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**A COMPARISON AND CONTRAST OF THE  
SUSPENSION OF THE WRIT OF *HABEAS CORPUS*  
BY PRESIDENTS ABRAHAM LINCOLN & GEORGE  
W. BUSH**

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## I. INTRODUCTION

During their presidencies, Abraham Lincoln and George W. Bush both suspended the writ of *habeas corpus*; while these two situations appear to be similar, the facts surrounding each president's suspension are vastly different. As I will later discuss in detail, President Lincoln was faced with an imminent rebellion near our nation's capital that threatened the existence of the United States, had it been successful. On the other hand, President Bush called for the detention of enemy combatants on foreign soil where there was no immediate danger posed to the United States because a substantial amount of time had passed since the terrorist attacks on our country.

Furthermore, President Lincoln was forced to act alone, as the events causing his suspension of the writ of *habeas corpus* arose while Congress was not in session, and would not be in session for the next several months. President Bush found himself in a much different situation, in that respect, as he had a congress currently in session, yet he still decided to take executive action without approaching legislators to suspend the writ of *habeas corpus* in compliance with the constitution. In both situations, the Supreme Court has ruled that access to the writ of *habeas corpus* is a fundamental right, and suspension of such by a president is in violation of the United States Constitution. Abraham Lincoln's suspension of *habeas corpus* during the Civil War presented issues similar to those presented by the Guantanamo detainee cases. Presidents Lincoln and Bush both unconstitutionally suspended *habeas corpus* during a time of war because the writ of *habeas corpus* is a fundamental right and suspension is a power granted only to congress. Although the suspension appears to be unconstitutional, President Lincoln was justified in suspending the writ of *habeas corpus* due to provisions in Article II of the United States Constitution.

## II. CONSTITUTIONAL AUTHORITY & HISTORICAL INFORMATION

### a. THE POWERS GRANTED TO THE PRESIDENT AND CONGRESS IN THE CONSTITUTION

Article I of the United States Constitution sets forth the legislative powers of the United States Congress.<sup>1</sup> Additionally, Article I grants congress the sole power to suspend the writ of *habeas corpus*. The text of Article I states that “[t]he 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.”<sup>2</sup> Although I will address the specific situations that both President Lincoln and President Bush were faced with later, it is important to note that even in cases of rebellion or invasion, the constitution clearly grants the power to suspend the writ of *habeas corpus* solely to congress.

Article II of the United States Constitution addresses the powers that are granted to the President of the United States.<sup>3</sup> Section one of Article II simply states that the President of the United States has executive power. Section one also addresses the election of the president, such as the selection of electors along with the eligibility requirements that must be met to be a presidential candidate. Section two of Article II addresses the military powers of the president by providing the following:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for offenses against the United States, except in Cases of Impeachment.<sup>4</sup>

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<sup>1</sup> U.S. CONST. art. I § 1.

<sup>2</sup> U.S. CONST. art. I § 9, cl. 2.

<sup>3</sup> U.S. CONST. art. II.

<sup>4</sup> U.S. CONST. art. II § 2, cl. 1.

However, nowhere in the text of this section, which addresses military powers, does the constitution provide any mention of the president having the power to suspend the writ of *habeas corpus*. Section three of this article discusses the president's state of the union address; however, it fails to provide any information regarding the suspension of *habeas corpus*. Likewise, section four of Article II also does not address the president having the power to suspend the writ of *habeas corpus*. Instead, section four states that the president and vice president may be removed from office through impeachment, while providing the reasons for impeachment.

One provision in Article II, that is of the utmost importance to President Lincoln's defense to his suspension of the writ of *habeas corpus*, is found in Article II section one. It states that before taking office, the president shall take an oath stating that "I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect, and defend the Constitution of the United States."<sup>5</sup> This section gives the President the ability to take drastic action, if necessary, to defend the constitution. In the case of Lincoln, this is important because this provision allowed him to take the drastic actions to preserve the United States from further damage.

#### b. THE HISTORY OF HABEAS CORPUS

The writ of *habeas corpus* has deep roots, going back to England before the United States existed. Before the passage of the federal statute in 1789, several states had already passed their own version of *habeas corpus* laws.<sup>6</sup> In addition to its most common use in criminal matters, the writ of *habeas corpus* has been used in numerous civil cases as well; this includes cases involving child custody matters and cases involving slaves.<sup>7</sup>

The suspension of *habeas corpus* by President Abraham Lincoln has long been a hotly debated constitutional law topic, that has had a major impact on supreme court decisions over the past two decades. The writ of *habeas corpus* is applied for

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<sup>5</sup> U.S. CONST. art. II § 1, cl. 8.

