

Ex Parte Merryman:
Myth, History, and Scholarship

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*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.

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¹ 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*). According to most commentators, Taney filed his *Merryman* opinion on June 1, 1861, after having announced rulings from the bench on May 27 and May 28, 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”). But compare Craig R.

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 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

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 the 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, 90 (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.

² See, e.g., 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) (“Chief Justice Taney . . . was brought into direct conflict with the President, by his famous decision in *Ex parte Merryman*.”); 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) (“However, early in the Civil War period, the Chief Executive and the Chief Justice confronted each other in a direct fashion.”); Sherrill Halbert, *The Suspension of the Writ of Habeas Corpus by President Lincoln*, 2 AM J. LEGAL HIST. 95, 95 (1958) (characterizing the Taney-Lincoln struggle over habeas corpus in *Merryman* as “titanic in character”); Phillip Shaw Paludan, “*Dictator Lincoln*”: *Surveying Lincoln and the Constitution*, 21(1) OAH MAG. OF HIST. 8, 8 (Jan. 2007) (“The event that inspired and legitimated these accusations [that Lincoln was a dictator] was Lincoln’s clash with the Chief Justice of the United States Supreme Court Roger B. Taney over the fate of Confederate sympathizer John Merryman.”); 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 . . .”), available at <http://www.fjc.gov/history/docs/merryman.pdf>.

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) (Douglas, J., concurring) (same); *id.* at 637 n.3 (Jackson, J., concurring) (same); LOUIS FISHER, CONG. RESEARCH SERV., ORDER CODE RL32458,

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.

I. INTRODUCTION: A BRIEF STATEMENT OF THE UNDISPUTED FACTS

Following the 1860 election of Abraham Lincoln, the parade of state secession would begin. By April 1861, Fort Sumter had fallen. 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.⁴ To secure the capital, President Lincoln directed Union troops to proceed to Washington through Maryland, a border state. Mobs in Maryland had attacked Union troops; bridges and railway lines had been destroyed; telegraph wires to the capital had been cut. It appears that the purpose of the greater part of this destruction was to prevent Union troops from passing through Maryland to secure Washington and, perhaps, also federal military installations in Maryland, such as Fort McHenry in Baltimore. On April

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) eighteen federal court opinions; (ii) four state court opinions; (iii) three hundred ninety seven domestic secondary sources; (iv) fifty three appellate court filings (including many filings in recent War on Terror detainee litigation); (v) nine trial court filings (including several filings in recent War on Terror detainee litigation); and (vi) three foreign secondary sources. See Keycite to *Ex parte Merryman* (accessed Oct. 15, 2015). Likewise, Westlaw reports, also as of Oct. 15, 2015, twelve legislative documents citing *Merryman* in the US GAO Federal Legislative Histories library.

⁴ 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 found Washington "filled with . . . disunionists and honeycombed with plots"); Halbert, *supra* note 2, at 106 ("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."); 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).

27, 1861, in order to secure the movement of Union troops through Maryland, Lincoln issued an order delegating authority to General Winfield Scott to suspend habeas corpus. Lincoln's order cited no statutory basis for his decision.

John Merryman was from a long-established land-owning politically-connected Maryland family, as was his wife. At the outbreak of the Civil War, he had already been elected to public office: member and president of the Baltimore County Commission.⁵ Rightly or not, military authorities suspected John Merryman of being an officer of a pro-secession militia group which allegedly had conspired to destroy and destroyed bridges and railway lines.⁶ As

⁵ See BRIAN MCGINTY, *THE BODY OF JOHN MERRYMAN: ABRAHAM LINCOLN AND THE SUSPENSION OF HABEAS CORPUS* 59 (2011) (describing Merryman's election to the Baltimore County Commission). *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 doubts as to Swisher's claim here; the prevailing view among modern commentators is that, prior to the Civil War, Merryman had run unsuccessfully for a state legislative seat. See MCGINTY, *supra* at 60 (discussing Merryman's failed 1855 campaign for a state legislative seat); see also Francis B. Culver, *Merryman Family*, 10(3) MD. HIST. MAG. 286, 296–97 (Sept. 1915). 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); WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 26 (1998) (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); James F. Simon, *Lincoln and Chief Justice Taney*, 35(3) J. SUP. CT. HIST. 225, 236 (Nov. 2010) (affirming that, prior to or at the time of his arrest, Merryman was a 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)). 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., 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) ("Carl Swisher reports that Merryman's father and Taney had gone to Dickinson College *together*." (emphasis added) (citing SWISHER, *supra* at 845)). Interestingly, Dickinson College has no record of Merryman's father, Nicholas Rogers Merryman, attending. See Jonathan W. White, *The Trials of John Merryman and Abraham Lincoln's Other Habeas Corpus Problem*, ABRAHAM LINCOLN INSTITUTE'S LINCOLN SYMPOSIUM LECTURE (Mar. 26, 2011), <https://www.youtube.com/watch?v=rAQQGiwmBsLo> (noting that "the archivist at Dickinson" could find "no record of Merryman's father ever being there") (at 38:56ff). In a contemporaneous report, *The New York Times* asserted that Merryman was Taney's "neighbour" and "personal friend." *Taney and Cadwallader*, N.Y. TIMES, May 29, 1861, 4–5, available at <http://www.nytimes.com/1861/05/29/news/taney-and-cadwallader.html>.

⁶ See MCGINTY, *supra* note 5, 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 (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.”); *infra* note 75 (discussing Merryman’s alleged involvement in regard to destroying telegraph wires). *But cf.* CARL BRENT SWISHER, *STEPHEN J. FIELD: CRAFTSMAN OF THE LAW* 112 (1930) (characterizing Merryman as a “Southern agitator” and asserting, absent any authority, that he was “arrested by military authorities . . . on the ground that his utterances were a hindrance to the Northern cause”). According to some, Merryman destroyed the bridges under orders from 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 militiaman], under orders (depending on the version, from [Governor] Hicks or someone else), Merryman helped burn railroad bridges”); 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); 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.”); cf. 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”); Geoffrey R. Stone, *Civil Liberties in Wartime*, 28(3) J. SUP. CT. HIST. 215, 220 (Nov. 2003) (characterizing Merryman as a “Confederate cavalryman”). *But see* MCGINTY, *supra* note 5, 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]”). Calabresi’s and Stone’s characterizing Merryman as a “Confederate” is unsupported, as is Talbert’s characterization of Maryland having a “pro-Southern majority.” *See* MCPHERSON, *BATTLE CRY*, *supra* note 4, 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.”); REHNQUIST, *supra* note 5, at 18 (“Maryland teetered both geographically and ideologically between North and South.”); *id.* at 20 (describing “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”); 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 4, 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 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); *compare* HARTZ, *supra* note 1, at 6 (characterizing Merryman as a “civilian”), 1 OTIS H. STEPHENS, JR. & JOHN M. SCHEB II, *AMERICAN CONSTITUTIONAL LAW: SOURCES OF POWER AND RESTRAINT* 197 (4th ed. 2008) (same),

a result, on Saturday, May 25, 1861, federal military authorities arrested Merryman, and they subsequently detained him at Fort McHenry. The same day—Saturday, May 25, 1861—Merryman’s Maryland counsel, George M. Gill and George H. Williams, brought Merryman’s habeas corpus petition to Chief Justice Roger Brooke Taney at Taney’s Washington home.⁷ On or about 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 am—in a court room in Baltimore; (ii) to explain the legal basis for Merryman’s detention by military authorities; and (iii) to “produce”⁸ the body of John Merryman at that hearing.

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 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 *Ex parte Merryman* as “ar[is]ing when [John Merryman] an officer in the Maryland militia was placed in military custody for allegedly using his position to recruit and train Confederate sympathizers” (emphasis added)). See generally *Ex parte Merryman*, 17 F. Cas. at 144 (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)).

⁷ See Downey, *supra* note 2, at 262–63 & n.3 (explaining that the petition was presented to Taney on Saturday, May 25, 1861, and also explaining other key dates); *id.* at 262 (explaining that Merryman’s petition was presented to “Taney at his home in Washington”); Simon, *supra* note 5, at 236 (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”); EDGAR J. MCMANUS & TARA HELFMAN, LIBERTY AND UNION: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 204 (concise ed. 2014) (“Merryman applied to Chief Justice Taney, who was then on circuit court duty in Maryland” (emphasis added)); JUDGE ANDREW P. NAPOLITANO, SUICIDE PACT 44 (2014) (“Merryman’s attorney sought a writ of habeas corpus from the federal court in Baltimore.”); REHNQUIST, *supra* note 5, at 18 (stating that “[t]he petition was presented to Chief Justice Taney on Sunday”); ROSS, *supra* note 4, at 67 (“[Merryman] filed a habeas corpus petition at the Baltimore circuit court”); 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)); Harold L. Kaplan, *Constitutional Limitations on Trials by Military Commissions*, 92 U. PA. L. REV. 272, 288 (1944) (“Application was made to Chief Justice Taney of the United States Supreme Court while he was sitting in the United States Circuit Court at Baltimore for a writ of habeas corpus.”); Stone, *supra* note 6, at 220 (“The judge assigned to hear Merryman’s petition was Chief Justice Roger B. Taney.” (emphasis added)); 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”).

