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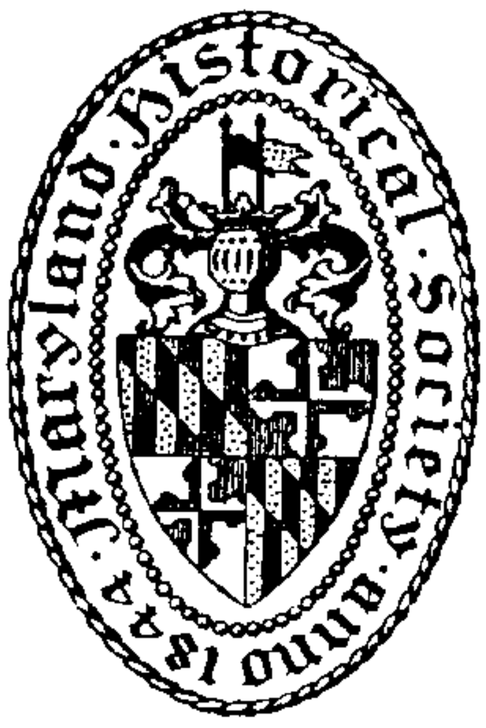

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EX PARTE MERRYMAN

THE centennial of the issuance of the writ of *habeas corpus* by Chief Justice Roger Brooke Taney in the case of *Ex parte Merryman* at Baltimore on May 26, 1861, was observed by the U. S. District Court in ceremonies beginning at 3:00 P. M., May 26, 1961. Chief Judge Roszel C. Thomsen opened the proceedings with the following remarks:

This very day marks the hundredth anniversary of one of the most important as well as dramatic cases ever heard in the Federal Courts of Maryland. The availability of the writ of *habeas corpus* is one of the points we often refer to in our Law Day exercises, and it seems only fitting that the Court should recognize the anniversary of the issuance of the writ in *Ex parte Merryman.*

We have therefore asked two of the ornaments of our Bar, Mr. H. H. Walker Lewis and Mr. William L. Marbury to prepare appropriate remarks.

We are honored by having with us on the Bench two Circuit Judges, Chief Judge Sobeloff and Judge Soper.

ADDRESS BY MR. LEWIS

At 2 o'clock on the morning of Saturday, May 25, 1861, John Merryman, of Hayfields, Baltimore County, was routed out of bed and arrested by a detachment of Union soldiers acting under the orders of General William H. Keim of Pennsylvania. The soldiers took Merryman from Cockeysville to Baltimore by train and then by hack to Fort McHenry, where, sometime after 8, he was locked up. The newspapers reported that Merryman, as First Lieutenant of the Baltimore County Horse Guards, had participated in the destruction of bridges on the Northern Central Railway, acting under orders from the public authorities.

Merryman, tall, handsome, and the owner of one of the best farms in Baltimore County, was a prominent citizen and president of the Maryland State Agricultural Society.[1] Friends

[1] Merryman was later Treasurer of Maryland and a member of the State Legislature.

rushed to his defense and that same Saturday a petition for writ of habeas corpus was prepared by attorneys George M. Gill and George H. Williams. It was sworn to before John Hanan, United States Commissioner, in Baltimore, and taken to Washington for presentation to Chief Justice Roger Brooke Taney of the Supreme Court.

Taney was 84 but mentally alert and vigorous. Born less than a year after the Declaration of Independence, his life was now closing in the midst of what Carl Sandburg calls the Second American Revolution. He was a member of an old and respected Southern Maryland family, but as a younger son he struck out on his own, practicing law in Frederick and later in Baltimore. He became Attorney General of Maryland, then Attorney General of the United States, and, during President Jackson's war on Mr. Biddle's Bank, Secretary of the Treasury. His first appointment to the Supreme Court failed of Senate confirmation, due to the enmities engendered by the Bank war, but he was reappointed and confirmed after the death of John Marshall, and assumed the difficult task of succeeding him as Chief Justice. Even in this exacting position, it was not long before his ability and judicial capacity won the admiration of earlier critics and detractors.

