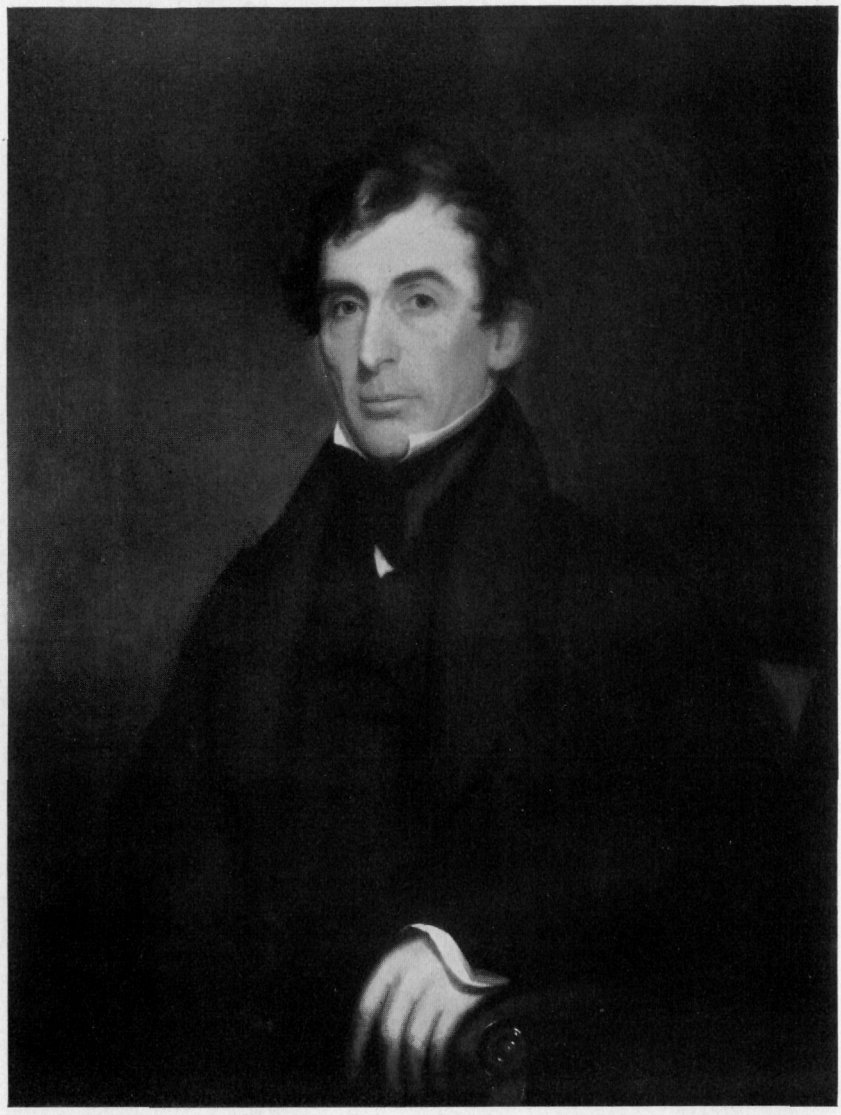

ROGER B. TANEY

From a portrait by Henry Inman

ROGER B. TANEY

By

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Chapter XXVI

CIVIL WAR AND MILITARY RULE

Like the nation as a whole, the state of Maryland was divided against itself, "half slave and half free." The population ranged all the way from uncompromising abolitionists on the one hand to equally uncompromising secessionists on the other. Most of the people, perhaps, belonged to the intermediate group which had sympathies both with the North and with the South, dreaded disunion, and hoped that Maryland might escape participation in war. Some of them, recognizing that the interests of Maryland were different from those of both North and South, believed that in the event of the destruction of the Union Maryland should align herself with a central confederacy, rather than with the states at either extreme. "I fear," declared Benjamin C. Howard, "that our country is destined to be cut up into parallel slices as you would slice up a loaf of bread." [1]