⁸ *Ex parte Merryman*, 17 F. Cas. at 144 (illustrating that the petition seeking habeas used “produce” language); *id.* (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

Cadwalader did not attend the May 27, 1861 hearing; instead, he sent Colonel R. M. Lee. At the hearing, Colonel Lee presented the court with a signed response from Cadwalader laying out the General's defense, i.e., arguing that habeas corpus had been lawfully suspended under presidential authority. Cadwalader's response also sought a postponement to seek additional direction from the President if the court should determine that Cadwalader's defense was insufficient. Furthermore, Cadwalader did not produce Merryman at the hearing as he was instructed to by Taney's ex parte order.

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

Prior to noon on May 28, 1861, the Marshal returned to the courthouse, without Cadwalader (and also without Merryman). Taney delivered an oral opinion later that day, and this ended live proceedings in court. On June 1, 1861, Taney filed an extensive written opinion. The written opinion was filed with the Circuit Court for the District of Maryland.

In his opinion, Taney expressed the view that the President has no unilateral power to suspend habeas corpus. In other words, under the Constitution, only Congress can suspend habeas corpus. 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."⁹ 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."¹⁰

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 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 Taney . . . vainly attempt[ed] to serve the writ"); ARTHUR H. GARRISON, *SUPREME COURT JURISPRUDENCE IN TIMES OF NATIONAL CRISIS, TERRORISM, AND WAR A HISTORICAL PERSPECTIVVE* 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 4, at 67 (dating the ex parte order to produce Merryman as on May 28, 1861).

⁹ *Ex parte Merryman*, 17 F. Cas. at 144.

¹⁰ *Id.*

Noting that his attachment order “ha[d] been resisted by a force too strong for me to overcome,”¹¹ Taney’s final judicial order did not command Cadwalader or anyone else to release Merryman. Instead, Taney’s final order merely meekly directed the Clerk of the Circuit Court for the District of Maryland 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 cause the civil process of the United States to be respected and enforced.”¹²

Merryman was not released as a consequence of Taney’s decision, nor was he brought before a military tribunal. Instead, he was transferred to the federal civil authorities, and indicted for treason in the District Court for Maryland on July 10, 1861. He was released on bail on or about July 13, 1861. 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. In 1867, the United States Attorney entered a *nolle prosequi*—as a result, Merryman was never brought to trial.¹³

¹¹ *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.

¹² *Id.* (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 a 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. *But see* 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[]”).

¹³ *See, e.g.*, MCGINTY, *supra* note 5, 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 5, at 39 (describing multiple charges, including “conspiracy to commit treason”); *see also* JAMES G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 120–27 (1926). *See generally Ex parte Merryman*, 17 F. Cas. *passim*. *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 to justify his arrest in the first place.”); 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 had either been released or was in the custody of the judicial [?] authorities. He was not indicted.”); *id.* at 120 (asserting that Merryman had been transferred to the civil authorities on May 25, 1861, and that at the time “Cadwalader made return” to the initial *ex parte* writ, he was “[u]naware that he no longer held the petitioner”); *but cf.* AMANDA DI PAOLO, *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.” *Id.* But DiPaolo offers no support for her factual claims. *See, e.g.*, REHNQUIST, *supra* note 5, at 50 (“[N]one of the civilians apprehended during [Secretary of State] Seward’s [early] tenure were tried for any offense before a military commission; this procedure came only under [Secretary of War] Stanton [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

During the war, Merryman sued General Cadwalader for false imprisonment—his suit was unsuccessful. After the war, Merryman was elected to the legislature and also to state-wide office.¹⁴

II. 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.¹⁵ However, Taney never ordered anyone to release Merryman. As explained, Taney’s final order merely stated:

cause? See MCPHERSON, *BATTLE CRY*, *supra* note 4, 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 6, at 134 (“Lincoln was unsure that he could rely on the loyalty of any Maryland authorities, including the judges and juries.”); DON E. FEHRENBACHER, *LINCOLN IN TEXT AND CONTEXT: COLLECTED ESSAYS* 134–35 (1987) (“[I]f [Maryland] offenders had been arrested by civil authorities, it was unlikely that any Maryland jury would have convicted them.”); ALLEN C. GUELZO, *LINCOLN’S EMANCIPATION PROCLAMATION: THE END OF SLAVERY IN AMERICA* 51 (2004) (“[A]nyone could have predicted that [Maryland] proslavery judges would have released Merryman on sight.”). Was it because the government had a weak case, or, perhaps, because Merryman had a good defense? See RAGSDALE, *supra* note 2, at 27 (“In June 1861, the Maryland General Assembly passed an act affirming Merryman’s qualification as a second lieutenant in the Baltimore County Horse Guards [i.e., the militia], and declared his acts as an officer in the unit to be legal. Seven months later, the General Assembly repealed the earlier act.”); *supra* note 6 (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 5, 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 circuit court judge—not to hear such cases alone because treason was a capital offense. *See, e.g.*, MCGINTY, *supra* note 5, at 157 (“Taney stubbornly refused to permit the treason cases to go to trial.”); *id.* 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); REHNQUIST, *supra* note 5, at 38–39 (same); SIMON, *supra* note 5, at 197 (noting Taney’s “dilatatory tactics”); *see also, e.g.*, RAGSDALE, *supra* note 2, at 29 (“As circuit judge, Taney successfully resisted the prosecution of Merryman and other Marylanders indicted for treason.”). *See generally infra* note 52 (discussing Judge Giles).

¹⁴ *See* MCGINTY, *supra* note 5, at 169–70 (indicating that John Merryman’s lawsuit against Cadwalader was dropped in 1864, and discussing Merryman’s post-Civil War political career); *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).

¹⁵ *See, e.g.*, *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 14 (2006) (Robertson, J.) (“Lincoln ignored Taney’s order”); 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*)); *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”); *cf.*, e.g., 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*)).

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.*, BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN THE AGE OF TERRORISM* 200 n.38 (2012) (“Chief Justice Roger Taney . . . ordered the release of a detainee in *Ex parte Merryman* Lincoln ignored Taney’s order”); JOSEPH M. BESSETTE & JOHN J. PITNEY, JR., *AMERICAN GOVERNMENT & POLITICS: DELIBERATION, DEMOCRACY, AND CITIZENSHIP* 163 (2014) (“When the authorities failed to produce the prisoner, Taney ordered him released. . . . Lincoln ignored Taney’s mandate”); DOUGLAS CLOUATRE, *PRESIDENTS AND THEIR JUSTICES* 60 (2010) (explaining that Taney’s “*Ex Parte Merryman* order to release . . . a civilian from military detention was ignored by Lincoln”); NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 110 (2004) (“Taney attempted to serve a paper at the prison to free Merryman”); 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”); 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. marshal sent to bring him into court. . . . Lincoln simply ignored the decision” (emphasis added)); KERMIT L. HALL & JOHN J. PATRICK, *THE PURSUIT OF JUSTICE: SUPREME COURT DECISIONS THAT SHAPED AMERICA* 52 (2006) (“The [C]hief [J]ustice ordered John Merryman released from prison.”); RANETA LAWSON MACK & MICHAEL J. KELLY, *EQUAL JUSTICE IN THE BALANCE: AMERICA’S LEGAL RESPONSES TO THE EMERGING TERRORIST THREAT* 238 (2000) (“Lincoln . . . suspend[ed] habeas corpus and disregard[ed] Chief Justice Taney’s order to release a prisoner held by executive fiat in *Ex Parte Merryman*”); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 23 (1999) (“Taney then stated that Lincoln’s suspension was unconstitutional and directed Merryman’s release.”); 12 WILLIAM M. WIECEK, *OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE BIRTH OF THE MODERN CONSTITUTION, 1941–1953*, at 285 (2006) (“President Abraham Lincoln ignored Chief Justice Roger B. Taney’s command that the army release John Merryman”); CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* 116 (2005) (“Chief Justice Taney . . . ordered a military commander to release [Merryman] Lincoln refused to accept this judicial command.”); Amy Coney Barrett, Symposium Introduction, *Stare Decisis and Nonjudicial Actors*, 83 NOTRE DAME L. REV. 1147, 1156 (2008) (“Taney held Lincoln’s suspension of the writ unconstitutional and ordered Merryman freed. Lincoln did not comply.” (footnote omitted)); Joseph M. Bessette, *Rethinking Jackson’s Concurrence in Youngstown v. Sawyer*, in *THE LIMITS OF CONSTITUTIONAL DEMOCRACY* 194, 214 (Jeffrey K. Tulis & Stephen Macedo eds., 2010) (“Lincoln ignored Taney’s order to release Merryman”); 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”); *id.* at 1430 (“Except for Lincoln in the very unusual climate of the Spring of 1861, no president has openly defied and refused to execute a judgment.”); Daniel C. Diller & Stephen H. Wirls, *Commander in Chief*, in 1 *GUIDE TO THE PRESIDENCY* 629, 668 (Michael Nelson ed., 2d ed. 2015) (“Taney . . . ordered the army to release Merryman, but Lincoln *defiantly* refused to permit his release.” (emphasis added)); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 362

