

TEMPLE LAW REVIEW

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HIGHER EDUCATION

VOL. 80 NO. 2

SUMMER 2007

ARTICLES

THE *FIELD* THEORY: MARTIAL LAW, THE SUSPENSION POWER, AND THE INSURRECTION ACT

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I. INTRODUCTION

Since the day it was handed down in 1861, Chief Justice Taney's infamous solo opinion in *Ex parte Merryman*¹ has polarized constitutional law scholars, both as to the capacity in which it was issued² and, more importantly, as to its

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1. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

2. There is actually much to be said about the debate over whether Taney issued the opinion in his capacity as Circuit Justice for the District of Maryland or as Chief Justice of the United States in chambers. Carl Brent Swisher, Taney's principal biographer and author of the authoritative history of the Taney Court, was emphatic that "Merryman's counsel decided to go directly to the Chief Justice, not as circuit judge but as the head of the Supreme Court." CARL B. SWISHER, 5 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836-64, at 845 (1974); *see also id.* at 849 n.26 (asserting that citation to *Merryman* as in circuit court "is not to be taken as an admission on the part of the Chief Justice that the case was disposed of in that court"). Clinton Rossiter, in his classic study of the Supreme Court and the war powers, wrote that Taney was sitting "not, as is commonly asserted, in the capacity of circuit justice, but as Chief Justice of the United States pure and simple, acting under section 14 of the Judiciary Act of 1789." CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 20 (1951). *But see, e.g.*, JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 287, 288 & n.17 (1988) (noting that "the Supreme Court Justice from each of the nine circuits served also as the presiding judge of the circuit court"); WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 44 (1998) (asserting that Taney was speaking as member of circuit court); JAMES F. SIMON,

substance.³ In *Merryman*, Taney decisively rejected President Lincoln's unilateral suspension of the writ of habeas corpus in and around Baltimore at the outset of the Civil War, concluding that the Constitution only authorized Congress to suspend the writ and that no emergency, no matter how existential, could justify subversion of such a vital constitutional precept.⁴ Lincoln famously (and rhetorically) responded to Taney in his July 4, 1861 address to Congress, asking "are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?"⁵ And Congress, whose authority Lincoln had usurped—according to Taney, anyway—eventually authorized the

LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT'S WAR POWERS 190 (2006) ("[I]n fact, he was acting in his capacity as a circuit court judge.").

For a contemporary suggestion that the answer to this seemingly pedantic historical footnote is of potentially constitutional significance (and asserting that Taney was sitting as Chief Justice in chambers), see Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251, 277-89 & n.126 (2005).

3. Significant pre-9/11 accounts of *Merryman* and its background include MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 4-18 (1991); J.G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 118-39 (Peter Smith 1963) (rev. ed. 1951); REHNQUIST, *supra* note 2, at 11-39; SWISHER, *supra* note 2, at 841-54; Sherrill Halbert, *The Suspension of the Writ of Habeas Corpus by President Lincoln*, 2 AM. J. LEGAL HIST. 95, 95-114 (1958); Joseph C. Long, *Ex Parte Merryman: The Showdown Between Two Great Antagonists: Lincoln and Taney*, 14 S.D. L. REV. 207, 208-34 (1969); Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 88-99 (1993); John D. Sharer, *Power, Idealism, and Compromise: The Coordinate Branches and the Writ of Habeas Corpus*, 26 EMORY L.J. 149, 151-62 (1977); Martin S. Sheffer, *Presidential Power to Suspend Habeas Corpus: The Taney-Bates Dialogue and Ex Parte Merryman*, 11 OKLA. CITY U. L. REV. 1, 1-16 (1986).

Given the upsurge in extrajudicial detention after September 11, *Merryman* has been at least as popular as a subject of recent scholarship. See, e.g., DANIEL FARBER, *LINCOLN'S CONSTITUTION* 157-63, 188-92 (2003) (exploring *Merryman* background and considering "jurisdictional view of suspension" in which valid suspension strips courts of jurisdiction); SIMON, *supra* note 2, at 177-98 (discussing historical context of *Merryman*); Arthur T. Downey, *The Conflict Between the Chief Justice and the Chief Executive: Ex Parte Merryman*, 31 J. SUP. CT. HIST. 262, 262-77 (2006) (arguing that results of Lincoln and Taney's struggle correctly balanced national security against personal liberty); 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, 33 (2003) (comparing events preceding *Merryman* with 9/11); Hartnett, *supra* note 2, at 279-83 (considering Lincoln's failure to challenge Taney's power to exercise original jurisdiction in case outside of Court's original jurisdiction); Jeffrey D. Jackson, *The Power to Suspend Habeas Corpus: An Answer from the Arguments Surrounding Ex Parte Merryman*, 34 U. BALT. L. REV. 11, 13, 53 (2004) (characterizing *Merryman* as "the prime example of a separation of powers conflict with regard to the power to suspend" and concluding that *Merryman*'s lesson is "an indictment of the inaction of Congress and the judiciary" rather than statement of presidential power).

Of course, the above citations are only a small sampling of the heavily saturated body of scholarship in which *Merryman* figures prominently. I have attempted here only a representative (and easily accessible) subset.

4. *Merryman*, 17 F. Cas. at 148-49.

5. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 421, 430 (Roy P. Basler ed., 1953). It was this quote that provided the title for Chief Justice Rehnquist's study of civil liberties during wartime. REHNQUIST, *supra* note 2.

suspension, implicitly at first via the August 1861 Ratification Act,⁶ and then explicitly through the March 1863 Habeas Corpus Act, enacted on the last day of the Thirty-seventh Congress.⁷

Merryman has long divided constitutional law scholars because of the strength of the arguments on both sides. Taney had the Constitution's text and structure in his corner,⁸ along with dicta from an important early Supreme Court decision by Chief Justice Marshall suggesting that the power to suspend the writ rested entirely with the legislature.⁹ But Lincoln had rhetoric, exigency, and principle behind him. With Congress not in session,¹⁰ with Confederate

6. Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 326, 326. The Act implicitly authorized the suspension because it ratified "all" measures taken but did not explicitly refer to the suspension of habeas corpus. For a thorough summary of the Act's background, including the suggestion by some members of Congress that the Act did *not* actually ratify Lincoln's suspension of habeas corpus, see David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1136-40 (2006). See also Sharer, *supra* note 3, at 168-70 (describing debate in Senate over ratification of Lincoln's suspension of writ).

7. Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755, 755; see also Currie, *supra* note 6, at 1160-63 & n.142 (summarizing Act's background and debate over whether it authorized Lincoln to suspend habeas or merely recognized that Lincoln already had lawful authority thereto).

8. Countless scholars and jurists have suggested that the question of "who" may suspend the writ can be answered simply by the location of the Suspension Clause—in Article I, Section 9 of the Constitution, the section dealing with limitations on the federal *legislative* power. See U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); Hamdi v. Rumsfeld, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting) ("Although this provision does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood, consistent with English practice and the Clause's placement in Article I."); WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 131-32 (1980) (discussing clause's placement in legislative article as support for proposition that it restricts Congress from suspending writ); David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 71 & n.51 (2006) (noting that Suspension Clause appears in Article I, which addresses congressional powers); *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1264 (1970) ("[I]t is fairly clear that the suspension clause itself was addressed exclusively to Congress: the original motion for a habeas clause mentioned Congress expressly, as did some subsequent proposals; there is no indication in the debates that the omission of reference to Congress in the clause finally adopted was intended to broaden its applicability." (footnotes omitted)).

9. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) ("If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so."). In his celebrated 1833 *Commentaries on the Constitution of the United States*, Justice Story espoused a similar view. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 676 (Carolina Academic Press 1987) (1833) (noting that although Congress had never suspended writ of habeas corpus, it had power to do so).

10. Because of constitutional idiosyncrasy (largely—but not entirely—remedied by the Twentieth Amendment, U.S. CONST. amend. XX, § 2), the Thirty-seventh Congress, elected in November 1860, was not scheduled to convene until December 1861. Although Lincoln called in mid-April for Congress to meet in special session on July 4, Proclamation No. 3, 12 Stat. 1258 (1861), that left the President as the sole embodiment of the federal government for the eleven weeks between the fall of Fort Sumter and Congress's return. See SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 75-77 (2006) (discussing Lincoln's unilateral power during those eleven weeks). As Clinton Rossiter notes, those eleven weeks, during which *Merryman* transpired, "constitute the most interesting single episode in the history of constitutional dictatorship." CLINTON L. ROSSITER, CONSTITUTIONAL

sympathizers attacking Northern troops passing through Baltimore to reinforce the capital,¹¹ with the Maryland legislature set to meet to consider secession from the Union,¹² and with only a small federal force in and around Washington City with the “enemy”—the Confederacy—just across the Potomac River,¹³ the physical preservation of the federal government, if not the very existence of the Nation, was threatened by the lawlessness in Baltimore.

Merryman has also polarized constitutional law scholars because of the implications of the two arguments.¹⁴ Those who generally disavow broad theories of inherent presidential power find themselves in the uncomfortable position of being forced to side with Chief Justice Taney, notwithstanding both (1) the historical discredit to which he has been subjected for his majority opinion in *Dred Scott v. Sanford*;¹⁵ and (2) the extent to which his motives in *Merryman* itself were, arguably, impure.¹⁶ In addition, for those who are less troubled by such unilateral executive action, Lincoln’s (and Attorney General Edward Bates’s)¹⁷ response to *Merryman* nevertheless begs the question whether the suspension of the writ was pursuant to President Lincoln’s textual constitutional authority under Article II,¹⁸ or whether it was

DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 224 (Greenwood Press 1979) (1948).

11. For helpful modern summaries of the chaos in Baltimore that preceded *Merryman*, including the “Pratt Street Riot,” where soldiers of the Sixth Massachusetts Volunteer Militia confronted an armed and angry pro-Confederacy mob (which apparently left sixteen dead—four members of the militia and twelve of the demonstrators), see REHNQUIST, *supra* note 2, at 20-22; and Downey, *supra* note 3, at 265-68. *But see* Downey, *supra* note 3, at 277 n.20 (noting historical debate over size of mob and number of fatalities). The most thorough account remains that of then-Mayor George Brown. *See generally* GEORGE WILLIAM BROWN, BALTIMORE AND THE NINETEENTH OF APRIL, 1861 (Baltimore, Johns Hopkins Univ. Press 1887).

12. *See, e.g.*, REHNQUIST, *supra* note 2, at 23-25 (describing Lincoln’s response to reports that Maryland legislature was to convene to discuss secession).

13. *See generally* MARGARET LEECH, REVELLE IN WASHINGTON: 1860-1865, at 53-86 (1941) (describing mounting tension in Washington and reports of violence across Potomac).

14. As Sandy Levinson has succinctly put it, “[i]nvariably, one must confront Abraham Lincoln, at once the most important and yet problematic of all American presidents.” LEVINSON, *supra* note 10, at 103.

15. 60 U.S. (19 How.) 393 (1857); *see also* SIMON, *supra* note 2, at 98-132 (discussing *Dred Scott* decision). *See generally* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978); MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006).

16. *See, e.g.*, SIMON, *supra* note 2, at 194 (suggesting that Taney’s demeanor and his unrelenting opinion made clear his desire to prove confrontation with President Lincoln).

17. Bates filed an opinion defending the unilateral suspension of the writ on July 5, 1861, the day after Lincoln defended his actions to Congress. *See generally* Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att’y Gen. 74 (1861).

