Ex parte Merryman and Debates on Civil Liberties During the Civil War

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Prepared for inclusion in the project
Federal Trials and Great Debates in United States History

Federal Judicial Center
Federal Judicial History Office
2007

The author thanks Jonathan W. White for assistance in the research for this unit.

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Introduction

In the early weeks of the Civil War, a brief proceeding in a federal court in Maryland revealed to the public an inherent conflict between the protection of civil liberties guaranteed by the Constitution and the efforts to preserve the union of states threatened by internal rebellion. At issue was a writ of habeas corpus, which is literally translated from Latin as "you have the body" and serves as a citizen's most important protection against unlawful imprisonment. The writ requires an official to bring a prisoner before a civil court and to justify the arrest and detainment of that citizen. The writ had been recognized in English law at least since the early fourteenth century, and since the seventeenth century the writ had been one of the essential guarantees of personal liberty in England and subsequently in the United States. President Abraham Lincoln's limited authorization of military arrests and the suspension of citizens' privilege of the writ of habeas corpus prompted the first of many public debates on the restriction of civil liberties in the face of attempts to sabotage the federal defense of the Union. The Chief Justice's provocative challenge of the President heightened public interest in the habeas corpus petition of an imprisoned Maryland resident at the same time that it demonstrated how quickly a civil war could disrupt the normal course of constitutional government.

Threat of secession

In the escalating secession crisis following the inauguration of President Lincoln on March 4, 1861, the security of the nation's capital and probably the fate of the United States depended on holding Maryland in the Union. After Virginia voted to secede on April 17, federal troops and supplies could only reach the capital through Maryland. But sympathy for the Confederacy and even support for secession ran high in Maryland. When a Massachusetts regiment passed through Baltimore on the way to Washington on April 19, a mob attacked the Northern troops, and the ensuing riot left the first dead of the Civil War. Fearful that more federal troops would provoke new violence, Maryland Governor Thomas Hicks authorized the destruction of railroad bridges connecting Baltimore to Northern states. At the same time, secessionist vigilantes destroyed telegraph lines and severed critical communications with Washington. The capital city filled with rumors of Robert E. Lee's imminent invasion of Maryland.

When Governor Hicks called a special session of the state legislature and a secession vote appeared likely, Lincoln instructed Winfield Scott, the commanding gen-

eral of the Army, to counter any effort to arm Maryland citizens against the federal government. Lincoln endorsed the use of "the most prompt, and efficient means," including "the bombardment of their cities—and in the extremest necessity, the suspension of the writ of habeas corpus." Two days later, Lincoln explicitly authorized Scott to suspend habeas corpus anywhere along troop transportation routes between Philadelphia and Washington. Although the Constitution authorized suspension of the privilege of habeas corpus during a rebellion or invasion, no federal authority had done so since the final days of the War of 1812 when General Andrew Jackson declared martial law in New Orleans.

The arrest of Merryman

At 2:00 a.m. on May 25, 1861, federal troops entered the country house of John Merryman and "aroused" the prominent Baltimore County planter from his bed. The troops took Merryman into custody and transported him to Fort McHenry, near Baltimore. There Merryman was detained under the order of the fort's commanding officer, General George Cadwalader. Merryman was arrested on orders of another U.S. Army general from Pennsylvania on suspicion that Merryman was an officer in a "secession company" that possessed federal arms and intended to use them against the government. The arresting officers testified that the prisoner had "uttered and advanced secession doctrines."

Within hours of his detention, Merryman contacted lawyers who drafted a petition for a writ of habeas corpus that would order his release on the grounds that no warrant authorized his arrest and that no legal process held him in custody. The petition was addressed to Chief Justice Roger Taney, who also sat as a judge on the U.S. Circuit Court for Maryland, and delivered to him at his home in Washington, D.C. Taney quickly left the capital to convene a Sunday court session in Baltimore and to consider the petition.

Chief Justice Taney in court

Chief Justice Taney's appearance in Baltimore immediately heightened the drama of the likely contest between the federal courts and the military. The eighty-four-year-old Chief Justice was by 1861 so closely linked with the sectional conflict that drove the nation into Civil War that few could view him as impartial. Taney, a native Marylander, had sat on the Supreme Court as Chief Justice since 1836, but he was now most closely associated with a single decision that had divided the nation. In *Dred Scott v. Sandford* in 1857, Taney had declared that legislation prohibiting slavery from western territories was unconstitutional and that African Americans, whether free or slave, had no standing as citizens under the Constitution. The decision regarding territories made political compromise of the sectional crisis nearly impossible, while

the disfranchisement of all African Americans convinced many in the North that the "Slave Power" controlled the federal government. As many in Maryland knew, Taney had privately sympathized with the Southern states in the spring of 1861. He appeared deliberately to raise the profile of the *Merryman* case with suggestions that he was acting in his capacity as Chief Justice rather than as a judge on the circuit court of Maryland and with his announcement, with no apparent evidence, that he might well be imprisoned in Fort McHenry himself for carrying out his judicial duties.

The military resists

On the day following Merryman's arrest, Taney issued the writ of habeas corpus and ordered General Cadwalader to appear in the circuit courtroom with Merryman and to explain his reasons for holding the prisoner in custody. Cadwalader refused to appear, explaining in a letter delivered to Taney on May 27 that Merryman stood charged with treason and "armed hostility against the Government," and that President Lincoln had authorized military officers to suspend the writ of habeas corpus when required by the public safety. Merryman, Cadwalader alleged, had announced his "readiness to co-operate with those engaged in the present rebellion against the Government of the United States" and was an officer in a local militia that possessed federal arms. The general requested a delay in any proceedings in the case until he received instructions from Lincoln. Taney, to no one's surprise, refused to delay the case and issued a writ of attachment requiring General Cadwalader to answer charges of contempt for refusing to bring Merryman before the court. When the deputy federal marshal went to the gate of Fort McHenry with Taney's writ, a guard barred his entrance and replied that no one was present to accept the document.

News of Cadwalader's second rebuff of the court spread throughout Baltimore, and on the morning of May 28 a large crowd gathered outside the Masonic Hall where the circuit court would meet. Taney left the nearby house where he was staying, and, aided by his grandson, he slowly made his was through the crowd. Then, before a courtroom "packed to its utmost capacity," Taney announced that the President had no constitutional or statutory authority to suspend the writ of habeas corpus and that when any military officer arrested a person not subject to the rules and articles of war, that officer had a duty to deliver the prisoner to a civil authority. It was "very clear" to Taney that Merryman was entitled to immediate release from imprisonment. Fearing that his oral opinion would be subject to misunderstanding, Taney promised to file a written opinion with the circuit court within a week.

Limited orders of the court

In the courtroom announcement and in the written opinion, Taney took the extraordinary step of ordering the clerk of court to send a transcript of the *Merryman*

proceedings to President Lincoln. "It will then remain for that high officer, . . ." concluded Taney, "to determine what measures he will take to cause the civil process of the United States to be respected and enforced." The provocative challenge to the President deflected attention from the court's own lack of action.

Taney issued no order to secure the release of John Merryman or to enforce the writs of the court. Taney announced to the court that he would not hold the marshal responsible for enforcing the writ of attachment or arresting General Cadwalader because "it has become so notorious that the military power is superior to the judicial." In his written opinion, Taney claimed to "have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome." The only formal orders of the court were those related to the filing of the records and the delivery of a copy to the President. As the written opinion made clear, Taney embraced the opportunity to chastise the President but avoided any order he could not enforce.

Taney's opinion

The written opinion was quickly reprinted by newspapers around the country and by publishers who offered pamphlet versions. In the clear and accessible language that had marked so many of his opinions, Taney offered an eloquent defense of the authority of the federal judiciary and of the right to petition for a writ of habeas corpus. Nothing in the evidence presented to Taney indicated that anyone had prevented court or judicial officers from carrying out their responsibilities, but the action of the military officers had "thrust aside the judicial authorities . . . and substituted a military government in its place." Taney carefully laid out the steps by which a military officer, suspecting Merryman of illegal activity against the government, should have approached the U.S. attorney for Maryland, who in turn would have presented a judge or other judicial officer with information justifying an arrest warrant. Rather than follow the well-established process of the civil courts, the military orders to arrest and detain Merryman had violated the Fourth Amendment protection against unreasonable search and seizure, the Fifth Amendment guarantee of due legal process before any imprisonment, and the Sixth Amendment right to a speedy trial.

Taney knew of Lincoln's authorization of the suspension of habeas corpus only through General Cadwalader's letter to the court, but Taney devoted most of his written opinion to a denial that the President had any authority to suspend the writ, let alone to delegate discretion over the writ to military officers. The Constitution prohibited any suspension of the writ "unless when in Cases of Rebellion or Invasion the public Safety may require it." Because the Constitution's only reference to habeas was in Article I, which established the legislative branch, Taney, like most legal commentators and judges before him, concluded that only Congress had the authority to suspend the writ under the prescribed circumstances.

Taney's review of the history of habeas corpus law in England and the United States demonstrated the long-standing prohibition on suspension of the writ by executive authority. Famed English jurist William Blackstone called it "the happiness of our Constitution" that the writ of habeas corpus could not be suspended by the executive power in Great Britain. If President Lincoln had the authority to suspend the writ, Taney added, then the Constitution "conferred upon him more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown." Supreme Court Justice Joseph Story, in his *Commentaries on the Constitution* of 1833, declared that any decision on the need to suspend habeas "most exclusively belongs" to Congress, and Chief Justice John Marshall in an opinion of 1807 said that if the public safety required the suspension of habeas, "it is for the legislature to say so."

Within the crowded courtroom when Taney delivered his oral opinion "great indignation was expressed against the Administration," and one prominent attorney, Andrew Ridgely, volunteered to organize a posse comitatus to free Merryman. The mayor of Baltimore approached the bench to offer congratulations to Taney, and former President Franklin Pierce sent the Chief Justice a letter of support. To Northern critics of the Chief Justice, the *Merryman* proceedings were further proof that Taney intended "to throw the weight of the judiciary against the United States and in favor of the rebels." Newspapers supporting President Lincoln reminded readers that the Constitution made no mention of who had authority to suspend habeas corpus and that the framers never anticipated open rebellion of United States citizens.

Whatever Taney's private views on secession and the rights of the Southern states, he rooted his opinion in such well-established law that initial commentaries generally supported the Chief Justice's interpretation. Judge John Cadwalader of the U.S. district court in Philadelphia, brother of the general detaining Merryman, wrote a private opinion based on an early report of the court proceedings. According to Judge Cadwalader, General Cadwalader should have stated that hostilities existed between the United States and armed enemies of the government and that he was holding Merryman as a prisoner of war. The judge agreed with Taney that only Congress could suspend habeas, and he noted that the general accused Merryman of treason, which could only be prosecuted in civil courts.

Lincoln on habeas corpus

If Lincoln had any response to the opinion delivered directly to him, he left no record of it, but since the outbreak of hostilities the President and his administration had been weighing the legality of suspending habeas. In his message to the special session of Congress on July 4, 1861, Lincoln offered his assurances that the suspension of the privilege of the writ had "purposely been exercised but very sparingly," and he was sensitive to critics who worried that the chief executive had himself violated one of

the laws he was sworn to "faithfully execute." With one third of the states in open rebellion and other states resisting his execution of the nation's laws, Lincoln thought it foolhardy to focus on a single law when the temporary and limited suspension of the law protecting habeas might enable him to enforce all other federal laws and thus to preserve the Union. He asked the Congress, "are all the laws, *but one*, to go unexecuted, and the government itself to go to pieces, lest that one be violated?" His own reply was that the gravest violation of his oath of office would be to allow the government to be overthrown as a result of an overly cautious regard for a single law.

Lincoln was confident that he had not acted illegally, since he believed that the Constitution, though silent on who was authorized to suspend the privilege of the writ in "Cases of Rebellion or Invasion," granted that power to both Congress and the executive. Surely the framers had not intended that "the danger should run its course, until Congress could be called together," since the provision for suspension of habeas anticipated use in an emergency. Yet Lincoln clearly considered the legal authority for suspending habeas secondary to his obligation "to preserve, protect, and defend" the Constitution. He left for the Congress to decide if legislation was necessary to justify the suspension of the privilege of the writ of habeas corpus.