<sup>6</sup> BADSHAH K. MIAN, AMERICAN HABEAS CORPUS: A HISTORICAL VIEW (1980).

<sup>7</sup> *Id.*

when an individual is alleged to be unjustly held.<sup>8</sup> When the writ is issued, whoever is holding that prisoner, generally the military, shall bring the person before the court and show cause as to why the individual is being detained.<sup>9</sup> If cause is not shown for the detention, the individual will then be released.<sup>10</sup> Essentially, “[t]he object of *habeas corpus* is to inquire into the legality of imprisonment, whether it is by competent authority and for a sufficient reason; and according to the evidence given at the hearing, the prisoner is either discharged, bailed, tried, or remanded to custody.”<sup>11</sup>

Before the Civil War, the issues surrounding the suspension of the writ of *habeas corpus* had never really surfaced.<sup>12</sup> However, a few judges had begun to discuss the issue of the authority to suspend *habeas corpus*.<sup>13</sup> The first major opinion that addressed this issue was *Ex Parte Bollman*, in which the Court established that the suspension of the writ of *habeas corpus* is a legislative power by stating the following:

If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can see only its duty, and must obey the laws.<sup>14</sup>

Following this case, there were several other opinions issued with similar rulings in the years leading up to the civil war.<sup>15</sup>

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<sup>8</sup> S. G. F., *The Suspension of Habeas Corpus During the War of the Rebellion*, 3 POL. SCI. Q., 454, 454-55 (1888).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> BADSHAH K. MIAN, *supra* note 6.

<sup>13</sup> *Id.*

<sup>14</sup> *Ex Parte Bollman*, 8 U.S. 75, 101 (1807).

<sup>15</sup> BINNEY, 1 THE SUSPENSION OF *HABEAS CORPUS* UNDER THE UNITED STATES CONSTITUTION, 34 (1862).

### C. THE SUSPENSION OF HABEAS CORPUS BY PRESIDENT LINCOLN

Monday, March 4, 1861, was a crucially important day in the history of the United States. On this day, Abraham Lincoln, a lawyer from Springfield, Illinois, stood face to face with Chief Justice of the United States Supreme Court, Roger B. Taney, to take the Presidential oath of office. Not only did President Lincoln take his oath of office that day, he also stood in front of the man whom he would become locked in an enormous legal battle with. The subject matter of this legal battle is still debated to this day.<sup>16</sup> With congress not set to be in session for several more months, President Lincoln was now faced with challenges unlike any faced by a President before him.<sup>17</sup> "He was therefore, confronted with an armed enemy to the south, and at the same time had to deal with the intrigue, subversion, and treason on his flanks, and even at his rear."<sup>18</sup> At that point, it was solely up to him to uphold the oath he had just taken which was to "preserve, protect, and defend the Constitution of the United States."<sup>19</sup>

Tensions of secession and rebellion continued to build when finally, on April 25, 1861, President Lincoln provided General Winfield Scott with the following message permitting him to suspend *habeas corpus* in Maryland:

I therefore conclude that it is only left to the commanding General to watch, and await their action, which, if it shall be to arm their people against the United States, he is to adopt the most prompt, and efficient means to counteract, even, if necessary, to the bombardment of their cities – and in the extremest necessity, the suspension of the writ of *habeas corpus*.<sup>20</sup>

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<sup>16</sup> Sherrill Halbert, *The Suspension of the Writ of Habeas Corpus by President Lincoln*, 2 THE AM. J. OF LEGAL HIST. 95, 96 (1958).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Letter from Abraham Lincoln to Winfield Scott (Apr. 25, 1861), in IV COLL. WORKS OF ABRAHAM LINCOLN, 344, 344 (Roy P. Basler ed., 1953).