Howard thought the border states should get together in convention, perhaps remain in the Union if Mr. Lincoln did not drive them out, and act together in any case. Governor Hicks seems for a time to have had much the same idea. He wrote to Governor Burton of Delaware, proposing that the two states unite in a central confederacy opposed both to the North and to the South. Burton replied, however, that Delaware must remain allied with the North.[2]

Governor Hicks was prominent among those who brought about the convention, held in Washington in February, 1861, to seek a way to save the Union. Unfortunately the convention was unable to

[1] Howard to John P. Kennedy, Dec. 26, 1860, Kennedy MSS., Peabody Institute.

[2] Hicks to Burton, Jan. 2, 1861; Burton to Hicks, Jan. 8, 1861. Advertised, *American Art Association Catalog*, May, 1923.

agree on a program satisfactory to all sections of the country. In the midst of the futile wrangling over the Dred Scott decision and other topics a member introduced the embarrassing fact that Taney, in the Gruber case in 1819, had declared that slavery was a blot on our national character. When Reverdy Johnson in surprise and discomfiture demanded the authority for the statement he learned that a Boston minister had recently quoted Taney's defense of Gruber from the pulpit.[3] The matter was much discussed thereafter. Although there was no absolute contradiction between the early argument and Taney's Dred Scott opinion, it required no little explaining to demonstrate this fact. There was inconsistency, of course, between the argument and the contention of many southerners that slavery was an institution decreed by God himself.

The date was approaching for the inauguration of the first Republican President. Abraham Lincoln left his home in Illinois and made his way eastward, delivering speeches from which unfortunate phrases were extracted by his rabid enemies for propaganda purposes. He went to New York, returned southward to Philadelphia, and planned to stop for a greeting in Baltimore. The bitter enmity of the pro-southern leaders in Baltimore, however, and the unruly character of the populace, made it appear altogether dangerous for Lincoln to present himself there. On the advice of Seward and General Scott he therefore passed through Baltimore secretly at night, to the disappointment of his friends and the exasperation of his enemies. The latter shrieked their derision, branded Lincoln as a coward, and prepared to make trouble at the first opportunity.

One day late in February a sensation was created at the Capitol when the homely westerner made his appearance there. Accompanied by Seward, by whom Taney had been so violently traduced, he visited the Supreme Court in the conference room. It is probable that he met there for the first time the Chief Justice who was so like him in gaunt homeliness and in his human qualities, and yet so different from him in theories of government. No record remains, unfortu-

[3] L. E. Chittenden, *Report of the Debates and Proceedings in the Secret Sessions of the Conference Convention*, p. 236.

nately, of the mutual appraisals made by the writer of the Dred Scott opinion and by the man who had criticized it and had talked suggestively of a conspiracy among "Stephen, Franklin, Roger, and James."

They met again on March 4, on the inaugural platform at the front of the Capitol. Shortly before one o'clock on that day the diplomatic corps and the local statesmen who had already taken their places arose as the doorkeeper of the Senate announced the Supreme Court of the United States. The judges, led by Taney, moved slowly to the red plush chairs brought for them from the Senate chamber. A few minutes later the President elect entered the Capitol at a side door, and went to the President's room to be relieved of the dust of the city. Then, towering in his long black coat and grasping his high top hat, he proceeded with Buchanan to the platform.

Quickly came the stage in the ceremony at which Lincoln was to tell the eager audience what he expected to do to preserve the Union. He stepped forward toward the desk, with his manuscript in one hand and in the other what was a most useless hat—whereupon came one of those almost pathetically friendly gestures which people like to remember. Stephen A. Douglas, for many years Lincoln's able political rival, had taken a place on the inaugural platform to provide for his huge following an example of loyalty to the incoming administration. As the awkward rail-splitter vainly sought to free his hands his dapper and graceful rival slipped inconspicuously forward, took the hat, and held it while the address was delivered.

