In Chambers Opinions by Justices of the Supreme Court*, 5 GREEN BAG 2d 181, 182-83 (2002).

33. *Merryman*, 17 F. Cas. at 145, 147.

34. *See, e.g.,* Arthur T. Downey, *The Conflict Between the Chief Justice and the Chief Executive:* Ex parte Merryman, 31 JOURNAL OF SUPREME COURT HISTORY 262, 262-78 (2006).

35. Ex parte Merryman, 17 F. Cas. at 147. The Chief Justice pointed to the suspension clause found in Article I of the Constitution, which outlines congressional duties.

36. MCGINTY, at ch. 1, 4.

37. Abraham Lincoln, Letter to Edward Bates (May 30, 1861), *as reprinted in* 4 COLL. WORKS, at 390.

Essential Civil War Curriculum | Copyright 2010 Virginia Center for Civil War Studies at Virginia Tech

> I am clearly of opinion that, in a time like the present, when the very existence of the nation is assailed, by a great and dangerous insurrection, the President has the lawful discretionary power to arrest and hold in custody persons known to have criminal intercourse with the insurgents, or persons against whom there is probable cause for suspicion of such criminal complicity.[38]

Disregarding the "in chambers opinion" of Chief Justice Taney, Lincoln boldly broadened the scope of the suspension of the writ.[39] In the draft of Lincoln's report to Congress (the only extant copy of his speech of July 4, 1861)[40], he passionately defended his position:

> The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution? . . . [A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?[41]

Lincoln explained that the outbreak of the Civil War made it necessary "to call out the war power of the government and so to resist force employed for the destruction by force for its preservation."[42] Lincoln further professed that his actions, "whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them."[43]

Although the Constitution is silent with respect to which branch of government is authorized to exercise the power to suspend habeas, Lincoln's words reflected his own belief that he had exercised a power that required at least some cooperation and approval from Congress.[44] Whatever confusion remained regarding the legality of Lincoln's unilateral suspension of habeas was quelled two years later when Congress, in addition to its previous ratification of August 6, 1861, enacted legislation empowering the President

---

38. 10 OFFICIAL OPINIONS OF THE ATTORNEY GENERAL OF THE UNITED STATES, ADVISING THE PRESIDENT AND HEADS OF DEPARTMENTS IN RELATION TO THEIR OFFICIAL DUTIES 81 (W.H. & O.H. Morrison 1868).
39. Abraham Lincoln, Letter to Henry W. Halleck (Dec. 2, 1861), *as reprinted in* 5 COLL. WORKS, at 35; Abraham Lincoln, Proclamation Suspending the Writ of Habeas Corpus (Sept. 24, 1862), *as reprinted in* 5 COLL. WORKS, at 436-37; Abraham Lincoln, Proclamation Suspending Writ of Habeas Corpus (Sept. 15, 1863), *as reprinted in* 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN 451-52 (Roy P. Basler ed., Rutgers University Press, 1953); *see also* FARBER, at 159.
40. No official copy of Lincoln's speech of July 4, 1861 has been found. The cited text is Lincoln's second proof, which contains his final revisions. *See* 4 COLL. WORKS, at 421 n.1.
41. Abraham Lincoln, Speech to Special Session of Congress (July 4, 1861), *as reprinted in* 4 COLL. WORKS, at 430.
42. *Id.* at 426.
43. *Id.* at 429.
44. *Id.* at 431.

to suspend the writ nation-wide while rebellion continued.[45]

2. *The Case of Clement L. Vallandigham*

On September 24, 1862, Lincoln issued a proclamation, declaring martial law and authorizing the use of military tribunals to try civilians within the United States who are believed to be "guilty of disloyal practice" or who "afford[ed] aid and comfort to Rebels."[46] This was just the beginning. The following March, Lincoln appointed General Ambrose Burnside as commanding general of the Department of the Ohio.[47] After only one month in that position, Major General Burnside issued General Order No. 38, authorizing imposition of the death penalty for those who aided the Confederacy and who "declared sympathies for the enemy."[48]