18. Most versions of the constitutional inherent power argument focus on the Vesting Clause, U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”), the Take Care Clause, *id.* art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . .”), and the Commander in Chief Clause, *id.* art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .”). *See, e.g.*, Sheffer, *supra* note 3, at 2 (describing Lincoln’s “imaginative combining of the commander-in-chief, take care, and

extraconstitutional—borne out of, and justified by, necessity.¹⁹

Merryman has therefore come to be seen as an all-or-nothing proposition. Either President Lincoln had inherent authority (be it constitutional or extraconstitutional) to suspend the writ, or he did not. And if he did not, the suspension was therefore unconstitutional—and Taney was right.²⁰ But what if some other source of legislative authority for the suspension existed? Is it possible that Taney and Lincoln were both right and, at the same time, both wrong? One judge thought so.

In *Ex parte Field*,²¹ an obscure and almost completely overlooked 1862 decision by the U.S. Circuit Court for the District of Vermont, U.S. District Judge David A. Smalley analyzed President Lincoln's authority to suspend the writ as being necessarily incident to his authority to impose martial law:²²

[T]he president has the power, in the present military exigencies of the country, to proclaim martial law, and, as a necessary consequence thereof, the suspension of the writ of habeas corpus in the case of military arrests. It must be evident to all, that martial law and the privilege of that writ are wholly incompatible with each other.²³

According to Judge Smalley, so long as the President had authority to impose martial law, he had authority to suspend the privilege of the writ wherever martial law was in force.²⁴ Moreover, Smalley traced Lincoln's authority to impose martial law not to Article II or to any theory of extraconstitutional presidential power; rather, Smalley found such authority in a series of early statutes providing for the calling forth of the militia and the federal armed forces to suppress insurrection.²⁵ At least where martial law has been

executive power clauses into a notion of presidential war power independent of legislative authority").

19. For one version of the argument that the suspension was extraconstitutional, see Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1066-68 (2003). See generally George Winterton, *The Concept of Extra-Constitutional Executive Power in Domestic Affairs*, 7 HASTINGS CONST. L.Q. 1 (1979) (providing overview of theory).

20. Or, in some cases, both Taney and Lincoln were right. See, e.g., Jackson, *supra* note 3, at 12 ("History tends to credit Taney with the correct legal conclusion, while crediting Lincoln with making the correct pragmatic one.").

21. 9 F. Cas. 1 (C.C.D. Vt. 1862) (No. 4761).

22. As I discuss in Part III, "martial law" as a term actually has several different meanings. In the context of *Field*, I use it to mean "martial rule," where military authority supersedes—and supplants—civilian authority. See generally CHARLES FAIRMAN, *THE LAW OF MARTIAL RULE* 28-49 (2d ed. 1943) (discussing distinctions between martial rule, martial law, military law, military government, and suspension of writ of habeas corpus); WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 817-32 (2d ed. 1920) (discussing martial law, laws of war, and military commissions). For more recent surveys of the American experience with martial law, see Kirk L. Davies, *The Imposition of Martial Law in the United States*, 49 A.F. L. REV. 67 (2000); Frederick Bernays Wiener, *Martial Law Today*, 49 MIL. L. REV. 89 (1970); and Jason Collins Weida, Note, *A Republic of Emergencies: Martial Law in American Jurisprudence*, 36 CONN. L. REV. 1397 (2004).

23. *Field*, 9 F. Cas. at 8.

24. *Id.*

25. See *id.* at 6-8 (reviewing statutory authority for presidential power). For a survey of these statutes and their centrality to debates over martial law and governmental emergency power, see Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149 (2004).

lawfully imposed, *Field* suggests that subsequent (and coincident) suspensions of the writ of habeas corpus are, in fact, authorized by Congress and are therefore constitutional. In short, *Field* suggests not that the principle behind Chief Justice Taney's decision in *Merryman*—i.e., that unilateral executive suspension of habeas is unconstitutional—was wrong, but that it might not have applied to *Merryman*.

This Article is devoted to exploring the argument at the heart of Judge Smalley's opinion in *Field*—that suspensions of the writ of habeas corpus are properly coincident with the imposition of martial law—and its modern implications, if true.²⁶ After tracing the background of *Merryman* in Part II, Part III summarizes *Field* and concludes by considering whether President Lincoln's imposition of martial law provides an alternative justification for the legality of his suspension of habeas corpus in and around Baltimore in early 1861, a justification largely—if not entirely—neglected by previous scholarship.

Thus, whether martial law justified President Lincoln's actions begs the altogether separate questions of whether Lincoln had authority to impose martial law at the outset of the Civil War, and, if so, whether that authority derived from the Calling Forth Clause's grant of authority to "suppress Insurrections" or to "execute the Laws of the Union."²⁷ After summarizing the Supreme Court's rather terse and undeveloped jurisprudence concerning martial law, Part IV concludes that, even by 1861, the Court had established the authority of the President to impose martial law pursuant to the Calling Forth Act of 1795²⁸ and the Insurrection Act of 1807²⁹ (and their progeny).³⁰ Although President Lincoln, acting in pursuance of such authority, validly proclaimed martial law in 1862,³¹ Part IV suggests that he also *effectively* imposed martial law in and around Baltimore in early 1861.³²

Recognizing that President Lincoln had authority at the outset of the Civil War to impose martial law, however, only begs a far more serious question, to which Part V is devoted: whether, and to what extent, the statutory framework interposes substantive *limitations* on presidential declarations of martial law. For, as others have suggested in critiquing an earlier form of this argument, "[i]f

26. The argument is not that the suspension of habeas corpus and the imposition of martial law are always coextensive. Rather, this Article focuses on the theory, advanced in *Field*, that the valid imposition of martial law is a predicate for the valid suspension of habeas corpus.

27. U.S. CONST. art. I, § 8, cl. 15.

28. Act of Feb. 28, 1795, ch. 36, 1 Stat. 424.

29. Act of Mar. 3, 1807, ch. 39, 2 Stat. 443.

30. Also of significance is the Suppression of the Rebellion Act of 1861, ch. 25, 12 Stat. 281. Together, these "Militia Acts" are codified as amended at 10 U.S.C.A. §§ 331-335 (West 1998 & Supp. 2007).

31. *Cf.* The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863) (relying on these statutes to uphold President Lincoln's imposition of naval blockade at outset of Civil War).

32. Thus, this Article does not attempt to reject as out-of-hand arguments in favor of a unilateral, inherent executive power to suspend habeas corpus. Rather, it suggests only that President Lincoln was acting pursuant to statutory authority in suspending habeas, at least in those areas in which he had already imposed martial law.

Congress has so conferred this power on the President, it has done no more to clarify the circumstances under which the power might be exercised.”³³ As I summarize in Part V, meaningful debates in American history over potential “triggers” for martial law have been few and far between. Indeed, the two most prominent examples—Congress’s debate over whether to refund then-General Andrew Jackson’s contempt fine for imprisoning a judge in conjunction with the imposition of martial law during the Battle of New Orleans in 1815,³⁴ and the public and judicial debate over the situation in Rhode Island occasioned by Dorr’s Rebellion in the early 1840s³⁵—predated the Civil War. As such, their contemporary relevance is questionable, at best.

Thus, whereas the *Field* theory sidesteps both the heavy-handedness of Taney’s slanted opinion in *Merryman* and the potentially limitless unilateral power claimed by Lincoln and Bates, it leaves unresolved a question of perhaps greater contemporary significance: does the current statutory framework relating to the imposition of martial law, known generally as the “Insurrection Act,”³⁶ provide either (1) substantive triggers for the imposition of military rule, or (2) criteria by which such authority can meaningfully be reviewed?

As I suggest, the answers to these questions are unclear, at best, and may in fact serve to undermine, rather than substantiate, the *Field* theory. Otherwise, *Field* would suggest that the privilege of the writ of habeas corpus can be suspended both in situations not expressly contemplated by the Constitution, and without express authorization by Congress. Part V concludes that *Field* may well be correct when Congress is acting to suppress insurrections or repel invasions—the situations contemplated by the Suspension Clause³⁷—but that it simply cannot be true that the imposition of martial law in any other situation would, of itself, effect a constitutionally valid suspension of habeas.

II. MERRYMAN

The facts and background of *Ex parte Merryman*³⁸ are well-known and have been previously explored in immeasurable scholarly detail.³⁹ I will attempt here to summarize the central points.

33. STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 971 (4th ed. 2007).

34. For detailed accounts of Jackson’s antics in New Orleans (and the subsequent refund debates), see generally MATTHEW WARSHAUER, ANDREW JACKSON AND THE POLITICS OF MARTIAL LAW (2006); and Abraham D. Sofaer, *Emergency Power and the Hero of New Orleans*, 2 CARDOZO L. REV. 233, 238-52 (1981). See also Caleb Crain, *Bad Precedent: Andrew Jackson’s Assault on Habeas Corpus*, NEW YORKER, Jan. 29, 2007, at 78 (reviewing WARSHAUER, *supra*).

35. See generally GEORGE M. DENNISON, THE DORR WAR: REPUBLICANISM ON TRIAL, 1831-1861 (1976) (providing historical account of events surrounding Dorr’s Rebellion).

36. See 10 U.S.C.A. §§ 331-335 (West 1998 & Supp. 2007) (defining circumstances under which militia and armed forces may be used to suppress insurrection). The Insurrection Act was amended by the John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 1076(a), 120 Stat. 2083, 2404-05 (2006), the implications of which are more fully assessed in Part IV.

37. U.S. CONST. art. I, § 9, cl. 2.

38. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

39. See *supra* notes 2-3 for a nonexhaustive list of sources exploring *Ex parte Merryman*.

By the time President Lincoln was sworn in (by Chief Justice Taney⁴⁰) as the nation's sixteenth President on March 4, 1861, seven states—Alabama, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Texas—had already seceded from the Union, and Jefferson Davis had taken the oath of office as President of the Confederate States of America.⁴¹ Four more states—Arkansas, North Carolina, Tennessee, and Virginia—would soon follow.⁴²

On April 14, under heavy pressure from Confederate forces under the command of General P. G. T. Beauregard, Fort Sumter surrendered.⁴³ The next day, Lincoln issued a proclamation declaring the Southern states to be in a state of insurrection and calling for 75,000 men to put down the uprising.⁴⁴ The first order of business was reinforcing the nation's capital, which, all of a sudden, found itself between a rock and a hard place—surrounded on one side by Virginia, which voted to secede (and seized federal armories at Harper's Ferry and the Gosport Navy Yard) on April 18,⁴⁵ and on its other three sides by Maryland, which was on the verge of following suit.⁴⁶ As the late Chief Justice Rehnquist described:

Baltimore was an absolutely critical rail junction for the purpose of bringing troops from the north or west into Washington, because the railroad coming down the coast from New York and Philadelphia, as well as the line from Harrisburg, ran through that city. . . . This strategic location, plus the substantial degree of secessionist sympathy in Baltimore, made the city the Achilles' heel of the early efforts to bring federal troops to defend Washington. And the status of Maryland as a border state, whose adherence to the Union was problematic, exacerbated this difficulty. Maryland teetered both geographically and ideologically between North and South. If the secessionists were to gain the upper hand, the Union war effort could be seriously compromised.⁴⁷

40. Monroe Johnson, *Taney and Lincoln*, 16 A.B.A. J. 499, 499 (1930). Just ten days after swearing in Lincoln, Taney issued the controversial—and pro-judicial restraint—decision in *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861), which held that the federal courts lacked the authority, through writs of mandamus, to compel state governors to surrender fugitive slaves under the Fugitive Slave Acts of 1793 and 1850. See SIMON, *supra* note 2, at 179-81 (discussing *Dennison* and its broader implications).

41. REHNQUIST, *supra* note 2, at 11-18 (describing political context at time of Lincoln's inauguration).

42. *Id.*

43. *Id.* at 15.