The attorney general's opinion

As Lincoln had indicated to the Congress, Attorney General Edward Bates soon delivered his opinion in support of the President's authority to suspend the writ of habeas corpus and to arrest individuals involved in insurrection against the government. Bates also interpreted the President's responsibility to preserve the Constitution and to execute the laws as an obligation to suppress any rebellion or insurrection. That obligation necessarily required the use of military force and the arrest of supporters of an insurrection, either for the purpose of bringing the rebels to trial or to render them incapable of further support of the insurrection. Bates found that the President and those to whom he delegated authority were also justified in refusing to obey a writ of habeas corpus because the federal courts had no jurisdiction over an appeal from an executive action of the President. Only the Congress could suspend the courts' authority to issue a writ of habeas corpus, admitted Bates, but the President had lawful power to suspend the privilege for persons arrested in connection with open rebellion against the government. Bates acknowledged that the President's power to arrest and to suspend the privilege of habeas corpus was liable to abuse, as was all power, but the Constitution clearly granted the power to the government and granted Congress the impeachment power to check any abuse by the chief executive.

Suspensions of habeas corpus

By the time Congress convened, Lincoln had suspended the privilege of the writ of habeas corpus in parts of Florida and in matters relating to an individual Army officer who supported the Confederacy, and the President had extended the original order to General Scott to encompass the route of federal troops traveling between New York and Washington. Congress took no direct action related to habeas corpus, but near the close of its session in the summer of 1861 it passed a statute declaring all military-related acts, proclamations, and orders of the President to be legal. The administration continued to arrest citizens and further suspend the writ without formal sanction from Congress. In August 1862, Secretary of War Edwin Stanton suspended the privilege of the writ in cases related to the draft of state militia members, and on September 24, 1862, Lincoln issued a similar proclamation that extended the suspension throughout the nation and applied to anyone resisting or interfering with enlistments and the draft.

In March 1863, Congress authorized the President, for the duration of the Civil War, to suspend the privilege of the writ whenever, "in his judgment, the public safety may require it." This act directed the secretaries of State and War henceforth to provide federal judges with the names of all individuals arrested under orders of the administration and detained within the judges' respective districts. It also provided for the release of any arrested individuals who were not indicted at the subsequent meeting of the grand jury in the federal court. The act also offered protections for any military or government officers sued in state or federal courts for arrests made under the authority of the President since the opening of the Civil War. Two more formal suspensions followed the act. On September 15, 1863, Lincoln suspended the writ in broadly defined cases, including those arising from the increasingly common judicial challenges to the draft. In July of 1864, the President's last proclamation regarding habeas reaffirmed the suspension of the writ in Kentucky, where many citizens "have joined the forces of the insurgents."

Military arrests and popular protests

Military arrests of civilians were initially overseen by the Secretary of State; from February 1862 they were overseen by the Secretary of War. In practice, the decisions to arrest usually fell on military officers, whose widely varying judgments inevitably led to excesses. The number of military arrests clearly exceeded 10,000, and some historians have estimated three times that number. Military arrests peaked during enforcement of the state militia drafts in 1862, and arrests were most frequent in the border states. The majority of individuals arrested under the suspension of habeas corpus were residents of either the border states or of the Confederacy. The overwhelming number of such cases related to military threats, interference with the draft,

or violations of commercial blockades, but high-profile arrests of newspaper editors or political critics brought the greatest popular criticism. Lincoln was particularly displeased with arrests related to political speech, unless the arresting officers could establish a clear threat to public safety.

The large number of arrests, continuing through much of the war and extending throughout the Union, soon pushed the *Merryman* proceedings from public memory, but the debate on the suspension of the privilege of the writ of habeas corpus and on the associated questions of martial law remained a contentious topic of debate throughout the Civil War. Notable legal writers, like Horace Binney, offered learned defenses of Lincoln's suspensions, while other prominent lawyers warned of the risks of abusing constitutional rights as part of a strategy of preserving the constitutional Union. Lincoln for the most part confined himself to questions of the military necessity of suspension and was seemingly unconcerned with authorization from the Congress. When the arrests threatened to undermine public support for the war effort, however, Lincoln offered his most extensive defense of military arrests and the restrictions on habeas writs. In the wake of the arrest and trial of Clement Vallandigham for what many considered political speech, the President faced a wave of criticism, much of it from supporters of the Union cause. Lincoln's widely published letter to Erastus Corning in response to the resolutions of a public meeting in Albany, New York, argued that Confederate sympathizers had manipulated constitutional liberties "to destroy Union, constitution, and law," and that he had no choice as a President faced with rebellion but to exercise powers that he readily agreed would be unjustified in times of peace and domestic security.

The fate of Merryman

In the weeks following the court proceedings in *Ex parte Merryman*, John Merryman remained in military custody at Fort McHenry. He was indicted in July 1861 by a grand jury of the U.S. District Court for Maryland. The indictment alleged that Merryman had conspired with upwards of 500 people to levy war against the United States and that he had joined with others to destroy six railroad bridges in an effort to prevent the movement of troops for the defense of Washington, D.C. He also stood accused of destroying a telegraph line in an attempt to disrupt communications and delay a proper defense of the United States. Judge William F. Giles of the U.S. district court remitted the case to the U.S. Circuit Court for the District of Maryland for trial in November. Merryman was released in the summer of 1861 after he and a group of supporters posted $40,000 bail. Close to 60 other indictments for treason were brought in Maryland federal courts, but none was prosecuted. At the November session of the circuit court, Taney continued all of the treason cases until April, then he was too ill to attend either scheduled session in 1862. The dismissal of all treason indictments in May 1863 was followed by another indictment of Merryman on similar charges

in July 1863, but still the case did not go to trial. In 1867, Andrew Ridgely, recently appointed Maryland's U.S. attorney by President Andrew Johnson, signed an order, called a *nolle prosequi*, announcing his intention to drop the prosecution of Merryman on treason charges.

Conclusion

The failure to try the treason cases, like Taney's unwillingness to enforce his *Merryman* opinion, revealed the disruptions of the judicial process during the Civil War. In the trial courts, prosecutors could not expect to find impartial juries, especially in border states where most treason indictments were presented, and judges sympathetic to the South found ways to delay trials. When faced with judicial challenges to the President's restrictions on civil liberties, some judges, like Taney, declined to test the authority of the judiciary against what they recognized as the superior power of the administration and the military. Others, sympathetic to the war goals of Lincoln, deferred to what they expected to be a temporary exercise of broad executive powers. The limits of the judiciary's ability to enforce decisions and many judges' recognition, shared with Lincoln, that preservation of the Union required extraordinary executive powers, discouraged the federal courts from resolving many of the constitutional questions raised by restrictions on civil liberties. This judicial record left few clear rules about the protection of those liberties, including the privilege of the writ of habeas corpus, when other crises threatened what the Constitution called "the public safety."

The Federal Courts and Their Jurisdiction

U.S. Circuit Court for the District of Maryland

The circuit courts of the federal judiciary were established by the Judiciary Act of 1789 and served as the most important trial courts in the federal system for most of the nineteenth century. They had jurisdiction over federal crimes, over suits between citizens of different states (known as diversity jurisdiction), and over most cases in which the federal government was a party. They also had jurisdiction over some appeals from the U.S. district courts. Except for a brief period in 1801–1802, the circuit courts before 1869 did not have their own judges. Supreme Court justices were assigned to regional circuits composed of several states and served with the local district judges on the circuit courts in the judicial districts of those states. The circuit courts were abolished by Congress in 1911.

The Judiciary Act of 1789 granted the district and circuit courts and the Supreme Court authority to issue writs of habeas corpus in response to petitions from individuals detained under federal authority or committed to trial in a federal court. As the justice assigned to the Fourth Circuit, which in 1861 encompassed Maryland, Delaware, and Virginia, Chief Justice Roger Taney was authorized to preside over a habeas proceeding in the U.S. Circuit Court for Maryland.

U.S. District Court for the District of Maryland

The district courts were established by the Judiciary Act of 1789 and had jurisdiction over admiralty cases, lesser crimes, and smaller suits. An act of 1842 granted the district courts jurisdiction to try all non-capital criminal cases, and an act of 1846 allowed grand juries in the district courts to present indictments for any crime within the jurisdiction of circuit as well as district courts. The latter act also required district courts to remit to the next session of the U.S. circuit court all indictments for capital offenses, including treason. A grand jury in the U.S. District Court for Maryland brought two indictments for treason against John Merryman, and district Judge William Giles remitted both indictments to the circuit court for trial. Merryman was never tried on the treason charges brought against him in 1861 and 1863.

Circuit court or Supreme Court?

Chief Justice Taney suggested he was acting as a Supreme Court justice "in chambers," meaning outside a regular session of the Court, and several historians have concluded that *Ex parte Merryman* was a Supreme Court case. As he would in other circuit court sessions, Taney initially sat on the bench with the district judge for Maryland, William Giles, but on the day he announced his opinion, Taney explained that he was acting "in his capacity as Chief Justice" and that Giles had appeared only to offer his counsel. Taney, according to a friend, also crossed out the reference to himself as a circuit judge in the petition from Merryman's lawyers. In an order to the clerk of the circuit court, Taney initially wrote that his opinion and the records of the proceedings were to be filed with the Supreme Court, but he deleted the reference to the high court and replaced it with the circuit court. Taney appears to have represented himself as Chief Justice to the extent that he could without asserting the authority of the Supreme Court, which he knew would have had no jurisdiction in the case.

A Supreme Court decision of 1807 had asserted that the Supreme Court had authority to issue a writ of habeas corpus only to petitioners who were held under an order of a lower federal court. In *Ex parte Bollman*, Chief Justice John Marshall had declared that the issuance of a writ of habeas corpus was not part of the original jurisdiction of the Court defined by the Constitution and, as he had already established in *Marbury v. Madison,* that Congress could not expand the Supreme Court's original jurisdiction. According to this decision, the Supreme Court would have no jurisdiction over the petition of John Merryman, who was detained by the military rather than a federal court. A later account by a confidante of Taney indicated that the Chief Justice acknowledged the full Supreme Court had no jurisdiction over the *Merryman* case, but that Taney believed the Judiciary Act of 1789 gave individual Supreme Court justices authority to issue writs of habeas corpus to any petitioner held by a federal authority. (No court had so decided.)

Taney realized that his jurisdictional authority in *Ex parte Merryman* was irrelevant, since he was exercising no judicial power apart from the orders to file the records of the proceedings and to send a copy to President Lincoln. The opinion without a decision was more of a political challenge to the President than a constitutional standoff between two branches of government, and Taney used his prominence as Chief Justice in hopes of inciting further public criticism of Lincoln's unprecedented assumption of war powers.

The Judicial Process: A Chronology

May 25, 1861

John Merryman was arrested by federal troops at his home in Baltimore County. He was detained by General George Cadwalader at Fort McHenry, near Baltimore. Merryman's lawyers presented Chief Justice Roger Taney with a petition for a writ of habeas corpus.

May 26, 1861

Taney, sitting in the U.S. circuit courtroom in Baltimore, issued the writ. The marshal for the District of Maryland presented General Cadwalader the writ, demanding the appearance of the general and Merryman before the circuit court. Cadwalader refused to appear and sent the court a letter asking for a delay until he received instructions from President Lincoln.

May 27, 1861

Taney refused to delay and issued a writ of attachment for contempt against Cadwalader. A guard at Fort McHenry refused to admit the marshal or to deliver the attachment to Cadwalader.

May 28, 1861

Taney issued an oral opinion stating that Merryman was entitled to be freed because the President did not have authority to suspend habeas corpus and the military was obligated to turn over to civil authorities any person it arrested if the person was not subject to articles of war, but Taney issued no order to release Merryman.

June 1, 1861

Taney presented a written opinion in *Ex parte Merryman*.

July 10, 1861

Merryman was indicted in the U.S. District Court for Maryland on charges of treason.

July 13, 1861

Judge William Giles remitted the *Merryman* case to the U.S. Circuit Court for Maryland.

May 6, 1863

On motion of the U.S. attorney for Maryland, all pending indictments for treason were quashed.

July 28, 1863

Merryman was indicted again in the U.S. District Court for Maryland. Judge William Giles remitted the indictment to the U.S. Circuit Court for Maryland.

April 23, 1867

U.S. Attorney Andrew Ridgely entered a *nolle prosequi* in *United States v. Merryman*, thus ending prosecution of the treason case.

Legal Questions Before the Court

Did the President have authority to suspend the privilege of the writ of habeas corpus?

Chief Justice Taney said that the President did not have the authority to suspend the privilege of the writ of habeas corpus and that the Constitution reserved that authority for the Congress.