With this order as justification, military officials arrested anti-war Congressman Clement L. Vallandigham of Ohio for a public speech he delivered in Mount Vernon, lambasting President Lincoln, referring to him as a political tyrant, and calling for his overthrow.[49] Specifically, Vallandigham was charged with having proclaimed, among other things, that "the present war was a wicked, cruel, and unnecessary war, one not waged for the preservation of the Union, but for the purpose of crushing out liberty and to erect a despotism; a war for the freedom of the blacks and the enslavement of the whites."[50]

Although he was a United States citizen who would ordinarily be tried for criminal offenses in the civilian court system, Vallandigham was tried before a military tribunal a day after his arrest.[51] Vallandigham, an attorney, objected that trial by a military tribunal was unconstitutional, but his protestations to the Lincoln administration fell on deaf ears.[52] The military tribunal found the Ohio Copperhead[53] in violation of General Orders

45. Habeas Corpus Act, ch. 80, 12 Stat. 755 (1863).
46. *See* Proclamation Suspending the Writ of Habeas Corpus (Sept. 24, 1862), *as reprinted in* 5 COLL. WORKS, at 436-37. Over 2,000 cases were tried by military tribunals during the Civil War and the Reconstruction Period. LEONARD CUTLER, THE RULE OF LAW AND THE LAW OF WAR: MILITARY COMMISSIONS AND ENEMY COMBATANTS POST 9/11 4 (2005).
47. *See* Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-war Speech in the Civil War*, 7 WM. & MARY BILL OF RTS. J. 105, 119 (1998).
48. General Order No. 38, *as reprinted in* BENJAMIN PERLEY POORE, THE LIFE AND PUBLIC SERVICES OF AMBROSE E. BURNSIDE, SOLDIER-CITIZEN-STATESMAN 206 (1882).
49. POORE, at 208; REHNQUIST, at 65-66.
50. Ex parte Vallandigham, 68 U.S. 243, 244 (1864).
51. *Id.*; *see also* Curtis, at 121.
52. *Vallandigham*, 68 U.S. at 246.
53. Copperheads were Northern Democrats who sided with the South and opposed the Civil War. Republicans dubbed such war opponents Copperheads because of the copper liberty-head coins they wore as badges. 1 ENCYCLOPEDIA OF THE AMERICAN CIVIL WAR: A POLITICAL, SOCIAL, AND MILITARY HISTORY 498-99 (David S. Heidler & Jeanne T. Heidler eds., 2000). The term Copperhead was "borrowed from the poisonous snake of the same name that lies in hiding and strikes without warning. However, 'Copperheads' regarded themselves as lovers of liberty, and some of them wore a lapel pin

No. 38 and ordered him imprisoned until the war's end.[54] Subsequent to this sentence, Vallandigham petitioned the United States Circuit Court sitting in Cincinnati for a writ of habeas corpus, which, perhaps much to Chief Justice Taney's dismay, was denied.[55] In a final attempt, Vallandigham petitioned the United States Supreme Court for a writ of certiorari, but his petition to the Court was unsuccessful, the court ruling that it was without jurisdiction to review the military tribunal's proceedings.[56]

Not surprisingly, the trial of Vallandigham by a military tribunal subjected Lincoln to yet more criticism. His critics bemoaned his decision, deeming it "a palpable violation of the . . . Constitution."[57] Lincoln insisted, however, that civilians captured away from the battlefield could lawfully be tried by a military tribunal because the whole country, in his opinion, was a war zone.[58] Lincoln further defended his suspension of habeas corpus:

> If I be wrong on this question of constitutional power, my error lies in believing that certain proceedings are constitutional when, in cases of rebellion or Invasion, the public Safety requires them . . . The constitution itself makes the distinction; and I can no more be persuaded that the government can constitutionally take no strong measure in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown to not be good food for a well one.[59]

President Lincoln, concerned about the harshness of Vallandigham's punishment and the potential criticism over Vallandigham's arrest, detention, and trial by military tribunal, commuted his sentence to banishment to the Confederacy.[60]

3. *The Case of Lambdin P. Milligan*

In 1866, the war having ended, the Supreme Court was called upon to consider the

---

with the head of the Goddess of Liberty cut out of the large copper penny minted by the Federal treasury." Frank J. Williams, Abraham Lincoln and Civil Liberties in Wartime, HERITAGE LECTURES 5 n.18 (May 5, 2004), *available at* http://www.heritage.org/Research/NationalSecurity/ hl834.cfm.