Taney was a tall, cavernous, Lincolnesque sort of man. He customarily dressed in black, and in earlier years of active practice at the bar, William Pinkney had said of him, "I can answer his argument, I am not afraid of his logic, but that infernal apostolic manner of his there is no replying to." [2] By now the apostolic manner had blended into the dignity of his judicial robes, and though he was bent with age, the strength and clarity of his mind made one forget the frailty of his physique. A few years before, Justice Benjamin R. Curtis of the Supreme Court had written his uncle, George Ticknor of Boston, that "Our aged Chief Justice grows more feeble in body, but retains his alacrity and force of mind wonderfully." [3]

As part of his judicial duties, Taney presided over the United States Circuit Court for the District of Maryland. He felt that

[2] John E. Semmes, *John H. B. Latrobe and His Times, 1803-1891* (Baltimore, 1917), p. 203.

[3] Benjamin R. Curtis, Jr., *A Memoir of Benjamin Robbins Curtis, LLD* (Boston, 1879), Vol. 1, p. 193.

the Merryman case could be handled there with greater convenience to all parties concerned and accordingly went to Baltimore for that purpose. On Sunday, May 26, acting as Chief Justice of the United States Supreme Court, he ordered that a writ of habeas corpus be issued. Thomas Spicer, Clerk of the Circuit Court issued the writ, and at 4 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 11 o'clock on Monday, May 27, and to show cause for his detention.

The stage for these events had been set by the secession of the South and by President Lincoln's call for troops to Washington. The only route over which they could be brought from the North 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, while making this transfer, the Sixth Massachusetts Infantry was attacked by a mob and in the ensuing melee 4 soldiers and 12 civilians were killed.[4]

These were the first killings of the Civil War and it is of interest to note that they occurred on the anniversary of the Battle of Lexington, which drew the first blood of the American Revolution.

Although requested, no advance notice of the arrival of the troops had been given to the Mayor or to the police. Accordingly, no escort was available when, about noon, the Massachusetts regiment pulled into the President Street station in southeast Baltimore and started across town in railroad cars drawn by horses. Nine cars crossed safely. Then a load of sand was dumped 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.

At this point someone produced a Confederate flag and paraded it ahead of the troops. They tried to avoid following it, and the flagbearers were attacked by Union sympathizers. This triggered a wild free-for-all, and soon cobblestones, bricks,

[4] It was this event that inspired James Ryder Randall, on April 23, 1861, to write "Maryland, My Maryland."

and bottles were hurtling through the air. Straggling soldiers were knocked down and their muskets snatched away. At least one was bayoneted with his own gun. Finally, they started to fire, the first civilian casualty being a young lawyer, Francis X. Ward. He survived, but others were less fortunate.

As usual, most of the casualties were bystanders. After the first onslaught, the soldiers were ordered to double time. This increased the mob's frenzy, just as dogs will attack more fiercely when a person flees. Also, the troops, while running, could not shoot effectively at the attackers in their rear, and so instead they poured a haphazard fire into the spectators clustered on sidewalks and street corners in front of them. One of those killed was a boy who had climbed onto a docked vessel for a better view.

The bloodshed would have been worse had not Mayor George William Brown come to the rescue from Camden Station, followed soon after by a detachment of police. The troops were brought to a walk, the police took up a position in their rear, and Mayor Brown marched beside the column, holding high an umbrella to identify himself and to protect the soldiers with his person.[5]

Although the troops were reunited at Camden Station, there was still one more casualty. Robert W. Davis, a prominent member of the firm of Paynter, Davis & Co., dry-goods dealers, had been inspecting some property on the outskirts of town when the trainload of soldiers passed him on its way towards Washington. He shook his fist at the train and was immediately shot and killed.[6]

That afternoon a mass meeting was called in Monument Square, attended by Governor Hicks, Mayor Brown, and leading citizens. A deputation was sent to President Lincoln to implore that no further troops be sent through Baltimore. As

[5] As a consequence of a later controversy with General Dix over pay to the City police, Mayor Brown was arrested and kept in military prison from September 17, 1861 until November 27, 1862. Ultimately he became Chief Judge of the Supreme Bench of Baltimore City.

[6] For detailed accounts of the riot, see: Matthew Page Andrews in *Baltimore, Its History and Its People*, edited by Clayton Colman Hall (N. Y.-Chicago, 1912), pp. 173-7; George William Brown, *Baltimore and the 19th of April, 1861* (Baltimore, 1887; Extra Volume III in Johns Hopkins Univ. Studies in Historical and Political Science). Charles B. Clark, "Baltimore and the Attack on the Sixth Massachusetts Regiment" *Md. Hist. Mag.*, LVI (Mar. 1961), 39-71.

a further precaution, it was determined to burn the railroad bridges connecting the City with the North, and an order to do so was issued.[7] It was the performance of this order that led to John Merryman's arrest.

