



The Writ of Habeas Corpus, The Constitution and Abraham Lincoln, War President

Curriculum Unit 08.01.01

by J. Robert Osborne

Introduction

The Constitution of the United States was written in 1787 and specifically referred to the writ of habeas corpus as a fundamental legal underpinning of the new nation. The thirteen original states ratified the Constitution and then it was amended in 1791 by the Bill of Rights. The request for the issuance of a writ of habeas corpus is made before a judge and, if granted, a prisoner must be brought before the judge. The writ requires whoever is holding the prisoner to produce him before the judge at a time determined by the judge. The writ of habeas corpus was the “mechanism” for the founders to encourage the separation of powers and maintain the balance between them because it was the ultimate protector of the rights of any individual threatened with unlawful imprisonment or detention. The courts had the legal authority to require the imprisoning governmental body to bring the accused to court and if the prisoner was not produced then the people who authorized the imprisonment were to be held in contempt of court. The founders understood that the law and not the government should be the ultimate determinant of our democracy and that the rights of its people had to be the law’s focus.

The writ of habeas corpus came from the legal traditions of English common law and it survived because it represented the struggle of the individual against the excess of governmental abuse. It directly addressed the inequality of power between a citizen and the government and it is the basis of this curriculum unit. It is an excellent beginning to the study of the origins of the government of the United States and it is a key legal concept to follow through the history of America. The curriculum unit will focus on the effects of war in the maintenance of this basic right, particularly the American Civil War. Abraham Lincoln did not hesitate to suspend the writ of habeas corpus when he believed that the Union was threatened and his actions will be the primary focus of the unit. There will be some significant time spent in the origins of the writ itself and what it means and the curriculum will also link Lincoln’s struggles with Chief Justice Taney and the Supreme Court with the very recent developments in the legal history of habeas corpus in the Supreme Court’s decision of the legal case, *Boumediene v. Bush* .

Objectives

The curriculum is designed to introduce one of the basic tenets of American democracy and how it's been affected in times of war, primarily the Civil War. After the students learn what the writ of habeas corpus is, where it came from and how it works the majority of the time will be spent studying the actions of President Lincoln during the Civil War.

There are three primary goals. The study of the writ of habeas corpus will serve as the template for the study of other key individual rights enjoyed by Americans. This curriculum will be the starting point for students in learning about the principles of American democracy. Second, the students will learn that the pressure on maintaining individual rights increases during times of war and that those rights can be lost. Third, the situation that faced President Lincoln at the beginning of the Civil War, and the actions he took, will provide the context for a more detailed study of habeas corpus. The students will do their own individual research as part of this phase and present a paper on an aspect of the application of the writ of habeas corpus in American history.

Design of the Curriculum

The curriculum unit will focus on the importance of the writ of habeas corpus in protecting Americans from unlawful imprisonment (even in time of war) and the choices that Abraham Lincoln faced at the beginning of the Civil War and how he dealt with them as the war evolved. Lincoln was the first President to face a threat to the survival of the United States after the Constitution was adopted. In addition to closely examining what challenges Lincoln faced I intend to prepare a curriculum that will refer to the Constitutional origins of key legal questions that confronted Lincoln and encourage the students to compare Lincoln's decisions to those made by President Bush during the ongoing War in Iraq and the simultaneous War on Terror. The curriculum will focus on the suspension of the writs of habeas corpus.

After establishing an understanding of the legal basis of the challenges Lincoln faced the curriculum will spend three fifths of its time describing the situation in the first two years of the Civil War. The Confederacy was militarily successful and the threat to the survival of the Union was palpable to even the most fervent radicals. Lincoln had to raise and maintain an army and that objective was not anticipated in the Constitution. Militias would not last indefinitely even if they were "well-regulated". President Lincoln also instituted a naval blockade without any Congressional funding and he suspended the writ of habeas corpus in Maryland and other places by executive order. Lincoln did not hesitate to challenge the First Amendment by closing down newspapers that offered criticism of his actions or support of the Confederacy. The curriculum will also examine the role of the military in carrying out many of Lincoln's orders and the delay in bringing people that had been arrested to trial. Martial law was used to establish order where the citizenry was unsettled. The mix of military and civilian authority is another aspect of Lincoln's time that is applicable to today.