44. Proclamation No. 3, 12 Stat. 1258 (1861).

45. MCPHERSON, *supra* note 2, at 278-79. Virginia's secession ordinance was not ratified until May 23. *Id.* at 280.

46. *Id.* at 284-85; see also NEELY, *supra* note 3, at 4 (describing Northern fears of Maryland's secession); Downey, *supra* note 3, at 267 (recounting pervasive fear in Washington that Maryland legislature would vote to secede); Jackson, *supra* note 3, at 14 n.20 (noting that in Maryland, Lincoln received only 2000 out of 93,000 votes cast in 1860 presidential election and that Maryland legislature was controlled by "Southern-Rights Democrats" (quoting MCPHERSON, *supra* note 2, at 285)).

47. REHNQUIST, *supra* note 2, at 18; see also SIMON, *supra* note 2, at 184 ("The only railroad access to Washington from the North was through Baltimore, which meant that the Union troops

Thus, it was little surprise when, on April 19, a mob of Confederate sympathizers attacked a regiment of Massachusetts⁴⁸ volunteers as it moved through Baltimore on its way to Washington.⁴⁹ After the incident, several railroad bridges north of Baltimore were burned,⁵⁰ and President Lincoln agreed to cease transporting troops through Baltimore, opting instead for a detour by sea from Perryville, north of Baltimore, to Annapolis, and then by land to Washington.⁵¹ In the interim, Washington was effectively cut off from the North, with irregular mail deliveries, no telegraph service, and, as importantly, no new troops.⁵²

Although Lincoln refused to interfere with a special session of the Maryland legislature called for April 26,⁵³ and although troops eventually *had* arrived on April 25,⁵⁴ Secretary of State William H. Seward and General Winfield Scott, Commanding General of the Union Army, were adamant that the pro-Confederate forces in Baltimore posed a continuing and potentially catastrophic threat to the security of the capital.⁵⁵ As such, Lincoln issued an order to Scott on April 27,⁵⁶ which would not become public for several months,⁵⁷ authorizing the suspension of habeas:

You are engaged in suppressing an insurrection against the laws of the United States. If at any point on or in the vicinity of any military line which is now or which shall be used between the city of Philadelphia and the city of Washington you find resistance which renders it necessary to suspend the writ of *habeas corpus* for the public safety, you personally or through the officer in command at the point at which resistance occurs, are authorized to suspend that writ.⁵⁸

expected to defend the District of Columbia would be transported through that city.”).

48. The identity of the Northern troops made the date of the Baltimore incident (which arguably produced the Civil War's first fatalities) ironic, as April 19 was the eighty-sixth anniversary of Lexington and Concord, the opening battles of the American Revolution. DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* 352 (2005).

49. For contemporary descriptions of the incident, see, for example, *id.*; REHNQUIST, *supra* note 2, at 20-22; SIMON, *supra* note 2, at 184-86; and Downey, *supra* note 3, at 265-68.

50. NEELY, *supra* note 3, at 5; REHNQUIST, *supra* note 2, at 21; SIMON, *supra* note 2, at 185.

51. *E.g.*, REHNQUIST, *supra* note 2, at 21.

52. *Id.* at 22-23; see also GOODWIN, *supra* note 48, at 353 (“For the next week, with wires cut and mails stopped, the residents of Washington lived in a state of constant fear.”).

53. REHNQUIST, *supra* note 2, at 23-25; see also SIMON, *supra* note 2, at 186 (observing that Lincoln declined to give order to arrest legislators as requested by General Scott).

54. NEELY, *supra* note 3, at 7-8; see also GOODWIN, *supra* note 48, at 355-56 (describing arrival of Seventh Regiment of New York in Washington).

55. NEELY, *supra* note 3, at 8-9. Scott was also concerned with the possibility of a seemingly imminent Confederate attack on the city, drafting an order on April 26 to Union pickets on bridges around the city to defend to the last. Scott would not declare the capital safe until April 29. *Id.* at 8.

56. See REHNQUIST, *supra* note 2, at 25 (noting that Lincoln was “[f]inally convinced of the wisdom of Seward’s advice”).

57. NEELY, *supra* note 3, at 8-9; Downey, *supra* note 3, at 268.

58. Letter from Abraham Lincoln to General Winfield Scott (Apr. 27, 1861), in 6 *THE COMPLETE WORKS OF ABRAHAM LINCOLN* 258 (John G. Nicolay & John Hay eds., 1894); see also Letter from Abraham Lincoln to General Winfield Scott (Apr. 27, 1861), in 4 *THE COLLECTED*

On May 13, 1861, Union troops entered and occupied the City of Baltimore, which would remain under military control for the duration of the war.⁵⁹ Twelve days later, around two o'clock in the morning on Saturday, May 25, 1861, a detachment of federal troops entered the Cockeysville, Maryland house of John Merryman and arrested him on suspicion of being involved in the destruction of railroad bridges and telegraph lines north of Baltimore on April 19.⁶⁰ Merryman was imprisoned at Baltimore's Fort McHenry, where he was given immediate access to counsel.⁶¹ His lawyers drafted a petition for a writ of habeas corpus,⁶² and presented it to Chief Justice Taney at his Washington home late in the afternoon on the twenty-fifth.⁶³ Taney convened a short hearing on the application for the writ on Sunday morning, May 26, at the Masonic Hall in Baltimore⁶⁴ (where the federal district and circuit courts sat),⁶⁵ and issued the writ, addressed to General George Cadwalader—commander of the military district including Fort McHenry—returnable at 11:00 a.m. on Monday, May 27.⁶⁶ Cadwalader did not appear on the twenty-seventh, sending instead Colonel Lee, his aide-de-camp, who, resplendent in full dress uniform complete with a sword and a red sash, read Cadwalader's formal written response:

WORKS OF ABRAHAM LINCOLN, *supra* note 5, at 347 (presenting text of unissued letter and noting differences). As Neely notes, there were two slightly different versions of the order. The original, unissued version (which appears in THE COLLECTED WORKS) only authorized suspension "on or in the vicinity of the military line, which is now used between the City of Philadelphia and the City of Washington, via Perryville, Annapolis City, and Annapolis Junction," NEELY, *supra* note 3, at 8, and therefore arguably omitted Baltimore altogether. *But see* REHNQUIST, *supra* note 2, at 25 (reprinting issued draft).

59. Downey, *supra* note 3, at 268.

60. MCPHERSON, *supra* note 2, at 287; REHNQUIST, *supra* note 2, at 26; SIMON, *supra* note 2, at 186. Ultimately, Merryman never *denied* burning down the railroad bridges; his defense, rather, was that he did so under orders as an officer of the state militia. Downey, *supra* note 3, at 278 n.53.

61. SIMON, *supra* note 2, at 186.

62. Merryman's was not the first writ of habeas corpus presented to a federal judge that implicated the April 27 suspension. District Judge William Giles, who, along with Chief Justice Taney, comprised the Circuit Court for the District of Maryland, had, on May 2, issued a writ of habeas corpus (that was subsequently ignored) instructing Major W. W. Morris, commander of Fort McHenry, to produce the body of a minor who had allegedly enlisted in the army without the consent of his parents. For details on the episode, which surely had at least some influence on Taney's precise course of action in hearing *Merryman*, see SWISHER, *supra* note 2, at 843-44.

63. Downey, *supra* note 3, at 262; Long, *supra* note 3, at 214 & n.30; *see also Ex parte Merryman*, 17 F. Cas. 144, 147 (C.C.D. Md. 1861) (No. 9487) ("The petition was presented to me, at Washington, under the impression that I would order the prisoner to be brought before me there, but as he was confined in Fort McHenry, in the city of Baltimore, which is in my circuit, I resolved to hear it in the latter city, as obedience to the writ, under such circumstances, would not withdraw General Cadwalader, who had him in charge, from the limits of his military command.").

64. *See* Downey, *supra* note 3, at 263 (summarizing chain of events).

65. *E.g.*, REHNQUIST, *supra* note 2, at 32; SIMON, *supra* note 2, at 187.

66. Downey, *supra* note 3, at 263. Although this procedure for considering a habeas petition seems somewhat unusual today, it was entirely normal, prior to *Walker v. Johnston*, 312 U.S. 275 (1941), for courts to issue the writ as a matter of course and to only inquire into the legality of the detention once the body of the detainee had been produced before the tribunal. *See Armentero v. INS*, 412 F.3d 1088, 1097-98 & n.13 (9th Cir. 2005) (Berzon, J., dissenting) (summarizing pre-*Walker* practice).

Sir: . . . The prisoner . . . is charged with various acts of treason, and with being publicly associated with and holding a commission as lieutenant in a company having in their possession arms belonging to the United States, and avowing his purpose of armed hostility against the government. [General Cadwalader] is also informed that it can be clearly established, that the prisoner has made often and unreserved declarations of his association with this organized force, as being in avowed hostility to the government, and in readiness to co-operate with those engaged in the present rebellion against the government of the United States. He has further to inform you, that he is duly authorized by the president of the United States, in such cases, to suspend the writ of habeas corpus, for the public safety. This is a high and delicate trust, and it has been enjoined upon him that it should be executed with judgment and discretion, but he is nevertheless also instructed that in times of civil strife, errors, if any, should be on the side of the safety of the country. He most respectfully submits for your consideration, that those who should co-operate in the present trying and painful position in which our country is placed, should not, by any unnecessary want of confidence in each other, increase our embarrassments. He, therefore, respectfully requests that you will postpone further action upon this case, until he can receive instructions from the president of the United States, when you shall hear further from him.⁶⁷

Merryman's counsel formally asked Lee if he had produced Merryman, which, Lee responded, he had not.⁶⁸ Taney then issued an attachment against Cadwalader for contempt for failing to comply with the writ of habeas corpus, returnable the next day, May 28, at noon.⁶⁹

When court convened on the twenty-eighth, neither Cadwalader nor any of his adjutants appeared.⁷⁰ Taney asked the U.S. Marshal for the District of Maryland, Washington Bonifant, if he had served the attachment on General Cadwalader, and Bonifant submitted a written response:

I proceeded, on this 28th day of May 1861, to Fort McHenry, for the purpose of serving the said writ. I sent in my name at the outer gate; the messenger returned with the reply, "that there was no answer to my card," and therefore, I could not serve the writ, as I was commanded. I was not permitted to enter the gate.⁷¹

Taney then delivered a short opinion from the bench, emphasizing that the President had no authority to suspend habeas corpus and that military officers had no authority to arrest and detain a civilian or to refuse to surrender such an arrestee to civilian authorities.⁷² Although the marshal had legal authority to

67. *Ex parte Merryman*, 17 F. Cas. at 146.

68. SIMON, *supra* note 2, at 188; Downey, *supra* note 3, at 265.

69. Downey, *supra* note 3, at 265.

70. REHNQUIST, *supra* note 2, at 33; SIMON, *supra* note 2, at 188-89; *see also* Downey, *supra* note 3, at 268 (describing court proceedings).

71. *Ex parte Merryman*, 17 F. Cas. at 147.

72. *Id.* at 147-48.

summon a *posse comitatus* to bring General Cadwalader before the court, Taney recognized that "the power refusing obedience was so notoriously superior to any the marshal could command" that Bonifant was excused from any further responsibility.⁷³ Taney concluded by noting that he would file a written opinion, and would forward a copy of such to President Lincoln, "in order that he might perform his constitutional duty, to enforce the laws, by securing obedience to the process of the United States."⁷⁴

A. *The Merryman Decision*

The written opinion Taney subsequently filed on June 1⁷⁵ either "presented an overwhelming case for the proposition that Lincoln had seriously overstepped his bounds,"⁷⁶ or was "superficial, somewhat misleading, and partially erroneous."⁷⁷ Even Carl Brent Swisher, Taney's principal biographer, suggested that "[i]t is futile to argue whether the President or the Chief Justice was *right* in the matter, for back of their legal differences were fundamental differences of opinion on matters of public policy."⁷⁸

Throughout his opinion, Taney seized on two propositions he found equally immutable: that only Congress could provide for suspension of the writ of habeas corpus, and that only members of the military could be subjected to military jurisdiction and thereby exempted from the process of civilian courts.⁷⁹ The Constitution only conferred limited authority on the President, and that authority did not extend to the extrajudicial detention of civilians:

The only power, therefore, which the president possesses, where the "life, liberty or property" of a private citizen is concerned, is the power and duty prescribed in the third section of the second article, which requires "that he shall take care that the laws shall be faithfully executed." . . . It is thus made his duty to come in aid of the judicial authority, if it shall be resisted by a force too strong to be overcome without the assistance of the executive arm; but in exercising this power he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments.