Although President Lincoln received the Baltimore delegation and sought to temporize with their request, his real answer was in the following order dated April 27 to Winfield Scott, Commanding General of the Army:

> 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.[8]

The attack on its militia had infuriated Massachusetts, and on the night of May 13 Brigadier General Ben Butler of that State, acting without orders, and in darkness and rain, marched 1,000 men into Baltimore, fortified Federal Hill, and proclaimed himself master of the City. He also proclaimed it treasonable to send supplies to the seceding States, to display a Confederate flag, or to do anything else to 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, in the second day of his glory, he was ordered to "Issue no more Proclamations" and was transferred to Norfolk by a special wire from General Scott which said, "Your hazardous occupation was made without my knowledge, and of course without my approbation."[9] Butler's successor in Baltimore was General George Cadwalader, of Philadelphia.

[7] This order was issued by the Mayor and Police Commissioners of Baltimore with the concurrence of Governor Thomas Holiday Hicks. As to the latter's concurrence, sometimes denied, see George L. P. Radcliffe, *Governor Thomas Hicks of Maryland and the Civil War* (Baltimore, 1901; Johns Hopkins Univ. Studies, Series XIX, Nos. 11-12), pp. 560-1; George William Brown, *Baltimore and the 19th of April, 1861* (Baltimore, 1887), p. 58.

[8] The War of the Rebellion—Official Records (Washington, D. C. 1880-1901), Series 1, II, 601-2.

[9] *Ibid.*, 28.

Local evidence of Yankee enterprise was not limited to Ben Butler, as shown by the following advertisement in the Baltimore newspapers:

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.[10]

On May 14, while still in command at Baltimore, General Butler had ordered the arrest of Ross Winans, a member of the House of Delegates, as he returned from a meeting of the State Assembly at Frederick. In addition to being a member of the Legislature, Winans was a prominent inventor and a man of great wealth, 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 came into the Merryman case.

While in Baltimore, the Chief Justice stayed at the home of his eldest daughter, Anne, and her husband, J. Mason Campbell, on Franklin Street. On the morning of Monday, May 27, leaning on the arm of his grandson, he entered the old Masonic Hall on St. Paul Street, where the United States Court was then held, and precisely at eleven took his place on the bench. Shortly thereafter an Aide-de-Camp in full military regalia, including red sash and sword, presented himself to the Court and 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 under the Constitution. Accordingly, he directed the Clerk to issue 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

[10] The Sun, Baltimore, Md., May 25, 1861.

in Court on Tuesday, but there was speculation as to what he might do to Taney. On leaving his daughter's home next 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, including several newspaper editors and at least two judges, Judge James L. Bartol of the Court of Appeals and Circuit Court Judge Richard Bennett Carmichael. The latter was arrested while conducting court at Easton and, when he refused to submit, was clubbed over the head with a revolver and forcibly dragged off the bench.[11]

When the Merryman case was called at noon on the 28th, the 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 remarked wryly that the Marshal had power to summon a *posse comitatus* to aid him in seizing General Cadwalader. But in this instance, said Taney, he excused him. The General's power of refusing obedience was notoriously superior to any the Marshal could command.[12] 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 he 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

[11] See Charles B. Clark, *Suppression and Control of Maryland, 1861-1865* *Maryland Hist. Mag.*, Vol. 54, pp. 241-271 (September, 1959).

[12] General Cadwalader was a member of a distinguished Philadelphia family and a brother of Judge John Cadwalader of that City. Mr. Thomas F. Cadwalader, of Baltimore, a grandson of the latter, reports that it used to be said that "if Judge John had issued the writ, he would have damn well made his brother obey it."

the long Anglo-American struggle for individual liberty.[13] 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.

After a civil war, the victors write the history books. The New Englanders who did so on this occasion were less than kind to the Chief Justice. In addition, the greatness of President Lincoln took some of the edge off Taney's strictures.

The Merryman case was a conflict between executive and judicial power. It was made the more dramatic by being a conflict between Taney and Lincoln. Unfortunately for Taney, people have come to feel that anyone who opposed Lincoln must have been wrong. In view of Lincoln's wisdom and self-restraint, history accords him latitude that could not be tolerated in a lesser man. But if the Constitution must depend upon the self-restraint of a single individual, what is there left?