There are two major issues that will be examined as tangential to President Lincoln's willingness to operate by expanding his executive authority. The first is the Emancipation Proclamation itself that Lincoln issued as the exercise of his role as commander in chief of the military. It was controversial at the time because of its limitations to ending slavery only where the Confederacy was in control. There is a decision to be made

whether the issue of slavery should be more of a key component of the curriculum. There were Military tribunals authorized by the Supreme Court in *Ex Parte Vallandigham* (1864) and that precedent may be directly applicable to the detention of prisoners at Guantanamo Bay.

The most interesting aspect of this period may be the ongoing resistance to Lincoln's Executive Authority by Chief Justice Roger Taney of Maryland. Taney opposed Lincoln's assumption of the power to suspend Habeas Corpus. He was particularly interested in the fate of a Southern supporter named Merryman who challenged his imprisonment in Maryland. Later, the Supreme Court held that Lincoln exceeded his authority in the resolution of another case (Milligan's case) in 1867 after Lincoln's death and the end of the Civil War. There had been tension between Lincoln and Taney for years over the issue of slavery and the Dred Scott Decision. The conflict between the two men should stimulate student interest because both Lincoln and Taney were passionate and articulate.

The unit on Lincoln's actions that helped define the role of the Commander in Chief in times of war will end by looking at what occurred from two different perspectives. The first perspective will assess the necessity of the decisions made and the alternate options not chosen by Lincoln. The political climate was often chaotic and Lincoln's executive branch was not the only branch willing to bend the rules. Congress passed three bills that sanctioned some of Lincoln's moves. They were: The Seditious Conspiracy Act of 1861, The Confiscation Act of 1862 and the Habeas Corpus Act of 1863. Congress approved the 13th amendment without the necessary two-thirds vote. Lincoln never wanted to acknowledge that the Confederacy was a separate state and he considered the southern states still part of the Union. The number of states still on the roles, inactive or not, indicated that there should be 27 affirmative votes and there were only 25 but the Senate affirmed anyway. The second perspective will examine his actions as precedents for Presidential authority in times of war. The unit will end with specific reference to the current political situation and the abridgement of rights due to the War on Terror in particular and the current climate of fear. We will focus on the failure to bring those accused of being terrorists to trial and the excesses of the Patriot Act.

The goal of this curriculum is to teach students about some of the legal foundations of this country and the complexity that waging war can bring to the separation of powers and the exercise of checks and balances. The writ of habeas corpus and President Lincoln's dual role as Commander in Chief and aggressive advocate of the preservation of the Union at the expense of its citizens' rights will be the focus. The expectation of Lincoln's heroism will be tempered by his willingness to do what he believed to be right whether it was constitutional or not.

Content of the Curriculum

The Constitution of the United States divides the authority to conduct war between the Congress in Article I and the Executive in Article II. In Article I has the powers granted to Congress carefully delineated. In Section 8, .11, Congress is granted the power to declare war. In Section 8,12 Congress is granted the power to raise and support armies provided that no grant of appropriations exceeds two years. Section 8 follows with granting Congress the power to raise and maintain a navy (.13), "To make rules for the government and government of the land and naval forces;" (.14), "To provide for calling forth the militia to execute the laws of the Union; to suppress insurrections and repel invasions;"(.15) and "To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may employed in the service of the United

States, reserving to the states respectively the appointment of the officers, and the authority for training the militia according to the discipline described by Congress; (.16). Article I appears to give Congress only, the power to declare war, raise, regulate and support armies, a navy and militias called to enforce the laws of the Union and suppress rebellion. Congress has the power to decide what chess pieces to place on the Board and where to place them but not the power to move them. Article I states that Congress can suspend the writ of habeas corpus. In Section Nine 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."

