

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 6: The Civil War and Reconstruction — Criminal Justice/Due Process and Habeas Corpus/The Civil War

Ex Parte Merryman, F. Cas. 144 (C.C. D. MD 1861)

John Merryman was a prominent Marylander and proponent of secession. Republicans believed he was secretly conspiring with other secessionists to prevent northern state militias from coming to Washington, D.C. Worried about the safety of the nation's capital, Abraham Lincoln on April 27, 1861, suspended habeas corpus in Baltimore. That suspension enabled the Union Army to detain persons suspected of aiding the confederacy for any period of time without charging them with a crime. Merryman was one of the first persons arrested under this order. He was held at Fort McHenry, outside of Baltimore. Merryman's friends asked Chief Justice Roger Taney, who was the local federal circuit court judge, for a writ of habeas corpus. Such a writ required the federal government to produce Merryman in an open courtroom and either charge him with a crime or release him. When the Lincoln administration refused to produce Merryman, Taney issued an opinion declaring unconstitutional the presidential suspension of habeas corpus. The Lincoln administration ignored that opinion. Merryman was eventually released on July 12, 1861. He was subsequently indicted for treason, but never tried.

A similar incident took place in Missouri later in 1861. Union military officers arrested several Missouri citizens believed to be conspiring to attack St. Louis. Federal District Court Judge Samuel Treat issued a writ of habeas corpus, ordering the military to release one of the citizens, Emmett McDonald. General William Harney refused. Harney first claimed that McDonald was not in his custody. This was consistent with a Lincoln administration strategy to avoid adjudication. Writs of habeas corpus are traditionally directed to the jailor of the person in custody. By moving detainees to different places overseen by different jailors, federal officials prevented courts from exercising authority over the jailor actually holding the detained person. General Harney nevertheless declared that he could not in good conscience obey the writ, even should he be the custodian of the detained person. He wrote, "I must take to what I am compelled to regard as the higher law, even by doing my conduct shall have the appearance of coming in conflict with the forms of the law."

When reading Taney's opinion in Ex parte Merryman consider the following questions. How did the chief justice connect habeas corpus to constitutional protections for persons accused of crime? Did these constitutional protections adequately justify Taney's decision that the president has no power to suspend habeas corpus? Would these principles, if applied, justify a judicial decision declaring unconstitutional both a presidential and congressional decision to declare martial law? Did Taney adequately consider the possibility of emergency powers? Was the Civil War an appropriate occasion for the use of emergency powers?

CIRCUIT JUDGE TANEY

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As the case comes before me, therefore, I understand that the president not only claims the right to suspend the writ of habeas corpus himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him. No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the president claimed this power, and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands, that the privilege of the writ could not be suspended, except by act of congress.

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The clause of the constitution, which authorizes the suspension of the privilege of the writ of habeas corpus, is in the 9th section of the first article. This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department. . . .

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It is the second article of the constitution that provides for the organization of the executive department, enumerates the powers conferred on it, and prescribes its duties. And if the high power over the liberty of the citizen now claimed, was intended to be conferred on the president, it would undoubtedly be found in plain words in this article; but there is not a word in it that can furnish the slightest ground to justify the exercise of the power.

. . . The short term for which [the president] is elected, and the narrow limits to which his power is confined, show the jealousy and apprehension of future danger which the framers of the constitution felt in relation to that department of the government, and how carefully they withheld from it many of the powers belonging to the executive branch of the English government which were considered as dangerous to the liberty of the subject; and conferred (and that in clear and specific terms) those powers only which were deemed essential to secure the successful operation of the government.

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Even if the privilege of the writ of habeas corpus were suspended by act of congress, and a party not subject to the rules and articles of war were afterwards arrested and imprisoned by regular judicial process, he could not be detained in prison, or brought to trial before a military tribunal, for the article in the amendments to the constitution immediately following the one above referred to (that is, the sixth article) provides, that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence."

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With such provisions in the constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, except in aid of the judicial power. He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law.

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