Today, one hundred years later, most of us would agree with Professor William E. Mikell of the University of Pennsylvania Law School, when he said,

> 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.[14]

[13] 17 Fed. Cases 144, No. 9487. The proceedings and opinion were separately printed by Lucas Brothers, Baltimore, in 1861, and are also included in an Appendix (pp. 640-659) to Samuel Tyler, *Memoir of Roger Brooke Taney, LLD* (Baltimore, 1872).

[14] William E. Mikell on Roger Brooke Taney in *Great American Lawyers* (Edited by William Draper Lewis, Philadelphia, 1908), Vol. 4, pp. 188-9.

Although charged with treason, Merryman was never brought to trial. He

MR. MARBURY'S REMARKS

It is something of a paradox that lawyers should gather today to be reminded of the proceedings in *Ex parte Merryman.* For it may fairly be said of that case that not since the rude Goth pulled the beard of the Roman senator has there been a more dramatic demonstration of the truth of the old maxim; *inter arma silent leges;* (freely rendered: "When the guns are firing, you cannot hear the lawyers talking.") Here in this court sat the highest judicial officer of the land. In the exercise of his clear constitutional authority he caused to be issued the most powerful and time-honored of all judicial mandates, the writ of *habeas corpus*—and his writ was ignored. In dignity, there was nothing left for him to do except to record his action for the judgment of posterity. Surely there is irony in the commemoration of such an exercise in futility.

True the occasion did have a different aspect. It took a bold heart to challenge the validity of President Lincoln's order authorizing the local military commander to suspend the writ of *habeas corpus.* Others who had challenged President Lincoln's actions had been placed under military arrest and confinement and Chief Justice Taney had reason to think that he might well suffer similar treatment. Since the decision in the *Dred Scott* case his name had been anathema to those who had placed Abraham Lincoln in the White House, and with war fevers rising and not unreasonable fears for the physical safety of the President reaching a point near hysteria, it took real courage to hand down the decision in *Ex parte Merryman.* This was especially true since that opinion gave not a little comfort to those who, like Colonel Charles Marshall, were undertaking to justify secession as the only way left to resist executive usurpation.

That President Lincoln felt able to ignore the order of the Chief Justice emphasizes its essential futility. Like the struggles of the heroes of Greek tragedy, which always aroused the pity and sympathy of the chorus but which just as invariably were completely unavailing to avert the fate to which the protagonists

is known to have had an interview with Secretary of War Cameron at Fort McHenry on July 4, 1861, and some time thereafter he was released. His next son, born December 5, 1864, was named Roger Brooke Taney Merryman, but died in infancy.

were predestined, so the proceedings in *Ex parte Merryman,* however much they may have aroused the sympathy of the community, were foredoomed to be ineffective. The President, like the gods on Olympus, could afford to treat the whole affair with indifference.

Why then do we think this a fitting occasion for ceremony? One answer is that it would be hard to find in the annals of this court any event more rich in historical interest. Indeed, *Ex parte Merryman* holds a very extraordinary fascination for the student of the Civil War era and especially for those who are interested in what happened here in Maryland during that period. But Mr. Lewis has already dealt with this aspect of the case, and I shall not attempt to gild the lily.

Is it because Taney's opinion established an important precedent in American constitutional law? That, I think, it would not be easy to demonstrate. This is hardly the occasion for an analysis of the decisions, beginning with *Ex parte Milligan,* which have explored this difficult terrain. All I shall say here is that after reading the utterances of those judges and legal scholars who have wrestled with this problem, I find it hard to escape the feeling that the answer to such questions lies more in the emotions than in any rational process. When justifiable fears for the national security are aroused, measures believed to be necessary for the protection of the State generally receive judicial sanction. We all remember the steps taken immediately after Pearl Harbor to relocate those residents of the Pacific Coast who were of Japanese descent. This "relocation" was, of course, nothing but detention in a concentration camp under military surveillance, of persons—many of them citizens of the United States—against whom no evidence of subversive action or of disloyal utterances had been brought forward. Yet this action received the highest judicial sanction in the *Korematsu* case.

Again, during World War II the military commander of the Hawaiian Islands, acting under authority of the Secretary of War, took certain security measures which he deemed necessary for the protection of the islands against subversion and possible invasion, including suspension of the writ of *habeas corpus.* The local District Judge, inspired no doubt by the example of Chief Justice Taney, undertook to challenge these measures.

