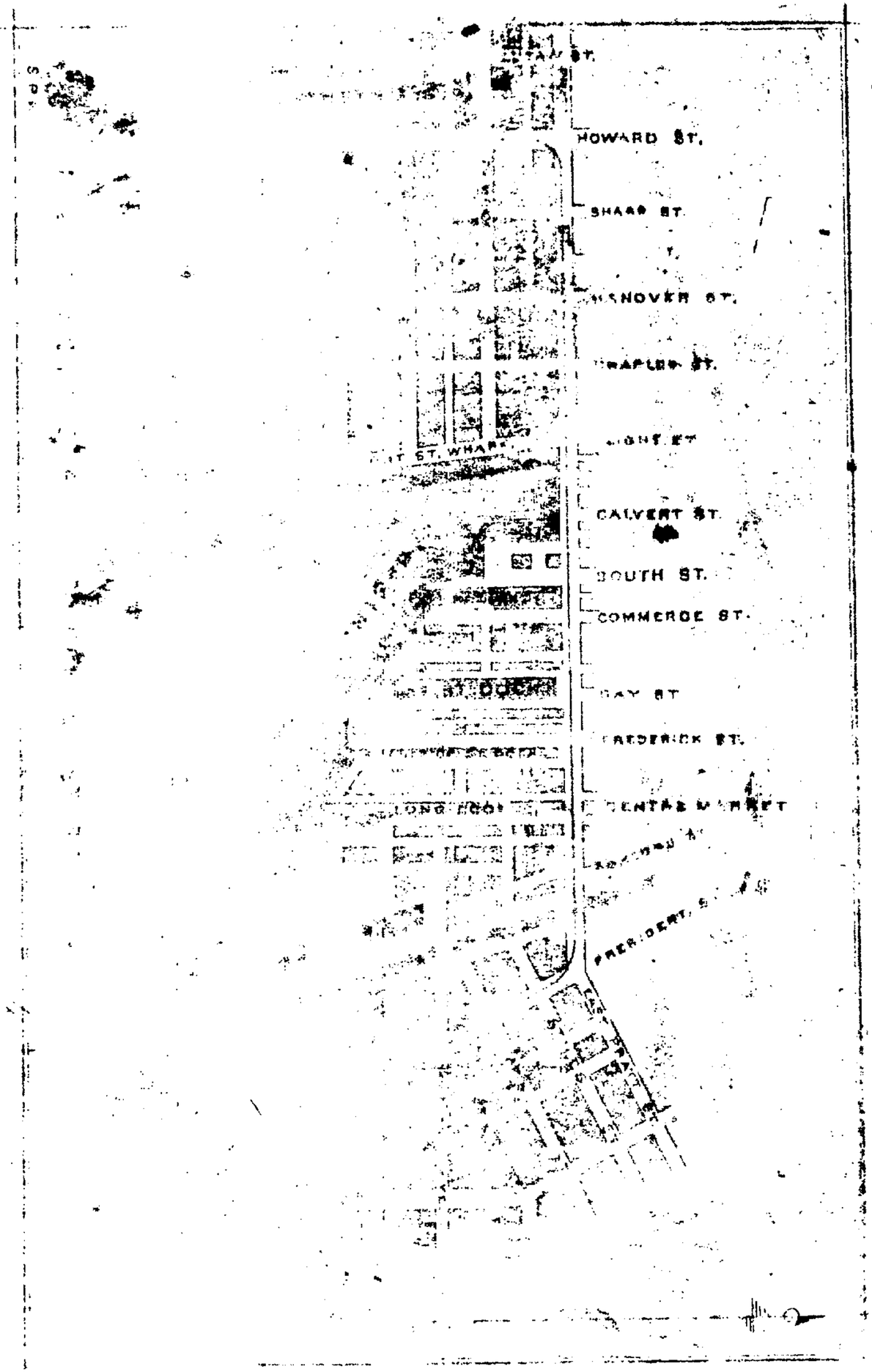

BALTIMORE

AND

THE NINETEENTH OF APRIL, 1861

A Study of the War

BY GEORGE WILLIAM BROWN

Chief Judge of the Supreme Bench of Baltimore, and Mayor of the City in 1861

BALTIMORE
N. MURRAY, PUBLICATION AGENT, JOHNS HOPKINS UNIVERSITY
1887

who sympathized with the South had no disposition to take arms against the Union so long as Maryland remained a member of it. This was subsequently proved by their failure to enlist in the Southern armies on the different occasions in 1862, 1863 and 1864 when they crossed the Potomac and transferred the seat of war to Maryland and Pennsylvania, under the command twice of General Lee and once of General Early.

