EX PARTE MERRYMAN: MYTH, HISTORY, AND SCHOLARSHIP

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I. Introduction

Ex parte Merryman[1] is iconic. It is, arguably, the first major American case testing the scope of lawful military authority during war time—not only during a war, but during a civil war. Not only were the civilian (judicial) authorities in conflict with the military authorities, but the Chief Justice of the United States clashed with the President—or, at

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[1] *Ex Parte* Merryman (*Merryman*), 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.); 4 (pt. 1) A COLLECTION OF IN CHAMBERS OPINIONS BY THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 1400–12 (Cynthia Rapp & Ross E. Davies comps., 2004) (reporting *Merryman*), http://tinyurl.com/judtw8q. According to most commentators, Taney filed his opinion in *Merryman* on June 1, 1861. *See, e.g.*, *id.* at 1400. *But see* ALLEN C. GUELZO, FATEFUL LIGHTNING: A NEW HISTORY OF THE CIVIL WAR AND RECONSTRUCTION 224 (2012) (dating the *Merryman* opinion as of June 3, 1861); EMILY HARTZ, FROM THE AMERICAN CIVIL WAR TO THE WAR ON TERROR: THREE MODELS OF EMERGENCY LAW IN THE UNITED STATES SUPREME COURT 16 (2013) (asserting that *Merryman* was decided in "April 1861"); *but cf.* JEAN H. BAKER, AFFAIRS OF PARTY: THE POLITICAL CULTURE OF NORTHERN DEMOCRATS IN THE MID-NINETEENTH CENTURY 158 (1998) (asserting that Merryman was arrested in "June 1861"); Christopher M. Curtis, *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court During the Civil War Era*, 64 ANNALS OF IOWA 76, 78 (2005) (book review) (assigning an 1862 date to *Merryman*). *But compare* Craig R. Smith & Stephanie J. Hurst, *Lincoln and Habeas Corpus*, *in* SILENCING THE OPPOSITION: HOW THE U.S. GOVERNMENT SUPPRESSED FREEDOM OF EXPRESSION DURING MAJOR CRISES 27, 34 (Craig R. Smith ed., 2d ed. 2011) (asserting that Taney's "filed opinion . . . responded" to the position put forward by Attorney General Bates in his July 5, 1861 letter memorandum), *with* Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74 (1861) (Bates, A.G.). Because it remains a matter of genuine doubt among sophisticated commentators what court decided *Merryman*, I have, throughout this Article, used "court" rather than "Court," as the latter is usually reserved for the Supreme Court of the United States.

least, that is the story as it is commonly told.[2] It is an 1861 case, but the stakes were large and, sadly, the issues remain relevant, if not eternal.[3]

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[2] *See, e.g.*, Shirakura v. Royall, 89 F. Supp. 713, 715 (D.D.C. 1950) (Fee, J.) ("It is assumed there is no desire in some future emergency to re-enact . . . the conflict between the Courts and the President in his military capacity, which marked this period of the War between the States . . . ." (citing *Merryman*)); JAMES M. MCPHERSON, THIS MIGHTY SCOURGE: PERSPECTIVES ON THE CIVIL WAR 213 (2007) (explaining that "the initial order to suspend the writ produced a confrontation between the president and the chief justice of the United States"); MARK E. NEELY JR., LINCOLN AND THE TRIUMPH OF THE NATION: CONSTITUTIONAL CONFLICT IN THE AMERICAN CIVIL WAR 64 (2011) ("The chief justice of the U.S. Supreme Court wrote the decision in May 1861, confronting the president of the United States less than two months after the firing on Fort Sumter."); ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 177 (2007) ("Justice Taney issued the writ of habeas corpus, forcing Lincoln to decide whether to obey the law or not."); CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 20 (expanded ed. 1976) ("At no other time in all the long history of the Court have a President and a Chief Justice . . . come into such direct conflict over an exercise of presidential power."); 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, 1856–1918, at 90 (1922) (asserting *Merryman* produced "direct conflict"); Arthur T. Downey, *The Conflict between the Chief Justice and the Chief Executive:* Ex parte Merryman, 31(3) J. SUP. CT. HIST. 262, 262 (Nov. 2006) (asserting "the Chief Executive and the Chief Justice confronted each other in a direct fashion"); Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 550 (1966) ("[I]n *Ex parte Merryman*, Chief Justice Taney had even gone out of his way to provoke the conflict with the President . . . ." (internal citation omitted)); Donald Grier Stephenson, Jr., *The Judicial Bookshelf*, 37(3) J. SUP. CT. HIST. 335, 343 (Nov. 2012) ("With the sixteenth President and fifth Chief Justice, however, there was at least one occasion [i.e., *Ex parte Merryman*] where the conflict may fruitfully be seen as plainly Taney versus Lincoln."); Jonathan W. White, *The Trial of Jefferson Davis and the Americanization of Treason Law*, *in* CONSTITUTIONALISM IN THE APPROACH AND AFTERMATH OF THE CIVIL WAR 113, 123 (Paul D. Moreno & Johnathan O'Neill eds., 2013) ("[Chief Justice] Taney's presence made *Ex parte Merryman* . . . a landmark decision."); *see also, e.g.*, BRUCE A. RAGSDALE, *EX PARTE MERRYMAN* AND DEBATES ON CIVIL LIBERTIES DURING THE CIVIL WAR 11 (Federal Judicial History Office 2007) ("[Taney's] opinion without a decision was more of a political challenge to the President than a constitutional standoff between two branches of government . . . ."), http://www.fjc.gov/history/docs/merryman.pdf. *But see* Bissonette v. Haig, 776 F.2d 1384, 1391 (8th Cir. 1985) (Arnold, J.) ("In *Merryman* . . . the result in the case would have been exactly the same had the custody been civilian, because Merryman was seized and imprisoned without any judicial process. It was the absence of that process, *rather than the military character of Merryman's custodian*, that caused the Chief Justice to take the view that the petitioner was unconstitutionally confined." (emphasis added)); Judge Andrew P. Napolitano, *A Legal History of National Security Law and Individual Rights in the United States: The Unconstitutional Expansion of Executive Power*, 8 N.Y.U. J.L. & LIBERTY 396, 409 (2014) (same).

[3] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting) (citing *Merryman*); Parisi v. Davidson, 405 U.S. 34, 47 (1972) (Douglas, J., concurring in the result) (same); Reid v. Covert, 354 U.S. 1, 31 n.55 (1957) (Black, J., judgment of the Court) (same); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 631 n.1 (1952)

However, the standard restatement of the facts, reasoning, and disposition of *Ex parte Merryman* appearing in many (if not most) law review articles is wrong. Moreover, these mistakes are not unique to academic lawyers; a fair number of judges, historians, and academics in allied fields make the same or very similar mistakes. These repeated errors are somewhat surprising because *Merryman* is, if not a leading case, only one short step removed from the received case law canon. To put it another way, what is frequently written about *Merryman* is a series of myths. This Article seeks to disentangle *Merryman*'s many myths from reality.

II. A Brief Statement of the Undisputed Facts

Following the 1860 election of Abraham Lincoln, the parade of state secession would begin. During April 1861, Fort Sumter had fallen.[4] Even Washington, the nation's capital, was threatened by Confederate armies, disloyal state militias, and irregular combatants, not to mention disloyal civilians, assassins, and spies.[5] To secure the capital, President

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(Douglas, J., concurring) (same); *id*. at 637 n.3 (Jackson, J., concurring) (same); LOUIS FISHER, CONG. RESEARCH SERV., ORDER CODE RL32458, MILITARY TRIBUNALS: HISTORICAL PATTERNS AND LESSONS CRS-22 to CRS-23 (2004) (same); Memorandum from E.F. Smith, Assistant Attorney General to W.P. Hobby, Governor of Texas, Op. No. 2238, Bk. 53, 1920 Tex. AG LEXIS 34, at *34 (1920) (same); PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 223 (4th ed. 2000) (same). Westlaw reports that *Merryman* is cited in: (i) 18 federal court opinions; (ii) 4 state court opinions; (iii) 397 domestic secondary sources; (iv) 53 appellate court filings (including many filings in recent War on Terror detainee litigation); (v) 9 trial court filings (including several filings in recent War on Terror detainee litigation); and (vi) 3 foreign secondary sources. *See* Keycite to *Ex parte Merryman* (last visited October 15, 2015). Likewise, Westlaw reports, also as of October 15, 2015, twelve legislative documents citing *Merryman* in the *U.S. Government Accountability Office Federal Legislative Histories* library.

[4] *See* BRIAN MCGINTY, THE BODY OF JOHN MERRYMAN: ABRAHAM LINCOLN AND THE SUSPENSION OF HABEAS CORPUS 34 (2011) (explaining that Union troops gave up the defense of Fort Sumter on April 13, 1861); *see also* JONATHAN W. WHITE, ABRAHAM LINCOLN AND TREASON IN THE CIVIL WAR: THE TRIALS OF JOHN MERRYMAN 10 (2011) (noting that Lincoln had "received word on April 14, 1861, that Fort Sumter had fallen into Confederate hands").

[5] *See* MCPHERSON, *supra* note 2, at 213 (noting that "Confederates and guerrillas were numerous" in border slave states); MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA 66 (2003) (asserting that "Confederate partisans . . . were common in the border states"); JOHN BRADLEY WINSLOW, THE STORY OF A GREAT COURT: BEING A SKETCH HISTORY OF THE SUPREME COURT OF WISCONSIN 189 (1912) (explaining that in March 1861, Lincoln

Lincoln directed Union troops to proceed to Washington through Maryland, a border state.[6] Mobs in Maryland had attacked Union troops;

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found Washington "filled with . . . disunionists and honeycombed with plots"); Sherrill Halbert, *The Suspension of the Writ of Habeas Corpus by President Lincoln*, 2 AM. J. LEGAL HIST. 95, 106 (1958) ("The real problem was to be found in the group of people who, by word and conduct, sought to undermine the war effort and destroy the morale of the people. They were the fifth columnists of their day."); Dennis J. Hutchinson, *Lincoln the "Dictator,"* 55 S.D. L. REV. 284, 290 (2010) ("Lincoln's first priority was Washington, D.C. Sandwiched between slave states, the District was vulnerable and honeycombed with disloyalists employed by the government, spies, and fellow travelers."); Stephen T. Schroth et al., *Lincoln, Abraham (Administration of), in* 3 THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA: AN ENCYCLOPEDIA 1009, 1011 (Wilbur R. Miller ed., 2012) (noting threat of "independent militias hostile to the Union cause" at the time Lincoln suspended the writ of habeas corpus); *see also* J.G. HOLLAND, HOLLAND'S LIFE OF ABRAHAM LINCOLN (Bison Books 1998) (Springfield, Mass., Gurdon Bill 1866) (noting that circa 1863, "[n]othing was more notorious than that the country abounded with spies and informers"); *cf.* JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM 287 (1988) ("Union officials . . . continued to worry about underground confederate activities in Baltimore."). *But cf. id.* at 287 (suggesting that Merryman's arrest was an "overreact[ion]" by U.S. Army officers).

[6] *See* MCGINTY, *supra* note 4, at 39 ("Recognizing the [capital] city's vulnerability, Lincoln wanted to summon volunteers from the state militias to report to the capital."); *id.* at 48–49 (Lincoln explained that "his sole purpose [for ordering troops through Maryland] was to protect Washington, not to attack Maryland or any of the Southern states."); *id.* at 83 (same); *see also* WHITE, *supra* note 4, at 10 (noting that Union reinforcements could only reach the capital through Maryland); *id.* at 17–18 (noting that Lincoln told Massachusetts troops which had arrived through Maryland that they had saved the capital from imminent rebel invasion). *Compare* Bart Talbert, *Book Review*, 75(1) HIST. 176, 177 (Spring 2013) (reviewing JONATHAN W. WHITE, ABRAHAM LINCOLN AND TREASON IN THE CIVIL WAR (2011)) ("[Merryman] was acting under orders of the then-state authorities, who wished to prevent further clashes between *Maryland's pro-Southern majority* and Northern militia units heading to Washington." (emphasis added)), *with* MCPHERSON, BATTLE CRY, *supra* note 5, at 287 ("Unionist candidates won all six seats in a special [Maryland] congressional election on June 13 [1861]. By that time the state had also organized four Union regiments. Marylanders who wanted to fight for the Confederacy had to depart for Virginia to organize Maryland regiments on Confederate soil."), *with* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 18 (1998) ("Maryland teetered both geographically and ideologically between North and South."), *id.* at 20 (describing a "delicate balance of opinion" in Maryland), *id.* at 24 (explaining that "Governor [Hicks] urged the legislature to preserve its 'neutral position' between the North and the South"), *and* JOHN E. SEMONCHE, KEEPING THE FAITH: A CULTURAL HISTORY OF THE U.S. SUPREME COURT 103 (1998) (characterizing Maryland, at the time of *Merryman*, as "bitterly divided"). *Compare* CAROL BERKIN ET AL., MAKING AMERICA: A HISTORY OF THE UNITED STATES 333–34 (7th ed. 2008) ("The [Maryland] state legislature . . . met [in 1861] and voted to remain neutral."), *and* MCPHERSON, BATTLE CRY, *supra* note 5, at 287–89 (explaining that Lincoln did not order the arrest of disunionist members when the Maryland legislature met in May 1861 and voted for neutrality, but "Lincoln decided to take drastic action" in September 1861—i.e., several months after *Merryman* had been adjudicated—and at this time thirty-one

bridges and railway lines had been destroyed; telegraph wires to the capital had been cut.[7] Why these attacks?—why all this destruction of infrastructure? No doubt different actors had different motives. But it seems likely that some (perhaps many) sought to slow down or prevent the arrival of loyal troops to secure Washington and, perhaps, to secure federal military installations in Maryland, such as Fort McHenry in Baltimore. (Certainly these were the natural, expected, and probable consequences of the attacks, even if these results were not specifically intended by the actors involved.) Lincoln responded. On April 27, 1861, in order to secure the movement of Union troops through Maryland, President Lincoln issued an order delegating authority to General Winfield Scott to suspend habeas corpus.[8] Lincoln's order cited no statutory basis for his decision.[9]

John Merryman was from a long-established land-owning politically-connected Maryland family, as was his wife.[10] At the outbreak of the Civil War, he had already been elected to public office as a member and president of the Baltimore County Commission.[11] Rightly or not,

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secessionist members were arrested by the military), *with* MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 14–18 (1991) (discussing conflicting historical claims in regard to alleged secessionist members of the Maryland legislature, and explaining that the U.S. military precluded some of those members from attending the state legislature and that the military arrested other members).

[7] *See* RAGSDALE, *supra* note 2, at 1; *see also id.* at 8, 27 (discussing Merryman's alleged participation in the destruction of railroad bridges and telegraph wires).

[8] *See* 6 COMPLETE WORKS OF ABRAHAM LINCOLN, 1860–1861, at 258, 258 (John G. Nicolay & John Hay eds., N.Y., The Lamb Publishing Co. new ed. 1894) (reproducing Lincoln's order); *infra* text accompanying note 116 (same); *see also* MCGINTY, *supra* note 4, at 57, 82–85; WHITE, *supra* note 4, at 22–23.

[9] *See* RAGSDALE, *supra* note 2, at 36; David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 71 n.48 (2006) ("President Lincoln ordered suspension of the writ during the Civil War . . . and prior to legislative authorization of suspension . . . .").

[10] *See* Francis B. Culver, *Merryman Family*, 10(2) MD. HIST. MAG. 176, 177 (June 1915) (noting that there were records of Merrymans in the colonies as early as 1635); Francis B. Culver, *Merryman Family*, 10(3) MD. HIST. MAG. 286, 297 (Sept. 1915) (noting that John Merryman's farm, Hayfields, which was some 560 acres, was originally owned by Colonel Nicholas Merryman Bosley, who was related both to John Merryman and John Merryman's wife); *see also* MCGINTY, *supra* note 4, at 56 (characterizing Merryman as a "scion of one of the state's oldest and most distinguished families"); *id.* (noting that Merryman's grandfather was "president of the second branch of the first [Baltimore] city council"); *id.* at 57 (characterizing Merryman's wife as an "heir to another of Maryland's old landowning families"); WHITE, *supra* note 4, at 25–26.

[11] *See* MCGINTY, *supra* note 4, at 59–60 (describing Merryman's election to the "Baltimore County Commission" and Merryman's failed 1855 campaign for a state legislative seat); WHITE, *supra* note 4, at 116 (noting that Merryman had been President

military authorities suspected John Merryman of being an officer of a pro-secession militia group which allegedly had conspired to destroy (and did destroy) bridges and railway lines.[12] As a result, at around 2:00

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of the "Baltimore County Board of Commissioners" in the "1850s"). *But cf.* 5 CARL B. SWISHER, OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836–64, at 845 (1974) (describing Merryman as a "member of the state legislature" at the time of or prior to his arrest). I have reservations as to Swisher's claim here, but admittedly, some contemporary commentators have adopted Swisher's position. *See, e.g.*, HAROLD J. KRENT, PRESIDENTIAL POWERS 146 (2005) (describing Merryman as a "state legislator" at the time of his arrest); LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008, at 118–19 (2009) (same); REHNQUIST, *supra* note 6, at 26 (same); JAMES F. SIMON, LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT'S WAR POWERS 186 (2006) (asserting that Merryman was a "state legislator," and stating that Merryman's home was Cockneysville, Maryland, when it was Cockeysville, Maryland); Adam R. Pearlman, *Meaningful Review and Process Due: How Guantanamo Detention is Changing the Battlefield*, 6 HARV. NAT'L SEC. J. 255, 264 (2015) (describing Merryman as "a Maryland state legislator"); Paul Finkelman, *Civil Liberties and Civil War: The Great Emancipator as Civil Libertarian*, 91 MICH. L. REV. 1353, 1359 & n.48 (1993) (reviewing MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES (1991)) ("Merryman was a member of the Maryland legislature . . . ." (citing SWISHER, *supra* at 844–45)); *cf.* James P. George, *Jurisdictional Implications in the Reduced Funding of Lower Federal Courts*, 25 REV. LITIG. 1, 64 (2006) (asserting that Merryman was a "Congressman"). Swisher also reports that Merryman's father "and Chief Justice Taney had attended Dickinson College in the *same period*." SWISHER, *supra* at 845 (emphasis added). Notwithstanding Swisher's offering no sources in support of his claim, other commentators have repeated and expanded upon it. *See, e.g.*, PAUL BREST ET AL., *supra* note 3, at 223 ("[Merryman's] father and Chief Justice Taney had attended Dickinson College *together*." (emphasis added) (citing SWISHER, *supra*)); Michael Stokes Paulsen, *The* Merryman *Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 90 n.27 (1993) ("Swisher notes that Merryman's father and Taney attended Dickinson College *together*." (emphasis added) (citing SWISHER, *supra* at 845)); John Yoo, *Lincoln and Habeas: of* Merryman *and* Milligan *and* McCardle, 12 CHAP. L. REV. 505, 513 (2009) (same). Interestingly, Dickinson College has no record of Merryman's father, Nicholas Rogers Merryman, attending. *See* WHITE, *supra* note 4, at 130 n.1. In a contemporaneous report, *The New York Times* asserted that Merryman was Taney's "neighbour" and "personal friend." *Taney and Cadwal[]ader*, N.Y. TIMES, May 29, 1861, 4–5, http://www.nytimes.com/1861/05/29/news/taney-and-cadwallader.html.

[12] *See* MCGINTY, *supra* note 4, at 62–63, 67–68, 169, 172; Jonathan W. White ed., Research Notes & Maryland Miscellany, *A New Word from Roger B. Taney on the Suspension of Habeas Corpus*, 107(3) MD. HIST. MAG. 359, 359 (Fall 2012); *see also* Chief Justice William H. Rehnquist, *Civil Liberty and the Civil War: The Indianapolis Treason Trials*, 72 IND. L.J. 927, 928–29 (1997) ("Merryman [was] suspected [by the authorities] of being a major actor in the dynamiting [?] of the railroad bridges."); *cf.* Eric M. Freedman, *Book Review*, 99(3) J. AM. HIST. 929, 929 (Dec. 2012) (reviewing BRIAN MCGINTY, THE BODY OF JOHN MERRYMAN (2011), and JONATHAN W. WHITE, ABRAHAM LINCOLN AND TREASON IN THE CIVIL WAR (2011)) ("As Union troops rushed to Washington, D.C., in April 1861, many Southern sympathizers violently opposed their passage."). According to some, Merryman destroyed the bridges under orders from

A.M., on Saturday, May 25, 1861, federal military authorities arrested Merryman, and they subsequently detained him at Fort McHenry.[13] The next day—Sunday, May 26, 1861—Merryman's Maryland counsel, George M. Gill and George H. Williams, presented Merryman's habeas

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Governor Hicks. *See* HAROLD H. BRUFF, UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION 134 (2015) ("Both the governor of Maryland and the mayor of Baltimore had authorized burning bridges to keep federal troops out."); 4 STATES AT WAR: A REFERENCE GUIDE FOR DELAWARE, MARYLAND, AND NEW JERSEY 499 n.320 (Richard F. Miller ed., 2015) ("In this capacity [as a state militiaman], under orders (depending on the version, from [Governor] Hicks or someone else), Merryman helped burn railroad bridges . . . ."); WHITE, *supra* note 4, at 101 ("Merryman had acted under the orders of Governor Hicks . . . ."); *see also* George W. Liebmann, *The Mayor and the President: A Re-examination of* Merryman, 25(2) SUPREME COURT HIST. SOC. QUARTERLY 10, 10 (2013) (asserting that Merryman acted under instructions from the mayor of Baltimore, with Governor Hicks' acquiescence). *But see* MCGINTY, *supra* note 4, at 156 (explaining that "Governor Hicks strenuously denied that he had ever given or even approved such orders [approving of the destruction of bridges and telegraph wires]"); *but cf.* 5 SWISHER, *supra* note 11, at 852 (noting that Merryman acted absent any written orders from Governor Hicks). Was Merryman a rebel? *See* CHRIS EDELSON, EMERGENCY PRESIDENTIAL POWER: FROM THE DRAFTING OF THE CONSTITUTION TO THE WAR ON TERROR 34 (2013) (claiming that Merryman was the "leader of a militia company training to join the rebellion"); CARL BRENT SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 112 (1930) (characterizing Merryman as a "Southern agitator"); Steven G. Calabresi, *The Right to buy Health Insurance Across State Lines: Crony Capitalism and the Supreme Court*, 81 U. CIN. L. REV. 1447, 1477 (2013) (characterizing Merryman as a "Confederate terrorist"); William D. Pederson, *Abraham Lincoln*, *in* THE PRESIDENTS AND THE CONSTITUTION: A LIVING HISTORY 211, 220 (Ken Gormley ed., 2016) (asserting that "Merryman served in a Confederate militia"); William Schuber & Ronald E. Calissi, *National Security & Liberty: A Delicate Balance*, 15(4) J. COUNTERTERRORISM & HOMELAND SECURITY INT'L 22 (Winter 2009) (characterizing Merryman as "serving in the Confederate Cavalry"); Geoffrey R. Stone, *Civil Liberties in Wartime*, 28(3) J. SUP. CT. HIST. 215, 220 (Nov. 2003) (characterizing Merryman as a "Confederate cavalryman"). Calabresi's, Stone's, and others' characterizing Merryman as a "Confederate" is not supported. Was Merryman a civilian? *Compare Merryman*, 17 F. Cas. 144, 147 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.) (explaining that "[a] military officer has no right to arrest and detain a person [such as Merryman] *not subject to the rules and articles of war*, for an offence against the laws of the United States, except in aid of the judicial authority, and subject to its control" (emphasis added)), HARTZ, *supra* note 1, at 6 (characterizing Merryman as a "civilian"), *and* Lewis S. Ringel, *Freedom Challenged: Due Process of Law During War*, *in* 4 WHITE HOUSE STUDIES COMPENDIUM 207, 210 (Robert W. Watson ed., 2007) (same), *with* 5 SWISHER, *supra* note 11, at 852 ("[T]he arrest of Merryman was not an instance of prosecution of a harmless civilian. He was a lieutenant in the Maryland [state] militia."), *and* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667, 726 (2003) (characterizing Merryman as "an officer in the Maryland militia").