I can testify from personal recollection to the reaction of that excellent lawyer and able judge, Robert P. Patterson, who was then Under-Secretary of War. Without a moment's hesitation Judge Patterson upheld the authority of the military commander and advised him to disregard the attempted intervention of the federal court.

Is there then any other justification for this gathering? I suggest that there is. Indeed, I believe that the role of Chief Justice Taney in *Ex parte Merryman* 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. On every hand committees arise dedicated to the idea that the rule of law furnishes the solution for all the troubles that presently vex the world, and Law Day has become a favorite occasion for every political orator to display his grasp of philosophical profundities—so that the ordinary man may be forgiven if he begins to suspect that this may be just another nostrum peddled by self-seeking adventurers.

I must also admit that to some the rule of law means little more than the fact that lawyers are somehow entitled to make money at the expense of laymen. This seems to be the view of those lawyers to whom the profession is a means of livelihood and nothing more. But I would venture to say that to every lawyer worthy of the name, the rule of law means something more profound than this. He may not understand it entirely and indeed if he tries to do so, he will speedily find himself wandering into the arena of juridical philosophy where the proponents of natural law contend with those who adhere to more pragmatic or positivist ideas. 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 the ordinary lawyer may lack competence in the field of jurisprudence and yet 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. In proclaiming that faith under such adverse circumstances, he must have been aware that the rule of law is a goal toward which men strive in an imperfect world rather than a present reality.

Whether we accept with Cicero and Aquinas the idea that the law has always existed in a perfect state as a brooding omnipresence in the sky (to borrow Mr. Justice Holmes' vivid phrase) or whether we follow the anthropologists in thinking of the law as an evolving concept developing from primitive origins, we must all agree, I think, that it responds to one of man's deepest urges, his instinctive desire for justice.

Again the religious analogy presses strongly for attention. The struggle of man in a material world to attain the life of the spirit is very similar to his effort to bring about the rule of law. In both cases he has available to his needs a discipline which harnesses reason and the emotions to work together for the desired objective. But just as the ardent seeker after the religious life sometimes finds that our churches fall grievously short of their aim, so the true advocate of the rule of law frequently finds it hard to discover in our legal institutions all that is needful to bring about the desired result. Our courts like our temples sometimes need to be cleansed of the money changers, our judges like our high priests occasionally display human frailty, and our legal system like our ecclesiastical organizations periodically seems to need renovation.

Again, just as men find it difficult to accept in their daily lives the simple requisites for spiritual living, so do they appear to find it difficult to make those sacrifices without which the rule of law can never be a reality. When, for example, as recently happened, a committee of the Maryland Bar Association unanimously recommends that the United States decline to submit to judicial determination disputes arising under our treaties with Panama, one is irresistibly reminded of the rich young man in the gospel who went his way sorrowing. In both cases there is a lack of faith without which the goal cannot be achieved.

In justification it may be suggested that there has never been a time when it was harder to trust in the efficacy of the rule of law. Yet I believe that if we but look for them, we can find evidences that there is more basis for this trust than one would suppose from a reading of the daily papers. I hold in my hand an issue of the Journal of the International Commission of Jurists which contains what I believe to be one of the most significant documents of our times. It is the so-called Declaration of Delhi issued at New Delhi in January, 1959 by the

International Congress of Jurists. This Congress consisted of 185 judges, practicing lawyers, and teachers of law from 53 countries who met to discuss the rule of law and the administration of justice throughout the world. Among their number were judges of the highest courts, presidents of national bar associations, and other recognized leaders of the profession. This Congress agreed unanimously on a set of conclusions which in their view embodied the essentials of the rule of law. I wish that time permitted me to read every word of that declaration to you. It is a noble document breathing the spirit of what we in our somewhat parochial way tend to think of as Anglo-American justice. On point after point there is stated with clarity and force principles both substantive and procedural which if adhered to could not but lead to a world in which the decision of disputes by the exercise of naked power would be unthinkable.

Granted that the views of a few lawyer's do not necessarily control the conduct of governments, we can nevertheless say that here as in *Ex parte Merryman*, only on a far wider basis, embracing most of the leading nations of the world and many of the emerging states of Asia and Africa, is a ringing declaration which in our century has as much significance as the noble words of Sir Edward Coke read to you by Mr. Lewis or as Chief Justice Taney's great opinion in *Ex parte Merryman*. So long as we have brethren in all these lands who subscribe to this basic creed we need not say with Sir Edward Grey that the lights are going out all over the world. While they may flicker at times and even be temporarily extinguished here and there, they are still burning in more places and with a brighter flame than at any previous time in the history of mankind. And so we may still dare to hope that the time will yet come when the rule of law becomes something more than just the lawyer's dream.