(1994) (“The one exception is *Merryman*, in which Lincoln apparently thought it necessary and constitutionally permissible to confine an agitator in violation of Chief Justice Taney’s judicial order. Rebellion was at hand, and a skilled provocateur might well have been a threat to national security. Under those circumstances Lincoln may have been right to defy Taney”); 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.” (footnote omitted)); Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 365 n.57 (2010) (“Lincoln famously defied Chief Justice Taney’s order to release a prisoner in *Ex parte Merryman*”); Finkelman, *supra* note 5, at 1378 (“Today we remember John Merryman because Lincoln ignored Chief Justice Taney’s writ of habeas corpus directing his release.”); John Ferejohn & Pasquale Pasquino, *Emergency Powers*, in OXFORD HANDBOOK OF POLITICAL THEORY 333, 341 (John S. Dryzek et al. eds. 2006) (“[Lincoln] . . . def[ie]d Chief Justice Taney’s order to release a prisoner”) (citing *Merryman*); 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 habeas corpus to release an individual held in military custody”) (citing *Merryman*); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What The Law Is*, 83 GEO. L.J. 217, 278 (1994) (explaining that Taney “ordered Merryman released”); *id.* at 279 (“Lincoln dissented. He did not release Merryman as Taney had ordered.”); David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 17 (2014) (“Having unilaterally suspended habeas corpus, President Abraham Lincoln ignored Chief Justice Taney’s order granting habeas relief in *Ex parte Merryman*.”); Robert J. Pushaw, Jr., *The “Enemy Combatant” Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1029 (2007) (“Lincoln disregarded Taney’s order to release Merryman”); Louis Michael Seidman, *The Secret History of American Constitutional Skepticism: A Recovery and Preliminary Evaluation*, 17 U. PA. J. CONST. L. 1, 53–54 (2014) (“A few months later, Chief Justice Taney issued a writ ordering the release of a Confederate supporter, John Merryman, and ruling that Lincoln had acted unconstitutionally by suspending the writ.” (footnote omitted)); Talbert, *supra* note 6, at 177 (“Chief Justice Roger B. Taney issued a writ of habeas corpus for [Merryman’s] release, but it was ignored by the president.”); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 638 n.131 (2009) (“Chief Justice Taney ordered the release of John 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.”); Michael Vorenberg, *The Chase Court (1864–1873): Cautious Reconstruction*, in THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE 103, 103 (Christopher Tomlins ed., 2005) (“Taney had issued an ex parte decision demanding Merryman’s release”); Associate Justice Richard E. Welch III, *“They Will Not Open Their Ears”: Should we Listen to the Supreme Court and Should the Courts Listen to us?*, 47 NEW ENG. L. REV. 93, 99 n.35 (2012) (“[O]ne should also consider President Lincoln’s direct defiance of Chief Justice Taney’s judicial order to release John Merryman.” (emphasis added)); John Yoo, *Lincoln at War*, 38 VT. L. REV. 3, 37 (2013) (“Lincoln . . . ignored Taney’s order releasing Merryman.”); John Yoo, *Merryman and Milligan (and McCardle)*, 34(3) J. SUP. CT. HIST. 243, 243 (Nov. 2009) (“In these two cases [*Merryman* and *Milligan*], federal courts ordered the release of the petitioners on the ground that the military had exceeded its constitutional authority.”); *id.* at 244 (“Taney then issued an opinion ordering Merryman’s release.”); *id.* (characterizing the response to Taney as “includ[ing] outright presidential defiance”); *id.* at 257 (“In *Merryman*, Chief Justice Taney issued a writ to President Lincoln, who refused to follow it. It is probably the only unambiguous example of a President of the United States refusing to obey an order of the federal judiciary.”); Ian Zuckerman, *One Law for War and Peace? Judicial Review and Emergency Powers between the Norm and the Exception*, 13(4) CONSTELLATIONS 522, 532 n.48 (Dec. 2006) (“Famously, Lincoln ignored Chief Justice Taney’s demand that Merryman be discharged in [*Ex parte Merryman*”); Thomas E. Baker, *At War with the Constitution: A History Lesson*

from the Chief Justice, 14 B.Y.U. J. PUB. L. 69, 70 (1999) (reviewing WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998)) (“Taney rebuked Lincoln by ruling that only Congress could suspend the writ of habeas corpus, and further directed that the President be delivered a copy of the order *requiring* the release of a civilian being held in military custody.” (emphasis added)); *see also, e.g.*, BRUFF, *supra* note 6, at 135 (“Lincoln should either have let Merryman go or appealed the order to *release* him.” (emphasis added)); JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 56 (1980) (noting “Abraham Lincoln’s outright refusal to obey Chief Justice Taney’s order in *Ex parte Merryman*”); 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)); OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 96 n.36 (2006) (“[I]n defiance of a court order to the contrary, Merryman was not released.”); 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*.”); SWISHER, *supra* note 6, at 112–13 (“Taney . . . reminded [Lincoln] that it now remained for the President to fulfil his oath of office by executing the judgment of the Court and releasing the prisoner. The President made no reply”); JOHN FABIAN WITT, LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 150 & n.* (2012) (“Lincoln had evaded the chief justice’s order [in *Merryman*]”); Fritz Allhof, *The War on Terror and the Ethics of Exceptionalism*, 8(4) J. MIL. ETHICS 265, 274 n.27 (Nov. 2009) (“Lincoln went on to ignore Taney’s order to restore [the writ].”); Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1814 n.79 (2009) (“President Lincoln famously ignored Chief Justice Taney’s judicial order in *Ex Parte Merryman . . .*”); Jennifer Mason McAward, *Congress’s Power to Block Enforcement of Federal Court Orders*, 93 IOWA L. REV. 1319, 1361 (2008) (“The most notorious and, indeed, the sole example of a presidential nullification of a court judgment is President Lincoln’s defiance of the mandate in *Ex parte Merryman*.”); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 46 (1993) (“*Ex parte Merryman . . .* is the only reported instance of which I am aware where a President asserted the power to disregard a judicial *judgment* on the ground that he disagreed with its legal basis.” (emphasis added)); 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 5, 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.”); Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 995 (2008) (“[C]onsider Lincoln’s decision to defy a habeas corpus order issued by Chief Justice Taney (in *Ex parte Merryman*) during the opening days of the war.”); Judge Richard A. Posner, *Desperate Times, Desperate Measures*, N.Y. TIMES, Aug. 24, 2003, at § 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

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 president of the United States. It will then remain for that high officer, in fulfilment of his constitutional obligation to ‘take care that the laws be faithfully executed,’ *to determine what measures he will take* to cause the civil process of the United States to be respected and enforced.¹⁶

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)).

¹⁶ *Ex parte Merryman*, 17 F. Cas. at 153 (quoting United States Constitution Article II, Section 3 (Take Care Clause)) (emphasis added); MCGINTY, *supra* note 5, at 91–92 (“This [situation] was . . . at least *remarkable*. There was no order commanding anybody in the chain of command—Cadwalader, [Major General] Keim [who authorized the arresting military officers to seize Merryman], 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.” (emphasis added)); *id.* at 150 (same); 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”); *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.) (“It follows that in my judgment the return of General E[lliott] shows no sufficient cause for the detention of the petitioner, or why he should refuse to produce his body before this court; but as the issuing of the attachment at the present time may lead to serious and most unfortunate collisions, which it is possible to avoid by a short delay, 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 it until they shall have had time to consider what steps they should properly take in the case.”). *But cf.* Ringel, *supra* note 6, at 210 (“[Taney] ordered Merryman transferred to a civilian court”).

As explained above, it was Major General Keim who 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 Ex parte Merryman*, 17 F. Cas. at 144. *But see* ALLEN C. GUELZO, ABRAHAM LINCOLN: REDEEMER PRESIDENT 281 (1999) (“Merryman was arrested on May 25th by General George Cadwalader”); JULIE NOVKOV, THE SUPREME COURT AND THE PRESIDENCY: STRUGGLES FOR SUPREMACY 222 (2013) (“Cadwallader . . . entered the home of Lt. John Merryman of Maryland’s militia and arrested him”); 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”); Thomas F. Carroll, *Freedom of Speech and of the Press during the Civil War*, 9 VA. L. REV. 516, 530 (1923) (“[Merryman] was taken to Fort McHenry by General Cadwallader acting under authority of General Keim.”); James Riddlesperger, *Suspension of Habeas Corpus*, in 1 ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 923, 923 (Paul Finkelman ed., 2006) (asserting that “Cadwalader ordered the arrest of . . . John Merryman”); *but cf.* REHNQUIST, *supra* note 5, at 26 (describing Colonel Yohe as a “[c]aptain”); *Affairs in Baltimore*, N.Y. TIMES, May 29, 1861 (referring to a “Captain Yoe [sic?]” as the senior officer who carried out Merryman’s seizure), available at <http://www.nytimes.com/1861/05/29/news/affairs-balimore->

Again, Taney issued no order to release Merryman. It follows Lincoln could not have ignored or defied it, and neither could anyone else for that matter.

