

# Congressional Debate on the Suspension of Habeas Corpus— A Simulation Activity

Prepared by Charlotte C. Anderson

*For use in conjunction with “Ex parte Merryman and Debates on Civil Liberties During the Civil War,” by Bruce A. Ragsdale, available at <http://www.fjc.gov/history/home.nsf>. A unit in the Teaching Judicial History Project, developed by the Federal Judicial Center in partnership with the American Bar Association’s Division for Public Education.*

## Activity Objectives

Through a simulation of a congressional debate on the suspension of the writ of habeas corpus, students will gain an understanding of the arguments surrounding *Ex parte Merryman* and of the public debates on civil liberties during the Civil War.

## Essential Questions

- Did the threat presented by the seceded states meet the constitutional criteria for the suspension of the writ of habeas corpus?
- Did President Lincoln have authority to suspend the writ of habeas corpus in the opening weeks of the Civil War?
- What were the most important disagreements between Chief Justice Taney and President Lincoln regarding the suspension of the writ of habeas corpus?

## Legal Issues Raised by the *Merryman* Proceedings

Although the Constitution authorizes the suspension of the writ of habeas corpus in limited circumstances, it does not specify which branch of government has authority to suspend the writ. Chief Justice Taney’s grant of the writ to John Merryman implicitly challenged President Lincoln’s suspension of the writ, but it left unresolved the respective authorities of the three branches of government.

## Estimated Time Frame

Three to four 50-minute class periods.

## Recommended Prep Work

Teachers will want to review the full unit on *Ex parte Merryman*, available online at <http://www.fjc.gov/history/home.nsf>. Students will need to be familiar with the basic outline of the case before making role assignments. Remind students that the Judiciary Act of 1789 provided for circuit courts on which a member of the

U.S. Supreme Court sat as one of the judges. Roger Taney, Chief Justice of the United States, presided on the circuit court that heard the *Merryman* proceedings.

Prepare copies of the worksheets and the reading material for each group.

## Description of the Activity

### *Activity Overview*

When President Lincoln addressed the Congress in July 1861, he asked the members to consider what legislation regarding suspension of the privilege of the writ of habeas corpus might be necessary. Two years later, in 1863, Congress passed the Habeas Corpus Act. This curriculum focuses on a simulated hearing of a fictional Joint Committee of the House and Senate charged with making a recommendation for legislation regarding suspension of the privilege of the writ of habeas corpus. Summoned to give testimony before this Joint Committee are (1) supporters of Lincoln's action and (2) supporters of Taney's position.

Preparation will probably require homework and one class period. The hearing will require one full class period with the following class period used for debriefing and discussion.

### *Group Work and Discussion*

Set the stage for this simulation by reviewing the intent and purpose of the writ of habeas corpus. You may want to report that in the *Ex parte Yerger* case (1868), Chief Justice Chase said it was "the most important human right in the Constitution" and called it "the best and only sufficient defense of personal freedom." Also review the following:

- Petition for a writ of habeas corpus, John Merryman, May 25, 1861 (pp. 32–33) (page numbers refer to the PDF version of "*Ex parte Merryman* and Debates on Civil Liberties During the Civil War," by Bruce A. Ragsdale, available online at <http://www.fjc.gov/history/home.nsf>).
- *Ex parte Merryman*, opinion of Chief Justice Roger Taney (excerpts) (pp. 33–35).

1. Divide the class into three groups to prepare for the simulation.

*Group One*—Assign at least three students to take the roles of the committee members. Divide the rest of the class into Groups Two and Three.

*Group Two*—This group will be responsible for three roles: spokesperson for President Lincoln, Attorney General Bates, and Horace Binney.

*Group Three*—This group will be responsible for three roles: spokesperson for Chief Justice Taney, John Merryman's lawyer, and Edward Ingersoll.

2. Distribute copies of the following resources and accompanying worksheets to the three groups:

Group One—Joint Committee

- *Ex parte Merryman*: A Short Narrative (excerpts “The arrest of Merryman” through “Taney’s opinion,” pp. 2–5)
- Constitutional and statutory authorities—Introduction; U.S. Constitution, Art. I, Sec. 9; and Judiciary Act of 1789, Sec. 14 (pp. 44–45)
- *In re McDonald*, U.S. District Court for the Eastern District of Missouri, 1861 (pp. 16–17)