Article II of the Constitution grants the Executive command of the armed forces. "Military Powers. The President shall be the commander-in chief of the Army and Navy of the United States, and of the militias of the several states, when called into the actual service of the United States;" It is clear that the President shall command but the extent of his or her command is not clear. The President's authority extends to all matters military but there is little explanation as to what is considered the boundary between military and civilian affairs. Abuse of the military powers by the executive would be subject to impeachment by the Congress. There is a tension between Congressional funding of a war and Presidential conducting of a war that is prescribed by the Constitution. President Lincoln used Section 3 of Article Two to justify his exercise of executive authority using the phrase, "he shall take care that the laws be faithfully executed."

During the 1850s, events occurred in that were the markers as America drifted towards its own Armageddon. States rights, sectional differences and the expansion or restriction of slavery were the issues that framed the political and social discourse of that time. When Congress accepted California as a free state in 1850 in exchange for a national fugitive slave law the balance between the slave and free states was lost. Florida and Texas were the last two slave states added to the Union in 1845. The admission of Iowa in 1846 and Wisconsin in 1848 restored the balance in the Senate before the admission of California shattered the carefully preserved illusion of equity. For most of the 1850s the margin was a thin one but with the addition of Minnesota in 1858 and Oregon in 1859 any Southern hope of return to equity between slave and free states was lost. The election of the Republican and free soil candidate in the election of 1860 without the support of any state in the southern United States signaled to the South that the possibility of its future retention of national political power was waning.

Lincoln was elected with the commitment to limit any further spread of slavery. If South Carolina had decided to remain in the Union Lincoln may have been forced to accept that self imposed limitation. The secession of eleven of the fifteen slave states in 1861 hastened Lincoln's move towards emancipation. By placing themselves as enemies of the United States, the Confederate States they exposed the economic vulnerability that was so powerfully linked to the institution of slavery. Without the economic power of King Cotton the Southern economy was not independently sustainable.

All of the above factors hastened the war and secession but it was the reality of armed insurrection that confronted the new President. He faced a rebellion of states that were located very near to the capital of Washington DC and a border state in Maryland that had so many active supporters of Southern independence that he feared that the capital could be cut off from the rest of the Union. Lincoln had a very small regular army at the onset of the war. With practically no military forces the new Commander in Chief faced Robert E. Lee and the Army of Northern Virginia, countless agitators and guerrillas in the border states (all slave holding states) of Delaware, Kentucky, Maryland and Missouri, and a hostile new enemy in the collective might of the Confederate States of America. Lincoln saw the Confederates as insurrectionists against the Union while the Confederacy regarded itself as a new and sovereign country; separate and distinct from the Union its states were once a part of.

Lincoln immediately moved to raise an army. He called for 75,000 volunteers without any authorization from Congress. He ordered the Navy to begin a blockade of all Southern ports and there had not been any declaration of war. He asked the states to raise their own militias to contribute to the armed forces of the United States. He did all of this while delaying calling Congress back into session until July 4th. The country was angry and anxious to face the threat from the Confederates and Congress was not ready to confront Lincoln on the suitability from a Constitutional perspective of these aggressive moves. It was here, at the very beginning of the war where Abraham Lincoln established his own precedent for later actions that were taken by him without clear Constitutional authority. Lincoln was the Commander in Chief and he was empowered to name his generals and direct them in the conduct of the war with the Southern states in the Confederacy. It was not apparent to the general population that Lincoln was readily assuming other authority that had been vested in the Congress by the Constitution.