Moreover, 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.¹⁷ Not against Lincoln. Lincoln was not a party in *Ex parte Merryman*. Lincoln was not served with process in *Ex parte Merryman*. Because Taney conducted all courtroom proceedings at a lightning pace,¹⁸ over a mere two

habeas-corpus-cask-return-sheriff-action-chief-justice-taney.html. 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 Ex parte Merryman*, 17 F. Cas. at 144 (“The prisoner was brought to this post on the 20th inst. . . .”). 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 id.* As ordered, Spicer issued and signed the writ. *See id.*; *Summons issued to General George Cadwalader to appear before Court on Monday, 27 May 1861, with the body of John Merryman*, ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES): JOHN MERRYMAN (1824–1881) (last visited Sept. 19, 2015), <http://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/001500/001543/pdf/summons.pdf>.

Cadwalader believed—in error—that the writ was issued by the clerk of the Supreme Court of the United States. *See Ex parte Merryman*, 17 F. Cas. at 144.

¹⁷ *See* REHNQUIST, *supra* note 5, 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). Apparently, at the time of the *Merryman* litigation, the commander of Fort McHenry was Major W.W. Morris. *See infra* note 52.

¹⁸ *See* CHANGES IN LAW AND SOCIETY DURING THE CIVIL WAR AND RECONSTRUCTION 59 (Christian G. Samito ed., 2009) (noting the Taney “swiftly ruled” in *Merryman*); 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 5, at 40–41 (criticizing Taney’s conduct of the proceedings, and characterizing them as “precipitate” and “hasty”); *see also* BRUFF, *supra* note 6, at 135 (explaining that Taney issued his opinion “[w]ithout inviting the executive’s lawyers to argue their side of the case”); ELLIS, *supra* at 413 (asserting that Taney reached his decision “without giving the administration an opportunity to justify its suspension”); MCGINTY, *supra* note 5, at 177 (“[Taney] did not give the United States district attorney an opportunity to express the government’s position on the critical question before the court”); REHNQUIST, *supra* note 5, 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”); JENNIFER L. WEBER, COPPERHEADS: THE RISE AND FALL OF LINCOLN’S OPPONENTS IN THE NORTH 223 n.35 (2006) (“Taney . . . made the ruling alone . . . and without ever hearing arguments on behalf of the government.”). Again, to clarify the chronology, Taney received a habeas petition on May 25, 1861, a Saturday; he issued an *ex parte* order on or about Sunday; i.e., he ordered Cadwalader to appear (and also to produce Merryman) the next day, on Monday at 11:00 am, 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 the government had asked for an adjournment. *See supra* notes 7–13, and accompanying text. Put simply, Taney was not only speeding the *Merryman* litigation along at a lightning pace, but he was working Saturdays and Sundays, whole weekends, to do so! *See*

days, i.e., 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.*¹⁹ In other words, Lincoln 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.²⁰

REHNQUIST, *supra* note 5, 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); *cf.* Fed. R. Civ. P. 12(a)(1)(A)(i) (granting a private party defendant 21 days to answer a complaint); *id.* 12(a)(2) (granting a United States officer, sued in an official capacity, 60 days to answer a complaint); *id.* 12(a)(3) (granting a United States officer, sued in an individual capacity, 60 days to answer a complaint). In effect, Taney did not give Cadwalader, a New Jersey 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 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://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/001500/001543/pdf/return28may61.pdf> (stating that the marshal made service on Cadwalader at “five o’clock PM” on May 26, 1861); 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); *see also infra* note 19 (discussing Lincoln’s apparent first recorded contact with the *Merryman* litigation). According to Dean Simon, Cadwalader’s request for a postponement was a “signal that General Cadwalader expected to take his orders from Lincoln, not the Chief Justice.” SIMON, *supra* note 5, at 188. Cadwalader’s position left him little time to think about “signals.” The Chief Justice ordered Cadwalader to, among other things, put forward a defense, in regard to a difficult set of legal issues, in less than one day—in fact, he had only seventeen hours. In such circumstances, it is hardly surprising that the military officer—who was also busy fighting a civil war—would seek further guidance from his superiors and also to shift, quite rightly in my view, an explosive political question onto the country’s elected leadership.

¹⁹ I see 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.”).

²⁰ *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 in any proceeding which is to be accorded finality 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.”); *see also, e.g., 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”); *cf., e.g., D’Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 176 (1850) (Catron, J.) (“On the other hand, the international law as it existed among the States in 1790 was, that a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, when the defendant had not been served with process or voluntarily

III. MYTH: THE *EX PARTE MERRYMAN* OPINION

The second *Merryman* myth is that Lincoln ignored Taney's *opinion*:²¹ that is, Lincoln's post-*Merryman* conduct and his interactions with Executive Branch subordinates failed to

made defence, because neither the legislative jurisdiction, nor that of courts of justice, had binding force.”). *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 5, 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.”); *but cf.* Michael Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 219 n.9 (2002) (“[C]ompare Chief Justice Taney’s writ of habeas corpus directed at President Lincoln, at the outset of the Civil War, in *Ex parte Merryman* Lincoln ignored the writ.”). 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 [plural] notions of fair play and substantial justice” (emphasis added)); *id.* at 320 (reformulating test for personal jurisdiction as relating to “our traditional [singular] conception of fair play and substantial justice”).

Now 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 Lincoln. If these views were grounded in unambiguous, or even reasonably clear, historical fact, 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 37, 64–80, and accompanying text.

²¹ *See, e.g.*, 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.”); 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”); REHNQUIST, *supra* note 5, at 40 (noting the “administration’s disregard of the decision”); SCOTT M. MATHESON, JR., *PRESIDENTIAL CONSTITUTIONALISM IN PERILOUS TIMES* 41 (2009) (“[Lincoln] ignor[ed] Taney’s opinion”); 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); Finkelman, *supra* note 5, at 1359 (“Lincoln neither

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 order absent any opinion.²² 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,²³ by any federal statute, or even by any federal judicial decision.²⁴ In short, in the American judicial system, orders are primary, not opinions.

obeyed [Taney's] opinion nor directly responded to it; he simply ignored it."); 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 . . ."); Gerard N. Magliocca, *The Gold Clause Cases and Constitutional Necessity*, 64 FLA. L. REV. 1243, 1258 n.88 (2012) ("Abraham Lincoln did ignore Chief Justice Taney's circuit opinion holding that the President could not unilaterally suspend habeas corpus . . ."); Seidman, *supra* note 15, at 53–54 ("Lincoln simply ignored the opinion."); Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1976 (2008) ("Lincoln and Bates' suspension of the writ of habeas corpus and defiance of Taney's opinion in *Ex parte Merryman* were followed by congressional suspension in 1863."); Yoo, *Merryman and Milligan (and McCordle)*, *supra* note 15, at 244 ("Taney then issued an opinion ordering Merryman's release."); *id.* (characterizing the response to Taney as "includ[ing] outright presidential defiance"); Ashley C. Nikkel, Note, *Painting Ourselves Into a Corner: The Fundamental Paradoxes of Modern Warfare in Al Maqaleh v. Gates*, 12 NEV. L.J. 443, 447 (2012) ("Lincoln, of course, ignored Taney."); *cf.*, e.g., Captain John C. Cruden, *The War-Making Process*, 69 MIL. L. REV. 35, 48 & n.56 (1975) ("Lincoln's suspension of habeas corpus was invalidated . . ." (citing *Merryman*)).

²² 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]?").

²³ See U.S. CONST. art. III.

²⁴ 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."). See generally Merrill,

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 the United States Constitution.”²⁵ In short, even *Cooper v. Aaron*, 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 *Ex parte 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 general such an abstract aspirational goal were conceded, such aspirations ought not to apply to *Merryman*. Why? First, we do not know what court issued *Merryman*²⁶

supra note 15 *passim*. 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).

²⁵ 358 U.S. 1, 4 (1958) (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. 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.

Cooper, 358 U.S. at 18–19 (emphasis added). The Court insulated “judgments” and “orders,” not opinions, against state interposition, nullification, mob violence, and other lawlessness. 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).