The first of these campaigns ended in the bloody battle of Antietam. The Maryland men, as a tribute to their good conduct, were placed at the head of the army, and crossed the river with enthusiasm, the band playing and the soldiers singing "My Maryland." Great was their disappointment that the recruits did not even suffice to fill the gaps in their shattered ranks.

CHAPTER VII.

CHIEF JUSTICE TANEY AND THE WRIT OF HABEAS CORPUS.—A UNION CONVENTION.—CONSEQUENCE OF THE SUSPENSION OF THE WRIT.—INCIDENTS OF THE WAR.—THE WOMEN IN THE WAR.

The suspension of the writ of *habeas corpus*, by order of the President, without the sanction of an Act of Congress, which had not then been given, was one of the memorable events of the war.

On the 4th of May, 1861, Judge Giles, of the United States District Court of Maryland, issued a writ of *habeas corpus* to Major Morris, then in command of Fort McHenry, to discharge a soldier who was under age. Major Morris refused to obey the writ.

On the 14th of May the General Assembly adjourned, and Mr. Ross Winans, of Baltimore, a member of the House of Delegates, while returning to his home, was arrested by General Butler on a charge of high treason. He was conveyed to Annapolis, and subsequently to Fort McHenry, and was soon afterwards released.

A case of the highest importance next followed. On the 25th of May, Mr. John Merryman, of Baltimore County, was arrested by order of General Keim, of Pennsylvania, and confined in Fort McHenry. The next day (Sunday, May 26th) his counsel, Messrs. George M. Gill and George H. Williams, presented a petition for the writ of *habeas corpus* to Chief Justice Taney, who issued the writ immediately, directed

to General Cadwallader, then in command in Maryland, ordering him to produce the body of Merryman in court on the following day (Monday, May 27th). On that day Colonel Lee, his aide-de-camp, came into court with a letter from General Cadwallader, directed to the Chief Justice, stating that Mr. Merryman had been arrested on charges of high treason, and that he (the General) was authorized by the President of the United States in such cases to suspend the writ of *habeas corpus* for the public safety. Judge Taney asked Colonel Lee if he had brought with him the body of John Merryman. Colonel Lee replied that he had no instructions except to deliver the letter.

Chief Justice.—The commanding officer, then, declines to obey the writ?

Colonel Lee.—After making that communication my duty is ended, and I have no further power (rising and retiring).

Chief Justice.—The Court orders an attachment to issue against George Cadwallader for disobedience to the high writ of the Court, returnable at twelve o'clock to-morrow.

The order was accordingly issued as directed.

A startling issue was thus presented. The venerable Chief Justice had come from Washington to Baltimore for the purpose of issuing a writ of *habeas corpus*, and the President had thereupon authorized the commander of the fort to hold the prisoner and disregard the writ.

A more important occasion could hardly have occurred. Where did the President of the United States acquire such a power? Was it true that a citizen held his liberty subject to the arbitrary will of any man? In what part of the Constitution could such a power be found? Why had it never been discovered before? What precedent existed for such an act?

Judge Taney was greatly venerated in Baltimore, where

he had formerly lived. The case created a profound sensation.

On the next morning the Chief Justice, leaning on the arm of his grandson, walked slowly through the crowd which had gathered in front of the court-house, and the crowd silently and with lifted hats opened the way for him to pass.

Roger B. Taney was one of the most self-controlled and courageous of judges. He took his seat with his usual quiet dignity. He called the case of John Merryman and asked the marshal for his return to the writ of attachment. The return stated that he had gone to Fort McHenry for the purpose of serving the writ on General Cadwallader; that he had sent in his name at the outer gate; that the messenger had returned with the reply that there was no answer to send; that he was not permitted to enter the gate, and, therefore, could not serve the writ, as he was commanded to do.

The Chief Justice then read from his manuscript as follows:

I ordered the attachment of yesterday because upon the face of the return the detention of the prisoner was unlawful upon two grounds:

1st. The President, under the Constitution and laws of the United States, cannot suspend the privilege of the writ of *habeas corpus*, nor authorize any military officer to do so.