Taney listened with deepest attention as Lincoln, in a manner conciliatory yet firm, gave assurance that it was not his purpose to interfere with slavery in the slave states, but that it was his purpose to execute the laws and to defend the property of the government. Under the Constitution, he declared, no state had the right to secede. It had been maintained that no state would desire to secede if it were possible otherwise to maintain its constitutional rights. He denied that any group was threatened with the loss of any right clearly guaranteed by the Constitution. The difficulties arose out of questions not clearly met by the Constitution, such as the power of

Congress to prohibit slavery in the territories, or the obligation of Congress not merely to tolerate slavery in the territories but also to protect it there.

It was assumed by some that the Supreme Court was to settle these questions. He did not deny that the decisions of the court were binding upon the parties to the cases decided, or that they were entitled to great respect and consideration in parallel cases by other departments of the government. "At the same time," he continued, "the candid citizen must confess that if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes."

One section of the country believed that slavery was right, and ought to be extended. The other believed that it was wrong, and ought not to be extended. This was the only substantial dispute before the country. The fugitive slave clause of the Constitution and the law for the suppression of the slave trade were perhaps as well enforced as any law could ever be in a community where it was imperfectly supported by the moral sense of the people. Even though enforcement was not perfect, it was better than it would be if the two sections separated, for in that case one of them would revive the slave trade, while the other would refuse to surrender fugitive slaves.

Urging the people to think calmly and well before they brought disaster on the country by secession, the new President concluded with his eloquent peroration: "I am loath to close. We are not enemies, but friends. We must not be enemies. Though passion may have strained it must not break our bonds of affection. The mystic chords of memory, stretching from every battlefield and patriot

grave to every living heart and hearthstone all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature." [4]

As the cheers of the crowd died away, Taney, trembling with emotion, stepped slowly forward, raised his hand and phrased the oath of office, which Lincoln repeated after him. The ceremony was over. Taney grasped the hand of this, the last man whom he was to induct into the presidential office, and congratulated him warmly on his address. Then the new President rode away to the White House to begin officially his futile efforts to stem the tide of secession.

In spite of the conciliatory tone of the message, confirmed secessionists regarded the program of holding and defending government property and collecting government revenues as a declaration of war. The South was out of the Union or was going out, and would not permit the government of another nation to hold forts within southern borders or collect revenues at southern ports. It was reported that Justice Campbell now regarded the situation as hopeless, and than he would soon resign from the Supreme Court.[5]

The opposition press in the southern and border states sharply criticized Lincoln's discussion of the Supreme Court, labeling as rank heresy his exaltation of the will of the majority above the judicial interpretation of the Constitution. It was a deliberate attempt, declared a Baltimore paper, to put numbers above right, to put opinion above law, to subordinate the Supreme Court to the illegitimate exercise of power by the government. The message, declared the same paper, showed that the President would *tolerate* slavery in the border states, and that was all. It was doubtful as to whether the party behind him would make even this concession to the rights of the South.[6]

While the new administration was being organized the Supreme Court carried to completion its work for the term. On the last day of the term, March 14, it handed down two decisions which attracted

[4] *Messages and Papers of the Presidents*, VI, 5–12.
[5] New York *Evening Post*, March 5, 1861
[6] Baltimore *Sun*, March 9, 1861.

much attention. One of them was in the long sequence of scandal-laden cases in which Myra Clark Gaines sought to recover property in Louisiana. The other was an important slave case, though it had significance in other respects as well. It arose from the attempt of Kentucky to extradite from Ohio a free negro who, while living in Kentucky, had violated Kentucky laws by aiding a slave to escape. He had fled to Ohio, and the governor of that state had refused to surrender him, on the ground that aiding fugitive slaves was not an extraditable offense. Kentucky brought suit against the governor to compel the surrender of the criminal.