Taney based his opinion in *Ex parte Merryman* on the Constitution, the tradition of habeas corpus in English law, and a decision of the Supreme Court. The Constitution's only reference to habeas corpus appeared in Article I, Section 9, which enumerated powers that the Congress was prohibited from exercising. Although that clause of the Constitution did not specify which branch of government had the limited authority to suspend the privilege of the writ of habeas corpus in times of crisis, Taney, like most earlier commentators, assumed that placement of the clause in Article I indicated that the power to suspend was limited to the Congress. Taney's review of English law demonstrated that the monarch had long been prohibited from suspending the privilege of habeas and that English legal authorities agreed that suspension was the prerogative of the Parliament. Taney cited a Supreme Court decision of 1807, in which Chief Justice John Marshall had written that the Congress alone had the authority to suspend the privilege to the writ, and Justice Joseph Story's famous *Commentaries,* which said only the Congress could determine if a rebellion or invasion justified suspension.

In the opening of his opinion, Taney expressed "some surprise" at reports that Lincoln claimed the authority to suspend the writ, "for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands, that the privilege of the writ could not be suspended, except by act of Congress."

Could the military detain an individual on charges of violating U.S. law?

Chief Justice Taney said that a military officer had no authority to arrest an individual for a criminal offense. If a member of the military suspected an individual of violating a U.S. law, he had an obligation to inform the U.S. attorney, who would determine if the matter should be brought before a district judge or a commissioner authorized to issue an arrest warrant.

Taney offered some of his strongest language to condemn the actions of the military officers who ordered and carried out the arrest of Merryman. They had "by force of arms, thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place." The arrest and detainment of Merryman, according to Taney, had violated essential rights guaranteed by the Constitution's Bill of Rights. Merryman had been seized without a warrant and with no presentation of evidence, in violation of the Fourth Amendment; he had been detained without any hearing or other due process of law, in violation of the Fifth Amendment; and he was now held at a "strongly garrisoned fort," with no prospect of a speedy trial in a court of justice, in violation of the Sixth Amendment. If the military had this authority to decide what constituted a crime and what constituted sufficient evidence to imprison someone, "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 be found."

Taney also asserted that the military officers had no reasonable expectation that the civil authorities would be unable to enforce the law, since no one in Maryland had heretofore resisted the process of any federal court or judicial officer. The district judge, the commissioner, the district attorney, and the marshal for the District of Maryland all lived within a few miles of Merryman, and would have been easily accessible to a military authority who suspected treasonous activity.

What jurisdiction did the federal courts have over a petition for a writ of habeas corpus from an individual detained by the military?

Section 14 of the Judiciary Act of 1789 authorized federal courts as well as individual district judges and Supreme Court justices to issue writs of habeas corpus to inquire into the reasons for a commitment, or imprisonment, under the order of a federal court or other federal authority. Although most habeas writs issued by the federal courts related to criminal proceedings, some federal courts had issued writs of habeas corpus to individuals held by the military, such as in New Orleans in the closing days of martial law imposed during the War of 1812. A Supreme Court decision of 1807 limited the Supreme Court's habeas jurisdiction to appeals of lower federal court orders and thus excluded military prisoners from submitting petitions directly to the high Court.

Although Chief Justice Taney acknowledged that the Supreme Court did not have jurisdiction to issue a writ of habeas corpus to an individual held in custody by the military, he reportedly believed that individual justices, sitting "in chambers" (outside a regular court session), did have such authority. In the *Merryman* proceed-

ings, however, Taney was intentionally vague about whether he has acting as Chief Justice in chambers or as the circuit justice for the U.S. Circuit Court for Maryland. In 1867, Chief Justice Salmon Chase denied a habeas petition from a military prisoner whose attorney cited Taney's personal belief in a justice's authority to grant the writ in chambers. Although the decision was unpublished, Chase privately told a senator that he had denied the petition because justices sitting on their own had the authority to grant habeas writs only to petitioners from their assigned circuits.

What did the federal courts decide in related cases?

In re McDonald, U.S. District Court for the Eastern District of Missouri, 1861 (16 Federal Cases 17)

Just days before the arrest of Merryman, another Army general in another border state refused to appear in a federal court in answer to a writ of habeas corpus. Like Taney, the federal judge in the Eastern District of Missouri declined to enforce the writ but offered a strongly argued defense of the judiciary's authority to enforce constitutional rights even in the midst of a civil war.

Emmett McDonald served as a captain in a Missouri militia company that in the spring of 1861 gathered arms at a camp named for the state's secessionist governor and prepared to attack the U.S. arsenal in nearby St. Louis. On May 10, federal forces took control of the militia's camp, seized the arms, and forced the militia members to march to St. Louis. Gathering crowds taunted the federal forces and sang cheers to Jefferson Davis and the Confederacy. Fighting broke out, leaving several dead and numerous civilians wounded. The militia members were released on the condition that they pledge not to take up arms against the Union, but McDonald refused and remained in the custody of the U.S. forces. McDonald then petitioned the U.S. District Court for the Eastern District of Missouri for a writ of habeas corpus, which was granted by Judge Samuel Treat and delivered to General William Harney, who had just assumed command of the Army's Department of the West. By the time Harney received the writ, he had transferred McDonald to the custody of troops in Illinois, outside the court's jurisdiction.

General Harney did not appear in court and sent a letter explaining that McDonald was not in his custody. Harney informed Treat that the existing crisis in Missouri compelled him to observe a "higher law," even if it appeared he was violating the forms of law. Although Lincoln's authorization of the suspension of habeas corpus did not extend to Missouri, Harney believed that the President's order to disperse "all armed rebels hostile to the United States" justified his predecessor's raid on the militia camp and the detention of McDonald. The general added that if McDonald had been in his custody, he would have taken no action to release a prisoner who had been a member of the offending militia.

Judge Treat had no options for enforcing the writ, but he filed in the district court a lengthy opinion that established the jurisdiction of his court over habeas petitions from persons detained by the military. Treat's exhaustive survey of habeas decisions in the federal courts and English precedents led him to conclude that Section 14 of the Judiciary Act of 1789 granted federal courts the authority to issue writs of habeas corpus to prisoners detained by any federal authority, not just those arrested by formal judicial process. The judge emphasized that the protections of the Bill of Rights were most likely to be ignored by authorities outside the courts, where the established procedure demanded some public explanation of an arrest and commitment. If the courts were denied jurisdiction over habeas writs from those held by the military or other federal authorities outside the judiciary, then citizens would be "powerless when arbitrary will, assuming to act in the name of the United States, chooses to trample upon every constitutional guarantee for the protection of individual liberty."

When Congress reconvened in early July, Representative Francis Preston Blair of Missouri introduced a bill to consolidate Missouri as a single judicial district and thus eliminate Treat's judgeship. The bill passed the House within a few weeks but failed in the Senate, and Treat continued to serve as a federal judge until his retirement in 1887. Emmett McDonald eventually fought for the Confederacy and was killed in action in 1864.

Ex parte Vallandigham, U.S. Circuit Court for the Southern District of Ohio, 1863 (28 Federal Cases 874)

In the denial of a writ of habeas corpus for a prominent politician imprisoned by the military, a federal judge from Ohio offered military officers enormous discretion in the suppression of public sympathy for the Confederacy or of criticism of the President's war strategy.

Representative Clement Vallandigham of Ohio was one of Lincoln's fiercest critics in the Congress during the first years of the Civil War. As a nationally known and charismatic "Copperhead," Vallandigham used his seat in the House of Representatives to challenge the President's leadership and to condemn the abolitionists, whom he blamed for the war. Vallandigham lost reelection to a fourth term in Congress and returned to Ohio, where he planned to run for governor. In May 1863, before a large crowd in Mount Vernon, Ohio, Vallandigham attacked General Orders No. 38, in which General Ambrose Burnside of the Department of the Ohio had recently declared martial law and made it a crime to express any public sympathy with the Southern rebels. Burnside ordered Vallandigham's arrest and trial by a military commission on charges of giving aid and comfort to Confederate forces and attempting to weaken public support for the government. The commission found Vallandigham guilty and sentenced him to imprisonment for the duration of the war.

Vallandigham petitioned the U.S. Circuit Court for the Southern District of Ohio for a writ of habeas corpus. After soliciting arguments from Burnside and his counsel as well as from the lawyers for Vallandigham, Judge Humphrey Leavitt denied the writ. An earlier decision by the same court had established that a habeas writ would not be granted if the judges were confident that no subsequent order of the court would result in the release of the prisoner. Leavitt was convinced that the Army would not obey an order in this case, but he also offered a substantive and potentially far-reaching argument for denying the writ of habeas corpus. Vallandigham's lawyers had argued that an individual who was not in military service, and therefore not subject to the rules of war, could not be arrested by the military or tried before a military commission. Judge Leavitt acknowledged that by the strict standards of the Constitution, the arrest violated civil liberties protected by the Bill of Rights, but Leavitt said that "the court cannot shut its eyes to the grave fact that war exists." With the republic in peril, a judge needed to interpret the Constitution so as to serve the larger goal of saving the nation from "hopeless ruin." Leavitt also deferred to the judgment of military officers who were charged with carrying out the President's orders to preserve and defend the Union. In time of war, it was impossible for a judge to know all that the President and his generals needed to do to preserve the Union. Leavitt cited the recent Emancipation Proclamation as an example of the expansive powers justified by military necessity. The legality of an arrest ultimately "depended on the necessity for making it."

After the denial of the habeas writ, Vallandigham's lawyers petitioned the Supreme Court for a writ of certiorari to review his trial by the commission. The Supreme Court, citing a lack of jurisdiction over appeals from a military tribunal, denied the writ.

Lincoln and his cabinet had no advance notice of Burnside's general order or of his decision to arrest Vallandigham. Secretary of War Edwin Stanton feared that the circuit justice might grant the writ of habeas corpus, and he prepared for Lincoln an order suspending habeas corpus in this case. Lincoln declined to issue the order. Following Vallandigham's conviction and the denial of his habeas petition, Lincoln commuted the prison sentence and ordered General Burnside to send Vallandigham to a Confederate general in Tennessee. Vallandigham soon left the Confederate states and went to Canada, from where he monitored his unsuccessful campaign for governor of Ohio. He returned to the United States in 1864 and campaigned against Lincoln's reelection.

Ex parte Milligan, Supreme Court of the United States, 1866 (71 U.S. Reports 2)

Lambdin Milligan of Indiana was suspected to be a member of a secret society, the Order of American Knights, that allegedly conspired to seize arms at a U.S. arsenal and to free Confederate prisoners of war. He was arrested by Army officers in October 1864 and tried by a military commission on charges of conspiracy against the government, aiding the rebels, inciting insurrection, disloyal practices, and violating the laws of war. The commission found Milligan and two collaborators guilty and sentenced them to death by hanging. Lincoln delayed the execution, but after Lincoln's assassination, President Andrew Johnson ordered the military to proceed with the punishment. Nine days before the scheduled execution, lawyers for Milligan petitioned the U.S. Circuit Court for Indiana for a writ of habeas corpus. The petition stated that the Habeas Corpus Act of 1863 provided that Milligan, who had never served in the military, should either have been brought before a civilian court to be tried or been released from custody.

The judges of the circuit court, Justice David Davis and Judge David McDonald, differed on the questions of the issuance of a habeas writ, the release of Milligan from custody, and the jurisdiction of the military commission. As provided for by law, the judges certified their split and sent the case to the Supreme Court. All nine justices voted to overturn the verdict of the military commission, but they disagreed about the grounds of their decision.

Justice Davis wrote for the majority in an opinion based on constitutional rights. The end of "the late wicked Rebellion" offered the opportunity for a more reasoned consideration of the questions presented by the case, and Davis thought that "no graver question was ever considered by this Court." One of the clearest provisions of the Constitution was "infringed when Milligan was tried by a court not ordained and established by the Congress, and not composed of judges appointed during good behavior." The arrest and trial of Milligan violated the protection against search and seizure without a warrant, the guarantee of a jury in a criminal trial, and the requirement for a grand jury indictment in a charge carrying the death penalty. Davis went beyond these questions of constitutional protections in criminal procedure to disallow the establishment of military commissions in areas where the civilian courts continued to operate without interruption. "Martial law can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction." Davis also held that martial law could be imposed only in areas that are in rebellion or in which an invasion has already occurred, and that the threat of an invasion was never sufficient to justify martial law. The safety of the country had not required martial law in Indiana, where the federal courts were capable of trying anyone accused of treason.

Chief Justice Salmon Chase wrote a concurring opinion for the minority of four justices and based his decision solely on the statutory authority provided by the Habeas Corpus Act of 1863. As Davis had also held, Chase wrote that the wartime statute granted military authorities the power to arrest without being held answerable to a writ of habeas corpus, but this expansive power was limited by the act's requirement that the military report to the federal courts the names of all individuals arrested and that following the end of the next grand jury meeting, all prisoners not indicted could petition the federal judge for release. The military commission in Indiana had met neither of those requirements. The four-justice minority asserted that the Congress had the authority to establish the military commission that was held in Indiana.