Lincoln was very concerned that the border-states would slip away from the Union too. Their importance to both sides, but particularly to the Confederacy, was clear. In the book, *Battle Cry of Freedom*, James McPherson says this about the border states of Missouri, Kentucky and Maryland. "The three states would have added 45% to the white population and military manpower of the Confederacy, 80% to its manufacturing capacity, and nearly 40% to its supply of horses and mules." (1) Maryland was the first place where Lincoln suspended the writ of habeas corpus. The authorities detained a Southern sympathizer named, Merryman. Merryman sued and the United States Supreme Court under Chief Justice Roger Taney agreed with his suit that Lincoln did not have the authority to suspend habeas corpus. In the Constitution, Article I, habeas corpus is not to be suspended by Congress unless the public safety is threatened by rebellion or invasion. The only mention of habeas corpus is in Article I in the injunction for Congress not to suspend the privilege except in the above two circumstances, there is no mention of habeas corpus in the description of Presidential powers in Article II. Regardless, Lincoln felt compelled to exercise the authority to suspend the writ of Habeas Corpus and he acknowledged to Congress later that he might have been on shaky Constitutional grounds in doing just that. Eventually, the United States Congress granted Lincoln the power to suspend the writ of habeas Corpus during the war going forward and retroactively back to the beginning of the war. His argument was basically that abusing this one provision of the Constitution was worth it if the Union's very existence was at stake. Lincoln's view was that the protections traditionally granted to all citizens were subject to question when a part of the citizenry was in rebellion against the Union.

There are specific events that should be studied in order to better understand what happened in the first years of the Lincoln Administration. These events each will have a lesson plan that will be part of the overall curriculum unit. They are three legal cases centered on the arrest and detainment of critics of Lincoln's policies and the Emancipation Proclamation that Lincoln made by military order not subject to direct congressional oversight.

John Merryman was a prominent and vociferous opponent of the Union cause in Maryland during the first months of the Civil War. Federal troops suspected that he had actively participated in cutting off Washington's telegraph and rail links with the Union states to the North. During the first suspension of the writ of habeas corpus issued by Lincoln, Merryman was arrested and detained as an agitator. His lawyers petitioned the Supreme Court for immediate review and Chief Justice Taney ordered the Federal officer that arrested Merryman to show up in his court to explain why he had arrested Merryman for treason and detained him unlawfully during the period of the suspension of the writ of habeas corpus in parts of Maryland. Chief Justice Taney believed that Lincoln was operating in ways that exceeded his executive authority.

When the military officer that had arrested Merryman did not show at the hearing requested by Taney the

Chief Justice, serving in this instance as a Federal Circuit Judge, issued this response when the government failed to produce its prisoner, Merryman, under the order issued by Taney. In his written response, Taney said, "That the President, under the Constitution and laws of the United States, can not suspend the privilege of the writ of habeas corpus, nor authorize any military officer to do so." (2) Lincoln ignored the opinion of Taney believing that he had the emergency power to suspend the writ of habeas corpus in such dire situations as rebellion or invasion. He would continue to do so until 1863 when Congress voted to authorize the President's power to suspend the writ of habeas corpus when deemed necessary for the protection of the public. Lincoln's defiance of the law and the courts illustrates a key weakness of the writ of habeas corpus. If the responsible person cited in the granting of the writ does not comply there may be little that the courts can do except order federal marshals to arrest them. If the person defying the issuance of the writ is backed by superior force, the writ may be rendered powerless. The person doing the imprisoning must accede to the power of the court in order for the writ to be effective.

The second case questioning the exercise of authority by President Lincoln arose when the military commander in Ohio, General Ambrose Burnside arrested a prominent Democratic politician, James Vallandigham because of his remarks that could be construed as advocating the avoidance of conscription. The question became, should he have been arrested at all and if so, what was he arrested for, advocating resistance to the government in times of war or exercising his right to free speech in criticizing the government. This case is a complicated one because of the debate over exactly why Vallandigham was arrested and it will be examined more completely in the lesson plan being developed for the curriculum unit.

