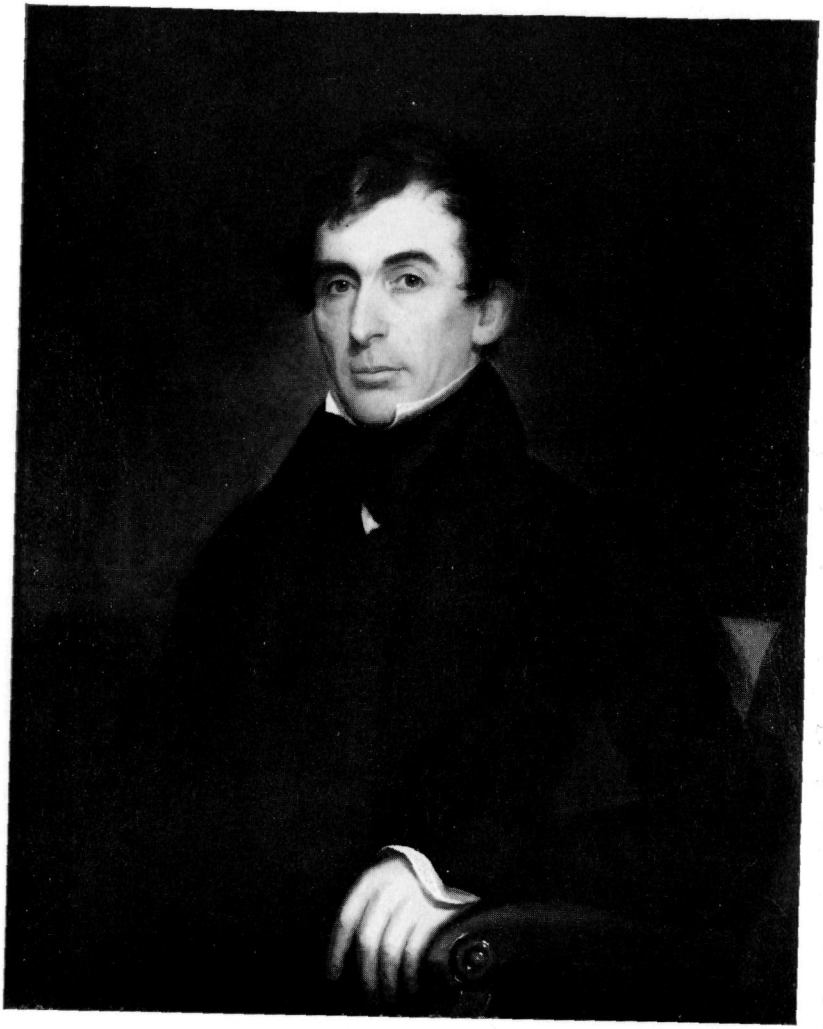

CHIEF JUSTICE ROGER BROOKE TANEY, 1777-1864

A PORTRAIT BY HENRY INMAN

Courtesy Harvard University Law School Collection

WITHOUT FEAR OR FAVOR

A BIOGRAPHY OF CHIEF JUSTICE

ROGER BROOKE TANEY

Walker Lewis

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PART V

THE CIVIL WAR

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THE BOOTH CASES AND THE CIVIL WAR

On March 6, 1857, the day of its Dred Scott decision, the Supreme Court took preliminary action in another slavery case that up to that time had excited even greater public interest. This was the "Glover Rescue" and came to the Supreme Court piecemeal. It appears in its reports as *Ableman v. Booth* and *U. S. v. Booth.*

These cases stemmed from the federal prosecution of Sherman S. Booth, abolitionist editor of the Milwaukee *Free Democrat,* for his part in rescuing Joshua Glover, a fugitive slave, from the custody of a United States Marshal. The Wisconsin Supreme Court converted the case into a first-class constitutional battle by twice freeing Booth on writs of habeas corpus on the ground that the federal fugitive slave law was unconstitutional. One of the writs was issued when he was first arrested, the other after his conviction by the federal court. The Wisconsin court also tried to block the appeal of its decision to the United States Supreme Court. It was the first serious attempt by a state to nullify federal power through judicial action, and it came at a time when the Supreme Court was already under heavy attack.

The federal government was committed by the Constitution to facilitate the recovery of fugitive slaves. Until Justice Story's opinion in the Prigg case, it had been generally assumed that the state and local governments were equally committed. When the Prigg decision made fugitive slaves exclusively a federal problem, the Northern states withdrew their cooperation and many of them passed so-called "Personal Liberty" laws designed to frustrate recovery. This in turn had the effect of forcing more

stringent federal legislation. The resulting Fugitive Slave Law of 1850 provided for enforcement by United States commissioners and federal marshals and was armed with much sharper teeth than the earlier 1793 statute.

In the light of existing precedents there was no real question as to the constitutionality of the new statute. All the Northern and some of the Southern justices of the Supreme Court, including Taney, had occasion to enforce it as part of their circuit duties. This brought them under savage attack in the abolitionist press. Even McLean was pilloried. A federal marshal in his circuit was imprisoned by the local authorities for "kidnaping" a fugitive slave. When McLean released him on a writ of habeas corpus, the New York *Tribune* of April 18, 1855, denounced it as "Judge McLean's jail delivery."

Joshua Glover, the fugitive in the Booth cases, was the slave of Benammi S. Garland of St. Louis, Missouri, who by curious coincidence had managed the estate of Dr. John Emerson and had arranged for the defense of Mrs. Emerson in the Dred Scott case. Joshua ran away in the spring of 1852 and settled near Racine, Wisconsin, where at the time of his recapture in 1854 he was working and living at a sawmill. He was located through information furnished by another Negro, and on Friday, March 10, his master, Benammi Garland, claimed him under a warrant issued by United States Commissioner Winfield Smith. Garland, accompanied by six men from the United States Marshal's office, found Joshua in a cabin playing cards with two other Negroes, one of whom immediately unbolted the door to admit the marshals. After a fight Joshua was subdued. Then, manacled and trussed, he was carted away in a wagon to Milwaukee where, early Saturday morning, he was put in jail.

Racine seethed. The courthouse bell was set ringing. On Saturday morning a public indignation meeting resolved that

> As the Senate of the United States has repealed all compromises heretofore adopted by Congress, we, as citizens of Wisconsin,

are justified in declaring, and do hereby declare, the slave catching law of 1850 disgraceful and also repealed.

A hundred residents set out from Racine for Milwaukee by steamboat.

Meanwhile, news of the event had been telegraphed to Sherman S. Booth of Milwaukee who organized a protest meeting at the courthouse. The story has him galloping through town on a white horse, rising in the saddle at each street corner and shouting "Freemen! To the rescue!" He later denied these details, but whatever the truth, there was a vast assemblage in the courthouse square that Saturday afternoon.

Meanwhile, Booth, with the aid of Byron Paine, a twenty-six-year-old lawyer, later to be a member of the Wisconsin Supreme Court, had obtained a writ of habeas corpus from County Court Judge Charles E. Jenkins, which was delivered to the sheriff for service on the United States Marshal. The sheriff was a cautious man. He first sought the advice of Federal Judge Miller who counseled him not to serve the writ. Then, as the Racine *Advocate* of March 20, 1854, tells us:

> A committee was appointed to wait upon the sheriff to see if he still persisted in refusing to serve the writ. This refusal being persisted in, measures were immediately taken to see what steps were necessary to see that the "Republic received no detriment" and that the laws of the land were enforced. The citizens of Milwaukee, on this notice being given, assembled to the number of 5,000 in the court house square, where they were addressed by the most eloquent and influential members of the Milwaukee bar. The excitement continued, and spread to all parts of the city. At five o'clock the delegation from this city [Racine] arrived at Milwaukee and were escorted to the court house square, where the citizens of Milwaukee were listening to addresses upon the subject matter. The military had been ordered out, but did not appear on the streets. At six o'clock the friends of law and order came to the conclusion that it would be unsafe as well

> as eminently wicked for a human being to be locked up in a jail over the Sabbath against whom no crime had been alleged; accordingly a courier was dispatched for a team, and as the court house bell rang the tocsin of liberty the writ of "open sesame" was enforced, while the glorious sun sank smilingly in the west as he shed his rays upon the spires of Milwaukee for the 11th day of March, 1854; a glorious prelude to the coming day of rest. The doors of the prison shook as though another Peter were within, and the willing cell yielded up its victim to the fresh light and air of God's glorious earth. The negro waved his hat as he mounted the wagon in return to the waving of hats and joyous shouts which arose from that vast crowd of free men who said that the Milwaukee jail could not be used for the confinement of men who had committed no crime.

