THE OLIVER WENDELL HOLMES DEVISE

History of the SUPREME COURT of the United States

VOLUME V

The Taney Period

1836-64

By Carl B. Swisher

NEW YORK

Macmillan Publishing Co., Inc.

Collier-Macmillan Publishers

LONDON

Macmillan Publishing Co., Inc.
866 Third Avenue, New York, N.Y. 10022
Collier-Macmillan Canada Ltd.

Library of Congress Cataloging in Publication Data

Swisher, Carl Brent, 1897–1968.
The Taney period, 1836–64.

(History of the Supreme Court of the United States, v. 5)
1. United States. Supreme Court—History.
I. Title.
KF8742.A45H55 vol. 5 347'.73'26 72–93318
ISBN 0–02–541380–5

FIRST PRINTING 1974

PRINTED IN THE UNITED STATES OF AMERICA

Contents

CHAPTER XXXIII

The War and the Federal Judges

ALTHOUGH DURING THE CIVIL WAR, as in most major wars, the judiciary was for the most part outside the mainstream of events, the early months engaged most of the members of the depleted Supreme Court and many of the federal district judges. Among their concerns were the suspension of the privilege of the writ of habeas corpus, the definition of treason, and prize law. The Lincoln Administration first considered suspending habeas corpus after the turbulent events in Baltimore in April, 1861. In that period Marylanders were deeply divided and confused as to their loyalties. Although many quickly committed themselves to the Union cause, various government officials, editors, and leading businessmen and politicians sympathized with the South or were at least more hostile to the Yankees of the North than they were loyal to the Union.

Some Marylanders, furthermore, recognized that their state's interests were not identical with those of either adjacent region. Eager to prevent Maryland from becoming a battleground between the North and the South, they talked of establishing a middle-states republic, free from military commitments, presumably with the dream of profitable trade in both directions. In December, 1860, soon after he had given up his position as Supreme Court Reporter, Benjamin C. Howard had discussed the possibility that "our country is destined to be cut up into parallel slices as you would slice a piece of bread."[1] Thomas H. Hicks, Know-Nothing governor of Maryland in this critical period who is given much credit for keeping Maryland from joining the seceding states, himself wavered before taking a stand. For a time he seems to have taken much the same position as Howard, proposing to Governor William Burton of Delaware that the two states unite in a central con-

[1] B. C. Howard to John P. Kennedy, Dec. 26, 1860, Kennedy Papers.

federacy opposed to both the North and the South. Governor Burton, however, insisted that Delaware must remain with the Union.[2]

With the outbreak of hostilities people who had speculatively shifted their positions were driven toward some kind of commitment. Governor Hicks moved slowly toward support of the Union. He was in Baltimore on April 19, 1861, when Baltimore lived up to its reputation as "Mob City" by producing a riot when at the call of the President a Massachusetts regiment marched through the city from one railroad station to another, causing bloodshed on both sides.[3] That night Governor Hicks, who was at the home of Mayor George William Brown, was awakened to hear from Marshal George P. Kane of the Baltimore police and Mayor Brown an appeal that he as governor authorize the destruction of the railroad bridges to the east of the city to prevent the entrance of more Northern troops. According to an unsympathetic account by William Watkins Glenn, editor of the pro-Southern *Baltimore Exchange*, Hicks was most reluctant to give his assent. He was said to have twisted the sheet over his head, rolled and groaned, and finally moaned, "Oh! Yes. Go ahead and do it." Early next morning, however, according to Glenn's report, Hicks "sneaked out of the house" and headed for Annapolis so that it proved impossible to get from him a written order for the burning of bridges.[4] The destruction of the bridges nevertheless proceeded, to the disruption of Union military transport.

Volunteer troops continued to move southward from the Northern states, with concentrations building up at Philadelphia and Harrisburg and other points so that it would soon be possible to occupy the city. Although part of the story is lost in the record of the confusion, it is clear that someone somewhere feared that dissident Marylanders might seek to use the federal courts to defeat Union strategy. In any event, without giving it publicity, President Lincoln on April 27, 1861, issued an order to Commanding General Winfield Scott to enable him to cope with judicial interference, a document which began: "You are engaged

[2] T. H. Hicks to William Burton, Jan. 2, 1861, and Burton to Hicks, Jan. 8, 1861, as excerpts were quoted in an advertisement in the catalog of the American Art Association, May, 1923; Carl B. Swisher, *Roger B. Taney*, 540.