[13] *See* WHITE, *supra* note 4, at 29 (noting that the Army seized Merryman at 2:00 A.M. on May 25, 1861); Downey, *supra* note 2, at 262–63 & n.3 (explaining the calendar dates of the key events).

corpus petition to Chief Justice Roger Brooke Taney at Taney's Washington home.[14] Later that day, that is, Sunday, May 26, 1861, the Chief Justice issued an ex parte order directing General George Cadwalader, the Army officer having overall command of the military district including the Fort: (i) to appear before Taney the next day—on Monday, May 27, 1861 at 11:00 A.M.—in a court room in Baltimore; (ii) to explain the legal basis for Merryman's detention by military authorities; and (iii) to "produce"[15] the body of John Merryman at that hearing.[16]

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[14] *See Merryman*, 17 F. Cas. at 145 ("On the 26th May 1861, the following sworn petition was presented to the [C]hief [J]ustice of the United States . . . ."); REHNQUIST, *supra* note 6, at 18 (stating that "[t]he petition was presented to Chief Justice Taney on Sunday"); Downey, *supra* note 2, at 262 (explaining that Merryman's petition was presented to "Taney at his home in Washington"); *cf.* James F. Simon, *Lincoln and Chief Justice Taney*, 35(3) J. SUP. CT. HIST. 225, 236 (Nov. 2010) (noting that the "petition was *delivered* to Chief Justice Taney on . . . the same day that Merryman was imprisoned" (emphasis added)). *But see* MAROUF HASIAN JR., IN THE NAME OF NECESSITY: MILITARY TRIBUNALS AND THE LOSS OF AMERICAN CIVIL LIBERTIES 91 (2005) (Merryman "had the good fortune of applying for [habeas corpus] at a time when Chief Justice Roger Taney was riding circuit in the area."); MARK C. MILLER, THE VIEW OF THE COURTS FROM THE HILL: INTERACTIONS BETWEEN CONGRESS AND THE FEDERAL JUDICIARY 57 (2000) ("Merryman filed for a writ of habeas corpus with the U.S. Court of Appeals in Maryland . . . ."); JUDGE ANDREW P. NAPOLITANO, SUICIDE PACT 44 (2014) ("Merryman's attorney sought a writ of habeas corpus from the federal court in Baltimore."); 5 SWISHER, *supra* note 11, at 845 ("[T]he petition was presented for Taney's signature in Baltimore."); Jeffrey D. Jackson, *The Power to Suspend Habeas Corpus*, 34 U. BALT. L. REV. 11, 17 (2004) ("Merryman's attorney then went to Washington, where he presented a petition for [a] writ of habeas corpus to Chief Justice Taney in chambers *at the Supreme Court*." (emphasis added)); *but cf.* Senator Ted Cruz, *The Obama Administration's Unprecedented Lawlessness*, 38 HARV. J.L. & PUB. POL'Y 63, 80 (2015) (asserting that Taney was "sitting by designation"); Stone, *supra* note 12, at 220 ("The judge *assigned* to hear Merryman's petition was Chief Justice Roger B. Taney." (emphasis added)).

[15] *Merryman*, 17 F. Cas. at 146 (noting that the writ was "[i]ssued 26th May 1861" and it was served "on the same day on which it issued"); *id.* at 145 (illustrating that the petition seeking habeas used "produce" language); *id.* at 146 (reporting Taney's ex parte order as directing Cadwalader to "have with you the body" of John Merryman "at eleven o'clock in the morning" on May 27, 1861); *id*. (quoting Taney, at the May 27, 1861 hearing, as stating "General Cadwalader was commanded to produce the body of Mr. Merryman before me"); *id*. (using "produce the body" language in the attachment order which went unserved on Cadwalader). To be clear, Taney's initial writ of habeas corpus to produce Merryman was issued and successfully served on Cadwalader on May 26, 1861, but that document should not be confused with the subsequent attachment order for contempt which went unserved on May 28, 1861. *But see* RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 120 n.55 (enlarged ed. 1974) ("The commanding officer rejected service of a writ of habeas corpus and stated that the President had authorized him to suspend the writ at his discretion."); EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 37 (1924) (explaining that, in *Merryman*, "Chief Justice

Cadwalader did not attend the May 27, 1861 hearing; instead, he sent Colonel R. M. Lee.[17] At the hearing, Colonel Lee presented the court with a signed response from Cadwalader laying out the General's defense, for example, arguing that habeas corpus had been lawfully suspended under presidential authority.[18] Cadwalader's response also

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Taney . . . vainly attempt[ed] to serve the writ"); ARTHUR H. GARRISON, SUPREME COURT JURISPRUDENCE IN TIMES OF NATIONAL CRISIS, TERRORISM, AND WAR: A HISTORICAL PERSPECTIVE 51 (2011) (conflating the two judicial orders, asserting that the May 26, 1861 order was not successfully served, and asserting that Merryman was housed in "Fort Henry"); THE LIBRARY OF CONGRESS CIVIL WAR DESK REFERENCE 144 (Margaret E. Wagner et al. eds., 2002) (explaining that Taney "issue[d] a writ of habeas corpus on May 27 for Merryman's release"); ROSS, *supra* note 5, at 67 (dating the ex parte order to produce Merryman as on May 28, 1861); James A. Dueholm, *Lincoln's Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis*, 29(2) J. ABRAHAM LINCOLN ASS'N 47, 49 (Summer 2008) ("Following a hearing in the matter, Taney ordered delivery of a writ of habeas corpus to General George Cadwal[]ader directing him to appear before Taney on May 28 with Merryman in tow."). To be clear, unlike Taney's initial May 26, 1861 ex parte order which directed Cadwalader to produce Merryman at the May 27 hearing, Taney's second *Merryman* order—issued on May 27, but which went unserved on the morning of May 28—directed the United States Marshal only to seize *General Cadwalader*, not *John Merryman*. *See infra* notes 74–75. *But see* 1 G. EDWARD WHITE, LAW IN AMERICAN HISTORY: FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR 444 (2012) ("He issued a writ of attachment requiring Cadwalader, with Merryman, to be in court the next day."); Louis Fisher, *Invoking Inherent Powers: A Primer*, 37 PRESIDENTIAL STUD. Q. 1, 3 (2007) ("When Taney attempted to serve a paper to free Merryman, prison officials refused to let Taney's marshal carry out his duty."); Craig S. Lerner, *Saving the Constitution: Lincoln, Secession, and the Price of Union*, 102 MICH. L. REV. 1263, 1288 (2004) (reviewing DANIEL FARBER, LINCOLN'S CONSTITUTION (2003)) ("The following day [i.e., on May 26, 1861], and again on May 28, Chief Justice Taney issued writs ordering General George Cadwalader at Fort McHenry to release Merryman. Taney directed that both writs be sent to Lincoln, in order that he might 'fulfill 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 refused to comply with Taney's orders." (footnote omitted)).

[16] *See supra* note 15 (collecting authority).

[17] *See* MCGINTY, *supra* note 4, at 11 (explaining that Cadwalader "had sent his aide, Colonel R. M. Lee"). *Compare The Case of Merriman* [sic], N.Y. TIMES, May 28, 1861 ("Chief Justice—Have you brought with you the body of JOHN MERRYMAN? Col. Lee—I have no instructions except to deliver this response to the Court. Chief Justice—The commanding officer declines to obey the writ."), http://www.nytimes.com/1861/05/28/news/the-case-of-merriman.html, *with Affairs in Baltimore*, N.Y. TIMES, May 29, 1861 (failing to mention Colonel Lee, and, instead, reporting that "Major Belger" attended the hearing on May 27, 1861 for Cadwalader, and also reporting that Major Belger read Cadwalader's response to the court), http://www.nytimes.com/1861/05/29/news/affairs-balimore-habeas-corpus-cask-return-sheriff-action-chief-justice-taney.html.

[18] *See Merryman*, 17 F. Cas. at 146 (reporting Cadwalader's response and defense, in which he asserted that he had been "duly authorized by the [P]resident of the United States, in such cases, to suspend the writ of habeas corpus, for the public safety"); *27 May*

sought a postponement to seek additional direction from the President if the court should determine that Cadwalader's defense was insufficient.[19] Furthermore, Cadwalader did not produce Merryman at the hearing as he was instructed by Taney's ex parte order.[20]

Because Cadwalader failed to produce Merryman, Taney directed the United States Marshal to serve an attachment for contempt on Cadwalader.[21] The Marshal sought to serve the attachment on the morning of Tuesday, May 28, 1861 at Fort McHenry, but the Marshal was not admitted.[22] *Many at the time, including perhaps Chief Justice Taney and others since, believed, and continue to believe, that this was a Cromwellian civilian-military confrontation.*[23] In other words, the

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1861, Letter from General Cadwalader to U.S. Supreme Court Chief Justice Roger B. Taney, ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES): JOHN MERRYMAN (1824–1881) (last visited Apr. 19, 2016), http://tinyurl.com/jxqem75 (same).

[19] *See Merryman*, 17 F. Cas. at 146 ("[General Cadwalader], therefore, respectfully requests that you will postpone further action upon this case, until he can receive instructions from the [P]resident of the United States, when you shall hear further from him.").

[20] *See id*. ("General Cadwalader was commanded to produce the body of Mr. Merryman before me [i.e., Chief Justice Taney] this morning, that the case might be heard, and the petitioner be either remanded to custody, or set at liberty, if held on insufficient grounds; but he has acted in disobedience to the writ . . . ."); *see also supra* note 17.

[21] *See Merryman*, 17 F. Cas. at 146 ("[Cadwalader] has acted in disobedience to the writ, and I therefore direct that an attachment be at once issued against him, returnable before me here, at twelve o'clock tomorrow [i.e., May 28, 1861].").

[22] *See id*. at 147 ("I [Washington Bonifant, U.S. Marshal for Maryland], proceeded, on this 28th day of May 1861, to Fort McHenry, for the purpose of serving the said writ. I sent in my name at the outer gate; the messenger returned with the reply, 'that there was no answer to my card,' and therefore, I could not serve the writ, as I was commanded. I was not permitted to enter the gate."). The reported case states that Bonifant told the court that he went to the Fort to serve the writ. However, in a colloquy with Taney reported in a contemporaneous newspaper account, Bonifant specified that it was his deputy, Mr. Vance, who went to the Fort to serve the writ. *See The Habeas Corpus Case: Gen. Cadwal[]ader Refuses To Allow The Process Of The Court To Be Served Upon Him*, THE SOUTH, (Evening) May 28, 1861, at 2, http://tinyurl.com/j7ob5n4. It is interesting to note that this newspaper's lead article on the front page in the left-most column was by Congressman Clement Vallandigham. *Id*. at 1. *See generally Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1863) (Wayne, J.). It might be asked, given the facts, as announced by Bonifant and Vance, whether this was a serious attempt to serve the attachment on Cadwalader. *See, e.g*., Charles Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253, 1280 (1942) ("A token attempt thereupon to attach General Cadwalader for contempt came to naught, of course, at the gate to the fort.").

[23] *See Merryman*, 17 F. Cas. at 147 ("[T]he chief justice said, that the marshal had the power to summon the posse comitatus to aid him in seizing and bringing before the court, the party [General Cadwalader] named in the attachment, who would, when so brought

military authorities prevailed not as a matter of established legal right as determined by the courts, but because the Army (which was acting under the direction of the President) had greater fire power than the United States Marshal (who was serving the attachment order under instructions from the Chief Justice).[24] As a result, the Marshal left the Fort.[25] He reached the courthouse prior to noon on May 28, 1861, and he came without Cadwalader or Merryman.[26] Chief Justice Taney delivered an oral opinion later that day, which ended live proceedings in court.[27] Subsequently, on Saturday, June 1, 1861, he filed an extensive written

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in, be liable to punishment by fine and imprisonment; but where, as in this case, the power [of the General and the Army in] refusing obedience was so notoriously superior to any the marshal could command, he held that officer excused from doing anything more than he had done."); *supra* note 2 (collecting post-*Merryman* authority). Although not appearing in Taney's *Merryman* opinion as reported in *Federal Cases*, Taney is reported elsewhere to have stated: "it is apparent [the Marshal] will be resisted in the discharge of that duty [involving the *posse comitatus*] by a force notoriously superior to the *posse*, and, this being the case, such a proceeding can result in no good, and is useless." MCGINTY, *supra* note 4, at 30 & n.46. In other words, based on nothing more than the Marshal's inability to get past the gate of a military base during a time of war, Taney took "judicial notice" that the military authorities would resist the civil authority. Professor (and New Hampshire Chief Justice) Joel Parker, *Habeas Corpus and Martial Law*, 93 N. AM. REV. 471, 516 (Oct. 1861), http://tinyurl.com/jewcacq, https://catalog.hathitrust.org/Record/100768188.

[24] *See supra* note 23 (collecting authority).

[25] *See* WHITE, *supra* note 4, at 31 ("[The U.S. Marshal] was denied admittance to the fort, so he returned to the court . . . .").

[26] *See Merryman*, 17 F. Cas. at 147 (noting that *Merryman* proceedings continued "[a]t twelve o'clock, on the 28th May 1861, [when] the [C]hief [J]ustice again took his seat on the bench, and called for the marshal's return to the writ of attachment"); *supra* note 25. Bonifant, the U.S. Marshal, and his deputy, Vance, attended these May 28, 1861 proceedings. *See The Habeas Corpus Case*, *supra* note 22, at 2. The attachment (as far as disclosed by the record) never reached Cadwalader, and Cadwalader was not in attendance on May 28, 1861. Merryman remained incarcerated until July 1861. *See* RAGSDALE, *supra* note 2, at 27.

[27] *See Merryman*, 17 F. Cas. at 147 ("[The Chief Justice] concluded [May 28, 1861 proceedings] by saying, that he should cause his opinion, when filed, and all the proceedings, to be laid before the [P]resident . . . ."); RAGSDALE, *supra* note 2, at 12; *The Habeas Corpus Case of John Merryman, Esq.*, THE SUN, (Morning) May 29, 1861, at 1 ("Here the Chief Justice concluded his remarks, and the case, as far as the judicial process is concerned, is closed."), http://tinyurl.com/zlkwsoe. *But see* WHITE, *supra* note 4, at 31 (asserting that Taney delivered his June 1, 1861 opinion to a "crowded" courtroom). I believe Professor White is mistaken here. But even if Taney read his June 1, 1861 opinion out loud to some audience—even an audience in a Baltimore courtroom—there is no reason to believe that this was a *Merryman* judicial proceeding or that any of the parties or their counsel were in attendance. John Merryman, of course, remained in his Fort McHenry prison, and General Cadwalader's precise location on this date is a mystery.

opinion.[28] The written opinion was filed with the United States Circuit Court for the District of Maryland.[29]

In his opinion, Taney expressed the view that the President had no unilateral power to suspend habeas corpus.[30] In other words, under the Constitution, only Congress can suspend habeas corpus.[31] He also took the position that: "A military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offence against the laws of the United States, except in aid of the judicial authority, and subject to its control."[32] For those reasons, he concluded: "It is, therefore, very clear that John Merryman, the petitioner, is entitled to be set at liberty and discharged immediately from imprisonment."[33]

Noting that his attachment order "ha[d] been resisted by a force too strong for me to overcome,"[34] Taney's final judicial order did not command Cadwalader or anyone else to release Merryman.[35] Instead, Taney's final order meekly directed the Clerk of the Circuit Court for the District of Maryland merely to transmit a copy of the proceedings and his opinion to President Lincoln, where it would "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

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[28] *See* RAGSDALE, *supra* note 2, at 12; *1 June 1861, Opinion of Justice Taney*, ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES): JOHN MERRYMAN (1824–1881) (last visited Apr. 19, 2016), http://tinyurl.com/hjeg3k4. Spicer, the clerk of the court, closed the official record on June 3, 1861. *See 3 June 1861, Certificate of Clerk*, ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES): JOHN MERRYMAN (1824–1881) (last visited Apr. 21, 2016), http://tinyurl.com/jf9wbv8.

[29] *See Merryman*, 17 F. Cas. at 153; *1 June 1861, Order that opinion be filed and recorded in the Circuit Court of the United States for the District of Maryland, directing the Clerk transmit a copy under seal to the President of the United States*, ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES): JOHN MERRYMAN (1824–1881) (last visited Apr. 19, 2016), http://tinyurl.com/glrfh2r.

[30] *See Merryman*, 17 F. Cas. at 148–50.

[31] *See id*.

[32] *Id*. at 147. *But see* 5 SWISHER, *supra* note 11, at 852 ("Merryman was not an instance of prosecution of a harmless civilian. He was a lieutenant in the Maryland [state] militia.").

[33] *Merryman*, 17 F. Cas. at 147.

[34] *Id*. at 153. It is possible that Taney's language here also referred to Cadwalader's failing to produce John Merryman at the initial hearing.

[35] *See* RAGSDALE, *supra* note 2, at 4 ("Taney issued no order to secure the release of John Merryman or to enforce the writs of the court."); *id*. at 12 ("May 28, 1861. Taney issued an oral opinion stating that Merryman was entitled to be freed . . . but Taney issued no order to release Merryman."); *see also infra* note 45 (collecting authority).

cause the civil process of the United States to be respected and enforced."[36]

Merryman was not released as a consequence of Taney's decision, nor was he brought before a military tribunal.[37] Instead, Merryman remained detained at Fort McHenry until he was transferred to the federal civilian authorities, and then he was indicted for treason in the District Court for Maryland on July 10, 1861.[38] He was released on bail on or about July 13, 1861.[39] There was considerable procedural wrangling and delay. The treason case—in any one of several different procedural incarnations—stretched into the future, past the end of the war itself.[40] In 1867, the United States Attorney entered a *nolle prosequi*—as a result, Merryman was never brought to trial.[41] During the

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[36] *Merryman*, 17 F. Cas. at 153 (quoting United States Constitution Article II, Section 3 (Take Care Clause)); *see, e.g.*, STEPHEN C. NEFF, JUSTICE IN BLUE AND GRAY: A LEGAL HISTORY OF THE CIVIL WAR 36 (2010) ("[Taney's] opinion concluded in a diplomatic (if not quite conciliatory) vein, with an *invitation* to the President to defuse the crisis. Perhaps, Taney speculated, General Cadwalader had exceeded his instructions, thereby relieving the President of any personal blame." (emphasis added)). An "invitation" is not an order.

[37] *See* MCGINTY, *supra* note 4, at 150 ("[Taney's opinion] did not . . . secure John Merryman's release from Fort McHenry . . . ."); *id.* at 154–55 (indicating that between July 10 and 13, 1861, Merryman was indicted, was turned over by the Army to the U.S. Marshal, representing the civil authorities, appeared in federal court as a defendant, and then was released on bail); REHNQUIST, *supra* note 6, at 50 (indicating that military commissions only began trying civilians under Secretary of War Stanton, who was appointed in 1862).

[38] *See* RAGSDALE, *supra* note 2, at 12–13.

[39] *See* MCGINTY, *supra* note 4, at 155.

[40] *See id.* at 156–59, 168–70; RAGSDALE, *supra* note 2, at 13.

[41] *See, e.g.*, MCGINTY, *supra* note 4, at 168–70 (explaining that Merryman was indicted for treason, but never tried); RAGSDALE, *supra* note 2, at 8–9, 12–13 (describing charges as conspiracy and treason); REHNQUIST, *supra* note 6, at 39 (describing multiple charges, including "conspiracy to commit treason"). *But see* TOM HEAD & DAVID WOLCOTT, CRIME AND PUNISHMENT IN AMERICA 88 (2010) ("[A]fter seven weeks of imprisonment, Merryman was abruptly released, no charges having ever been filed . . . ."); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW 121–22 (2d ed. 1989) ("[Merryman] was not indicted."); *but cf.* AMANDA DIPAOLO, ZONES OF TWILIGHT: WARTIME PRESIDENTIAL POWERS AND FEDERAL COURT DECISION MAKING 50 (2010) (asserting that, in *Merryman*, "[a] trial for treason took place"). DiPaolo also reports that prior to Merryman's arrest, Lincoln "replaced Maryland's civilian courts with military commissions." DIPAOLO, *supra* at 50; *see also* Roger C. Cramton, *Lincoln and Chief Justice Taney, by James F. Simon*, 29(1) J. ABRAHAM LINCOLN ASS'N 76, 77 (Winter 2008) ("Merryman had been convicted by a military court . . . ."). But DiPaolo and Cramton offer no support for their factual claims in regard to Merryman's having been tried or convicted—by military tribunal or otherwise. *See, e.g.*, REHNQUIST, *supra* note 6, at 50 ("[T]his [military commission]

war, Merryman sued General Cadwalader for false imprisonment; however, Merryman's suit was unsuccessful.[42] After the war, Merryman was elected to the legislature and also to state-wide office.[43]

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procedure came only under [Secretary of War] Stanton [who was appointed in 1862].").
Why was Merryman never tried? Was it because the government feared it could not get a unanimous Maryland jury to convict when as much as half of Maryland was sympathetic to the confederate cause? *See* DON E. FEHRENBACHER, LINCOLN IN TEXT AND CONTEXT: COLLECTED ESSAYS 134–35 (1987) (stating that "it was unlikely that any Maryland jury would have convicted"); MCPHERSON, BATTLE CRY, *supra* note 5, at 289 ("[Merryman's] case never came to trial because the government knew that a Maryland jury would not convict him."); *see also* BRUFF, *supra* note 12, at 134 ("Lincoln was unsure that he could rely on the loyalty of any Maryland . . . judges and juries."); ALLEN C. GUELZO, LINCOLN'S EMANCIPATION PROCLAMATION: THE END OF SLAVERY IN AMERICA 51 (2004) (asserting "that [Maryland] proslavery judges would have released Merryman on sight"); *cf.* WHITE; *supra* note 4, at 5 (suggesting that federal prosecutors were "overwork[ed]" and "possibl[y] negligen[t]"); Cynthia Nicoletti, *Placing Merryman at the Center of* Merryman, 34(2) J. ABRAHAM LINCOLN ASS'N 71, 76, 78 (Summer 2013) (reviewing BRIAN MCGINTY, THE BODY OF JOHN MERRYMAN (2011), and JONATHAN W. WHITE, ABRAHAM LINCOLN AND TREASON IN THE CIVIL WAR (2011)) (describing northern prosecutors as "tepidly loyal"). Was it because the government had a weak case or Merryman had a good defense? *See* RAGSDALE, *supra* note 2, at 27 ("In June 1861, the Maryland General Assembly passed an act . . . declar[ing] [Merryman's] acts as an officer in the [militia] unit to be legal."); *supra* note 12 (collecting conflicting sources in regard to whether Governor Hicks approved Merryman's conduct). Was it because the war was over, and it was time to let bygones be bygones? *See* MCGINTY, *supra* note 4, at 169 ("Neither Lee nor Jefferson Davis was ever tried . . . . What would have been the point of trying a relatively minor offender like John Merryman . . . for his offenses?"). Was it—like so much else—all Chief Justice Taney's doing? Taney, as the senior Maryland circuit court judge, postponed hearing treason proceedings in November 1861, and in April 1862, complaining of illness, he again delayed proceedings until the following November. Taney told Judge Giles—the only other Maryland federal circuit court judge—not to hear such cases alone because treason was a capital offense. *See, e.g.*, MCGINTY, *supra* note 4, at 158 (quoting a letter from Taney, from 1864, the year Taney died, which stated that treason trials cannot move forward because Maryland was under martial law); RAGSDALE, *supra* note 2, at 29 ("As circuit judge, Taney successfully resisted the prosecution of Merryman and other Marylanders indicted for treason."); SIMON, *supra* note 11, at 197 (noting Taney's "dilatory tactics"). Taney's tactics might explain why Merryman was not prosecuted between 1861 and 1864, the year Taney died. But, if we are to explain why Merryman was not prosecuted thereafter, then we must look to other causes. *See* WHITE, *supra* note 4, at 59 (explaining that Taney's successor, Chief Justice Chase, who also had Maryland circuit duty, "postponed [the Baltimore treason cases] from term to term" perhaps because Chase expected Lincoln to issue a general amnesty in the near future); *cf. id*. at 5, 54, 118 ("A conviction for treason might make a martyr of the accused . . . .").