Group Two—Spokesperson for Lincoln, Bates, and Binney

- Constitutional and statutory authorities—Introduction; U.S. Constitution, Art. I, Sec. 9; and Judiciary Act of 1789, Sec. 14 (pp. 44–45)
- Biography of Abraham Lincoln (pp. 23–24)
- *Ex parte Merryman*: A Short Narrative (excerpts “The arrest of Merryman” through “Taney’s opinion,” pp. 2–5)
- Lincoln’s orders on habeas corpus (excerpts) (p. 36)
- President Abraham Lincoln, message to Congress in special session, July 4, 1861 (excerpt) (p. 37–38)
- Opinion of Attorney General Edward Bates, July 5, 1861 (excerpts) (pp. 39–40)
- Horace Binney, *The Privilege of the Writ of Habeas Corpus Under the Constitution* (excerpt) (pp. 40–42)
- Abraham Lincoln to Erastus Corning and others, June 12, 1863 (excerpts) (pp. 43–44)

Group Three—Spokesperson for Taney, Merryman’s lawyer, Ingersoll

- Constitutional and statutory authorities—Introduction; U.S. Constitution, Art. I, Sec. 9; and Judiciary Act of 1789, Sec. 14 (pp. 44–45)
- Biography of Roger Brooke Taney (pp. 28–29)
- *Ex parte Merryman*: A Short Narrative (excerpts “The arrest of Merryman” through “Taney’s opinion,” pp. 2–5)
- Petition for a writ of habeas corpus, John Merryman, May 25, 1861 (pp. 32–33)
- *Ex parte Merryman*, opinion of Chief Justice Roger Taney (excerpts) (pp. 33–35)
- Roger Taney to Franklin Pierce, June 12, 1861 (excerpt) (p. 37)
- Edward Ingersoll, “Personal Liberty and Martial Law: A Review of Some Pamphlets of the Day” (pp. 42–43)

3. Provide time for the groups to read and prepare for their respective testimonies. This will probably require homework time as well as one full class period.

4. The simulation itself will take a full class period. Begin by allowing about ten minutes for each of the three groups to meet and review their respective statements/roles.

Arrange the room for the simulation. The committee sits in the front of the room with three chairs (or desks) for each group of speakers facing them. The worksheet for the joint committee outlines procedures for the simulation.

### Debrief and Wrap-up

Begin the class discussion by asking what was the strongest argument from each set of testimonies; then address the two questions before the committee:

- Is it necessary to suspend the privilege to the writ of habeas corpus in the face of the secession of the Southern states and the outbreak of the Civil War?
- If habeas corpus is to be suspended, what authority and actions should be assigned to the executive, the judicial, and the legislative branches of government?

Close the session by reviewing the constitutional and statutory authorities related to habeas corpus (U.S. Constitution, Article I, Sec. 9; Judiciary Act of 1789, Sec. 14; and Habeas Corpus Act of 1863) (pp. 44–46).

What role does the 1863 Act authorize for each branch? How does it compare to the committee's recommendations? Describe how Congress actually responded to Lincoln's suggestion for consideration of habeas legislation. If time permits, consider the following question: Should the Constitution be amended regarding the suspension of the privilege of the writ of habeas corpus and, if so, how?

### Assessment

- Assess the written testimonies and committee statements prepared for the simulation.
- Assign essays in which students must identify the strongest arguments of the two testifying groups and give reasons for their choices.
- Analyze key documents to distinguish facts and opinions.

### Alternative Modalities and Enrichment Activities

- After the hearing is concluded, the whole class could be divided into small groups to assume the role of the joint committee in closed session to explore the questions raised.
- Act out scenes from the *Merryman* case—the arrest, the delivery of the petition for the writ to Taney, Cadwalader's refusal to accept the writ, the

scene at the courtroom, Lincoln conferring with Bates and Binney (fictional scene), etc.

- Write articles reporting on the joint committee hearing for Northern and Southern newspapers.

### **Involving a Judge**

Invite a judge to discuss how today's courts decide whether or not to issue a writ of habeas corpus. The judge might also address how the current courts would judge the legitimacy of a suspension of the writ.

### **Standards Addressed**

*U.S. History Standards (Grades 5–12)*

Era 5—Civil War and Reconstruction (1850–1877)

*Standard 2B:* Evaluate the Union's reasons for curbing wartime civil liberties.

*Standards in Historical Thinking*

*Standard 2:* Historical Comprehension

- C. Identify the central question(s) the historical narrative addresses.
- D. Differentiate between historical facts and historical interpretations.

*Standard 3:* Historical Analysis and Interpretation

- A. Compare and contrast differing sets of ideas, values, etc.
- B. Consider multiple perspectives.
- C. Analyze cause-and-effect relationships and multiple causation, including the importance of the individual, the influence of ideas.
- E. Distinguish between unsupported expressions of opinion and informed hypotheses grounded in historical evidence.