[3] For an account of these events see George William Brown, *Baltimore and the Nineteenth of April, 1861*; George L. P. Radcliffe, *Governor Thomas H. Hicks of Maryland and the Civil War*; Edward G. Everett, "The Baltimore Riots, April, 1861," Pennsylvana History, 24:331, 1957; Charles B. Clark, *Politics in Maryland During the Civil War* (1952) (reprinting articles appearing under the same title, in *American Historical Magazine*, 38–41.

[4] Manuscript Diary of William Watkins Glenn, entry of Apr. 19, 1861, Glenn Papers.

in repressing an insurrection against the laws of the United States." If at any point between Philadelphia and Washington the general found resistance such that it was necessary to suspend the writ of habeas corpus for the public safety, the general himself or the local commanding officer was authorized to suspend the writ.[5]

On May 2, 1861, Major W. W. Morris, claiming to act exclusively on his own initiative, administered to a federal court the first military rebuff. On that day Judge William F. Giles issued a writ of habeas corpus, not for an offender in connection with military obstruction, but for the release of a minor who had enlisted in local Union forces without the consent of his parents. A deputy marshal presented the writ to Major Morris, commander at Fort McHenry. Morris read the document and handed it back with the remark that he would see the court and the marshal damned before he would surrender one of his men.[6]

Judge Giles immediately issued an order directing Morris to appear in court on May 8 to show why an attachment should not be issued against him for his refusal to obey the writ. He drafted the order in the form of a denunciation of military disobedience to the writ and gave it to the press for publication even before its delivery at the fort. This was the first time in his thirty-three years at the bar and bench, he wrote, that the writ had failed in Maryland to procure obedience. He sincerely hoped that in this crisis wiser counsels might prevail at the post, "and that no unnecessary conflict of authority may be brought in, between those owing allegiance to the same government and bound by the same laws."[7]

In his order Judge Giles stated that there had been no suspension of habeas corpus by competent authority. Major Morris, reading the Giles order in a newspaper, replied to it in a formal letter, not indicating any knowledge of the Presidential order and saying that his action was taken "entirely on my own responsibility without instructions from, or consultation with any person whatever." There might have been a question whether the Presidential authorization extended to the status of an illegally enlisted minor, since it was couched in terms of resistance to military forces along the line from Philadelphia to Washington.

[5] The order appears in somewhat varying phraseology in John J. Nicolay and John Hay, *Abraham Lincoln: A History*, IV, 169, and Abraham Lincoln, *Collected Works*, Roy P. Basler, ed., IV, 347.

[6] Affidavit of James Gettings, May 2, 1861, Attorney General Papers.

[7] In the matter of the petition of John G. Muller before Judge Giles, in the District Court of the United States for the State of Maryland. A clipping from the *Baltimore Exchange*, May 4, 1861, Attorney General Papers.

In justifying his action, Morris scathingly denounced the violence of Baltimore people against the Union forces. He argued that the writ of habeas corpus in the hands of an unfriendly power might depopulate the fortification and place it at the mercy of a "Baltimore Mob" in much less time than it could be done by all the appliances of modern warfare. Furthermore, in view of the ferocious attitude of the community against the military, he would be averse to appearing publicly and unprotected on the streets of Baltimore. In these circumstances, he said to Judge Giles, "I think it your duty to sustain the federal military and to strengthen their hands instead of endeavoring to strike them down."[8]

Judge Giles replied by saying that the statement in the newspapers represented what he had said in court and that he had given it to the press to prevent unintentional misrepresentation. He refrained from further discussing the issues beyond saying that the power to suspend the writ of habeas corpus was "a power which in my opinion belongs to Congress alone,"[9] thereby getting into the record one of the major points made later in criticism of suspension by the President. When a marshal was sent to serve on Major Morris the order of the court he refused to receive it, remarking that he would not obey any order or permit service of a writ of any kind issued by this or any other court.[10] Judge Giles, unable to act further, sent copies of the correspondence to the district attorney, William Meade Addison, with the suggestion that they be sent to Washington. Addison forwarded them to Attorney General Bates[11] and, according to Morris, the matter became an issue in the Cabinet the next day, even as the minor was quietly released.[12]

