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THE MERRYMAN CASE

THE FIRST TERM after the election found the Court in a new room. In the enlargement of the Capitol, the Senate moved to the north wing, where it still meets, and the Supreme Court took over the former Senate chamber. Congress had appropriated $25,000 for furnishing the Court's new quarters and the plans included busts of the former chief justices. Taney had interested himself in acquiring these, a circumstance which was to become ironic.

Although the new quarters were light and commodious, the move brought nostalgia. In the larger, grander setting, a contemporary noted that the justices seemed to shrink. Moreover, it was a crippled and a changing court. Nathan Clifford of Maine had been appointed in place of Curtis, but Daniel's vacancy was not filled until 1862. Meanwhile, the death of McLean and the resignation of Campbell, both in 1861, reduced the Court to six, of whom two, Taney and Catron, were too ill to sit regularly. Not until 1862 was the Court brought up to strength, by the appointment of Noah H. Swayne of Ohio, Samuel F. Miller of Iowa, and David Davis of Illinois. Then, in 1863, in order to give the administration a safer margin, it was temporarily enlarged to ten, by the addition of Stephen J. Field of California.

From Taney's standpoint, the passing of the old Court was sad enough; but even harder was the change in status produced by the Civil War. In wartime the need for quick, energetic action transcends legal forms. Success, rather than legality, determines what is right, and if the law stands in the way, it is

brushed aside. An old Latin maxim says, "*Silent leges inter arma*" — laws are silent in the midst of arms.

For Taney, who had dedicated his life to the defense of legal rights, it was a period of frustration. In his eyes, war did not justify flaunting the Constitution. It had been written at the close of an earlier civil war, by individuals who had staked their lives on its success but who nevertheless believed certain safeguards appropriate even during wartime. For example, they provided in Art. I, Sec. 9, Ch. 2 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."

This was written into that part of the Constitution which deals with Congress, and the accepted view was that only Congress had power to suspend the writ. The Supreme Court had recognized this in *Ex Parte Bollman*, a case arising out of the Aaron Burr conspiracy; and Justice Joseph Story's *Commentaries on the Constitution* stated specifically that the right to judge whether the emergency had arisen must exclusively belong to Congress.

Early in the Civil War it seemed militarily desirable to suspend the writ of habeas corpus and President Lincoln authorized certain military officers to do so without waiting for Congressional authority. Did he have this power? And if he did not, who could stop him? This became Taney's problem in *Ex Parte Merryman*.

At two o'clock on the morning of Saturday, May 25, 1861, a detachment of Union soldiers under General William H. Keim of Pennsylvania hauled John Merryman, of "Hayfields," Baltimore County, out of bed and imprisoned him in Fort McHenry. They placed no charges but it was known that he had participated in the destruction of bridges on the Northern Central Railway. Tall and handsome, Merryman was president of the Maryland Agricultural Society and an officer in the state militia.

Friends rushed to his defense and that same Saturday Baltimore attorneys George M. Gill and George H. Williams prepared a petition for a writ of habeas corpus. This they presented to Taney in Washington.

The stage for these events had been set by the secession of the South and by President Lincoln's call for troops to Washington. Their only route by rail ran through Baltimore, where they had to change trains and cross town to the Camden Street station of the B. & O. On April 19, 1861, a mob attacked the Sixth Massachusetts Infantry while making this transfer. In the ensuing melee four soldiers and eleven civilians were killed.

These were the first fatalities of the Civil War. They occurred on the anniversary of the Battle of Lexington, which had drawn the first blood in the American Revolution.

The mayor and police had received no advance notice of the arrival of the troops, although it had been requested. Accordingly, no escort was available when, about noon, the Massachusetts regiment pulled into the President Street Station and started across town in railroad cars drawn by horses. Nine cars crossed safely. Then Southern sympathizers dumped a load of sand on the tracks. The gathering crowd, aided by Negroes from Southern ships at the adjacent wharves, hauled heavy anchors into the way. The remaining cars were forced to turn back and 220 Massachusetts infantrymen had to dismount and march on foot.