Although the *Milligan* decision would be celebrated as a landmark case in civil liberties, it initially faced enormous criticism, particularly from Republicans who feared that it would undermine the use of military commissions to enforce equal rights for freed slaves and Unionists in the South. Radical Republicans, like Thaddeus Stevens of Pennsylvania, linked the *Milligan* decision with *Dred Scott*, and feared that the Supreme Court would once again come to the defense of the white South.

Ex parte McCardle, Supreme Court of the United States, 1869 (74 U.S. Reports 506)

William McCardle was arrested by officers of the military government of Mississippi established under the Reconstruction Act of 1867, and he was tried by a military commission on charges of publishing libelous articles in his newspaper. McCardle's attorney petitioned the U.S. Circuit Court for Mississippi for a writ of habeas corpus, and on the return argued that by the terms of *Ex parte Milligan,* McCardle could not be tried by a military court in a state with a functioning civil federal court. Judge Robert Hill of the circuit court denied McCardle's release and returned him to the custody of the military government. Under the terms of the Habeas Corpus Act of 1867, McCardle appealed Hill's circuit court decision to the Supreme Court, and the case was argued over four days in early March 1868. The 1867 act gave the federal courts jurisdiction to grant habeas writs to individuals held by state as well as federal authorities, and it provided a right of appeal to the Supreme Court from any habeas decision in the U.S. circuit courts.

Congress, fearing that the Supreme Court might declare unconstitutional the Reconstruction Act of 1867, in late March and before the Court announced a decision, repealed the 1867 provision for habeas appeals to the Supreme Court. Chief Justice Salmon Chase, citing the Congress's constitutional authority to define the Supreme Court's appellate jurisdiction, declared in a unanimous opinion that the 1868 repeal act denied the Court any jurisdiction in the case, and the Supreme Court dismissed McCardle's appeal.

Chase noted at the close of his opinion that the Supreme Court retained the habeas jurisdiction granted by the Judiciary Act of 1789. In 1869, the Supreme Court relied on that jurisdiction in the case of Edward Yerger, who was tried for murder by a military commission in Mississippi. Yerger had petitioned the U.S. Circuit Court for the District of Mississippi for a writ of habeas corpus, and, after a hearing, that court remanded Yerger to military custody. Yerger's attorneys then petitioned a Supreme Court justice to issue a writ of habeas corpus. The Supreme Court ruled that the appellate jurisdiction defined by the Judiciary Act of 1789 gave it the authority to issue a writ to Yerger because he remained in custody as a result of a decision of a U.S. circuit court.

Legal Arguments in Court

Lawyer for John Merryman

In the petition signed by John Merryman and addressed to Chief Justice Roger Taney, attorney George Williams argued that the arrest without a warrant violated Merryman's constitutional rights. Merryman had been arrested and detained without any legal authority from a court, a magistrate, or other civil officer, and was thus entitled to be "discharged and restored to liberty." The petition also denied that Merryman was an officer of the local militia, as alleged by the arresting military officer.

George Williams interviewed John Merryman within hours of his arrest and confinement at Fort McHenry. Merryman signed the petition, but General George Cadwalader, the commanding officer of the fort, refused to allow Williams to examine any documents related to the detention of Merryman. The petition stands as the only documentation of the lawyer's argument in favor of the writ since no formal arguments were presented before the court.

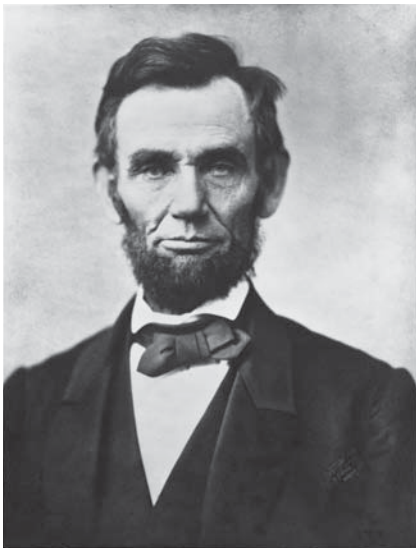
The Lincoln administration

No lawyers appeared before Chief Justice Taney to defend the military's arrest and detention of John Merryman. General George Cadwalader, whom Taney ordered to appear with Merryman, dispatched his aide, Colonel Lee, to read the general's letter to Taney explaining that Merryman was held on charges of treason and support for the armed rebellion against the government. Cadwalader added that he was authorized by the President to suspend the writ of habeas corpus when public safety so required.

Although no representative of the Lincoln administration appeared in a court to defend the suspension of the privilege of habeas corpus, Lincoln prepared his own explanation for the Congress when it convened on July 4, 1861, and his attorney general, Edward Bates, subsequently presented a more detailed justification. Lincoln also argued that the constitutional authority to suspend the privilege of habeas corpus could be exercised by the President in the event of an insurrection or invasion, when the severity of the crisis required action before Congress could be called back into session. Although Lincoln denied that he had violated any law, he asserted that his constitutional oath to preserve the Union took precedence over the observation of a single law protecting habeas corpus.

Biographies

Abraham Lincoln (1809–1865)



President Abraham Lincoln
Photograph by Alexander Gardner. Courtesy of Prints and Photographs Division, Library of Congress [LC-USZX62-13016].

By the time of his inauguration on March 4, 1861, President Abraham Lincoln faced an unprecedented threat to the constitutional union of states. Seven states had seceded and formed a separate Confederate government, determined to control federal property within its borders. Lincoln's decision to provision and defend Fort Sumter in South Carolina prompted an attack from Confederate forces and led to the secession of four more states. As he prepared the nation for war, Lincoln confronted the threat of disloyal citizens in states that remained in the Union. Nowhere was that threat greater than in the border states of Missouri, Kentucky, and, especially, Maryland, with its strategic location surrounding the northern side of the nation's capital, which already faced a Confederate Virginia across the Potomac.

Lincoln's initial authorization of the suspension of habeas corpus was part of his strategy to secure Maryland for the Union. Lincoln rejected the military's advice to arrest Maryland legislators before they convened to consider secession, but he authorized the commanding general of the Army to take the necessary measures to counteract any armed threat from Maryland, including "the bombardment of their cities—and in the extremest necessity, the suspension of the writ of habeas corpus." Although the state assembly did not vote to secede, the mob attacks on federal troops in Baltimore and the sabotage of railroad and communication lines convinced Lincoln to authorize explicitly the suspension of habeas corpus along the route traveled by federal troops on their way from Philadelphia to Washington. Under this authority, Army officers arrested and detained John Merryman.

Lincoln never directly responded to Chief Justice Taney's challenge to "respect" and "enforce" the civil process of the courts, but in several public messages, Lincoln explained that in the midst of a rebellion, defending the viability of a constitutional government based on the consent of the governed was a more important presidential responsibility than scrupulously observing specific protections of civil liberties.

Lincoln insisted that the Constitution, as reflected in its provision for suspension of habeas during invasions or insurrections, authorized different kinds of governmental power during a rebellion than it would permit in times of peace and domestic security. Lincoln would authorize the suspension of habeas corpus in eight orders during the Civil War, at one point extending the suspension over the entire nation. Lincoln also authorized military trials for civilians and some restrictions on freedom of speech and the press.

At the opening of Congress in July 1861, Lincoln said the rebellion of Southern states presented the question: "Must a government, of necessity be too *strong* for the liberties of its own people, or too *weak* to maintain its own existence?" Throughout the Civil War, Lincoln sought to discern which limits on liberties were necessary to maintain the Union, without which he believed the Constitution would be meaningless. His resistance to the initial suspension of habeas, his call for caution in "arbitrary" military arrests, and his frequent rebuke of what he considered the excesses of his military commanders indicated Lincoln's continual struggle to balance citizens' liberty and the government's strength in the midst of a Civil War that the framers could never have anticipated. Lincoln's willingness to restrict or ignore civil liberties exposed him to intense criticism, even from many Northern supporters. Those who opposed the war effort were often scathing in their attacks on a man they saw as a proto-dictator. But however much Lincoln stretched the boundaries of executive authority, it was seldom without reflection on history and constitutional law.

As revealed in the July 4, 1861, message to Congress and the 1863 letter to Erastus Corning and other critics in Albany, New York, Lincoln's defense of wartime restrictions on civil liberties elicited some of his most powerful writing and some of his most original thinking about the Constitution and the bonds of Union. His almost mystical notion of the Constitution as the embodiment of the founding generation's trust in popular government guided and restrained his own policy toward civil liberties, even as that policy inevitably denied justice to innocent individuals and failed to establish clear legal guidelines for civil liberties in times of national crisis.

George Cadwalader (1806–1879)

Brevet major-general in command of the Department of Annapolis, U.S. Army

As the commanding general at Fort McHenry, where John Merryman was held in custody, General George Cadwalader was the recipient of the writ of habeas corpus ordering him to appear with Merryman before Chief Justice Taney at the U.S. circuit court in Baltimore. Ten days before the arrest of Merryman, Cadwalader received from Army headquarters in Washington the authorization to arrest and detain individuals even if they were demanded by writs of habeas corpus from the federal courts. The office of the commanding general reminded Cadwalader that this authorization to

ignore the writ was a "high and delicate trust," but that he was expected to err on the side of the safety of the country.

Cadwalader was born in Philadelphia in 1806 to a prominent family that included his brother, John, the U.S. district judge in the Eastern District of Philadelphia from 1858 to 1879. George Cadwalader attended the University of Pennsylvania, read law, and was the long-time director of a Philadelphia insurance company. He also was active in a Philadelphia militia that helped to quell anti-immigrant riots in 1844. Cadwalader served as a brigadier general in the Mexican War. At the outbreak of the Civil War, the governor of Pennsylvania mustered him for service in the U.S. Army, and General Winfield Scott appointed him commander of the critical Department of Annapolis, where secessionists threatened troops on their way to defend Washington, D.C.

Brigadier General George Cadwalader
Mezzotint by John Sartain.
Courtesy of Prints and Photographs Division, Library of Congress [LC-USZ62-92080].

After receiving the writ of habeas corpus, Cadwalader declined to appear in court with Merryman, and by letter he informed Chief Justice Taney that he had been authorized to suspend the writ in the case of individuals presenting a threat to public safety. Cadwalader requested a delay in any court proceedings until he received further instructions from President Lincoln. In the meantime, Cadwalader informed his superiors in Washington that he was still waiting for the names of witnesses and the specific charges against Merryman, who had been arrested under orders of officers under the command of another general. When Taney issued an attachment for contempt against Cadwalader for failure to appear in court, the guard at Fort McHenry refused to admit the marshal bearing the writ of attachment, and Cadwalader made no reply to the court. Cadwalader then received from Washington orders to detain anyone implicated in treason and to decline "most respectfully" any related writs of habeas corpus until "the present unhappy difficulties are at an end."

George Cadwalader served with the Army of West Tennessee in 1862 and was commander of the U.S. Army's Department of Philadelphia from 1863 to 1865. He then returned to private business in Philadelphia.

William Fell Giles (1807–1879)

District judge, U.S. District Court for the District of Maryland

U.S. District Court Judge William Fell Giles regularly sat with Chief Justice Roger Taney in their joint capacity as judges on the U.S. Circuit Court for Maryland. Giles was at Taney's side in the courtroom at the beginning of the proceedings in *Ex parte Merryman*, but before Taney announced his opinion on May 28, 1861, Taney explained that Giles would not be in court that day. Taney had requested the counsel of Giles at the earlier session, but he asserted that he issued the writ of attachment against General Cadwalader by himself in his capacity as Chief Justice of the United States. Giles therefore did not need to be in court to hear the return on the writ, and Taney added that he did not want to prevent Giles from attending "an important church meeting" that Tuesday morning. Giles was also absent from the special circuit court session of June 3, 1861, when Taney ordered the record of the *Merryman* proceedings to be filed with the court and a copy to be sent to President Lincoln.

Giles presided in the U.S. district court in July 1861 when a grand jury presented an indictment of John Merryman on charges of treason and in July 1863 when Merryman was indicted again following the dismissal of the original charges. Giles remitted both indictments to the U.S. circuit court, which had exclusive jurisdiction over the trial of capital crimes. Although Giles would be present at the regular sessions of the circuit court during the remainder of the Civil War, Merryman never faced trial because of Taney's several postponements and repeated illnesses.