The signal for the next judicial attempt at restraint of the military came when at 2:00 A.M. on the morning of May 25, 1861, troops under the command of Captain Samuel Yohe charged with protection of the railroad between Baltimore and Harrisburg, under the overall direction of Major General William H. Keim, entered the home of John Merryman near Cockeysville, some miles north of Baltimore, and arrested him for participation in the destruction of railroad bridges after the Baltimore riot of April 19. Merryman was imprisoned in Fort McHenry.[13] The records do not reveal the urgency that led to the arrest at this time

[8] W. W. Morris to William F. Giles, May 6, 1861, Attorney General Papers. See also *New York Evening Post*, May 14, 1861.

[9] William F. Giles to W. W. Morris, May 7, 1861, Attorney General Papers.

[10] John W. Watkins to William F. Giles, May 8, 1861, Attorney General Papers.

[11] William Meade Addison to Edward Bates, May 8, 1861, Attorney General Papers.

[12] Manuscript diary of William Watkins Glenn, entry of June 2, 1861, Glenn Papers.

[13] For the records and papers in the case, from which primarily the materials presented hereafter are taken, see 1 O.R. (2d) 574–85.

of night but they do show that about this time Captain Yohe found it expedient to make in the heart of the secessionist area in Baltimore an ostentatious display of Union military strength.[14]

Southern sympathizers used the arrest as the occasion for pouring out their indignation at what they regarded as the unspeakable arrogance of the military and of the government in Washington. Merryman was a prominent farmer, politician, and member of the state legislature as well as of a state company of cavalry. His father and Chief Justice Taney had attended Dickinson College in the same period.

Merryman was given immediate access to counsel, who drafted a petition for a writ of habeas corpus. Since Judge Giles had already failed to procure obedience from Major Morris at Fort McHenry, Merryman's counsel decided to go directly to the Chief Justice, not as circuit judge but as the head of the Supreme Court. The writ was addressed not to Major Morris but to General George Cadwalader,[15] commander of the military district in which Fort McHenry was included, who was himself a lawyer and the brother of Judge John Cadwalader, federal district judge in Philadelphia.[16]

On Sunday, May 26, the petition was presented for Taney's signature in Baltimore. When Taney at the appointed time took his place on the bench in the Masonic Hall where he was accustomed to hold Circuit Court, General Cadwalader did not appear. Instead, arriving some twenty minutes late, an aide-de-camp, a Colonel Lee, decked out in full uniform and wearing a red sash and a sword, appeared to convey the general's regrets and say that engagements at the fort had prevented his coming. Lee presented a statement in which Cadwalader said that Merryman was "charged with various acts of treason, and with being publicly associated with, and holding a commission as lieutenant in a company having possession of arms belonging to the United States, and avowing his purpose of armed hostility against the Government." The general's statement officially brought into the open the Presidential suspension of the privilege of the writ of habeas corpus—or suspension of the writ, as loosely expressed in most of the official documents of the time. "He has further to inform you that he is duly authorized by the President of the United States, in such cases to suspend the writ of *Habeas Corpus*, for the public safety. This is a high and delicate trust, and it has been enjoined upon him that it should be executed with

---

[14] See *Baltimore South*, May 27, 1861.

[15] This is the spelling currently used. At that time it was frequently spelled "Cadwallader."

[16] See *Baltimore South*, May 27, 1861; *Baltimore American*, May 28, 1861. The proceedings are detailed at length in the several local newspapers and in the Tyler and Steiner and Swisher biographies of the Chief Justice.

judgment and discretion—but he is nevertheless instructed that in times of civil strife, errors, if any, should be on the side of safety to the country."

Finally, the general administered a politely phrased rebuke to the court for its interference: "He most respectfully submits for your consideration, that those who should co-operate in the present trying and painful position in which our country is placed, should not, by reason of any unnecessary want of confidence in each other, increase our embarrassments." He therefore requested postponement of any action by the court until he could receive instructions from the President.