This powerful message from Lincoln shows that he understood the potential implications of suspending the writ of *habeas corpus* in Maryland. In fact, President Lincoln was quite hesitant to suspend the writ of *habeas corpus* by instructing General Scott to suspend the writ only in the “extremest necessity.”<sup>21</sup>

*Ex Parte Merryman* is the landmark *habeas corpus* case regarding President Lincoln’s suspension of the writ. This is mainly due to the strongly worded opinion delivered by Chief Justice Roger B. Taney. On May 25, 1861, Mr. Merryman was taken into custody, by force from his own home in Maryland, for recruiting, training, and leading a drill company for Confederate Service.<sup>22</sup> He was then detained in prison at Fort McHenry without a warrant.<sup>23</sup>

Mr. Merryman’s lawyer then filed for a writ of *habeas corpus*. Chief Justice Taney ordered General George Cadwallader to appear in court on May 28 and to have Merryman with him.<sup>24</sup> However, President Lincoln had already sent word to the Commanding General of the United States military that they had the authority to suspend the writ of *habeas corpus*.<sup>25</sup> When *habeas corpus* was served on a commanding officer, the officer simply stated that he had been authorized by President Lincoln to suspend the writ of *habeas corpus* at his discretion, and he did in this case.<sup>26</sup> On May 28, Taney ruled that the president did not have the power to suspend the writ of *habeas corpus* and that an opinion to support his ruling would soon follow.<sup>27</sup>

In the opinion, Chief Justice Taney stated that his thoughts regarding the writ of *habeas corpus* were that “it was admitted on all hands that the privilege of the writ could not be suspended except by any act of congress.”<sup>28</sup> He went on to discuss Article I of the constitution, where the language setting

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<sup>21</sup> Sherrill Halbert, *supra* note 16, at 98.

<sup>22</sup> James A. Dueholm, *Lincoln's Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis*, J. OF THE ABRAHAM LINCOLN ASS'N, Summer 2008, at 49.

<sup>23</sup> *Ex parte Merryman*, 17 F. Cas. 144, 144 (C.C.D. Md. 1861) (No. 9,487).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> James A. Dueholm, *supra* note 22.

<sup>28</sup> *Ex parte Merryman*, 17 F. Cas. at 148.



forth the right to suspend the writ of *habeas corpus* is located. Taney stated, “[t]his article is devoted to the legislative department of the United States and has not the slightest reference to the executive department.”<sup>29</sup> Chief Justice Taney then moved on to discuss Article II of the Constitution in order to prove that President Lincoln had acted beyond the scope of the authority granted to the president. In doing so, he took another shot at President Lincoln by stating:

The only power, therefore, which the president possesses, where the “life, liberty or property” of a private citizen is concerned, is the power and duty prescribed in the third section of the second article, which requires “that he shall take care that the laws shall be faithfully executed.” He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the co-ordinate branch of the government to which that duty is assigned by the constitution.<sup>30</sup>

Next, Chief Justice Taney reiterated the constitutional provisions and stated that “fundamental laws, which Congress itself could not suspend, have been disregarded and suspended, like the writ of *habeas corpus*.”<sup>31</sup> Finally, he closed by saying that if the authority of the constitution may be illegally taken away by military force under any circumstances, citizens are “no longer living under a government of laws.”<sup>32</sup>

Although President Lincoln never took any public notice of *Ex Parte Merryman*, it became quite evident that he had been made aware of Chief Justice Taney’s opinion, when he delivered the following message to congress:

I have been reminded from a high quarter that one who is sworn to ‘take care that the laws be faithfully executed’ should not himself be one to

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 149.

<sup>31</sup> *Id.* at 152.

<sup>32</sup> *Id.*

violate them. Of course, I have some consideration to the questions of power and propriety before I acted in this manner.<sup>33</sup>

Here, President Lincoln is not suggesting that he broke any laws by acting unconstitutionally as suggested in Justice Taney's opinion. However, it seems from this statement that he was more than just aware of the opinion and he was starting to realize that he had potentially violated the constitution. In a different message to congress, President Lincoln publicly denied violating any laws in the following statement:

In my opinion, I violated no law. The provision of the constitution that "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," is equivalent to a provision - is a provision - that such privilege may be suspended when, in cases of rebellion or invasion, and the public safety does require the qualified suspension of the privilege of the writ of *habeas corpus*.<sup>34</sup>

Although this statement from President Lincoln suggesting that he did not violate any laws is a compelling argument, there are some things he did not take into consideration before speaking to Congress. He is citing to a provision in the constitution from Article I, which gives Congress the power to act. This provision gives no authority to the executive branch to suspend the writ of *habeas corpus*, which suggests that, contrary to his statement, he did in fact violate the law.