All the judges again united in a single opinion, as they had done in the Booth cases, with Taney as their spokesman.[7] Taney denied the argument of counsel from Ohio that a man could be extradited only if his act was an offense in the state to which he had fled, as well as in the state seeking to capture him, delving into American history to show why the general rule prevailing in international law did not apply to extradition between states within the Union. It seemed therefore that the court must grant the request for a mandamus. Not so, however. The Constitution provided briefly that offenders should "be delivered up." The act of Congress defining procedure declared that "it shall be the duty" of the executive to arrest and surrender him. The obligation applied to all offenders who were sought by the states from which they had fled, declared Taney, but it was only a moral obligation, not a legal one. Although the federal government had the authority to empower state officers to do certain acts it could not command them, and in this case it had not attempted to do so. If Governor Dennison refused to do his duty the court could not issue a mandamus to compel him to do it.

The decision saved the court from much embarrassment. It put the abolitionist governor of Ohio in the wrong, yet avoided the necessity of issuing a mandamus which probably would not have been obeyed. From the point of view of good public policy furthermore, as well as of good constitutional theory, it was probably best to refrain from asserting the legal obligation to surrender any fugitive

[7] *Kentucky* v. *Dennison*, 24 Howard 66 (1861).

whenever another state demanded it. Northern critics, naturally enough, resented the implied criticism of the governor of Ohio, and denied that there was even a moral obligation to surrender the negro.

The New York *Evening Post* abusively declared that the court should have done nothing more than disclaim jurisdiction. "A good part of Judge Taney's opinion is therefore extra-judicial—the individual opinion of an old lawyer, who is either too conceited or endowed with too little power of discrimination to perceive what part of his views of a particular subject are pertinent to the case before him, and what are not. The real decision in the case is that the court has no jurisdiction, and therefore the application for a mandamus must be dismissed. All the rest, all the parade of reasonings and conclusions on other points, has no more of the nature of a judicial decision than if it had been a letter addressed by Judge Taney to the publisher of a newspaper. It is the talk of a man who has certain opinions which he wishes to get before the world, which he hopes his judicial position will persuade the country to receive as oracles, and who is resolved to express them in his seat on the bench without regard to the fitness or propriety of the occasion." [8]

The criticism was grossly unfair, unless it was to be made against all the innumerable court opinions which said more than was absolutely necessary for the decision of the cases at hand. All the questions discussed by Taney had been legitimately raised and fully argued. In passing upon them Taney and his colleagues were merely doing as they and their predecessors had done from the time when the court was created, and as their successors were to do. If the policy was wrong it was wrong at all times, and not merely as applied to a few cases decided just preceding the Civil War.

The vacancy caused by Daniel's death remained unfilled when the court adjourned, although there was daily discussion as to what would be done about it. Less than a month later another vacancy resulted from the death of McLean, the senior member of the court, who had served for twenty-two years. Campbell remained with the

[8] New York *Evening Post*, March 16, 1861.

court for a time in spite of rumors as to his resignation. He attempted to act as a mediator between the southern leaders and Seward, Lincoln's Secretary of State, whom he believed to be acting for the President in negotiations concerning the evacuation of Fort Sumter. Seward proved to be acting only on his own initiative, however, and when the administration refused to support him in commitments made through Campbell the latter was discredited with the southern leaders and left in a most embarrassing position. Giving up the situation as hopeless, and feeling that if a choice must be made his loyalty belonged to Alabama rather than to the Union, he resigned from the Supreme Court, leaving it crippled by a third vacancy.

