the district judge had not sufficient prestige to make a serious public issue of the disobedience of the orders of the court.

It was with this case in the background that another case arose involving the same legal problems, when Taney was called upon to take action, presumably chiefly because of the additional prestige which his decision would give to arguments of the type which Judge Giles had advanced. General Keim, of Pennsylvania, had been ordered to put a stop to secessionist activities between Philadelphia and Baltimore. Among other things he called for the arrest of the captain of a secessionist company operating in Maryland. The result was the arrest of John Merryman, a country gentleman, the president of the state agricultural society, and an active secessionist. He was confined in Fort McHenry. On the same day, May 25, 1861, he petitioned for a writ of habeas corpus partly on the ground that he was not the captain of any company—which technically was true, although he was lieutenant in a company of cavalry, and had supervised the destruction of a number of railroad bridges. The petition was presented to Taney, who, it seems probable, went to Baltimore chiefly for the purpose of receiving it.

On May 26 Taney issued a writ of habeas corpus, directing General George Cadwalader to bring Merryman before the Chief Justice of the United States on the following day at the circuit court room in the Masonic Hall. The order added to the already intense excitement. A reporter, phrasing well the vindictive attitude of extreme abolitionists toward Taney, declared that his purpose was "to bring on a collision between the judicial and military departments of the government, and if possible to throw the weight of the judiciary against the United States and in favor of the rebels." Taney was at heart a rebel himself, the reporter continued. He had recently expressed the wish that "the Virginians would wade to their waists in northern blood." The fact that he volunteered to go to Baltimore to issue a writ in favor of a rebel showed the alacrity with which he served the cause of the rebellion.[15]

With the mind of the North prepared for Taney's decision by this

[15] New York *Times*, May 29, 1861.

kind of propaganda, and with southern sympathizers eagerly hoping that Taney could and would curb the growing power of the military forces of the Union, the case was called, on the morning of March 27. Instead of appearing in court, and bringing Merryman with him, General Cadwalader sent a statement to be read by his aide-de-camp, Colonel Lee, an officer decked out in full uniform with a red sash and wearing a sword. The statement reviewed the facts of the case, called attention to the President's order for the suspension of the writ of habeas corpus, and requested the postponement of the case until the President could be consulted.

In effect, although it was done in courteous language, the military authorities told the court they would obey a court order only if the President saw fit to direct them to do so. Taney countered with a stern reply. "General Cadwalader was commanded to produce the body of Mr. Merryman before me this morning," he declared, "that the case might be heard, and the petitioner be either remanded to custody or set at liberty if held on insufficient grounds; but he has acted in disobedience to the writ, and I therefore direct that an attachment be at once issued against him, returnable before me here at twelve o'clock tomorrow, at the room of the circuit court." [16]

An audience of some two thousand people assembled on the following day to witness the outcome of the struggle between the Chief Justice and the military authorities. Leaving the Campbell home in the company of his grandson, Taney remarked that he might be imprisoned in Fort McHenry before night, but he was going to court to do his duty. As he took his place he announced that he acted alone rather than with Judge Giles because of the fact that he was sitting not as a member of the circuit court, but as Chief Justice of the United States. One reason for the distinction, undoubtedly, was the belief that it would lend added weight to the decision.

When Taney called for the return upon the writ of attachment the marshal replied in writing that he had not been allowed to enter Fort McHenry to serve the writ, and that he had sent in his card but

[16] The proceedings appear at length in the contemporary newspapers and other records of the period, and are presented and discussed in the Tyler and Steiner biographies.

had received no reply. "It is a plain case, gentlemen," Taney declared, "and I shall feel it my duty to enforce the process of the court." He had ordered the writ of attachment because the detention of the prisoner was unlawful on two grounds. First, the President could not constitutionally suspend the writ of habeas corpus nor authorize any military officer to do so. Second, if a military officer arrested a person not subject to the rules and articles of war the prisoner must be turned over to the civil authorities. He would write out his opinion at length, and file it in the office of the clerk of the circuit court.

It would have been well for his reputation for judicial calmness had Taney stopped with the reading of his prepared statement. Unfortunately he forgot himself in the excitement of the moment, and made additional comments. Because the military force was supérior to any force the marshal could summon, the court would not be able to seize General Cadwalader. If he were before the court it would inflict punishment of fine and imprisonment. Under the circumstances he would write out the reasons for his opinion, and "report them with these proceedings to the President of the United States, and call upon him to perform his constitutional duty and enforce the laws. In other words, to enforce the process of this court." [17]

It is hardly surprising, therefore, that reporters wrote "sensation" after this notice that the Chief Justice would carry war into the camp of the Executive. It was "sensation" of enthusiastic approval on the part of the crowd, and was similarly pleasing to most Baltimore papers and to some few Democratic papers elsewhere. Union presses, however, stormed wrathfully at the "hoary apologist for treason," and were not less abusive than they had been after the Dred Scott decision. The New York *Tribune*, for instance, continued day after day to rearrange the stock of expletives in Horace Greeley's vocabulary into varied scorching characterizations, and other papers differed only in matters of vocabulary and figures of speech.