The Chief Justice refused to debate with the general, or with his aide, either the matter of public policy or the law of the suspension of the writ. Counsel for Merryman asked formally whether Colonel Lee had produced the body of Merryman, according to the order of the court. Colonel Lee replied that he had not. Chief Justice Taney thereupon issued the following stern pronouncement:

> General Cadwalader was commanded to produce the body of Mr. Merryman before me this morning, 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.

In great excitement the people of Baltimore waited to see the outcome of this contest between the Chief Justice and the general, who in this affair represented the military authority of the President. On May 28, well before the appointed hour, the courtroom was tightly packed and a crowd of some two thousand people were assembled in the street outside. Among the lawyers crowding into the area reserved for the bar was Benjamin C. Howard, who was given a place at the clerk's desk.[17] Leaving for the court from the home of his son-in-law, J. Mason Campbell, in the company of his grandson, Taney remarked that he himself might be imprisoned in Fort McHenry before nightfall but he was determined to do his duty.

At the session of the court held on the preceding day Judge Giles had sat with Chief Justice Taney, but he was absent at the second session, avowedly because of some church duty scheduled for that time. Actually his absence on this occasion may have been for the purpose of enabling the Chief Justice to highlight the fact that this was not a session of the Circuit Court but was a session at chambers by the Chief

[17] *Baltimore Patriot*, May 28, 1861.

Justice of the Supreme Court, and Taney so announced, though at that time and for many years thereafter opinions written at chambers were not usually printed in official reports.

Taking his seat on the bench the Chief Justice asked, "Marshal, have you your return, sir?" Marshal Washington Bonifant handed him a folded paper which was in turn handed to the clerk to be read aloud. It stated that the marshal had gone to the fort pursuant to the writ of attachment and had sent in his name from the outer gate, but had been told that there was no answer, so that he had been unable to serve the writ. After further colloquy the Chief Justice read the following statement:

> *I ordered the attachment yesterday, because upon the face of the* return the detention of the prisoner was unlawful upon two grounds.
>
> 1. 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.
>
> 2. A military officer has no right to arrest and detain a person, not subject to the rules and articles of war, for an offence against the laws of the United States, except in and 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 orally 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 the Circuit Court, in the course of this week.[18]

Having eschewed oral statement the Chief Justice nevertheless proceeded to make one, as if carried on by the weight of his emotions. The marshal, he said, had the legal power to summon a posse and bring the general into court, but since the marshal would undoubtedly be met by superior force, such action could not be taken. If the general were before the Court, it would inflict such punishment as lay within its power, of fine and imprisonment. Under the circumstances he would write out the conclusions on which the opinion was based and would "report them with these proceedings to the President of the United States, and call upon him to perform his constitutional duty to enforce the laws. In other words, to enforce the process of this Court." At this point the reporter noted the word "Sensation," to describe the reaction of the

---

[18] *Baltimore American*, May 29, 1861.

audience. With this statement the proceedings ended, but it was said that for hours thereafter a large crowd remained assembled in the street outside.[19]

After the Court had adjourned, George William Brown, mayor of Baltimore, went up to congratulate Chief Justice Taney on preserving the integrity of the writ of habeas corpus. The latter replied, "Mr. Brown, I am an old man, a very old man, but perhaps I was preserved for this occasion." "Sir, I thank God that you were," replied the mayor. Taney added that he knew that his own imprisonment had been considered but that the danger had now passed. The time of the mayor, he prophesied, was yet to come.[20]

News of the Merryman case and of Chief Justice Taney's action spread over the country even before his opinion was made public a few days later. The *New York Tribune* gloated over General Cadwalader's "rebuke of the hoary apologist for crime" and asserted that Merryman was undoubtedly a traitor of the deepest dye.[21] A reporter for the *New York Times* asserted that Taney's purpose was to bring on a collision between the judicial and the military branches of the government; Taney himself was at heart a rebel, who was reported to have expressed the hope that in the war in Virginia the Virginians would wade to their waists in Northern blood; his going to Baltimore to hear the case disclosed the alacrity with which he was willing to serve the Southern cause.[22] Less inclined to condemn, the *New York Herald* voiced the belief that Taney had unknowingly made himself the tool of Maryland secession.[23] The *New York Evening Post* remarked that while newly selected servants of the nation were being required to take an oath of loyalty it might be well to tender the same oath to the Chief Justice.[24]