Someone now paraded a Confederate flag ahead of the troops, and Union sympathizers attacked the flagbearers. This triggered a wild free-for-all. Cobblestones, bricks, and bottles hurtled through the air. Muskets were snatched from stragglers and at least one soldier was bayoneted with his own gun. Finally, the soldiers fired. The first civilian casualty was a young lawyer, Francis X. Ward. He survived; others were less fortunate.

After the first onslaught, an officer ordered double time. This increased the mob's frenzy, just as dogs are made fiercer when a person flees. While running, the troops could not shoot effectively at the attackers in their rear; instead they poured a haphazard fire into spectators clustered on sidewalks and street corners. One of those killed was a boy who had climbed a docked vessel for a better view.

The bloodshed would have been worse had not Mayor George William Brown rushed to the rescue, followed by a detachment of police. He brought the troops to a walk, stationed the police in their rear, and convoyed them to Camden Station, holding high an umbrella to identify himself and to protect the soldiers with his person.

Although the troops were reunited safely at Camden Station, there was still one more casualty. Robert W. Davis, of the firm of Paynter, Davis & Co., dry-goods dealers, had been inspecting some property on the outskirts of town when a trainload of soldiers passed him on its way towards Washington. He shook his fist and was immediately shot and killed.

That afternoon Mayor Brown called a mass meeting in Monument Square, attended by Governor Hicks and leading citizens. A deputation was sent to President Lincoln to implore him not to bring further troops through Baltimore. As a further precaution, it was determined to burn the railroad bridges connecting the city with the North, and the militia were ordered to do so. It was the performance of this order that constituted John Merryman's offense.

President Lincoln temporized with the Baltimore delegation, but his real answer was an order dated April 27 to Winfield Scott, Commanding General of the Army. It read:

> You are engaged in suppressing an insurrection against the laws of the United States. If at any point on or in the vicinity of any military line which is now or which shall be used between the city of Philadelphia and the city of Washington, you find resistance which renders it necessary to suspend the writ of habeas corpus, for the public safety, you personally or through the officer in command at the point at which the resistance occurs, are authorized to suspend the writ.

The attack on its troops infuriated Massachusetts, and on the night of May 13, Brigadier General Ben Butler of that state, acting without orders, in darkness and in rain, marched 1000 men into Baltimore and fortified Federal Hill. Dominating Baltimore with his artillery, he proclaimed himself master of the city. He also proclaimed it treasonable to display a Confederate flag or to do anything that could give aid or comfort to the enemy. In Massachusetts, Butler was the hero of the hour and was promptly promoted to Major General. But the Union command took a dimmer view. On May 15, General Scott transferred Butler to Norfolk and ordered him to "Issue no more Proclamations." A special wire said, "Your hazardous occupation was made without my knowledge, and of course without my approbation." Butler's successor in Baltimore was General George Cadwalader, of Philadelphia.

Local evidence of Yankee enterprise was not limited to Ben Butler, as may be seen from the following advertisement in the Baltimore *Sun*:

> INVALIDS AND OTHERS WHO ARE COMPELLED TO LEAVE BALTIMORE IN ITS PRESENT STATE OF ANARCHY, WILL FIND A PLEASANT AND PEACEFUL HOME FOR THE SUMMER AT DR. MONDE'S WATER-CURE ESTABLISHMENT AT FLORENCE, MASSACHUSETTS.

On May 14, while still in command in Baltimore, General Butler had ordered the arrest of Ross Winans, a member of the House of Delegates, as he returned from a special session of the Legislature at Frederick. In addition to being a member of the State Assembly, Winans was a prominent inventor, reputedly worth fifteen million dollars. No charges were placed against him, but he was held prisoner until he took an oath not to commit any act of hostility against the government of the United States. Winans' imprisonment undoubtedly was a factor in the alacrity with which Taney reacted to the Merryman petition.