[42] *See* MCGINTY, *supra* note 4, at 169–70 (indicating that John Merryman's lawsuit against Cadwalader was dropped in 1864). *Compare* WHITE, *supra* note 4, at 92 (describing Merryman's 1863 suit for "wrongful arrest" against Cadwalader, which was dropped in March 1864), *with id*. at 94 (describing Merryman's second suit against Cadwalader, instituted in May 1864, and dropped in 1865).

III. Myth: The *Ex Parte Merryman* Order

The first and primary *Merryman* myth is that President Lincoln ignored or defied a judicial *order* from Chief Justice Taney to *release* John Merryman.[44] However, Taney never ordered anyone to release Merryman. Taney's final order merely stated,

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[43] *See* MCGINTY, *supra* note 4, at 169–70 (discussing Merryman's post-Civil War political career); WHITE, *supra* note 4, at 115 (noting that the state legislature elected Merryman state treasurer); *see also* Jonathan W. White ed., *A Letter to Secretary of State William H. Seward Regarding Civil Liberties in Maryland*, 107(2) MD. HIST. MAG. 171, 172 (Summer 2012).

[44] *See, e.g.*, Hamdan v. Rumsfeld, 464 F. Supp. 2d 9, 14 (2006) (Robertson, J.) ("Lincoln ignored Taney's order . . . ."); United States v. Minoru Yasui, 48 F. Supp. 40, 48 & n.18 (D. Or. 1942) (Fee, J.) ("History shows that in such instances [during wars] the power of the courts has been defied." (citing *Merryman*)), *vacated*, 320 U.S. 115 (1943); Major Christopher M. Ford, *From Nadir to Zenith: The Power to Detain in War*, 207 MIL. L. REV. 203, 222 (2011) ("The Court ruled the suspension unconstitutional and ordered Merryman released."); Jack Goldsmith, *Reflections on Government Lawyering*, 205 MIL. L. REV. 192, 198 (2010) ("Lincoln decided to ignore Chief Justice Roger B. Taney's order to release a prisoner because the President lacked authority to suspend the writ of habeas corpus." (citing *Merryman*)); Colonel Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 108 & n.553 (1998) ("Confronting an unprecedented national crisis, Lincoln took a series of actions wholly without constitutional sanction—[including] blatantly disregarding court orders . . . ." (citing *Merryman*)); *see also, e.g.*, Captain Brian C. Baldrate, *The Supreme Court's Role in Defining the Jurisdiction of Military Tribunals: A Study, Critique, and Proposal for* Hamdan v. Rumsfeld, 186 MIL. L. REV. 1, 38 (2005) ("President Lincoln ignored Taney's order and continued to confine Merryman, eventually indicting him for treason."); Colonel Gary M. Bowman, *Army Lawyers and the Interagency: An Examination of Army Lawyers' Experience with Military Commissions and Habeas Corpus*, *in* THE US ARMY AND THE INTERAGENCY PROCESS: HISTORICAL PERSPECTIVES 339, 343 (Kendall D. Gott & Michael G. Brooks eds., 2008) ("[Taney] issued an order to release Merryman, which went unheeded by the Army . . . ."); Major Jon P. Bruinooge, 22 A.F. L. REV. 205, 223 n.89 (1980). The same *Merryman* myth is repeatedly put forward in the leading student-edited law journals and in other fora by judges and leading academics. *See, e.g.*, BRIAN R. DIRCK, WAGING WAR ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS 88 (2003) ("Taney himself issued a writ of habeas corpus to secure Merryman's release . . . ."); Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421, 1430 n.44 (1999) ("Chief Justice Taney's order that Merryman be released was ignored . . . ."); Judge Michael Chertoff, *Judicial Review of the President's Decisions as Commander in Chief*, 55 RUTGERS L. REV. 1289, 1292 (2003) ("Lincoln ignored Chief Justice Taney's order to release John Merryman . . . ."); Richard H. Fallon, Jr., *Executive Power and the Political Constitution*, 2007 UTAH L. REV. 1, 3 ("[Taney] ordered that the prisoner Merryman, whose detention Congress had not purported to authorize, must be released . . . . President Lincoln chose to defy the Chief Justice's decision." (citation omitted)); Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227, 1277 (2008) (asserting that "Chief Justice Taney . . . had issued a writ of

> I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the [C]ircuit [C]ourt of the United States for the [D]istrict of Maryland, and direct the clerk to transmit a copy, under seal, to the [P]resident 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*

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habeas corpus to release an individual held in military custody" (citing *Merryman*)); Amanda L. Tyler, *Is Suspension a Political Question*, 59 STAN. L. REV. 333, 355 n.121 (2006) ("Taney . . . ordered the release of the prisoner; Lincoln, however, did not comply with the order."); John Yoo, *Judicial Supremacy Has Its Limits*, 20 TEX. REV. LAW & POL. 1, 24 (2015) ("Lincoln . . . ignored Taney's order *releasing* Merryman." (internal citation omitted) (emphasis added)); John Yoo, Merryman *and* Milligan *(and* McCardle*)*, 34(3) J. SUP. CT. HIST. 243, 244 (Nov. 2009) (noting that "Taney then issued an opinion ordering Merryman's release" and further noting "outright presidential defiance"); *see also, e.g.*, DANIEL FARBER, LINCOLN'S CONSTITUTION 188 (2003) ("Critics point out that *Merryman* is the only known instance where the *president* has actually disobeyed a court order because he disagreed with it." (emphasis added)); MICHAEL STOKES PAULSEN & LUKE PAULSEN, THE CONSTITUTION: AN INTRODUCTION 249 (2015) ("Chief Justice Roger Taney ruled against President Lincoln's suspension of the writ of habeas corpus in the Civil War in 1861, but Lincoln disregarded *that decree* . . . ." (emphasis added)); *id.* ("Abraham Lincoln did not comply with Chief Justice Taney's order in *Merryman*."); Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1296 (2004) (asserting that "Lincoln defied Chief Justice Taney's order invalidating Lincoln's suspension of habeas corpus" without quoting any particular language in Taney's order); Paulsen, *Lincoln and Judicial Authority*, *supra* at 1285 (expounding upon "Lincoln's [d]efiance of Taney's order in *Ex parte Merryman*"); Paulsen, *The* Merryman *Power*, *supra* note 11, at 89 ("In *Ex parte Merryman*, Lincoln . . . refus[ed] to honor a judicial decree as binding law on the executive, even in that specific case."); Judge Richard A. Posner, *Desperate Times, Desperate Measures*, N.Y. TIMES, Aug. 24, 2003, § 7, p. 10 (reviewing DANIEL FARBER, LINCOLN'S CONSTITUTION (2003)) (asserting that Lincoln "flout[ed] Chief Justice Roger Taney's order granting habeas corpus" and that "[o]fficials are *obliged* to obey judicial orders even when erroneous" (emphasis added)). Judge Posner's position is puzzling. Generally, "officials"—like anybody else—are only obliged to obey a judicial order, if issued by a court of competent jurisdiction, if the "officials" are parties served with process, and if the "officials" have an opportunity to be heard. *Cf., e.g.*, RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 273 (2003) ("The propensity to obey judges is unrelated to the textual basis of their decisions. It is a function simply of their jurisdiction, with *Ex parte Merryman* a rare exception."). How can Posner conclude that Lincoln "flout[ed]" a judicial order without explaining what court issued the order, the basis of the court's jurisdiction, how and when Lincoln was made a party, and when Lincoln (as opposed to General Cadwalader, the named defendant) had an opportunity to be heard? *But cf.* RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 85–86 (2006) ("[Lincoln] was as *right* to disobey the law in [*Merryman*] as Gandhi and Martin Luther King Jr. were right to do so in their situations." (emphasis added)).

> *take* to cause the civil process of the United States to be respected and enforced.[45]

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[45] *Merryman*, 17 F. Cas. 144, 153 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.) (quoting United States Constitution Article II, Section 3 (Take Care Clause)) (emphasis added); BRIAN MCGINTY, THE BODY OF JOHN MERRYMAN: ABRAHAM LINCOLN AND THE SUSPENSION OF HABEAS CORPUS (2011) states,

> This [situation] was . . . at least *remarkable*. There was no order commanding anybody in the chain of command—Cadwalader, Keim, General in Chief Scott, or even Abraham Lincoln himself—to set John Merryman "at liberty." There was no court order requiring that he be released from Fort McHenry or restored to freedom. He had not, by court order, been "discharged" from the army's custody.

Id. at 91–92 (emphasis added); *id*. at 150 ("[Taney's *Merryman* opinion] . . . explained why [Merryman] was entitled to be set at liberty but [it] did not order Lincoln or Cadwalader (or anybody else) to set him at liberty."); RAGSDALE, *supra* note 2, at 4 & 12 (same); JACK STARK, PROHIBITED GOVERNMENT ACTS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 48 (2002) ("The disposition is not congruent with the opinion . . . . Instead [Taney] made a mere gesture . . . ."); Frank I. Michelman, *Living with Judicial Supremacy*, 38 WAKE FOREST L. REV. 579, 595 n.69 (2003) (explaining that after Cadwalader refused to produce Merryman, "Taney ruled Lincoln's order unconstitutional and void . . . but *he did not issue any direct order for Merryman's production or release*" (emphasis added)); *see also, e.g.*, *Ex parte* McQuillon, 16 F. Cas. 347, 348 (S.D.N.Y. 1861) (No. 8294) (Betts, J.) ("[Judge Betts] would, however, follow out that case [*Merryman*], but would express no opinion whatever, as it would be indecorous on his part to oppose the [C]hief [J]ustice. *He would therefore decline taking any action on the writ at all*." (emphasis added)); *In re* Kemp, 16 Wis. 359, 1863 WL 1066, at *8 (1863) (Dixon, C.J.) ("I deem it advisable, *adhering to the precedent set by other courts and judges under like circumstances*, and out of respect to the national authorities, to withhold [granting habeas relief] until they shall have had time to consider what steps they should properly take in the case." (emphasis added)). As explained above, Major General Keim authorized Merryman's arrest. The arrest was carried out by Colonel Yohe and Yohe's subordinates. After doing so, Yohe ordered Adjutant Wittimore and Lieutenant Abel to transfer Merryman to Fort McHenry, at which juncture Merryman fell under General Cadwalader's authority. *See Merryman*, 17 F. Cas. at 146. *But see* ALLEN C. GUELZO, ABRAHAM LINCOLN: REDEEMER PRESIDENT 281 (1999) ("Merryman was arrested on May 25th by General George Cadwalader . . . ."); J.G. RANDALL & DAVID DONALD, THE CIVIL WAR AND RECONSTRUCTION 301 (2d ed. rev. 1969) ("Merryman . . . was arrested in Maryland . . . by order of General Cadwalader . . . ."); *but cf.* REHNQUIST, *supra* note 6, at 26 (describing Colonel Yohe as a "[c]aptain"); 5 SWISHER, *supra* note 11, at 844 (same); *Affairs in Baltimore*, *supra* note 17 (referring to a "Captain Yoe [sic]" as the senior officer who carried out Merryman's seizure). Interestingly, Merryman's petition indicated that these events happened on or about May 25, 1861, but Cadwalader's response indicated that these events happened on or about May 20, 1861. *See Merryman*, 17 F. Cas. at 146 ("The prisoner was brought to this post on the 20th inst[ant] . . . ."). Such errors during the fog of war (or, even, during everyday litigation) are hardly surprising. For example, Taney ordered the clerk of the Circuit Court for the District of Maryland, Thomas Spicer, to issue the original writ. *See*

Again, Taney issued no order to release Merryman. It follows, therefore, that Lincoln could not have ignored or defied it, nor could anyone else for that matter.

Even if we assume, counterfactually, that Taney had issued an order releasing Merryman, any such order would have been directed against the named defendant—Merryman's jailer—General George Cadwalader,[46] not against Lincoln. Lincoln was not a party in *Merryman*. Lincoln was not served with process in *Merryman*. Because Taney conducted all court proceedings at a lightning pace,[47] over a mere

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id. As ordered, Spicer issued and signed the writ. *See id.* However, Cadwalader believed—in error—that the writ was issued by the clerk of the Supreme Court of the United States. *See id.* (reproducing Cadwalader's response which described Spicer as "clerk of the [S]upreme [C]ourt of the United States").

[46] *See* REHNQUIST, *supra* note 6, at 23 ("The writ [of habeas corpus] was directed to the official who had custody of the prisoner . . . ."); *id.* at 33 ("The writ was addressed to General George Cadwalader, commander of the military district in which Fort McHenry lay . . . ."); Stephen I. Vladeck, *The Field Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 80 TEMP. L. REV. 391, 400 (2007) (same); *see also* Michelman, *supra* note 45, at 595 n.69 ("On one famous occasion, Lincoln did directly resist a clear, final ruling of a court, *although not a direct judicial order to himself*." (emphasis added)). *But see* WHITE, *supra* note 15, at 452 ("Lincoln deliberately ignored a legal obligation *imposed on him* by Taney's order . . . ." (emphasis added)). Apparently, at the time of the *Merryman* litigation, the commander of Fort McHenry was Major W.W. Morris. *See infra* note 89.

[47] *See* RICHARD J. ELLIS, THE DEVELOPMENT OF THE AMERICAN PRESIDENCY 413 (2012) (noting that Taney "rushed to Baltimore to preside at the hearing," and further characterizing the *Merryman* proceedings as a "rush to judgment"); REHNQUIST, *supra* note 6, at 40–41 (criticizing Taney's conduct of the proceedings, and characterizing them as "precipitate" and "hasty"); *see also* BRUFF, *supra* note 12, at 135 (explaining that Taney issued his opinion "[w]ithout inviting the executive's lawyers to argue their side of the case"); REHNQUIST, *supra* note 6, at 40 (noting that Taney decided *Merryman* "without benefit of hearing argument from counsel"); JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 172 (2006) (asserting that, in *Merryman*, Taney "[r]efus[ed] to allow the government to be heard"). To clarify the chronology, Taney received a habeas petition on Sunday, May 26, 1861; he issued an ex parte order later that same day; i.e., he ordered Cadwalader to appear (and also to produce Merryman) the next day, on Monday at 11:00 A.M., and he concluded all live judicial proceedings the following day, on Tuesday. All these courtroom-related events took place during an ongoing civil war, in circumstances where Cadwalader—the government-defendant—had asked for an adjournment. *See supra* notes 13–29, and accompanying text. Put simply, Taney was not only speeding the *Merryman* litigation along at a lightning pace, but he was working on weekends to do so! *See* REHNQUIST, *supra* note 6, at 40 ("The writ was issued by Taney on [Sunday]—surely not a normal business day for the judiciary—and was made returnable the next morning . . . ."); *id*. at 26 (same); *see also* Fed. R. Civ. P. 12(a)(1)(A)(i) (granting a private party defendant twenty-one days to answer a complaint); *id*. 12(a)(2) (granting a United States officer, sued in an official

two days, that is, during May 27 and May 28, 1861, during the fog of (civil) war, *it remains unclear if Lincoln even knew of the existence of the judicial proceedings while they were ongoing*.[48] In other words, Lincoln

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capacity, sixty days to answer); *id*. 12(a)(3) (granting a United States officer, sued in an individual capacity, sixty days to answer); *cf.* Roger Roots, *Unfair Federal Rules of Procedure: Why Does the Government Get More Time?*, 33 AM. J. TRIAL ADVOC. 493, 495 n.12 (2010) (suggesting that federal sixty day rule for the government to answer goes back to the nineteenth century). In effect, Taney did not give Cadwalader, a Pennsylvania native, even *one* full business day either: (i) to consult (much less coordinate) with the United States Attorney for Maryland, with the Attorney General in Washington, and with the Army's law officers; or (ii) to find a private attorney in the Maryland bar to represent his personal interests in high-stakes litigation. *See* Letter from E.D. Townsend, Assistant Adjutant General, Headquarters of the Army, Washington, to General Cadwalader (May 27, 1861) (acknowledging "receipt, by the hands of a special messenger, of your report *of this date*, with four enclosures, in relation to the arrest of John Merryman" (emphasis added)) (available in the Cadwalader Family collection of the Historical Society of Pennsylvania); *26 May 1861, Return of U.S. Marshall* [sic] *Washington Bonifant*, ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES): JOHN MERRYMAN (1824–1881) (last visited Oct. 22, 2015), http://tinyurl.com/j42y9l5 (stating that the U.S. Marshal, Washington Bonifant, made service on Cadwalader "on the 26th day of May 1861 at half past five o'clock p.m."). The Chief Justice ordered Cadwalader, among other things, to put forward a defense in regard to a difficult set of momentous constitutional issues in less than eighteen hours. *But cf.* 5 SWISHER, *supra* note 11, at 845 (noting that General Cadwalader was a lawyer). In such circumstances, it is hardly surprising that the military officer—who was also busy administering a military district during a civil war—would seek further guidance from his superiors and would also seek to shift an explosive political question onto the country's elected leadership. To be fair to the Chief Justice, whether Taney's initial ex parte order to produce Merryman was rightly or wrongly granted, because Cadwalader failed to obey that order, any effort by Cadwalader to seek an adjournment may very well have appeared to Taney as lacking merit. Equity's clean hands maxim comes to mind. Moreover, all judges, especially chief justices, are used to being and expect to be obeyed. To put it another way, the sort of jurist who would grant Cadwalader a postponement—i.e., the ponderous and thoughtful jurist who would recognize the practical and legal difficulties the court's initial ex parte order imposed on Cadwalader, the government-defendant, by mandating, in effect (i) Cadwalader's finding an attorney, (ii) his coordinating his legal strategy with distant military superiors and government law officers, (iii) his submitting a timely formal legal response, and (iv) his producing John Merryman in less than one day—is the sort of jurist who never would have demanded compliance in the first instance with such tight time constraints during an ongoing civil war. Many commentators recognize that John Merryman's position—i.e., that Merryman's arrest and detention absent judicial process was a denial of due process—had, at least, some merit. One might also fairly ask: Did Taney's ex parte order, in effect, deny Cadwalader meaningful due process?

[48] There appears to be no record indicating that Lincoln had knowledge of *Ex parte Merryman* prior to May 30, 1861. *See* 3 LINCOLN DAY BY DAY: A CHRONOLOGY, 1861–1865, at 45 (Earl Schenck Miers & C. Percy Powell eds., 1960) ("May 30 [1861]. . . . Maryland district attorney consults with President concerning John Merryman in prison at Fort McHenry, Md., without benefit of writ of habeas corpus."). *But cf.* WHITE, *supra*

never had any meaningful opportunity to be heard. Because Lincoln was not a party, because he was not served with process, and because he had no meaningful opportunity to be heard, Lincoln would not have been bound by any judicial order to release Merryman (even if Taney had issued such an order). That is black letter law.[49]

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note 4, at 1 (asserting that "[o]n May 26, [1861,] Taney issued the [ex parte] writ, but President Abraham Lincoln ignored it.").

[49] *See, e.g.*, Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (Jackson, J.) ("An elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); Hansberry v. Lee, 311 U.S. 32, 40 (1940) (Stone, J.) ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."); Pennoyer v. Neff, 95 U.S. 714, 729 (1877) (Field, J.) ("[I]t was a familiar rule that countries foreign to our own disregarded a judgment merely against the person, where the defendant had not been served with process nor had a day in court . . . ."); D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 176 (1850) (Catron, J.). *But see* Michael Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 720 (2004) (suggesting that in *Merryman* the "executive and military were *in effect* parties to the case" (emphasis added)); Paulsen, *The* Merryman *Power*, *supra* note 11, at 89 ("In *Ex parte Merryman*, Lincoln . . . refus[ed] to honor a judicial decree as binding law on the executive, even in that specific case."). Professor Paulsen's position is troubling. At the close of the *Merryman* litigation, Taney had the clerk of the Circuit Court transmit a copy of the proceedings and his opinion to Lincoln. Surely, such an after the fact communication cannot be enough to bind anyone—including the President—either legally or in any normative sense connected to now defunct, then-established, or now-prevailing conceptions of fair play or civil procedure. *Cf.* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (Stone, C.J.) (explaining that the scope of personal jurisdiction rests on considerations relating to "traditional notions of fair play and substantial justice."). Some otherwise well-informed commentators believe that Cadwalader defied the courts, and that he did so as a result of instructions which he had already received through the military chain of command, but having their ultimate source from President Lincoln. If these views were grounded in unambiguous or even reasonably clear historical fact, then it would be fair to ascribe Cadwalader's "defiance" to Lincoln (even if, as a formal legal matter, Lincoln was not an actual party to *Merryman*). But these views are not well grounded in historical fact. As explained below, there is little in the historical record to establish that Cadwalader ignored or defied the courts. But even if we adopt the position that Cadwalader's actions could be fairly characterized as "defying" the courts, there is no good reason—supported by the reported historical record—to tie Cadwalader's conduct to any purported authorization originating with Lincoln. *See infra* notes 68, 107–33, and accompanying text.

IV. Myth: The *Ex Parte Merryman* Opinion

The second *Merryman* myth is that Lincoln ignored Taney's *opinion*:[50] that is, Lincoln's post-*Merryman* conduct and his interactions with Executive Branch subordinates failed to properly reflect the law as established by Taney. Simply put, the legal and normative assumptions behind this critique of Lincoln's conduct do not cohere with the basic structure of the American legal system.