At this point Joshua Glover makes his exit from recorded history, allegedly shouting "Hallelujah" from the deck of a lake boat bound for Canada.

The fugitive slave law had been generously endowed with pains and penalties, and it was not long before accommodations were found for Booth in the jail so recently vacated by Glover. Byron Paine immediately applied for another writ of habeas corpus, this time to Justice Abram D. Smith of the Wisconsin Supreme Court, who released Booth on the ground that the Fugitive Slave Law was unconstitutional. The citizens of Racine, in more cheerful mood, resolved

> That we hail with unmingled satisfaction the decision by Judge Smith by which the Constitution is vindicated and restored to its original purity . . .

From Justice Smith, the federal marshal, Stephen V. R. Ableman, appealed to the three-man Wisconsin Supreme Court. There, Chief Justice Edward V. Whiton agreed with Smith that the Fugitive Slave Law was unconstitutional. The third member, Justice Samuel Crawford, refused to go this far but was able

to concur in Booth's release by finding a technical defect in the commitment. Ableman then carried the case to the United States Supreme Court.

While this appeal was pending, Booth was indicted and convicted in the United States District Court in Wisconsin, which sentenced him to a month's imprisonment and a fine of $1000. Paine again applied for a writ of habeas corpus, this time to the Supreme Court of Wisconsin itself. It not only released Booth, but also did what it could to block an appeal to the United States Supreme Court, by directing its clerk to ignore that court's writ of error and to refuse to furnish a record of the proceedings. Senator Sumner, among others, congratulated Wisconsin on its defiance.

Faced with judicial mutiny, the justices of the Supreme Court closed ranks. They made short shrift of the Wisconsin court's refusal to forward its record, accepting instead affidavits from the federal authorities. Then, in a unanimous opinion by Taney they reversed both Wisconsin decisions.

This judgment was handed down on March 7, 1859, ten days before Taney's eighty-second birthday, but if there was any slackening in his vigor, the opinion did not show it. Taney considered it one of his best, while as knowledgeable a critic as Charles Warren pronounced it "the most powerful of all his notable opinions . . . an opinion which Marshall himself never excelled in loftiness of tone." The style, in fact, is reminiscent of Marshall. It cites no precedent, but the power and clarity of its reasoning sweeps the reader irresistibly along to its conclusion. Some sense of its flavor may be gathered from the following:

" . . . The supremacy of the State courts over the courts of the United States, in cases arising under the Constitution and laws of the United States, is now for the first time asserted and acted upon in the Supreme Court of a State.

"If the judicial power exercised in this instance has been reserved to the States, no offence against the laws of the United States can be punished by their own courts without the permis-

sion and according to the judgment of the courts of the State in which the party happens to be imprisoned; for if the Supreme Court of Wisconsin possessed the power it has exercised in relation to offences against the act of Congress in question, it necessarily follows that they must have the same judicial authority in relation to any other law of the United States . . . And, moreover, if the power is possessed by the Supreme Court of the State of Wisconsin, it must belong equally to every other State in the Union, when the prisoner is within its territorial limits . . .

" . . . No one will suppose that a Government which has now lasted nearly seventy years, enforcing its own laws by its own tribunals, and preserving the Union of the States, could have lasted a single year, or fulfilled the high trusts committed to it, if offences against its laws could not have been punished without the consent of the State in which the culprit was found . . .

". . . The supremacy conferred on this Government could not peacefully be maintained unless it was clothed with judicial power equally paramount in authority to carry it into execution; for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from local influences . . . And the Constitution and laws and treaties of the United States; and the powers granted to the Federal Government, would soon receive different interpretations in different States, and the Government of the United States would soon become one thing in one State and another thing in another. It was essential, therefore, to its very existence as a Government, that it should have the power of establishing courts of justice altogether independent of State power to carry into effect its own laws . . .

"This tribunal . . . was erected not by the Federal Government but by the people of the States, who formed and adopted that Government . . . So long, therefore, as this Constitution shall endure, this tribunal must exist with it; deciding, in the

peaceful forms of judicial proceeding, the angry and irritating controversies between sovereignties which in other countries have been determined by the arbitrament of force . . . Nor can it be inconsistent with the dignity of a sovereign State to obey faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a State of this Union. On the contrary, the highest honor of sovereignty is untarnished faith."

The logic of Taney's opinion is unanswerable, but in the late 1850's large elements of the country were no longer swayed by logic. The Wisconsin Legislature immediately adopted resolutions defying the Court and asserting the independence of the state's judiciary. The New York *Tribune* called the decision "usurpation." Abolitionists in Congress denounced it with the same unrestrained bitterness as the Dred Scott decision. Among responsible lawyers and the judiciary, however, better sense prevailed. Even the Wisconsin Supreme Court ultimately retracted, and the closing chapter was a victory for Taney's position.

When the Supreme Court's mandate was presented to the Wisconsin court its composition had changed. Chief Justice Whiton had died, Justice Smith had declined reelection, and Justice Crawford had met defeat because of his lack of enthusiasm for the court's position in the Booth case. One of the new judges was Byron Paine, who had represented Booth and been swept into office for that reason. In the further proceedings, Paine disqualified himself and the other two justices disagreed. Accordingly, the court could take no affirmative action. At first the "friends of liberty" welcomed this deadlock, as it relieved the court of the necessity of complying with the mandate of the United States Supreme Court. But when Booth was again arrested by the federal authorities, it had the effect of blocking his release on a further writ of habeas corpus.

Booth ultimately was pardoned by President Buchanan but his troubles were not over. Benammi Garland, the owner of Joshua Glover, recovered a $1246 judgment against him under

the Fugitive Slave Act and his printing press was sold to pay it. When Booth went to the state courts to get his press back, the Wisconsin Supreme Court turned him down. Even though the Fugitive Slave Act might be unconstitutional, they said, they could not interfere in the proceedings of the federal courts. In so holding, the Wisconsin court had of course come full circle from its earlier position. It was a begrudging triumph for Taney, but nonetheless a triumph.

Though the Supreme Court could still exact respect, it realized it could not enforce obedience, and it sought to avoid direct clashes. For example, when another impasse was presented by *Kentucky v. Dennison,* it sidestepped the difficulty, in an opinion which Taney again wrote for a unanimous court.

The Commonwealth of Kentucky, through Beriah Magoffin, its governor, had asked the United States Supreme Court to order William Dennison, Governor of Ohio, to deliver up for trial one Willis Lago, a free Negro who had been indicted by the grand jury of Woodford County, Kentucky, for seducing and enticing Charlotte, the slave of C. W. Nuckols, to leave her owner and escape to Ohio. The extradition papers were in order but Governor Dennison refused to honor them, alleging that the Kentucky offense charged against Lago was not a crime in Ohio.

Both the United States Constitution and the federal statutes made provision for the extradition of individuals charged with crime in another state. Did this apply only where the offense was also recognized as a "crime" under the laws of the state where the fugitive sought refuge? No, said Taney. Extradition as between States "was intended to include every offence made punishable by the law of the State in which it was committed . . . without any reference to the character of the crime charged, or to the policy or laws of the State to which the fugitive has fled." Accordingly, Governor Dennison was under a clear legal obligation to deliver Lago. But, added Taney, "if the Governor of Ohio refused to discharge this duty, there is no power delegated

to the General Government, either through the judicial department, or any other department, to use any coercive means to compel him."

Once more the cry went up from hostile critics that the Court's views had been extra-judicial; that if it could not order compliance by the Governor of Ohio, it had no business passing upon the issues in the case at all. The New York *Evening Post* of March 16, 1861, called it "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 which are not."

By now, Taney must have become inured to attack, if one of his pride and sensitivity ever could become so. But abuse was only one element in the growing gloom. Still more disheartening was the march of current events and their threat to the values he set highest.