2d. A military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offense against the laws of the United States, except in aid of the judicial authority and subject to its control; and if the party is arrested by the military, it is the duty of the officer to deliver him over immediately to the civil authority, to be dealt with according to law.

I forbore yesterday to state the provisions of the Constitution of the United States which make these principles the fundamental law of the Union, because an oral statement might be misunderstood in some portions of it, and I shall therefore put my opinion in writing, and file it in the office of the clerk of this court, in the course of this week.

The Chief Justice then orally remarked:

In relation to the present return, it is proper to say that of course the marshal has legally the power to summon the *posse comitatus* to seize and bring into court the party named in the attachment; but it is apparent he will be resisted in the discharge of that duty by a force notoriously superior to the *posse*, and, this being the case, such a proceeding can result in no good, and is useless. I will not, therefore, require the marshal to perform this duty. If, however, General Cadwallador were before me, I should impose on him the punishment which it is my province to inflict—that of fine and imprisonment. I shall merely say, to-day, that I shall reduce to writing the reasons under which I have acted, and which have led me to the conclusions expressed in my opinion, and shall direct the clerk to forward them with these proceedings to the President, so that he may discharge his constitutional duty "to take care that the laws are faithfully executed."

It is due to my readers that they should have an opportunity of reading this opinion, and it is accordingly inserted in an Appendix.

After the court had adjourned, I went up to the bench and thanked Judge Taney for thus upholding, in its integrity, the writ of *habeas corpus*. He replied, "Mr. Brown, I am an old man, a very old man" (he had completed his eighty-fourth year), "but perhaps I was preserved for this occasion." I replied, "Sir, I thank God that you were."

He then told me that he knew that his own imprisonment had been a matter of consultation, but that the danger had passed, and he warned me, from information he had received, that my time would come.

The charges against Merryman were discovered to be unfounded and he was soon discharged by military authority.

The nation is now tired of war, and rests in the enjoyment of a harmony which has not been equalled since the days of James Monroe. When Judge Taney rendered this decision the Constitution was only seventy-two years old—twelve years younger than himself. It is now less than one hundred years

old—a short period in a nation's life—and yet during that period there have been serious commotions—two foreign wars and a civil war. In the future, as in the past, offenses will come, and hostile parties and factions will arise, and the men who wield power will, if they dare, shut up in fort or prison, without reach of relief, those whom they regard as dangerous enemies. When that period arrives, then will those who wisely love their country thank the great Chief Justice, as I did, for his unflinching defense of *habeas corpus*, the supreme writ of right, and the corner-stone of personal liberty among all English-speaking people.

In the Life of Benjamin R. Curtis, Vol. I, p. 240, his biographer says, speaking of Chief Justice Taney, with reference to the case of Merryman, "If he had never done anything else that was high, heroic and important, his noble vindication of the writ of *habeas corpus* and the dignity and authority of his office against a rash minister of State, who, in the pride of a fancied executive power, came near to the commission of a great crime, will command the admiration and gratitude of every lover of constitutional liberty so long as our institutions shall endure." The crime referred to was the intended imprisonment of the Chief Justice.

Although this crime was not committed, a criminal precedent had been set and was ruthlessly followed. "My lord," said Mr. Seward to Lord Lyons, "I can touch a bell on my right hand and order the imprisonment of a citizen of Ohio; I can touch a bell again and order the imprisonment of a citizen of New York; and no power on earth, except that of the President, can release them. Can the Queen of England do so much?" When such a power is wielded by any man, or set of men, nothing is left to protect the liberty of the citizen.

On the 24th of May, a Union Convention, consisting of fourteen counties of the State, including the city of Baltimore, and leaving eight unrepresented, met in the city. The counties not represented were Washington, Montgomery, Prince George, Charles, St. Mary's, Dorchester, Somerset, and Worcester. The number of members does not appear to have been large, but it included the names of gentlemen well known and highly respected. The Convention adopted Resolutions which declared, among other things, that the revolution on the part of eleven States was without excuse or palliation, and that the redress of actual or supposed wrongs in connection with the slavery question formed no part of their views or purposes; that the people of this State were unalterably determined to defend the Government of the United States, and would support the Government in all legal and constitutional measures which might be necessary to resist the revolutionists; that the intimations made by the majority of the Legislature at its late session—that the people were humiliated or subjugated by the action of the Government—were gratuitous insults to that people; that the dignity of the State of Maryland, involved in a precise, persistent and effective recognition of all her rights, privileges and immunities under the Constitution of the United States, will be vindicated at all times and under all circumstances by those of her sons who are sincere in their fealty to her and the Government of the Union of which she is part, and to popular constitutional liberty; that while they concurred with the present Executive of the United States that the unity and integrity of the National Union must be preserved, their view of the nature and true principles of the Constitution, of the powers which it confers, and of the duties which it enjoins, and the rights which it secures, as it relates to and