Taney plunged immediately into the composition of his opinion in the Merryman case, writing and correcting as was his custom to secure the most effective statement possible, labeling it "Before the Chief Justice of the Supreme Court of the United States at Chambers."[25] It was drafted as a challenge to the power of the President to suspend the writ of habeas corpus and to delegate that power to a military officer. No official notice, he said, had been given to the courts of justice or to the public, by proclamation or otherwise, that the President claimed this power. He had listened with surprise to General Cadwalader's

---

[19] *Ibid.*

[20] George William Brown, *Baltimore and the Nineteenth of April, 1861*, 90.

[21] *New York Tribune*, May 29, 30, 1861.

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

[23] *New York Herald*, May 30, 1861.

[24] *New York Evening Post*, May 29, 1861.

[25] An early and much corrected draft of the opinion in Taney's longhand is preserved in the Howard Papers.

statement of the President's claim, "for I had assumed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands, that the privilege of the writ could not be suspended, except by act of Congress."[26] Alluding to President Jefferson's treatment of the writ as capable of suspension only by Congress, Taney stated that had the refusal to obey the writ been voiced by the military commander on his own responsibility he would merely have referred to the Constitution and its unanimous interpretation on this point. But since the official claimed to act under the authority of the President, and since he believed the President to have exercised a power which he did not possess, he deemed it expedient to examine the whole subject.

The constitutional provision stated 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." Taney emphasized the fact that the provision was included in section 9 of Article I, a section which followed an enumeration of the powers of Congress and "has not the slightest reference to the executive department." It consisted, as he read it, only of prohibitions upon Congress. Therefore the statement of exceptional circumstances under which the writ might be suspended seemed to him to apply only to Congress. The writ, or its privilege, could be suspended only by Congress, and Congress, not the President, was the judge of what the public safety might require. He stressed the brevity of the Presidential term—ignoring the fact that members of the House of Representatives were chosen for only half the length of that term—and dwelt upon the limitations on the Presidential office. In contrast to the delight Taney had once taken at the vigorous exercise of Presidential power by Andrew Jackson, he now saw the President as little more than a ministerial officer doing the will of Congress and necessarily leaving a great deal even of administrative responsibility to other officers of the government.

The Chief Justice delved into Blackstone's *Commentaries* and Hallam's *Constitutional History* to show that in England restriction on the privilege of the writ had been a legislative and not an executive power. He turned to Story's *Commentaries* to show that the same was true in the United States, and to an opinion by Chief Justice Marshall with an incidental comment to the same effect.[27] He contended, furthermore, that even if the privilege of the writ were suspended by Act of

---

[26] *Ex parte* Merryman, 17 Fed. Cas. 144, 148 (No. 9487) (C.C.D. Md. 1861). This citation of the case as in the Circuit Court for the district of Maryland is not to be taken as an admission on the part of the Chief Justice that the case was disposed of in that court. He continued to treat it as a decision by the Chief Justice at chambers.

[27] *Ex parte* Bollman and Swartwout, 4 Cranch 75, 101 (1807).

Congress, persons not subject to the rules and articles of war could not be detained by the military or tried before a military tribunal. In a concluding paragraph he stated that he would file the opinion with the clerk of the Circuit Court and direct him to transmit a copy, under seal, to the President. "It will then remain for that high officer, in 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."[28]

By contrast with his Dred Scott opinion, which he had worked on for weeks after delivery before giving it to the public, Taney made his Merryman opinion available within a week. It was published in newspapers and journals all over the country, as well as in pamphlets distributed by or for the Chief Justice himself.[29] He did some additional writing in the case as comments came in, appending a paragraph to a copy given to his grandson, R. B. Taney Campbell, and wished that the added material had been incorporated in the original opinion,[30] but the addendum has apparently not been preserved.