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

73. *Id.* at 147.

74. *Id.*

75. Jackson, *supra* note 3, at 18 (citing WALKER LEWIS, WITHOUT FEAR OR FAVOR: A BIOGRAPHY OF CHIEF JUSTICE ROGER BROOKE TANEY 452 (1965)).

76. Downey, *supra* note 3, at 268.

77. Sheffer, *supra* note 3, at 9.

78. CARL BRENT SWISHER, ROGER B. TANEY 555 (1935).

79. *Ex parte Merryman*, 17 F. Cas. at 148-49.

corpus, and the judicial power also, by arresting and imprisoning a person without due process of law.⁸⁰

After extensively reviewing Blackstone's *Commentaries*, a host of other secondary authorities, and the English experience under the 1679 Habeas Corpus Act, Taney seized on Chief Justice Marshall's opinion in *Ex parte Bollman*⁸¹ and Justice Story's *Commentaries on the Constitution of the United States* as further evidence that only Congress could provide for suspension of the writ.⁸² Thus:

I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.⁸³

As for Taney's authority over the military—and General Cadwalader specifically—the Chief Justice was unreserved:

In such a case, my duty was too plain to be mistaken. I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him; I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the circuit court of the United States for the district of Maryland, and direct the clerk to transmit a copy, under seal, to the president of the United States. It will then remain for that high officer, in fulfillment 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.⁸⁴

Afterward, Taney, who had initially suspected that he might himself be imprisoned by the end of the proceedings,⁸⁵ famously told the Mayor of

80. *Id.* at 149 (quoting U.S. CONST. art. II, § 3; *id.* amend. V).

81. 8 U.S. (4 Cranch) 75 (1807).

82. *Ex parte Merryman*, 17 F. Cas. at 150-52 (citing *Ex parte Bollman*, 8 U.S. (4 Cranch) 75; and 3 STORY, *supra* note 9, § 1336 (Boston, Hillard, Gray & Co. 1883)).

83. *Id.* at 152.

84. *Id.* at 153 (quoting U.S. CONST. art. II, § 3).

85. See, e.g., Long, *supra* note 3, at 215 (noting that Taney feared that "by nightfall he himself might be in Ft. McHenry with Merryman"). I would be remiss if I did not here acknowledge the recently rekindled debate over whether President Lincoln actually swore out an arrest warrant for the Chief Justice, a debate revived largely by a 1989 history of the U.S. Marshals Service, see FREDERICK S. CALHOUN, *THE LAWMEN: UNITED STATES MARSHALS AND THEIR DEPUTIES, 1789-1989*, at 103 (1989) (describing Lincoln administration's actions toward Chief Judge Taney), and, according to some, corroborated by the full recounting of the conversation between Taney and Mayor Brown in Brown's 1887 memoir of the events giving rise to *Merryman*, see BROWN, *supra* note 11, at 90 ("He then told me that he knew that his own imprisonment had been a matter of consultation, but that the danger had passed . . ."). Whether the story is true or merely apocryphal, however, is ultimately

Baltimore that "I am an old man, a very old man . . . but perhaps I was preserved for this occasion."⁸⁶ The Chief Justice was somewhat more circumspect in responding to a letter commending the decision from former President Franklin Pierce:

The paroxysm of passion into which the country has suddenly been thrown, appears to me to amount almost to delirium. I hope that it is too violent to last long, and that calmer and more sober thoughts will soon take its place: and that the North, as well as the South, will see that a peaceful separation, with free institutions in each section, is far better than the union of all the present states under a military government, and a reign of terror preceded too by a civil war with all its horrors, and which end as it may will prove ruinous to the victors as well as the vanquished. But at present I grieve to say passion and hate sweep everything before them.⁸⁷

Public reaction to the decision, particularly in the press, was fervent and acrimonious—both for and against.⁸⁸ The decision also "touched off a flurry of pamphlets and articles supporting both Lincoln and Taney."⁸⁹

B. *Lincoln's Response*

Notwithstanding the wide-scale (and wide-ranging) reaction occasioned by Taney's opinion, President Lincoln did not publicly react until his July 4 address to Congress.⁹⁰ On May 30, however, two days after the decision (and before Taney filed his written opinion), Lincoln wrote to Attorney General Edward Bates asking him to confer with Maryland lawyer Reverdy Johnson and prepare a memorandum defending his unilateral suspension of habeas corpus.⁹¹ Bates spent the next six weeks preparing the opinion, which Lincoln promised was

irrelevant for purposes of this Article. What does seem clear is that Taney's fear of potential arrest, given the political climate and given the Lincoln administration's other questionable actions toward federal judges, *see, e.g.*, SWISHER, *supra* note 2, at 864-66 (describing intimidation of Judge Merrick); Sharer, *supra* note 3, at 162-64 (describing administration's use of military to intimidate federal judge), was not necessarily unfounded.

86. BROWN, *supra* note 11, at 90.

87. Letter from Roger Brooke Taney to Franklin Pierce (June 12, 1861), in *Some Papers of Franklin Pierce, 1852-1862*, 10 AM. HIST. REV. 350, 368 (1905).

88. *See, e.g.*, SWISHER, *supra* note 2, at 850-53 (summarizing newspaper accounts); *see also* NEELY, *supra* note 3, at 10, 240 n.28 (describing public response); SIMON, *supra* note 2, at 190 (detailing response of press).

89. Long, *supra* note 3, at 219 & n.50 (noting published material in support of Lincoln and Taney); *see also* Jackson, *supra* note 3, at 22 n.77 (collecting sources that identify writings and publications supporting both men).

90. Indeed, as Simon suggests:

In June 1861, he had much else on his mind. With Congress adjourned, he had already blockaded southern ports, closed the mails to "disloyal" publications, called for thousands of new recruits for the Union army, and authorized the payment of \$2 million from the U.S. Treasury to private citizens in New York to expedite the recruiting effort.

SIMON, *supra* note 2, at 195.

91. *See* Letter from Abraham Lincoln to Edward Bates (May 30, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 5, at 390, 390 (requesting memorandum).

forthcoming in his July 4 address.⁹² Bates officially filed the opinion on July 5,⁹³ and Congress received it the following week, albeit only after making a formal request.⁹⁴

In an otherwise elegant (and at times poetic) message,⁹⁵ Lincoln buried his response to Taney—which he did not specify as such—in a meandering and dense passage in which, as Neely notes, the “syntax . . . was unusually labored”:⁹⁶

This authority [suspending habeas] has purposely been exercised but very sparingly. . . . The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practically, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated? To state the question more directly, are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it? But it was not believed that this question was presented. It was not believed that any law was violated. . . . It was decided that we have a case of rebellion, and that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made. Now it is insisted that Congress, and not the Executive, is vested with this power. But the Constitution itself, is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion.⁹⁷

Thus, Lincoln argued, the suspension was justified both by the

92. See Lincoln, *supra* note 5, at 431 (“No more extended argument is now offered; as an opinion, at some length, will probably be presented by the Attorney General.” (footnote omitted)).

93. Suspension of the Writ of Habeas Corpus, 10 Op. Att’y Gen. 74, 74 (1861).

94. See NEELY, *supra* note 3, at 14 (noting that Congress passed resolution asking for the opinion).

95. Although Lincoln’s message was dated July 4, it was actually read to the joint session of Congress by the Clerk of the House of Representatives on July 5. S. JOURNAL, 37th Cong., 1st Sess. 12 (1861); see also DAVID HERBERT DONALD, LINCOLN 304 (1995) (discussing content of Lincoln’s response).

96. NEELY, *supra* note 3, at 12; see also *id.* at 13 (noting Lincoln’s use of passive voice in key paragraph). As Neely notes:

What is also apparent in it is the work of a fledgling president, uncertain of his legal ground and his proper audience, nervous, and at once too candid and too unforthcoming. This was not the work of a statesman or of a sure politician. Lincoln would learn fast, but he had not mastered the job by July 1861.

Id.

97. Lincoln, *supra* note 5, at 429-31 (footnotes omitted).

Constitution's text and by the exigencies of the situation.⁹⁸ To the former, Lincoln harped on the Constitution's failure to specify that only Congress can suspend the writ.⁹⁹ To the latter, Lincoln raised the specter of the existential threat to the Union that may well have resulted from Maryland's secession.¹⁰⁰ Moreover, Lincoln implicitly suggested that the two points were linked, for the lawlessness in Baltimore itself jeopardized Congress's ability to meet and to thereby provide authorization for Lincoln's actions.¹⁰¹

The memorandum subsequently filed by Attorney General Bates, although laying out the defense of the suspension in far more substantial detail, was, in the words of Chief Justice Rehnquist, "not a very good opinion."¹⁰² Even Bates equivocated, noting that "[v]ery learned persons have differed widely about the meaning of [the Suspension Clause], and I am by no means confident that I fully understand it myself."¹⁰³ In substance, as one recent commentator noted:

Bates argued that the Constitution was vague as to which branch should exercise the power to suspend, and, as the head of a coordinate and co-equal branch, the President had the power to interpret the Constitution and was not bound by the judicial branch's interpretation. He argued that the President had a "peculiar duty" above the other branches to preserve the Constitution and execute the laws, and that this duty required the President to use whatever means he deemed necessary to put down the rebellion. Bates also contended that the rebellion was purely political in nature, and that courts had no power to interfere with the President's political decisions.¹⁰⁴

Bates was also quick to seize on an earlier opinion Taney wrote when he was Attorney General, emphasizing the President's power under another 1807 statute to use the military to expel intruders on public lands.¹⁰⁵ Indeed, although Bates did not argue that the Militia Acts were the *basis* for Lincoln's authority to suspend habeas, he repeatedly invoked the Acts as support for President Lincoln's authority to use military force, as a general matter, to put down the insurrection.¹⁰⁶ Ultimately, if there was a flaw in Bates's opinion, it was its failure to be more decisive. Over the course of twenty-six pages, the opinion never embraced a coherent theory of presidential power (in marked contrast to Lincoln's July 4 message to Congress) but rather provided more of a survey of

98. *Id.* at 440.

99. Sheffer, *supra* note 3, at 20.

100. Lincoln, *supra* note 5, at 423-24.

101. *See id.* at 430-31 (implying that President could suspend writ in case of emergency as framers could not have intended "that in every case, the danger should run its course, until Congress could be called together").

102. REHNQUIST, *supra* note 2, at 44 ("The opinion would persuade only those who were already true believers.").

103. Suspension of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74, 87 (1861).

104. Jackson, *supra* note 3, at 21.

105. 10 Op. Att'y Gen. at 80. For the opinion Bates drew on, see *Removal of Intruders from Lands Ceded by the Creeks*, 2 Op. Att'y Gen. 574 (1833).

106. *See, e.g.*, 10 Op. Att'y Gen. at 83 (noting that Acts of Congress enacted in 1795 and 1807 gave President power to employ militia, army, and navy to suppress insurrection and execute laws).

different reasons why a unilateral executive suspension power is consistent, or at least not inconsistent, with the Constitution.