RESPONSE OF JUDGE W. CALVIN CHESNUT

It was a happy thought by Chief Judge Thomsen to note the significance of Law Day by remembering one of the most important historical orders of this Court. Just one hundred years ago Chief Justice Taney, presiding in the United States Circuit Court for Maryland, signed a *habeas corpus* order

directed to General Cadwalader at Ft. McHenry to bring into court John Merryman, then held in custody. The Court is indebted today for the excellent and eloquent recounting of this proceeding by Mr. Lewis and Mr. William L. Marbury.

As Chief Justice of the Supreme Court of the United States, Taney frequently presided here in the Circuit Court, the whole jurisdiction of which in 1912 was transferred to the District Court, which, with the Supreme Court, have been the only federal courts continuous since 1789. The Circuit Court was situated in what was then called the new Masonic Temple on the east side of St. Paul Street just north of Fayette, where it had been housed since 1822. Of course, as we all know, that building no longer stands but has been superseded by the architecturally beautiful State Court House.

The occasion today furnishes a double opportunity for the members of the District Court. First, all of the present members of the Court wish to express their deep appreciation and respect for the judicial services of Roger Brooke Taney, the most illustrious member of this Court; and secondly, to make some present appropriate comment regarding the nature and function, past and present, of the great writ of *habeas corpus*.

Maryland has not been unmindful of the career of the great Chief Justice. Many years ago an interesting biography of him was published by Bernard C. Steiner, one time Librarian of the Enoch Pratt Free Library, and more recently a more extended and definitive biography has been published by Dr. Carl B. Swisher of the Johns Hopkins University. A statue of Taney by the sculptor Rinehart, showing a seated figure in judicial robe, occupies a prominent place in front of the State Capitol at Annapolis and a replica of the statue, even more familiar to Baltimoreans, faces the Washington Monument in Washington Square.

We are told that Severn Teackle Wallis in his address at the unveiling of the Annapolis statue, described it as "The figure has been treated by the artist in the spirit of that noble and absolute simplicity which is the type of the highest order of greatness."

It is quite impossible to overvalue the writ of *habeas corpus* enacted by the British Parliament in 1679, in consequence of an arbitrary and unlawful imprisonment by the King of a simple citizen. It has served its great purpose in the cause of

individual human liberty for nearly 300 years. Blackstone praised it as a second Magna Charta. The statute was in force in Maryland before the American Revolution and was given constitutional stature in the Federal Constitution of 1789 which provided that for federal law it should not be suspended except in time of rebellion or invasion. And by the 14th section of the first Judiciary Act of 1789 the power to issue it, in proper cases, was conferred upon federal judges. It is the most incisive legal surgical tool in the armory of the courts. Like many other most useful writs, it is of course capable of abuse, as we know in present common practice in this court, by irresponsible petitioners; but despite that, it should forever be retained as an indispensable feature of liberty.

On this occasion it is interesting to note that the use of the writ in the Merryman case was the forerunner in a few years, of two other famous *habeas corpus* cases in the Supreme Court, and it is a curious coincidence only of an alliterative nature, that the name of the petitioner in all three cases began with an "M," and that two of the three arose in Maryland and Mississippi respectively. One case, *Ex parte McCardle*, resulted in the temporary repeal of the right to appeal to the Supreme Court during the Reconstruction Period. The third case arising in Indiana, *Ex parte Milligan*, firmly established the doctrine of Taney's opinion in the Merryman case.

I may add a footnote to what has been so well said by Mr. Lewis about it. Shortly after I came to the Court in 1931 I was interested to personally examine many of the original court papers still then retained by the Clerk of this Court, including particularly the papers in the Merryman case. From that personal examination it is easy to visualize just what occurred. When Gen. Cadwalader's aide, in response to the writ which had been issued by Chief Justice Taney, was presented and the statement was made that Gen. Cadwalader refused on orders of President Lincoln to present Merryman, Taney reached for a readily accessible yellow pad and immediately, in his own handwriting, wrote the order holding Gen. Cadwalader in contempt for disobedience to the writ of the court. The penmanship was faltering, due to evident physical infirmity, but the wording was precise and positive.

We hope that these proceedings today will be duly transcribed and become one of the records of this Court.