Taney's closest friends outside of Maryland were Virginians. His greatest congeniality was with those who, like himself, were products of the landed aristocracy. It was their traditions that he treasured, their qualities that he most admired — their emphasis on courtesy, their regard for the dignity of the individual, and their tolerance. In the North and in the deep South such traits were being smothered. Only in the intermediate tier of states was there still dominant a spirit of live and let live.

At the distance that now separates us, we tend to see only the extremes and to overlook the wide variations that existed in local conditions and attitudes. In Maryland and the so-called border states, slavery was on the way out. Nor did Taney and those who thought as he did wish to prolong it. What they wanted to preserve was their accustomed way of life and the right to control their own affairs.

For Taney the year 1860 opened badly. December 1859 had found him too ill to sit on the Court at any time during the long

five-month term. In May 1860 Justice Daniel of Virginia died, after nineteen years of service. Of all those then on the Court, he was the closest in age to Taney.

In the same month the Democratic nominating convention in Charleston, South Carolina, split over the question of slavery in the Territories. This resulted in two Democratic candidates, Stephen A. Douglas of Illinois, and John C. Breckinridge of Kentucky, as well as an independent candidate, John Bell of Tennessee. The split paved the way for Republican victory.

Ever since going on the Bench Taney had held himself rigidly aloof from politics. But the year 1860 posed a cruel test. His Dred Scott opinion was a main issue in the campaign. Breckinridge supported it, Lincoln opposed it, Douglas sought to straddle, and Bell tried to brush it under the rug. Inevitably, Taney found himself the center of attack and on at least one occasion an attempt was made to involve him personally in the campaign.

In August a pro-Douglas paper, hoping to influence Catholics, published an anonymous communication stating that Chief Justice Taney favored the election of its candidate. George W. Hughes, a Democratic Congressman from Maryland and intimate friend of the Chief Justice, knew this to be untrue and asked permission to deny the statement. Taney replied on August 22, 1860: "I cannot take any notice of such an anonymous publication myself, nor authorize any one else to take the slightest notice of it . . . Whatever I might say or authorize to be said in this matter would be regarded as said not merely by an individual, but by the Chief Justice of the Supreme Court . . . I never speak upon political issues of the day in public, nor in mixed companies . . . To my intimate and confidential friends, *as you know,* I speak freely and without reserve. And I do this because I know them well enough to be quite sure that they understand the nature of these conversations and guard them as you have done."

In the same letter, Taney deprecated the suggestion made by

another individual that the publication would influence Catholic votes. "His remark implies," said Taney, "that the Irish Roman Catholics vote from religious bigotry, and blindly follow leaders because they happen to be Roman Catholics. I presume he has had but little association with that class . . . For if he would look at the Catholics of Baltimore and the Irish Catholics, he would see that they are as much divided as other churches, and vote as independently of leaders."

As the campaign wore on and the signs pointed to a Republican victory, Taney found it more and more difficult to be objective. In such a victory he foresaw destruction of the Union and slave insurrections in the South. On October 19, his agony burst forth in a letter to his son-in-law, James Mason Campbell, with whom he lived when on circuit duty in Baltimore.

"I hope to be with you on the 2d Monday in November," he wrote. "I do not come the first week because it is the week of the election and I know nothing can be done in court while that is in progress and news coming in from other places . . .

"The result of your late City election has been most gratifying . . . I wish I could entertain the same hopes of the election of President that I did of your Mayor. But I have not the slightest hope of New York, and am by no means sure of the entire south for Breckinridge, not even Virginia . . .

"I find I have written to you a long letter about political matters. It is the first I have ever written to anyone on the subject since I have been on the Bench. But being out of court and much confined to the house, my thoughts have been constantly turned to the fearful state of things in which we have been living for months past. I am old enough to remember the horrors of St. Domingo, and a few days will determine whether anything like it is to be visited upon any portion of our own southern countrymen. I can only pray that it may be averted and that my fears may prove to be nothing more than the timidity of an old man."

Despite the precedent of John Brown's raid, the long, terrifying shadow of slave insurrections failed to materialize. But dis-

union did. Led by South Carolina, the states of the lower South took Republican victory as a signal for secession. Meanwhile, the middle tier states, Virginia, Maryland, Delaware, North Carolina, Kentucky, Tennessee, Missouri, and Arkansas, hesitated. In all of them there was union sentiment, and they waited to see what position Lincoln would take. The inauguration was expected to make the situation clear, and Taney looked with more than usual interest to the seventh of the occasions on which he was to administer the presidential oath of office.

Unfortunately, the interregnum between election and inauguration was too long. In November, Republicans, elated by their victory, seemed disposed to let the Southern states go their own way. Wendell Phillips argued for dissolution of the Union. Horace Greeley wrote: "We hold, with Jefferson, to the inalienable right of communities to alter or abolish forms of government that have become oppressive or injurious; and if the cotton states shall decide that they can do better out of the Union than in it, we insist on letting them go in peace." But there was no firm governmental leadership. President Buchanan, now a lame duck, was old, tired, and longing for retirement. He had neither the strength nor the spirit to conciliate or to coerce. Justice John A. Campbell, and a few other prominent individuals, made determined efforts to heal the breach, but they had no real authority. More and more, the extremists, both North and South, got the bit in their teeth, and by March opinion had hardened.

Lincoln's inaugural address, while taking a strong stand against secession, was moderate in tone. But it fell on deaf ears in the areas where moderation was most needed. Republican extremists thought it weak; Southern fire-eaters took it as an ultimatum. Even Taney found ground for dismay, for tucked into a discussion of the Supreme Court as arbiter of the Constitution was the statement: ". . . the candid citizen must confess that if the policy of the government upon vital questions affecting the whole people, is to be irretrievably 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." To Taney, Lincoln's inference that popular elections could overturn court decisions was, of course, constitutional heresy.

At this time Lincoln was fifty-two and Taney a few days short of eighty-four. In spite of differences in age and background, they were in many respects alike. Tall, gaunt, unprepossessing, sensitive, introspective, kindly, considerate, unassuming; each had a will of iron, a rigid code of personal integrity, and a strong sense of humanity. Under more favorable circumstances they would have found much in common. It was unfortunate that events cast them in antagonistic roles.

During Taney's last years on the Bench he faced the hostility of the administration and saw constitutional safeguards overwhelmed by Civil War. Military demands persuaded the government to disregard individual constitutional rights, and the Court's guardianship of liberty was swept aside.

33

THE MERRYMAN CASE

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

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

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

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

For Taney, who had dedicated his life to the defense of legal rights, it was a period of frustration. In his eyes, war did not justify flaunting the Constitution. It had been written at the close of an earlier civil war, by individuals who had staked their lives on its success but who nevertheless believed certain safeguards appropriate even during wartime. For example, they provided in Art. I, Sec. 9, Ch. 2 that: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

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

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

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

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

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

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

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

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

After the first onslaught, an officer ordered double time. This increased the mob's frenzy, just as dogs are made fiercer when a person flees. While running, the troops could not shoot effec-

tively at the attackers in their rear; instead they poured a haphazard fire into spectators clustered on sidewalks and street corners. One of those killed was a boy who had climbed a docked vessel for a better view.

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

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

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

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

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

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

When the Merryman case was called at noon on Tuesday the 28th, United States Marshal Washington Bonifant reported that he had gone to Fort McHenry to serve the writ of attachment and had been denied admittance. The Chief Justice reminded the Marshal that he had power to summon a *posse comitatus* to aid him in seizing General Cadwalader. But in this instance, he said, he excused him. The Chief Justice then proceeded to hold the detention of Merryman unlawful upon two grounds: "First — That the President, under the Constitution of the United States, cannot suspend the privilege of the writ of habeas corpus, nor authorize a military officer to do it. Second — A military officer has no right to arrest and detain a person not subject to the rules and articles of war for an offense against the laws of the United States, except in aid of the judicial authority and subject to its control."

To avoid any misunderstanding Taney said he would put his opinion in writing for delivery to the President. This he did on Friday, June 1, in language as ringing as any document in the long Anglo-American struggle for individual liberty. The keynote, perhaps, was when he said, ". . . if the authority which the Constitution has confided to the judiciary department and judicial officers may thus upon any pretext or under any circumstances be usurped by the military power at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty, and property at the will and pleasure of the army officer in whose military district he may happen to be found."