Tellingly, even Professor Sheffer, who has offered the most sustained defense of Bates's opinion (and, perhaps, of Lincoln's actions),¹⁰⁷ focused largely on the emergency argument—that the suspension was justified by the lawlessness in Baltimore. After all, Sheffer argues:

[T]he Baltimore police commissioners and marshal were taken into custody. A military provost-marshal was appointed in their place to execute the police laws of the state with the aid of subordinate police officers. The commissioners in response ordered the police force not to cooperate, and troops were moved into the city to act in lieu of police. Therefore, *without any express declaration, a condition of martial rule prevailed*.¹⁰⁸

The difference, then, between Taney's reasoning and that of Lincoln and Bates, might well be analogized to the distinction between formalism and functionalism in separation-of-powers cases.¹⁰⁹ On Taney's view, the Constitution only allows Congress to suspend the writ, irrespective of the exigencies of the situation. On the view espoused by Lincoln and Bates, the constitutional "silence" as to which branch may suspend the writ, coupled with both (1) the grave nature of the threat posed by the Maryland lawlessness (and the seceded South), and (2) the previous examples of congressional authorization of the domestic use of the military, provided enough of a foundation for Lincoln's actions. In a way, history would prove them both right, and, importantly, both wrong. For even though Taney thought congressional authorization was essential, and even though Bates thought that the 1795 and 1807 Acts were of *some* relevance, neither put the two pieces together.

As for John Merryman, on July 4, 1861, the same day that Lincoln addressed the joint session of Congress, Secretary of War Simon Cameron came to Fort McHenry to interview Merryman and discuss his fate.¹¹⁰ On July 12, at the request of Attorney General Bates, Merryman was released "to the civil authorities."¹¹¹ He was subsequently indicted for treason in the U.S. Circuit Court for the District of Maryland but was released on bond and returned home on July 25, two months to the day of his initial arrest.¹¹² Moreover, due to intentional obstruction by (and the declining health of) Chief Justice Taney, Merryman became one of hundreds indicted for treason in the Baltimore circuit court whose case never went to trial.¹¹³

107. Sheffer, *supra* note 3, at 16-21.

108. *Id.* at 5-6.

109. Cf. William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 21-29 (1998) (contrasting formalist and functionalist reasoning in separation-of-power cases).

110. Sheffer, *supra* note 3, at 16-17.

111. *Id.* at 17.

112. *Id.*

113. See REHNQUIST, *supra* note 2, at 39 (noting Taney's efforts to keep treason cases out of Maryland courts); SIMON, *supra* note 2, at 197-98 (discussing Taney's efforts to ensure that no other

Ultimately, Merryman was elected to the Maryland House of Delegates in 1874. Three months after Chief Justice Taney died, in December 1864, Merryman and his wife, Anne Louise, gave birth to a baby boy. They named him Roger Brooke Taney Merryman.¹¹⁴

III. *EX PARTE FIELD*

A. *Background*

Taney would not be the only Union¹¹⁵ judge asked to decide the legality of Lincoln's unilateral suspension of habeas corpus during the Civil War. To the contrary, a number of courts confronted some form of the legal question raised in *Ex parte Merryman*,¹¹⁶ and virtually all of them reached a similar conclusion—i.e., that President Lincoln's extralegislative suspension of habeas corpus was unconstitutional.¹¹⁷

Whereas the great majority of judicial decisions on the legality of Lincoln's suspension of habeas corpus held that the President's actions were unconstitutional, largely on the strength of Chief Justice Taney's analysis in

judge would hear Merryman's case); SWISHER, *supra* note 2, at 954-58 (summarizing Taney's manipulations of docket).

114. Downey, *supra* note 3, at 277.

115. The Confederacy also struggled with the question of the executive's authority to suspend habeas corpus and impose martial law—perhaps even more so than the Union. For a fascinating survey of the similar constitutional issues confronted in the South, see David P. Currie, *Through the Looking Glass: The Confederate Constitution in Congress, 1861-1865*, 90 VA. L. REV. 1257, 1326-44 (2004).

116. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

117. *E.g.*, United States *ex rel.* Murphy v. Porter, 27 F. Cas. 599, 602 (C.C.D.D.C. 1861) (No. 16,074a) (concluding that Lincoln's suspension of writ was outside of his executive powers); *Ex parte Benedict*, 3 F. Cas. 159, 162-65 (N.D.N.Y. 1862) (No. 1292) (determining that President's suspension of writ was unconstitutional); *Ex parte McQuillon*, 16 F. Cas. 347, 347-48 (S.D.N.Y. 1861) (No. 8924) (denying execution of writ and following Taney's opinion in *Ex parte Merryman*); Jones v. Seward, 40 Barb. 563, 565-6 (N.Y. Sup. Ct. 1863) (observing that suspension of writ was outside President's power); *In re Kemp*, 16 Wis. 382, 391 (1863) (concluding that President has no power to suspend writ); *cf.* Skeen v. Monkeimer, 21 Ind. 1, 3 (1863) (opining that giving military police ability to hold anyone without charge gives them almost unlimited power). *But see Ex parte Vallandigham*, 28 F. Cas. 874, 922-24 (C.C.S.D. Ohio 1863) (No. 16,816) (stating that even in time of war and emergency, President is not above Constitution but refusing to grant writ in light of existing emergency); *In re Dunn*, 8 F. Cas. 93, 93 (S.D.N.Y. 1863) (No. 4171) (declaring proclamation suspending writ to be "valid and efficient in law"); *In re Fagan*, 8 F. Cas. 947, 949 (D. Mass. 1863) (No. 4604) (finding that March 3, 1863 statute authorized President to suspend writ); McCall v. McDowell, 15 F. Cas. 1235, 1241-45 (C.C.D. Cal. 1867) (No. 8673) (upholding constitutionality of congressional act granting President power to suspend writ while noting that Congress, not President, has power to suspend writ).

Of all of these decisions, *Kemp* was perhaps the most widely reported, and the Lincoln administration seriously considered appealing the Wisconsin Supreme Court's holding to the U.S. Supreme Court (as the Wisconsin Supreme Court assumed it would). Fearing an adverse decision, however, Attorney General Bates admonished then-Secretary of War Stanton not to advocate such a course of action. SWISHER, *supra* note 2, at 923. Arguably, the enactment of the 1863 Habeas Corpus Act shortly thereafter mooted the issue.

Merryman, two exceptions stand out.¹¹⁸ The first was the case of John Dugan, in which the Supreme Court for the District of Columbia, in January 1865, sustained the President's inherent constitutional power to suspend the writ of habeas corpus (holding the 1863 Habeas Corpus Act¹¹⁹ unconstitutional in the process).¹²⁰ The Supreme Court granted review of the lower court's decision,¹²¹ but Dugan's subsequent release mooted the question.¹²²

The second decision came much earlier in the war. In the fall of 1862, Vermont District Judge David A. Smalley was confronted with an application for a writ of habeas corpus filed by Anson Field, who had been arrested by C. C. P. Baldwin, the U.S. Marshal for the District of Vermont, apparently for encouraging "disloyal practices."¹²³ Smalley, an appointee of President Franklin Pierce,¹²⁴ was chairman of the Democratic National Committee from 1856 to 1860¹²⁵ and had been the author of an important grand jury charge in January 1861 concerning the potential liability for treason of those who gave aid and comfort to the Confederacy.¹²⁶

Although the facts are somewhat spotty, it appears that Baldwin arrested Field on August 28, 1862, along with two other men—Lyman and Barney—for violating an August 8 order signed by Secretary of War Stanton that authorized (or, at least, purported to authorize) U.S. marshals and local magistrates to "arrest and imprison any person or persons who may be engaged, by act, speech, or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or in any other disloyal practice against the United States."¹²⁷ On September 1, Smalley issued a writ of habeas corpus ordering

118. It appears that the two cases discussed herein are the only two examples of decisions upholding Lincoln's view, Long, *supra* note 3, at 219 n.53, although a third, *Ex parte Vallandigham*, broadly endorsed the military necessity argument, *Ex parte Vallandigham*, 28 F. Cas. at 921.

119. Act of Mar. 3, 1863, ch. 81, 12 Stat. 755.

120. *In re Dugan*, 6 D.C. 131, 145-48 (1865). As the court noted:

Perhaps the experience of the last four years has prejudiced our judgment. We, together with a vast majority of the loyal people of the Republic, have regarded every possible vigorous and legal exercise of executive power for the suppression of the existing rebellion, not only as the legal right, but the solemn and sworn duty of the President.

Id. at 148.

121. *Ex parte Dugan*, 69 U.S. (2 Wall.) 134 (1865) (per curiam).

122. Sharer, *supra* note 3, at 175 n.156.

123. *Ex parte Field*, 9 F. Cas. 1, 1 (C.C.D. Vt. 1862) (No. 4761) (noting that orders violated by Field related to discouraging enlistments).

124. Federal Judicial Center, Judges of the United States Courts, David Allen Smalley, <http://www.fjc.gov/servlet/tGetInfo?jid=2210> (last visited Jan. 20, 2008).

125. United States Government: Independent Agencies, Supreme Court and Congress, Democratic National Committee (2000), http://www.worldstatesmen.org/USA_govt2.html#DNC.

126. Charge to Grand Jury—Treason, 30 F. Cas. 1032, 1033-34 (C.C.S.D.N.Y. 1861) (No. 18,270).

127. *Field*, 9 F. Cas. at 2 (summarizing background). By a separate order issued the same day, Stanton suspended habeas corpus nationwide and authorized military commissions for those falling within the scope of the first order. REHNQUIST, *supra* note 2, at 60. According to Neely, Stanton issued such orders, which were published five days later as "General Order No. 104," at the direct request of President Lincoln. NEELY, *supra* note 3, at 53. As Neely documents:

The brief period of sweeping and uncoordinated arrests that followed their issuance

Baldwin to make a return on the writ or to produce the bodies of the detainees before him.¹²⁸ After concluding that the return was insufficient, Smalley ordered the production of the prisoners within three hours, with which Baldwin, upon further orders from the War Department, refused to comply.¹²⁹ Smalley then issued an order to show cause why Baldwin should not be held in contempt, scheduling a hearing on the matter for October 3, 1862, which was later postponed to October 7.¹³⁰

In the interim, on September 24, 1862, two days after issuing the preliminary Emancipation Proclamation,¹³¹ President Lincoln issued perhaps the second-most important proclamation of the war:

WHEREAS, it has become necessary to call into service not only volunteers but also portions of the militia of the states by draft in order to suppress the insurrection existing in the United States, and disloyal persons are not adequately restrained by the ordinary processes of law from hindering this measure and from giving aid and comfort in various ways to the insurrection:

Now, therefore, be it ordered, First.—That during the existing insurrection and as a necessary measure for suppressing the same, all rebels and insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to rebels against the authority of United States, shall be subject to martial law and liable to trial and punishment by courts-martial or military commissions :

Second.—That the writ of habeas corpus is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority or by the sentence of any court-martial or military commission.¹³²

Thus, when Judge Smalley ruled on whether Baldwin should be held in contempt for disobeying the writ of habeas corpus Smalley had issued on September 1, he had to decide a series of related questions: whether Baldwin

constituted the lowest point for civil liberties in the North during the Civil War, the lowest point for civil liberties in U.S. history to that time, and one of the lowest for civil liberties in all of American history.

Id.; see also *id.* at 55 (noting that more than 354 Northern civilians were imprisoned under Stanton's orders between August 8 and September 8).

128. *Field*, 9 F. Cas. at 1.

129. *Id.* at 5 (referencing August 30 order from War Department Judge Advocate Levi C. Turner instructing Baldwin to “[p]ay no attention to the habeas corpus for the liberation of Lyman, Barney and Field, and, if any attempt be made to liberate them from custody, resist it to the utmost, and report the names of all who may attempt it”).

130. *Id.* at 2.