He departed leaving a note of friendly farewell for Taney. "In taking leave of the court," he wrote, "I should do injustice to my own feelings if I were not to express to you the profound impression that your eminent qualities as a magistrate and jurist have made upon me. I shall never forget the uprightness, fidelity, learning, thought and labor, that have been brought by you to the consideration of the judgments of the court, or the urbanity, gentleness, kindness and tolerance that have distinguished your intercourse with the members of the court and bar. From your hands I have received all that I could have desired and in leaving the court, I carry with me feelings of mingled reverence, affection and gratitude." [9]

In the meantime exciting events occurred which turned public attention from such minor matter as Supreme Court appointments, but which ultimately, through bringing about the suspension of the writ of habeas corpus, embroiled Taney in a controversy with the administration. The bombardment and surrender of Fort Sumter marked the beginning of military hostilities. In response to the President's call for volunteers troops began to move toward Washington. A vociferous and energetic portion of Baltimore and vicinity were determined that the city and state should have nothing at all to do with the war, or should support the South. Troops moving through Baltimore were stoned, and their way was blocked. Bridges

[9] Campbell to Taney, April 29, 1861, *Maryland Historical Magazine*, V, 35.

along the Baltimore and Ohio Railroad were destroyed to prevent the further transportation of northern troops through the state. A number of delegations, one of them headed by the governor, went to Washington to urge that troops be headed some other way.

Sabotage on the part of disloyal persons became so general and so dangerous that on April 27, 1861, the President directed General Scott to suspend the writ of habeas corpus, either personally or through his officers, if it proved necessary for the public safety. The purpose was to make it possible to imprison persons on suspicion and hold them in confinement without the prospect of their being released by means of writs of habeas corpus from judges who might themselves be southern sympathizers. The suspension was a delicate step, particularly in view of the fact that it had no authorization from Congress. The Constitution provided that the writ should not be suspended "unless when in cases of rebellion or invasion the public safety may require it." Who might suspend it under these circumstances was not stated, but from the position of the clause in the Constitution it could be reasonably inferred that the power was with Congress, rather than with the President.

Almost immediately the issue came before Judge William F. Giles, in the United States district court in Baltimore. He issued a writ of habeas corpus for the release of a minor who had enlisted in the army without his parents' consent. A deputy marshal presented the writ to Major W. W. Morris, at Fort McHenry, who read it and handed it back declaring that he would see the court and the marshal damned before he would deliver up one of his men.[10]

The Baltimore newspapers played up the story, and Judge Giles, to prevent misunderstanding, made a statement to the press. This was the first time within his experience of thirty-three years at the bar and on the bench, he declared, that the writ of habeas corpus had failed to procure obedience in Maryland. It had not been suspended by a competent authority, and no circumstances had arisen under which it could have been legally suspended. "The court sincerely hopes," he concluded, "that in a crisis like the present wiser counsels

[10] Affidavit of U.S. Deputy Marshal James Gettings, May 2, 1861, Attorney General MSS.

may 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." [11]

Major Morris wrote to differ as to the justification for the suspension of the writ. For two weeks, he declared, Baltimore had been under the control of revolutionary authorities. Soldiers had been attacked and murdered in the streets, and no arrests had been made. Supplies intended for Fort McHenry had been stopped, and the intention to capture the fort had been boldly proclaimed. The flag over the federal offices had been cut down by a man wearing a Maryland uniform. The Maryland legislature, a body elected in defiance of the law, was debating the forms of abrogating the federal compact. "If this is not rebellion, I know not what to call it. I certainly regard it as sufficient legal cause for suspending the writ of habeas corpus."

In the hands of an unfriendly authority, he continued, the writ of habeas corpus might depopulate the fort and place it at the mercy of the "Baltimore mob" in much less time than it could be done by all the appliances of war. Furthermore, in view of the ferocious spirit of the community toward the army, he would himself be highly averse to appearing publicly and unprotected in the city to defend the interests of the body to which he belonged. If the judge had never known the writ to be disobeyed it was only because such a contingency in public affairs had not hitherto arisen.[12]

When the marshal attempted to serve Major Morris with an order to appear and show why a writ of attachment should not issue against him, he refused to receive the order. He declared that he would obey no order of any kind issued by this court or by any other court.[13] Judge Giles wrote to Morris deploring the suspension of the writ, and expressing the opinion that it could be legally suspended only by act of Congress, whatever the circumstances.[14] The ability to use force was all on the side of the Major, however, and

[11] Baltimore *Exchange*, May 4, 1861.
[12] Morris to Giles, May 6, 1861, Attorney General MSS.
[13] John W. Watkins to Giles, May 8, 1861, *ibid.*
[14] Giles to Morris, May 7, 1861, *ibid.*

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 superior 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.