54. THE TRIAL OF HON. CLEMENT L. VALLANDIGHAM BY A MILITARY COMMISSION AND THE PROCEEDINGS UNDER HIS APPLICATION FOR A WRIT OF HABEAS CORPUS IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO 33 (Cincinnati, Rickey and Carroll, 1863).

55. *Id.* at 37-39, 272.

56. *Vallandigham*, 68 U.S. at 251.

57. *See* Annotation to Lincoln's Letter to Matthew Birch and Others, *in* 6 COLL. WORKS, at 300.

58. MCPHERSON, at 217.

59. To Erastus Corning and Others (June 12, 1863), *as reprinted in* 6 COLL. WORKS, at 267.

60. *See* Curtis, at 121. The Confederacy was not happy to see Vallandigham, who made his way to Winsor, Ontario, opposite Ohio, where he ran unsuccessfully for Governor of Ohio.

legality of Lincoln's suspension of habeas corpus and his use of military tribunals.[61] The Supreme Court, upon which Taney no longer sat, as he had died in 1864, proceeded to conclude, as Taney had in *Merryman*, that the President could not unilaterally suspend the writ of habeas corpus.

On October 5, 1864, Lambdin P. Milligan, a lawyer and Indiana citizen, had been arrested by the military commander for that military district on the basis of his belief that Milligan was plotting to overthrow the government.[62] Although Milligan was not captured on the battlefield, he was tried by a military commission and sentenced to death even though the civilian courts were functioning in Indiana.[63] Before the sentence was carried out, Milligan petitioned the Circuit Court of the United States for the District of Indiana for a writ of habeas corpus.[64] The Circuit Court certified the question to the Supreme Court, which assumed jurisdiction and issued the writ.[65]

In so concluding, the Supreme Court reasoned that the suspension of habeas corpus was permissible, but that such a suspension did not apply to Milligan's case because he had not joined the Confederate forces and was captured away from the battlefield in an area where civilian courts were still operating.[66] According to the Court, Milligan was simply a person who was ideologically aligned with the Confederates and not an enemy combatant who should be tried by a military tribunal.[67] Therefore, Milligan could only be properly tried in a civilian court and not by a military tribunal.[68] This post-war, post-Taney Court also impliedly validated Chief Justice Taney's opinion in *Merryman* as it agreed that only Congress may authorize the suspension of habeas corpus.[69]

Milligan did make clear, however, that the right of American citizens to seek a writ of habeas corpus may be suspended during wartime so long as those citizens have joined enemy forces or have been captured on the battlefield. Indeed, without such a ruling, "the Union could not have fought the Civil War, because the courts would have ordered President Lincoln to release thousands of Confederate POWs and spies."[70]

That Lincoln emerges from the perennial controversy that afflicted his Administration over civil liberties with a reputation for statesmanship may be the most powerful argument for his judicious application of executive authority during a national emergency. As historian Don E. Fehrenbacher has noted, "Although Lincoln, in a general

61. Ex parte Milligan, 71 U.S. 2 (1866).
62. THE MILLIGAN CASE 64 (Samuel Klaus, ed., Gaunt, Inc. 1997).
63. *Milligan*, 71 U.S. at 106-07.
64. *Id.* at 107-09.
65. *Id.* at 110-11.
66. *Id.* at 127, 131.
67. *Id.* at 131.
68. *Id.*
69. *Id.*
70. John Yoo, War by Other Means: An Insider's Account of the War on Terror 146 (2006).
72. Don E. Fehrenbacher, Lincoln in Text and Context: Collected Essays 139 (Stanford University Press, 1987).

sense, proved to be right, the history of the United States in the twentieth century suggests that he brushed aside too lightly the problem of the example that he might be setting for future presidents."[71]

****