131. Proclamation No. 16, 12 Stat. 1267 (1862); see also Proclamation No. 17, 12 Stat. 1268, 1269 (1863) (designating certain states and parts of states as in rebellion, and declaring slaves therein located to be free).

132. Proclamation No. 1, 13 Stat. 730 (1862).

lawfully arrested Field in the first place, whether Baldwin had the authority to ignore Smalley's order, and whether Field was ultimately entitled to release. Smalley therefore had to consider the legality of both Stanton's August 8 orders and of President Lincoln's Proclamation of September 24.

B. *Holding*

Smalley began his analysis by focusing on the legality of Stanton's August 8 orders. After emphasizing that the orders were maddeningly ambiguous as to what "disloyal practices" were, and providing examples of how perfectly benign disagreements of opinion could render even the most loyal civilians subject to military jurisdiction, he emphasized that "[t]his order was made, and the action under it was had, before any attempt was made to establish martial law."¹³³ Noting the inconsistency of Stanton's orders with the Suspension Clause and the Fourth and Fifth Amendments, Smalley concluded that, "[i]f there be any force in language, it appears to me too plain for discussion, that either the constitution or the order must fall."¹³⁴ Moreover, Smalley noted, it was not even clear that the orders emanated from President Lincoln.¹³⁵ Finally, after expressing his marked displeasure with the propriety of an order from the War Department directed to *judicial officers* such as Baldwin,¹³⁶ Smalley noted that it was not as if Baldwin was without *any* authority to arrest Field; he could have charged Field with violating an 1861 Act of Congress,¹³⁷ as interpreted by Justice Nelson in a subsequent grand jury charge.¹³⁸ Despite this alternative available to Baldwin, Smalley observed:

But, instead of performing his duty under the law, as an officer of this court, he volunteered, as a military agent, to make the arrest upon his own motion, and throw the accused into jail in violation of law. When he was before me on the 1st of September, he was reminded that, if the petitioner was guilty of the offence charged against him, he could and would be punished under the law; but he still chose to disobey the positive order of the court to bring the prisoner before it. This was a high handed, arbitrary exercise of power, without right, and in defiant violation of all constitutional authority and law, and of all civil liberty; and, if the power and majesty of the law are not to be trampled on with

133. *Field*, 9 F. Cas. at 3.

134. *Id.*

135. *See id.* at 5 ("[T]he fact that the orders of the 8th of August, which, upon the construction claimed to be given to them, were broad enough to embrace every species of disloyalty, in word or act, were revoked in less than thirty days after they were issued, and that, eighteen days thereafter, the president issued his own proclamation in relation to military arrests and the writ of habeas corpus, is strong evidence, that he did not regard the aforesaid orders from the war department as emanating from him.").

136. *Id.* at 5-6.

137. *See* Act of July 31, 1861, ch. 33, 12 Stat. 284 (criminalizing attempts to undermine U.S. government).

138. *Field*, 9 F. Cas. at 6. The specific charge referenced by Smalley appears to be unreported. For a similar charge, see Charge to Grand Jury--Treason, 30 F. Cas. 1034 (C.C.S.D.N.Y. 1861) (No. 18,271).

impunity, but are to be vindicated and maintained, as in times past, he ought to be and must be punished therefor[e].¹³⁹

As such, Baldwin was liable for disobeying the writ of habeas corpus issued by Smalley on September 1.

The next question was whether, and to what extent, President Lincoln's Proclamation of September 24 altered the underlying legality of Baldwin's conduct (and Field's detention). As Smalley put it, "[i]s the power thus assumed by the president conferred upon him by the constitution or any act of congress, or by both combined?"¹⁴⁰ To answer that difficult question, Smalley first observed that the Constitution made the President commander in chief of the armed forces and of the militia of the several states and provided that the President "take care that the laws be faithfully executed."¹⁴¹ Next, Smalley noted that the Constitution gave Congress the power "to provide for calling forth the militia[] to execute the laws of the Union[,] suppress insurrections, and repel invasions,"¹⁴² and that Congress had so provided in a 1795 statute.¹⁴³ According to Smalley, three Supreme Court decisions—*Houston v. Moore*,¹⁴⁴ *Martin v. Mott*,¹⁴⁵ and *Luther v. Borden*¹⁴⁶—had established the proposition that the 1795 Act authorized the President to call out the militia and to impose martial law to suppress insurrections.¹⁴⁷ There could hardly be any question that the September 24 Proclamation was validly in furtherance of that authority.¹⁴⁸

139. *Field*, 9 F. Cas. at 6.

140. *Id.* Smalley was clear on the gravity of the issue:

This is the most grave and important question that has ever been presented before the judicial tribunals of this country—one upon which eminent jurists have differed and upon which they will undoubtedly continue to differ. I approach it with great hesitancy and would be glad to avoid expressing an opinion upon it; but I have no choice. In order to examine it in all its aspects, it is necessary to consider the present condition of the Union. That a gigantic insurrection and rebellion has been, for more than eighteen months, and is still, raging in many of the states, and that the armies of the rebellious states have been, and are, invading loyal states with immense forces, that hundreds of millions of dollars have been expended, and many thousands of lives lost, in endeavors to suppress and put it down, and that hundreds of thousands of men are now in the field, and in hostile array against each other, we know to be true. That there are recruiting stations in nearly every town in the loyal states, and troops in various places in every state being drilled and disciplined, in squads, companies, and regiments, and that a draft has been ordered, we also know.

Id. Even Vermont, far from the front lines, was raided by Confederate troops (coming from Canada) late in the war. For a summary of the St. Albans Raid, see Matthew Farfan, *The St. Albans Raid*, TOWNSHIP HERITAGE WEBMAGAZINE, <http://www.townshipsheritage.com/Eng/Hist/Law/st.albans.html> (last visited Jan. 20, 2008).

141. *Field*, 9 F. Cas. at 6 (quoting U.S. CONST. art. II, § 3).

142. *Id.* at 6-7 (quoting U.S. CONST. art. I, § 8, cl. 15).

143. *Id.* at 7 (citing Act of Feb. 28, 1795, ch. 36, 1 Stat. 424).

144. 18 U.S. (5 Wheat.) 1 (1820).

145. 25 U.S. (12 Wheat.) 19 (1827).

146. 48 U.S. (7 How.) 1 (1849).

147. *Field*, 9 F. Cas. at 7-8 (discussing *Luther*, 48 U.S. (7 How.) 1; *Martin*, 25 U.S. (12 Wheat.) 19; *Moore*, 18 U.S. (5 Wheat.) 1).

148. See *infra* Part IV for a discussion of presidential authority under the Militia Acts.

Moreover, Smalley noted, these cases established that the President's determination of the need for martial law was not subject to judicial review. Thus, whereas:

it may be argued that Vermont is a loyal state, more than five hundred miles from the seat of war; that the people are patriotic and law abiding; that the enforcement of civil law has not been interfered with within her borders; and that, therefore, there is nothing to justify martial law. . . . [W]e have already seen that this is a question for the president, not for the court, to determine.¹⁴⁹

Distinguishing *Merryman* and *Ex parte Benedict*,¹⁵⁰ Smalley emphasized that "both cases came up on an entirely different state of facts from that which now exists. The president had not then proclaimed martial law, and, in neither of the cases, was the act of 1795 referred to at all by the court, in its opinion."¹⁵¹ Because the Proclamation was unreviewable, Smalley had no choice but to conclude that, "[t]he writ of habeas corpus being now suspended, as to persons arrested as the petitioner was, if he were at this time before me, I should be constrained to order him back into the custody of the marshal."¹⁵² At the same time, because the writ had not yet been lawfully suspended on September 1, when Baldwin had disobeyed his original writ of habeas corpus, Smalley fined the Marshal \$100, which Baldwin promptly paid.¹⁵³

As should be clear, *Ex parte Field*¹⁵⁴ is a remarkably interesting case. In one exhaustive and authoritative decision, Smalley held that Secretary of War Stanton's August 8 orders were patently unconstitutional; that, at least until martial law was proclaimed, the War Department had no authority to give orders to court officers, especially where such orders were to ignore court orders; that the U.S. Marshal was in contempt of court for disobeying a writ of habeas corpus; that President Lincoln's September 24 Proclamation was lawfully promulgated pursuant to an Act of Congress; and that, because President Lincoln had lawfully imposed martial law, the Proclamation's concomitant suspension of habeas corpus was constitutional. In short, *Field* held that, because President Lincoln had authority to impose martial law by virtue of the 1795 Act, he also had authority to suspend habeas corpus. It was not that such authority was inherent in Article II, but that it was necessarily part of the crisis power that Congress, acting pursuant to its own constitutional authority, had delegated to

149. *Field*, 9 F. Cas. at 8; see also *id.* at 3 ("It will not be pretended that Vermont is not a loyal state. She has been, and is, among the first and most earnest to aid and sustain the government in putting down the causeless and atrocious rebellion which is now distracting and desolating our hitherto happy country. She has furnished more men to fight the battles of the Union than any other state of equal population; and thousands of the best and bravest of her sons now sleep the sleep of death, in the swamps and on the battle-fields of Virginia, Maryland, and Louisiana.").

150. 3 F. Cas. 159 (N.D.N.Y. 1862) (No. 1292).

151. *Field*, 9 F. Cas. at 9.

152. *Id.*

153. *Id.*

154. 9 F. Cas. 1 (C.C.D. Vt. 1862) (No. 4761).

the executive.¹⁵⁵

C. *Whither Field?: Merryman's Historiography*

For as interesting and potentially significant a take on the underlying legal issues as the opinion in *Field* is (and was at the time), and given the extent to which it provided a powerful reconciliation of the seemingly irreconcilable viewpoints advanced by Taney and by Lincoln and Bates, it has been consistently overlooked and underappreciated in scholarship concerning *Merryman* and the legality of Lincoln's unilateral suspension of habeas corpus.¹⁵⁶ Moreover, even those few authors who have devoted *any* attention to the decision have largely misunderstood its thesis.

For example, in his otherwise thorough treatment of how Civil War-era courts dealt with the question of authority to suspend the writ, Professor Sharer reads *Field* as standing for the proposition "that the President had constitutional power to determine whether the public safety required the suspension."¹⁵⁷ In so holding, Sharer suggests that *Field* inappropriately relied on *Martin* and *Luther*, "since in both [of the earlier cases] the President was acting pursuant to specific congressional legislation."¹⁵⁸ Of course, Judge Smalley's argument was that Lincoln, too, was acting pursuant to congressional authorization. To similar effect is Professor Long's 1969 article, which concluded that "[i]n *Ex Parte Field*, the court felt that the President had the power to declare martial law . . . as a part of his powers as Commander-in-Chief of the armed forces."¹⁵⁹ And numerous citations to *Field* further reinforce this understanding of the decision.¹⁶⁰

Indeed, only one author¹⁶¹ appears to have understood the potential importance of *Field* on the statutory authorization point.¹⁶² In his recent book,

155. *Field*, 9 F. Cas. at 6-7.

156. As one prominent example, James Garfield Randall, author of what remains the authoritative survey of the constitutional issues raised by and during the Civil War, nowhere mentions the 1862 decision. See generally RANDALL, *supra* note 3.

157. Sharer, *supra* note 3, at 165-66.

158. *Id.* at 166 n.93.

159. Long, *supra* note 3, at 220 n.53. Long correctly recognized that the *Field* court "felt that martial law and the writ of habeas corpus were mutually exclusive, and . . . that the power to declare martial law must, as a corollary, contain the power to suspend the writ." *Id.*

160. See, e.g., Albert S. Glass, *Historical Aspects of Habeas Corpus*, 9 ST. JOHN'S L. REV. 55, 67 & n.30 (1934) (noting that *Field* opinion dissented from view that only Congress could suspend habeas); Morris Shepp Isseks, *The Executive and His Use of the Militia*, 16 OR. L. REV. 301, 307 n.23 (1937) (noting court's decision in *Field* that President could suspend habeas corpus).