This was presented to Taney as Chief Justice of the Supreme Court, in Washington, but he felt that the case could be better

handled in Baltimore and went there for that purpose. On Sunday, May 26, he ordered that the writ be issued. Thomas Spicer, Clerk of the Circuit Court was on hand to do so, and at four o'clock that afternoon deputy United States Marshal Vance served it on General Cadwalader at Fort McHenry. It directed the General to produce the body of John Merryman in the United States Circuit Court at eleven o'clock on Monday, May 27, and to show cause for his detention.

While in Baltimore, the Chief Justice stayed at the Campbells' home on Franklin Street. On the morning of Monday, May 27, leaning on the arm of his grandson, Taney Campbell, he entered the old Masonic Hall at St. Paul and Fayette streets, where the United States Court was then held, and precisely at eleven took his place on the bench. Shortly thereafter an aide-de-camp, resplendent with red sash and sword, tendered a written document. General Cadwalader, it said, was holding Merryman on charges of treason and, acting under the authority of President Lincoln, had suspended the writ of habeas corpus.

This, said the Chief Justice, was something that neither the President nor General Cadwalader had authority to do. Then, taking a sheet of foolscap, he wrote out a writ of attachment requiring General Cadwalader to appear in Court at noon the following day to show cause why he should not be held in contempt.

It was idle to think that General Cadwalader would appear in Court, but there were many who thought he would retaliate. On leaving his daughter's home that morning, the Chief Justice remarked that it was likely he should be imprisoned in Fort McHenry before night. This was not as fanciful as it may now appear. In the months ahead, the military were to arrest and imprison the mayor, the chief of police, all four police commissioners, a member of Congress, thirty-one members of the Maryland Legislature, and many others; in fact, anyone who particularly displeased them. Included were several newspaper editors and at least two judges, James L. Bartol of the Court of Appeals,

and Circuit Court Judge Richard Bennett Carmichael. Carmichael, a relative of Taney's old friend of Annapolis days, was arrested while conducting court at Easton, and, when he refused to submit, was clubbed over the head with a revolver and dragged off the bench.

When the Merryman case was called at noon on Tuesday the 28th, United States Marshal Washington Bonifant reported that he had gone to Fort McHenry to serve the writ of attachment and had been denied admittance. The Chief Justice reminded the Marshal that he had power to summon a *posse comitatus* to aid him in seizing General Cadwalader. But in this instance, he said, he excused him. The Chief Justice then proceeded to hold the detention of Merryman unlawful upon two grounds: "First — That the President, under the Constitution of the United States, cannot suspend the privilege of the writ of habeas corpus, nor authorize a military officer to do it. Second — 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."

To avoid any misunderstanding Taney said he would put his opinion in writing for delivery to the President. This he did on Friday, June 1, in language as ringing as any document in the long Anglo-American struggle for individual liberty. The keynote, perhaps, was when he said, ". . . 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."

One hundred years later, in a court ceremony commemorating the anniversary of the case, William L. Marbury of Baltimore discussed its continuing significance. "The role of Chief Justice

Taney," he said, "symbolizes the deepest aspirations of our times. All of us must surely entertain the hope that the rule of law will ultimately replace the use of naked power. I realize that this is beginning to be a shopworn phrase . . . But just as the ordinary man may be confused by the debates of theologians and yet be moved by the examples of the saints, so . . . he may respond in his inmost being to a great act of faith, such as the ruling of Chief Justice Taney in *Ex Parte Merryman*. For in the last analysis, it is Taney's faith in the rule of law which breathes through the opinion in that case."

Under other circumstances, Lincoln probably would have sympathized with Taney's views. But military necessity came first, and Lincoln was forced to shrug off the order and opinion. Nevertheless, the administration was anxious to play it down. On July 4, 1861, Secretary of War Cameron interviewed the prisoner at Fort McHenry, and on July 12 ordered that he be delivered to the custody of the United States Marshal, in literal though belated compliance with Taney's order. Meanwhile, Merryman had been indicted for treason, but he was released on bond and never brought to trial. He fared better than many others who had done far less. His imprisonment was made comfortable and lasted only forty-nine days, whereas many Marylanders spent months and even years at Fort Warren and other points of federal detention.