In the United States—indeed, across the common law world—the courts establish and clarify law through judicial orders. Orders usually appear with opinions, but the latter are not necessary to resolve a case or controversy. Indeed, a court—even an appellate court—may issue an

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[50] *See, e.g.*, Parisi v. Davidson, 405 U.S. 34, 47 (1972) (Douglas, J., concurring in the result) ("Mr. Chief Justice Taney in *Ex parte Merryman* . . . held that the President alone had no authority to suspend the writ, a position that Lincoln did not honor."); Major Kirk L. Davies, *The Imposition of Martial Law in the United States*, 49 A.F. L. REV. 67, 99 n.160 (2000) ("President Lincoln ignored Chief Justice Taney's opinion and Merryman remained imprisoned."); Wayne McCormack, *Emergency Powers and Terrorism*, 185 MIL. L. REV. 69, 94 n.116 (2005) ("President Lincoln ignored Chief Justice Taney's opinion, and Merryman remained imprisoned."); *see also, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 122 (2005) ("Lincoln proceeded to disregard Taney's solo ruling, thereby challenging Taney's very jurisdiction over the matter."); WILLIAM C. BANKS & STEPHEN DYCUS, SOLDIERS ON THE HOME FRONT: THE DOMESTIC ROLE OF THE AMERICAN MILITARY 117 (2016) ("Taney's opinion was ignored by President Lincoln . . . ."); PAUL BREST ET AL., *supra* note 3, at 822 ("Lincoln in effect refused to follow Taney's opinion . . . ."); RICHARD H. FALLON JR., THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW AND PRACTICE 26 (2d ed. 2013) ("Lincoln actually defied a ruling by the Chief Justice Roger Taney denying the authority of military officials to hold suspected Confederate sympathizers without bringing them into court and proving them guilty of crimes."); *id.* at 318 ("[Lincoln] ordered his military officers to ignore Taney's ruling, and the officers obeyed the President, not the Chief Justice."); ALBERT BUSHNELL HART, SALMON PORTLAND CHASE 327 (Boston, Houghton Mifflin & Co. 1899) ("The President simply ignored Taney's decision . . . ."); SCOTT M. MATHESON, JR., PRESIDENTIAL CONSTITUTIONALISM IN PERILOUS TIMES 41 (2009) ("[Lincoln] ignor[ed] Taney's opinion . . . ."); REHNQUIST, *supra* note 6, at 40 (noting the "administration's disregard of the decision"); DONALD GRIER STEPHENSON, JR., THE WAITE COURT: JUSTICES, RULINGS, AND LEGACY 277 (2003) ("[Lincoln] supported his commanders in defying Chief Justice Taney's [*Merryman*] ruling . . . ."); *id*. at 5 (same); WHITE, *supra* note 4, at 75 ("In fact, Lincoln treated the Habeas Corpus Act in the same way that he responded to Chief Justice Taney's opinion in *Merryman*: he ignored it."); *id*. at 88 (same); Adam Klein & Benjamin Wittes, *Preventative Detention in American Theory and Practice*, 2 HARV. NAT'L SEC. J. 85, 118 (2011) ("Taney eventually declared Merryman's detention unlawful and transmitted his opinion to Lincoln, who more or less ignored it . . . ."); Jonathan W. White, *The Strangely Insignificant Role of the U.S. Supreme Court in the Civil War*, 3(2) J. CIVIL WAR ERA 211, 218 (June 2013) ("Lincoln simply ignored Taney's opinion.").

order absent any opinion.[51] The issuance of opinions by courts is a convention or tradition of the American judicial system, but such opinions are not mandated by the express text of Article III,[52] by any federal statute, or even by any federal judicial decision.[53] In short, in the American judicial system, orders are primary, not opinions.

In the first paragraph of *Cooper v. Aaron*, a unanimous Supreme Court stated, "[This case] necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court *orders* resting on this Court's considered *interpretation* of

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[51] *See, e.g.*, Judge Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 222 (1999) ("The federal system has adopted a number of strategies to deal with this [high] volume [of federal cases], including more staff, with centrally located staff attorneys; a smaller proportion of cases argued orally; less time allotted to those cases that are argued; *decisions by one-line order* or brief memorandum; and, of course, unpublished opinions." (emphasis added)). *But cf. id.* at 226 ("When a governmental official, judge or not, acts contrary to what was done on a previous day, without giving reasons, and perhaps for no reason other than a change of mind, can the power that is being exercised properly be called 'judicial' [and consistent with Article III]?").

[52] *See* U.S. CONST. art. III.

[53] *See, e.g.*, Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126 (2000) ("The operative legal act performed by a court is the entry of a judgment; an opinion is simply an explanation of reasons for that judgment."); Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1161 (2006) ("An opinion cannot be central to dispute resolution because there is no requirement that an *appellate* court issue an opinion, and frequently such courts decide cases without any opinion." (emphasis added)); *see also* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1327 (1996) ("The President's ordinary obligation to enforce a judgment extends only to the raw judgment itself: the finding of liability or nonliability and the specification of the remedy. That duty does not impose on the President any requirement in future cases to follow the reasoning that led to the court's judgment or to extend the principles of that judgment beyond the issues and parties encompassed by it."); *id.* at 1328 ("[T]he issuance of opinions is not an essential aspect of the judicial power."); *cf.* Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1187–88 (2012) ("Suppose President Lincoln and President Nixon both believed the courts got the Constitution wrong. Must they nonetheless honor the courts' decisions? If so, is any obligation limited to complying with specific orders, as Lincoln famously suggested, or must the executive more broadly follow the doctrines laid down by the courts?" (citing Lincoln's First Inaugural Address) (internal citation omitted)). *But compare* Lawson & Moore, *supra* at 1328 n.284 (suggesting that legal "requirements that judges give reasons for their conclusions . . . are therefore constitutionally questionable"), *with* Sullivan, *supra* at 1161 n.90 (explaining that under Federal Rule of Civil Procedure 52(a), federal district courts must "explain their decisions when they sit as the trier of fact," such as when a district court hears a case absent a jury). *See generally* Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 *passim* (1993).

the United States Constitution."[54] In short, even *Cooper*, which is the most forceful and ambitious statement of the scope of federal judicial authority, framed the issue in terms of state officials' wrongful interference or other noncompliance with extant federal judicial orders, not in terms of noncompliance with mere opinions. Applying the legal standard laid out in *Cooper* to Lincoln during *Merryman* would be quite anachronistic. But, even if the legal standard laid out in *Cooper* ought to apply to Lincoln's conduct, *Cooper* does not mandate that officials (such as the President) must comply with mere opinions. In short, faulting Lincoln for noncompliance with Taney's *Merryman* opinion makes little sense as a formal legal matter.

Still, even if obedience to mere opinions is not a strict legal obligation, one might reason that Executive Branch obedience to judicial opinions reflects a valuable rule of law aspirational goal. But, even if in

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[54] Cooper v. Aaron, 358 U.S. 1, 4 (1958) (*Cooper*) (authored unanimously) (emphasis added). This language is not unique to the opinion's first paragraph. Later, the Court stated,

> No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislatures of the several states may, at will, annul the *judgments* of the courts of the United States, and destroy the rights acquired under those judgments, the [C]onstitution itself becomes a solemn mockery . . . ." *United States v. Peters*, 5 Cranch 115, 136 [(1809)]. A Governor who asserts a power to nullify a federal court *order* is similarly restrained. If he had such power, said Chief Justice Hughes, in 1932, also for a unanimous Court, "it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases . . . ." *Sterling v. Constantin*, 287 U.S. 378, 397–398 [(1932)].

Cooper, 358 U.S. at 18–19 (emphasis added). The Court insulates "judgments" and "orders," not opinions, against "interposition" by state officials, nullification, mob violence, and other lawlessness. *Id*. *But cf.* Michael Stokes Paulsen, *Checking the Court*, 10 N.Y.U. J.L. & LIBERTY 18, 110 & n.143 (2016) (suggesting that in *Cooper* the Supreme Court asserted that its opinions are the law of the land). For those seeking to engage in comparative legal analysis with other common law jurisdictions, beware: "judgement," as used today in the Common Travel Area, is synonymous with an American judicial opinion, not an order! *See* BRYAN A. GARNER, GARNER'S MODERN AMERICAN USAGE 490 (Jeff Newman & Tiger Jackson eds., 3d ed. 1980) (defining "judgment" and noting the distinction between American English and British English in the legal context).

general such an abstract aspirational goal were conceded, such aspirations ought not to apply to *Merryman.* Why? First, we do not know which court issued *Merryman*[55] or whether it had valid jurisdiction.[56] Those that have studied the case have been, and remain,

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[55] *See supra* note 1 (illustrating that *Merryman* was reported in *Federal Cases* as a circuit court opinion, and in Rapp & Davies as a chambers opinion). *Compare* MCGINTY, *supra* note 4, at 174 (arguing that *Merryman* was a chambers opinion, not a circuit court decision), *with* REHNQUIST, *supra* note 6, at 44 (noting that, in *Merryman*, Taney "was speaking only as a member of a circuit court"), Fallon, *supra* note 44, at 3 ("Ruling in his capacity as circuit judge, Chief Justice Roger Taney concluded in *Merryman* that only Congress, not the President, could validly suspend the judicial power and obligation to issue writs of habeas corpus."), *and* White, *supra* note 50, at 218 ("Taney was sitting as a circuit justice in the U.S. Circuit Court for the District of Maryland, but he made his opinion appear to be that of a Supreme Court justice 'at chambers.'"). A few commentators have suggested that Taney issued *Merryman* in his capacity as a purported district court judge. *See, e.g.*, BRIAN R. DIRCK, THE EXECUTIVE BRANCH OF FEDERAL GOVERNMENT: PEOPLE, PROCESS, AND POLITICS 99 (2007) (asserting that Taney issued *Merryman* "in his capacity as a federal district court judge"); GEORGE KATEB, LINCOLN'S POLITICAL THOUGHT 148 (2015) ("*Ex parte Merryman* . . . [was issued] pursuant to Taney's role as a district court judge . . . ."); Steven G. Calabresi & Justin Braga, *Judge Robert H. Bork and Professor Bruce Ackerman: An Essay on The Tempting of America*, 13 AVE MARIA L. REV. 47, 52 (2015) (reviewing ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990), and Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L.J. 1419 (1990) (book review)) ("President Lincoln refused to enforce [the] Chief Justice's district court ruling . . . ."). Finally, it has been suggested that *Merryman* was issued by the Supreme Court of the United States. *See, e.g.*, Hedges v. Obama, 890 F. Supp. 2d 424, 458 (S.D.N.Y. 2012) (Forrest, J.) ("In *Ex parte Merryman* . . . the Supreme Court made clear . . . ."), *vacated*, 724 F.3d 170 (2d Cir. 2013); DANIEL R. COQUILETTE & BRUCE A. KIMBALL, ON THE BATTLEFIELD OF MERIT: HARVARD LAW SCHOOL, THE FIRST CENTURY 268 (2015) (describing *Merryman* as a Supreme Court case); DIRCK, *supra* note 44, at 88 (asserting that *Ex parte Merryman* was "issued by the Supreme Court"); HEAD & WOLCOTT, *supra* note 41, at 88 ("When a complaint was filed before the Supreme Court on [Merryman's] behalf, *they* ruled in *Ex Parte Merryman* . . . ." (emphasis added)); MARK R. LEVIN, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA 128 (2005) ("In *Ex parte Merryman*, Taney, writing for the Court . . . ."); POSNER, LAW, PRAGMATISM, AND DEMOCRACY, *supra* note 44, at 272 (asserting that *Merryman* is "one of the few cases in which a Supreme Court decision . . . has been openly defied by one of the other branches"); SAMUEL WALKER, CIVIL LIBERTIES IN AMERICA 155 (2004) (explaining that the "Supreme Court overrule[d] President Lincoln in *Ex Parte Merryman*"); Ken Gormley, *Conclusion: An Evolving American Presidency*, *in* THE PRESIDENTS AND THE CONSTITUTION: A LIVING HISTORY, *supra* note 12, at 623, 651 (characterizing *Merryman* as a Supreme Court ruling); Mark E. Neely, Jr., *The Constitution and Civil Liberties Under Lincoln*, *in* OUR LINCOLN: NEW PERSPECTIVES ON LINCOLN AND HIS WORLD 37, 39 (Eric Foner ed., 2008) ("*Ex parte Merryman* . . . stands as one of the most poorly understood of decisions to come from the Supreme Court.").

[56] For discussion of the conflicting views relating to what court (if any) decided *Merryman* and also competing views as to the validity of the court's jurisdiction (if any), see the thorough publications by MCGINTY, *supra* note 4, at 174–76 (noting that Taney's

unsure and divided what court (if any) issued the decision, that is, the Circuit Court for the District of Maryland or, simply, Chief Justice Taney in chambers, and concomitantly, what was the source (if any) of Taney's jurisdiction to hear and decide the dispute.[57] Second, although the matter is unsettled, one view is that in-chambers opinions, although (apparently) establishing the law of the case, do not carry controlling precedential weight with regard to other cases,[58] even those with closely similar facts. Finally, although Taney concluded that Merryman was entitled to be

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jurisdiction is disputed), Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251, 289 (2005) (concluding that "there remains no constitutional impediment to an individual Justice exercising *original* jurisdiction and issuing writs of habeas corpus as they have been empowered to do since 1789"), and Neely, *supra* note 55, at 37, 39–41 (arguing that Taney lacked jurisdiction in *Merryman* because Section 14 of the Judiciary Act of 1789 worked an unconstitutional expansion of the original jurisdiction of the Supreme Court, even if that authority were exercised by a single justice in chambers). *See generally* FARBER, *supra* note 44, at 190–92 (discussing whether Taney had jurisdiction in *Merryman*); William Baude, *The Judgment Power*, 96 GEO. L.J. 1807 (2008) (collecting authority); Vladeck, *supra* note 46 (same). Ragsdale argues that "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." RAGSDALE, *supra* note 2, at 11. Evidently, Ragsdale discounts the initial ex parte order and subsequent attachment order, both directed to Cadwalader, as exercises of judicial power.

[57] *See supra* note 55 (discussing which purported court issued *Merryman*); *supra* note 56 (discussing the source of the court's purported jurisdiction in *Merryman*). *Compare* An Act to Establish the Judicial Courts of the United States, ch. 20, § 14, 1 Stat. 73, 81 (1789) (granting the "courts of the United States . . . [the] power to issue writs of . . . *habeas corpus*"), *with id.* at 82 (granting "[J]ustices of the [S]upreme [C]ourt" and "judges of the district courts . . . [the] power to grant writs of *habeas corpus*").

[58] *See, e.g.*, Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1010 n.167 (2005) ("Actions by single Justices are generally not considered to have precedential value . . . ."); Chief Justice Frank J. Williams & Nicole J. Benjamin, *Military Trials of Terrorists: From the Lincoln Conspirators to the Guantanamo Inmates*, 39 N. KY. L. REV. 609, 615 (2012) ("Unfortunately for Chief Justice Taney, his words carried no precedential value as an in-chambers opinion."); *cf., e.g.*, *Ex parte* Walton, 60 N.C. 350, 1864 WL 4848, at *6 (1864) (Pearson, C.J.) ("The question is, does that decision settle the law or should it be overruled? I am aware that, in the opinion of the Secretary of War [for the Confederacy] and of his Excellency, Gov. Vance, the decision of a single Judge on *habeas corpus* questions is only binding in the *particular case* . . . ." (emphasis in the original)), *rev'd on other grounds*, Gatlin v. Walton, 60 N.C. 325, 1864 WL 1053 (1864); *id.* 1864 WL 4848, at *9 (suggesting that "a 'judgment of discharge [by a single judge],' on *habeas corpus*, will, as heretofore, be treated as binding only in the particular case"); MARK E. NEELY JR., SOUTHERN RIGHTS: POLITICAL PRISONERS AND THE MYTH OF CONFEDERATE CONSTITUTIONALISM 64–79 (1999) (discussing Chief Justice Pearson's jurisprudence). *But cf. The Impeachment Trial of President Abraham Lincoln*, 40 ARIZ. L. REV. 351, 367 (1998) (reporting Mark E. Neely, Jr. stating, in mock cross-examination, that "we can consider [*Merryman*] a precedent from the Chief Justice of the Supreme Court").

released, Taney did not order his release. Taney's opinion put forward only advice (or, perhaps, a legal position akin to an Office of Legal Counsel memorandum), not a traditional judicial order. In other words, *Merryman* was effectively an advisory opinion, and given the disparity between Taney's order (which left Merryman in jail) and his opinion (which asserted that Merryman was entitled to be freed), it was perhaps a good deal less.

In these circumstances, where Lincoln did not know which court (if any) issued the opinion, its basis for jurisdiction (if any), or the opinion's precedential weight, Lincoln should not have conformed Executive Branch conduct to Taney's opinion for all the reasons just stated, and also because judicially-issued advisory opinions are inconsistent with Article III and separation of powers norms. Executive Branch compliance with an advisory opinion (unless the President independently agrees with the opinion's rationale) does not reflect comity or aspirational rule of law values, but instead, such compliance would reward judicial aggrandizement. In short, Lincoln had every reason to believe that there was no obligation to obey Taney's opinion.

V. Myth: Appealing *Ex Parte Merryman*

The third *Merryman* myth is that Lincoln could have (and should have) upheld rule of law values by seeking clarity from the courts by appealing Taney's *Merryman* decision to the (full) United States Supreme Court.[59] However, this was not feasible.[60] In the context of a

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[59] *See, e.g.*, JUSTICE STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES ch. 1 (2015) ("[Lincoln] did not release John Merryman. Neither did he appeal the ruling, *as he might have done*." (emphasis added)); BRUFF, *supra* note 12, at 135 ("Lincoln should either have let Merryman go or appealed the order to release him."); Fallon, *supra* note 44, at 22 ("[T]ake the best-known example . . . Lincoln defied the court in *Merryman* without bothering to appeal . . . ." (footnote omitted)); Paulsen, *Lincoln and Judicial Authority*, *supra* note 44, at 1285 ("But defiance it was: [Lincoln] did not obey Taney's order, nor did his administration seek any sort of appeal to the full Supreme Court."); Paulsen, *The* Merryman *Power*, *supra* note 11, at 92 (posing the question whether Lincoln was "required [in *Merryman*] either to comply or to seek review and reversal by the full Supreme Court"); *see also, e.g.*, THOMAS J. DILORENZO, LINCOLN UNMASKED: WHAT YOU'RE NOT SUPPOSED TO KNOW ABOUT DISHONEST ABE 93 (2006) ("The Lincoln administration could have appealed the chief justice's ruling, but it chose to simply ignore it . . . ."). *But see* Frank W. Dunham, Jr., *Where* Moussaoui *Meets* Hamdi, 183 MIL. L. REV. 151, 156 (2005) ("Rather than adhere to the ruling, Lincoln appealed it to the full Supreme Court."). Dunham puts forward no authority for his factual claim regarding a purported *Merryman*

habeas action, if the decision had been in chambers, the prevailing view is that there was no route to appeal to the full Court.[61] Moreover, even if

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appeal. Likewise, among modern commentators, there is little substantive agreement in regard to which party would have prevailed had a *Merryman* appeal (or the same issues in another case) been heard by the full Supreme Court under Taney in early 1861. *Compare*, *e.g.*, FEHRENBACHER, *supra* note 41, at 124 ("There had been six justices forming the majority that declared the Missouri Compromise unconstitutional in the Dred Scott case. Only four of them continued to serve on the Court during the Civil War, and three of those four (including two Southerners) soon proved themselves to be strong Unionists. Taney alone remained unrepentant and unredeemed, as it were, and Taney alone was responsible for *Ex parte Merryman* . . . ."), *and* Mark E. Neely Jr., *"Seeking a Cause of Difficulty with the Government": Reconsidering Freedom of Speech and Judicial Conflict under Lincoln*, *in* LINCOLN'S LEGACY: ETHICS AND POLITICS 48, 52 (Phillip Shaw Paludan ed., 2008) ("Taney did not have the whole court behind him or any way of getting it behind his [*Merryman*] decision any time soon."), *with* Paulsen, *The* Merryman *Power*, *supra* note 11, at 92 n.38 ("[O]ne would not be optimistic about Lincoln's chances of prevailing [in a *Merryman* appeal] with the 1861 Taney Court."), ROSS, *supra* note 5, at 66 (at the time *Merryman* was decided, "the Court's majority [was] still . . . made up of men unsympathetic to Lincoln and his party"), *with* HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II, at 93 (5th rev. ed. 2000) (explaining that "the Court was at best a toss-up in terms of its stance on Lincoln's policies."), *and* White, *supra* note 50, at 218 ("An appeal to the [full] Supreme Court, in other words, would have been imprudent.").

[60] *See* REHNQUIST, *supra* note 6, at 44 (noting "significant procedural obstacles to such an appeal as the law then stood"). It goes without saying that Cadwalader, Lincoln, and his administration had no moral, practical, or legal duty to appeal *Merryman* absent the power to take such an appeal. *See* THE FEDERALIST NO. 63, at 338 (James Madison) (J.R. Pole ed., 2005) ("Responsibility in order to be reasonable must be limited to objects within the power of the responsible party . . . ."); ENOCH POWELL, M.P. (for South Down, N.I.), *Christianity and the Curse of Cain*, *in* WRESTLING WITH THE ANGEL 13 (1977) ("No one can be responsible for what he does not control."); J. ENOCH POWELL, M.P. (for Wolverhampton, South-West, Eng.), SHADOW SECRETARY OF STATE FOR DEFENCE, *Speech at Wolverhampton* (Dec. 12, 1966), *in* FREEDOM AND REALITY 197, 199, 260 (John Wood ed., 1969) ("'[R]esponsibility' depends upon the prior question of power . . . ."); C.H. MCILWAIN, CONSTITUTIONALISM AND THE CHANGING WORLD 282 (1939) (same).

[61] *See* MCGINTY, *supra* note 4, at 176 (suggesting that no appeal was possible); WHITE, *supra* note 15, at 445 (same); *see also In re* Metzger, 46 U.S. (5 How.) 176, 191 (1847) (McLean, J.) ("This Court can exercise no power in an appellate form over decisions made at his chambers by a *Justice of this Court* or a judge of the district court." (emphasis added)). Although *Merryman* was a final decision, because it was a non-appealable judgment and, more importantly, because it was brought against a government official, one suspects that other habeas petitioners could not have successfully sought relief against Cadwalader or other government officials via offensive collateral estoppel. *See* United States v. Mendozo, 464 U.S. 154, 162 (1984) (Rehnquist, J.) ("We hold, therefore, that nonmutual offensive collateral estoppel simply does not apply against the government . . . ."); Warner/Elektra/Atl. Corp. v. County of DuPage, 991 F.2d 1280, 1282 (7th Cir. 1993) (Posner, J.) (explaining that "an unappealable finding does not

the court which heard *Merryman* was the Circuit Court for the District of Maryland, or even if an appeal could be taken to the full Court from an otherwise jurisdictionally sound in-chambers habeas decision, Cadwalader, the government, and Lincoln could have taken no such appeal in *Merryman*. Why? Merryman had brought a habeas corpus proceeding seeking a judicial order compelling Cadwalader to release him.[62] Taney never issued any such order against Cadwalader (or against anyone else). As such, Merryman was the *nonprevailing* party, and only he was entitled to take an appeal (assuming any such appeal was authorized by statute or otherwise permitted).[63] Cadwalader—as odd as it sounds—was the *prevailing* party in *Merryman*, and in the American system of justice, absent special circumstances, only a nonprevailing party, i.e., only a party aggrieved by a judicial *order* (not by an *opinion*) may take an appeal.[64]

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collaterally estop"); 18 CHARLES ALAN WRIGHT ET AL., FED. PRAC. & PROC. JURIS. § 4421 (2d ed. Apr. 2016 update) ("Since appellate review is an integral part of the system, there is strong reason to insist that preclusion should be denied to findings that could not be tested by the appellate procedure ordinarily available, either by appeal or by cross-appeal." (footnote omitted) (collecting authority)); *see also supra* note 58 (suggesting limited precedential effect of a chambers opinion).

[62] *See Merryman*, 17 F. Cas. 144, 145 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.) ("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 . . . ." (emphasis added)).

[63] *Cf.* Paul Finkelman, *Limiting Rights in Times of Crisis: Our Civil War Experience—A History Lesson for a Post 9-11 America*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 25, 39 (2003) (noting that "Merryman did not appeal his incarceration to the full Supreme Court").