Giles was born in Harford County, Maryland, and read law before he entered practice in Baltimore. He served as a member of the Maryland House of Delegates from 1838 to 1840, and he defeated noted author John Pendleton Kennedy to win election as a Democrat for the U.S. House of Representatives. Giles served one term in Congress from 1845 to 1847 and returned to private practice. He was also a longtime officer in the American Colonization Society, which supported the emigration of free African Americans to Liberia. In 1853, President Franklin Pierce offered Giles a recess appointment as judge of the U.S. District Court for Maryland, and the Senate confirmed his nomination in January 1854. Giles served as a federal judge until his death in Baltimore.

John Merryman (1824–1881)

John Merryman was born in Baltimore County to an old landed Maryland family. As a young man, he worked briefly in a counting house in Puerto Rico, but spent most of his adult life managing his estate and farm lands. In 1843, he settled at Hayfields Estate, near Cockeysville, Maryland. He was best known in Maryland as an active member of the Maryland State Agricultural Society, of which he was president from 1857 to 1861. Following the Civil War, he engaged in the fertilizer business as well

as agriculture and stock breeding. He again was elected president of a reorganized agricultural society in 1877, and he won a medal at the Centennial Exposition in Philadelphia for his Hereford cattle. Merryman served on the vestry of his church and was a long-time delegate to the Episcopal Diocesan convention.

While following the pursuits of a gentleman farmer in the years before the Civil War, Merryman also served as a member of the local militia, the Baltimore County Troops, and was first lieutenant in the Baltimore County Horse Guards in 1861. Merryman acknowledged his role in the destruction of railroad lines in Baltimore County in the spring of 1861, which was carried out by state militia members on orders of Maryland's Governor Thomas Hicks in an effort to halt troops movements that had provoked riots in Baltimore. The federal officers who arrested him, and two grand juries in the U.S. district court, believed that Merryman's activities went well beyond anything ordered by the governor. Pennsylvania troops camped near Merryman's estate when they found their route to Baltimore obstructed, and Merryman may have been among the Maryland militia members who pursued the Pennsylvanians to the state border as they withdrew. Officers in the arresting party testified that Merryman had been drilling with his company and had advocated secessionist principles. Merryman's indictment for treason in July 1861 alleged that he had burned a bridge and attacked troops to prevent them from protecting Washington and that he had ordered the destruction of telegraph lines to sever communications with the capital.

Merryman remained at Fort McHenry until July when he and friends posted bail for his release pending trial on the charges of treason. No trial was ever held, and following a second indictment in 1863, the U.S. attorney dropped all charges in 1867. In June 1861, the Maryland General Assembly passed an act affirming Merryman's qualification as a second lieutenant in the Baltimore County Horse Guards, and declared his acts as an officer in the unit to be legal. Seven months later, the General Assembly repealed the earlier act.

Like many others subjected to military arrest and imprisonment, Merryman turned to the state courts to sue for damages. In February 1863, in the circuit court for Harford County, Maryland, Merryman filed suit against George Cadwalader for unlawful imprisonment and asked for $50,000 in damages. Cadwalader, who then resided in Pennsylvania, successfully petitioned to remove the case to the federal circuit court. Merryman then failed to pursue the suit, and the U.S. circuit court dismissed the case in April 1864.

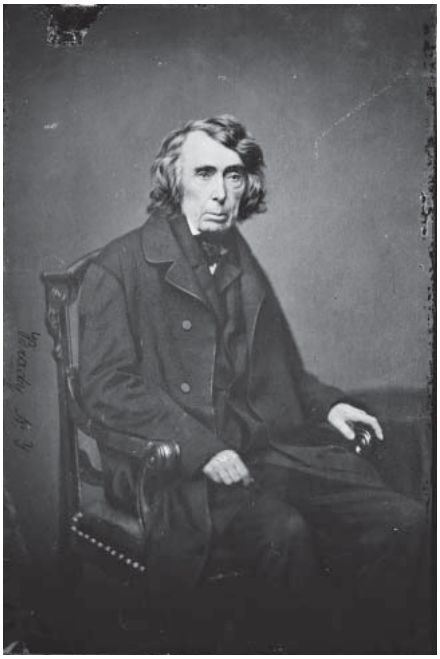
In 1864, Merryman named his ninth child, a son who died in infancy, Roger B. Taney Merryman. Merryman was elected treasurer of Maryland in 1870, and as a member of the Maryland House of Delegates in 1874, he served on the committee appointed to receive a statue of Taney presented to the state legislature. When Merryman died in November 1881, the *Baltimore Sun* obituary made no mention of the habeas proceedings or his militia service, but recounted his agricultural interests and

noted that he was "the kind-hearted gentleman, the good neighbor and the hospitable host."

Roger Brooke Taney (1777–1864)

Chief Justice of the United States and presiding judge in Ex parte Merryman

By the time he received Merryman's petition for a writ of habeas corpus, Chief Justice Roger Taney was convinced that President Lincoln presented a grave threat to constitutional government. Privately, he warned that the Republicans were abolitionists intent on overturning constitutional protections of slavery, and while Taney denied a right to secession, he sympathized with the Southern states and preferred letting them go to preserving the Union by force. His defense of civil liberties and the civilian courts in the *Merryman* opinion was one of his first and strongest challenges to Lincoln's use of presidential authority to secure the Union.



Chief Justice Roger B. Taney

Courtesy of Brady-Handy Photograph Collection, Library of Congress, Prints and Photographs Division [reproduction number: LC-BH82-402-B].

Taney had served on the Supreme Court since he was appointed by President Andrew Jackson in 1836. For much of that time, the Court's most important cases centered on federal authority over the economy of the expanding nation. Taney's collective decisions established widely respected revisions of the more explicitly nationalist decisions of his predecessor, John Marshall. Taney's ideas about the dual sovereignty of state and federal governments brought to the Supreme Court a Jacksonian caution about concentrated economic authority, whether exercised by banks or the federal government.

Born to an old Maryland family and raised as a Roman Catholic, Taney entered public office as a Federalist member of the Maryland legislature in 1799. In the 1820s he became an ardent supporter of Andrew Jackson, for whom he served as attorney general and secretary of the Treasury in the 1830s. As a key adviser to Jackson during debates on the Bank of the United States, Taney earned many enemies, and the Senate rejected his original nomination as an associate justice of the Supreme Court. After his confirmation as Chief Justice in 1836, Taney's legal knowledge and gracious manners won him the personal respect of his colleagues on the bench.

Taney's later years on the Court, and his historical reputation, were tainted by his lifelong refusal to accept legal limits on slavery or to recognize rights for free African Americans. Taney professed a personal aversion to slavery and provided for the gradual manumission of the relatively few slaves he inherited, yet he was deeply attached to the culture and politics of the slaveholding South. As attorney general, he denied that African Americans had any inherent rights under the Constitution. In slavery-related cases before the Supreme Court, Taney voted to protect the institution regardless of the implications for his usual concern for the balance of state and federal power.

His legal defense of slavery found its most extreme statement in the *Dred Scott* opinion of 1857. In this case brought by an enslaved man who had been carried into states and territories that prohibited slavery, Taney went well beyond the immediate questions about Scott's status to declare unconstitutional all federal laws prohibiting slavery in the territories, to hold that all African Americans, whether enslaved or free, had no standing as citizens, and to assert that the federal government was constitutionally barred from depriving anyone of slave property. The extremity of the opinion enflamed public opinion in the North and pushed the divided nation closer to Civil War.

The *Merryman* proceedings reflected Taney's determination to challenge the Lincoln administration and its strategy to preserve the Union. As circuit judge, Taney successfully resisted the prosecution of Merryman and other Marylanders indicted for treason. The increasingly isolated and eccentric Chief Justice, anticipating cases that never came before the Supreme Court, drafted opinions declaring conscription and emancipation unconstitutional. Taney died on October 12, 1864.

Even in death the old Chief Justice provoked impassioned debate. When the House of Representatives in 1865 appropriated funds for a bust of Taney to sit alongside those of other Chief Justices in the Supreme Court, Senator Charles Sumner successfully challenged the bill, reminding the Senate that the *Dred Scott* decision "was more thoroughly abominable than anything of the kind in the history of the courts." Congress finally approved a commission for Taney's bust in 1874.

Media Coverage and Public Debates

The drama of Chief Justice Taney confronting an Army general and the President of the United States attracted national press attention to the court proceedings in Baltimore. The case made public for the first time Lincoln's authorization to suspend the privilege of the writ of habeas corpus in Northern states and became a focus of debates on the President's assumption of wartime executive authority. The court proceedings in Baltimore, where federal troops had already fought with pro-Confederate mobs, heightened many northerners' anxiety about the extent of secessionist support within the states that remained within the Union.

The initial press response fell along familiar partisan lines, as Democrats and Southern sympathizers seized upon the military arrest as evidence of Lincoln as an emerging tyrant. *The Crisis* of Columbus, Ohio, lamented that "men on mere *suspicion* of *political opponents*, are deprived of their liberty." A New York paper urged a defense of the writ of habeas corpus as the most important protection against "the exercise of judicial authority by injudicious men." The *Baltimore Sun* reported that "all know" the power to suspend the writ "left the liberty of the citizen at the mercy of the military officer." According to Republican newspapers, Taney's eagerness to confront the administration was further confirmation of the villainy of the author of the *Dred Scott* decision. The case was proof, according to the *New York Times*, that the Chief Justice "serves the rebel cause." The *Chicago Tribune* added that the Chief Justice, sworn to uphold the Constitution, "takes sides with traitors who are exerting every energy to subvert it."

To many others Taney was a hero, and his opinion in *Ex parte Merryman* was quickly republished in pamphlets, including one issued by a New Orleans printer. In Maryland, the military arrest of a prominent planter like Merryman galvanized the many secessionists in the state and became the stuff of popular legend. A song sheet of "John Merryman," to the tune of "Old Dan Tucker," celebrated the Marylander who "would not stoop to Lincoln's pander" and linked Merryman with Jefferson Davis and other Confederate leaders. The role of federal soldiers in shooting citizens during the April riot in Baltimore was reflected in another popular pro-Southern song, "Maryland, My Maryland," which graphically warned "The despot's heel is on thy shore" and cheered the Marylanders who spurned the "Northern scum." The military arrests publicized by the *Merryman* coverage fed the popular criticism of Lincoln as a tyrant or dictator, disregarding constitutional liberties and assuming unprecedented executive powers. In one of the earliest of his numerous anti-Lincoln and pro-Confederate prints produced during the Civil War, Adalbert Volck in 1861 pictured Lincoln insolently resting his feet atop volumes titled "Habeas Corpus," "Law," and "Constitution."

Ex parte Merryman also marked the beginning of a more substantive constitutional debate on habeas corpus and the proper extent of executive and military authority in a civil war. Among the first legal commentaries on Taney's opinion was that of Joel Parker, a Harvard law professor and long-time justice of the New Hampshire Superior Court. Relying in part on a Supreme Court decision of Taney regarding the suspension of habeas in Rhode Island during the Dorr Rebellion, Parker argued that in time of war and within the area of military operations, the courts could not demand of a military officer any civil duty that conflicted with military duty. The Constitution did not authorize any particular branch of government to suspend the writ of habeas corpus, according to Parker, but made that suspension incidental to the exercise of other powers, such as the power to put down an insurrection or to make war. Horace Binney presented a notable defense of the President's authority to suspend the privilege of the writ of habeas corpus. As recognized in practice and in laws dating to the 1790s, it was the executive's responsibility to identify the conditions for suspension, such as when a rebellion or invasion prevents the execution of the laws and thereby threatens public safety. Binney also contended that the authority to suspend was safest in the hands of the President, who was subject to a limited term and impeachment. Among critics of the Lincoln administration, Edward Ingersoll presented one of the most notable rebuttals of Parker and Binney. Ingersoll, the author of a leading treatise on habeas corpus published in 1849, thought all precedent supported the argument that only the legislature had authority to suspend the privilege of the writ. It was the "monstrous idea of the hour" that the military had an inherent executive power that overrides all law and the process of law.

Lincoln's own commentary on habeas corpus in a public letter addressed to Erastus Corning and other Democratic critics in Albany, New York, was probably the most widely read, or at least widely known, publication on the topic. Lincoln wrote the letter in response to the resolutions of a public meeting that condemned the military arrest and trial of Clement Vallandigham, a former member of Congress who had publicly denounced the imposition of martial law in Ohio. Lincoln described his reluctance to restrict the civil liberties of individuals and the events that convinced him that only the executive could protect the public safety by exercising the constitutional provision for suspending the privilege of the writ when faced with "sudden and extensive uprisings against the government." The letter was initially published in the *New York Tribune,* and the Loyal Publication Society distributed 500,000 copies of a pamphlet version.