²⁶ See *supra* note 1 (illustrating conflicting reports of the case—both as a circuit court opinion and also as an in chambers opinion of the Chief Justice of the United States). Compare MCGINTY, *supra* note 5, at 174 (arguing that *Merryman* was a chambers opinion, not a circuit court decision), with REHNQUIST, *supra* note 5, at 44 (noting that, in *Merryman*, Taney “was speaking only as a member of a circuit court”), and Jonathan W. White, *The Strangely Insignificant Role of the U.S. Supreme Court*

or whether it had valid jurisdiction.²⁷ Those that have studied the case have been and remain unsure and divided whether it was issued by the Circuit Court for the District of Maryland or

in the Civil War, 3(2) J. CIVIL WAR ERA 211, 218 (June 2013) (“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 even 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”). Likewise, several commentators have suggested that *Merryman* was issued by the Supreme Court. See, e.g., DIRCK, *supra* note 15, at 88 (asserting that *Ex parte Merryman* was “issued by the Supreme Court”); HEAD & WOLCOTT, *supra* note 13, 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”); ANDREW P. NAPOLITANO, CONSTITUTIONAL CHAOS 162 (2004) (asserting that *Merryman* was a “Supreme Court” ruling); POSNER, LAW, PRAGMATISM, AND DEMOCRACY, *supra* note 15, 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*”); Samuel P. Newton, *1851–1900: Introduction*, in 5 THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA, *supra* note 4, at 2097, 2098 (characterizing *Merryman* as a Supreme Court ruling); Dawinder S. Sidhu, *Baltimore, Maryland*, in 1 *id.* at 105, 106 (same); see also, e.g., PAULSEN & PAULSEN, *supra* note 15, at 177 (“Lincoln understood the Constitution *not* necessarily to mean whatever the Supreme Court said it meant concerning slavery and national authority (*Dred Scott*) or concerning presidential power in wartime (*Ex parte Merryman*).”); cf., e.g., Frank W. Dunham, Jr., *Where Moussaoui Meets Hamdi*, 183 MIL. L. REV. 151, 156 (2005) (asserting, absent evidence, that “Lincoln appealed [*Merryman*] to the full Supreme Court”). See generally JONATHAN W. WHITE, ABRAHAM LINCOLN AND TREASON IN THE CIVIL WAR: THE TRIALS OF JOHN MERRYMAN (2011) (reporting on *Merryman* in all its complexity).

²⁷ 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 5, at 174–76 (noting that Taney’s 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 Mark E. Neely, Jr., *The Constitution and Civil Liberties Under Lincoln*, in OUR LINCOLN: NEW PERSPECTIVES ON LINCOLN AND HIS WORLD 37, 39–41 (Eric Foner ed., 2008) (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 15, at 190–92 (discussing whether Taney had jurisdiction in *Merryman*); William Baude, *The Judgment Power*, 96 GEO. L.J. 1807 (2008) (collecting conflicting authorities); Vladeck, *supra* note 17 (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

was a decision by Chief Justice Taney in chambers, and concomitantly what was the source of Taney's jurisdiction to hear and decide the dispute. Second, although the matter was and is unsettled, one view is that in chambers opinions, although (apparently) establishing the law of the case, do not carry controlling precedential weight in regard to other cases,²⁸ even those with closely similar facts. Finally, although Taney concluded that Merryman was entitled to be 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 what court (if any) issued the opinion, its basis for jurisdiction (if any), and 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.

IV. 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.²⁹ But this was not feasible.³⁰ In the context of a habeas

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.

²⁸ 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."). 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").

²⁹ 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 6, at 135 ("Lincoln should either have let Merryman go or appealed the order to release him."); Fallon, *Executive Power*, *supra* note 15, 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 15, 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 5, 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., TODD BREWSTER, *LINCOLN'S GAMBLE: THE TUMULTUOUS SIX MONTHS THAT GAVE AMERICA THE EMANCIPATION*

action, if the decision had been in chambers, the prevailing view is that there was no route to appeal to the full Court.³¹ But even if 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. Taney never issued any such order against Cadwalader (or against anyone else). As such,

PROCLAMATION AND CHANGED THE COURSE OF THE CIVIL WAR 156 (2015) (“[Lincoln’s] administration did not appeal the decision on Merryman’s habeas petition”); 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”); THOMAS J. DILORENZO, THE REAL LINCOLN: A NEW LOOK AT ABRAHAM LINCOLN, HIS AGENDA, AND AN UNNECESSARY WAR 137 (2002) (same). *But see* Dunham, *supra* note 26, at 156 (asserting, absent evidence, that “Lincoln appealed [*Merryman*] to the full Supreme Court”).

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 13, 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*”), THE LIBRARY OF CONGRESS CIVIL WAR DESK REFERENCE, *supra* note 8, at 208 (“Taney issues this writ . . . but the full U.S. Supreme Court refused to support him.”), 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 5, 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 4, at 66 (at the time *Merryman* was decided, “the Court’s majority [was] still . . . made up of men unsympathetic to Lincoln and his party”), and SIMON, *supra* note 5, at 239–40 (noting that Attorney General Bates opposed appealing an 1862 Wisconsin Supreme Court case, raising *Merryman*-related issues, to the United States Supreme Court), 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) (“[Lincoln] visualised the Court as a partner in the nation’s preservation—not an easily realized vision, for the Court was at best a toss-up in terms of its stance on Lincoln’s policies.”).

³⁰ See REHNQUIST, *supra* note 5, 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 C.H. MCILWAIN, CONSTITUTIONALISM AND THE CHANGING WORLD 282 (1939) (“[T]here can be no responsibility without power”); J. ENOCH POWELL, M.P. AND 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”).

³¹ See MCGINTY, *supra* note 5, at 176 (suggesting that no appeal was possible); 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)).

Merryman was the *nonprevailing* party, and only he was entitled to take an appeal (assuming any such appeal were possible).³² 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.³³

V. 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 here 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;³⁴
- 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;³⁵

³² See 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”).

³³ 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 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., Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84–85 (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, was the recipient of a famous Civil War era letter discussing habeas corpus from President Lincoln. 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).

³⁴ See, e.g., BREST ET AL., *supra* note 3, at 223 (stating that Cadwalader “refused either to attend the May 27 hearing . . . and refused to comply with a second order [to attend a contempt hearing] to be present the following day”); Finkelman, *supra* note 5, 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.”); *infra* notes 38–45, and accompanying text.

³⁵ 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”); Dennis J. Hutchinson, *Lincoln the “Dictator,”* 55 S.D. L. REV. 284, 291 (2010) (“Notwithstanding Taney’s opinion, the military commander at Ft. McHenry, acting under the commander-in-chief’s orders, declined to produce Merryman.”); Klein &

C. When the United States Marshal attempted to serve an attachment order on Cadwalader at the Fort, Cadwalader sent the Marshal away;³⁶ and finally,
D. Cadwalader received authorization from Lincoln to ignore or defy the United States Marshal.³⁷

Wittes, *supra* note 21, 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 29, at 52 (“Taney confronted the army colonel bringing word of General Cadwalader’s defiance.”); *infra* notes 46–60; *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 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, *Political Question*, *supra* note 15, at 343 (“Likewise, [Lincoln] ignored Chief Justice Taney’s command in *Merryman* that a federal prisoner detained pursuant to presidential order be produced.”).

³⁶ *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 on-point 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 6, 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 61–63; *see also*, e.g., Cole, *supra* note 35, at 2571 (“Justice Taney then issued an attachment for contempt, but the military refused to accept service of that order.”); Rosen, *supra* note 15, 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.”).

³⁷ *See*, e.g., *United States v. 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); LOUIS FISHER, *THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER* 323 (2014) (“The commandant, acting under Lincoln’s orders, refused to produce Merryman.”); ROSS, *supra* note 4, at 67 (“Lincoln . . . ordered the army officer who had arrested Merryman to refuse to accept the writ.”); Hutchinson, *supra* note 35, 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 64–80; *see also*, e.g., EDWARDS & WAYNE, *supra* note 15, at 415 (“Taney ordered [Merryman’s] release, but *Lincoln* refused to give him up to the U.S. marshal 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 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,

These factual and legal assertions lack substantial merit.

A. *Did Cadwalader Ignore or Defy Chief Justice Taney by not Showing up for the First Day's Hearing on May 27, 1861?*³⁸

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 defendant. As a civil or quasi-civil matter,³⁹ jailer-defendants are not obligated to attend habeas hearings in person. Customarily, such defendants send a representative (or, an attorney is sent for the named defendants by the government's relevant law department).⁴⁰ Here, Cadwalader sent Colonel Lee. No defiance here: full stop. Indeed, although Taney would initiate contempt proceedings against Cadwalader, the only reason Taney offered for those contempt proceedings was that Cadwalader failed to produce Merryman. Taney's attachment order makes no mention of the fact that Cadwalader failed to attend the May 27, 1861 proceedings.⁴¹

1861 message to Congress, which took place more than a month after *Merryman*)); Rosen, *supra* note 15, 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 . . .”).

³⁸ See *supra* note 34.

³⁹ 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 . . .”).

⁴⁰ See REHNQUIST, *supra* note 5, 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 6, at 312–13 (explaining that Lee was Cadwalader’s “ADC,” aide-de-camp, and that Lee reported to the court that Cadwalader was “unavoidably detained”). *But see Affairs in Baltimore*, *supra* note 16 (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), available at <http://www.nytimes.com/1861/05/29/news/affairs-balimore-habeas-corpus-cask-return-sheriff-action-chief-justice-taney.html>.