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

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

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

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

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

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

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

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

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

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

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

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

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

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FURTHER CLASHES WITH THE ADMINISTRATION

THE MERRYMAN CASE was only the first of Taney's clashes with the administration. His defense of constitutional rights against the assaults of expediency made him oppose several war measures. This has not helped his later public image. History has not been kind to those who aligned themselves against Lincoln, however commendable their reasons.

President Lincoln did not immediately call a special session of Congress but preferred to act for a time on his own responsibility. This necessarily put in issue the extent of his power. *Ex parte Merryman* was one consequence. Another was the Prize Cases which arose at about the same time, although not finally decided until 1863, involving the power of the President to seize ships trading with Confederate ports.

On April 19, 1861, the same day as the Baltimore attack on the Massachusetts militia, Lincoln ordered a naval blockade of the first states to secede, and on April 27, he extended it to Virginia and North Carolina. Congress was not in session and did not act until July 13. In the meantime, the federal navy seized ships and cargoes, including some owned by neutrals.

As a matter of international law, the legality of the blockade depended upon the existence of a state of war. If the United States was "at war" with the Confederacy, the law of nations gave it the right, as a belligerent, to establish a blockade and to seize ships trading with the South. But the power to declare war was vested in Congress and it had not acted until July 13. What was the status prior to that time?

The administration urged that in giving Congress the power

to declare war, the Constitution meant only foreign war. The President was justified, they said, in treating the Southern rebellion as a war and in taking immediate action to suppress it, notwithstanding the absence of congressional authority. This construction had the compulsion of practical expediency, but the Constitution itself had been adopted on the heels of a rebellion and the Founding Fathers were intimately familiar with the meaning and conditions of war. Had they used the term in only the limited sense urged by the administration?

It did not require much nose-counting to realize that the Supreme Court might well decide against the government. Although all the justices were loyal to the Union, they were conservative, and three of the six* were from the South. Consequently, it was deemed prudent to hold back the cases until three new justices (Swayne, Miller, and Davis) had been appointed. In addition, the Court was temporarily enlarged to ten, although the tenth (Field) did not arrive soon enough to participate.

The Prize Cases put the administration in an embarrassing predicament. Secretary of State Seward regarded the secessionists as traitors and denied that they were belligerents. To do otherwise, he felt, would encourage foreign recognition of the Confederacy. But if they were not belligerents, international law did not justify a blockade. As a result of these inconsistencies, the situation was so delicate that a hostile or even an unguarded opinion could cause serious international complications. Accordingly, both Seward and Attorney General Bates were fearful of what the justices might do or say. A symptom of this sensitivity appears in Bates's diary for February 26, 1863.

> At about 5 o'clock, while I was at dinner, [he said] Judge Swayne called . . . to talk about Mr. Eames, who was entrusted by me with the chief management of the Prize cases. It seems that Mr. Eames in the conduct of the cases made himself very obnoxious

* The deaths of Daniel and McLean, and the resignation of Campbell reduced the Court to that number.

to the Court — I am sure that they did him a great injustice — for they said that his speech was no argument at all, did no good, but harm, to the cause, acting like a harlequin, and turning a solemn trial into a farce. That he had never argued a case before and did not know how. That Chief Justice Taney said that he no longer wondered at Fitz-John Porter's conviction — he deserved to be convicted for trusting his case to such a counsel.*

The Court divided 5 to 4, Grier (Pennsylvania) and Wayne (Georgia) joining the three new justices to sustain the Government. Nelson (New York), Catron (Tennessee), Clifford (Maine), and Taney dissented. It was a narrow squeak, even with the new appointments, although the division did not follow sectional lines.

Republicans castigated the dissenters. It was perhaps a tribute to Taney's prestige that the attacks tended to focus on him, even though the dissenting opinion had been written by Nelson. Much of the comment was patently unfair. Reading it, one would assume that the dissenting justices had done their best to halt the blockade and to paralyze the Union cause. Actually, they had said only that the Navy had no power to seize ships and cargoes until Congress acted. They did not question the validity of the blockade after it had been authorized by Congress on July 13, 1861, and they pointed no embarrassing fingers at the administration's inconsistencies.

Republican anger was perhaps heightened by a slap that Taney administered on the same day, by filing an opinion that the Secretary of the Treasury was acting illegally in deducting income tax from judicial salaries. To jaded modern sensitivities a 3 per cent income tax would carry little sting. But to persons like Taney who were forced to support their families on small salaries during the inflationary conditions of wartime, it must have

* Fitz-John Porter, generally accounted one of the ablest of the Union Generals, was court-martialed and cashiered for not obeying impossible orders issued by General Pope at the Second Battle of Bull Run (Manassas) in August 1862. He was later cleared by another military tribunal.

seemed a heavy straw. In any event, it offended an important principle as applied to judges.

The Constitution (Art. III, Sec. 1) provides that federal judges "shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office." This was designed to protect the independence of the judiciary by removing one of the more obvious sources of legislative pressure. It seemed clear to Taney and to the other judges that the Treasury Department's 3 per cent deduction from their salaries was a diminution of their compensation, but the question was what, if anything, to do about it. They did not want to appear in personal opposition to the government, and even if they did, who could pass on such a case? As stated by Taney, "all the Judges of the Courts of the United States have an interest in the question and could not therefore with propriety undertake to hear and decide it."

In this dilemma, Taney took it upon himself to address a letter to Salmon Portland Chase, Secretary of the Treasury, calling attention to the Constitutional provision and saying, "Having been honored with the highest judicial station under the Constitution, I feel it to be more especially my duty to uphold and maintain the constitutional rights of that department of the Government, and not by any act or word of mine have it to be supposed that I acquiesce in a measure that displaced it from the independent position assigned to it by the statesmen who framed the Constitution. And in order to guard against any such inference, I present to you this respectful but firm and decided remonstrance against the authority you have exercised under this Act of Congress. And request you to place this protest upon the public files of your office as the evidence that I have done everything in my power to preserve and maintain the Judicial Department in the position and rank in the Government which the Constitution has assigned to it."

The letter was dated February 16, 1863. Chase ignored it, and on March 10, the day the Prize Cases were decided, Taney had

it officially entered on the records of the Court. The Treasury Department continued the deductions, but after the War the matter was reconsidered and in 1872 Secretary of Treasury George S. Boutwell of Massachusetts ordered the tax on judicial salaries refunded.

These actions did not endear Taney to the administration. But it was on circuit that he achieved his greatest unpopularity. Although he had been gravely ill in 1862, he felt strong enough in 1863 to hold court in Baltimore and to strike down two governmental actions that savored to him of despotism.

The first of these, decided June 3, 1863, upset the seizure of certain merchandise by the federal Provost-Marshal. In September 1862, the War Department had ordered Provost-Marshal McPhail to locate and arrest a Colonel Stone then allegedly in Baltimore to make purchases for the Confederacy. He was said to be the nephew of a dealer in artificial flowers, appropriately named Rose. Accordingly, a Federal detective, Voltaire Randal, visited Rose's store. He pretended to be a Captain Thomas of Cone River, Virginia, and did his best to ingratiate himself with Rose and his family, spending evenings in his home and bringing presents to his children.

Rose said that he knew no one named Stone, but mentioned that a young man named Stern had formerly worked for him and was then in Philadelphia. The detective wrote Stern and, using his seeming intimacy with Rose as a basis for confidence, persuaded him he could make large profits by shipping hats, boots and other merchandise to Virginia for sale. Later, he said that he had a boat at North Point and would transport the merchandise if Stern would buy it. To demonstrate his *bona fides* he exhibited letters (that his office had confiscated) to and from distinguished persons in the South. Stern, finally persuaded, organized a group of friends to buy the merchandise and accompany it to Virginia aboard the schooner *Caroline*. Before they started the detective produced a packet of letters addressed to Southerners and got Stern to put them in his luggage. They were

genuine, as well as incriminating, having recently been intercepted by the Provost-Marshal.

The schooner *Caroline* was in fact owned by the government and manned by employees of the Provost-Marshal's office. To carry the deception still further, they had a Navy tug intercept it and tow it to Fort McHenry, where Stern and his friends were arrested. Condemnation proceedings were then brought against the merchandise as contraband, on the ground that it was being illegally transported to Virginia.