The arrest and imprisonment by the Military Governor of Ohio is equally disturbing to advocates of civil liberties. Lincoln's reliance on the military to maintain order, often through martial law allowed military officers to expand their local authority without following precedent or the laws protecting the right of citizens. The military officers that exercised the authority granted them became the representative of his intentions to the people they governed. If they were fair, Lincoln was seen as a good and fair President. If they were capricious and arbitrary in their administration of authority then Lincoln could be perceived as a tyrant. The military was charged to maintain order but it had an entirely different system of justice than the civilian justice system. There is a presumption of guilt, not innocence and the jury is made up of military officers and it is not a jury of peers. The people charged by the military did not enjoy the protection of individual liberties that they would in civilian courts. When to apply military justice and martial law is the question that continues to this day.

Lambdin Milligan was a member of the Democratic Party and an advocate for peace in the state of Indiana. He was suspected of planning acts against the United States and arrested by the army. The military tribunal in Indiana tried him for treason with the penalty of death. His supporters appealed his arrest, conviction and death sentence on the grounds that there was a civilian court open and available to try him as a civilian in a state that was not threatening to secede or support the Confederacy. Lincoln was thought to be ready to commute Milligan's sentence before Lincoln was assassinated. Milligan took his appeal to the Supreme Court because his right to habeas corpus protection had been ignored when a military tribunal tried him. The Supreme Court overturned his conviction after Lincoln's death because there was a civilian alternative court open to conduct his trial and a military tribunal should not then have tried him. This case will be referred to when the curriculum unit compares the actions of Lincoln during the Civil War and the actions of President Bush during the War in Iraq and the War on Terror.

Daniel Farber makes the following analysis of Milligan and cases like it in his book, *Lincoln's Constitution* .

"The best synthesis of the law on the general subject of martial law would probably be something like this. In emergencies -- sudden attack or insurrection --the president has the power to suspend the writ of habeas corpus and detain suspects within the general zone of military conflict. Congress has the ultimate control over suspension of habeas. The only apparent limitations on Congress are the existence of an invasion or insurrection and of the requisite need to protect public safety. Military trials, as opposed to preventive detentions, are also permissible in time of war, but under narrower circumstances -- in the actual theater of war, in occupied hostile territory, or for individuals connected with our own military or the enemies." (3)

The tension between military jurisdiction and justice and civilian court jurisdiction is a vibrant one within a democracy. Farber's analysis is equally relevant for events in Lincoln's era and today.

Although Lincoln was initially committed to limiting the spread of slavery into new territory when he was elected his views hardened as he managed the course of the war against the Confederate States of America. The immorality of slavery and its importance to the economy of the Confederacy combined to convince him that slavery had to be dealt with before the former slave states could return to the Union. Lincoln determined that he must emancipate the slaves but he wondered how he could do it without antagonizing the slave owners in the border-states and the Unionists who were ambivalent about freeing the slaves because they might represent a threat to white laborers. He also wondered what the most appropriate exercise of presidential authority might be in order to insure the success of his efforts to emancipate the slaves in America.

Lincoln came to the conclusion that his unquestioned role of Commander in Chief would be the best vehicle to issue the Emancipation Proclamation. He would free the slaves in lands under the control of his enemy, the Confederacy, by military decree. He reasoned that slaves were the property of plantation owners who provided the only currency available to the South, cotton. If he could disrupt the production of cotton by offering the work force the alternative of freedom then that was the militarily prudent course to follow by military decree.

Lincoln used the military and emergency powers to protect the Union during an insurrection within the Union. It was a unique time in American history and his exercise of power should be viewed skeptically when applying his principles to modern times. After 9/11, the current administration has used fear and secrecy to extend its

own executive power and it is very revealing when the actions of the Bush Administration are compared to Lincoln's actions when the very existence of the Union was threatened by rebellion.