⁴¹ See, e.g., *Ex parte Merryman*, 17 F. Cas. 144, 144 (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”). *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://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/001500/001543/pdf/attachment.pdf>. *But see* ELLIS, *supra* note 18, 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).

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.⁴² If the Army had 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."⁴³ Nothing like this happened in *Ex parte Merryman*.⁴⁴

⁴² See CHRISTOPHER PETER LATIMER, CIVIL LIBERTIES AND THE STATE 89 (2011) ("Within hours of this detention, Merryman contacted lawyers who drafted a petition for a writ of habeas corpus"); 5 SWISHER, *supra* note 5, at 845 ("Merryman was given immediate access to counsel"); cf. MCGINTY, *supra* note 5, 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* note 5, 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").

⁴³ 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 5, 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 29, at 92–94 (arguing that Lincoln signed a warrant to arrest Taney, notwithstanding the inability to 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).

⁴⁴ See Finkelman, *supra* note 5, at 1378 ("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." (footnote omitted) (quotation marks omitted)). 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, who had denounced 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. Cf. NEFF, *supra* note 12, at 36 (characterizing Cadwalader's response to Taney's writ as "polite[]"); RANDALL & DONALD, *supra* note 16, at 302 ("[Cadwalader] showed no truculence toward the judiciary as did Jackson in the War of 1812"). 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; RANDALL, *supra* note 13, at 145 & n.10. Once martial law ended, Judge

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. Nothing like that happened. Quite the opposite: Cadwalader and Lee asked for more time to prepare a defense.⁴⁵

*B. Did Cadwalader Defy Taney by not Producing Merryman After Taney Granted a Writ of Habeas Corpus Directed to Cadwalader to Produce (but not Release) Merryman?*⁴⁶

Merryman was seized by military authorities on Saturday, May 25, 1861. That very day, Merryman's attorneys drafted a petition for habeas corpus, and presented it to Taney. On or about 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 am. It is true that Cadwalader did not produce Merryman on May 27, as he was required to do by Taney's order.⁴⁷

Hall fined Jackson \$1,000 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* RANDALL, *supra* note 13, at 145 & n.10. Although Taney would take a somewhat different view of the legality of suspending habeas corpus by presidential order in *Merryman* in 1861, "[i]n 1843, Chief Justice Roger Taney privately praised [former President] Jackson for his measures three decades earlier and condemned [Judge] Hall's use of habeas corpus and his fine of Jackson." 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 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 Chief Justice Taney to Jackson (Jan. 4, 1844), in 6 *id.* at 250, 251 ("[I]f there is any thing upon which the people of this country have made up their minds, it is that the fine was most unjustly imposed . . ."). 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.*, Letter from President Lincoln to Erastus Corning and others (June 12, 1863), in 8 COMPLETE WORKS OF ABRAHAM LINCOLN, *supra* note 33, at 298, 311–12 (reporting Lincoln's discussion of the Jackson-Hall incident, including Lincoln's noting that Jackson arrested Judge Hall and the lawyer who brought the habeas petition to Hall, and also Hollander, a third-party, who merely called Jackson's conduct "a dirty trick" at a time when martial law had been imposed); *supra* note 43 (discussing rumors to the effect that Lincoln and the administration considered seizing Taney).

⁴⁵ *See Ex parte Merryman*, 17 F. Cas. at 144 (reproducing Cadwalader's response which stated that Cadwalader "respectfully requests that you will postpone further action upon this case" until the President can be consulted).

⁴⁶ *See supra* note 35.

⁴⁷ *See Ex parte Merryman*, 17 F. Cas. at 144; REHNQUIST, *supra* note 5, at 33–34.

But all these preliminary proceedings—prior to the May 27, 1861 hearing—were *ex parte*: Merryman’s attorneys had been present before Taney, but not the government’s or Cadwalader’s attorney. The government was, at the very least, entitled to argue that the *status quo* should be preserved until it also had an opportunity to be heard and to put forward its defenses *in court*, i.e., that the President’s suspension put Merryman beyond judicial relief, including a grant of a writ of habeas corpus.⁴⁸ Of course, I do not for a moment suggest that *ex parte* judicial orders need not be obeyed.⁴⁹ But such preliminary *ex parte* orders are qualitatively different from other judicial orders, particularly final judicial orders,⁵⁰ issued after notice and an opportunity to be heard in an adversarial hearing (or trial) on the merits.⁵¹

⁴⁸ Cf. KRENT, *supra* note 5, at 146 (“Without argument [from Cadwalader], Taney ordered the prisoner brought before him”); ROSEN, *supra* note 18, at 172 (asserting that, in *Merryman*, Taney “[r]efus[ed] to allow 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 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, the government was unwilling to throw in the towel before it had any opportunity to be heard.

⁴⁹ I do 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 37, 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 15, 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.” (footnote omitted)). See generally *infra* note 81.

⁵⁰ See, e.g., Paulsen, *Lincoln and Judicial Authority*, *supra* note 15, 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

Here, Cadwalader could have believed—in good faith—that after a brief hearing, his initial failure to comply should and would be excused.⁵² Indeed, as Chief Justice Taney explained:

a party's merely violating a preliminary ex parte judicial order. Cf. Merrill, *supra* note 15, 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 *supra* note 16, 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.” *Ex parte Merryman*, 17 F. Cas. at 153 (emphasis added). But see Paulsen, *Lincoln and Judicial Authority*, *supra* note 15, 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. Were they binding, and against whom or what entities?

⁵¹ Such a hearing, dealing solely with the merits of the government'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., *Ex parte Merryman*, 17 F. Cas. at 144 (“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 initial 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 52 (discussing Cadwalader's potential defenses in regard to the contempt proceeding).

⁵² 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) (“[T]he situation [at the time *Merryman* was adjudicated] was peculiar. Many of the states were actually in armed rebellion against the general government. Maryland, while it had not in fact not seceded, was in a partial state of insurrection.”); REHNQUIST, *supra* note 51, at 66 (“[Union] [t]roops moving through [Baltimore] were stoned”); see also, e.g., 1 *THE REBELLION RECORD: A DIARY OF AMERICAN EVENTS* 239 (Frank Moore ed., N.Y., G.P. Putnam 1861) (reproducing 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 army would render me very averse

“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”⁵³ 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 the court order.

Like many litigants faced with an ex parte temporary restraining order or preliminary injunction, Cadwalader was caught between a rock and 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 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 *Ex parte Merryman* was civil war, but because *all* ex parte orders pose very basic challenges to principles, policies, and values relating to due process, traditional notions of justice and fair play, and natural justice.⁵⁴

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

from appearing publicly and *unprotected* in the city of Baltimore to defend the interest of the body to which I belong” (emphasis added)).

⁵³ *Ex parte Merryman*, 17 F. Cas. at 144 (emphasis added).

⁵⁴ See, e.g., *Anton Piller KG v Mfg. Processes Ltd.*, [1976] Ch. 55, 60 (Eng. C.A.) (Lord Denning, M.R.) (“[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.) (“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 contempt* [by the plaintiff seeking the order] *will be dealt with accordingly*” (emphasis added)); *supra* note 20 (collecting authorities). 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 in the middle of an ongoing civil war—in such a manner. Reasonable judges and commentators in the context of adjudicating contempts (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.

gave military officers discretion to suspend habeas corpus.⁵⁵ 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 president claimed this power [to suspend habeas], and had exercised it in the manner stated in the return [i.e., Cadwalader’s response].”⁵⁶

Ultimately, Taney would reject Cadwalader’s defense on the merits. 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 in open court on May 27, 1861. One could fairly assume that this was known to Cadwalader because Cadwalader’s representative, Colonel Lee, had attended the May 27, 1861 hearing, and at that hearing,

⁵⁵ See *Ex parte Merryman*, 17 F. Cas. at 144.

⁵⁶ *Id.* at 148. Note that Chief Justice Taney expressly denied the existence of any presidential proclamation suspending habeas corpus. See *id.*; Carroll, *supra* note 16, at 530 (explaining that “[n]o [public Executive Branch] proclamation was issued” concurrently with Lincoln’s military orders suspending habeas); Yoo, *Merryman and Milligan (and McCardle)*, *supra* note 15, at 247 (same). But see DIRCK, *supra* note 26, at 99 (characterizing Lincoln’s suspension of habeas corpus as a “proclamation”); REHNQUIST, *supra* note 5, 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 *Ex parte 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 7, 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 5, 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 6, 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 15, 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 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* note 68 (noting competing views in regard to martial law in Maryland as early as April 1861, including a contemporaneous *New York Times* article).

