Ex parte Merryman—Suggestions for Judges

Judges can make an important contribution to students' understanding of the cases included in the Federal Judicial Center's Teaching Judicial History project. When meeting with students who are studying the cases, judges may wish to draw on these suggested discussion topics.

Overview

In *Ex parte Merryman*, Chief Justice Roger Taney issued a writ of habeas corpus in response to a petition from John Merryman, who had been arrested and detained by U.S. Army officers on suspicion of activity in support of secessionists in Maryland during the early weeks of the Civil War. When George Cadwalader, the commanding officer of Fort McHenry, refused to bring Merryman before the court and refused to receive Taney's subsequent writ of attachment for contempt, Taney delivered an opinion describing why Merryman was entitled to release from military custody and why President Lincoln did not have the authority to suspend the privilege of the writ of habeas corpus. Although Taney ordered that his opinion be delivered to the President, the court issued no order to force the military or any officer of the executive branch to free John Merryman. Taney publicly challenged Lincoln to determine how, as President, Lincoln would ensure that the civil process would be enforced. Taney's refusal to order Merryman's release averted a likely constitutional crisis, but the case prompted the first in a series of public debates over civil liberties during a civil war, the respective authority of the judicial and the executive branches, and the role of the military in preserving the peace in states that remained in the Union.

Understanding the court procedures and legal questions

In studying the historic cases, students find it helpful to understand the differences between historical and current procedures in the federal courts. They also want to learn how the current courts handle similar cases. The questions below highlight features of the *Merryman* proceedings that can frame conversations between judges and students.

1. Taney submitted a written opinion stating his views on the suspension of habeas corpus, but he did not attempt to enforce any order. How might

Taney have enforced an order to release Merryman? How would an order to release a prisoner be executed today?

2. Taney criticized the military for assuming judicial authority in a locale where the regular court system was in operation. How have other conflicts between the military and the judiciary been resolved?
3. In March 1863, Congress passed a law permitting limited suspensions of the writ of habeas corpus and requiring all subsequent arrests to be reported to the federal courts. How might Taney have responded to that law if it had been challenged in court?
4. Why and from whom are petitions for a writ of habeas corpus submitted to federal courts today?
5. On what grounds does a judge decide to issue a writ of habeas corpus or to release a prisoner from custody?
6. How might a federal judge determine the legality of a suspension of the privilege to the writ of habeas corpus?

Focus on Documents

The following excerpted documents can be the basis of a classroom discussion with students who have read about the *Merryman* case and reviewed these selections in advance of a judge's visit.

1. Opinion of Chief Justice Roger Taney (p. 33)

A. Taney explained that he had exercised all the power authorized by the Constitution and laws of the United States, but he was unable to enforce the writ of habeas corpus. What might he have done to compel Cadwalader to appear in court or to secure the release of John Merryman? More generally, what are the limits of the judiciary's ability to enforce an order directed to the executive branch?

B. Taney harshly criticized the Army for pushing the judiciary aside and substituting a military government for a functioning court system. The arrest and detention of Merryman violated the constitutional protection against search and seizure without a warrant and denied the prisoner his constitutional rights to due process and a speedy trial. How, in Taney's opinion, could the existing federal courts have dealt with the threat of sabotage or treason by Confederate sympathizers? What did later court decisions, such as *Ex parte Milligan*, say about the relationship be-

tween military law and the federal courts? What would be required for the military to bypass the federal courts today?

2. President Abraham Lincoln message to Congress, July 4, 1861 (p. 37)

President Lincoln offered two arguments in defense of his decision to authorize the suspension of habeas corpus in the opening weeks of the Civil War. He said that his sworn oath to "take care that the laws be faithfully executed" required him to abridge the protection of the writ of habeas corpus if he were to see that other laws were observed. He famously asked "are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?" Lincoln also argued that the constitutional provision for suspension of habeas corpus necessarily applied to the executive branch, since during a recess of Congress only the President could respond to the emergency associated with the rebellion or invasion anticipated by the Constitution.

If a U.S. attorney had presented these arguments in court, how might Taney or another federal judge have responded?

3. Horace Binney, Edward Ingersoll, and Abraham Lincoln on the President's authority to suspend the writ of habeas corpus (pp. 40, 42, 43)

Even in the North, leading legal authorities differed about Lincoln's suspension of the privilege of the writ of habeas corpus. The well-respected Horace Binney argued that only the executive was capable of determining when the public safety was threatened by invasions or rebellions, as was required for suspension under the Constitution. Edward Ingersoll, author of the leading treatise on habeas corpus, insisted that courts in the United States and in Great Britain had always held that suspension was exclusively the power of the legislature. Lincoln continued to argue that the Constitution permitted the exercise of certain powers in cases of rebellion or invasion that would not be permitted in times of peace. How could courts settle these different opinions about the suspension of habeas corpus?