[64] *See, e.g.*, Erastus Corning v. Troy Iron & Nail Factory, 56 U.S. (15 How.) 451, 465 (1853) (Grier, J.) (expounding on the "aggrieved" party rule); Atl. Mut. Ins. Co. v. Nw. Airlines, Inc., 24 F.3d 958, 961 (7th Cir. 1994) (Easterbrook, J.) ("A litigant dissatisfied with the analysis of an opinion, but not aggrieved by the judgment, may not appeal. . . . Indeed, a debate about [the] language of an opinion is not even a case or controversy within the scope of Article III."); *see also, e.g.*, Livornese v. Med. Protective Co., 136 Fed. Appx. 473, 481 n.8 (3d Cir. 2005) (Roth, J.) ("As the District Court imposed no actual liability against [the cross-appellant] by the March 7, 2003 . . . order, or by any other order, there is nothing for us to reverse. We construe [the cross-appellant's] request as an invitation to reverse the legal memorandum or reasoning of the District Court. We review only judgments, not opinions."); 13 CYCLOPEDIA OF FEDERAL PROCEDURE *Necessity that judgment be adverse* § 58.08 (3d ed. 2015) ("[T]he law does not give a party who is not aggrieved an appeal from a judgment in his or her favor . . . ."); *cf., e.g.*, Act to Establish the Judicial Courts of the United States, ch. 20, § 22, 1 Stat. 73, 84–85 (1789) (requiring that in seeking review in the Supreme Court of the United States from federal circuit court decisions "writs of error shall not be brought but within five years after rendering or passing *the judgment or decree complained of*" (emphasis added)). Interestingly, Erastus Corning, a party to the 1853 Supreme Court case discussed above,

VI. Myth: General Cadwalader's Conduct

The fourth *Merryman* myth is an entire constellation of factual and legal claims relating to General Cadwalader's conduct. The claims include:

> A. Cadwalader (as opposed to Lincoln) ignored or defied Chief Justice Taney by not showing up for the first day's hearing on May 27, 1861;[65]
> B. Cadwalader defied Taney by not producing Merryman after Taney granted a writ of habeas corpus directed to Cadwalader to produce (but not release) Merryman;[66]

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was the recipient of a famous Civil War era letter from President Lincoln discussing habeas corpus. *See* Letter from President Lincoln to Erastus Corning and others (June 12, 1863), *in* 8 COMPLETE WORKS OF ABRAHAM LINCOLN, 1862–1863, at 298, 298–314 (John G. Nicolay & John Hay eds., N.Y., The Tandy-Thomas Co. new ed. 1894) [*hereinafter* Presidential Letter]. Prior to the outbreak of the Civil War, Corning sold cattle to Merryman. *See* WHITE, *supra* note 4, at 26.

[65] *See, e.g.*, PAUL BREST ET AL., *supra* note 3, at 223 (stating that Cadwalader "refused either to attend the May 27 hearing . . . or to produce Merryman . . . . Cadwalader refused to comply with a second order [to attend a contempt hearing] to be present the following day"); THOMAS J. REED, AVENGING LINCOLN'S DEATH: THE TRIAL OF JOHN WILKES BOOTH'S ACCOMPLICES 17 (2016) ("Cadwalader refused to appear in court . . . . This caused the elderly chief justice of the United States to write a scorching opinion . . . ."); Finkelman, *supra* note 11, at 1359 ("Cadwalader refused to appear before Taney but sent a subordinate to inform the Chief Justice that Merryman was charged with treason . . . ."); Mark F. Leep, *Ex Parte Merryman*, *in* AMERICAN CIVIL WAR: THE DEFINITIVE ENCYCLOPEDIA AND DOCUMENT COLLECTION 603, 603 (Spencer C. Tucker ed., 2013) ("Cadwalader refused [to attend the May 27, 1861 hearing] and rebuffed a second demand to appear."); Yoo, *Judicial Supremacy*, *supra* note 44, at 18 ("The General refused to appear . . . ."); *infra* notes 69–79, and accompanying text.

[66] *See, e.g.*, LOUIS FISHER, THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER 323 (2014) ("The commandant, acting under Lincoln's orders, refused to produce Merryman."); HARTZ, *supra* note 1, at 16 ("When both Cadwalader and Lincoln himself refused to obey Taney's [ex parte] order, Justice Taney decided the case against Lincoln . . . ."); Hutchinson, *supra* note 5, at 291 ("Notwithstanding Taney's opinion, the military commander at Ft. McHenry, acting under the commander-in-chief's orders, declined to produce Merryman."); Klein & Wittes, *supra* note 50, at 118 ("In response to Merryman's petition for a writ of habeas corpus, Chief Justice Taney . . . ordered Union General George Cadwalader to produce Merryman in federal court in Maryland. When Cadwalader defied the order . . . ."); Neely, *supra* note 59, at 52 ("Taney confronted the army colonel bringing word of General Cadwalader's defiance."); *infra* notes 80–104; *see also, e.g.*, CHARLES GROVE HAINES & FOSTER H. SHERWOOD, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1835–1864, at 457 (explaining that the Merryman incident "led to outright executive defiance of judicial authority"); Michal R. Belknap, 89 MIL. L. REV. 59, 82 (1980) ("[W]hen Chief Justice Roger Taney . . . had

C. When the United States Marshal attempted to serve an attachment order on Cadwalader at the Fort, Cadwalader sent the Marshal away;[67] and finally,
D. Cadwalader received authorization from President Lincoln to ignore or defy the United States Marshal.[68]

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ordered military authorities to deliver up a prisoner during the Civil War, they . . . defied his order . . . ."); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2571 (2003) ("[T]he military refused to produce the petitioner."); Tyler, *supra* note 44, at 343 ("Likewise, [Lincoln] ignored Chief Justice Taney's command in *Merryman* that a federal prisoner detained pursuant to presidential order be produced.").

[67] *See, e.g.*, FRANK L. KLEMENT, THE LIMITS OF DISSENT: CLEMENT L. VALLANDIGHAM & THE CIVIL WAR 69 (1998) (affirming, absent any on-point sources, that "Cadwalader refused to accept the writ [of attachment] and denied entrance to Fort McHenry to the marshal seeking to serve it"); DAVID M. SILVER, LINCOLN'S SUPREME COURT 29 (2d ed. 1998) (affirming, absent any sources, that the "General resisted Taney's writ of attachment by directing that the marshal of the court be denied entrance to Fort McHenry"); 4 STATES AT WAR, *supra* note 12, at 313 (same); Douglas W. Kmiec, *The Supreme Court in Times of Hot and Cold War: Learning from the Sounds of Silence for a War on Terrorism*, 28(3) J. SUP. CT. HIST. 270, 273 (Nov. 2003) (noting that "Lincoln's subordinate commander General Cadwalader barred the Court's officer from even entering the fort where Merryman was held"); *infra* notes 105–106; *see also, e.g.*, Cole, *supra* note 66, at 2571 ("Justice Taney then issued an attachment for contempt, but the military refused to accept service of that order."); Rosen, *supra* note 44, at 149 n.704 ("[M]ilitary officers at Fort McHenry, Maryland, acting upon Lincoln's suspension of habeas corpus, intentionally . . . barred from the fort the marshal who attempted to serve it.").

[68] *See, e.g.*, United States v. Minoru Yasui, 48 F. Supp. 40, 51 (D. Or. 1942) (Fee, J.) ("No designation need be given to acts which the military sometimes are required to commit under the stress of war and of military necessity, such as . . . the refusal of General Cadwalader under Lincoln's order to obey the writ of the federal circuit court . . . ."), *vacated*, 320 U.S. 115 (1943); *Ex parte* Owens, 258 P. 758, 787 (Crim. Ct. App. Okla.) (Doyle, P.J.) ("The commandant in response to the writ answered that the president had notified him that [the president] had suspended the writ of habeas corpus and instructed [the commandant] not to obey it."), *quashed by*, Dancy v. Owens, 258 P. 879 (Okla. 1927); FISHER, *supra* note 66, at 323 ("The commandant, acting under Lincoln's orders, refused to produce Merryman."); ROSS, *supra* note 5, at 67 ("Lincoln . . . ordered the army officer who had arrested Merryman to refuse to accept the writ."); Hutchinson, *supra* note 5, at 291 ("Notwithstanding Taney's opinion, the military commander at Ft. McHenry, acting under the commander-in-chief's orders, declined to produce Merryman. Thus, Abraham Lincoln defied a lawful order of the Chief Justice of the United States."); *infra* notes 107–133; *see also, e.g.*, GEORGE C. EDWARDS III & STEPHEN J. WAYNE, PRESIDENTIAL LEADERSHIP: POLITICS AND POLICY MAKING 415 (8th ed. 2010) ("Taney ordered [Merryman's] release, but *Lincoln* refused to give him up to the U.S. [M]arshal sent to bring him into court . . . ." (emphasis added)); H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 207 & n.7 (2002) ("The only clear counterexample [of the executive duty to obey judicial orders] is President Lincoln's instruction to his subordinates to disregard a writ of habeas corpus issued by Chief Justice Taney . . . ." (citing *Merryman*)); Barry Friedman, *The*

These factual and legal assertions lack substantial merit.

A. Is it True that Cadwalader (as Opposed to Lincoln) Ignored or Defied Chief Justice Taney by not Showing up for the First Day's Hearing on May 27, 1861?

Anyone who has ever been a law clerk in a court with original jurisdiction over habeas matters knows that jailers who have responsibility over large institutions rarely personally attend habeas hearings, even though such jailers are the named defendants.[69] As a civil or quasi-civil matter,[70] jailer-defendants are not obligated to attend

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History of the Countermajoritarian Difficulty, Part Four: Law's Politics, 148 U. PA. L. REV. 971, 1032 n.275 (2000) ("Lincoln's instructions to ignore the order in *Ex Parte Merryman* . . . may be the most defiant . . . ." (citing Lincoln's July 4, 1861 message to Congress, which took place more than a month after *Merryman*)); Rosen, *supra* note 44, at 149 n.704 ("[M]ilitary officers at Fort McHenry, Maryland, acting upon Lincoln's suspension of habeas corpus, intentionally disobeyed a writ of habeas corpus issued by Chief Justice Taney . . . .").

[69] *See, e.g.*, FREDERICKA SARGENT, ASSISTANT ATTORNEY GENERAL, EVERYTHING YOU EVER WANTED TO KNOW ABOUT FEDERAL HABEAS AND THEN SOME 2 (2014) ("In Texas, the respondent [in a habeas action] is always the Director of the Criminal Institutions Division for the Texas Department of Criminal Justice (TDCJ). According to the Texas Constitution, TDCJ is represented by the Attorney General's Office (OAG)."), http://tinyurl.com/hctk5vj. When a prisoner sues a jailer-defendant or government entity in relation to the conditions of the prisoner's confinement, the jailer will sometimes attend the hearing or trial, particularly because he may have relevant information in regard to prison procedures and conditions. Such federal civil rights actions for damages under 42 U.S.C. § 1983 are distinguishable from traditional habeas corpus actions challenging the fact or length of the prisoner's confinement. *See* Act to Establish the Judicial Courts of the United States, ch. 20, § 14, 1 Stat. 73, 82 (1789) (authorizing "writs of *habeas corpus* for the purpose of an inquiry into *the cause of commitment*" (emphasis added)); *see also* 28 U.S.C. § 2254 (habeas procedures for prisoners in state custody), § 2255 (habeas procedures for prisoners in federal custody). In these latter cases, where the prisoner seeks, not damages, but release (or speedier release), the jailer-defendant will rarely attend because he will rarely have relevant information in regard to the original cause of commitment. *See generally* Preiser v. Rodriguez, 411 U.S. 475 (1973) (Stewart, J.); Martin A. Schwartz, *The* Preiser *Puzzle: Continuing Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DEPAUL L. REV. 85 (1988).

[70] *See* Browder v. Dir., Dep't of Corrs. of Ill., 434 U.S. 257, 269 (1978) (Powell, J.) ("It is well settled that habeas corpus is a civil proceeding."); Peter Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty Act of 1996*, 30 AM. J. CRIM. L. 171, 198 (2003) ("Habeas corpus proceedings are usually treated as civil or quasi-civil proceedings . . . .").

habeas hearings in person.[71] Customarily, such defendants send a representative (or, an attorney is sent for the named defendants by the government's relevant law department).[72] Here, Cadwalader sent Colonel Lee.[73] This cannot be fairly characterized as defiance. Although Taney would initiate contempt proceedings against Cadwalader, the only justification Taney offered for those contempt proceedings was that Cadwalader failed to produce Merryman.[74] Taney's attachment order makes no mention of the fact that Cadwalader failed to attend the May 27, 1861 proceedings.[75]

What might defiance by the Army have looked like? If the Army had denied Merryman access to an attorney or had denied him access to his family, perhaps that would have been defiance.[76] If the Army had

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[71] *See, e.g.*, 10 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 104 (2005) ("A party in a civil trial may be represented by counsel or may represent himself . . . . A party may, however, choose not to attend the trial and be represented in court solely by an attorney."), http://tinyurl.com/haxxtch.

[72] *See, e.g.*, *supra* note 69.

[73] *See* REHNQUIST, *supra* note 6, at 41 ("Obviously, Colonel Lee [was] present not as legal counsel for the government but as a representative of Merryman's custodian (General Cadwalader) . . . ."); *see also* 4 STATES AT WAR, *supra* note 12, at 312–13 (explaining that Lee was Cadwalader's "ADC," i.e., aide-de-camp, and that Lee reported to the court that Cadwalader was "unavoidably detained"). *But see Affairs in Baltimore*, *supra* note 17 (reporting that Major Belger, not Colonel Lee, appeared for Cadwalader).

[74] *See Merryman*, 17 F. Cas. 144, 146 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.) (ordering "an attachment forthwith [to] issue against General George Cadwalader for a contempt, in refusing to produce the body of John Merryman").

[75] *See id.* *But see* Stephenson, *supra* note 2, at 344 ("Taney issued an attachment for contempt against Cadwalader for failure to appear in court . . . ."). To be clear, Taney's attachment order commanded the Marshal to attach Cadwalader's (not Merryman's) body, i.e., to bring Cadwalader to court where Cadwalader's contempt would be adjudicated. *See 27 May 1861, Attachment issued by Clerk, Thomas Spicer*, ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES): JOHN MERRYMAN (1824–1881) (last visited Sept. 25, 2015), http://tinyurl.com/jksfafz. *But see* ELLIS, *supra* note 47, at 413 ("[Taney] dispatched the court's marshal to Fort McHenry under orders to bring Merryman to court by noon the next day."); Louis Fisher, *National Security Law: The Judicial Role*, *in* FREEDOM AND THE RULE OF LAW 203, 210 (Anthony A. Peacock ed., 2010) ("Prison officials, acting under Lincoln's policy, refused to let Taney's marshal serve a document at the prison to release Merryman."); *but see also* E. THOMAS SULLIVAN & TONI M. MASSARO, THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW 112 n.292 (2013) (same) (citing Fisher, *supra* at 210).

[76] *See* CHRISTOPHER PETER LATIMER, CIVIL LIBERTIES AND THE STATE 89 (2011) ("Within hours of his detention, Merryman contacted lawyers who drafted a petition for a writ of habeas corpus . . . ."); 5 SWISHER, *supra* note 11, at 845 ("Merryman was given immediate access to counsel . . . ."); *cf.* MCGINTY, *supra* note 4, at 153 ("Merryman was treated well during the time he was in Fort McHenry. His family and friends were allowed to visit him and help him make plans for his future . . . ."); REHNQUIST, *supra*

arrested Merryman's attorney, before or after the attorney petitioned Taney for a writ of habeas corpus, arguably, that would have been defiance. If the Army had closed the courthouse where the proceedings were being heard, or had seized pamphlets or newspapers publishing Taney's opinion, then that would have constituted defiance. Had the Army seized Taney's papers or Chief Justice Taney himself on his way to or from the courthouse, then that certainly could be fairly characterized as defiance.[77] Nothing like this happened in *Merryman*.[78]

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note 6, at 39 (noting, in relation to the period following the court proceedings, that Merryman "was permitted to see members of his family and numerous friends").

[77] *See* PHILLIP SHAW PALUDAN, THE PRESIDENCY OF ABRAHAM LINCOLN 76 (1994) ("It was grand drama, but Taney was not in danger."); ROSSITER, *supra* note 2, at 23 (noting that after adjudicating *Merryman*, "Taney returned to Washington unmolested"); *see also* MCGINTY, *supra* note 4, at 151–53 (discussing persistent rumors that Lincoln considered having Taney arrested, and characterizing such rumors as "strain[ing] credulity"); *cf.* DILORENZO, LINCOLN UNMASKED, *supra* note 59, at 92–94 (arguing that Lincoln signed a warrant to arrest Taney, notwithstanding the author's inability to document or produce any such warrant). Furthermore, federal authorities arrested state judges during the Civil War. *See* Arthur John Keeffe, *Practicing Lawyer's Guide to the Current Law Magazines*, 48 A.B.A. J. 491, 491 (1962) (noting that Judge Bartol of the Maryland Court of Appeals and Judge Carmichael of the Maryland Circuit Court were arrested by federal authorities during the Civil War).

[78] *See* Finkelman, *supra* note 11, stating,

> But compared to the trampling of civil liberties in other nations during civil wars, what happened under Lincoln seems almost innocent and naive. . . . Merryman's arrest is astounding because he had access to an attorney. . . . This was a globally unique privilege for a civilian in military custody. That the army allowed Merryman's attorney to travel from Baltimore to Washington in order to appeal directly to Taney, and then allowed Taney to hold court in Baltimore and openly challenge military authority, is in itself remarkable. No one later thought to interfere with Taney when he published his opinion castigating Lincoln. This could hardly happen in very many other places during a civil war.

Id. at 1378 (internal citations omitted) (quotation marks omitted). *But see* Egan v General Macready [1921] 1 IR 265 (O'Connor, M.R.) (granting habeas writ to release prisoner, which was disobeyed by military authorities, then issuing an attachment order for contempt, followed by compliance by the military); Wolfe Tone's Case, 27 How. St. Tr. 613, 625 (1798) (Kilwarden, C.J.) (granting habeas writ to produce prisoner, which was disobeyed by military authorities, then issuing an attachment order for contempt, followed by the death of the prisoner, while still in custody, in consequence of self-harm). Professor Finkelman is engaged in hyperbole here. It is more than likely that a good many people, including Chief Justice Taney and some in the Executive Branch, *thought* about doing precisely these things, particularly because of a well-known precedent which arose in connection with the War of 1812. General Andrew Jackson imposed martial law in New Orleans and arrested Louaillier, a member of the assembly,

Had Cadwalader sought to defy Taney what might he have done? Had he sent no one at all in response to the writ, or had Colonel Lee asserted in open court that the military authorities would not abide by the decision of the court, arguably, that would have constituted defiance, but nothing like that happened. Quite the opposite: Cadwalader and Lee asked for more time to prepare a defense.[79]

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who had criticized Jackson in a letter in a newspaper. Judge Dominick A. Hall, a federal district court judge, intended to issue a writ of habeas corpus. *See* JOHN SPENCER BASSETT, THE LIFE OF JACKSON 225 (new ed. 1925) ("[Judge Hall] granted Louaillier's request, stipulating that Jackson should have notice before the writ was served on him."). Jackson's response was a good bit more firm than Cadwalader's and Lincoln's—Jackson jailed Judge Hall. *See* RANDALL & DONALD, *supra* note 45, at 302 ("[Cadwalader] showed no truculence toward the judiciary as did Jackson in the War of 1812 . . . ."). *But cf*. JAMES MACGREGOR BURNS, PACKING THE COURT: THE RISE OF JUDICIAL POWER AND THE COMING CRISIS OF THE SUPREME COURT 65 (2009) (characterizing Cadwalader's response as a "rebuke[]"). The federal district attorney sought a writ of habeas corpus on behalf of Judge Hall from a state judge, and General Jackson proceeded to jail both the district attorney and the state judge. *See* BASSETT, *supra* at 226. Once martial law ended, Judge Hall fined Jackson $1000 for contempt of court. These events from the War of 1812 remained active in the public mind. *See, e.g.*, MATTHEW WARSHAUER, ANDREW JACKSON AND THE POLITICS OF MARTIAL LAW: NATIONALISM, CIVIL LIBERTIES, AND PARTISANSHIP 197 (2006) ("Most let the issue of martial law rest [after Jackson died in 1845]. Yet it still remained in the minds of some."). For example, in 1844, Congress remitted the fine for contempt Jackson had paid, and also paid Jackson interest. *See* JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 145 & n.10 (1926). "In 1843, Chief Justice Roger Taney privately praised [former President] Jackson for his measures three decades earlier and [Taney] condemned [Judge] Hall's use of habeas corpus and his fine of [General] Jackson." *See* Paul D. Halliday, *Habeas Corpus*, *in* THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 673, 688 (Mark Tushnet et al. eds., 2015); *see* Letter from Chief Justice Taney to (former) President Jackson (Apr. 28, 1843), *in* 6 CORRESPONDENCE OF ANDREW JACKSON, 1839–1845, at 216, 217 (John Spencer Bassett ed., 1933) ("Future ages will be amazed that such conduct as that of Judge Hall could find defenders or apologists in the count[r]y, and how there could be any difficulty in stigmatizing the disgraceful proceeding in the manner it deserves."); *see also* Letter from Taney to Jackson (Jan. 4, 1844), *in* 6 *id*. at 250, 251. If, as Professor Finkelman argued, President Lincoln never *thought* about interfering with Chief Justice Taney, then he was a fool, and Lincoln was no fool. *See, e.g.*, Presidential Letter, *supra* note 64, at 298, 311–12 (reporting Lincoln's discussion of the General Jackson-Judge Hall incident); *see also* THE DIARY OF EDWARD BATES, 1859–1866, at 252 (Howard K. Beale ed., 1933) (noting that in a April 21, 1862 cabinet meeting, the President "talked about arresting the attornies" who brought civil actions "for [wrongful] sei[z]ure of persons and property" against government officials).

[79] *See Merryman*, 17 F. Cas. at 146 (reproducing Cadwalader's signed response which stated that Cadwalader "respectfully requests that you will postpone further action upon this case" until the President can be consulted).

B. Is it True that Cadwalader Defied Taney by not Producing Merryman After Taney Granted a Writ of Habeas Corpus Directed to Cadwalader to Produce (but not Release) Merryman?

Merryman was seized by military authorities at 2:00 A.M. on Saturday, May 25, 1861.[80] Afterwards, Merryman's attorneys drafted a petition for habeas corpus, and they presented it to Chief Justice Taney on Sunday, May 26, 1861 in his Washington home.[81] Later that day, that is, Sunday, May 26, 1861, Taney granted the petition in part: Taney ordered Cadwalader to produce (but not release) Merryman for a hearing to be held on Monday, May 27, 1861, at 11:00 A.M.[82] It is true that Cadwalader did not produce Merryman on May 27, as he was required to do by Taney's order.[83]

All the preliminary proceedings—all the proceedings prior to the May 27, 1861 hearing—were ex parte. Merryman's attorneys had been present before Taney, but the government's attorney and Cadwalader's attorney were absent—if only because they had not yet received any notice from a United States Marshal.[84] Cadwalader and the government were, at the very least, entitled to argue that the status quo should be preserved until they also had an opportunity to be heard and to put forward their defenses *in court*, i.e., asserting that the President's unilateral suspension put Merryman beyond judicial relief, including a grant of a writ of habeas corpus.[85] Of course, this is not for a moment to

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[80] *See supra* note 13.

[81] *See supra* note 14.

[82] *See supra* note 15.

[83] *See Merryman*, 17 F. Cas. at 146; REHNQUIST, *supra* note 6, at 33–34.

[84] *See Merryman*, 17 F. Cas. at 146 (noting that the writ was "[i]ssued 26th May 1861" and it was served "on the same day on which it issued"); *26 May 1861, Return of U.S. Marshall* [sic] *Washington Bonifant*, ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES): JOHN MERRYMAN (1824–1881) (last visited Oct. 22, 2015), http://tinyurl.com/j42y9l5 (stating that the U.S. Marshal, Washington Bonifant, made service on Cadwalader "on the 26th day of May 1861 at half past five o'clock p.m."). It is precisely because these preliminary issues were decided by Taney in the absence of the government, Cadwalader, and their attorneys that this case was captioned as an "Ex parte" matter. *See* EDELSON, *supra* note 12, at 288 n.50 ("'Ex parte' means 'on behalf of one party alone.' . . . [In an ex parte matter,] [t]he court initially considers whether to issue the writ without hearing from the government.").