The report does not show what happened to Stern and his friends, but when the proceedings to forfeit the merchandise came before Taney, he ordered that it or its value be returned; also that the Provost-Marshal pay damages and costs. He considered that the parties "had been seduced and betrayed into the purchase of the goods by the Provost-Marshal's officers and could see no possible benefit to accrue to the Government from such a seizure that would in any way compare with the great evil that would arise from a court of justice countenancing such conduct." Furthermore, looking at the substance of the transaction, the goods were not in fact proceeding from Baltimore to Virginia. "The claimants may have desired to carry them there, and may have thought they were going there," said Taney, "but the Court is not to regard the outside coloring which imposed upon the claimants. The substantial fact is that they were going to Marshal McPhail's office from the time they left their respective depositaries in Baltimore till they arrived there."

The opinion was published in full in the *Baltimore Daily Gazette* of June 4, 1863. It must have made unhappy reading for the friends of the administration.

The second of Taney's 1863 thrusts was the Carpenter case, decided in Baltimore on June 19. By act of May 20, 1862, Congress authorized the Secretary of the Treasury to prevent the transportation of goods which might fall into the hands of the insurgents. Pursuant to this the Secretary required permits to ship merchandise to any place in Maryland south of the Wash-

ington and Annapolis Railroad, or on the Eastern Shore of the Chesapeake Bay. Together, these areas totaled half of the state. Persons suspected of Southern sympathies were denied permits, and shipments without proper permits were confiscated.

The Carpenter case involved a box of dry goods put aboard the ship *Henry and Susan* for shipment from Baltimore to Nanjemoy in Charles County, Maryland, south of the proscribed line. The shipper, William A. Dean, had obtained a permit in the name of R. D. P. Radcliffe of Nanjemoy, but the dry goods were in fact intended for G. W. Carpenter, a neighbor who had purchased them from Dean but was unable to obtain a permit in his own name. When Radcliffe disclaimed ownership of the box, the government confiscated it.

Taney held illegal the regulations under which the seizure had been made. Furthermore, even "if these regulations had been made directly by Congress, they could not be sustained by a court of justice whose duty it is to administer the law according to the Constitution of the United States . . . The United States," he said, "have no right to interfere with the internal and domestic trade of a State. They have no right to compel it to pass through the custom house, nor to tax it . . . A Civil war or any other war does not enlarge the powers of the Federal Government over the States or the people, beyond what the compact has given to it in time of war . . . Nor does a civil war or any other war absolve the judicial department from the duty of maintaining with an even and firm hand the rights and powers of the Federal Government, and of the States, and of the citizens, as they are written in the Constitution which every judge is sworn to support."

Vigorous and ringing words for a man of eighty-six, but bitter to the administration. Led by Senator Hale of New Hampshire, the more extreme Republicans tried to legislate the Supreme Court out of existence and to substitute judges more to their liking. It was chiefly Lincoln who restrained them, preferring merely to add a tenth justice and to let nature take its course.

But nature was slow; to the Republicans depressingly slow. Taney, they felt, was wronging not only the administration but also the mortality tables.

Taney's health was a matter of prime public interest. "No man ever prayed as I did that Taney might outlive James Buchanan's term," said Senator Benjamin Franklin Wade of Ohio, "and now I am afraid I have overdone it." Not all comments had the relieving decency of humor. In February 1864, Judge Ebenezer Rockwood Hoar of Boston wrote William M. Evarts of New York (both prominently mentioned for the expected vacancy): "I had hardly read your parting words about the Chief Justiceship, when the telegraph brought the disgusting intelligence, 'Chief Justice Taney is better.'"

Taney refused to oblige, his vigor of mind seeming to compensate for his physical frailty. "He was like a disembodied spirit," remarked Dr. Grafton Tyler, "for that his mind did not in any degree participate in the infirmities of the body."

But what of the spirit? He was fully conscious of the gloating watchfulness, and he was sensitive to the hostility. Nor could he bring himself to feel friendship for Lincoln. On December 31, 1861, following the Merryman case, he wrote Justice Wayne, "I expect some friends tomorrow, and as there is no established etiquette which requires the court to wait on the President on the 1st of January, as a matter of official courtesy, I am sure my brethren will excuse me for not joining them tomorrow."

"There was," said Mrs. John A. Logan, "no sadder figure to be seen in Washington during the years of the Civil War than that of the aged Chief Justice . . . He had outlived his epoch, and was shunned and hated by the men of the new time of storm and struggle . . ." He was also convinced that he was being spied upon and that his mail was being opened. Very likely it was. But as the difficulties and the sense of persecution increased, his spirit rose to meet them. They only made him the more determined to interpose himself against what he regarded as military despotism. In the long days of illness at home he

prepared opinions on the conscription law and on the Act of Congress authorizing paper money as legal tender. Neither piece of legislation came before him, but he was ready with the law on the subject if they did.

Any conflict involving Lincoln finds most Americans on his side. He has come as close to being deified as any President in our history, with the possible exception of Washington. And deservedly so. He was a great and good man, he saved the Union, and he gave his life for his country. But there is another aspect to consider. As sympathetic and expert an observer as Professor J. G. Randall had this to say in his *Constitutional Problems under Lincoln* (1951): "Lincoln, who stands forth in popular conception as a great democrat, the exponent of liberty and of government by the people, was driven by circumstances to the use of more arbitrary power than perhaps any other President has seized. Probably no President has carried the power of proclamation and executive order (independently of Congress) so far as did Lincoln." Just as it was Lincoln's function to produce victory, so it was Taney's to protect constitutional rights. Conflict between them was inevitable, and it was Taney's misfortune to be ranged against one of the greatest and most beloved of all our Presidents.

The war was also a personal misfortune in that it divided his family. Ellen and Sophia lived with him in Washington; the Campbells and Elizabeth in Baltimore; and Maria in the South, where her husband, Richard T. Allison, was a major in the Confederacy. Love of family was central to Taney's life. On March 15, 1862, he wrote James Mason Campbell: "Monday next you know is my birthday . . . At five o'clock of the day I will drink the health of all of you and of dear Maria and Allison in a glass of old sherry and expect you to pledge us at the same moment. It is the next thing to being together."

On October 31, 1862, writing again to his son-in-law, he said: "Mrs. Dey, the daughter of Judge Campbell, who has kindly called on us to tell us all about Mr. Allison and dear Maria, goes

to Baltimore tomorrow and will call on Elizabeth and your family. I wish to send Maria at my own expense everything that Anne and Elizabeth may think she wants or would like. But you know nothing must be sent by me surreptitiously. Whatever I give her must be done openly and with the permission of the military authorities."

Sons and grandsons of his friends had joined the Confederacy, and in many ways Taney's sympathies went with them. He was opposed to secession but he was even more strongly opposed to coercion; he preferred a free South to one ruled by the military. When young McHenry Howard, grandson of John Eager Howard, called on the Chief Justice on his way south, Taney said, "The circumstances under which you are going are not unlike those under which your grandfather went into the Revolutionary War."

He scrupulously rejected preferential treatment. His savings were invested in bonds of the State of Virginia which, after the outbreak of war, stopped payment to Northern holders. Knowing his financial condition, friends arranged to get his interest to him, but he would not accept it.

Later in the war, his Negro body servant, Madison Franklin, was drafted. Dr. Grafton Tyler knew that Madison had a heart ailment and offered to get him excused on the ground of physical disability. But the old Roman refused. Hard pressed as he was, he preferred to pay for a substitute.*

As the years closed in, he thought longingly of past happinesses. On August 6, 1863, he wrote to his friend David M. Perine of Baltimore: "During this hot season I have often thought of the pleasant days I have passed at your home, enjoying the fresh country air and walking over your grounds. But my walking days are over; and I feel that I am sick enough for a hospital, and that hospital must be my own house." On March 18, 1864, he wrote again to Perine:

* Under the Civil War Conscription Act anyone drafted was permitted to purchase a substitute for a flat sum, in this case $100.

"Your birthday letter . . . brought back to memory many kindnesses and scenes of unbroken intimacy and friendship for forty years. At the age of eighty-seven I cannot hope to see many more birthdays in this world, and can hardly hope to live long enough to see more peaceful and happier times. You, I trust, who are so much younger than I am, will be spared to see and enjoy them. And that it may please God to lengthen your days in the enjoyment of every blessing, is the sincere and earnest prayer of your friend, R. B. Taney."