*Standard 5:* Historical Issues-Analysis and Decision-Making

- A. Identify issues and problems in the past and analyze the interests, values, perspectives, and points of view of those involved in the situation.
- F. Evaluate the implementation of a decision by analyzing the interests it served; estimating the position, power, and priority of each player involved; assessing the ethical dimensions of the decision; and evaluating its costs and benefits from a variety of perspectives.

### *Worksheet for Group One—Joint Committee*

The joint committee of the House and Senate has been appointed by the leadership of both houses of Congress to make recommendations regarding legislation that should be considered in regard to the suspension of the writ of habeas corpus during the present rebellion. In order to meet this charge, the committee will hold a hearing and meet in closed session to discuss its recommendations.

In preparing for the hearing, you should examine the *Merryman* case and existing laws related to the suspension of the writ of habeas corpus and review what the U.S. district court decided in *In re McDonald* (1861).

- *Ex parte Merryman: A Short Narrative* (excerpts “The arrest of Merryman” through “Taney’s opinion,” pp. 2–5)
- Constitutional and statutory authorities—Introduction; U.S. Constitution, Art. I, Sec. 9; and Judiciary Act of 1789, Sec. 14 (pp. 44–45)
- *In re McDonald*, U.S. District Court for the Eastern District of Missouri, 1861 (pp. 16–17)

(Note: Page numbers refer to the PDF version of “*Ex parte Merryman* and Debates on Civil Liberties During the Civil War,” by Bruce A. Ragsdale, available online at <http://www.fjc.gov/history/home.nsf>.)

Develop a brief summary of existing law and the district court decision for the committee chair to use in opening the hearing.

Appoint a committee chair. All members should be prepared to take notes and ask questions of the speakers. Among the questions to be considered by the committee:

1. Is suspension of the writ of habeas corpus necessary under the current (July 1861) circumstances?
2. Should the President be given a general authority to suspend the writ or should Congress narrowly define the authority to suspend?
3. What time limits should be imposed on any authority to suspend? How long can people be held without criminal charges?
4. Should suspensions of the writ be subject to any oversight or review? If so, who should be responsible for review?

### The Hearing

The committee chair calls the hearing to order, announces the committee’s charge and the purpose of the hearing, briefly summarizes existing law and court decisions, and announces that each group will have ten minutes to speak and that the committee will have questions following each group’s testimony (5 minutes).

Chair calls the first speakers (10 minutes for testimony):

- spokesperson for President Lincoln
- Attorney General Bates
- Horace Binney

Questions from committee, with chair moderating (5 minutes). Chair thanks and dismisses the speakers.

Chair calls the second speakers (10 minutes for testimony):

- spokesperson for Chief Justice Taney
- John Merryman's lawyer
- Edward Ingersoll

Questions from committee with chair moderating (5 minutes). Chair thanks the speakers, adjourns the hearing, and announces that the committee will now go into closed session to deliberate.

Closed session (10 minutes). The chair asks the committee members:

- What do you think was the strongest argument from each set of testimonies?
- Is new legislation needed?
- If so, what authority and action should each branch of government take in suspending the writ?

The chair determines if there is consensus or if further deliberation needs to take place in a future meeting and adjourns the session.

### *Worksheet for Group Two—Supporters of Lincoln’s Position*

Your group is responsible for preparing testimony from the perspective of supporters of President Lincoln’s action and position. The supporters are a spokesperson for President Lincoln; Attorney General Bates; and Horace Binney. All group members should be familiar with the following background reading but should take responsibility for drawing on relevant documents to prepare their testimonies.

- Constitutional and statutory authorities—Introduction; U.S. Constitution, Art. I, Sec. 9; and Judiciary Act of 1789, Sec. 14 (pp. 44–45)
- Biography of Abraham Lincoln (1809–1865) (pp. 23–24)
- *Ex parte Merryman*: A Short Narrative (excerpts “The arrest of Merryman” through “Taney’s opinion,” pp. 2–5)
- Lincoln’s orders on habeas corpus (excerpts) (p. 36)
- President Abraham Lincoln, message to Congress in special session, July 4, 1861 (excerpt) (p. 37–38)
- Opinion of Attorney General Edward Bates, July 5, 1861 (excerpts) (pp. 39–40)
- Horace Binney, The Privilege of the Writ of Habeas Corpus Under the Constitution (excerpt) (pp. 40–42)

(Note: Page numbers refer to the PDF version of “*Ex parte Merryman* and Debates on Civil Liberties During the Civil War,” by Bruce A. Ragsdale, available online at <http://www.fjc.gov/history/home.nsf>.)