Taney had been too much and too often abused to be greatly dis-

[17] As quoted in the Baltimore *American*, May 29, 1861.

turbed by the outburst. Indeed, in defending the writ of habeas corpus, one of the great traditional bulwarks of individual liberty, and in resisting military encroachments on the rights of southern sympathizers, he seems to have acted from a profound sense of mission. "Mr. Brown, I am an old man, a very old man," he replied to the Baltimore mayor's congratulations on his decision, "but perhaps I was preserved for this occasion." He believed, indeed, that the government had considered the possibility of imprisoning him. Although that danger seemed to have passed, he warned Mayor Brown, a southern sympathizer, in what proved to be an accurate prediction, that the time of the latter would yet come.[18]

Taney immediately wrote out his opinion in the case, filed it with the clerk of the circuit court, and directed that a copy be sent to the President. "It will then remain for that high officer," he concluded, "in the fulfillment 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."[19] He elaborated his argument that only Congress, and not the President, could suspend the writ of habeas corpus. He contended that the civil administration of justice in Maryland was unobstructed save by the military authority itself, and that under these circumstances the military had no right to supersede the performance of civil functions.

This document, prepared in defense of the reign of law as against arbitrary military rule, has after the calmer appraisal of more remote periods been hailed as a masterpiece of its kind. Indeed, although it was not specifically mentioned, many of its principles were sanctioned by the Supreme Court shortly after the close of the war, with the personal and political friend of President Lincoln as its spokesman.[20] Immediately contemporary reactions, however, were those which were to be expected. The opinion was loudly praised by friends of the South, and heartily denounced by the friends of the administration.

[18] George W. Brown, *Baltimore and the 19th of April 1861*, pp. 90–91.
[19] Ex parte *Merryman*, Federal Cases, No. 9487.
[20] See Ex parte *Milligan*, 4 Wallace 1 (1866), opinion by Justice David Davis.

A few days after Taney's altercation with the commander at Fort McHenry, Judge Samuel Treat, of St. Louis, had a similar experience in a federal district court, when an officer refused to produce a man for whom a writ of habeas corpus had been issued.[21] Treat sent a copy of his opinion to Taney, and Taney replied by sending Treat a copy of his own opinion in the Merryman case. "It exhibits a sad and alarming condition of the public mind," he wrote to Treat, "when such a question can be regarded as open to discussion; and no one can see to what disastrous results the inflamed passions of the present day may lead. It is however most gratifying to one trained in the belief that a government of laws is essential to the preservation of liberty to see the judiciary firmly performing its duty and resisting all attempts to substitute military power in the place of the judicial authorities." [22]

Replying in similar fashion to a congratulatory letter from Franklin Pierce, Taney added that the "paroxysm of passion into which the country has suddenly been thrown appears to me to amount almost to delirium. I hope that it is too violent to last long, and that calmer and more sober thoughts will soon take its place: and that the North, as well as the South, will see that a peaceful separation, with free institutions in each section, is far better than the union of all the present states under a military government, and a reign of terror preceded too by a civil war with all its horrors, and which end as it may will prove ruinous to the victors as well as the vanquished. But at present I grieve to say passion and hate sweep everything before them." [23]

If it was true, as reported,[24] that Taney received a letter from the President concerning the Merryman case, neither party made the fact public. On July 4, however, in his message to the special session of Congress, the President made an official though indirect reply to Taney. He stated that the legality and propriety of authorizing the suspension of the privilege of the writ of habeas corpus had been

[21] In re *McDonald*, Federal Cases, No. 8751.
[22] Taney to Treat, June 5, 1861, Treat MSS., Missouri Historical Society.
[23] Taney to Pierce, June 12, 1861, Pierce MSS.
[24] New York *Herald*, June 2, 1861.