The opinion had the impact of a military victory for the South and was hailed with delight by enemies of the Administration. To a Maryland friend who had written to him in praise of it, Taney replied that he had no desire for conflict with the executive branch of the government, and would prefer to spend the rest of his life in peace, yet "I trust I shall always be found ready to meet any responsibility or any consequence that my official duty may require me to encounter."[31] In reply to an approving letter from Franklin Pierce, Taney said that in the present state of the public mind, inflamed with passion and seeking to accomplish its object by force of arms, he sensed his grave responsibility in the Merryman case. Public sentiment was almost at the stage of delirium. His hope was that the North as well as the South would soon see that a peaceful separation with free institutions in each section was better than union under a military government based on civil war and a reign of terror ruinous to the victors as well as the vanquished.[32] He did not say how he reconciled his retention of his position as Chief Justice with his conviction that the Union should be dissolved.

The *Baltimore Sun* provided an example of the reaction of pro-Southern newspapers:

---

[28] 17 Fed. Cas. 153.

[29] See R. B. Taney to J. Mason Campbell, June 13, 1861, Howard Papers.

[30] R. B. Taney to J. Mason Campbell, Mar. 15, 1862, Howard Papers.

[31] R. B. Taney to George W. Hughes, June 6, 1861, Samuel Tyler, *Memoir of Roger Brooke Taney*, 430–31.

[32] "R. B. Taney to Franklin Pierce, June 12, 1861," *American Historical Review*, 10:368, 1905.

XXXIII: *The War and the Federal Judges*

It is not possible to read the opinion of Chief Justice Taney, in the Merryman case, without an impressive sense of the power of truth, and the convincing logic of the constitution and the laws. The paper is unanswerable. Like a stream first issuing as a spring clear and pellucid, it moves forward gathering breadth and strength, majesty and power, till in the accumulating volume of unvarying truth and right principle, it sweeps away all corruption and pours its tribute abundantly into the popular mind. . . .

Long after this terrible conflict shall have been brought to an end; when the fanaticism and commercial aggrandizement it is waged to serve shall have subsided; when the peace of desolation or of prosperity shall brood over the land, the grand, true, cogent, resistless influence of this document from the mind of Roger B. Taney will live, at once a vindication of the principles of the republic, and of the fundamental rights of the people, and an overwhelming protest against the action of those who have so rudely assailed them. It will take its place among the historic records of the period, as a precedent in all the future commotion and collision which may disturb the nation; or, as a monumental scroll, over-written with the words, "In memoriam," mark the era at which the nation ceased to exist, and the liberties of the people were immolated upon the altar of political and commercial ambition.[33]

Northern attitudes toward Taney's opinion were comparable to that expressed by the *New York Tribune* with respect to his original performance in court—"No Judge whose heart was loyal to the Constitution would have given such aid and comfort to public enemies." The editor renounced fear of a military despotism, which so disturbed the Chief Justice, and warned that "Of all the tyrannies that afflict mankind, that of the judiciary is the most insidious, the most intolerable, the most dangerous."[34] Taney's critics called attention to alleged inconsistencies between his challenge to the President and to the military in the *Merryman* case and his opinion in *Luther v. Borden* where no North-South issue was directly involved.[35] In the earlier case the Chief Justice had asked rhetorically whether a federal court could inquire into the correctness of the decision of the President to call out the militia. If it could, and if it differed with the President, it would be the duty of the court "to discharge those who were arrested or detained by the troops in the service of the United States or the government, which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guaran-

---

[33] *Baltimore Sun*, June 4, 1861.

[34] *New York Tribune*, May 30, 1861.

[35] See for example the *New York Herald*, June 9, 1861.

tee of anarchy and not of order."[36] By contrast with his disparaging comments in the *Merryman* case on the scope of Presidential power, and stress on the safeguards erected against Presidential tyranny, Taney had said in the *Luther* case, "It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe and at the same time equally effectual."[37] While the situations were not identical, the Chief Justice in the two cases dealt so differently with similar constitutional issues as further to convince Northern critics that in the Merryman case he was using constitutional principles to aid the secessionist cause.

Most immediate reactions to the Merryman case, whether approving or hostile, reflected primarily political considerations, with critical legal analysis to come later. When read without reference to the sectional controversy, the Taney opinion contains little to which critics can object and much to be applauded. It rings clear for all who fear the unnecessary expansion of executive power or irresponsible military behavior. That the danger to liberty was very real is shown by the tyrannical conduct during the war period on the part of various military leaders, including many who had not been brought up in a military tradition but who seem to have used their novel positions for behaving ruthlessly in the Union cause.