Taney was largely responsible for the fact that Merryman and some sixty others similarly indicted for treason were never prosecuted. He doubted whether they would receive a fair trial under the conditions of military rule obtaining in Baltimore, and he insisted that they not be tried in his absence. He instructed District Judge Giles not to try capital cases by himself, and, as Taney was the only other judge designated to sit in the Circuit Court in Baltimore, this made the treason cases dependent on his presence. For over a year he was too ill to do circuit duty.

This did not please the administration, which brought pressure to get the cases tried. There was precedent for the trial of

capital cases in the Circuit Court by a single judge, and in 1864 James Mason Campbell wrote Taney that Judge Giles was showing signs of weakening. On May 14 of that year Taney replied:

"I do not exactly understand what my Brother Giles means by saying the treason cases would probably be forced to trial by the District Attorney. I am yet to learn that the District Attorney can force the court to do anything that they think illegal or unjust, whatever he may think of it. The treason cases cannot be tried simply because it is not at present in the power of the Court to give the parties the rights or the trial which the Constitution requires. Maryland is now under martial law, and the process of the Court is obeyed or not at the pleasure of the military authority. The treason cases cannot therefore be tried under present circumstances and I shall so write to my Brother Giles."

The administration did not, of course, concede Taney's position in the Merryman case. Attorney General Bates ruled that the war powers of the President authorized his suspension of the writ of habeas corpus. This was buttressed by opinions obtained from Horace Binney and Reverdy Johnson, and lawyers plunged into the argument on both sides. Surprisingly, Taney's strongest support came from his recent antagonists in Wisconsin. The Supreme Court of that state, which had battled him in the Booth cases, now came out flat-footedly against presidential suspension. In the case of *Nicholas Kemp*, involving the military arrest of a civilian for participation in a draft riot, the Court held unconstitutional the refusal of the commanding General to honor a writ of habeas corpus. Chief Justice Dixon said:

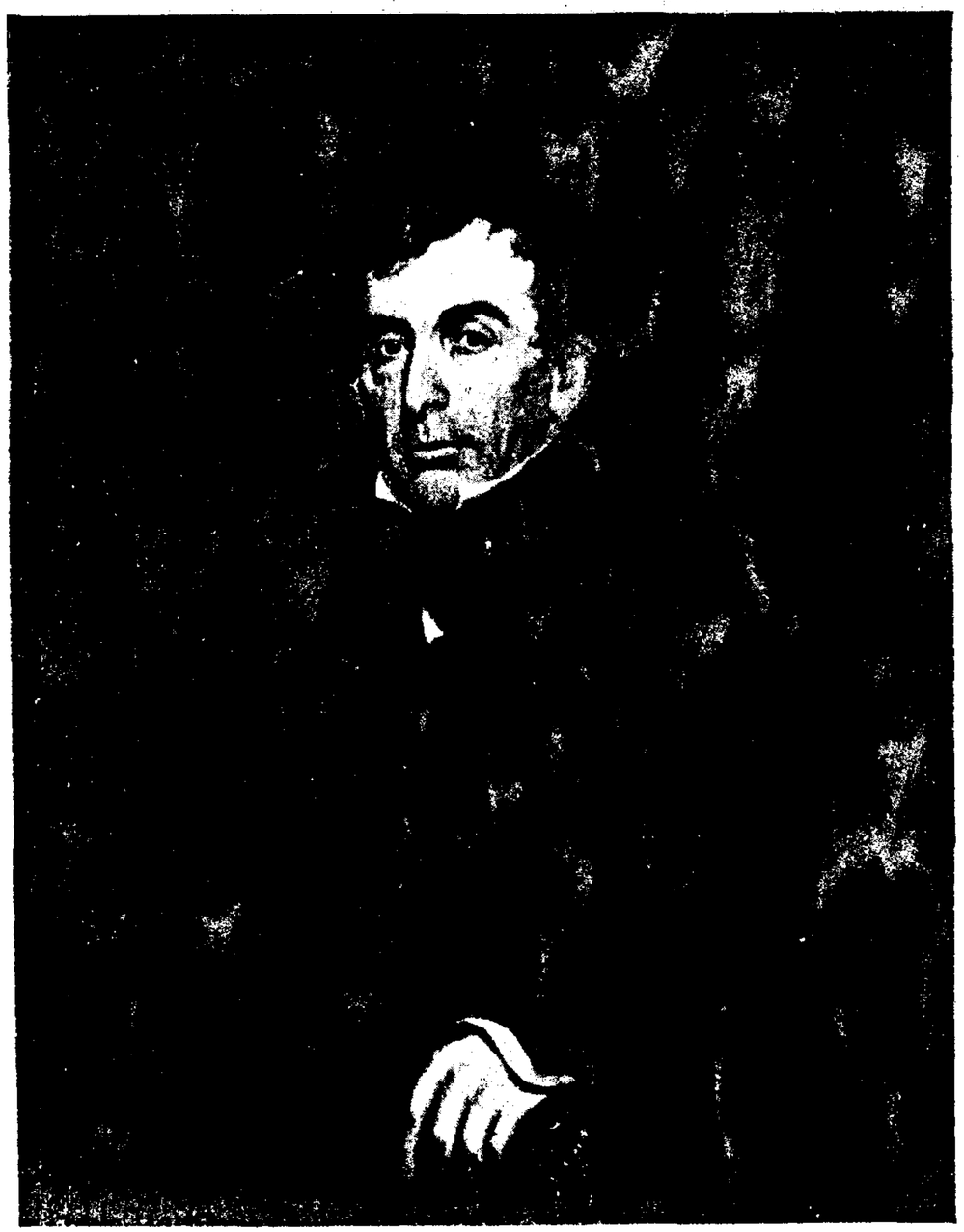
"The principles involved have recently been the subjects of most profound and elaborate argument by several most able lawyers and judges . . . I think the President has no power, in the sense of the Constitution of the United States to suspend the privilege of the writ of habeas corpus. It is, in my judgment a legislative and not an executive act; and the power is vested in Congress. Upon this question it seems to me that the reasoning

of Chief Justice Taney in *Ex Parte Merryman* is unanswerable."

Later authority has also backed Taney. In *Ex Parte Milligan* a Republican dominated Supreme Court held illegal the establishment of military tribunals to try civilians in states where the civil courts were open. In essence the constitutional issue was the same as in the Merryman case and the decision has been regarded as sustaining Taney's position. For example, Charles Warren's *The Supreme Court in United States History* says, "Never did a fearless Judge receive a more swift or more complete vindication."

Important as may have been the constitutional issue in *Ex Parte Merryman*, what may be even more significant is the insight it gives us as to Taney himself. As said by Professor William E. Mikell of the University of Pennsylvania Law School:

"Taney's action in this case was worthy of the best traditions of the Anglo-Saxon judiciary. There is no sublimer picture in our history than this of the aged Chief Justice — the fires of Civil War kindling around him . . . serene and unafraid, interposing the shield of the law in the defense of the liberty of the citizen. Chief Justice Coke, when the question was put to him by the King as to what he would do in a case where the King believed his prerogative concerned, made the answer which has become immortal, 'When the case happens, I shall do that which shall be fit for a judge to do.' Chief Justice Taney when presented with a case of presidential prerogative did that which was fit for a judge to do."



CHIEF JUSTICE ROGER BROOKE TANEY, 1777-1864
A PORTRAIT BY HENRY INMAN
Courtesy Harvard University Law School Collection

WITHOUT FEAR OR FAVOR

A BIOGRAPHY OF CHIEF JUSTICE
ROGER BROOKE TANEY

Walker Lewis

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