questioned. The attention of the country had been called to the proposition that one who was sworn to "take care that the laws be faithfully executed" should not himself violate them. His answer and his justification lay in the fact that all the laws were being resisted in nearly one-third of the states. "Must they be allowed to finally fail of execution," he asked, "even had it been perfectly clear that by the use of the means necessary to their execution some single law, made in such extreme tenderness of the citizen's liberty that practically it relieves more of the guilty than of the innocent, should to a very limited extent be violated? To state the question more directly, are all the laws *but one* to go unexecuted, and the government itself go to pieces lest that one be violated?" He did not, however, believe that the Constitution had been violated. He suggested a brief argument to that effect, leaving a more extended argument to be presented on the following day in an official opinion by the Attorney General.[25]

It is futile to argue whether the President or the Chief Justice was *right* in the matter, for back of their legal differences were fundamental differences of opinion on matters of public policy. Lincoln preferred to interpret the Constitution so as to avoid the appearance of violating it, but he preferred violating it in one particular to permitting the Union to be destroyed. Taney regarded the dissolution of the Union as less disastrous than the reign of coercion which would be necessary to save and maintain it. Lincoln won, and the Union was saved. Men who are the products of the surviving culture, the culture of the North, are not inclined to question that the saving was worth the cost. Yet no one familiar with the destructiveness of the war and with the subsequent decay of the finer aspects of the culture of the old South will deny the greatness of the cost, or wonder that Taney, farseeing as he was, was appalled by it.

One point at issue between Taney and the military authorities was never officially stated clearly. The authorities assumed not only that ordinary legal and judicial processes were too slow to be effective in

[25] *Messages and Papers of the Presidents*, VI, 25. For the Bates opinion see 10 Official Opinions of the Attorneys General 74.

the crisis, but also that the normal effectiveness of these processes would be warped by the prejudices of the judges. It was of little significance that no one had resisted federal judicial officers, if the officers were themselves disloyal. The point was one of importance even though not clearly stated, for although Taney and Giles presumably would not have conducted themselves in a frankly illegal manner they had definite prejudices and sympathies, and, as was true of other judges, their prejudices and sympathies affected the principles of law which they chose to emphasize in given cases. Had Taney felt about the issues of the war as did the President and the Attorney General, for instance, he might have pursued the legal arguments employed by them without destroying his own reputation as a careful logician and as an authority on constitutional law. He felt so differently, however, as to prefer the death of the Union to the medicine which the President prescribed as necessary to save it. Loyal unionists, quite naturally, were unwilling to trust judges who held or were suspected of holding such ideas.

Because of its nearness to the capital city of the nation, Maryland had to be prevented from seceding. Leaders guilty of overt acts were imprisoned and held by military authorities. This, however, was not enough. The large numbers of secession aristocrats of Baltimore and vicinity were able, without tangible violation of law, to keep alive the resistance to the government and to plot arrangements for an alliance with the Confederacy. After trying to control them by peaceful means Attorney General Bates remarked in disgust that they were so far perverted and so deeply committed to the cause of the enemy that it was useless to argue with them. "To keep them quiet," he concluded, "we must make them conscious that they stand in the presence of coercive power." [26]

To make them conscious of coercive power the authorities arrested Mayor Brown and the police commissioners of the city without making any specific charges against them, and lodged them in Fort McHenry. Finding this an effective method for getting rid of

[26] Bates to N. P. Banks, June 16, 1861, Attorney General's Letter Book.

embarrassing persons, the government used it to get rid of influential members of the legislature and other disloyal persons of prominence. The prisoners included a grandson of Frank Key, a son of General William H. Winder, and others of Taney's friends or the sons of his old friends. Most of them were shifted to Fortress Monroe, and then to other places of confinement as expediency required, without ever being charged with particular offenses. Finally, in the latter part of 1862, when Maryland was safely under the control of loyal persons, the exiles, fuming and raging, were permitted to return to their homes.

Persons who had participated in the burning of railroad bridges or in other direct attempts to sabotage the government program were accused before grand juries, and indictments were found against them. In due time some sixty treason cases, including that of Merryman, were listed on the docket of the federal circuit court. After being held for a time many of them were released pending trial, though on exceedingly high bail. There was much curiosity and anxiety as to what Taney would do with these treason cases, at the November term of the court, at which he sat with Judge Giles. He disappointed the sensation seekers, however, and doubtless served the interests of the alleged criminals as well, by continuing the cases to the April term, intimating that the questions involved would in the meantime be decided by the Supreme Court.

Cases involving the questions at issue were not reached at the ensuing term of the Supreme Court. Taney fell ill, and was unable to attend the circuit court at the April term. The Maryland treason cases were therefore postponed again, doubtless to the deep relief of the accused, for southern influence had now been so effectively suppressed by military power that the Union extremists ran unchecked. Jury trials would probably have been conducted in an atmosphere of intolerance toward the prisoners in spite of all that sympathetic judges might be able to do on their behalf.