Even in his weakest moments, Taney did not dread death. Indeed, he seemed much more concerned about cigars. He was so devoted to Cuban Principes that their scarcity seemed a personal affront. He kept the Campbells scouring the shops of Baltimore and importuning dealers in New York. He even thought of smoking a pipe, but decided against it, writing his grandson, Taney Campbell, on September 13, 1864, a month before his death: "I have given up my notion of pipe smoking, not from fear of injuring the few stumps I have left, but because it has occurred to me since I wrote my former letter that all the pipe tobacco will now be of northern growth and very unpalatable to one who is accustomed to Spanish cigars."

Now and again his supply of Principes was replenished, but on such occasions he was apt to be tripped by his own generosity. At least once, when he found himself with two precious boxes, he gave one to a friend.

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"ALL THINGS IN THIS WORLD PASS AWAY"

"All things, my lord, in this world pass away: wife, children, honour, wealth, friends, and what else is dear to flesh and blood. They are but lent us till God please to call for them back again, that we may not esteem anything our own, or set our hearts upon anything but Him alone, who only remains forever." *

LINCOLN'S FIRST Attorney General, Edward Bates of St. Louis, was required to bear the brunt of Taney's strictures on unconstitutionality. If anyone in the Cabinet had personal cause for resentment and dislike it was Bates.

Before coming to Washington, his knowledge of Taney stemmed from the Dred Scott decision, which he hated with abolitionist fervor. When he got there, official etiquette demanded a formal call on the Chief Justice, and he had to steel himself to make it. Disturbingly, Taney was not at all as he anticipated. On November 27, 1861, he confided to his diary: "Called on C. J. Taney, and had a conversation much more pleasant than I expected." From then on Bates found it impossible to preserve the hostility that Republicanism required. He could hate Taney officially, and he tried to ease him off the Court by pushing bills to pension him, but he could not resist the old man's intellect, integrity and kindliness. The final diary entry on their relations was on Thursday, October 13, 1864. It said:

> Chief Justice Taney died last night, in ripe old age. The event has been long expected and takes no one by surprise . . . He

* Letter of condolence from George Calvert, First Lord Baltimore, to Thomas Wentworth (later Earl of Strafford), October 11, 1631.

was a man of great and varied talents; a model of a presiding officer; and the last specimen within my knowledge, of a graceful and polished old fashioned gentleman.

Taney's death was indeed no surprise; least of all to Taney. More than two years before, when the Court adjourned on March 24, 1862, he was ill at home and asked the justices to pay him a last visit before leaving the city. He did not expect to see them again; nor they him.

In October 1864 intestinal pain gave warning of the end. Dr. Thomas Buckler, summoned from Baltimore for consultation, shook his head sadly. Taney had already realized it was the end, and accepted it philosophically. He asked for absolution by a priest, and spent his last hours at peace in the midst of his assembled family, all the daughters except Maria being at his bedside.

The Washington *Star* of October 13, 1864, reported:

The venerable Roger B. Taney, Chief Justice of the United States, breathed his last at his residence on Indiana Avenue, near Third Street, at ten minutes to ten o'clock last evening, in the presence of his family. Judge Taney had reached the advanced age of 87. He had been in ill health for several years past. He did not, however, take to his bed until Monday week, and it was then apparent that it was his last sickness.

The family physician, Dr. Grafton Tyler of Georgetown, and Dr. James C. Hall of this city have been in constant attention on the deceased and yesterday he was visited by Dr. Thomas Buckler of Baltimore . . . Judge Taney leaves five daughters, four of whom — Mrs. Stevenson, Mrs. Taylor, Mrs. Campbell and Miss Taney — were present at the time of his death, together with his son-in-law, J. Mason Campbell, Esq.

On October 15, the *Star* said:

Shortly after six o'clock [A.M.] the friends of the deceased commenced to assemble at the late residence of the Chief Justice, among whom were President Lincoln, Secretary Seward,

Attorney General Bates, and Postmaster General Dennison, and after the family and friends had taken a last look at the features of the deceased the lid of the coffin was closed, and the corpse borne to the hearse by six colored servants.

A few minutes to seven o'clock the procession moved off in the following order: Detailed policemen, carriage containing Rev. Father Walter of St. Patrick's Church and Dr. Grafton Tyler of Georgetown, one of the physicians who attended the deceased; pallbearers in carriages, viz: Messrs. J. M. Carlisle, W. J. Stone, Jr., D. W. Middleton, Clerk of the Supreme Court; W. H. Lamon, Marshal of the District of Columbia; Conway Robinson and Mr. Tyler of Frederick; hearse containing the corpse, on either side of which walked two policemen; carriages containing J. Mason Campbell and son; Joseph Taney, nephew of the deceased, and we believe the only male relative of the name living; and Messrs. Howard and Perine; carriage containing President Lincoln; carriage containing the Secretary of State, Postmaster General and Attorney General; carriages containing other friends of the deceased, followed by other carriages containing the servants.

In this order the cortege moved to the depot where it arrived just before the regular train left, the hall being crowded with persons preparing to take the train, and a number of carriages being in front. A space was, however, cleared in front of the building, and the procession, later forming on the pavement, walked through the depot with uncovered heads, those in the depot standing still and lifting their hats as the body was moved to the car which was to take it on its way to its last resting place.

All those who accompanied the remains, with the exception of the President, Secretary Seward and Postmaster General Dennison (who are unable to leave the city on account of the press of business) took their seats in the cars, which shortly after left for Frederick.

The train will arrive at Frederick at half past eleven o'clock — after taking on at the Relay House a number of the friends of the deceased from Baltimore — and the remains will be immediately taken to the church, where at noon solemn high mass will be celebrated, after which the body will be interred in the ceme-

tery at that place. In accordance with the wishes of the family, there will be as little display as possible, and probably, there will be no sermon preached.

In accordance with his wishes, Taney was buried beside his mother in the Catholic cemetery, the rules of his church preventing burial with his Protestant wife and daughters.

Democratic newspapers extolled his memory. In this there was no surprise, any more than in the general expressions of hostility from Republicans. But, in addition, there were some attacks of extreme virulence. *The Independent* of October 20, 1864, referred to his "perdurable ignominy" and repeated once more the false charge that Taney had said the Negro had no rights which a white man need respect, adding, "History will expose him to eternal scorn in the pillory she has set up for infamous judges." *The Independent* had been the first to publish this falsehood. The error had been exposed and called to its attention, yet here it was again, dug up like a dead cat to fling at a corpse.

Even more shocking were attacks in the Senate in February 1865 when Senator Trumbull of Illinois sponsored a routine appropriation for $1000 to place a bust beside those of the other Chief Justices in the Supreme Court room. Senator Sumner of Massachusetts leapt up in opposition. The Justice was wicked and degraded, he said; "the name of Taney is to be hooted down the page of history." Senator Wade of Ohio, backing Sumner, said he would rather appropriate $2000 to hang Taney in effigy then $1000 to honor his memory.

But not even these attacks prepare one for the terrible pamphlet published in August 1865 under the title: "The Unjust Judge — A Memorial of Roger Brooke Taney, Late Chief Justice of the United States." In this someone packed sixty-six closely printed pages with hatred so malignant that it seems obscene. It was priced at fifty cents a copy. We do not know how many were distributed, but the mere hope of selling enough to pay the ex-

pense is a sad commentary on the extent to which Taney had been disparaged in the public mind.

Some of the pamphlet was history. Much was argument designed to prove that the Constitution was subordinate to the Declaration of Independence and controlled by its language. But the dominant theme was the iniquity of the Dred Scott decision and the premeditated evil of its author. It reached its climax in speaking of Taney: "As a man, a Christian and a jurist, he falls below the lowest standard of humanity, religion and law recognized among civilized men . . . As a jurist, or, more strictly speaking as a Judge, in which character he will be most remembered, he was, next to Pontius Pilate, perhaps the worst that ever occupied the seat of judgment among men."