affects the question of slavery in many of the essential bearings, is directly opposed to the views of the Executive; that they are fixed in their conviction, amongst others, that a just comprehension of the true principles of the Constitution forbid utterly the formation of political parties on the foundation of the slavery question, and that the Union men will oppose to the utmost of their ability all attempts of the Federal Executive to commingle in any manner its peculiar views on the slavery question with that of maintaining the just powers of the Government.

These resolutions are important as showing the stand taken by a large portion of the Union party of the State in regard to any interference, as the result of the war or otherwise, by the General Government with the provisions of the Constitution with regard to slavery.

After the writ of *habeas corpus* had been thus suspended, martial law, as a consequence, rapidly became all-powerful, and it continued in force during the war. That law is by Judge Black, in his argument before the Supreme Court in the case of *ex parte* Milligan,[1] shown to be simply the rule of irresponsible force. Law becomes helpless before it. *Inter arma silent leges.*

On May 25, 1862, Judge Carmichael, an honored magistrate, while sitting in his court in Easton, was, by the provost marshal and his deputies, assisted by a body of military sent from Baltimore, beaten, and dragged bleeding from the bench, and then imprisoned, because he had on a previous occasion delivered a charge to the grand jury directing them to inquire into certain illegal acts and to indict the offenders. His imprisonment in Forts McHenry, Lafayette, and Delaware, lasted more than six months. On December 4, 1862, he was

[1] 4 Wallace Sup. Court R. 2.

unconditionally released, no trial having been granted him, nor any charges made against him. On June 28, 1862, Judge Bartol, of the Court of Appeals of Maryland, was arrested and confined in Fort McHenry. He was released after a few days, without any charge being preferred against him, or any explanation given.

Spies and informers abounded. A rigid supervision was established. Disloyalty, so called, of any kind was a punishable offense. Rebel colors, the red and white, were prohibited. They were not allowed to appear in shop-windows or on children's garments, or anywhere that might offend the Union sentiment. If a newspaper promulgated disloyal sentiments, the paper was suppressed and the editor imprisoned. If a clergyman was disloyal in prayer or sermon, or if he failed to utter a prescribed prayer, he was liable to be treated in the same manner, and was sometimes so treated. A learned and eloquent Lutheran clergyman came to me for advice because he had been summoned before the provost marshal for saying that a nation which incurred a heavy debt in the prosecution of war laid violent hands on the harvests of the future; but his offense was condoned, because it appeared that he had referred to the "Thirty Years' War" and had made no direct reference to the debt of the United States, and perhaps for a better reason—that he had strong Republican friends among his congregation.

If horses and fodder, fences and timber, or houses and land, were taken for the use of the Army, the owner was not entitled to compensation unless he could prove that he was a loyal man; and the proof was required to be furnished through some well-known loyal person, who, of course, was usually paid for his services. Very soon no one was allowed to vote unless he was a loyal man, and soldiers at the polls assisted in settling the question of loyalty.

Nearly all who approved of the war regarded these things as an inevitable military necessity; but those who disapproved deeply resented them as unwarrantable violations of sacred constitutional rights. The consequence was that friendships were dissolved, the ties of blood severed, and an invisible but well-understood line divided the people. The bitterness and even the common mention of these acts have long since ceased, but the tradition survives and still continues to be a factor, silent, but not without influence, in the politics of the State.

History repeats itself. There were deeds done on both sides which bring to mind the wars of England and Scotland and the border strife between those countries. There were flittings to and fro, and adventures and hairbreadth escapes innumerable. Soldiers returned to visit their homes at the risk of their necks. Contraband of every description, and letters and newspapers, found their way across the border. The military lines were long and tortuous, and vulnerable points were not hard to find, and trusty carriers were ready to go anywhere for the love of adventure or the love of gain.