President Lincoln's failure to publicly acknowledge Justice Taney's opinion presented constitutional issues beyond *habeas corpus*. Judicial review is the power of the courts to examine the actions of the legislative and executive branch to determine whether such actions are in violation of the

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<sup>33</sup> Message to Congress in Special Session (Jul. 4, 1861), in IV COLL. WORKS OF ABRAHAM LINCOLN, 321, 329 n.1 (Roy P. Basler ed., 1953). See IV JOHN G. NICOLAY & JOHN HAY, ABRAHAM LINCOLN: A HISTORY, 176 et. seq. (1890) (includes the full text of the autograph manuscript of this portion of the message).

<sup>34</sup> *Id.*

Constitution. President Lincoln was defying the power of judicial review in this situation, which is a cause for great concern. As a result, President Lincoln set a troubling precedent for any President of the United States to potentially ignore any Supreme Court order that they do not like.

By September of 1862, President Lincoln issued a proclamation suspending the writ of *habeas corpus* throughout the United States. This proclamation stated:

Whereas, it has become necessary to call into service not only volunteers but also portions of the militia of the States by draft in order to suppress the insurrection existing in the United States, and disloyal persons are not adequately restrained by the ordinary processes of law from hindering this measure and from giving aid and comfort in various ways to the insurrection; Now, therefore, be it ordered, first, that during the existing insurrection and as a necessary measure for suppressing the same, all Rebels and Insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to Rebels against the authority of United States, shall be subject to martial law and be liable to trial and punishment by Courts Martial or Military Commission: Second. That the Writ of Habeas Corpus is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any for, camp, arsenal, military prison, or other place of confinement by any military authority or by the sentence of any Court Martial or Military Commission. In witness whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed. Done at the City of Washington this twenty fourth day of September, in the year of our Lord one thousand

eight hundred and sixty-two, and of the Independence of the United States the 87th.<sup>35</sup>

Once again, this formal proclamation by President Lincoln shows that he was very hesitant in his suspension of *habeas corpus* by stating that it was a “necessary measure.” The tone of how he demonstrates the necessity in the proclamation exhibits that he was taking what he considered to be the best course of action, whether it was actually legal to do so or not.

On September 15, 1863, President Lincoln issued another proclamation suspending *habeas corpus*, but this time it was based upon legislation passed by congress in March of 1863. Lincoln did not want to use the legislation passed that spring, saying that he did not need it.<sup>36</sup> However, as tensions continued to rise, Lincoln felt that he had no other choice than to issue a proclamation with the legislation that had been passed by congress, giving the president the authority to suspend the writ of *habeas corpus*.<sup>37</sup> The proclamation regarding the Habeas Corpus Suspension Act stated the following:

Whereas the Constitution of the United States has ordained that 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; and Whereas a rebellion was existing on the third day of March, 1863, which rebellion is still existing; and Whereas by a statute which was approved on that day it was enacted by the Senate and House of Representatives of the United States in Congress assembled that during the present insurrection the President of the United States, whenever in his judgment the public safety may require, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout

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<sup>35</sup> TEACHING AMERICAN HISTORY, PROCLAMATION SUSPENDING THE WRIT OF HABEAS CORPUS

<https://teachingamericanhistory.org/library/document/proclamation-suspending-the-writ-of-habeas-corporus/> (last visited Nov 4, 2019).

<sup>36</sup>James A. Dueholm, *supra* note 22, at 50-51.