In the autumn of 1862 Taney was still in poor health, and he felt unable to attend the November term of the circuit court. It is clear that his sympathies were with the persons accused of treason, and

that he felt unable to guarantee them a fair trial under the circumstances. He may therefore have welcomed an excuse for absenting himself from court, in so far as his absence provided a reason for further postponing the cases. He feared, however, that pressure would be put on Judge Giles to hear the cases while sitting alone. He therefore wrote to Giles to show that the district judge, sitting alone in the circuit court, could not try cases which might lead to capital punishment. If both judges sat, and the case involved a new and doubtful question in criminal law, the question could be certified to the Supreme Court. If the district judge sat alone, however, the question could not be so certified, and the decision of the judge would have to stand. Taney thought there was ample evidence that Congress had not intended in a case of life and death to give such power to a district judge.[27]

Giles' sympathies were so similar to those of Taney that in the conduct of treason trials he would doubtless have done his best for the defendants. Under the circumstances, however, he might have been unable to save them, and he may have welcomed Taney's argument showing that he could not conduct the trials while sitting alone.

In the meantime William Price, the new district attorney in Maryland, was planning a vigorous prosecution of the treason cases. "You are aware from the constitution of the court," he wrote to Attorney General Bates, "[that] if the Chief Justice should be on the bench, the treason cases will have to be made very plain and conclusive if we expect a conviction." [28] When he discovered that Taney would be absent, and that the presence of a member of the Supreme Court would be necessary at the trials, he tried ineffectively to have arrangements made whereby another judge could be designated to sit with Giles.[29]

Giles himself effectively blocked Price's plans in one particular. There was no record of the testimony on the basis of which the indictments for treason had been found, but Price had expected to get

[27] Taney to Giles, Oct. 7, 1862, S. P. Chase MSS., Historical Society of Pennsylania.
[28] Price to Bates, Sept. 1, 1862, Attorney General MSS.
[29] Price to Bates, Oct. 15, 1862, *ibid.*

the evidence from the notes kept by one of the grand jurors. Before surrendering his notes, however, the man consulted Giles, who told him that giving out secret information in this way would be in violation of his oath [30]—whereupon Price, deeply exasperated, was left to get his information as best he could.

By circumstances and devices of one sort or another the cases were kept pending until another year and more had passed. In the spring of 1864 Taney discussed them in a letter to Justice Nelson. He doubted that he would be able to go to Baltimore, but declared his intention to postpone the cases further if he did go. To him the official orders issued by military authorities almost every day, and the arrest of civilians without assignment of cause, showed that Maryland was under martial law and that the civil authority was utterly powerless. The court could not under the circumstances give a fair and impartial trial, since witnesses and jurors would feel that they might be imprisoned for anything they said displeasing to the military authority, and the court would be unable to protect them. If the party was acquitted he might nevertheless be rearrested and imprisoned, and the court could neither protect him nor punish the offenders. "I will not place the judicial power in this humiliating position," Taney declared, "nor consent thus to degrade and disgrace it, and if the district attorney presses the prosecutions I shall refuse to take them up." [31]

The cases were further postponed in some way without this act of outright defiance of the administration. In another six months Taney was in his grave, and six months after that the war was over. Although the persecution mania and the self-interest of Republican "radicals" carried distress and disorder throughout the South for many years, neither Merryman nor any other of the Marylanders charged with treason during the first year of the war was brought to trial. For this fact the credit or the blame belongs in no small part to Taney. In view of his belief that the maintenance of the Union

[30] Price to Bates, Jan. 16, 1863, *ibid.*

[31] Taney to Samuel Nelson, May 8, 1864, from a copy provided by Edward S. Delaplaine, Frederick, Md.

was not worth the cost in tyranny, repression, and blood, his position on this and allied matters is easy to understand. Furthermore, it is by no means clear that the cause of the Union would have been served better had the disloyal sons of Maryland been tried and convicted of treason and made to pay the penalty. Just so much would the terrific social cost of the war have been increased, to add to the bitterness and hatred which hung like a cloud over the country for many years to come.

Taney's efforts to prevent the prosecution of the southern sympathizers accused of treason have not hitherto been generally known. His opinion in the Merryman case, however, by which he attempted to outlaw a part of the military régime of which the prosecutions were a part, has come to be regarded as one worthy of the deepest respect. It stands as a courageous defense of the rights of citizens against the usurpations of military brusqueness and tyranny, and against repressive rule of any kind by executive authority. It is regarded as a noble and fitting monument to Taney's memory.

ROGER B. TANEY

By

CARL BRENT SWISHER

NEW YORK
THE MACMILLAN COMPANY
1935