[85] *See* KRENT, *supra* note 11, at 146 ("Without argument [from Cadwalader], Taney ordered the prisoner brought before him . . . ."); *cf.* ROSEN, *supra* note 47, at 172 (asserting that, in *Merryman*, Taney "[r]efus[ed] to allowed the government to be heard"). If Cadwalader had produced Merryman and also subsequently prevailed on the merits, then even such a favorable decision for Cadwalader and the government would

suggest that ex parte judicial orders need not be obeyed.[86] However, such preliminary ex parte orders are qualitatively different from other judicial orders, particularly final judicial orders[87] issued after notice and

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have been little more than dicta in regard to the initial ex parte order, particularly if the decision had been fact-dependent and tied to Merryman's specific conduct. In order to test *judicially* the legal validity of Taney's initial ex parte order as a precedent for future cases, Cadwalader had to maintain a live adversarial controversy and the status quo. To put it another way, Cadwalader's conduct should only be characterized as "defying" the courts if one assumes that individual jailer-defendants and the government should be denied a substantive opportunity to test judicially the power of the courts to issue ex parte habeas orders in the context of purported presidential suspension. Not surprisingly, Cadwalader, the named government-defendant, was unwilling to throw in the towel before he had any opportunity to be heard.

[86] This Article does not opine on the precise scope of what obedience is due judicial orders, ex parte or otherwise, issued by a court with competent jurisdiction. *Compare*, *e.g.*, POWELL, *supra* note 68, at 207 ("American executive officers must obey judicial orders, *at least once affirmed at the highest level* [of the judiciary]." (emphasis omitted)), *and* Dale Carpenter, *Judicial Supremacy and its Discontents*, 20 CONST. COMMENT. 405, 423 (2004) ("[E]ven if Lincoln was defying Chief Justice Taney's order on constitutional grounds, he was not defying an order of the Supreme Court, the judicial body that possesses ultimate judicial authority. . . . If there are degrees of executive defiance of judicial orders, ranging from disobeying a district judge to disobeying an appellate court to disobeying the Supreme Court, Lincoln's defiance was at the lower end of the spectrum."), *with* Merrill, *supra* note 53, at 59–60 ("The problem . . . to paraphrase Gertrude Stein, is that a court is a court is a court. The Supreme Court, the courts of appeals, and the district courts all exercise the same constitutional power—the judicial power [of Article III]—and all conduct their affairs in fundamentally similar ways. . . . There are a number of practical differences between courts at different levels in the judicial system . . . . But these are at most differences in degree, and would not seem to justify treating the work product of courts at different levels in the judicial hierarchy as imposing a fundamentally different obligation on the executive branch." (citation omitted)). *See generally infra* note 134.

[87] *See, e.g.*, Paulsen, *Lincoln and Judicial Authority*, *supra* note 44, at 1285 ("Lincoln's denial of judicial supremacy [in *Ex parte Merryman*] extend[ed] . . . even to *final judicial decrees* in a particular case—breaking through the limits that Lincoln himself had declared as a Senate candidate responding to *Dred Scott* in 1857 and 1858, and which he had reaffirmed in his First Inaugural barely a month earlier." (emphasis added)). *But cf.* STEPHEN M. ENGEL, AMERICAN POLITICIANS CONFRONT THE COURT: OPPOSITION POLITICS AND CHANGING RESPONSES TO JUDICIAL POWER 192 (2011) (arguing that Lincoln's position in *Dred Scott*, his First Inaugural, and his response to *Merryman* were consistent in that they "highlighted the unsettled nature of the law on new questions and the plausibility of alternative interpretations, at least until a single interpretation congealed through repetitive announcement and enforcement"). Professor Paulsen's abstract position is entirely correct: a party's resisting a final judicial order issued after adversarial proceedings is far more significant than a party's merely violating a preliminary ex parte judicial order. *See also* Locks v. Commanding Gen., Sixth Army, 89 S. Ct. 31, 32 (1968) (Douglas, J., in chambers) ("Article I, s 9, of the Constitution provides 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.' It may be that in

an opportunity to be heard in an adversarial hearing (or trial) on the merits.[88]

Here, Cadwalader could have believed—in good faith—that after a brief hearing, his initial failure to comply should, and would, be

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time that provision will justify the issuance of a writ of habeas corpus by an individual Justice. *The point, however, has never been decided* . . . ." (emphasis added)); *cf.* Merrill, *supra* note 53, at 70 (noting "consensus . . . that executive actors have a duty to enforce *final* judicial judgments, even if they disagree with their legal bases" (emphasis added)); *id*. at 43, 46 (same, and again referring exclusively to "final" judgments). Unfortunately, Professor Paulsen nowhere explains how Lincoln (or the administration, or, indeed, anyone) violated or, even, could have violated Taney's final judicial decree in *Merryman*. *See* MCGINTY, *supra* note 4, and accompanying text (reproducing Taney's final order). Indeed, Taney's language was worded in such general and abstract terms that one might say it was impossible for the President to violate Taney's order. For example, Taney stated, "It will then remain for that high officer [the President], 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." *Merryman*, 17 F. Cas. at 153 (emphasis added). *But see* Paulsen, *Lincoln and Judicial Authority*, *supra* note 44, at 1287–88 ("Taney ordered General Cadwalader's arrest and further directed that his opinions and orders immediately be transmitted to President Lincoln, with *instructions* that they be enforced." (emphasis added)). Professor Paulsen's characterization is not helpful, because it was the nature of those "instructions" which was, and remains, at issue. What did Taney's so-called "instructions" specifically command? Were those instructions binding, and against whom or what entities?

[88] Such a hearing, dealing solely with the merits of Cadwalader's, i.e., the government-defendant's, legal argument would be adversarial as long as Merryman's attorney was present, even if Merryman was not. Likewise, a federal prisoner bringing a modern statutory habeas action has a right to be present if an evidentiary hearing will be held or if facts are disputed. *See Habeas Corpus Procedure*, 83 HARV. L. REV. 1154, 1189–91 (1970). Taney would decide *Merryman* based on well-known principles and precedents of public law, without regard to any specific facts related to John Merryman's conduct. *See, e.g.*, *Merryman*, 17 F. Cas. at 147 ("I ordered this attachment yesterday, because, *upon the face of the return*, the detention of the prisoner was unlawful . . . ." (emphasis added)). Chief Justice Rehnquist characterized Taney's ex parte order as a modern order to show cause. *See* WILLIAM H. REHNQUIST, THE SUPREME COURT 66 (rev. ed. 2002). Likewise, Taney's subsequent attachment order has also been characterized as an order to show cause. *See, e.g.*, *Ex parte* Merryman: *Proceedings of the Court Day, May 26, 1961*, 56(4) MD. HIST. MAG. 384, 389 (Dec. 1961) (characterizing the "writ of attachment [as] requiring General Cadwalader to appear . . . to show cause why he should not be held in contempt"). In other words, when the attachment was issued, Taney had only decided that Cadwalader had violated his prior ex parte order, but liability for the purported contempt, and Cadwalader's defenses, had not yet been adjudicated in adversarial proceedings. *See infra* note 89 (discussing Cadwalader's potential defences in regard to the contempt proceeding). *But see* Yoo, *Judicial Supremacy*, *supra* note 44, at 18 ("Taney held the General in contempt . . . .").

excused.[89] Indeed, as Chief Justice Taney explained, "I ordered this attachment [against Cadwalader] yesterday, *because*, upon the face of the return [i.e., Cadwalader's response], the detention of the prisoner was unlawful . . . ."[90] In other words, Cadwalader's failure to obey the original ex parte order was only potentially sanctionable *because* his substantive defense had failed. Had Cadwalader's defense succeeded, there would have been no possibility of contempt, notwithstanding his failure to obey Taney's ex parte order.

Like many litigants faced with an ex parte temporary restraining order or preliminary injunction, Cadwalader was caught between a rock and a hard place: he could waive a potentially meritorious defense by obeying the court order (i.e., by producing the prisoner), or he could preserve the status quo by putting forward a good faith defense on the merits. The latter strategy necessitated that he disobey the court's ex parte order and that he refuse to produce the prisoner until the merits of *his* position had been judicially heard and determined. Such a strategy poses the risk of sanctions should it fail, but even if it fails, characterizing such a litigant or his strategy as "defying" the courts is grossly simplistic. This is true not merely because the context of *Merryman* was civil war, but because *all* ex parte orders pose very basic

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[89] *See* Woods v. Jianas, 92 F. Supp. 102, 104 (W.D. Mo. 1950) (Reeves, C.J.) ("If, however, it shall be made to appear that the defendant is unable to comply with the order, then he should be discharged."); Comment, *The Application of the Law of Contempt to the* Uphaus *Case*, 61 COLUM. L. REV. 725, 732 (1961) ("Inability to obey a court order is a good defense in all contempt proceedings."). Cadwalader could have pled something akin to *force majeure*. *See, e.g.*, 1 W. F. BAILEY, A TREATISE ON THE LAW OF HABEAS CORPUS AND SPECIAL REMEDIES 458 (1913) (noting that at the time *Merryman* was adjudicated, "the situation was peculiar. Many of the states were actually in armed rebellion against the general government. Maryland, while it had not in fact seceded, was in a partial state of insurrection."); REHNQUIST, *supra* note 88, at 66 ("[Union] [t]roops moving through [Baltimore] were stoned . . . ."); WHITE, *supra* note 4, at 30 ("The northern press reported that 150 men, 'armed to the teeth,' had lined the courtroom to force Merryman's release if he was brought into court."); *see also, e.g.*, 1 THE REBELLION RECORD: A DIARY OF AMERICAN EVENTS 239 (Frank Moore ed., N.Y., G.P. Putnam 1861) (reproducing a May 14, 1861, letter from Major W.W. Morris, Commanding Fort McHenry, to Judge Giles, United States District Court for the District of Maryland, explaining the reasons for his inability to comply with the court's writ of habeas corpus, including "[t]he ferocious spirit exhibited [in Maryland] toward the United States [A]rmy would render me very averse from appearing publicly and *unprotected* in the city of Baltimore to defend the interest of the body to which I belong" (emphasis added)).

[90] *Merryman*, 17 F. Cas. at 147 (emphasis added).

challenges to principles, policies, and values relating to due process, traditional notions of justice and fair play, and natural justice.[91]

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[91] *See, e.g.*, Anton Piller KG v. Mfg. Processes Ltd., [1976] Ch. 55, 60 (Eng. C.A.) (Lord Denning, M.R.) finding,

> [T]he [ex parte] order sought in this case is not a search warrant. It does not authorise the plaintiffs' solicitors or anyone else to enter the defendants' premises against their will. It does not authorise the breaking down of any doors, nor the slipping in by a back door, nor getting in by an open door or window. It only authorises entry and inspection by the permission of the defendants. The plaintiffs must get the defendants' permission. But it does do this: It brings pressure on the defendants to give permission. It does more. *It actually orders them to give permission*—with, I suppose, the result that if they do not give permission, they are guilty of contempt of court.

(emphasis added)); *id*. at 62 (Ormrod, L.J.) stating,

> The form of the [ex parte] order makes it plain that the court is not ordering or granting anything equivalent to a search warrant. The order is an order on the defendant *in personam* to permit inspection. *It is therefore open to him to refuse to comply with such an order*, but at his peril either of further proceedings for contempt of court—in which case, of course, the court will have the widest discretion as to how to deal with it, *and if* [in adversarial proceedings on the merits] *it turns out that the order was made improperly in the first place, the* [subsequent] *contempt* [against the party initially seeking the ex parte order] *will be dealt with accordingly* . . . .

(emphasis added)); *supra* note 49 (collecting authority). Would any rational person characterize a litigant, who refuses to obey an ex parte Anton Piller order, as having "defied" the courts? If not, then there is little reason to characterize Cadwalader—who made a difficult legal decision, with less than one day's notice, in the middle of an ongoing civil war—in such a manner. Reasonable judges and commentators in the context of adjudicating contempt(s) (as in other contexts) have always distinguished between those who err in good faith (even assuming Cadwalader erred) from those who actively choose to defy court orders. *Cf., e.g.*, Hallmark Cards Inc. v. Image Arts Ltd., [1977] F.S.R. 150, 153 (Eng. C.A.) (Buckley, L.J.) ("[I]f the [defendant] party against whom the [ex parte] order is made were to succeed [in subsequent adversarial proceedings] in getting the order discharged, *I cannot conceive* that that party would be liable to any penalties for any breach of the order of which he may have been guilty while it subsisted, for if the order is discharged upon the footing that it ought not to have been made, then the contempt is in truth no contempt, although technically no doubt there is contempt because the order, until discharged, is an operative order and the party who refuses access is acting in disobedience of the order." (emphasis added)); HILARY BIEHLER, EQUITY AND THE LAW OF TRUSTS IN IRELAND 703–04 (6th ed. 2016) (noting conflicting English authority, but concluding that: "[w]hile it cannot be disputed that failure to comply with the terms of an [ex parte] Anton Piller order in any circumstances technically amounts to contempt of court and should not be condoned, it is submitted that

To put it another way, Cadwalader could have believed that he was in possession of legal arguments unknown to Taney, i.e., unknown to Taney at the time he granted the initial ex parte order after having heard only Merryman's side of the dispute. The factual basis of this claim is not unsupported. Cadwalader's response explained to the court that the President gave military officers discretion to suspend habeas corpus.[92] Taney, in his written opinion, filed some days later, stated, "No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the [P]resident claimed this power [to suspend habeas], and had exercised it in the manner stated in the return [i.e., Cadwalader's response]."[93]

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the courts should be slow to impose penalties where the order is subsequently set aside [in adversarial proceedings]").

[92] *See Merryman*, 17 F. Cas. at 146.

[93] *Id.* at 148; Thomas F. Carroll, *Freedom of Speech and of the Press during the Civil War*, 9 VA. L. REV. 516, 530 (1923) (explaining that "[n]o [public Executive Branch] proclamation was issued" concurrently with Lincoln's military orders suspending habeas); Jonathan W. White, *The Civil War Disloyalty Trial of John O'Connell*, 9(1) OHIO VALLEY HIST. 3, 4 (Spring 2009) (noting "Lincoln privately informed General-in-Chief Winfield Scott that he could suspend the writ . . . ."); Yoo, Merryman *and* Milligan *(and* McCardle*), supra* note 44, at 247 (same); *see also Ex parte* Field, 9 F. Cas. 1, 9 (C.C.D. Vt. 1862) (No. 4761) (Smalley, J.) (noting, with respect to *Merryman*, that "[t]he president had not then proclaimed martial law"). *But see* DIRCK, THE EXECUTIVE BRANCH OF FEDERAL GOVERNMENT, *supra* note 55, at 99 (characterizing Lincoln's suspension of habeas corpus as a "proclamation"); REHNQUIST, *supra* note 6, at 26 (characterizing Lincoln's April 27, 1861 order to General Scott as a "proclamation"). An alternative possibility is that even absent a presidential proclamation, Taney was aware, in general terms, of Lincoln's suspension order, but is complaining only of not having received "official" notice, including the specific scope of the suspension, and an explanation of the constitutional or statutory basis for the President's action. *See Merryman*, 17 F. Cas. at 148 (explaining that "[n]o official notice ha[d] been given to the courts"). *Compare* ROSSITER, *supra* note 2, at 21 (explaining that Taney went from Baltimore to Washington to adjudicate *Merryman* "in full knowledge of the President's [prior] order of April 27" authorizing General Scott to suspend habeas corpus), *with* NAPOLITANO, *supra* note 14, at 44 ("This order was not made public; rather, it was confined to executive secrecy."), NEELY, *supra* note 6, at 9 ("No one informed the courts or the other civil authorities [in regard to the April 27, 1861 order]."), REHNQUIST, *supra* note 6, at 41 ("Taney's hasty decision is all the more remarkable because he had only learned at the Monday session [May 27, 1861] of the Court of the existence of the presidential proclamation [purporting to suspend habeas corpus]."), White, *A New Word*, *supra* note 12, at 359 (stating that Taney, as of May 26, 1861, was "[u]naware that Lincoln had suspended the writ"), *and* Yoo, Merryman *and* Milligan *(and* McCardle*), supra* note 44, at 247 ("Neither Lincoln nor [General] Scott publicized the [April 27, 1861 presidential] order, nor did they issue it as a public proclamation, nor was it sent to the courts or Congress at the time."), *with* BRIAN R. DIRCK, LINCOLN AND THE CONSTITUTION 75–76 (2012) ("Few people in Maryland—even local judges—were aware of what Lincoln had done."), *and* JOSEPH L. ESPOSITO, PRAGMATISM, POLITICS, AND

Ultimately, Taney would reject Cadwalader's defense on the merits.[94] But the failure of a defense does not establish that Cadwalader acted in bad faith or that he sought to ignore the court—nor does the failure of a defense establish that Cadwalader intended to defy court orders, nor does it establish that Cadwalader believed that he was authorized by Lincoln (or by anyone else) to ignore or defy actual court orders. To suggest otherwise, to suggest that Cadwalader sought to ignore or defy court orders, based on nothing more than the extant meager record of the decision in *Merryman*, is to engage in myth-making.

What about May 28, 1861? Taney had rejected Cadwalader's defense on May 27, 1861.[95] One can fairly assume that this was known to Cadwalader because Cadwalader's representative, Colonel Lee, had attended the May 27, 1861 hearing, and also because, at that hearing, Taney ordered the Marshal to serve the attachment against Cadwalader.[96] (The Marshal attempted—unsuccessfully—to serve the attachment the next morning.[97]) Should Cadwalader have produced Merryman the next day, on May 28, 1861 or thereafter? The answer here is surprisingly

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PERVERSITY: DEMOCRACY AND THE AMERICAN PARTY BATTLE 220 (2012) (explaining that when Cadwalader's response was read in open court, "Lincoln's habeas corpus suspension . . . became widely known for the first time"). *See generally infra* notes 116–17 (noting competing views with regard to martial law in Maryland as early as April 1861, including a contemporaneous *New York Times* article).

[94] *See Merryman*, 17 F. Cas. at 147 (concluding that "John Merryman, the petitioner, is entitled to be set at liberty and discharged immediately from imprisonment" because "upon the face of [Cadwalader's] return, the detention of the prisoner was unlawful").

[95] *See id.* ("I [Taney] ordered this attachment yesterday [May 27, 1861], because, upon the face of [Cadwalader's] return, the detention of the prisoner was unlawful, upon the grounds: 1. That the [P]resident, under the [C]onstitution of the United States, cannot suspend the privilege of the writ of habeas corpus, nor authorize a military officer to do it. 2. A military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offence against the laws of the United States, except in aid of the judicial authority, and subject to its control . . . ."). *But see* 5 SWISHER, *supra* note 11, at 852 ("Merryman was not an instance of prosecution of a harmless civilian. He was a lieutenant in the Maryland [state] militia.").

[96] *See Merryman*, 17 F. Cas. at 146–47. However, one report of the *Merryman* litigation indicates that Colonel Lee had left the May 27, 1861 hearing prior to Taney's announcing (from the bench) that he intended to order the attachment against Cadwalader. *See The Case of Merriman* [sic], *supra* note 17. So, it is just possible that Cadwalader did not have timely information about Taney's attachment.

[97] *See Merryman*, 17 F. Cas. at 147 (reproducing Bonifant's return which stated "by virtue of the . . . writ of attachment, to me directed, on the 27th day of May 1861, I proceeded, on this 28th day of May 1861, to Fort McHenry, for the purpose of serving the said writ"); *supra* notes 22, 26.

murky (even assuming Cadwalader had a duty to obey court orders in circumstances, such as here, where the President had already purportedly unilaterally authorized the suspension of habeas corpus). On May 27, 1861, after Cadwalader failed to comply with the original writ of habeas corpus to produce Merryman, Taney indicated that he would issue an attachment against Cadwalader.[98] *The attachment only ordered the Marshal to attach the body of General Cadwalader.*[99] *But Taney's attachment order did not direct Cadwalader (or Lee, the Army, the President, or anyone else) to comply with the prior writ to produce Merryman.*[100] At that point, the focus of the litigation shifted from the lawfulness of Merryman's incarceration to Cadwalader's purported contempt. Indeed, the courtroom drama of May 28, 1861 was about the United States Marshal's inability to serve the attachment, not the underlying merits of Cadwalader's (or the government's) position.

Apparently, the attachment was issued as a remedial order to correct Cadwalader's initial failure to produce Merryman. Cadwalader could have stopped that remedial process by complying or at least offering to comply with the original writ, or he could have opposed the attachment on the merits. What defense or defenses Cadwalader might have put forward (if any) are impossible to know because: (i) the Marshal was unable to serve the attachment the next day, May 28, 1861; (ii) federal law officers (who should have advised and represented Cadwalader) at the start of a new administration and amidst a civil war were "disorganized;"[101] and (iii) Taney terminated the judicial proceedings the very same day[102] (without granting Cadwalader a sought-after adjournment).

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98 *See Merryman*, 17 F. Cas. at 144–47.

99 *See id.* at 146 ("[Cadwalader] has acted in disobedience to the [ex parte] writ, and I therefore direct that an attachment be at once issued against *him*, returnable before me here, at twelve o'clock tomorrow [i.e., May 28, 1861]." (emphasis added)).

100 *See id.* at 146–47; Michelman, *supra* note 45, at 595 n.69 (explaining that after Cadwalader refused to produce Merryman, "Taney ruled Lincoln's order unconstitutional and void . . . but *he did not issue any direct order for Merryman's production or release*" (emphasis added)).

101 REHNQUIST, *supra* note 6, at 40–41.

102 *See supra* note 27; *see also United States Court, Important Proceedings, The Case of John Merryman, Esq.*, THE SUN, (Morning) May 28, 1861, at 1, http://tinyurl.com/h3wehll.

By May 29, 1861, with the termination of live, in-court judicial proceedings, the attachment became a nullity,[103] and any further compliance by Cadwalader with the original ex parte writ was not feasible.[104] Cadwalader's defiance—if it is properly so characterized—lasted all of *one* day—May 28, 1861—during a civil war. Is there really anything of consequence to be learned from this event? One also wonders why so many are willing to ascribe Cadwalader's one-day's noncompliance to President Lincoln?

C. Is it True that Cadwalader Sent the Marshal away from the Fort?

The United States Marshal in *Merryman*, who attempted to serve the court's attachment order on Cadwalader, reported, "I sent in my name at the outer gate [of the Fort]; the messenger returned with the reply, 'that there was no answer to my card,' and therefore, I could not serve the writ, as I was commanded. I was not permitted to enter the gate."[105] Neither the Marshal's affidavit, nor the standard histories of the case support any inference that Cadwalader gave the order to send the Marshal away. We do not know where Cadwalader was on the morning of Tuesday, May 28, 1861, when the Marshal attempted to serve the attachment order. We do not know who received the Marshal's card from the guards at the gate, nor do we know why that person failed to respond to the card, nor do we know why the Marshal was not admitted. Many have guessed, and undoubtedly, Cadwalader may have been involved, if not in control of these events.[106] But no one has put forward

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[103] *See* Philip A. Hostak, Note, International Union, United Mine Workers v. Bagwell*: A Paradigm Shift in the Distinction Between Civil and Criminal Contempt*, 81 CORNELL L. REV. 181, 185 & n.26 (1995) ("[I]f the underlying controversy giving rise to a civil contempt action is settled or is otherwise terminated, the contempt proceeding becomes moot, and the sanctions must end." (citing *Gompers v. Buck's Stove & Range Co*., 221 U.S. 418, 452 (1911) (Lamar, J.))).