<sup>37</sup> *Id.*

the United States or any part thereof; and Whereas, in the judgment of the President, the public safety does require that the privilege of the said writ shall now be suspended throughout the United States in the cases where, by the authority of the President of the United States, military, naval, and civil officers of the United States, or any of them, hold person under their command or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy, or officers, soldiers, or seamen enrolled or drafted or mustered or enlisted in or belonging to the land or naval forces of the United States, or as deserters therefrom, or otherwise amenable to military law or the rules and articles of war or the rules or regulations prescribed for the military or naval services by authority of the President of the United States, or for resisting a draft, or for any other offense against the military or naval service: Now, therefore, I, Abraham Lincoln, President of the United States, do hereby proclaim and make known to all whom it may concern that the privilege of the writ of habeas corpus is suspended throughout the United States in the several cases before mentioned, and that this suspension will continue throughout the duration of the said rebellion or until this proclamation shall, by a subsequent one to be issued by the President of the United States, be modified or revoked. And I do hereby require all magistrates, attorneys, and other civil officers within the United States and all officers and others in the military and naval services of the United States to take distinct notice of this suspension and to give it full effect, and all citizens of the United States to conduct and govern themselves accordingly and in conformity with the Constitution of the United States and the laws of Congress in such case made and provided. In Testimony whereof I have hereunto set my hand and caused the seal of the United States to be affixed, this fifteenth

day of September, A.D. 1863 and of the independence of the United States of America the eighty-eighth.<sup>38</sup>

Although this act provided the president with power to suspend the writ of *habeas corpus*, part of the legislation strongly restricted a president's ability to suspend the writ due to time restrictions imposed that would free anyone not indicted by the first available Grand Jury.<sup>39</sup> This imposed a great burden on Lincoln's ability to detain those who had not actually committed crimes because he was having the military detain people who were undermining and disrupting the war by assisting the Confederates.<sup>40</sup> At the end of the Civil War, after Andrew Johnson had assumed the office of President, he used the act to overturn a writ of *habeas corpus* in a case.<sup>41</sup> Eventually suspension of the writ of *habeas corpus* resided in both the North and South as some provisions expired, while other provisions were repealed and replaced.<sup>42</sup>

#### IV. BUSH'S SUSPENSION OF HABEAS CORPUS

In the days, and even years, following the terrorist attacks of September 11, 2001, President George W. Bush, just months after taking office, felt that taking executive action similar to that of President Lincoln during the Civil War was necessary.<sup>43</sup> His actions to suspend air travel following the attacks were not at issue here because such actions were *de minimis*. However, his actions taken to deny the privilege of the writ of *habeas corpus* to individuals held captive as enemy combatants during the war on terrorism were a major constitutional issue. In fact, "President George W. Bush's

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<sup>38</sup> Presidential Proclamation (Sep. 17, 1863), WRITINGS OF ABRAHAM LINCOLN, (Arthur Brooks Lapsley ed., 1906).

<sup>39</sup> James A. Dueholm, *supra* note 22, at 53.

<sup>40</sup> *Id.*

<sup>41</sup> CIVIL WAR ON THE WESTERN BORDER: THE MISSOURI-KANSAS CONFLICT, 1854-1865, HABEAS CORPUS SUSPENSION ACT, <https://civilwaronthewesternborder.org/timeline/habeas-corpus-suspension-act> (last visited Nov 4, 2019).

<sup>42</sup> *Id.*

<sup>43</sup> James P. Pfiffner, *Federalist No. 70: Is the President Too Powerful?*, 71 PUB. ADMIN. REV. 112 (2011).

assertions of executive authority were arguably the broadest of any president.”<sup>44</sup>

President Bush decided to try the accused terrorists in Military Tribunals and had a detention camp set up at a U.S. Navy base located in Guantanamo Bay, Cuba.<sup>45</sup> Military Tribunals are special court proceedings that are used specifically for prosecuting war crimes that are unlike normal criminal courts in the United States. The most important distinction between Military Tribunals and criminal courts is that Military Tribunals do not have to provide those individuals being tried with many rights such as the Sixth Amendment, rules of evidence, and the right to appeal.<sup>46</sup>

Soon after detainees, held as enemy combatants, arrived at Guantanamo, where they were to be housed, *habeas corpus* petitions began to be filed.<sup>47</sup> The first petitions along with those that followed were all dismissed. This trend continued until public tensions concerning the situation in Guantanamo heightened to the point where the Supreme Court decided to expand the rights of the detainees housed there.<sup>48</sup>

A 2004 Supreme Court decision in the case *Hamdi v. Rumsfeld* is the first landmark decision of this era concerning the writ of *habeas corpus* and the actions taken by President Bush. In that case, Hamdi was a United States Citizen who was captured in Afghanistan by United States allied forces and was turned over to the United States military.<sup>49</sup> He was then transferred to a United States Navy base in Virginia, where he was still being detained when his father filed a *habeas corpus* petition on his behalf.<sup>50</sup> The court ultimately concluded that Hamdi’s right to *habeas corpus* was in no way dependent on the status of his citizenship.<sup>51</sup> *Rasul v. Bush* was another 2004 Supreme Court decision involving detainees who were being held as enemy