Historical Documents

Petition for a writ of habeas corpus, John Merryman, May 25, 1861

Within hours of his arrest and transfer to Fort McHenry, John Merryman met with his brother-in-law and a lawyer, George H. Williams, who drafted a petition for a writ of habeas corpus. General Cadwalader denied Williams access to the written record of the arrest, so Williams relied on information from Merryman. The petition was addressed to Chief Justice Roger Taney, who also served as a judge of the U.S. circuit court in Baltimore. An associate of Taney later asserted that the Chief Justice personally crossed out the reference to "judge of the Circuit Court" to indicate that he was acting as Chief Justice in chambers. After Williams met with a commissioner of the circuit court and swore to the truth of the petition, Taney received the petition at his home in Washington and quickly traveled to Baltimore for a court session on May 26.

[Document Source: Original case files in possession of the U.S. District Court for the District of Maryland.]

To the Honorable Roger B. Taney Chief Justice of the Supreme Court of the United States ~~and judge of the Circuit Court of the United States in and for the District of Maryland~~

The petition of John Merryman of Baltimore county and State aforesaid respectfully shews that being at home in his own domicil he was about the hour of 2 o'clock AM of the 25th May A. D. 1861, aroused from his bed by an armed force pretending to act under military orders from some person to your petitioner unknown. That he was by said armed force deprived of his liberty by being taken into custody, and removed from his said home to Fort McHenry, near to the City of Baltimore and in the District aforesaid; and where your petitioner now is in close custody.

That he has been so imprisoned without any process or color of law whatsoever, and that none such is pretended by those who are thus detaining him, and that no warrant from any Court magistrate or other person having legal authority to issue the same exists to justify such arrest; but to the contrary the same, as above is stated, hath been done without color of law and in violation of the Constitution and laws of the United States ~~and the State of Maryland~~ of which he is a citizen.

That since his arrest he has been informed that some order purporting to come from one General Keim of Pennsylvania, this petitioner unknown, directing the arrest of the captain of some Company in Baltimore County of which Company the

petitioner never was and is not Captain was the pretended ground of his arrest and is the sole ground as he believes on which he is now detained.

That the person now so detaining him and holding him at said fort is Brigadier General George Cadwalader the military commander of said post professing to act in the premises under or by color of the authority of the United States.

Your petitioner therefore prays that the writ of Habeas Corpus may issue to be directed to the said George Cadwalader commanding him to produce your petitioner before you, judge as aforesaid with the cause, if any, for his arrest and detention, to the end that your petitioner be discharged and restored to liberty, and as in duty.

John Merryman

Fort McHenry 25th May 1861.

Ex parte Merryman, opinion of Chief Justice Roger Taney (excerpts)

According to Chief Justice Taney, President Lincoln's unpublished order to suspend habeas corpus was a radical departure from well-established principles of law in both the United States and Great Britain. Taney emphasized how the arrest and detainment of Merryman foreshadowed the arbitrary rule of a military government, unchecked by any constitutional guarantees of civil liberties. Taney's narrative of the arrest portrayed Merryman as an innocent citizen, seized in the peace of his own home and dragged away in the middle of the night by officers with no legal authority to detain him.

Taney's review of English and American legal traditions put Lincoln at odds with the greatest legal minds of both countries. The Chief Justice argued that the powers of the executive were narrowly circumscribed by the Constitution and, in matters related to law enforcement, subordinate to the judiciary. But rather than assist the judiciary in the enforcement of laws, the military had swept aside the judicial power of the federal government and went beyond the suspension of habeas corpus to threaten the civil liberties protected by the Bill of Rights. Taney maintained that the force of arms prevented him from carrying out his constitutional duties, and he challenged the President to restore constitutional order and due process of law.

[Document Source: Original case files in possession of the U.S. District Court for the District of Maryland. Published in *Federal Cases*.]

As the case comes before me, therefore, I understand that the President not only claims the right to suspend the writ of Habeas Corpus himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey Judicial process that may be served upon him.

No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the President claimed this power, and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise. For I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands that the privilege of the writ could not be suspended, except by act of Congress. . . .

And the only power therefore which the President possesses, where the "life, liberty, or property" of a private citizen is concerned, is the power and duty prescribed in the 3rd section of the 2nd Article, which requires "That he Shall take care that the laws be faithfully executed." He is not authorized to execute them himself or through agents or officers civil or military appointed by himself, but he is to take care that they be faithfully carried into Execution as they are expounded and adjudged of by the Coordinate Branch of the Government to which that duty is assigned by the Constitution. It is thus made his duty to come in aid of the judicial authority, if it shall be resisted by a force too strong to be overcome without the assistance of the Executive arm. But in Exercising this power he acts in subordination to judicial authority, assisting it to Execute its process & enforce its judgments. . . .

But the documents before me show that the military authority, in this case has gone far beyond the mere suspension of the privilege of the writ of Habeas Corpus. It has, by force of arms, thrust aside the judicial authorities and officers to whom the Constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers. For at the time these proceedings were had against John Merryman, the District Judge of Maryland, the Commissioner appointed under the act of Congress; the District Attorney, and the Marshal, all resided in the city of Baltimore, a few miles only from the home of the prisoner. Up to that time there had never been the slightest resistance or obstruction to the process of any court, or judicial officer of the United States in Maryland, except by the military authority. And if a military officer, or any other person, had reason to believe that the prisoner had committed any offence against the laws of the United States, it was his duty to give information of the fact, and the evidence to support it, to the District Attorney; and it would then have become the duty of that officer to bring the matter before the District Judge or Commissioner, and if there was sufficient legal evidence to justify his arrest, the Judge or Commissioner would have issued his warrant to the Marshal, to arrest him; and upon the hearing of the case, would have held him to bail, or committed him for trial, according to the character of the offense, as it appeared in the testimony, or would have discharged him immediately, if there was not sufficient evidence to support the accusation. There was no danger of any obstruction, or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military. And yet under these circumstances a military officer, stationed in Pennsylvania, without giving any information to the

District Attorney, and without any application to the judicial authorities, assumes to himself the judicial power, in the District of Maryland, undertakes to decide what constitutes the crime of Treason, or rebellion, what evidence (if, indeed, he required any) is sufficient to support the accusation, and justify the commitment, and commits the party, without a hearing even before himself, to close custody in a strongly garrisoned Fort, to be there held, it would seem, during the pleasure of those who committed him.

The Constitution provides, as I have before said, that "no person shall be deprived of life, liberty, or property, without due process of law." It declares that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It provides that the party accused shall be entitled to a speedy trial in a court of justice.

And these great and fundamental laws, which Congress itself could not suspend, have been disregarded and suspended, like the writ of Habeas Corpus, by a military order, supported by force of arms. Such is the case now before me, and I can only say, that 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.

In such a case my duty was too plain to be mistaken. I have exercised all the power which the Constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible, that the officer, who has incurred this grave responsibility, may have misunderstood his instructions, and exceeded the authority intended to be given him. I shall, therefore, order all the proceedings in this case, with my opinion, to be filed, and recorded in the Circuit Court of the United States for the District of Maryland, and direct the clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer, in fulfilment 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.

Lincoln's orders on habeas corpus (excerpts)

In hopes of reducing tensions in Maryland in April 1861, Lincoln resisted military advice to arrest secessionist Maryland legislators before they met, but on April 25 he instructed Winfield Scott, the commanding general of the Army, to watch the state proceedings carefully and to prepare to counteract any effort to arm Marylanders against federal troops. Two days later, as Northern troops traveled through Maryland to defend the nation's capital, Lincoln authorized the military to suspend the writ of habeas corpus along a transportation route deliberately chosen to avoid Baltimore and the secessionist mobs that had already attacked troops transiting through the city. General Cadwalader referred to this order in his explanation of why he would not appear with John Merryman before Chief Justice Taney.

The memorandum of May 17 responded to military arrests in Washington, D.C., and reflected Lincoln's recurring discomfort with the suspension of habeas, even as he defended the need for limiting civil liberties to secure the Union.

[Documents Source: *The Collected Works of Abraham Lincoln*, Roy P. Basler, et al., eds., 9 vols. (New Brunswick, NJ: Rutgers University Press, 1953), 4: 344, 347, 372.]

Abraham Lincoln to Winfield Scott, April 25, 1861

I therefore conclude that it is only left to the commanding General to watch, and await their action, which, if it shall be to arm their people against the United States, he is to adopt the most prompt, and efficient means to counteract, even, if necessary, to the bombardment of their cities—and in the extremest necessity, the suspension of the writ of habeas corpus.

Abraham Lincoln to Winfield Scott, April 27, 1861

You are engaged in repressing an insurrection against the laws of the United States. If at any point on or in the vicinity of the military line, which is now used between the City of Philadelphia and the City of Washington, via Perryville, Annapolis City, and Annapolis Junction, 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 where the resistance occurs, are authorized to suspend the writ.

Memorandum [May 17, 1861]

Unless the *necessity* for these arbitrary arrests is *manifest*, and *urgent*, I prefer they should cease.

Roger Taney to Franklin Pierce, June 12, 1861 (excerpt)

Taney's challenge to President Lincoln brought words of support from former President Franklin Pierce, a New Hampshire Democrat with political ties to the slaveholding states. The fragility of the Union in the spring of 1861 is evident in this letter in which the sitting Chief Justice of the United States freely acknowledges to a former President that he would prefer the secession of the Southern states to any military effort to preserve the United States.

[Document Source: "Some Papers of Franklin Pierce, 1852–1862," American Historical Review, 10 (January 1905): 368.]

Your cordial approbation of my decision in the case of the Habeas Corpus has given me sincere pleasure. In the present state of the public mind inflamed with passion and seeking to accomplish its object by force of arms, I was sensible of the grave responsibility which the case of John Merryman cast upon me. But my duty was plain—and that duty required me to meet the question directly and firmly, without evasion—whatever might be the consequences to myself.

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.

President Abraham Lincoln, message to Congress in special session, July 4, 1861 (excerpt)

On April 15, 1861, in response to the fall of Fort Sumter, Lincoln called for 75,000 troops to defend the Union and used his constitutional authority to convene a special session of the Congress, to meet on July 4. His message to the Congress, read to the members by clerks on July 5, explained the actions he had taken since the outbreak of war. In this excerpt, Lincoln answered the critics who had challenged the legality of his suspension of the writ of habeas corpus. Lincoln argued that the constitutional authority to suspend habeas in cases of rebellion or invasion could be executed by the President, since only the executive branch would be able to respond in an emergency if Congress was in recess. Even more important to Lincoln was his responsibility to preserve the Union, even if that duty required the temporary disregard of a single law protecting habeas.

Here and throughout the message to Congress, Lincoln's focus on his obligation to preserve the constitutional union of states cast the war as a struggle to ensure the

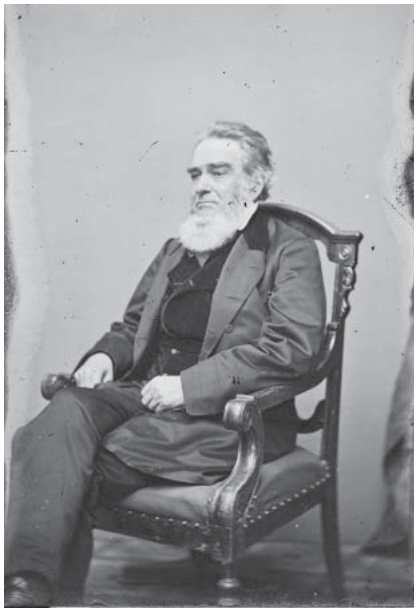
very idea of representative government. "It presents to the whole family of man, the question, whether a constitutional republic, or a democracy—a government of the people, by the same people—can, or cannot, maintain its territorial integrity, against its own domestic foes. It presents the question, whether discontented individuals, too few in members to control administration, according to organic law, in any case, can always, . . . break up their Government, and thus practically put an end to free government upon the earth."

[Document Source: *The Collected Works of Abraham Lincoln*, Roy P. Basler, et al., eds., 9 vols. (New Brunswick, NJ: Rutgers University Press, 1953), 4: 420–44.]