The curriculum will provide an overview before it concentrates on the applicable parts of the Constitution of the United States and their origin in the law. Habeas Corpus has been a part of English Common Law since before the Magna Carta. Its fundamental protection from the abuses of authority has protected nobles and the common man for centuries. The reference to the suspension of the writ of habeas corpus in Article I of the Constitution does state that the power to do so would belong to the Congress. Lincoln assumed that power without any authorization of Congress and many people were incarcerated without trial for up to two years. When Congress finally did approve the President's actions suspending habeas corpus it also granted retroactive immunity to preserve the authority of President Lincoln during the war.

Structure and Lesson Plans

The curriculum is designed for high school sophomores taking United States History 1 in an urban setting and its format is based on seventy-five minute classes in a block schedule and to last two weeks. There is an assumption that the range of skills is very broad and that some of the students are operating with dissimilar skill sets. Most of the students are relatively unfamiliar with the origins of the rights of individuals. When appropriate there will be more challenging assignments for honors sections.

The five individual lessons will be presented in two parts that reflect the prescribed curriculum of the New Haven School District in United States History I. Unit Six; The Origins of American Government will start with two lessons on the importance of the writ of habeas corpus in English Common Law and its importance in the philosophies of our founders. That will be both the introduction of the writ of habeas corpus and the beginning of the study of the United States Constitution and the Bill of Rights. Then the second part of the curriculum will be a part of Unit Nine in the New Haven School District, the Civil War.

The concept of the writ of habeas corpus will be a bridge between the study of the Constitutional beginnings of America and the Civil War. The study of Lincoln and habeas corpus during the Civil War will also be linked to the present by examining the recent *Boumediene v. Bush*, Supreme Court case. Lincoln and habeas corpus will be the fulcrum for a preceding study during the beginnings of this nation and an examination of habeas corpus in the present.

LESSON ONE: (Part of Unit Six)

SUBJECT: The Introduction of what Habeas Corpus Means and Its Role in the development of English Common Law.

Habeas Corpus means, "You have the body" in Latin. The writ of habeas corpus is what a lawyer can seek from a judge that will require the person served the writ to produce the subject of the writ in court. If the writ is granted by judicial authority then the authority imprisoning an individual must produce the prisoner or be held in contempt of court.

NOTE: This is a difficult concept to understand and situational modeling may be the best teaching strategy to convey its meaning. I will ask each member of the class to write in their history journal their response to the following exercise of authority. The teacher will not let the students leave at the end of class and locks the door to prevent their exit. The teacher refuses to respond to any request to leave and there are security guards in the classroom to prevent any physical response by the imprisoned students. Who will the students turn to for relief and what will they ask them to do?

The college class sections will receive a detailed explanation on what habeas corpus means and they will take turns reading the material and asking questions as we go along. The honors sections will read the explanation of habeas corpus' role in English Common law as cited by Justice Kennedy in the Supreme Court decision in the *Boumediene v Bush* case.

There will be a list of key words and terms that the students will have to research and learn before the end of the second lesson. Library time for this research will be part of a more detailed lesson plan. The students will retain their definition sheets for the second part of the curriculum unit to be presented during the study of the Civil War.

LESSON TWO: (Part of Unit Six)

SUBJECT: The importance of the writ of habeas corpus as a fundamental protection of the individual and its incorporation into the United States Constitution.

The importance of the writ of habeas corpus under American law will be the focus of the second class. There will be specific examples of the use of the writ of habeas corpus during the colonial period. There will also be original materials that will read in class that will speak to the importance of the writ to James Madison and why it was included as an important individual right in the Constitution itself before other individual rights were addressed in the first ten amendments to the Constitution.

The debate over the inclusion of the writ in the Constitutional Convention and then the subsequent state ratification conventions will also demonstrate the process of ratification and the variance in the perspectives of different states.

NOTE: The class will be asked to debate the issue of the ratification of a document that includes the writ of habeas corpus. There will be four different groups that will prepare for the debate and present their arguments. (One group will be for inclusion, another group will be against inclusion on the grounds that it grants the individual too much power, another group will be against inclusion because it restricts the right of the executive authority in times of crisis and the fourth group will argue that it seems odd that only Congress (of the three branches of government) was granted the right to suspend the writ in times of national emergency.)