[104] *See, e.g.*, ROSSITER, *supra* note 2, at 23 (noting that after adjudicating *Merryman*, "Taney returned to Washington unmolested").

[105] *Merryman*, 17 F. Cas. at 147. *See generally* note 22 (collecting authority).

[106] *See supra* note 67 (collecting authority); *see also, e.g.*, BURNS, *supra* note 78, at 65 ("The chief justice said *his* marshal might well have ordered a posse . . . ." (emphasis added)); ELLIS, *supra* note 47, at 413 (describing the U.S. Marshal as the "court's" marshal); PALUDAN, *supra* note 77, at 76 (describing Bonifant as "the court's marshal"); Kmiec, *supra* note 67, at 273 (noting that "Cadwalader barred the Court's officer from even entering the fort"); *cf., e.g.*, 1 A MEMOIR OF BENJAMIN ROBBINS CURTIS, LL.D. 240 n.1 (Benjamin R. Curtis ed., Boston, Little, Brown, and Co. 1879) (asserting that "the writ of the Chief Justice . . . was refused entrance into the fort, upon the excuse that the President had suspended the writ of *habeas corpus*"); Fisher, *supra* note 75, at 210

any document or record supporting the inference that it was Cadwalader who was responsible. Perhaps Chief Justice Taney believed Cadwalader was responsible; perhaps Taney genuinely believed that this moment was a defining Cromwellian civilian-military confrontation. But, if Taney and Taney's intellectual successors would also have us believe this, then they must proffer some evidence to support their position. Precisely what is that evidence?

D. Is it True that Cadwalader had Received Authorization from President Lincoln to Ignore or Defy the U.S. Marshal?

There are commentators who argue that Cadwalader received authorization from Lincoln to defy the United States Marshal and, by implication, to defy the courts.[107] These commentators point to three instances where Lincoln spoke to this subject or, at least, so they believe. They point: (i) to Lincoln's April 27, 1861 order granting military authorities discretion to suspend habeas corpus;[108] (ii) to a May 28, 1861 order from E.D. Townsend, Assistant Adjutant General, directing Cadwalader to hold prisoners without regard to court orders;[109] and (iii)

("Prison officials, acting under Lincoln's policy, refused to let Taney's marshal serve a document at the prison to release Merryman."). *See generally supra* note 23 (discussing whether the incident at the gate of the Fort was a Cromwellian civilian-military confrontation). Note how these commentators describe the U.S. Marshal as the "court's" or "Taney's" functionary. *Cf.* Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1154–55 (2009) (hypothesizing that in the context of contempt proceedings arising in connection with Executive Branch disobedience to the judiciary, a "stand-off" could arise between "judicial marshals" and "executive branch law enforcement officials"). *But see infra* note 112 (explaining that U.S. marshals are better characterized as Executive Branch functionaries, albeit whose regular duties include, among others, the enforcement of judicial orders).

[107] *See supra* note 68 (collecting authority).

[108] *See id.*; *see also, e.g.*, *Ex parte* Owens, 258 P. 758, 787 (Crim. Ct. App. Okla.) (Doyle, P.J.) ("The commandant in response to the writ answered that the president had notified him that [the president] had suspended the writ of habeas corpus and instructed [the commandant] not to obey it."), *quashed by*, Dancy v. Owens, 258 P. 879 (Okla. 1927).

[109] *See supra* note 68 (collecting authority); *see, e.g.*, Andrew Hyman, *Declining to Enforce Court Orders Was All in a Day's Work for Abraham Lincoln*, THE ORIGINALISM BLOG (July 1, 2015, 9:10 AM), http://tinyurl.com/pyjfw8t ("There is plentiful evidence that Cadwalader's refusal to comply with Taney's orders was authorized by Lincoln, even putting aside Lincoln's speech of July 4. For example, on May 28, [1861,] Cadwalader received an order from the Assistant Adjutant General at Army headquarters acknowledging the writ of habeas corpus for Merryman, and adding: 'The general-in-chief [Winfield Scott] directs me to say under authority conferred upon him by the

to Lincoln's July 4, 1861 message to Congress,[110] which, among other subjects, addressed the issue of habeas corpus.

It must be noted at the outset that the common problem with each of these three positions is that they make little sense. Both the United States Marshal and General Cadwalader worked for President Lincoln: both were subordinate Executive Branch officers.[111] Both men held their positions at the pleasure of the President.[112] The Marshal was a civilian

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President of the United States and fully transferred to you that you will hold in secure confinement' the prisoner John Merryman. Thus, there is no doubt that President Lincoln believed he could legally authorize his subordinates to ignore or defy judicial orders, in the *Merryman* case.").

110 *See supra* note 68 (collecting authority); *see, e.g.*, Friedman, *supra* note 68, at 1032 n.275 ("Lincoln's instructions to ignore the order in *Ex Parte Merryman* . . . may be the most defiant . . . ." (citing Lincoln's July 4, 1861 message to Congress, which took place more than a month after *Merryman*)).

111 *See* U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States . . . ."); *infra* note 112 (collecting sources explaining that the President has the power to appoint and remove U.S. marshals). *But see supra* note 106 (listing sources suggesting that U.S. marshals are functionaries of the courts).

112 *See* Act to Establish the Judicial Courts of the United States, ch. 20, § 27, 1 Stat. 73, 87 (1789) (providing "[t]hat a marshal shall be appointed in and for each district for the term of four years, but shall be removable from office at pleasure"); United States v. Lee, 106 U.S. 196, 223 (1882) (Miller, J.) ("Dependent as its courts are for the enforcement of their judgments upon officers appointed by the executive, and removable at his pleasure . . . ."); THE FEDERALIST NO. 78, *supra* note 60, at 412 (Alexander Hamilton) ("It may truly be said [that the courts] have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."); *see also* Michael Stokes Paulsen, Nixon *Now: The Courts and the Presidency After Twenty-five Years*, 83 MINN. L. REV. 1337, 1342 (1999) (arguing "contra *United States v. Nixon*[,] [418 U.S. 683 (1974) (Burger, C.J.)], that the President of the United States must have the final say as to all matters concerning the execution of the laws of the United States by officers of the executive branch"); *id.* at 1390–97 (same). *See generally* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008). The Judiciary Act does not expressly state who has the power to appoint and to remove marshals. However, the Act was passed on September 24, 1789, and, on that very day, President Washington sent eleven nominations for marshal to the United States Senate. *See* 1 S. EXEC. J., 1st Cong., 1st Sess. 28–29 (1789) (Washington, Duff Green 1828) (reproducing President Washington's September 24, 1789 nominations for multiple positions created under the Judiciary Act); *see also* 4 STATES AT WAR, *supra* note 12, at 500 n.331 (explaining that the United States Marshal who attempted to serve the attachment, Washington Bonifant, was appointed to the Marshal's office by Lincoln in 1861). Indeed, Bonifant was appointed to the Marshal's office by Lincoln twice in 1861: first, in April 1861, as a recess appointment, and then again, after *Merryman*, with Senate confirmation. *See* 11 S. EXEC. J., 37th Cong., 1st Sess. 441 (July 13, 1861) (indicating prior recess appointment along with a nomination to the post); *id.* at 474–75 (indicating July 22, 1861 confirmation). Bonifant has been described as a "leader" or "founder" of the Republican

officer, and Cadwalader was a military officer. In these circumstances, if Lincoln wanted to avoid friction between the Marshal and Cadwalader, if Lincoln wanted to stop the Marshal from serving the attachment, and if Lincoln wanted to insulate Cadwalader from Taney's judicial orders, then all Lincoln had to do was direct the Marshal not to serve the attachment. Moreover, if the Marshal refused to accede to Lincoln's instructions, then Lincoln also had the additional option of removing the Marshal.

The idea that Lincoln would have knowingly engineered this purported civilian-military confrontation, between two officers responsible to him, seems fairly odd.[113] Why would Lincoln have authorized Cadwalader to ignore an otherwise lawful court order, when he had open to him the much easier path of controlling or removing the officer—the United States Marshal—whose actions were necessary to give that judicial order lawful effect (through service of process)? Moreover, given that Lincoln did not use his supervisory[114] or removal power over the Marshal to arrest the process of the courts,[115] should not

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party in Maryland. *See* 4 STATES AT WAR, *supra* note 12, at 500 n.331 (describing Bonifant as a "leader" of the Republican party in Maryland); WARTIME WASHINGTON: THE CIVIL WAR LETTERS OF ELIZABETH BLAIR LEE 50 n.16 (Virginia Jeans Laas ed., 1999) (characterizing Bonifant as a "founder" of the Republican party in Maryland).

[113] *See, e.g.*, *Merryman, John, of Hayfields*, *in* THE BIOGRAPHICAL CYCLOPEDIA OF REPRESENTATIVE MEN OF MARYLAND AND DISTRICT OF COLUMBIA 312, 313 (Baltimore, National Biographical Publishing Company 1879) ("Th[e] [Chief Justice's] order was not executed, for the reason that the President of the United States instructed the General to resist the [M]arshal.").

[114] *See, e.g.*, Presidential Letter, *supra* note 64, at 298, 313 ("And yet, let me say that, in my own discretion, I do not know whether I would have ordered the arrest of Mr. Vallandingham [sic]. While I cannot shift the responsibility from myself, I hold that, as a general rule, the commander in the field is the better judge of the necessity in any particular case. Of course I must practise [sic] a general directory and revisory power in the matter."). The error in spelling—"Vallandingham" should be "Vallandigham"—appears to be made by Nicolay & Hay, the *Complete Works*' editors, not by Lincoln. The same might also be said for the editors' use of "practise" rather than "practice." *See Abraham Lincoln to Erastus Corning and Others, [June] 1863*, AMERICAN MEMORY: THE ABRAHAM LINCOLN PAPERS AT THE LIBRARY OF CONGRESS (last visited July 30, 2015) (displaying Lincoln's original letter), http://tinyurl.com/nrs4ho6 (copy #1), *and* http://tinyurl.com/p7oa57j (copy #2).

[115] *See also* United States *ex rel.* Murphy v. Porter, 27 F. Cas. 599 (C.C.D.C. 1861) (No. 16,074a) (Dunlop, C.J.) (describing a situation where a deputy United States marshal was instructed by other Executive Branch officials not to serve a judicial attachment order on a military officer); RANDALL, *supra* note 78, at 162–63 (discussing *Murphy*); *cf.* 1 LETTERS OF JOHN HAY AND EXTRACTS FROM DIARY 46, 47 (1908) (reporting diary entry of October 22, 1861). Even in *Murphy*, complex and unresolved questions remain as to the scope of precisely what authority the Executive Branch claimed to validly exercise.

these commentators, instead of asserting that Lincoln threatened the rule of law as embodied by the normal conventions of judicial process and traditional inter-branch comity, take the position that Lincoln's conduct—on this occasion—left the courts both free to exercise decisional independence, and also free to issue and serve court orders?

1. President Lincoln's April 27, 1861 Suspension of Habeas Corpus

Lincoln issued an order to General Scott. The order stated,

> 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 or which shall be used between the city of Philadelphia and the city of Washington you find resistance which renders it necessary to suspend the writ of *habeas corpus* for the public safety, you personally, or through the officer in command at the point at which resistance occurs, are authorized to suspend the writ.[116]

In *Murphy*, the Executive Branch arrested the process of the Circuit Court. However, an Executive Branch decision to arrest the process of the courts—without more—is not coterminous with an Executive Branch decision to oust (or, to ignore, or to defy) the courts from adjudicating the validity of the (arguably, logically prior) Executive Branch decision not to serve judicial process in a particular case. As in *Merryman*, *Murphy* left this issue unresolved.

[116] 6 COMPLETE WORKS OF ABRAHAM LINCOLN, *supra* note 8, at 258 (reproducing Lincoln's April 27, 1861 order to General Scott delegating authority *to suspend* habeas between Philadelphia and Washington). *But see* Schroth et al., *supra* note 5, at 1011 ("Lincoln told General Winfield Scott . . . that the writ of habeas corpus *was suspended* . . . ." (emphasis added)). Arguably, Lincoln gave Scott authority to suspend habeas as early as April 25, 1861. *See* 6 COMPLETE WORKS OF ABRAHAM LINCOLN, *supra* note 8, at 255, 256 (reporting Lincoln's April 25, 1861 order to General Scott). *See generally id.* at 295–96 (reproducing Lincoln's July 2, 1861 order to General Scott delegating authority to suspend habeas between New York and Washington). Professor Stone has argued that: "On April 27, to restore order in Baltimore and to enable Union forces to protect Washington, Lincoln suspended the writ of *habeas corpus* and declared martial law in Maryland." Stone, *supra* note 12, at 220; *see also* BERKIN ET AL., *supra* note 6, at 333 ("Lincoln and General Scott ordered the military occupation of Baltimore and declared martial law . . . ." (bold omitted)); BURNS, *supra* note 78, at 66 (explaining that after *Merryman* was announced "Lincoln continued to impose martial law"); Fallon, *supra* note 44, at 2 ("At stake in *Merryman* was the constitutional authority of the President to declare martial law . . . ."); Jan Ellen Lewis, *Defining the Nation: 1790 to 1898*, *in* SECURITY V. LIBERTY: CONFLICTS BETWEEN CIVIL LIBERTIES AND NATIONAL SECURITY IN AMERICAN HISTORY 117, 147–48 (Daniel Farber ed., 2008) ("[Lincoln]

Lincoln's order meant, at least, that the military had authority to arrest, seize, and detain individuals suspected of treasonous activity, and if the detained person brought judicial proceedings in regard to the arrest, etc., then the military personnel could put in a good faith defense, or otherwise plead valid authorization by the President under the Suspension Clause.[117] Did Lincoln *also* intend that his order was a

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imposed martial law in Maryland to protect troop movements . . . ."); *cf.* MCPHERSON, BATTLE CRY, *supra* note 5, at 287 (noting that martial law was declared in Baltimore on May 13, 1861); Calabresi, *supra* note 2, at 1478 ("[A]t most Lincoln thought that the State of Maryland where John Merryman was arrested was in a state of martial law in the spring of 1861 . . . ."); *Affairs in Maryland; Martial Law Enforced in Baltimore*, N.Y. TIMES, Apr. 25, 1861, at 1 ("A system of martial law exists in both [Washington and Baltimore], but it was not officially proclaimed."), http://www.nytimes.com/1861/04/25/news/affairs-in-maryland-martial-law-enforced-in-baltimore.html. *See generally* NEFF, *supra* note 36, at 40–44 (expounding on similarities and differences between the suspension of habeas and martial law); Saikrishna Bangalore Prakash, *The Sweeping Domestic War Powers of Congress*, 113 MICH. L. REV. 1337, 1370 n.241 (2015) (distinguishing martial law from the suspension of habeas corpus); Stone, *supra* note 12, at 220 n.22 (same). The basis for Professor Stone's position, i.e., that Lincoln's April 27, 1861 order "declared martial law," is obscure. Professor Fallon's position—that martial law was at issue in *Merryman*—is difficult to square with the fact that "martial law" is not expressly discussed anywhere in Taney's opinion. *See Ex parte* Field, 9 F. Cas. 1, 9 (C.C.D. Vt. 1862) (No. 4761) (Smalley, J.) (noting, with respect to *Merryman*, that "[t]he president had not then proclaimed martial law"). *But cf.* WHITE, *supra* note 4, at 31 ("[Taney] censured Lincoln for never declaring martial law . . . .").

[117] *See, e.g.*, Marcus McArthur, *Abraham Lincoln and Treason in the Civil War: The Trials of John Merryman by Jonathan W. White*, 3(4) J. CIVIL WAR ERA 589, 590 (Dec. 2013) stating,

> While the danger of such [arbitrary] arrests [made by the military] to civilians is obvious, White explains that federal officials faced numerous civil suits toward the end of the war and into Reconstruction by civilians seeking damages for their alleged wrongful arrests. According to White, the broader significance of the *Merryman* case is that "government officials, both in their official capacity and as private citizens, needed protection from civil suits for actions they had taken while in office or the military service".

(citation omitted); *see also Ex parte* Benedict, 3 F. Cas. 159, 174 (N.D.N.Y. 1862) (No. 1292) (Hall, J.) finding,

> Such a suspension may prevent the prisoner's discharge; but it leaves untouched the question of the illegality of his arrest, imprisonment, and deportation. If these are unlawful, the marshal and others engaged in these arrests are liable in damages in a *civil prosecution*; such damages to be assessed by a jury of the country. Besides this civil liability, the parties engaged in making this arrest, and carrying the prisoner out of the state, and beyond the protection of its officers and tribunals, may, perhaps, be subject to *criminal punishment.*

direction to military commanders to ignore or defy judicial orders granting habeas should the courts hear and determine that Lincoln had no authority to suspend habeas?

These two issues—authority to suspend habeas and authorization to ignore or defy judicial orders—are related, but they are not the same.[118]

Id. (emphasis added); WHITE, *supra* note 4, at 106 ("*Merryman*'s larger significance was that government officials . . . needed protection from civil suits . . . ."); *cf*. MAJOR GENERAL SIR ERNEST DUNLOP SWINTON (*nom de plume* OLE LUK-OIE), *An Eddy of War*, *in* THE GREEN CURVE AND OTHER STORIES 213, 236 (1909), who stated,

> [A] war has not taken place in England since—the Lord knows when, and our population, even the best intentioned, are so ignorant about what it really means, that our troops have been severely handicapped . . . . *Why, I have heard that during the first few days* [of the invasion] *the soldiers were chary of trespassing, and that it took a lot of persuading to make them enter any preserved woods* . . . . But we are learning: and now that martial law has been declared—only after a hot debate, mind you, even though the enemy was in England—people are realising what 'War' is.

Id. (emphasis added); Elbridge Colby, *Book Review*, 31 COLUM. L. REV. 917, 918 (1931) (reviewing CHARLES FAIRMAN, THE LAW OF MARTIAL RULE (1930)) ("[M]ilitary men are as uncertain as the civilians are fearful, what are the real powers under 'martial law.'"). *But compare* FARBER, *supra* note 44, at 192 ("The law of the time did not recognize any good-faith defense to a damage action based on an illegal official act."), *with* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1928 (2010) (explaining that during the antebellum period "Congress provided relatively routine indemnification for officers acting in good faith [and within the scope of their agency relationship, contract, or instructions]").

[118] *See Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.), stating,

> I understand that the [P]resident *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*.

Id. (emphasis added)); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 130–31 (1866) (Davis, J.) ("The suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it."); Richard A. Posner, *supra* note 44, § 7, p. 10 ("Farber slides too easily from the question of whether Lincoln was authorized to suspend habeas corpus to whether he was authorized to flout Chief Justice Roger Taney's order granting habeas corpus, as he

Commentators who point to the President's order as evidence that Lincoln authorized Cadwalader to defy the courts do not meaningfully grapple with this ambiguous language. Moreover, in his response, Cadwalader presented a defense on the merits; he never hinted that the President's suspension order stripped the courts of jurisdiction to hear habeas actions or that military officers were not obliged to obey the courts. Indeed, Cadwalader sought an adjournment in order to get further guidance as to his defense.[119] Why would Cadwalader have told Taney that he would seek further guidance, and why seek further guidance, if he already believed Lincoln's order stripped the courts of the

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did."); *see also supra* note 117 (quoting *Ex parte Benedict*); *cf.* Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74, 90 (1861) (Bates, A.G.),

> If by the phrase *the suspension of the privilege of the writ of habeas corpus*, we must understand a repeal of all power to issue the writ, then I freely admit that none but Congress can do it. *But* if we are at liberty to understand the phrase to mean, that, in case of a great and dangerous rebellion . . . the public safety requires the arrest and confinement of persons implicated in that rebellion, I as freely declare the opinion, that the President has lawful power to *suspend the privilege* of persons arrested under such circumstances.

(second emphasis added)); REHNQUIST, *supra* note 6, at 37 ("But *habeas corpus* does not speak at all to the sort of justifications that a court will deem sufficient to remand the prisoner to custody, rather than to order him discharged."). *But see* STEPHANIE COOPER BLUM, THE NECESSARY EVIL OF PREVENTATIVE DETENTION IN THE WAR ON TERROR: A PLAN FOR A MORE MODERATE AND SUSTAINABLE SOLUTION 92 (2008) ("By eliminating the writ, detainees could not challenge the legality of their respective detentions."); DAVID HERBERT DONALD, LINCOLN 299 (1995) (explaining that Lincoln's April 27, 1861 order meant that "[s]uch persons [who were arrested] could be detained indefinitely without judicial hearing and without indictment, and the arresting officer was not obliged to release them when a judge issued a writ of habeas corpus"); EDELSON, *supra* note 12, at 34 ("Scott was authorized to arrest and indefinitely detain people he deemed dangerous without permitting them access to a court to challenge their detention."); *but cf.* Stone, *supra* note 12, at 220 n.22 ("[A]n individual held unlawfully can file a petition for a writ of *habeas corpus* asking a court to determine whether the detention is lawful. Suspension of the writ of *habeas corpus* disables courts from intervening in this process."); Frank J. Williams, *Abraham Lincoln and Civil Liberties: Then and Now*, *in* LINCOLN REVISITED: NEW INSIGHTS FROM THE LINCOLN FORUM 251, 254 (John Y. Simon et al. eds., 2007) ("With suspension of the writ, this immediate judicial review [i.e., habeas corpus] becomes unavailable."). Chief Justice Taney and Judge Richard Posner are entirely correct to distinguish the two issues: lawful authority to suspend habeas corpus, and lawful authority to exclude judicial review in regard to habeas corpus after such a purported suspension. Still, how Chief Justice Taney concluded that Lincoln authorized anyone to defy the courts is unexplained. Likewise, how Judge Posner concluded that Lincoln disobeyed, much less "flout[ed]," any order issued by Taney is unclear.

[119] *See Merryman*, 17 F. Cas. at 146.

power to lawfully compel obedience in habeas actions? Similarly, Taney wrote, "It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions [from the President], and exceeded the authority intended to be given him."[120] Thus, it appears that even Taney was somewhat unsure what the intended scope of Lincoln's order was.

One is faced with two possible interpretations of Lincoln's order. The first interpretation gives the order a limited scope, going to initial arrest and extending a defense to military officers carrying out those arrests. The second interpretation is far more ambitious, and suggests that Lincoln intended to exclude judicial review of Executive Branch determinations in the habeas context. One would think that any adoption of the second view would require a reasonably strong basis in fact, but Lincoln's statement is ambiguous. It is not clearly supported by either Cadwalader's conduct or Taney's opinion. As a matter of judicial construction, when faced with an ambiguous Executive Branch order, one which would exclude the courts and another which would not, the latter interpretation should be favored. For example, in *Ex parte Beck*, the court explained,

> Respondent [the United States] suggests, somewhat significantly, the court is bound to say, that his superior officers order him to hold petitioner, and that to disobey may subject him to punishment, even that of death; that, if this court grants habeas corpus ordering him to release petitioner, respondent will be very embarrassed, in that obedience to either will be disobedience to the other. *It is not understood that the orders to respondent are other than general, to imprison all deserters.* It is not understood any order to respondent even hints to him to disobey a decree of any court of the United States—a decree that within its jurisdiction is the law of the land, therein to be held inviolate, to be executed and obeyed by military and civilians alike, so long as it is unreversed.[121]

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[120] *Id*. at 153; *see, e.g.*, NEFF, *supra* note 36, at 36 ("Perhaps, Taney speculated, General Cadwalader had exceeded his instructions, thereby relieving the President of any personal blame."). *But see supra* note 118 (quoting Chief Justice Taney's *Merryman* opinion, which laid the blame on Lincoln).