The "Unjust Judge" is the more appalling because written with genuine talent. Its author exhibited extensive knowledge of history, law, and the classics, as well as literary ability of a high order. That the author realized he was prostituting his talents is attested by his spewing out his venom anonymously.*

To understand Taney, it is necessary to consider the bad with the good. And we must remember that in speaking of the dead the good is commonly exaggerated. The partiality of friends can be as obscuring as the malice of enemies. But in our present situation there is this significant difference. All those who spoke or wrote disparagingly of Taney did so from a distance, judging him principally, if not solely, in the light of his Dred Scott opinion. Sumner, for example, had no personal knowledge of Taney, even though he had met him formally. The same is true of

* Speculations as to the authorship of "The Unjust Judge" are set out in an appendix to this volume.

Wade, Beecher, and the others like them. Among those who knew Taney one finds no shred of malice, even where there was hostility.

Ward Hill Lamon was a devoted friend and one-time partner of Lincoln, who appointed him United States Marshal for the District of Columbia. This background might have been expected to produce hostility, but he said of Taney, "I never went into his presence on business that his gracious courtesy and kind consideration did not make me feel that I was a better man for being in his presence."

Richard S. Coxe, one of the busiest and most successful practitioners before the Supreme Court, was born in New Jersey, graduated from Princeton, and studied law with Horace Binney in Philadelphia. He was associated with Taney in early cases and knew him personally for forty years. He said, "He had beyond all comparison the most acute and discerning mind I ever met with at the bar. I have been associated with other gentlemen of the highest character, but I never found one who devoted himself so intensely and absolutely as he did to assist in aiding and instructing his junior counsel."

Samuel Freeman Miller, Republican and abolitionist of Iowa, was appointed to the Supreme Court by Lincoln in 1862 and in twenty-eight years of service on the Bench won recognition as one of the greatest of the justices. He had this to say: "When I came to Washington, I had never looked upon the face of Judge Taney, but I knew of him. I remembered that he had attempted to throttle the Bank of the United States, and I hated him for it. I remembered that he took his seat upon the Bench, as I believed, as a reward for what he had done in that connection, and I hated him for that. He had been the chief spokesman of the Court in the Dred Scott case, and I hated him for that. But from my first acquaintance with him, I realized that these feelings toward him were but the suggestions of the worst elements of our nature; for before the first term of my service in the

Court had passed, I more than liked him, I loved him. And after all that has been said of that great good man, I stand always ready to say that conscience was his guide and sense of duty his principle."

Benjamin Robbins Curtis of Massachusetts was one of the most successful lawyers of his day and one of the ablest members of the Supreme Court. He attacked Taney in his Dred Scott dissent and resigned from the Court after an acrimonious exchange of letters. But at memorial proceedings held in the First Circuit Court in Boston on October 17, 1864, he said of him: "In respect to his mental powers there was not then, nor at any time while I knew him intimately any infirmity or failure whatever . . . In consultation with his brethren he could, and habitually did, state the facts of a voluminous and complicated case with every important detail of names and dates with extraordinary accuracy, and I may add with extraordinary clearness and skill. And his recollection of principles of law and of the decisions of the Court over which he presided was as ready as his memory of facts.

"He had none of the querulousness which too often accompanies old age. There can be no doubt that his was a vehement and passionate nature; but he had subdued it. I have seen him sorely tried, when the only observable effects of the trial were silence and a flushed cheek . . .

"The surpassing ability of the Chief Justice, and all his great qualities of character and mind, were more fully and constantly exhibited in the consultation-room, while presiding over and assisting the deliberations of his brethren, than the public knew, or can ever justly appreciate. There, his dignity, his love of order, his gentleness, his caution, his accuracy, his discrimination, were of incalculable importance. The real intrinsic character of the tribunal was greatly influenced by them; and always for the better . . .

"He was as absolutely free from the slightest trace of vanity

and self-conceit as any man I ever knew . . . The preservation of the harmony of the members of the Court, and of their goodwill to himself, was always in his mind . . .

"It is one of the favors which the providence of God has bestowed on our once happy country, that for the period of sixty-three years this great office has been filled by only two persons, each of whom has retained, to extreme old age, his great and useful qualities and powers. The stability, uniformity, and completeness of our national jurisprudence are in no small degree attributable to this fact . . ."

Dred died of consumption on Sept. 17, 1858, and was buried in the Wesleyan Cemetery, St. Louis. In 1867, when that cemetery was abandoned, Taylor Blow, who had become a Catholic, had Dred's body removed to Calvary Cemetery. Taylor Blow, whose sympathies remained with the South, went into bankruptcy in 1867 and died in 1868. See Hopkins, p. 180, note 67.

421 For the more scurrilous comments on the Court and the decision, see especially the New York *Tribune* of March 7, 10, and 17, 1857, and the *Independent* of March 12 and 26, 1857.

422 The quotes are from Warren, *Supreme Court*, Vol. II, pp. 216, 220, 275, 315.

The Rhodes quote is from James Ford Rhodes, *History of the United States from the Compromise of 1850* (New York, 1896), Vol. II, p. 254.

423 The Corwin quote is from Edward S. Corwin, *The Dred Scott Decision in the Light of Contemporary Legal Doctrine*, 17 Amer. Hist. Rev. (1911) pp. 52-69; later published as Chapter IV in his *The Doctrine of Judicial Review, Its Legal and Historical Basis and Other Essays* (Princeton University Press, 1914).

424 Taney's comment on Seward's attack is referred to in Tyler, p. 391.

425 For the views of Professor Corwin see *The Dred Scott Decision in the Light of Contemporary Legal Doctrine*. On the *obiter dictum* point, see also Horace A. Hagan, "The Dred Scott Decision," 15 Georgetown L. J. (1927), p. 95; Wallace Mendelson, "Dred Scott's Case Reconsidered," 38 Minn. L. Rev. (1953), 16.

426 Beveridge's *Life of John Marshall* was awarded the Pulitzer Prize for biography, in 1920. Justice Louis D. Brandeis of the Supreme Court and Felix Frankfurter, then a Professor at Harvard Law School, were among those who urged Beveridge to undertake a life of Taney.

427 The quotes are from Claude G. Bowers, *Beveridge and the Progressive Era* (Boston, 1932), pp. 584-585.

428 Taney's letter of August 29, 1857 to Franklin Pierce is in 10 Amer. Hist. Rev. 359.

429 The quotation is from an address made Sept. 26, 1931, at the unveiling of a bust of Taney at Frederick, Maryland. See 17 ABA Journal (1931) 785 at 787.

32. THE BOOTH CASES AND THE CIVIL WAR

433 *Ableman v. Booth* and *U. S. v. Booth*, 18 Howard 476 (1856), 21 Howard 506 (1859).

434 As to Benammi Garland's connection with Mrs. Emerson and with the Dred Scott case see Hopkins, pp. 8 (n. 24), 16, 21 (n. 29), 30 (n. 8).

For accounts of Glover's arrest and rescue, and the Wisconsin Court proceedings, see: Vroman Mason, *The Fugitive Slave Law in Wisconsin, with Reference to Nullification Sentiment* (Madison, 1895), Chaps. III and IV; John Bradley Winslow, *The Story of a Great Court* (Chicago, 1912), Chap. VII; Stephen S. Gregory, "A Historic Judicial Controversy and Some Reflections Suggested by It," 11 Michigan Law Rev. 179 (1913).

437 The Warren quotation is from Warren, *Supreme Court*, Vol. II, pp. 336, 338.

The quotations from Taney's opinion are from 21 Howard 506 (1859), at 514 et seq.

439 The resolutions adopted by the Wisconsin Legislature on March 19, 1859, are set out in Tyler at pp. 397-398.

440 Booth's effort to recover his printing press was frustrated by the Wisconsin Court in *Arnold v. Booth*, 14 Wis. 180 (1861).

Kentucky v. Dennison, 24 Howard 66 (1861).

442 Taney's letter of August 22, 1860, to George W. Hughes is in Tyler at pp. 405-408. Hughes was the owner of "Tulip Hill," a beautiful old estate outside Annapolis, which Taney had often visited.

443 Taney's letter of October 19, 1860, to J. Mason Campbell is in the manuscript collection of the Maryland Historical Society.

Taney's reference to the "horrors of St. Domingo" relates to the bloody slave insurrections which took place there in the 1790's. A number of the white survivors sought refuge in Baltimore.