LESSON THREE: (Part of Unit Nine)

SUBJECT: The challenges that President Lincoln faced as the chief executive in wartime and his willingness to suspend the writ of habeas corpus. What it would mean to lose the legal right to ask for a writ of habeas corpus. Part One.

The initial activity will require that each student formulate their own list of the challenges they believe President Lincoln faced at the beginning of the Civil War. The general circumstances will be presented as follows: Between his election in November 1860 and his inauguration in March of 1861 seven states had seceded and formed the Confederate States of America. There was good reason to think that more states

would follow. What did he face and what could he do? There will be a class discussion to construct one overall assessment of the situation Lincoln faced.

There will be a review of the writ of habeas corpus and the definitions and terms that each student prepared as part of the first part of the curriculum unit.

President Lincoln's assumption of the power to suspend the writ of habeas corpus will be studied in the details of the most significant exercises of suspension. There will also be a careful examination of the opposition President Lincoln encountered from Chief Justice Roger Taney.

The students will then select a topic for a three-page paper from a list provided by the teacher. The paper will be due at the end of the fifth and final lesson. There will be research time built into the more detailed lesson plan.

LESSON FOUR: (Part of Unit Nine)

SUBJECT: The challenges that President Lincoln faced as the chief executive in wartime and his willingness to suspend the writ of habeas corpus. What it would mean to lose the legal right to ask for a writ of habeas corpus. Part Two.

The course of the war and the responses by different governmental bodies to President Lincoln's will be the initial focus. There will be specific focus on the issuance of the Emancipation Proclamation and the establishment of military tribunals.

NOTE: The students will then be asked to write in their journals in response to the following statement. "The President should have the unlimited right to use whatever authority necessary in times of war, regardless of the effects on the rights of the individual under Constitutional law." Do you agree or disagree?

The class will end with a discussion about the writ of habeas corpus and the controversies surrounding the actions of President Abraham Lincoln suspending it without Congress exercising its Constitutional authority to suspend the writ. The students will prepare for the fifth lesson by reading excerpts from the majority and minority opinions from *Boumediene v. Bush*.

LESSON FIVE: (Part of Unit Nine)

SUBJECT: The writ of habeas corpus today while the United States is at war with terrorism and the *Boumediene v. Bush* decision. What does it mean for the future?

There are a number of key questions that will be discussed in class:

1. What is the War on Terror and will it ever end or will the United States always be at war?
2. What is the difference, if any, between the right of citizens and non-citizens to protection by the writ of habeas corpus?
3. Are there places under American law where the writ of habeas corpus is not recognized as a legal right?
4. What is an "enemy combatant"?

5. Do President Lincoln's suspensions of habeas corpus without Congressional approval establish a legal precedent for a future chief executive to refer to in restricting access to the protection of the writ of habeas corpus in future wars?

The students will also present their papers to the class with an oral summary of what they learned in the process.

ASSESSMENT

The effectiveness of the presentation of the curriculum unit to the students will be measured in five ways.

Each student's participation in the many class exercises and discussions.

The quality of the work on the sheet of terms to be defined that will be handed in at the end of the first part of the curriculum.

The results of a quiz about habeas corpus and its origins to be given at the end of the first part of the unit.

The results of a test to be given on the content of the entire unit after the fifth lesson.

The quality of the paper prepared by each student.

There will also be a detailed questionnaire that each student will be asked to fill out and the results will be tabulated. The suggestions from improving the curriculum will be carefully assessed and there will be appropriate changes made if necessary.

SPECIAL NOTE: In the first paragraph of the curriculum the word mechanism is in quotes. There will be special recognition for the student that determines its origin from the original materials the students will read. (The answer is: *Boumediene v. Bush* .)