[121] *Ex Parte* Beck, 245 F. 967, 972 (D. Mont. 1917) (Bourquin, J.) (emphasis added); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A*

The same reasoning ought to apply to *Merryman*. Because Lincoln's order does not squarely address the issue of whether he intended to exclude the courts, it is unreasonable to suggest he intended to do so—particularly where contemporaneous coordinate evidence does not clearly support the conclusion that he attempted to do so.

2. Assistant Adjutant General E.D. Townsend's May 28, 1861 Order

Townsend, writing from Army Headquarters in Washington, sent Cadwalader an order that stated,

> The [G]eneral-in-[C]hief [Winfield Scott] directs me to say under authority conferred upon him by the President of the United States and fully transferred to you that you will hold in secure confinement all persons implicated in treasonable practices unless you should become satisfied that the arrest in any particular case was made without sufficient evidence of guilt.
> In returns to writs of habeas corpus by whomsoever issued you will most respectfully decline for the time to produce the prisoners but will say that when the present unhappy difficulties are at an end you will duly respond to the writs in question.[122]

Constitutional History, 121 HARV. L. REV. 941, 999 (2008) ("*At the limit*, [Lincoln's] suspension orders even supplied a basis for refusing to produce detainees when ordered to do so by courts." (emphasis added)); *see also* Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 670 (1986) (Stevens, J.) ("We begin with the strong presumption that Congress intends judicial review of administrative action."). *See generally* Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2014); Phillip Shaw Paludan, *"Dictator Lincoln": Surveying Lincoln and the Constitution*, 21(1) OAH MAG. OF HIST. 8, 10 (Jan. 2007) ("With all this discretion what strikes modern historians is how respectful Lincoln was of constitutional limitations on the extent of his power.").

[122] Letter from E.D. Townsend, Assistant Adjutant General, Headquarters of the Army, Washington, to Major General G. Cadwalader (May 28, 1861), *in* 1 (series 2) THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 576–77 (Wash., GPO 1883), http://tinyurl.com/j9kl6sm. There is an earlier May 16, 1861 letter from Townsend to Cadwalader. Townsend states,

> I have already by the direction of the [G]eneral-in-[C]hief addressed to you a letter and a telegram of yesterday's date and have received your acknowledgment of the letter. Herewith you will receive a power to arrest persons under certain circumstances and to hold them

This order was dated May 28, 1861.[123] This was the second and final day on which public hearings were conducted in *Merryman*, and also the day on which the Marshal unsuccessfully sought to serve the attachment order on Cadwalader at the Fort sometime prior to noon.[124]

No one has put forward any document or record establishing that Cadwalader was in receipt of Townsend's May 28, 1861 order prior to the time the Marshal had been sent away from the Fort. Townsend's order may have been drafted after noon, or the order may only have arrived in Cadwalader's hands (assuming it ever arrived) after the Marshal had already left the Fort. Indeed, telegraph lines to Washington had been cut.[125] Absent further evidence, there is no good reason to suggest that Cadwalader, or anyone else, relied on this order in regard to any decision to send the Marshal away from the Fort. Indeed, there is some good reason to believe that this order was not in Cadwalader's hands at the time the Marshal was sent away from the Fort. The order expressly directed Cadwalader to "most respectfully decline for the time to produce the prisoners" and also to "say that when the present unhappy difficulties are at an end you will duly respond to the writs in question." Here, the Marshal was sent away from the Fort without any answer; this

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> prisoners though they should be demanded by writs of habeas corpus. This is a high and delicate trust and as you cannot fail to perceive to be executed with judgment and discretion. Nevertheless in times of civil strife errors if any should be on the side of safety to the country. *This is the language of the general-in-chief himself*, who desires an early report from you on the subject of the number of troops deemed necessary for your department.

Id. at 571–72 (emphasis added) (editor's mark omitted). Townsend's order originates with General Scott, not with Lincoln.

123 *See* Letter from E.D. Townsend, Assistant Adjutant General, Headquarters of the Army, Washington, to Major General G. Cadwalader, *supra* note 122, at 576 (quoting from a letter dated May 28, 1861).

124 *See supra* notes 21–26 (collecting sources explaining the timing of these events).

125 *See* MCGINTY, *supra* note 4, at 67 ("Merryman ordered his men to cut the telegraph lines . . . ."); REHNQUIST, *supra* note 6, at 22 ("Not only were no [U.S.] troops arriving [in Washington], but the telegraph lines had been cut and mail deliveries from the north were irregular."); *cf.* Stone, *supra* note 12, at 220 ("Union soldiers seized John Merryman, a cavalryman who had allegedly burned bridges and destroyed telephone [sic] wires during the April riots."). Our records of this time are incomplete. It is true that telegraph lines to Washington had been cut, but not *every* such line may have been cut. Telegraph lines between Washington and Baltimore (or the Fort itself) may have been intact on May 28, 1861; likewise, some telegraph lines which had been cut by Merryman and others may have been repaired by that date.

(in)action[126] by the military authorities at the Fort is not consistent with Townsend's order.

The more important point is: there is no reasonable way to connect President Lincoln to the order Townsend issued on May 28, 1861, and this is the core issue. Lincoln gave the Army discretion to suspend habeas, but he did not clarify if he intended to deny such detainees the opportunity to judicially contest the legality of the suspension itself. It is hardly surprising that—faced with an emergency—the Army interpreted Lincoln's ambiguous order in a maximalist fashion, but that tells us little about what Lincoln intended or meant to achieve by giving the Army discretion to suspend habeas. Simply put, what a military subordinate (i.e., Townsend) thinks or believes, even when acting under higher military authority (i.e., General Scott), as here, does not establish what President Lincoln intended or meant.[127] Of course, as a political matter, Lincoln remained responsible for what his Executive Branch

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[126] Inaction is not best authority, but it may count as some authority. *See, e.g.*, Paulsen, *Lincoln and Judicial Authority*, *supra* note 44, at 1290 ("[Lincoln's] position, as expressed by his (in)action, was that the President was not bound to obey and enforce judicial decrees that he believed were incorrect . . . ."); *cf., e.g.*, Aaron-Andrew P. Bruhl, Response, *Against Mix-and-Match Lawmaking*, 16 CORNELL J.L. & PUB. POL'Y 349, 362 (2007) ("Absence of evidence is sometimes evidence . . . notably when the evidence is expected.").

[127] *See, e.g.*, *Ex parte* Field, 9 F. Cas. 1, 5 (C.C.D. Vt. 1862) (No. 4761) (Smalley, J.) (ascribing an order directing the United States Marshal to resist court orders to the "war department," and not to the President, and further concluding that "[a] more flagrant disregard of the [C]onstitution of the United States can hardly be conceived"); *Ex parte* Benedict, 3 F. Cas. 159, 161–62 (N.D.N.Y. 1862) (No. 1292) (Hall, J.) states,

> My personal confidence in the integrity, patriotism, and good sense of the [P]resident, as well as the respect due to the high office he holds, compels me to *require the most conclusive evidence upon the point* before adopting the conclusion that he has ever deliberately sanctioned so palpable a violation of the constitutional rights of the citizens of the loyal states *as the order of the war department*, thus construed, would justify and require.

Id. (emphasis added). Notice that both Judge Smalley and Judge Hall construe the disputed orders as war department orders, as opposed to assuming—absent on-point evidence—that the orders were directly authorized by the President. *See also infra* note 129 (distinguishing the President's legal and moral responsibility in regard to disputed conduct by subordinate Executive Branch officers from the administration's responsibility); *cf. supra* note 60 (discussing the President's purported legal and moral duty to have sought an appeal in *Merryman*).

subordinates did.[128] But that abstract political responsibility under the Take Care Clause[129] is worlds apart from establishing that Lincoln actually, specifically, and directly authorized his subordinates, through the military chain of command, to ignore or defy court orders.[130]

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[128] *Compare* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 38–39 (1998) ("The *administration* continued to confine Merryman at Fort McHenry . . . ." (emphasis added)), *and* Michal R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 GA. L. REV. 65, 117 (1998) (noting that "the Lincoln *administration* had defied Chief Justice Taney in *Ex parte Merryman*" (emphasis added)), *with* Judge Shira A. Scheindlin & Matthew L. Schwartz, *With All Due Deference: Judicial Responsibility in a Time of Crisis*, 32 HOFSTRA L. REV. 1605, 1614 (2004) ("Although the court issued the writ, in a true show of presidential hubris Lincoln simply ignored the decision, keeping Merryman detained in Fort McHenry until he was subsequently indicted for conspiracy to commit treason." (citing REHNQUIST, *supra* at 38–39)), Captain Robert G. Bracknell, *All The Laws But One: Civil Liberties in Wartime*, 47 NAVAL L. REV. 208, 213 & n.19 (2000) (reviewing REHNQUIST, *supra*) ("Lincoln ordered Merryman's continued imprisonment at Fort McHenry." (citing REHNQUIST, *supra* at 38)), *and* Eric L. Muller, *All The Themes But One*, 66 U. CHI. L. REV. 1395, 1399 (1999) (reviewing REHNQUIST, *supra*) ("Rehnquist notes that Lincoln ignored Taney's order and [he] refused to release Merryman . . . ." (citing REHNQUIST, *supra* at 38)). Notice how Chief Justice Rehnquist diffuses responsibility to the "administration," but the reviewers argue that Rehnquist laid responsibility for Merryman's continued detention directly at Lincoln's door. *See also supra* note 127 (distinguishing the "war department" from the President, and also expounding on the evidentiary standard necessary before finding the President responsible for the war department's conduct).

[129] *See, e.g.*, U.S. CONST. art. II, § 3 (Take Care Clause); BRUFF, *supra* note 12, at 135 ("When the military refused to deliver up Merryman, the frustrated Taney sent the record to Lincoln, who bore ultimate responsibility for the refusal."); *supra* note 114 (discussing presidential supervisory authority). If Professor Bruff meant only that Lincoln was politically responsible for his military subordinates, as the President is responsible for the conduct of all his subordinates, such a claim is both obviously true and largely unimportant. But if, instead, Professor Bruff meant that Lincoln was legally or morally responsible for Cadwalader's failure to comply with Taney's ex parte order or subsequent opinion, or that Lincoln specifically or directly authorized Cadwalader's noncompliance, then among other things, Bruff would have to make both a factual and a legal showing. Bruff would have to show that Lincoln had actual knowledge of Taney's order prior to the end of the litigation, or Bruff would have to show that Taney's ex parte order or attachment had continuing legal effect after the close of litigation, or Bruff would have to show that Lincoln's orders were intended to preclude or, fairly construed, precluded meaningful (if not all) judicial review in the habeas context.

[130] *But see, e.g.*, Hutchinson, *supra* note 5, at 291 ("Notwithstanding Taney's opinion, the military commander at Ft. McHenry, acting under the commander-in-chief's orders, declined to produce Merryman. *Thus*, Abraham Lincoln defied a lawful order of the Chief Justice of the United States." (emphasis added)). Even assuming that the Chief Justice was acting here for a court with jurisdiction, a matter actively contested to this day, there is no good reason to ascribe Cadwalader's purported lawlessness to Lincoln unless there is some showing that Lincoln's orders were intended to authorize or, fairly construed, authorized Cadwalader to ignore or defy court orders. Where in the extant literature is this evidence put forward?

3. President Lincoln's July 4, 1861 Message

In his July 4, 1861 message to Congress, Lincoln stated,

> 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.[131]

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[131] 6 COMPLETE WORKS OF ABRAHAM LINCOLN, *supra* note 8, at 297, 308–09 (reproducing Lincoln's July 4, 1861 message to Congress in special session). Because Lincoln's July 4, 1861 message post-dated Cadwalader's conduct, it makes little sense to suggest that Cadwalader relied upon Lincoln's message. For the same reason, it makes little sense to suggest that Cadwalader actually relied upon federal statutes which post-dated *Merryman* proceedings. *See, e.g.*, Habeas Corpus Suspension Act of Mar. 3, 1863, ch. 81, 12 Stat. 755 (granting, subject to limitations, the President power to suspend habeas corpus); Act of Aug. 6, 1861, ch. 63, 12 Stat. 326 (ratifying, after the fact, prior presidential actions). A general discussion of the scope of Congress' post-*Merryman* statutes relating to habeas is beyond the scope of this Article. The literature on this subject is quite uneven. *Compare, e.g.*, CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 230 (1948) ("Congress, faced by a *fait accompli* that was in its nature irrevocable [in respect to President Lincoln and his administration's pre-July 4, 1861 actions], registered approval of 'all the acts, proclamations, and orders of the President respecting the [A]rmy and [N]avy of the United States and calling out or relating to the militia or volunteers from the United States' in an act of August 6, 1861."), *with* Nasser Hussain & Austin Sarat, Introduction, *Responding to Government Lawlessness: What Does the Rule of Law Require*, *in* WHEN GOVERNMENTS BREAK THE LAW: THE RULE OF LAW AND THE PROSECUTION OF THE BUSH ADMINISTRATION 1, 15 (Austin Sarat & Nasser Hussain eds., 2010) ("Congress, faced with a fait accompli, could *only* register its retroactive approval of the proclamations and orders of the president." (citing ROSSITER, *supra*) (emphasis added)). Hussain and Sarat's use of "only" seems woefully unsupported: congressional silence was also a possibility. Likewise, Taney could have issued an order mandating Merryman's release; Taney chose not to do so. *See also* Vladeck, *supra* note 46, at 391 (characterizing Taney's *Merryman* opinion as "infamous"); *cf.* Stephen I. Vladeck, *Justice Jackson, the Memory of Internment, and the Rule of Law after the Bush Administration*, *in* WHEN GOVERNMENTS BREAK THE LAW, *supra* at 183, 193 & n.65 ("Even if it [the Supreme Court] lacked the physical force to end the abuse [by the President in relation to the exercise of purported war powers], its declaration at least would absolve loyal people from the legal or moral duty of obedience to its decree." (quoting Justice Jackson's draft opinion in *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Jackson, J., dissenting))); Ingrid Brunk Wuerth, *International Law as Interpretive Norm*, *in* PROCEEDINGS OF THE 99TH ANNUAL MEETING AMERICAN SOCIETY OF INTERNATIONAL LAW 192, 195 (2005) ("Even if a court's decision is ignored by the President, it serves a valuable function by forcing him to justify his actions politically in

It is difficult to understand how Lincoln's message to Congress authorized (or, even functionally authorized) Cadwalader's ignoring or defying the courts in relation to *Merryman* proceedings. First, responsible civilian officers in the American system of government do not customarily find, seek, or justify their official actions based on political speeches, communications, or messages. *A fortiori*, Cadwalader—an experienced military officer during an actual rebellion—would not have relied on Lincoln's message here, nor would he have relied on any other such political communication.

Second, *Merryman* judicial proceedings in open court ended on Tuesday, May 28, 1861, although the formal opinion was not filed until Saturday, June 1, 1861.[132] Lincoln's July 4, 1861 message to Congress post-dated the *Merryman* opinion by more than a month.[133] So, in fact, Cadwalader could not have relied on Lincoln's message to Congress during the actual litigation. At best, Lincoln's message might have ratified Cadwalader's conduct after the fact, assuming Lincoln spoke with the requisite degree of clarity in regard to the precise issue.

But Lincoln did not speak with the requisite degree of clarity. Lincoln's message only argues that the President had the power to suspend habeas corpus and to arrest and detain persons without use of "ordinary" judicial processes. Lincoln does not clarify whether he also intended for subordinate Executive Branch officers to ignore or defy courts, should the courts decide that the suspension itself was unconstitutional. Like his prior orders to General Scott, Lincoln's message to Congress lacked the requisite degree of clarity with respect to the core issue which most interests us. Simply put, we do not know what Lincoln intended, what he meant, how he was understood by actors at the time, or how a reasonable person at the time would have understood him. At best, we can make educated guesses, but in doing so, we veer from established fact and history into myth-making.

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the face of a judicial decision to the contrary."). *But see* ROBERT COVER, NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 162 n.165 (Martha Minow et al. eds., 1993) (characterizing Taney's "insistence upon jurisdiction" in *Merryman* as "courageous"); *id*. at 161 (analogizing "Taney's resistance to Lincoln" to "Lord Coke's resistance to King James"); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 189, 211 (1945) (characterizing Taney's actions in *Merryman* as "heroic").

[132] *See supra* notes 26–28 (collecting sources explaining the dates of these two events).

[133] *Compare supra* note 28 (noting June 1, 1861 date on which the *Merryman* opinion was filed with the Circuit Court for the District of Maryland), *with supra* note 131 (noting July 4, 1861 date for Lincoln's message to Congress).

VII. Conclusion

Lest there be any confusion . . . some have argued that the President—in certain circumstances—has an independent power to interpret the Constitution, and a concomitant power to ignore or defy court orders if the President comes to a good faith conclusion that the courts have erred.[134] This Article has *not* opined on the correctness of

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[134] *See, e.g.*, Paulsen, *Lincoln and Judicial Authority*, *supra* note 44, at 1290, stating,

> Lincoln's position was not, and could not be, limited to the stance that the President could refuse to implement judicial decisions in cases of "clear" judicial error, or "clear" disregard for the Constitution, or of "atrocious" decisions, in legal or moral terms. His position, as expressed by his (in)action, was that the President was not bound to obey and enforce judicial decrees that he believed were incorrect, whenever circumstances suggested complying with the decision would be in some meaningful way harmful to important national interests.

Id.; Paulsen, *The* Merryman *Power*, *supra* note 11 *passim*; *see also, e.g.*, Calabresi, *supra* note 44, at 1434–35 ("The President is obligated to execute all court judgments absent a clear mistake, even those that concern the scope of his constitutionally rooted executive privilege."). Absent a statute clearly mandating that the President enforce court orders, the President has no duty to execute court judgments, i.e., no duty beyond the abstract duty imposed by the Constitution's Take Care Clause to supervise his Executive Branch subordinates. *See* U.S. CONST. art. II, § 3; *Merryman*, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.) ("[The President] is *not* authorized to execute the[] [laws] 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 . . . ." (emphasis added)); *see also* Nixon v. Fitzgerald, 457 U.S. 731, 748 n.27 (1982) (Powell, J.) (requiring an "explicit" statement from Congress before applying statute to President); Memorandum from William H. Rehnquist, Asst. Att'y Gen., for the Honorable Egil Krogh, Staff Assistant to the Counsel to the President, Office of Legal Counsel, Re: Closing of Government Offices in Memory of Former President Eisenhower 3 (Apr. 1, 1969) (on file with author) ("[S]tatutes which refer to 'officers' or 'officials' of the United States are construed not to include the President unless there is a specific indication that Congress intended to cover the Chief Executive."). Given the truly enormous scope of the Executive Branch, particularly during war time, and the many competing demands on the President's time, his responsibility to control any one of his many subordinates must be quite attenuated. Generally, the President's war-time duty to control subordinates under the Take Care Clause is notional, or aspirational, and only subject to control via regular elections and impeachment, i.e., political controls. There may be some limited and extreme cases where a war-time President's duty to control subordinates under the Take Care Clause is properly subject to judicial oversight, e.g., knowingly accepting an actual bribe in regard to official duties from a foreign government and other clearly established bad faith, knowingly violating an established legal duty, or asserting a regal power to suspend the law. *Cf.* David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 CONST. COMMENT. 155, 173 (2002) ("[T]he delegates . . . stripped [the President] of the

this departmentalist view. This view may be the best or the correct understanding of the original public meaning of the Constitution, or it may not.

Instead, this Article makes the more limited claim that *Merryman* and what we currently know about Cadwalader's and Lincoln's actions in connection with the *Merryman* litigation, what preceded it, and its aftermath—all are too ambiguous to lend support to a strong departmentalist view of the Constitution. It may be that there is support for a *Merryman* power,[135] but wherever that support may be, it is not to be had in *Ex parte Merryman*.

That said, Civil War documents may be newly unearthed or rediscovered. If tomorrow a military record were discovered establishing that Cadwalader gave the command to turn the United States Marshal away from Fort McHenry and that he gave that command after having received Townsend's order, there would be no reason to be surprised. Alternatively, if tomorrow a military record establishing just the opposite were discovered, there would be no reason to be surprised either. Likewise, if tomorrow a letter or other document were found from Lincoln disavowing any intent to defy judicial orders in the habeas

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monarch's dispensing and suspending powers, powers which were utterly discordant with the president's duties under the Take Care Clause."); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63(1 & 2) LAW & CONTEMP. PROBS. 7, 16 (Winter/Spring 2000) ("Its history and purpose confirm that the Take Care Clause denies the President any dispensing or suspending power . . . ."); Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 694 (1989) ("The Framers were well aware of the abuse of regal authority and at the Constitutional Convention [they] expressly rejected any presidential power to suspend acts of Congress, binding the President instead to obedience with the [Take Care] Clause."). However, if the President is an actual party in a litigation, then additional or different considerations may apply depending on the circumstances. There is nothing simple about these questions, which touch on issues relating to political obedience at the root of our (and indeed of any) legal system. *See generally supra* note 86. Still, there is no good reason to conflate, on the one hand, the President's limited *aspirational* duty to supervise his Executive Branch subordinates who have direct statutory responsibility to *enforce* court orders against *third parties*, with, on the other hand, the President's *concrete personal* duty to *obey* court orders when he is an *actual named party*—either in an official capacity or in an individual capacity—in litigation. *Cf. Merryman*, 17 F. Cas. at 153 ("It will then remain for [the President], 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." (quoting Take Care Clause)).

[135] *See* Paulsen, *The* Merryman *Power*, *supra* note 11 *passim*.

context, it should not be a cause for surprise. And, if tomorrow a letter or other document were found from Lincoln robustly authorizing just such defiance,[136] there would be no cause for surprise either.

The historical record we have today lacks the requisite clarity necessary to reach a considered judgment regarding what Lincoln intended, and how he was understood by his subordinates and the wider public when he gave the Army discretion to suspend habeas corpus. One reason the record may lack such clarity is that, during the *Merryman* litigation and in its immediate aftermath, President Lincoln might never have given this specific legal question any thought at all.[137] Of course, the other reason we lack clarity is that Chief Justice Taney never ordered Lincoln, or anyone else, to release John Merryman.

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[136] When President Lincoln wished to break with constitutional norms and expectations, he did so openly. *See, e.g.*, BANKS & DYCUS, *supra* note 50, at 117 (explaining that in *Merryman*, "[Lincoln] acted openly, unlike some of his successors, and he stood ready to suffer the political consequences"). For example, Lincoln once directed a U.S. Treasury official to withhold an Article III judge's pay. *Compare, e.g.*, U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts . . . shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."), *with* Letter from William H. Seward, Secretary of State, to Elisha Whittlesey, Esq., First Comptroller of the Treasury (Oct. 21, 1861), *in* 2 (series 2) THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 1022, 1022 (Wash., GPO 1897) (reproducing Seward's directive to Whittlesey, per Lincoln's instructions, that Judge William M. Merrick's salary should not be paid). At this time, Merrick was suspected of treason. *See id*. at 1021–23 (recording Merrick-related correspondence). *See generally* Jonathan W. White, *'Sweltering with Treason': The Civil War Trials of William Matthew Merrick*, 39(2) PROLOGUE 26 (Summer 2007).

[137] *Cf.* REHNQUIST, *supra* note 6, at 48–49 (discussing *Murphy v. Porter*). *Murphy v. Porter* concluded on October 31, 1861: this was some five months after Taney had filed his *Ex parte Merryman* opinion. *See supra* notes 1, 27–28, 115, and accompanying text.