161. I should note here that, for obvious reasons, this survey of *Merryman's* historiography does not include my earlier work, which has twice confronted *Field* and its implications, albeit without resolving, in either case, the questions presented here. See Vladeck, *supra* note 25, at 175-77 & nn.116-18 (noting that *Field* stood for proposition that when martial law is authorized, habeas is necessarily suspended); Stephen I. Vladeck, Note, *The Detention Power*, 22 YALE L. & POL'Y REV. 153, 165 & nn.67-69 (2004) (noting *Field's* conclusion that the valid imposition of martial law authorizes suspension of habeas).

162. There are a number of citations to *Field* noting its holding vis-à-vis the relationship between martial law and habeas corpus but without inquiring into the *source* of the President's authority to

Lincoln's Constitution, Professor Farber notes that, pursuant to the theory embraced in *Field*, "even before the [July 4] special session, Lincoln already probably had whatever congressional authorization he needed, at least for the initial emergency suspension in *Merryman*. This source of authority was the militia act."¹⁶³ Farber's analysis stops there, however, and does not engage Judge Smalley's suggestion in *Field* that the militia acts would not have authorized the suspension in *Merryman* because, unlike in *Field*, martial law had not yet been imposed.¹⁶⁴

Judge Smalley's analysis in *Field* raises two immediate questions. First, was he correct that President Lincoln had statutory authority, by virtue of the so-called "Militia Acts," to impose martial law in his September 24 Proclamation? Second, if so, would martial law lawfully imposed (and pursuant to statute) have therefore provided an alternative justification for President Lincoln's unilateral suspension of habeas corpus in April 1861? Whereas the latter question is of substantial historical importance, the former, for reasons I shall explain, is of potentially monumental contemporary significance.

IV. THE "FIELD" THEORY: MARTIAL LAW AND THE MILITIA ACTS

In upholding the legality of President Lincoln's nationwide suspension of habeas corpus in September 1862, Judge Smalley's opinion in *Ex parte Field*¹⁶⁵ relied on the President's statutory authority under the Militia Acts to call out the military and to impose martial law. In this Part, I turn to Smalley's argument that the Militia Acts authorized the imposition of martial law. Although Smalley correctly interpreted the Supreme Court's decisions in *Houston v. Moore*,¹⁶⁶ *Martin v. Mott*,¹⁶⁷ and *Luther v. Borden*¹⁶⁸ as reading such authority into the statutes, the Court's decisions, as this Part suggests, still left the circumstances in which martial law could validly be imposed manifestly underdefined. Instead, to understand the propriety of the imposition of martial law, we must look more carefully at then-General Andrew Jackson's imposition of military jurisdiction in New Orleans in 1815 and at the 1842 Dorr War in Rhode Island.

impose martial law. See, e.g., Maurice S. Culp, *Executive Power in Emergencies*, 31 MICH. L. REV. 1066, 1083 n.77 (1933) (noting *Field* court's view that suspending habeas corpus is "an incident to the military power of proclaiming and enforcing martial law"); G.G. Phillimore, *Martial Law in Rebellion*, 2 J. SOC'Y COMP. LEGIS. 45, 70 (1900) (noting *Field* court's view of power to suspend habeas corpus as "a necessary consequence" of declaring martial law). For works looking more generally at the relationship between martial law and habeas corpus, see generally John H. Hatcher, *Martial Law and Habeas Corpus*, 46 W. VA. L.Q. 187 (1940); and J.W. Brabner Smith, *Martial Law and the Writ of Habeas Corpus*, 30 GEO. L.J. 697 (1942).

163. FARBER, *supra* note 3, at 162.

164. Indeed, Farber argues that the Supreme Court's later decision in *Moyer v. Peabody*, 212 U.S. 78 (1909), validated *Field* and Lincoln's initial suspension. FARBER, *supra* note 3, at 162. For more on *Moyer*, see *infra* Part V.

165. 9 F. Cas. 1 (C.C.D. Vt. 1862) (No. 4761).

166. 18 U.S. (5 Wheat.) 1 (1820).

167. 25 U.S. (12 Wheat.) 19 (1827).

168. 48 U.S. (7 How.) 1 (1849).

A. *The 1792, 1795, and 1807 Militia Acts*¹⁶⁹

First, the statutes:¹⁷⁰ The term “Militia Acts” is loosely used to refer to a series of statutes enacted by early Congresses that provided for the calling forth of the militia to respond to various domestic crises.¹⁷¹ Acting largely pursuant to its authority under the Calling Forth or First Militia Clause,¹⁷² Congress delegated expansive power to the President, particularly when Congress was not in session, to “execute the Laws of the Union, suppress Insurrections and repel Invasions.”¹⁷³

The first and perhaps most important example was the Calling Forth Act of 1792.¹⁷⁴ In addition to a provision outlining the President’s authority to “suppress insurrections” and “repel invasions,”¹⁷⁵ section 2 of the Act delineated the President’s authority to use the militias of the several states to “execute the laws”:

[W]henever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, the same being notified to the President of the United States, by an

169. The analysis of the Militia Acts in this section is borrowed largely from Vladeck, *supra* note 25, at 159-67. Lest the reliance on my earlier work give the impression that I am just retreading the same path, one of the animating purposes of this Article is to answer questions raised (and left unanswered) previously. See, for example, *supra* note 33 and accompanying text, which raises the question of the limitations imposed on presidential declarations of martial law.

170. I should note here, if only because there is no better place to do so, the complete nonissue of the interaction between the Insurrection/Militia Acts and the subsequently enacted Posse Comitatus Act of 1878, ch. 263, § 15, 20 Stat. 152 (codified as amended at 18 U.S.C. § 1385 (2000)). Although the Posse Comitatus Act generally prohibits the federal military from acting in a domestic law enforcement capacity, it does not apply to statutes that expressly authorize such activity. 18 U.S.C. § 1385 (2000). Moreover, when the Posse Comitatus Act was enacted, it was understood that the Insurrection/Militia Acts provided such express authorization. See Vladeck, *supra* note 25, at 168 (noting that Posse Comitatus Act explicitly exempts Militia Acts from its coverage); Joshua M. Samek, Note, *The Federal Response to Hurricane Katrina: A Case for Repeal of the Posse Comitatus Act or a Case for Learning the Law?*, 61 U. MIAMI L. REV. 441, 446-47 (2007) (summarizing contemporary misunderstandings of statutory authorization exception to Posse Comitatus Act).

171. Vladeck, *supra* note 25, at 152-53 & n.9.

172. U.S. CONST. art. I, § 8, cl. 15.

173. *Id.* The Calling Forth Clause has been remarkably understudied in separation-of-powers literature. Most of the emphasis on the provision has been in the context of the President’s authority to deploy the National Guard overseas, an issue largely resolved in *Perpich v. Department of Defense*, 496 U.S. 334 (1990). See, e.g., ROSSITER, *supra* note 2, at 14-15 & n.4 (noting infrequent attention paid to Calling Forth Clause). For a contemporary take on the clause’s importance, especially vis-à-vis domestic emergency power, see Stephen I. Vladeck, *The Calling Forth Clause and the Domestic Commander in Chief*, 29 CARDOZO L. REV. 1091 (2008). For the most detailed analyses of the clause, see *The Selective Draft Law Cases*, 245 U.S. 366, 382-86 (1918); Alan Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. CIN. L. REV. 919, 923-50 (1988); Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 182-210 (1940).

174. Calling Forth Act of 1792, ch. 28, 1 Stat. 264, *repealed by* Act of Feb. 28, 1795, ch. 36, § 10, 1 Stat. 424, 425.

175. *Id.* § 1, 1 Stat. at 264.

associate justice or the district judge, it shall be lawful for the President of the United States to call forth the militia of such state to suppress such combinations, and to cause the laws to be duly executed. And if the militia of a state, where such combinations may happen, shall refuse, or be insufficient to suppress the same, it shall be lawful for the President, if the legislature of the United States be not in session, to call forth and employ such numbers of the militia of any other state or states most convenient thereto, as may be necessary, and the use of militia, so to be called forth, may be continued, if necessary, until the expiration of thirty days after the commencement of the ensuing session.¹⁷⁶

Although the 1792 Calling Forth Act was a temporary and unprecedented experiment in the congressional delegation of emergency power to the President,¹⁷⁷ its procedures were followed to the letter by President Washington in responding to the Whiskey Rebellion in western Pennsylvania in 1794.¹⁷⁸ After obtaining certification from Supreme Court Associate Justice James Wilson that, in Allegheny and Washington counties, the “laws of the United States are opposed, and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshal of that district,”¹⁷⁹ and after issuing a proclamation commanding the insurgents to disperse, as required by section 3 of the 1792 Act,¹⁸⁰ Washington assembled militiamen from Pennsylvania, New Jersey, Virginia, and Maryland to quell the threat.¹⁸¹

Largely in light of President Washington’s successful resort to the

176. *Id.* § 2, 1 Stat. at 264. The thirty-day time limit, which was retained in the 1795 Act (and expanded to sixty days in 1861), stands as a fairly powerful suggestion that the early Congresses understood the immense (and constitutionally significant) difference between the scope of presidential emergency power when Congress was in session as compared to when it was not. See Vladeck, *supra* note 25, at 163 n.55 (suggesting that Congress, in establishing time limits, considered President’s authority to act when Congress was not in session).

177. See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 81-84, 157 (1997) (chronicling congressional enactments establishing militia and authorizing President to employ militias in response to invasions and insurrections); David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1, 44-48 (1971) (discussing passage of 1792 Act).

178. See Vladeck, *supra* note 25, at 160-61 (noting significance of Washington administration’s rigid adherence to letter of 1792 Act). For a detailed summary of the background (and the federal government’s response) to the Whiskey Rebellion, see ROBERT W. COAKLEY, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789-1878*, at 28-68 (1988).

179. Letter from James Wilson to the President of the United States (Aug. 4, 1794), in FREDERICK T. WILSON, *MASS VIOLENCE IN AMERICA: FEDERAL AID IN DOMESTIC DISTURBANCES 1787-1903*, at 34 (1969).

180. Calling Forth Act of 1792, ch. 28, § 3, 1 Stat. at 264.

181. COAKLEY, *supra* note 178, at 39. Given the extent to which the Washington administration’s response precisely tracked the procedures specified by Congress, Chief Justice Vinson’s invocation of the Whiskey Rebellion in his *Youngstown* dissent as an important early example of resort to inherent executive power under the Commander in Chief Clause, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 683-84 (1952) (Vinson, C.J., dissenting), is wholly inaccurate.

procedures specified by the 1792 Calling Forth Act,¹⁸² Congress made its temporary delegation of authority permanent in 1795.¹⁸³ Although the 1795 Calling Forth Act left section 1 of the 1792 Act intact, it thoroughly rewrote section 2 in light of the Whiskey Rebellion experience, removing several of the 1792 Act's checks on presidential unilateralism in the process.¹⁸⁴

First, the Act removed the requirement of an antecedent court order—which had been added as a necessary amendment in 1792—leaving the President as the sole arbiter of when circumstances necessitated the calling forth of the militia. Second, the 1795 Act removed the 1792 Act's requirement that militiamen from other states could be used only when Congress was not in session, despite the fears at [the Constitutional Convention] that militiamen from New Hampshire might be sent to quell a disturbance in Georgia, and vice versa. Third, the 1795 Act kept the dispersal proclamation requirement but removed the requirement from the 1792 Act that such a proclamation be issued “previous thereto,” i.e., before calling out the militia. A fair reading of the 1795 Act suggests that all Congress sought to require was a contemporaneous proclamation—notice to the rebels that the troops were on their way.¹⁸⁵

Finally, whereas the 1795 Act broadly authorized the President to call out the militias of the several states to execute the laws, suppress insurrections, and repel invasions, it said nothing about the President's authority to use the *federal* armed forces in similar situations. After several temporary authorizations for the use of federal regulars in situations in which the 1795 Act authorized use of the state militias,¹⁸⁶ Congress made the authority permanent in the so-called Insurrection Act,¹⁸⁷ a one-sentence statute enacted without any recorded debate¹⁸⁸ on the last day of the Ninth Congress:

[I]n all cases of insurrection, or obstruction to the laws, either of the

182. See COAKLEY, *supra* note 178, at 67-68 (“By his actions in the Whiskey Rebellion, Washington had apparently dissipated the fears expressed in 1792 that these powers ‘could not with safety be entrusted to the President of the United States.’ The Whiskey Rebellion thus resulted in the establishment of both a permanent law and a precedent for all future use of federal military force in domestic disorders.” (footnote omitted)).