Notes

1. McPherson, James, *The Battle Cry of Freedom* , Oxford University Press, Oxford and New York, 1988 (Page 284)
2. Simon, James F., *Lincoln and Chief Justice Taney* , Simon and Shuster Paperbacks, New York, London and Toronto, 2006 (Page 189)
3. Farber, Daniel, *Lincoln's Constitution* , The University of Chicago Press, Chicago and London, 2003 (Page 169)

Annotated Bibliography

Habeas Corpus and Lincoln Unit

Adams, Charles, *When in the Course of Human Events*, Rowman and Littlefield,

Lanham Boulder New York Toronto Oxford 2005

This book by Adams skillfully presents the Southern perspective on the exercise of Federal power.

Burt, Robert, *The Constitution in Conflict*, Belknap Press of Harvard University

Press, Cambridge London 1992

Robert Burt comprehensively depicts the tensions between events and Constitutional Law throughout American history.

Carwardine, Richard, *LINCOLN A Life of Purpose and Power*, Vintage Books

Division of Random House, New York 2007

Carwardine's book won the Lincoln Prize and it tells his story well from the very beginning. Chapter Six is particularly relevant to this curriculum.

Farber, Daniel, *Lincoln's Constitution*, University of Chicago Press, Chicago

London 2003

Farber's entire book is dedicated to the study of President Lincoln and the myriad of constitutional issues that were important in his wartime presidency.

Friedman, Lawrence M., *A History of American Law*, A Touchstone Book

Simon and Schuster, New York London 2005

Goodwin, Doris Kearns, *Team of Rivals*, Simon and Schuster, New York

London 2005

Goodwin's book has many insights into Lincoln the politician.

Hawes, Robert Jr., *One Nation, Indivisible?*, Fultus TM Books, 2006

This is another book that represents the position of the state and each state's right to determine its own political future regardless of the will of the Federal Government.

Levy, Leonard W., *Origins of the Bill of Rights*, Yale Nota Bene Yale University

Press, New Haven and London 2001

There is an excellent chapter on the writ of habeas corpus that discusses its historical origins and its role in protecting individuals from unlawful imprisonment.

McPherson, James, *Battle Cry of Freedom*, Oxford University Press, Oxford 1988

This book is an excellent panoramic recounting of the entire course of the Civil War.

Miller, William Lee, *President Lincoln, The Duty of a Statesman*, Alfred A. Knopf

New York 2008

Simon, James, *Lincoln and Chief Justice Taney*, Simon and Schuster Paperbacks

New York and London

Simon's explanation of the legal and political controversy over the suspension of habeas corpus depicts Taney as a complex character.

Stone, Geoffrey, *Perilous Times Free Speech in Wartime*, WW Norton and Company

New York and London 2004

This is a must read for every teacher of American history.

Course Readings for Students

English Petition of Right (1628)

English Habeas Corpus Act of 1679

Lincoln's First Inaugural Address

Lincoln's Second Inaugural Address

The Constitution of the United States

The First Fourteen Amendments to the Constitution

Emancipation Proclamation 1863

The Syllabus and the First Twenty-One Pages of the Majority Opinion in the Supreme Court Decision in *Boumediene v. Bush*

Handouts Prepared for the Curriculum.

Terms, Events and People

Habeas Corpus and Lincoln Curriculum

I.

Magna Carta
The Divine Right of Kings
Petition of Right of 1628
King Charles I
Oliver Cromwell
Habeas Corpus Act of 1679
John Peter Zenger
James Sommersett
Northwest Ordinance of 1787
Charles Pinckney
The Federalist Papers
James Madison
Alexander Hamilton
Ex Parte Bollman (1807)
Legal precedent

II.

Roger Taney
Separation of Power
Jefferson Davis
Ex Parte Merryman
Ex Parte Milligan
Confiscation Acts
Emancipation Proclamation
Clement Vallandigham
Thirteenth Amendment
Ambrose Burnside
Suspension Clause
William H. Seward
George McClellan
Virginia Declaration of Rights
Prize Cases (1862)

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