The women were as deeply interested as the men, and were less apprehensive of personal consequences. In different parts of the city, not excepting its stateliest square, where stands the marble column from which the father of his country looked down, sadly as it were, on a divided people, there might have been found, by the initiated, groups of women who, with swift and skillful fingers, were fashioning and making garments strangely various in shape and kind—some for Northern prisons where captives were confined, some for destitute homes beyond the Southern border, in which only women and children were left, and some for Southern camps where ragged soldiers were waiting

to be clad. The work was carried on not without its risks; but little cared the workers for that. Perhaps the sensation of danger itself, and a spirit of resistance to an authority which they refused to recognize, gave zest to their toil; nor did they always think it necessary to inform the good man of the house in which they were assembled either of their presence or of what was going on beneath his roof.

The women who stood by the cause of the Union were not compelled to hide their charitable deeds from the light of day. No need for them to feed and clothe the soldiers of the Union, whose wants were amply supplied by a bountiful Government; but with untiring zeal they visited the military hospitals on missions of mercy, and when the bloody fields of Antietam and Gettysburg were fought, both they and their Southern sisters hastened, though not with a common purpose, to the aid of the wounded and dying, the victims of civil strife and children of a common country.

CHAPTER VIII.

GENERAL BANKS IN COMMAND.—MARSHAL KANE ARRESTED.—POLICE COMMISSIONERS SUPERSEDED.—RESOLUTIONS PASSED BY THE GENERAL ASSEMBLY.—POLICE COMMISSIONERS ARRESTED.—MEMORIAL ADDRESSED BY THE MAYOR AND CITY COUNCIL TO CONGRESS.—GENERAL DIX IN COMMAND.—ARREST OF MEMBERS OF THE GENERAL ASSEMBLY, THE MAYOR AND OTHERS.—RELEASE OF PRISONERS.—COLONEL DIMICK.

On the 10th of June, 1861, Major-General Nathaniel P. Banks, of Massachusetts, was appointed in the place of General Cadwallader to the command of the Department of Annapolis, with headquarters at Baltimore. On the 27th of June, General Banks arrested Marshal Kane and confined him in Fort McHenry. He then issued a proclamation announcing that he had superseded Marshal Kane and the commissioners of police, and that he had appointed Colonel John R. Kenly, of the First Regiment of Maryland Volunteers, provost marshal, with the aid and assistance of the subordinate officers of the police department.

The police commissioners, including the mayor, offered no resistance, but adopted and published a resolution declaring that, in the opinion of the board, the forcible suspension of their functions suspended at the same time the active operation of the police law and put the officers and men off duty for the present, leaving them subject, however, to the rules and regulations of the service as to their personal conduct and deportment, and to the orders which the board might see

in England short of that of Parliament can suspend or authorize the suspension of the writ of *habeas corpus*. I quote again from Blackstone (1 Bl. Com. 136): "But the happiness of our Constitution is that it is not left to the executive power to determine when the danger of the State is so great as to render this measure expedient. It is the Parliament only, or legislative power, that, whenever it sees proper, can authorize the Crown, by suspending the *habeas corpus* for a short and limited time, to imprison suspected persons without giving any reason for so doing." If the President of the United States may suspend the writ, then the Constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen than the people of England have thought it safe to entrust to the Crown—a power which the Queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign even in the reign of Charles I.

But I am not left to form my judgment upon this great question from analogies between the English Government and our own, or the commentaries of English jurists, or the decisions of English courts, although upon this subject they are entitled to the highest respect, and are justly regarded and received as authoritative by our courts of justice. To guide me to a right conclusion, I have the Commentaries on the Constitution of the United States of the late Mr. Justice Story, not only one of the most eminent jurists of the age, but for a long time one of the brightest ornaments of the Supreme Court of the United States, and also the clear and authoritative decision of that court itself, given more than half a century since, and conclusively establishing the principles I have above stated.

Mr. Justice Story, speaking in his Commentaries of the *habeas corpus* clause in the Constitution, says: "It is obvious that cases of a peculiar emergency may arise which may justify, nay, even require, the temporary suspension of any right to the writ. But as it has frequently happened in foreign countries, and even in England, that the writ has, upon various pretexts and occasions, been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design, and sometimes because they were forgotten, the right to suspend it is expressly confined to cases of rebellion or invasion, where the public safety may require it. A very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused in bad times to the worst of purposes. Hitherto no suspension of the writ has ever been authorized by Congress since the establishment of the Constitution. It would seem, as the power is given to Congress to suspend the writ of *habeas corpus* in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body" (3 Story's Com. on the Constitution, Section 1836).