Soon after the first call for militia, it was considered a duty to authorize the Commanding General, in proper cases, according to his discretion, to suspend the privilege of the writ of habeas corpus; or, in other words, to arrest, and detain, without resort to the ordinary processes and forms of law, such individuals as he might deem dangerous to the public safety. This authority has purposely been exercised but very sparingly. Nevertheless, the legality and propriety of what has been done under it, are questioned; and the attention of the country has been called to the proposition that one who is sworn to "take care that the laws be faithfully executed," should not himself violate them. Of course some consideration was given to the questions of power, and propriety, before this matter was acted upon. The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution, 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? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it? But it was not believed that this question was presented. It was not believed that any law was violated. The provision of the Constitution 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," is equivalent to a provision—is a provision—that such privilege may be suspended when, in cases of rebellion, or invasion, the public safety *does* require it. It was decided that we have a case of rebellion, and that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made. Now it is insisted that Congress, and not the Executive, is vested with this power. But the Constitution itself, is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called

together; the very assembling of which might be prevented, as was intended in this case, by the rebellion.

Opinion of Attorney General Edward Bates, July 5, 1861 (excerpts)



Edward Bates
Courtesy of Prints and Photographs Division, Library of Congress [LC-B813-1741 B].

On May 30, 1861, three days after Taney offered his oral opinion in Ex parte Merryman, President Lincoln asked Attorney General Edward Bates to consult with former Attorney General Reverdy Johnson on the legal authority to suspend the writ of habeas corpus. On July 5, Bates reported to Lincoln on two questions related to habeas corpus: (1) Did the President have the authority in a time of domestic rebellion to arrest and detain individuals known to be working in support of the insurgents?; and (2) In the case of such arrests, did the President have the authority to refuse to obey a writ of habeas corpus? Like Lincoln, Bates rooted the authority to arrest and detain rebels in the President's sworn duty to preserve, protect, and defend the Constitution. That duty required the suppression of domestic insurrections, and only the President was able to determine how to suppress a rebellion and thereby see that the laws of the nation were executed. Bates believed the Constitution established a clear separation of powers that prevented the judiciary from in any way restricting the President's performance of the executive's constitutional duties. Unlike Taney, who described the executive branch as limited in its inherent powers, Bates thought the executive was of all the branches, "the most active, and the most constant in action," whereas the judiciary was "powerless to impose rules of action and of judgment upon the other departments."

Bates, of Missouri, had served as that state's first attorney general in 1821, and later served in the U.S. House of Representatives and the Missouri legislature. He was a candidate for the Republican presidential nomination in 1860, and like the other unsuccessful candidates, he received an invitation from the victorious Lincoln to serve in the cabinet. Bates served as attorney general until his retirement in December 1864.

[Document Source: *Official Opinions of the Attorneys General of the United States*. Ed., J. Hubley Ashton. vol. 10. Washington, D.C.: W.H. & O.H. Morrison, 1868.]

It is the plain duty of the President (and his peculiar duty, above and beyond all other departments of the government) to preserve the Constitution and execute the laws all over the nation; and it is plainly impossible for him to perform this duty without putting down rebellion, insurrection, and all unlawful combinations to resist the general government. The duty to suppress the insurrection being obvious and imperative, the two acts of Congress of 1795 and 1807 come to his aid, and furnish the physical force which he needs to suppress the insurrection and execute the laws. These two acts authorize the President to employ for that purpose, the militia, the army, and the navy.

The argument may be briefly stated, thus: It is the President's bounden duty to put down the insurrection, as (in the language of the act of 1795) the "combinations are too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals." And this duty is imposed on the President for the very reason that the courts and the marshals are too weak to perform it. . . .

If it be true, as I have assumed, that the President and the judiciary are co-ordinate departments of government, and the one not subordinate to the other, I do not understand how it can be legally possible for a judge to issue a command to the President to come before him *ad subjiciendum* – that is, to submit implicitly to his judgment, and, in case of disobedience, treat him as a criminal, in contempt of a superior authority, and punish him, as for a misdemeanor, by fine and imprisonment. . . . Besides, the whole subject-matter is political and not judicial. The insurrection itself is purely political. Its object is to destroy the political government of this nation and to establish another political government upon its ruins. And the President, as the chief civil magistrate of the nation, and the most active department in the government, is eminently and exclusively political in all his principal functions. As the political chief of the nation, the Constitution charges him with its preservation, protection, and defence, and requires him to take care that the laws be faithfully executed. . . . And the judiciary department has no political powers and claims none, and therefore (as well as for other reasons already assigned) no court or judge can take cognizance of the political acts of the President, or undertake to revise and reverse his political decisions.

Horace Binney, The Privilege of the Writ of Habeas Corpus Under the Constitution (excerpt)

Horace Binney's commentary on habeas corpus was published in several editions and became the subject of numerous other pamphlets published during the Civil War. Binney originally drafted the commentary in response to a request from Francis Lieber, a prominent university professor and strong supporter of Lincoln's efforts to

defend the Union. Lieber was disappointed with Edward Bates's arguments presented to the President and Congress in defense of the President's authority to suspend the privilege of the writ of habeas corpus. Lieber approached Binney in July 1861 and asked for a rebuttal of Taney's opinion in Ex parte Merryman. At 81, Horace Binney was one of the country's most respected lawyers. He had established a successful practice in Philadelphia in the early nineteenth century and prepared widely used reports on decisions of the Pennsylvania Supreme Court. He spent much of his career as a legal adviser to banks and corporations.

Binney suggested that the constitutional provision regarding habeas broke with earlier practice in Great Britain and America by prescribing the limited conditions under which the privilege of the writ could be suspended. The British practice led many to conclude that the power to suspend still rested alone with the legislature, but in Binney's view, no one, including Taney, had carefully examined this assumption. Since the Constitution only permitted suspension during a rebellion or invasion that threatened the public safety, the power to suspend necessarily fell to the branch of government that was best able to determine what was required to restore public safety. For Binney, that branch was the executive, which was also as he explains here the "safest depository of the power."

[Document Source: *Union Pamphlets of the Civil War, 1861–1865*. Ed., Frank Friedel. 2 vols. (Cambridge, MA.: Harvard University Press, 1967): 1: 231–32.]

Chief Justice Taney's opinion in Merryman's case is not an authority. This of course is said in the judicial sense. But it is not even an argument, in the full sense. He does not argue the question from the language of the clause, nor from the history of the clause, nor from the principles of the Constitution, except by an elaborate depreciation of the President's office, even to the extent of making him, as Commander-in-Chief of the Army called from the States into the service of the United States, no more than *an assistant to the Marshal's posse*: the deepest plunge of judicial rhetoric. The opinion, moreover, has a tone, not to say a ring, of disaffection to the President, and to the Northern and Western side of his house, which it is not comfortable to suppose in the person who fills the central seat of impersonal justice. But this may be the apprehensiveness of the reader.

The remarkable features of this opinion, is that for proof of the President's exclusion from the power, the Chief Justice dwells upon the President's brief term of office – his responsibility, by impeachment for malfeasance in office – the power of Congress to withhold appropriations for the Army, of which he is Commander-in-Chief, and to disband it if the President uses it for improper purposes – his limited power of appointment – his limited treaty-making power – his inability to appoint even inferior officers, unless he is authorized by Congress to do so. Chief Justice Taney has elaborately stated all this, without appearing to perceive, that these very considerations may have, and certainly ought to have, induced the Convention to

devolve upon the President, exclusively, the trust and power of suspending or not suspending the privilege in time of rebellion, as he should think the public safety required. The constitutional limitations of the office make the President the safe and the safest depository of such a discretion. There can be little danger of abuse from an office of such powers. It was the great power of a King of England, that was the operative motive with Parliament for taking the power of suspension from him; and they have left it in a body that is of equal power under the Constitution, and apparently on its way to greater.

Edward Ingersoll, Personal Liberty and Martial Law: A Review of Some Pamphlets of the Day (excerpt)

Edward Ingersoll was born to a prominent Philadelphia family, and he studied for the law after attending the University of Pennsylvania. In 1849, he published a treatise on the History and Law of the Writ of Habeas Corpus. Ingersoll sympathized with the Confederacy and was so critical of the Union war effort that he was arrested for a public speech, but then won release on a writ of habeas corpus. This pamphlet was a direct response to those of Horace Binney and other writers who defended the President's authority to suspend the privilege of the writ of habeas corpus. For Ingersoll, the assertion of executive authority to suspend the writ and impose martial law threatened the survival of constitutional government. He warned that "the question, whether the executive or the legislative department of the government, is to judge of 'the requirements of the public safety in case of rebellion or invasion,' amounts in its elements to the question of despotism or free representative government." Here he describes the long-established consensus that suspension was the prerogative of the legislature.

[Document Source: *Union Pamphlets of the Civil War, 1861–1865*. Ed., Frank Friedel. 2 vols. (Cambridge, MA.: Harvard University Press, 1967): 1: 281–82.]

The Federal Constitution of 1787 has, during more than seventy years, been the subject of very extended and elaborate consideration. This more or less in all and every part of it. Many books have been written in elucidation and explanation of its every clause and section. This particular Habeas Corpus clause has been over and again at the hands of judges, legislators and text writers, a frequent subject of thought and comment. It came up broadly for the consideration of the nation and its legislators, in the year 1807, when the question of action under its provisions was practically before the public. Thus during the seventy years of the existence of this fundamental law of our Government, this particular subject has been before a free, talking, writing, thinking people, and has been, as history shows, during that time freely and much discussed, written and talked about. It was always, and by everybody, considered a

matter of vast and vital importance; perhaps of vaster and more vital importance than any one other matter of our fundamental law. During this long period of time, and this frequent handling of the matter, there has been no whisper of difference of opinion or views upon this point. All have been agreed that the power to suspend the privilege of the writ of Habeas Corpus was a legislative power. It has been so asserted and assumed by authors, legislators and judges, and upon occasions innumerable. No dissent has ever been given, no doubt has ever been expressed. This popular right, as claimed, was supposed to have a great historical root. It has not been created by Americans in 1787; but had always, in their books of history, been claimed by them as of great ancestral foundation and descent.

Abraham Lincoln to Erastus Corning and others, June 12, 1863 (excerpts)

One of Lincoln's most celebrated writings was a response to the resolutions approved by a meeting of Democrats in Albany, New York. The meeting, led by Erastus Corning, the president of the New York Central Railroad, criticized Lincoln for his infringements on constitutional liberties in general, and the arrest and trial of former Representative Clement Vallandigham in particular. The President said that he composed the letter from scattered notes he kept in his desk drawer, and he vetted the letter with his cabinet before sending it to Corning and to the New York Tribune for publication. The letter was widely reprinted.

Deep in the midst of a war with no certain outcome, Lincoln emphasized the imperative of limiting certain civil liberties to protect the public safety and the federal military. Relying on the limited provision for the suspension of habeas, Lincoln asserted that in the face of a rebellion the Constitution permitted various governmental powers that would be impermissible in times of peace and domestic security. Here he also argued that supporters of the seceded states deliberately manipulated public support for civil liberties in an effort to subvert the defense of the Union.

The Albany Democrats were unmoved. Their reply to Lincoln referred to his "gigantic and monstrous heresy put forth in your plea for absolute power," and warned "that the American people will never acquiesce in this doctrine." Thanks to the efforts of the Loyal Publication Society and its free distribution of the letter, Lincoln's reply to Corning became one of his most widely read writings.

[Document Source: *The Collected Works of Abraham Lincoln*. Roy P. Basler, et al., eds., 9 vols. (New Brunswick, NJ: Rutgers University Press, 1953), 6: 260–69.]

It undoubtedly was a well pondered reliance with them [the Southern rebels] that in their own unrestricted effort to destroy Union, constitution, and law, all together, the government would, in great degree, be restrained by the same constitution and law, from arresting their progress. Their sympathizers pervaded all departments of

the government, and nearly all communities of the people. From this material, under cover of "Liberty of speech" "Liberty of the press" and "*Habeas corpus*" they hoped to keep on foot amongst us a most efficient corps of spies, informers, supplyers, and aiders and abettors of their cause in a thousand ways. They knew that in times such as they were inaugerating, by the constitution itself, the "Habeas corpus" might be suspended; but they also knew they had friends who would make a question as to *who* was to suspend it; meanwhile their spies and others might remain at large to help on their cause. Or if, as has happened, the executive should suspend the writ, without ruinous waste of time, instances of arresting innocent persons might occur, as are always likely to occur in such cases; and then a clamor could be raised in regard to this, which might be, at least, of some service to the insurgent cause. It needed no very keen perception to discover this part of the enemies' programme, so soon as by open hostilities their machinery was fairly put in motion. Yet, thoroughly imbued with a reverence for the guarranteed rights of individuals, I was slow to adopt the strong measures, which by degrees I have been forced to regard as being within the exceptions of the constitution, and as indispensable to the public Safety. . . .