444 The Greeley quote is from William Harlan Hale, *Horace Greeley —Voice of the People* (New York, 1950), p. 229.

33. THE MERRYMAN CASE

447 *Ex Parte Bollman*, 4 Cranch 75 (1807).

See Joseph Story, *Commentaries on the Constitution of the United States* (5th Ed. by Melville M. Bigelow, Boston, 1891), Vol. II, pp. 214-215.

Merryman was later Treasurer of Maryland and a member of the State Legislature. He was to name his next son, born December 5, 1864, Roger Brooke Taney Merryman.

448 It was the Baltimore attack on the Massachusetts militia that on April 23, 1861, inspired James Ryder Randall, a Baltimorean then teaching in Louisiana, to write the words to "Maryland, My Maryland."

For detailed accounts of the riot, see: Charles B. Clark, "Baltimore and the Attack on the Sixth Massachusetts Regiment, April 19, 1861," Md. Hist. Mag. (1961), Vol. 56, pp. 39-71; Matthew Page Andrews in *Baltimore, Its History and Its People*, edited by Clayton Colman Hall (New York — Chicago, 1912), pp. 173-177; George William Brown, *Baltimore and the 19th of April, 1861* (Baltimore, 1887; Extra Volume III in Johns Hopkins University Studies in Historical and Political Science).

449 The order to burn the railroad bridges was issued by the Mayor and Police Commissioners of Baltimore with the concurrence of Governor Thomas Holiday Hicks. As to the latter's concurrence, later denied, see George L. P. Radcliffe, *Governor Thomas Hicks of Maryland and the Civil War* (Baltimore, Johns Hopkins University Studies, Series XIX, Nos. 11-12, 1901), pp. 560-561; Brown, p. 58.

Mayor Brown was arrested on September 17, 1861, and imprisoned at Fort Warren, Massachusetts, until November 27, 1862, by order of General Dix, the Federal officer then in command at Baltimore. The cause, or excuse, was his payment of wages to police officers who had been ordered off the city police force by General Dix. Mayor Brown ultimately became Chief Judge of the Supreme Bench of Baltimore City.

Lincoln's order of April 27 to General Scott is in The War of the Rebellion — Official Records (Washington, D. C., 1880-1901) Series 1, II, 601-602.

450 Dr. Monde's advertisement appeared in the issue of the Baltimore *Sun* of May 25, 1861, among others.

451 As to military arrests in Maryland see Charles B. Clark, "Suppression and Control of Maryland, 1861-1865," Md. Hist. Mag. (1959), Vol. 54, pp. 241-271.

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

452 *Ex parte Merryman* is reported in 17 Fed. Cases 144, No. 9487. The proceedings and opinion were separately printed by Lucas Brothers, Baltimore, in 1861, and are also included in an Appendix (pp. 640-659) to Tyler.

452 The ceremony was held in the U. S. District Court for the District of Maryland on May 26, 1961, Chief Judge Roszel C. Thomsen, presiding. The remarks of Mr. Marbury and others are in 56 Md. Hist. Mag. 384, et seq (December, 1961).

453 Taney's instructions to Judge Giles were in a letter dated October 7, 1862, printed in 41 Maryland State Bar Proceedings, 87-88.

454 Taney's letter of May 14, 1864 to James Mason Campbell is in the manuscript collection of the Maryland Historical Society.

In re Nicholas Kemp, 16 Wis. 359 (1863).

455 *Ex Parte Milligan*, 4 Wall. 1 (1866).

The Charles Warren quote is from *Supreme Court*, Vol. II, p. 374. In *Ex Parte Vallandigham*, 1 Wall. 243 (1864) the Supreme Court had refused to review the court martial proceedings of a civilian under circumstances similar to those in the Milligan case. Taney was still Chief Justice at the time of this decision, but, due to illness, he did not participate in the case, as see J. G. Randall, *Lincoln the President — Midstream* (New York, 1952), p. 229.

The quote is from William E. Mikell on Roger Brooke Taney in *Great American Lawyers* (Philadelphia, 1908), Vol. 4, pp. 188-189.

34. FURTHER CLASHES WITH THE ADMINISTRATION

456 The Prize Cases, 2 Black 635 (1863).

457 The quotation is from *The Diary of Edward Bates*, edited by Howard K. Beale, Vol. IV of Annual Report of Amer. Hist. Assn. for 1930 (Washington, D. C., Govt. Printing Office, 1933), p. 281.

459 Taney's letter of February 16, 1863, to Secretary of Treasury Chase is in Tyler, pp. 432-434.

460 The case involving the merchandise of Stern and others is in Tyler at pp. 436-443, transcribed from the *Baltimore Daily Gazette* of June 4, 1863. It was entitled *Claimants of Merchandise v. U. S.*

461 The Carpenter case was reported in the Baltimore *Sun* for Saturday, June 20, 1863. Neither this opinion nor the foregoing one, reported in the *Baltimore Daily Gazette* for June 4, was included in the compilation of Taney's Circuit Court Decisions as published by Kay and Brother in Philadelphia in 1871, which runs only through the April Term 1861.

463 Senator Wade's remark is in Nicolay and Hay, *Lincoln*, Vol. IX, p. 386.

463 Hoar's letter to Evarts in February 1864 is in Moorfield Storey and Edward W. Emerson, *Ebenezer Rockwood Hoar, a Memoir* (Boston, 1911), p. 138.

Dr. Grafton Tyler's remark about Taney is in Tyler, p. 457.

Taney's letter of December 31, 1861, to Justice Wayne is in 13 Md. Hist. Mag. 167 (1918).

The Logan quote is from Mrs. John A. Logan, *Thirty Years in Washington or Life and Scenes in Our National Capital* (Hartford, 1901), p. 413.

464 The Randall quote is from James Garfield Randall, *Constitutional Problems under Lincoln* (Revised Ed., University of Illinois Press, 1951), p. 513.

Taney's letters of March 15 and October 31, 1862, are in the Maryland Historical Society manuscript collection, Howard Papers.

465 Taney's remark to McHenry Howard is set out in a letter dated May 1, 1919, from him to Dr. Bernard C. Steiner, Maryland Historical Society manuscript collection, Howard Papers.

The incidents involving the Virginia bonds and Madison Franklin are described in Tyler, pp. 480-482.

Taney's letters of August 6, 1863, and March 18, 1864, to Perine are in Tyler, pp. 454-455. Perine died on December 24, 1882, at the age of 86.

466 Taney's letter of September 13, 1864, to his grandson is in the Maryland Historical Society manuscript collection, Howard Papers.

35. "ALL THINGS IN THIS WORLD PASS AWAY"

467 George Calvert's letter was written upon the death of Wentworth's second wife. It is in Clayton Colman Hall, *The Lords Baltimore and the Maryland Palatinate* (Baltimore, 1902), p. 26.

The quotations are from *The Diary of Edward Bates*, pp. 204-205 and 418.

470 For the Senate controversy over the Taney bust see the Congressional Globe for Feb. 23, 1865, 38th Cong., 2d Sess., pp. 1012-1017. Senators McDougall of California, Trumbull of Illinois, and Carlile of West Virginia, spoke in favor of the appropriation, as did Reverdy Johnson. The latter made a heated attack on Sumner which started Sumner on such a tirade that time was called by the Vice President before he could finish. He later included in his *Works* thirty-three more pages of further remarks that he would have made

had time permitted. *The Works of Charles Sumner*, 15 vols. (Boston, 1875-83), Vol. XII, pp. 138-178.

The day following the "Bust Debate," Congress granted Taney's daughter Sophia a pension as the widow of Col. Francis Taylor. See the note to page 378.

470 "The Unjust Judge" was printed by Baker & Godwin, Printing-House Square, New York City, in 1865, and was copyrighted in their name.

472 Marshal Lamon's remarks are in Tyler, p. 448.

Richard S. Coxe's remarks were quoted in the Baltimore *Sun* for Friday, Oct. 14, 1864.

The Miller quote is from Charles Fairman, *Mr. Justice Miller and the Supreme Court, 1862-1890* (Harvard University Press, 1939), p. 52.

473 Curtis's remarks at the memorial meeting of the Bar of the First Circuit, Boston, Monday, October 17, 1864, are in Tyler, pp. 509-516.