On the other hand the arrest of Merryman was not an instance of persecution of a harmless civilian. He was a lieutenant in the Maryland militia. The governor, because of the Southern sympathies of many of his people, had not responded to the President's act in calling the militia into the federal service. While the burning of bridges of which Merryman was accused had not been done pursuant to a written order from the governor, Mayor Brown, who had heard Governor Hicks' reluctant oral agreement, spread that information abroad,[38] even though Hicks made no public admission.

Thus the question of Merryman's military responsibility for his acts was anything but clear. It could have been argued, though subject to criticism from many angles, that a state militiaman in committing an offense against the military forces of the Union when a federal call had been issued for such militia was subject to the laws of war. It is also probably true, however, that Merryman was arrested not for offenses already committed, but rather to prevent the commission of others.

---

[36] Luther v. Borden, 7 How. 1, 43 (1849).

[37] *Ibid.*, 44.

[38] Brown, *Baltimore and the Nineteenth of April, 1861*, 73–74.

XXXIII: *The War and the Federal Judges*

Punishment of Merryman by court-martial or military commission seems not to have been seriously considered, but the reasons were probably more political than legal. The President was far more concerned about keeping Maryland and other border states in the Union than about having punishment properly meted out in all cases. Indeed, the arrest of Merryman and the subsequent handling of the case did the Union cause far more harm than he could have done if left at large. There is some indication, indeed, that his release was about to be ordered from Washington when the embroilment of Chief Justice Taney in the case made his release inexpedient from a propaganda point of view.[39] That clash having taken place, Merryman continued to be held at Fort McHenry, in spite of the crowded condition of the place and the need for all the space and facilities for military purposes, and he was permitted to see callers from his family and numerous friends in Baltimore.[40] They in turn continued to make propaganda out of his detention; a report of a committee of the legislature pictured him as "the victim of military lawlessness and arbitrary power—the great remedial writ of *habeas corpus*, and all the guaranties of freedom which it embodies, having been stricken down, at one blow, for his oppression."[41]

The Administration got Merryman off its hands by the expedient of having him indicted in a civil court and transferred to civil jurisdiction where he was granted bail. The grand jury, wrote a reporter, were "all unconditional Union men."[42] Merryman was indicted for treason or for conspiracy to commit treason, the indictment charging that he had conspired with five hundred persons for armed resistance to the government and had participated in the destruction of the bridges to prevent the passage of troops, along with other illegal acts.[43] The Secretary of War thereupon authorized the transfer of Merryman to civil jurisdiction, and the Attorney General authorized his admission to bail.[44] He was released on bail fixed at forty thousand dollars.[45] He then became one of that considerable number of Marylanders under indictment whose prosecution was considered from time to time throughout the war but was prevented either because of the strategy of Chief Justice Taney,

---

[39] See Bernard C. Steiner, "James Alfred Pearce," *Maryland Historical Magazine*, 19:25, 1924.

[40] *Baltimore Sun*, quoted in *New York Evening Post*, June 3, 1861.

[41] *New York Evening Post*, June 17, 1861. The report was said to have been made by the Committee on Federal Relations of the Maryland legislature.

[42] *New York Herald*, June 22, 1861.

[43] *New York Evening Post*, July 12, 1861.

[44] Edward Bates to William Meade Addison, July 12, 1861, Attorney General's Letter Book B–4, 85.

[45] *New York Herald*, July 14, 1861.

as discussed hereafter, or because the Administration feared that more would be lost than gained through such prosecutions.

While Judge Giles and Chief Justice Taney were clashing with the military in Maryland, United States District Judge Samuel Treat was having similar difficulties in St. Louis. Missouri, like Maryland, was a border state, with a powerful secessionist faction which included the governor and other officers. Militia stationed at Camp Jackson, near St. Louis, were said to be receiving Confederate supplies and to constitute a threat to the United States arsenal in the city. On May 10, 1861, Captain Nathaniel Lyon moved against Camp Jackson with United States troops and forced its surrender. It was said that many of the prisoners moved through the streets hurrahing for Jeff Davis, and that writs of habeas corpus would be applied for by many of them but would be ignored by Captain Lyon.[46] All the enlisted men took an oath not to fight against the United States, and all but one of the fifty captured officers gave their parole to the same effect, with the appended sentence that "While we sign this parole with a full intention of observing it, we nevertheless protest against the justice of its exactions."[47] Captain Emmet McDonald, the officer who refused to give his parole, applied to Judge Treat for a writ of habeas corpus. On May 13, the day before the writ was served, and probably with the knowledge that service was planned, Captain McDonald was sent across the Mississippi River and some ten miles into Illinois, where he would be out of the jurisdiction of Judge Treat's court.[48]