If I be wrong on this question of constitutional power, my error lies in believing certain proceedings are constitutional when, in cases of rebellion or Invasion, the public Safety requires them, which would not be constitutional when, in absence of rebellion or invasion, the public Safety does not require them—in other words, that the constitution is not in it's application in all respects the same, in cases of Rebellion or invasion, involving the public Safety, as it is in times of profound peace and public security. The constitution itself makes the distinction; and I can no more be persuaded that the government can constitutionally take no strong measure in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown to not be good food for a well one. Nor am I able to appreciate the danger, apprehended by the meeting, that the American people will, by means of military arrests during the rebellion, lose the right of public discussion, the liberty of speech and the press, the law of evidence, trial by jury, and Habeas corpus, throughout the indefinite peaceful future which I trust lies before them, any more than I am able to believe that a man could contract so strong an appetite for emetics during temporary illness, as to persist in feeding upon them through the remainder of his healthful life.

Constitutional and statutory authorities

The debate on the suspension of the privilege of the writ of habeas corpus centered on the constitutional provision that failed to identify which branch or branches of government had the authority to suspend habeas during the specified crises. The Judiciary Act of 1789, which established the federal court system, identified which

judges could issue the writ and in what cases, but it made no reference to the authority to suspend.

At the opening of the special session of Congress in July 1861, Lincoln asked the members to consider what legislation they would consider necessary in light of his recent suspension of the privilege of the writ. Although Congress considered an authorization for the President to suspend the writ, it passed no legislation specifically addressing habeas until the closing day of the third and final session of that Congress. The Habeas Corpus Act of 1863 answered some of the concerns about the suspension of civil liberties by requiring the executive and the military to report all arrests to the U.S. circuit courts and providing for the release of prisoners not indicted in the courts by a certain date. The act also offered protection from legal penalties for the President and military or civilian officers who might be sued for infringing the civil liberties of persons arrested. John Merryman was one of the many arrested and denied the protections of habeas corpus who subsequently in state courts filed suit against the officers who detained them.

U.S. Constitution, Article I, Section 9

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.

Judiciary Act of 1789, Section 14

SEC. 14. *And be it further enacted,* That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.——*Provided,* That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

[Document Source: September 24, 1789, U.S. Statutes at Large 1 (1789): 73.]

Habeas Corpus Act of 1863

An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That, during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is autho-

rized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof. . . .

Sec. 2. *And be it further enacted,* That the Secretary of State and the Secretary of War be, and they are hereby, directed, as soon as may be practicable, to furnish to the judges of the circuit and district courts of the United States and of the District of Columbia a list of the names of all persons, citizens of states in which the administration of the laws has continued unimpaired in the said Federal courts, who are now, or may hereafter be, held as prisoners of the United States, by order or authority of the President of the United States or either of said Secretaries, in any fort, arsenal, or other place, as state or political prisoners, or otherwise than as prisoners of war; the said list to contain the names of all those who reside in the respective jurisdictions of said judges, or who may be deemed by the said Secretaries, or either of them, to have violated any law of the United States in any of said jurisdictions, and also the date of each arrest; . . .

And in all cases where a grand jury, having attended any of said courts having jurisdiction in the premises, after the passage of this act, and after the furnishing of said list, as aforesaid, has terminated its session without finding an indictment or presentment, or other proceeding against any such person, it shall be the duty of the judge of said court forthwith to make an order that any such prisoner desiring a discharge from said imprisonment be brought before him to be discharged; . . .

Provided, however, That no person shall be discharged by virtue of the provisions of this act until after he or she shall have taken an oath of allegiance to the Government of the United States, and to support the Constitution thereof; . . .

[Document Source: March 3, 1863, U.S. Statutes at Large 12 (1863): 755.]

Newspaper Coverage

New-York Daily Tribune, May 30, 1861. "Martial Law—Habeas Corpus" (excerpt)

Let us not be afraid of a military despotism. Of all the tyrannies that afflict mankind, that of the Judiciary is the most insidious, the most intolerable, the most dangerous. The times are perilous. Treason is abroad. Rebels are in arms against the State. A powerful force, commanded by learned and patriotic men, versed both in civil and martial law, is in the field to subdue them. We advise the three Judges of the Supreme Court who have not turned traitors to the Government, and the one or two whose position is not yet clearly defined, to attend to their appropriate duties in the Courts, and leave the task of overthrowing this formidable conspiracy against Liberty and Law to the military and naval forces of the United States.

We beg leave also to remind Mr. Chief Justice Taney that the only man who heartily defended him against the many severe attacks made upon him in the Senate Chamber, because of his decision in the Dred Scott case, was Judah P. Benjamin of Louisiana, now the Attorney-General of the so-called Confederate States. He is a traitor, deserving the scaffold for his crime. We trust that gratitude to his Senatorial champion will not lead the venerable jurist to exhibit too much sympathy with his fellow-citizens of Maryland who are plotting to betray that State into the hands of the Confederate rebels below the Potomac.

New York World, June 7, 1861. "Taney vs. Taney" (excerpt)

The elaborate opinion put on record and published to the world by Chief Justice Taney, in the Merryman case, was so obviously intended as a grave inculpation of the President of the United States, and is so utterly wanting in any expressions of sympathy, either with him in the grave emergency in which he is called to act or with the cause of the Union which he is striving to uphold, that, even if all the legal *dicta* the chief justice propounds were conceded to be correct, no patriotic mind could approve of the too evident design to weaken and undermine the confidence of the country in the President. In the midst of a rebellion which threatens the very existence of the government, its highest judicial officer volunteers the weight of his influence and of the influence of his high position in favor of the rebels. *Volunteers*, we say, because a strict interpretation of his duty required him to do no more than to award the writ when applied for. The attachment against Gen. Cadwalader for

contempt of court, and the publication of a document intended to prove that the President is striking at the very foundation of public liberty, can be regarded, under the circumstances, as nothing better than a gratuitous manifestation of hostility to the government and sympathy with the rebels.

Baltimore American and Commercial Advertiser, June 4, 1861. "The Habeas Corpus Case" (excerpt)

We regret that nothing has as yet been done towards the trial or release of Mr. Merryman. Of course it is impossible for those not in the secrets of the Government to know what reason there can be for postponing action in the case, but one thing is evident—that with the courts of the land in full operation, no delay would seem fair to the citizen which cuts him off from a speedy trial.

Besides all this, it is eminently proper that a Government which is fighting to maintain the integrity of the Constitution should interpose no arbitrary action to suspend or interfere with rights plainly guaranteed under it, if it would have the support and countenance of its citizens.

New York Weekly Journal of Commerce, June 6, 1861. "Habeas Corpus" (excerpt)

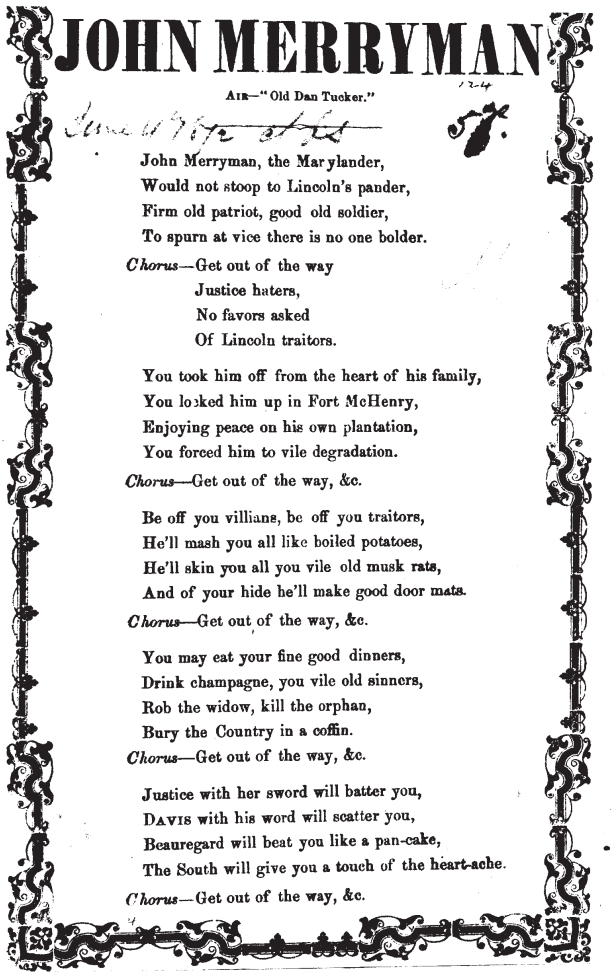
The importance of the writ was never more manifest than at this moment, when the executive Department of the Government of the United States, in the attempt to suppress a rebellion, is tempted to take upon itself the exercise of judicial functions. The grand object of the writ is, to prevent the exercise of judicial authority by injudicious men; to guarantee the citizen that no military force shall hold him in duress unless by due process of law.

The remark of one of the New York papers that the writ was "originally intended to secure the liberty of loyal men," and that "it would be a gross perversion of its powers to employ it as the protecting shield of rebels," is a specimen of the very tyranny which the writ of *habeas corpus* is designed to overcome. The writ was originally and always intended as a defence of the subject against the tyranny of the government; and nowhere is such defence more needed than under a government like our own. . . .

It is marvellous that within the past two weeks the leading Administration papers have been filled with endeavors to justify the most illegal and unconstitutional proceedings, forgetting that they thus more than justify the entire course of the Southern rebellion!

Popular Culture

Popular songs celebrated the Marylanders who resisted federal troops and organized support for the Southern cause. A song sheet chronicled the arrest and jailing of John Merryman and linked him with leaders of the new Confederate States. The gruesome lyrics of "Maryland, My Maryland" were written soon after the Baltimore riots of April 19, 1861, when Massachusetts troops traveling to Washington, D.C., fired on a taunting mob. Later in the Civil War, several versions of the song were published with Union lyrics, opening, "The Rebel horde is on thy shore." In 1939, the Maryland legislature declared the original version to be the official state song.



JOHN MERRYMAN

AIR—"Old Dan Tucker."

John Merryman, the Marylander,
Would not stoop to Lincoln's pander,
Firm old patriot, good old soldier,
To spurn at vice there is no one bolder.

Chorus—Get out of the way
Justice haters,
No favors asked
Of Lincoln traitors.

You took him off from the heart of his family,
You locked him up in Fort McHenry,
Enjoying peace on his own plantation,
You forced him to vile degradation.

Chorus—Get out of the way, &c.

Be off you villians, be off you traitors,
He'll mash you all like boiled potatoes,
He'll skin you all you vile old musk rats,
And of your hide he'll make good door mats.

Chorus—Get out of the way, &c.

You may eat your fine good dinners,
Drink champagne, you vile old sinners,
Rob the widow, kill the orphan,
Bury the Country in a coffin.

Chorus—Get out of the way, &c.

Justice with her sword will batter you,
DAVIS with his word will scatter you,
Beauregard will beat you like a pan-cake,
The South will give you a touch of the heart-ache.

Chorus—Get out of the way, &c.

"John Merryman" song sheet
Civil War Song Sheets, Series 2, Vol. 1, Rare Book and Special Collection Division, Library of Congress.

"Maryland, My Maryland"

The despot's heel is on thy shore,
Maryland!
His touch is at thy temple door,
Maryland!
Avenge the patriotic gore
That flecked the streets of Baltimore,
And be the battle queen of yore,
Maryland! My Maryland!
. . .
Thou wilt not cower in the dust,
Maryland!
Thy beaming sword shall never rust,
Maryland!
Remember Carroll's sacred trust,
Remember Howard's warlike thrust—
And all thy slumberers with the just,
Maryland! My Maryland!

Dear Mother! burst the tyrant's chain,
Maryland!
Virginia should not call in vain;
Maryland!
She meets her sisters on the plain—
"SIC SEMPER," 'tis the proud refrain,
That baffles minions back amain!
Maryland!
Arise, in majesty again,
Maryland! My Maryland!
. . .
Thou wilt not yield the vandal toll,
Maryland!
Thou wilt not crook to his control,
Maryland!
Better the fire upon the roll,
Better the blade, the shot, the bowl,
Than crucifixion of the soul,
Maryland! My Maryland!

I hear the distant thunder-hum,
Maryland!
The Old Line's bugle, fife and drum,
Maryland!
She is not dead, nor deaf, nor dumb—
Huzza! she spurns the Northern scum!
She breathes—she burns! she'll come! she'll come!
Maryland! My Maryland!

[Document Source: "Maryland, My Maryland," American Song Sheets, 850, Rare Book and Special Collections Division, Library of Congress.]

Lincoln as Don Quixote

Etching, 1861, by Adalbert John Volck (1828–1912), from *Great American Tragedians, Comedians, Clowns and Rope Dancers in Their Favorite Character*

Courtesy of National Portrait Gallery, Smithsonian Institution.

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