

# Trump admin's threat to suspend core U.S. legal right sparks outcry and alarm

Stephen Miller said the president is “actively looking at” suspending the right for people to see a judge if detained in the U.S. Legal scholars say that Congress, not Trump, has that power.



— Habeas corpus grants anyone detained in the U.S. the right to see a judge, challenge the government’s evidence against them and present a defense.

Kurt Miller / The Riverside Press-Enterprise via Getty Images file

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**By David Rohde**



Legal experts and Democrats expressed growing alarm over the weekend that Trump administration officials are openly discussing unilaterally suspending habeas corpus – a bedrock American legal right – without the approval of Congress.

The writ of habeas corpus, which dates back centuries, grants anyone detained in the U.S. the right to see a judge, challenge the government’s evidence against them and present a defense.

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But White House Deputy Chief of Staff Stephen Miller downplayed its [significance on Friday](#), suggesting that the administration could move to suspend it unilaterally. "That's an option we're actively looking at," Miller told reporters at the White House.

Steve Vladeck, a constitutional law professor at Georgetown University, described Miller's statement [on Substack](#) as "factually and legally nuts" and called it the "most remarkable (and remarkably scary) comments about federal courts that I think we've ever heard from a senior White House official."

Other legal scholars strongly challenged Miller's assertion that the president could unilaterally suspend habeas corpus, Latin for "that you have the body." Vladeck and three other experts said

that a legal consensus has existed for decades that only Congress has the authority to suspend the right.

They noted that Article 1 of the Constitution, which describes Congress's powers, states, "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."

Over the weekend, senior Republicans [largely declined to answer](#) questions about Miller's threat. Democrats argued that the Trump administration is using its immigration crackdown to undermine the power of the judicial branch, bypass traditional legal safeguards and dangerously increase the power of the president.

"The one power you cannot give the executive is the power to arbitrarily imprison people who oppose the regime," Sen. Chris Murphy, D-Conn., said at a Democratic rally in Sarasota, Florida. "Today it may be an El Salvadorian immigrant or a foreign student, but tomorrow it is you or me. The slope to despotism can be slippery and quick."

## **Trump reportedly involved in discussions**

President Trump has been personally involved in discussions with the administration about potentially suspending habeas corpus, [CNN reported on Saturday](#). He appeared to allude to the issue in a statement to reporters on April 30.

"There are ways to mitigate it and there's some very strong ways," Trump said. "There's one way that's been used by three very highly respected presidents, but we hope we don't have to go that route."

The White House did not respond to requests for comment from NBC News.

Trump was most likely referring to Abraham Lincoln and Andrew Johnson, who suspended habeas corpus during and after the Civil War; Theodore Roosevelt, who suspended it in two provinces in the Philippines during a 1905 rebellion there; and Franklin Delano Roosevelt, who suspended it in Hawaii after the Japanese attack on Pearl Harbor.

The Supreme Court and several federal judges have recently ruled that anyone detained in the U.S. – including migrants – has the right to appear before a judge and present their defense.

Trump and Miller have assailed those rulings.

In his remarks on Friday, Miller referred to the jurists responsible as “a handful of Marxist judges” carrying out “a judicial coup.” He warned that the administration’s decision to suspend habeas corpus unilaterally would depend on whether the courts “do the right thing.”

Vladeck accused Miller of threatening judges. “It’s not just the mafia-esque threat implicit in this statement,” Vladeck [wrote](#). “He’s suggesting that the administration would (unlawfully) suspend habeas corpus if (but apparently only if) it disagrees with how courts rule in these cases.”

Ilya Somin, a law professor at George Mason University, called Miller’s claim that the president has the power to unilaterally suspend habeas corpus false.

“Habeas corpus can only be suspended under the Constitution in times of invasion or insurrection. None of that is happening now,” said Somin, a libertarian legal scholar and the Simon Chair of Constitutional Studies at the libertarian Cato Institute. “And it can only be done by Congress, not the president acting on his own.”

Somin and Jonathan Adler, a law professor at Case Western Reserve University, cited a 2004 Supreme Court ruling in which conservative Justice Sandra Day O’Connor concluded that only Congress has the authority to suspend habeas corpus.

O’Connor also emphasized that habeas corpus has acted as a “critical check” on the executive branch’s power to unlawfully detain individuals in the U.S.

“Only in the rarest of circumstances has Congress seen fit to suspend the writ,” O’Connor wrote, referring to habeas corpus. “At all other times, it has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law.”

Supreme Court Justice Antonin Scalia, a conservative icon, agreed in an opinion of his own that the power to suspend habeas corpus rests solely with Congress. He also said that the executive branch cannot unilaterally round up Americans and hold them in “detention without charge,” even in times of rebellion.

“Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime,” Scalia wrote. “The Executive’s assertion of military exigency has not been thought sufficient to permit detention without charge.”

Professor Stephen Gillers, an expert on legal ethics at New York University Law School, said that Trump and Miller are trying to discredit judges and maximize the power of the presidency.

“Denial of habeas corpus jurisdiction for immigrants is an attempt to do an end run around checks and balances,” Gillers said. “It is a way to sideline the courts and retain maximum power in the executive branch.”

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Courtney Kube and Lawrence Hurley contributed.

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