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<sup>44</sup> *Id.*

<sup>45</sup> BILL OF RIGHTS INSTITUTE, GEORGE W. BUSH AND MILITARY TRIBUNALS - PRESIDENTS AND THE CONSTITUTION, <https://billofrightsinstitute.org/educate/educator-resources/lessons-plans/presidents-constitution/military-tribunals/> (last visited Nov 4, 2019).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 511 (2004).

<sup>50</sup> *Id.* at 510.

<sup>51</sup> *Id.* at 523.

combatants.<sup>52</sup> In this case, the Court held that the district court had jurisdiction to hear the *habeas corpus* challenges.<sup>53</sup> *Rasul* was the first case in this era that dealt with detainees that were being held at the Guantanamo Bay Naval Base in Cuba. In making its decision, the Court determined that it was immaterial that the aliens were being held in military custody when it came to the district court's jurisdiction to hear the claims.<sup>54</sup>

After these decisions by the Supreme Court, President Bush was successful in his efforts of getting the Republican majority congress to pass legislation into law that prevented *habeas corpus* from applying to aliens who were being held as enemy combatants.<sup>55</sup> The legislation was named the Military Commissions Act of 2006.<sup>56</sup>

Also in 2006, the Supreme Court, in the case of *Hamdan v. Rumsfeld*, held that detainees had the right to appeal their *habeas corpus* petitions to federal appellate courts.<sup>57</sup> In that case, the court determined that President Bush's determination of practicability was insufficient to justify any variances from the typical procedures governing courts-martial.<sup>58</sup>

In 2008, the Supreme Court addressed the Military Commissions Act of 2006 that President Bush, and his fellow Republican majority of congress, had passed into law in the case of *Boumediene v. Bush*. In that case, the petitioners were all aliens who were detained at Guantanamo Bay after being captured outside of the United States and labeled as enemy combatants.<sup>59</sup> As a result, each of the petitioners in the case filed a writ of *habeas corpus* but were denied in District Court, where it was ordered that the cases were to be dismissed for lack of jurisdiction because Guantanamo is located outside United States territory.<sup>60</sup> In the case, the Supreme Court held that the petitioners did have the constitutional privilege of *habeas corpus* and the protections afforded by it regardless of their designation as enemy combatants or their detention at

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<sup>52</sup> *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>53</sup> *Id.* at 483.

<sup>54</sup> *Id.* at 485.

<sup>55</sup> BILL OF RIGHTS INSTITUTE, *supra* note 45.

<sup>56</sup> *Id.*

<sup>57</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>58</sup> *Id.* at 622.

<sup>59</sup> *Boumediene v. Bush*, 553 U.S. 723, 732 (2008).

<sup>60</sup> *Id.* at 734.



Guantanamo.<sup>61</sup> This decision rendered the Military Commissions Act of 2006 as an unconstitutional suspension of the writ of *habeas corpus* by President Bush and his fellow legislators in congress who helped him pass the legislation. In making its decision, the Court relied on intent of the framers by stating that the framers considered the writ of *habeas corpus* to be a vital instrument in protecting individual liberty.<sup>62</sup> The Court noted that the vitality was evident because of the specified limited grounds for suspending the writ of *habeas corpus* in the Suspension Clause.<sup>63</sup> The Court even went as far to say that the Clause was designed to protect abuses of the writ by both the Executive and Legislative Branches of government.<sup>64</sup>

#### V. LINCOLN'S ACTIONS WERE JUSTIFIED AND BUSH'S WERE NOT

Presidents Lincoln and Bush were both faced with a great crisis near the beginning of their respective presidencies. President Lincoln faced rebellion at the beginning of the Civil War and President Bush had taken office just months before the 9/11 terrorist attacks. Both of these situations appeared to require executive action, with each president feeling "compelled to violate provisions of the constitution."<sup>65</sup>

President Lincoln took executive action suspending *habeas corpus* to prevent a complete rebellion that would encircle the nation's capital and threaten the existence of the United States as a country. Ultimately, Lincoln admitted to violating the Constitution by basically taking the role of Congress away in his suspension of the writ of *habeas corpus*.<sup>66</sup> He was able to justify his constitutional violation by arguing that, had he not acted in the way he did, the Union would be jeopardized. In doing so, Lincoln stated:

are all the laws but one, to go unexecuted, and the government itself go to pieces, lest that one

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<sup>61</sup> *Id.* at 732.