When the writ was served on Brigadier General William S. Harney, he replied that McDonald was not imprisoned by him and had not been held by him since the issuing of the writ. Furthermore, the events at Camp Jackson had taken place before his arrival there. But he was unwilling to say anything to cast doubt on the validity of those proceedings, and was willing to take responsibility for them.[49]

Thereupon, Judge Treat, like Chief Justice Taney, proceeded to write an opinion on the scope of the power of the federal courts with respect to the writ of habeas corpus. General Harney had said nothing about the suspension of the writ by the President but had merely said that he would not obey it by releasing or subjecting to release a man in McDonald's position. Judge Treat argued elaborately from the Constitution and federal statutes and cases that the federal courts had the power in question, and thought it all the more important that the

---

[46] J. B. Eads to Simon Cameron, May 11, 1861, 1 O.R. (2d) 107.

[47] N. Lyon to S. Williams, May 17, 186, *ibid.*, 112.

[48] William S. Harney to E. D. Townsend, May 18, 1861, *ibid.*, 114–15.

[49] W. S. Harney to Samuel Treat, May 15, 1861, *ibid.*, 115–16.

lodgment of the power be found there in view of the fact that the state courts did not have the power to take a prisoner from federal jurisdiction.[50]

It was reported that an application for a writ of habeas corpus for McDonald was filed in a federal District Court in Springfield, Illinois, before another judge of almost identical name, Samuel H. Treat, but the military apparently kept McDonald out of judicial reach. To Southern sympathizers, General Harney's defiance of Judge Treat was "equalled only by that of General Cadwallader in refusing to obey a similar writ issued by Judge Taney."[51] On the other hand, a newspaper with Northern sympathies was quoted as condemning the two judges for their meddling and traitorous efforts to thwart the government in its hour of peril, and suggested that suspension of the writ might well be followed by "suspension" (that is, hanging) of the two judges.[52]

Chief Justice Taney and Judge Treat exchanged copies of their opinions, the former calling it an alarming state of the public mind when the question of jurisdiction could be held in doubt. No one, he wrote somberly, could foresee the disastrous results to which inflamed passions might lead. It was gratifying to see the judiciary firmly performing its duty "and resisting all attempts to substitute military power in the place of the judicial authorities."[53]

In spite of the military frustration of Judge Treat's court, Captain McDonald, whether by exchange of prisoners or otherwise, eventually found his way into the Confederate forces, where he served well the cause of the South until he was killed, sometime in 1864. Judge Treat, on the other hand, having incurred the enmity of Francis P. Blair, Jr., commonly known as Frank Blair, who was elected to the House of Representatives from St. Louis, came close to losing his judicial position. Born in New Hampshire and educated at Harvard, Treat had moved to St. Louis in 1841 and had become a local leader of the Democratic Party. Although never a secessionist or a particular friend of slavery, he had displayed early his dislike of Frank Blair, who in 1856 was reported to be in Washington "*lionizing* amid the 'negro worshippers.' "[54] In March, 1857, at the very end of the Pierce Administration and just before the beginning of the Administration of James Buchanan (whom Treat disparaged for his lack of boldness), Congress divided into two judicial districts the one district in Missouri then served by Judge Robert W. Wells. The asserted ground was the need for a

End of scan

---

[50] *In re* McDonald, 16 Fed. Cas. 17, 33 (No. 8751) (D.C.E.D. Mo. 1861). See *Cong. Globe*, 37th Cong., 1st Sess. 66 (1861).

[51] *Nashville Union and American*, June 6, 1861.

[52] *Ibid.*

[53] R. B. Taney to Samuel Treat, June 5, 1861, Treat Papers.

[54] Samuel Treat to Thomas G. Reynolds, Aug. 26, 1856, *ibid.*