Three or more students should take responsibility for preparing testimony for each role. Although a group of students will work together to prepare each testimony, one person should take the role in speaking before the Committee. The testimonies should answer these questions:

#### 1. Spokesperson for President Lincoln

- When did Lincoln first ask Congress to consider new legislation regarding the suspension of the writ of habeas corpus? Did the President think it necessary?
- What does Lincoln say is the responsibility of the President (the executive branch)?
- According to Lincoln, under what conditions can the writ be suspended?
- What is Lincoln’s principal reason for suspending the writ?
- What does Lincoln say he was concerned about in ordering the suspension?

- What does Lincoln say would be the ramification of his critics' arguments?
- Why does Lincoln think that the framers of the Constitution must not have meant that only Congress could suspend the writ?

## 2. Attorney General Bates

(*Note:* Although the excerpt of Bates' opinion does not specifically refer to "writ of habeas corpus," it is Lincoln's suspension of the writ that Bates is defending.)

- What does Bates argue is the duty of the President beyond what other departments are responsible for?
- Under what circumstances does Bates say that the President is the one who must suspend the writ?
- Does Bates believe the executive and judicial branches are co-equal? Why does he make this argument?
- What argument does Bates make about political powers? Why is this an important distinction for him to make?

## 3. Horace Binney

- How does Binney challenge Chief Justice Taney's reading of the history of habeas corpus?
- How does Binney explain Taney's argument that the President should not and does not have the power to suspend the writ?
- Why does Binney think that the executive branch is the safest authority for suspending the writ of habeas corpus?

Review all testimonies that have been prepared to be sure that all the basic points or arguments for the group's position will be presented.

### *Worksheet for Group Three—Supporters of Chief Justice Taney’s Position*

The joint committee has requested individuals to appear before the committee to give testimony about their part in the *Ex parte Merryman* case and, if appropriate, their perspectives on suspension of the writ of habeas corpus.

Group Three is responsible for preparing testimony from the perspective of supporters of Chief Justice Taney’s position. Supporters include a spokesperson for Chief Justice Taney; a lawyer for John Merryman; and Edward Ingersoll. All group members should be familiar with the following background reading but should take responsibility for drawing on relevant documents to prepare their testimonies:

- Constitutional and statutory authorities—Introduction; U.S. Constitution, Art. I, Sec. 9; and Judiciary Act of 1789, Sec. 14 (pp. 44–45)
- Biography of Roger Brooke Taney (pp. 28–29)
- *Ex parte Merryman: A Short Narrative* (excerpts “The arrest of Merryman” through “Taney’s opinion,” pp. 2–5)
- Petition for a writ of habeas corpus, John Merryman, May 25, 1861 (pp. 32–33)
- *Ex parte Merryman*, opinion of Chief Justice Roger Taney (excerpts) (pp. 33–35)
- Roger Taney to Franklin Pierce, June 12, 1861 (excerpt) (p. 37)
- Edward Ingersoll, “Personal Liberty and Martial Law: A Review of Some Pamphlets of the Day” (pp. 42–43)

(Note: Page numbers refer to the PDF version of “*Ex parte Merryman* and Debates on Civil Liberties During the Civil War,” by Bruce A. Ragsdale, available online at <http://www.fjc.gov/history/home.nsf>.)

Three or more students should take responsibility for preparing testimony. Although a group of students will work together to prepare each testimony, one person should take the role in speaking before the committee. Since students responsible for Ingersoll’s testimony have the least amount of material to rely on, they should assist the others in preparing their testimonies. The testimonies should answer the following questions:

#### Lawyer for John Merryman

- Who petitioned for the writ of habeas corpus and what were the circumstances that led to this petition?
- Who issued the writ?
- What was the response of the person receiving the writ?
- Under what circumstances did the case come before the circuit court?

### Spokesperson for Chief Justice Taney

- Who did Taney say had authority to suspend the writ?
- What does Taney say is the President's role in "executing the laws"?
- What does Taney say is the role of the judiciary?
- What kind of government does Taney fear may take over?
- What does Taney say that a military officer should do when someone has "committed an offence against the laws of the United States"?

*Note:* Taney's letter to Pierce was written after this hearing. Do you think Taney would or should reveal to the committee the sentiments expressed in this letter?

### Edward Ingersoll

- What is the history of the writ of habeas corpus, according to Ingersoll?
- What does Ingersoll assert about interpretation of suspension of the writ?
- What does Ingersoll say about how Americans acquired the right to the writ of habeas corpus?

Group members should review all testimonies that have been prepared to be sure that all the basic points or arguments for the group's position will be presented.