And Chief Justice Marshall, in delivering the opinion of the Supreme Court in the case of *ex parte* Bollman and Swartwout, uses this decisive language in 4 Cranch 95: "It may be worthy of remark that this Act (speaking of the one under which I am proceeding) was passed by the first Congress of the United States, sitting under a Constitution which had declared 'that the privilege of the writ of *habeas corpus* should not be suspended unless when, in cases of rebellion or invasion, the public safety might require it.' Acting under the immediate influence of this injunction, they must have felt with peculiar force the obligation of providing

efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of *habeas corpus*."

And again, on page 101: "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 only see its duty, and must obey the laws."

I can add nothing to these clear and emphatic words of my great predecessor. But the documents before me show that the military authority in this case has gone far beyond the mere suspension of the privilege of the writ of *habeas corpus*. It has, by force of arms, thrust aside the judicial authorities and officers to whom the Constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers. For, at the time these proceedings were had against John Merryman, the district judge of Maryland, the commissioner appointed under the Act of Congress, the district attorney and the marshal, all resided in the city of Baltimore, a few miles only from the home of the prisoner. Up to that time there had never been the slightest resistance or obstruction to the process of any court or judicial officer of the United States in Maryland, except by the military authority. And if a military officer, or any other person, had reason to believe that the prisoner had committed any offense against the laws

of the United States, it was his duty to give information of the fact, and the evidence to support it, to the district attorney; it would then have become the duty of that officer to bring the matter before the district judge or commissioner, and if there was sufficient legal evidence to justify his arrest, the judge or commissioner would have issued his warrant to the marshal to arrest him, and upon the hearing of the case would have held him to bail, or committed him for trial, according to the character of the offense as it appeared in the testimony, or would have discharged him immediately, if there was not sufficient evidence to support the accusation. There was no danger of any obstruction or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military. Yet, under these circumstances, a military officer stationed in Pennsylvania, without giving any information to the district attorney, and without any application to the judicial authorities, assumes to himself the judicial power in the District of Maryland; undertakes to decide what constitutes the crime of treason or rebellion; what evidence (if, indeed, he required any) is sufficient to support the accusation and justify the commitment; and commits the party without a hearing, even before himself, to close custody in a strongly garrisoned fort, to be there held, it would seem, during the pleasure of those who committed him.

The Constitution provides, as I have before said, that "no person shall be deprived of life, liberty or property without due process of law." It declares that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly

describing the place to be searched, and the persons or things to be seized." It provides that the party accused shall be entitled to a speedy trial in a court of justice.

These great and fundamental laws, which Congress itself could not suspend, have been disregarded and suspended, like the writ of *habeas corpus*, by a military order, supported by force of arms. Such is the case now before me, and I can only say that if the authority which the Constitution has confided to the judiciary department and judicial officers may thus upon any pretext or under any circumstances be usurped by the military power at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.

In such a case my duty was too plain to be mistaken. I have exercised all the power which the Constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions and exceeded the authority intended to be given him. I shall therefore order all the proceedings in this case, with my opinion, to be filed and recorded in the Circuit Court of the United States for the District of Maryland, and direct the clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer, in fulfilment of his constitutional obligation, to "take care that the laws be faithfully executed," to determine what measures he will take to cause the civil process of the United States to be respected and enforced.

R. B. TANEY,
Chief Justice of the Supreme Court of the United States.

APPENDIX IV.

On the 12th of July, 1861, I sent a message to the First and Second Branches of the City Council referring to the events of the 19th of April and those which followed. The first paragraph and the concluding paragraphs of this document are here inserted:

"THE MAYOR'S MESSAGE.

"TO THE HONORABLE THE MEMBERS OF THE
FIRST AND SECOND BRANCHES OF THE CITY COUNCIL.

"*Gentlemen:*—A great object of the reform movement was to separate municipal affairs entirely from national politics, and in accordance with this principle I have heretofore, in all my communications to the city council, carefully refrained from any allusion to national affairs. I shall not now depart from this rule further than is rendered absolutely necessary by the unprecedented condition of things at present existing in this city. . . . .

"After the board of police had been superseded, and its members arrested by the order of General Banks, I proposed, in order to relieve the serious complication which had arisen, to proceed, as the only member left free to act, to exercise the power of the board as far as an individual member could do so. Marshal Kane, while he objected to the propriety of this course, was prepared to place his resignation in my hands whenever I should request it, and the majority of the board interposed no objection to my pursuing such course as I