Taney ordered the Marshal to serve the attachment against Cadwalader.⁵⁷ (The Marshal attempted to serve the attachment the next morning.) Should Cadwalader have produced Merryman the next day, on May 28, 1861 or thereafter? The answer here is surprisingly murky (even assuming Cadwalader had a duty to obey court orders in circumstances, such as here, where the President had already 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. *The attachment only ordered the Marshal to attach the body of General Cadwalader. 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.* 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 Cadwalader might have put forward (if any) is 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;"⁵⁸ and (iii) Taney terminated the judicial proceedings the very same day⁵⁹ (without granting the government a sought-after adjournment). By May 29, 1861, with the termination of live in-court judicial proceedings, the attachment became a nullity,⁶⁰ and any further compliance by Cadwalader with the original ex parte order was not feasible. 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

⁵⁷ One report of the *Merryman* litigation indicates that Colonel Lee left the May 27, 1861 hearing prior to Taney's announcing (from the bench) that he will order the attachment against Cadwalader. See *The Case of Merriman* [sic], N.Y. TIMES, May 28, 1861, available at <http://www.nytimes.com/1861/05/28/news/the-case-of-merriman.html>. So it is just possible that Cadwalader did not have timely information about Taney's attachment.

⁵⁸ REHNQUIST, *supra* note 5, at 40–41.

⁵⁹ See *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."), available at <http://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/001500/001543/pdf/sun29may1861.pdf>; see also *United States Court, Important Proceedings, The Case of John Merryman, Esq.*, THE SUN, (Morning) May 28, 1861, at 1, available at <http://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/001500/001543/pdf/sun28may1861.pdf>.

⁶⁰ 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))).

event? And why are so many willing to ascribe Cadwalader's one-day's noncompliance to President Lincoln?

*C. When the United States Marshal Attempted to Serve an Attachment Order on Cadwalader at Fort McHenry, the Marshal was sent away—has Anyone Established that it was Cadwalader who sent the Marshal away from the Fort?*⁶¹

The United States Marshal in *Merryman*, who attempted to serve the court's attachment order on Cadwalader, reported that: "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."⁶² 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. 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.⁶³ But no one has put forward any document or record supporting the inference that it was Cadwalader who was responsible. Perhaps Chief Justice Taney believed Cadwalader was responsible; perhaps he genuinely believed that this moment was a defining Cromwellian civil-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?

⁶¹ See *supra* note 36.

⁶² *Ex parte Merryman*, 17 F. Cas. at 144. The reported case states that the United States Marshal, Washington Bonifant, told the court that he went to the Fort to serve the attachment. 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 attachment. See *The Habeas Corpus Case: Gen. Cadwallader Refuses To Allow The Process Of The Court To Be Served Upon Him*, THE SOUTH, (Evening) May 28, 1861, at 2, available at <http://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/001500/001543/pdf/south28may61.pdf>. 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.").

⁶³ See *supra* note 36 (collecting authorities); see also, e.g., BURNS, *supra* note 12, at 65 ("The chief justice said *his* marshal might well have ordered a posse . . ." (emphasis added)); ELLIS, *supra* note 18, at 413 (describing the U.S. Marshal as "the court's marshal"); PALUDAN, *supra* note 43, at 76 (describing Bonifant as "the court's marshal"); Kmiec, *supra* note 36, at 273 (noting that "Cadwalader barred the Court's officer from even entering the fort"); cf., e.g., Louis Fisher, *supra* note 40, at 210 ("Prison officials [?], acting under Lincoln's policy, refused to let Taney's marshal serve a document at the prison to release Merryman."). Note how these commentators describe the United States marshal as the "court's" or "Taney's" functionary. *But see infra* note 65 (explaining that United States marshals are better characterized as Executive Branch functionaries, albeit, whose regular duties include, among others, the enforcement of judicial orders).

*D. Is it True that Cadwalader Received Authorization from Lincoln to Ignore or Defy the United States Marshal?*⁶⁴

There are those commentators who argue that Cadwalader received authorization from Lincoln to defy the United States Marshal and, by implication, to defy the courts. 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; (ii) to a May 28, 1861 order from E.D. Townsend, Assistant Adjutant-General, directing Cadwalader to hold prisoners without regard to court orders; and (iii) to Lincoln's July 4, 1861 message to Congress, 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; both held their positions at the pleasure of the President.⁶⁵ The Marshal was a civil officer; Cadwalader, 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, 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 civil-military confrontation, between two officers responsible to him, seems fairly odd. Why would Lincoln have authorized Cadwalader to ignore an otherwise lawful court order, when

⁶⁴ See *supra* note 37.

⁶⁵ See Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87 (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"); THE FEDERALIST NO. 78, at 412 (Alexander Hamilton) (J.R. Pole ed., 2005) ("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). 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) (reproducing Washington's September 24, 1789 nominations for multiple positions created under the Judiciary Act); see also 4 STATES AT WAR, *supra* note 6, 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 party in Maryland. See 4 STATES AT WAR, *supra* note 6, 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).

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 supervisory⁶⁶ or removal power over the Marshal to arrest the process of the courts,⁶⁷ should not 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?

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.⁶⁸

⁶⁶ See, e.g., Letter from President Lincoln to Erastus Corning and others (June 12, 1863), in 8 COMPLETE WORKS OF ABRAHAM LINCOLN, *supra* note 33, 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 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).

⁶⁷ See also *United States ex rel. Murphy v. Porter*, 27 F. Cas. 599 (C.C.D.D.C. Oct. 31, 1861) (No. 16,074a) (Dunlop, C.J.) (describing circumstances 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 13, 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. 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 (primary or, arguably, logically prior) decision not to serve judicial process. As in *Merryman*, *Murphy* left this issue unresolved.

⁶⁸ 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 April 27, 1861 order to General Scott delegating authority to suspend habeas between Philadelphia and Washington). *But see* Schroth et al., *supra* note 4, at 1011 (“Lincoln told General Winfield Scott . . . that the writ of habeas corpus was suspended . . .” (emphasis added)). A slightly different report of the order can be found in RAGSDALE, *supra* note 2, at 36. Arguably, Lincoln gave Scott authority to suspend habeas as early as April 25, 1861. See 6 COMPLETE WORKS, *supra* at 255, 256 (reporting Lincoln’s April 25, 1861 order to General Scott). Furthermore, on July 2, 1861, Lincoln gave Scott authority to suspend habeas again, but with broader geographic authority. *Id.* at 295, 295–96 (reproducing Lincoln’s July 2, 1861

Lincoln's order meant, at least, that the military had authority to arrest, seize, and detain individuals suspected of treasonous activity, and that 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.⁶⁹ Did Lincoln *also* intend that his order was a direction to military commanders to

order to General Scott delegating authority to suspend 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 6, 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 12, at 66 (explaining that after *Merryman* was announced "Lincoln continued to impose martial law"); POWE, *supra* note 5, at 119 (asserting that Lincoln had declared martial law in Maryland prior to Merryman's arrest); 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] imposed martial law in Maryland to protect troop movements"); Schroth et al., *supra* note 4, at 1011 (affirming that "Lincoln declared martial law in Maryland"); *cf.* MCPHERSON, BATTLE CRY, *supra* note 4, at 287 (noting that martial law was declared in Baltimore on May 13, 1861); Calabresi, *supra* note 6, 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"); Fallon, *Executive Power*, *supra* note 15, at 2 ("At stake in *Merryman* was the constitutional authority of the President to declare martial law"); *Affairs in Maryland; Martial Law Enforced in Baltimore*, N.Y. TIMES, Apr. 25, 1861, at 1, available at <http://www.nytimes.com/1861/04/25/news/affairs-in-maryland-martial-law-enforced-in-baltimore.html> ("A system of martial law exists in both [Washington and Baltimore], but it was not officially proclaimed."). *See generally* NEFF, *supra* note 12, at 40–44 (expounding on similarities and differences between the suspension of habeas and martial law); CARY STACY SMITH & LI-CHING HUNG, THE PATRIOT ACT: ISSUES AND CONTROVERSIES 79 (2010) (distinguishing martial law from the suspension of habeas corpus); Maurice G. Baxter, *Book Review*, 53 IND. MAG. HIST. 95, 96 (1957) (reviewing DAVID M. SILVER, LINCOLN'S SUPREME COURT (1956)) (distinguishing suspension of habeas corpus from martial law); *id.* at 97 (distinguishing suspension from military trial); Saikrishna Bangalore Prakash, *The Sweeping Domestic War Powers of Congress*, 113 MICH. L. REV. 1337, 1370 n.241 (2015) (same); Stone, *supra* note 6, 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 discussed anywhere in Taney's opinion. Professor Mark E. Neely, Jr. has taken the position that "Lincoln did not say so, but [General] Scott assumed he could delegate the authority [to suspend habeas corpus] to others." NEELY, *supra* note 6, at 9. Neely's position is odd: Lincoln's order gave Scott express authority to subdelegate to other officers. Furthermore, even absent such express authority, Scott's authority to subdelegate was implied. *Cf.* Jason Marisam, *The Interagency Marketplace*, 96 MINN. L. REV. 886, 897 (2012) ("[I]n the absence of clear congressional language to the contrary, high-level agency officials can usually subdelegate authority to lower level officials or subagencies within the [same] agency.").