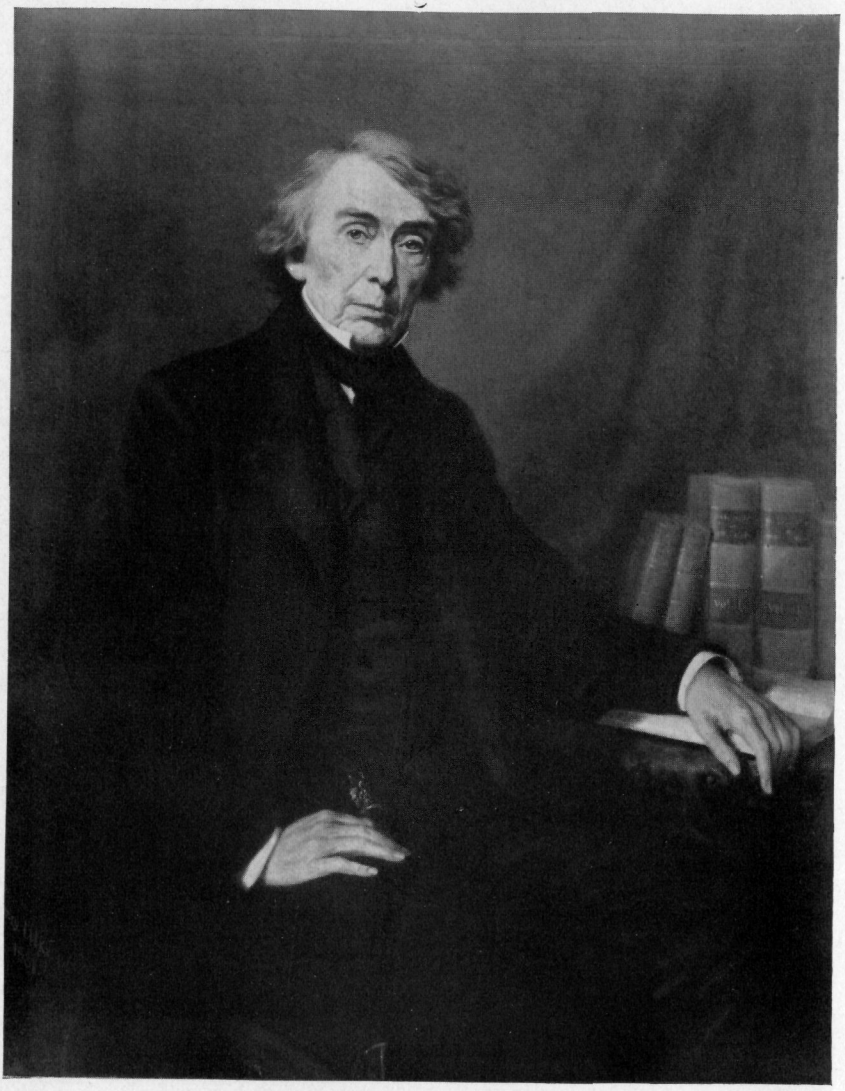
[18] George W. Brown, *Baltimore and the 19th of April 1861*, pp. 90–91.
[19] Ex parte *Merryman*, Federal Cases, No. 9487.
[20] See Ex parte *Milligan*, 4 Wallace 1 (1866), opinion by Justice David Davis.

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.



ROGER B. TANEY

From a portrait in the Treasury Department

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.