<sup>62</sup> *Id.* at 743.

<sup>63</sup> *Id.* at 745.

<sup>64</sup> *Id.* at 758.

<sup>65</sup> James P. Pfiffner, *supra* note 43.

<sup>66</sup> *Id.* at 115

be violated?... It was decided that we have a case of rebellion, and that the public safety does require the qualified suspension of the privilege of the writ, which was authorized to be made.<sup>67</sup>

This is an extremely valid argument by Lincoln because, had the Maryland capital fallen during the rebellion, Washington D.C. would have been next and there would have been no way of stopping it from happening. At the time of the initial suspension, congress was not in session and would not be for several months. In his statement President Lincoln mentioned that there was a case of rebellion in which the public safety required the suspension. This shows that President Lincoln followed the guidelines set forth in the constitution giving congress the power to suspend the writ. However, with congress not being in session, he realized that it was solely up to him to take action regardless of actually having the constitutional power to do so. Had congress been in session and ready to take up the matter, this apparent constitutional violation by President Lincoln would not have been justifiable because he could have approached them about a possible suspension of the writ. What makes this suspension justifiable is a provision located in Article II of the constitution. During the oath of office, President Lincoln swore to preserve and defend the constitution. This statement by him shows that he knew he was violating the constitution but, at the same time, felt he was taking the best course of action to preserve it for the future because taking no action would put the country's existence in jeopardy.

On the other hand, President Bush initially took action by shutting down the national air transportation system, which appears to be an appropriate response due to the multiple attacks on the United States by the use of airplanes that day. However, over the next few years, Bush took several executive actions, such as denying *habeas corpus* to enemy combatants that had been taken captive during the war in the Middle East, who were held at Guantanamo in violation of the constitution.<sup>68</sup> His first actions came nearly nine months after the attacks occurred. Unlike President Lincoln, Bush did not argue that denying

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

enemy combatants the writ of *habeas corpus* was a necessity. Instead he argued that "he was acting with the inherent authority of the presidency."<sup>69</sup> This is a very troubling argument at attempting justification by a then sitting president because that opens the door for any president in the future to use that same argument used by President Bush to basically have free reign as an inherent power of the presidency whenever they want, regardless of the laws of the United States.

The major difference in the actions of both Presidents, which makes Lincoln's violation of the constitution justifiable and Bush's not justifiable, revolves around the difference in the facts of the situations. President Lincoln was faced with a true public safety issue and actual rebellion. President Bush took action as a response to the global war on terrorism, triggered by the attacks on September 11, 2001. Citing invasion or public safety as a reason for taking actions works for President Lincoln because he truly had no other alternatives and Article II provided him with the option to take such action. However, President Bush cannot cite these as reasons before taking actions because he had the military detain these enemy combatants on foreign soil, years after the actual attacks, with no solid proof that they were actually involved in the attacks or currently posing a threat to attack the United States. It would have been much more reasonable and potentially justifiable for the same reasons as those of President Lincoln had President Bush denied *habeas corpus* to the terrorism suspects and enemy combatants in the months following the attacks in the case of such an emergency.<sup>70</sup> However, if it were such a necessity on the basis of invasion, President Bush should have approached congress asking them suspend the writ of *habeas corpus* shortly after the attacks instead of waiting until much time had passed before taking such drastic, unconstitutional action. By taking these actions, not only did President Bush violate the constitution, but he also did more damage to the country by severely harming international relations with countries, such as those in the Middle East, who provide a large quantity of oil for the United States.

Although the Supreme Court has ruled otherwise, the suspension of the writ of *habeas corpus* by President Lincoln was not a violation of the Constitution pursuant to the provisions in

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<sup>69</sup> James P. Pfiffner, *supra* note 43.

<sup>70</sup> *Id.*

Article II that gives the President the power to protect and preserve the United States Constitution. President Bush, however, unconstitutionally suspended the writ during a time of war as noted by Supreme Court rulings and pursuant to the United States Constitution.