⁶⁹ *See* 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) ("[Professor] White introduces another important layer of complexity to the already complex story by observing the threat that such 'arbitrary' arrests posed to the arresting officers. While the danger of such arrests 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

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.⁷⁰ Those commentators, who point to the

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.) (“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.”); *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) (“[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 foreign 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. We are doing better.” (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 15, 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]”).

⁷⁰ *See Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.) (“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.*” (emphasis added)); Richard A. Posner, *supra* note 15, at § 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 did. Officials are obliged to obey judicial orders even when erroneous.”); *see also Ex parte Benedict*, 3 F. Cas. at 174 (“Such a suspension may prevent the prisoner’s discharge; but it leaves untouched the question of the illegality of his arrest, imprisonment, and deportation.”); *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 5, 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,

President's order as evidence that Lincoln authorized Cadwalader to defy the courts, do not meaningfully grapple with the ambiguous language in Lincoln's order. 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.⁷¹ 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 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."⁷² 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 gives it 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 order, one which excludes the courts and one which does not, the latter 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

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"); CHRIS EDELSON, EMERGENCY PRESIDENTIAL POWER: FROM THE DRAFTING OF THE CONSTITUTION TO THE WAR ON TERROR 34 (2013) ("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 6, 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 all 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.

⁷¹ See *Ex parte Merryman*, 17 F. Cas. at 144.

⁷² *Id.* at 153; see, e.g., NEFF, *supra* note 12, at 36 ("Perhaps, Taney speculated, General Cadwalader had exceeded his instructions, thereby relieving the President of any personal blame."). *But see supra* note 70 (quoting Chief Justice Taney's *Merryman* opinion, which laid the blame on Lincoln).

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.⁷³

The same reasoning ought to apply in *Ex parte 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 exclude the courts.

Assistant Adjutant-General, E.D. Townsend’s May 28, 1861 Order. Townsend, writing from Army headquarters in Washington, sent Cadwalader an order. Townsend’s order stated:

The general-in-chief [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.⁷⁴

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

No one has put forward any document or record establishing that Cadwalader was already 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.⁷⁵ Absent further evidence,

⁷³ 245 F. 967, 972 (D. Mont. 1917) (Bourquin, J.) (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); Paludan, *supra* note 2, at 10 (“With all this discretion what strikes modern historians is how respectful Lincoln was of constitutional limitations on the extent of his power.”).

⁷⁴ 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, 576–77 (Washington, Government Printing Office 1883).

⁷⁵ *See* MCGINTY, *supra* note 5, at 67 (“Merryman ordered his men to cut the telegraph lines . . .”); REHNQUIST, *supra* note 5, at 22 (“Not only were no [United States] troops arriving [in Washington], but the telegraph lines had been cut and mail deliveries from the north were irregular.”); *cf.* Stone, *supra* note 6, at 220 (“Union soldiers seized John Merryman, a cavalryman who had allegedly burned bridges and destroyed telephone [?] 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 had been

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

But the more important point is there is no reasonable way to connect Townsend's May 28, 1861 order to Lincoln, 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.⁷⁶ Of course, as a political matter, Lincoln remained responsible for what his Executive Branch subordinates did.⁷⁷ But

cut. Telegraph lines between Washington and Baltimore (or the Fort itself) may have been intact on May 28, 1861; likewise, telegraph lines which had been cut by Merryman and others may have been repaired by that date.

⁷⁶ 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.) ("My personal confidence in the integrity, patriotism, and good sense of the president, 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." (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 77 (distinguishing, on the one hand, the President's legal and moral responsibility in regard to disputed conduct by subordinate Executive Branch officers from, on the other hand, the administration's responsibility).

⁷⁷ 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 "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*

that abstract political responsibility under the Take Care Clause⁷⁸ is worlds apart from establishing that Lincoln actually authorized his subordinates (through the military chain of command) to ignore or defy court orders.⁷⁹

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.⁸⁰

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 76 (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).

⁷⁸ *See, e.g.*, U.S. CONST. art. II, § 3 (Take Care Clause); BRUFF, *supra* note 6, at 135 (“When the military refused to delivery up Merryman, the frustrated Taney sent the record to Lincoln, who bore ultimate responsibility for the refusal.”); *supra* note 66 (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 opinion, or that Lincoln 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 order 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 all judicial review in the habeas context.

⁷⁹ *But see, e.g.*, Hutchinson, *supra* note 35, 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. It appears that such evidence is lacking in the extant literature. *See, e.g., supra* note 78.

⁸⁰ 6 COMPLETE WORKS, *supra* note 68, 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,

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—a military officer during an actual rebellion—would not rely on Lincoln's message here, nor would he rely on any other such political communication.

Second, *Merryman* judicial proceedings in open court ended on May 28, 1861, although the formal opinion was not filed until June 1, 1861. Lincoln's July 4, 1861 message post-dated the *Merryman* opinion by more than a month. So, in fact, Cadwalader could not have relied on Lincoln's message to Congress during the actual litigation. At most, 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. But Lincoln does not clarify if he also intended or meant 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,

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 army and navy 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. 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*, 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 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"); Note, *The Espionage Cases*, 32 HARV. L. REV. 417, 420 & n. (1919) ("During the Civil War, when a real menace to personal liberty presented itself, the judges fearlessly applied the law.²" (citing *Merryman*)).

Lincoln's message to Congress lacks the requisite degree of clarity in regard 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.

VI. 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.⁸¹ This Article has *not* opined on the correctness of this departmentalist

⁸¹ See, e.g., Paulsen, *Lincoln and Judicial Authority*, *supra* note 15, at 1290 (“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.”); Paulsen, *The Merryman Power*, *supra* note 5 *passim*; see also, e.g., Calabresi, *supra* note 15, 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.”).

My own view is that absent a statute clearly mandating that the President enforce court orders, the President has no duty to execute court judgments 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; 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 is quite attenuated. His duty under the Take Care Clause is notional or aspirational, and generally only subject to control via regular elections and impeachment. I.e., political controls. The President’s duty under the Take Care Clause is not properly subject to judicial oversight absent clearly established bad faith. E.g., receiving a bribe from a foreign official, etc. 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 49. 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 responsibility to *enforce* court orders against *third parties*, with, on the other hand, his *concrete personal* duty to *obey* court orders when he is an *actual party*—either in an official capacity or in an individual capacity—in litigation. Cf. *Ex parte Merryman*, 17 F. Cas. 144, 153 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.) (“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)). But see Paulsen, *The Civil War as Constitutional Interpretation*, *supra* note 20, at 720 (suggesting that, in *Merryman*, the “executive and military were *in effect* parties to the case” (emphasis added)); Rehnquist, *supra* note 6, at 929 (“Taney . . . ordered *the government* to show cause why Merryman should not be released. A representative of the commandant appeared in court

view. This view may be the best or the correct understanding of the original public meaning of the Constitution, and it may not. Instead, this Article makes only 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,⁸² 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. For example, 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. And 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 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,⁸³ there would be no cause for surprise either. The historical record we have today lacks the requisite clarity to reach a considered judgment in

for *the government* to advise Taney that the writ of habeas corpus had been suspended . . .” (emphasis added)). It appears that William Meade Addison, the United States Attorney for the District of Maryland, attended the *Merryman* proceedings. See MCGINTY, *supra* note 5, at 11 & 177 (reporting Addison's attendance); Downey, *supra* note 2, at 277 n.13 (same). I see no indication that Chief Justice Taney offered Addison any opportunity to be heard, nor do I see any indication that Addison sought any such opportunity. See BRUFF, *supra* note 6, at 135 (explaining that Taney issued his opinion “[w]ithout inviting the executive's lawyers to argue their side of the case”); ELLIS, *supra* note 18, at 413 (asserting that Taney reached his decision “without giving the administration an opportunity to justify its suspension”); MCGINTY, *supra* note 5, at 177 (“[Taney] did not give the United States district attorney an opportunity to express the government's position on the critical question before the court . . .”); REHNQUIST, *supra* note 5, 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]efused to allow the government to be heard”); JENNIFER L. WEBER, *COPPERHEADS: THE RISE AND FALL OF LINCOLN'S OPPONENTS IN THE NORTH* 223 n.35 (2006) (“Taney . . . made the ruling alone . . . and without ever hearing arguments on behalf of the government.”). This is some, albeit limited, indication that neither the “executive” nor the “government” was a party in *Merryman*.

⁸² See Paulsen, *The Merryman Power*, *supra* note 5 *passim*.

⁸³ I note that when Lincoln wished to break with constitutional norms and expectations, he did so openly. For example, he once directed a United States 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 (Washington, Government Printing Office 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).

regard to what Lincoln intended and meant 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.⁸⁴ Of course, the other reason we lack clarity is that Chief Justice Taney never ordered Lincoln, or anyone else, to release John Merryman.

⁸⁴ Cf. REHNQUIST, *supra* note 5, at 48–49 (discussing *Murphy v. Porter*); *supra* note 67 (same). *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 & 66, and accompanying text.