183. The Third Congress had already needed to reauthorize separately President Washington's authority under the 1792 Act, since his authority to use militias from *other* states expired thirty days after Congress was back in session. Vladeck, *supra* note 25, at 161 & n.48 (citing Act of Nov. 29, 1794, ch. 1, 1 Stat. 403 (expired 1795)).

184. Act of Feb. 28, 1795, ch. 36, § 2, 1 Stat. 424, 424.

185. Vladeck, *supra* note 25, at 162 (footnotes omitted).

186. See, e.g., Act of Mar. 2, 1799, ch. 31, § 7, 1 Stat. 725, 726 (repealed 1802) (granting President power to use federal forces when acting under Calling Forth Act of 1795). The first statute allowing the President to call forth a joint contingent of the militia and the “land or naval forces of the United States” was the Neutrality Act of 1794, ch. 50, §§ 7-8, 1 Stat. 381, 384. According to Coakley, “[i]t was really this law that led directly to another law passed in 1807 permitting the president to use the regular military forces for the same purposes that the law of 1795 permitted him to use the militia.” COAKLEY, *supra* note 178, at 346-47.

187. Insurrection Act of 1807, ch. 39, 2 Stat. 443.

188. COAKLEY, *supra* note 178, at 83 n.46.

United States, or of any individual state or territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land or naval force of the United States, as shall be judged necessary, having first observed all the pre-requisites of the law in that respect.¹⁸⁹

Although the 1807 Act curiously (and inexplicably) omitted “invasions” from those cases wherein the President could call out the federal armed forces,¹⁹⁰ it solidified the President’s authority to employ any means necessary to use military force to respond to other domestic crises, including insurrections and obstruction of the laws.¹⁹¹

B. *The Militia Acts and the War of 1812*

For a host of reasons, the War of 1812 quickly provided a series of opportunities for courts and government officials to clarify the scope of the federal government’s authority under the Militia Acts. Faced with the first post-Constitution conflict fought on American soil, the federal government repeatedly invoked its authority over the local citizenry—authority that was as untested as it was unprecedented. Thus, in the subsequent debates over the federal government’s power to require members of state militias to fight on behalf of the United States, which I discuss in Part IV.B.1, and in the decades-long debates over the propriety of Andrew Jackson’s imposition of martial law in New Orleans, discussed in Parts IV.B.2-3, the War of 1812 furnished an important early lens through which to assess the scope of the federal government’s domestic military power.

1. *Martin v. Mott*

Acting pursuant to his authority under the 1795 Act, President Madison federalized various of the state militias during the War of 1812.¹⁹² A series of state courts rejected the power of the President, as opposed to the state governors, to determine when an exigency had arisen sufficient to warrant the calling forth of the state militias.¹⁹³ The U.S. Supreme Court, however, twice

189. Insurrection Act of 1807, ch. 39, 2 Stat. at 443.

190. Vladeck, *supra* note 25, at 164-65.

191. See *id.* at 165-66 & n.68 (describing Insurrection Act of 1807 as “amalgamation of Congress’s calling-forth power”).

192. In early 1812, Congress enacted legislation further authorizing the preparation of a large, defensive militia force. See Act of Apr. 10, 1812, ch. 55, 2 Stat. 705, 705-07 (authorizing President to require state quotas of militias); Act of Jan. 11, 1812, ch. 11, § 1, 2 Stat. 670, 670 (authorizing President to raise companies of Rangers to protect country). The militias ultimately proved woefully ineffective, however, leading both to the Hartford Convention and to the growth of the federal armed forces in the aftermath of the conflict. See, e.g., James Biser Whisker, *The Citizen-Soldier Under Federal and State Law*, 94 W. VA. L. REV. 947, 965 (1992) (“[N]either the standing army nor the militia acquitted themselves well.”).

193. See, e.g., A Letter from the Governor of the Commonwealth of Massachusetts, to the

sustained Madison's actions—implicitly in 1821 in *Houston v. Moore*¹⁹⁴ and then expressly in 1825 in *Martin v. Mott*.¹⁹⁵

In *Mott*, the Court was confronted with the question of whether a citizen could be court-martialed for his failure to join the New York militia after Madison called it out in 1814.¹⁹⁶ Although various of the state courts that previously considered the issue held that the President lacked the power to court-martial a citizen for refusing to serve in a state militia, the Court concluded to the contrary. Justice Story authored the unanimous opinion which held that such authority came from the 1795 Militia Act.¹⁹⁷ Moreover, Story noted:

We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard[ize] the public interests.¹⁹⁸

Thus, Story wrote, the 1795 Act empowered President Madison to call out the New York militia, and his determination of the exigency was not subject to second-guessing by state officials.¹⁹⁹ Importantly, though, Story did not suggest that the President's decision was entirely unreviewable:

If the fact of the existence of the exigency were averred, it would be traversable, and of course might be passed upon by a jury; and thus the legality of the orders of the President would depend, not on his own judgment of the facts, but upon the finding of those facts upon the proofs submitted to a jury.²⁰⁰

Given Congress's declaration of war against England,²⁰¹ and given that "the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to

Justices of the Supreme Judicial Court, with the Answer of the Justices, 8 Mass. (7 Tyng) 548, 549 (1812) ("[N]o power is given, either to the president, or to the congress, to determine that either of the said exigencies does in fact exist. . . . [I]t is reserved to the states . . ."); see also Jason Mazzone, *The Security Constitution*, 53 UCLA L. REV. 29, 116-17 & n.485 (2005) (summarizing recalcitrance of New England states).

194. 18 U.S. (5 Wheat.) 1, 15 (1820).

195. 25 U.S. (12 Wheat.) 19, 29 (1827).

196. *Mott*, 25 U.S. (12 Wheat.) at 20-23 (summarizing background).

197. *Id.* at 28-29; Vladeck, *supra* note 25, at 171 & n.93.

198. *Mott*, 25 U.S. (12 Wheat.) at 30.

199. *Id.* at 31-32.

200. *Id.* at 33. To similar effect, see *Vanderheyden v. Young*, 11 Johns. 150 (N.Y. Sup. Ct. 1814).

201. Act of June 18, 1812, ch. 102, 2 Stat. 755.

effectuate the object,"²⁰² there was simply no question, in the case at hand, that Madison had acted validly within the scope of the 1795 Act and that Mott had been lawfully court-martialed.²⁰³

2. Martial Law in New Orleans

Whereas *Mott* for the first time established the constitutionality and significance of the Militia Acts, an entirely separate incident from the War of 1812—the Battle of New Orleans—would furnish America's first experience with martial rule. The ironic history of the Battle of New Orleans is relatively familiar.²⁰⁴ Even though the United States and Britain had signed the Treaty of Ghent formally ending the war on December 24, 1814,²⁰⁵ a large force of British soldiers, unaware of the armistice, attempted to capture New Orleans in early January 1815,²⁰⁶ only to be repulsed by Andrew Jackson and his significantly smaller army.²⁰⁷

Somewhat less well-known is the full story of how, as part of his preparations for the battle, Jackson had taken full control of the city in early December, declaring martial law on his own authority (and without any instructions to such effect from President Madison) on December 16, 1814, once the British fleet arrived.²⁰⁸ Although the British forces were soundly defeated on January 8, and withdrew on January 18,²⁰⁹ and although Jackson learned of the Treaty of Ghent from the British commander on February 13,²¹⁰ martial law remained in place until Jackson was officially notified of the formal proclamation of peace, which did not occur until one month later, on March 13, 1815.²¹¹

In the interim, among various other repressive measures,²¹² Jackson ordered the arrest of Louis Louaillier, a Louisiana state senator who had published a widely circulated letter making a powerful case against Jackson's authority to impose martial law.²¹³ When Federal District Judge Dominic

202. *Mott*, 25 U.S. (12 Wheat.) at 29.

203. *Id.*

204. For a concise summary of this history, see Crain, *supra* note 34, at 78. See also WARSHAUER, *supra* note 34, at 19-45 (telling story of martial law in New Orleans); Sofaer, *supra* note 34, at 238-40 (describing Jackson's military command in Battle of New Orleans).

205. Treaty of Peace and Amity (Treaty of Ghent), U.S.-Gr. Brit., Dec. 24, 1814, 8 Stat. 218.

206. Sofaer, *supra* note 34, at 239-40.

207. *Id.*; see also WARSHAUER, *supra* note 34, at 29 (reporting British retreat).

208. See WARSHAUER, *supra* note 34, at 20-26 (summarizing circumstances leading up to Jackson's proclamation). For the proclamation itself, see WINTHROP, *supra* note 22, at 821.

209. Sofaer, *supra* note 34, at 240. As Sofaer notes, the British fleet sailed to a point one hundred miles off the Louisiana coast on February 5. *Id.*

210. *Id.* at 241.

211. *Id.* at 244. Jackson actually received word of the Treaty of Ghent from then-Secretary of War James Monroe on March 6, but Monroe had enclosed the wrong documents with the message, and so Jackson refused to accept that peace had been properly proclaimed. *Id.* at 243.

212. See WARSHAUER, *supra* note 34, at 30-31 (noting military imprisoned more than thirty men without ever charging them with crimes).

213. *Id.* at 35; Sofaer, *supra* note 34, at 242.

Augustan Hall issued a writ of habeas corpus demanding the production of Louaillier,²¹⁴ Jackson arrested Hall, seized the writ, and ordered the U.S. marshal not to interfere.²¹⁵ After peace was formally proclaimed and Jackson restored civilian authority, Hall held him in contempt and fined the future President \$1000.²¹⁶ Notwithstanding the arrests of Louaillier and Hall, Jackson's actions in New Orleans are far more significant because of the theory on which they were predicated—and because of the debate that a bill to refund Jackson's contempt fine would engender in Congress almost three decades later.

As one recent commentator summarizes:

Jackson's theory of martial law can be inferred from the advice of his two legal aids: Edward Livingston and Abner Duncan. Livingston, putting forth the traditional common law position, argued that Jackson would be invoking martial law at his own peril, as martial law was unknown to the Constitution and the laws of the United States. Duncan, however, put forward the pragmatic and novel argument that the civil authorities in New Orleans had ceased to function as a result of the impending English attack. The military, by default, became the only body able to protect New Orleans from invasion. The extent of the military's authority in such a circumstance should only be limited by the necessity of the crisis. Jackson sided with Duncan.²¹⁷

The Louisiana Supreme Court (and most contemporary observers, including, it would seem, President Madison)²¹⁸ flatly rejected Jackson's conception of martial law—as allowing the complete subjugation of civilian authority for the duration of the crisis.²¹⁹ But, for better or worse, Jackson's actions in New Orleans added a new, third category of “martial law” to the American legal lexicon. Prior to 1815, America followed the traditional English common-law conception of military authority, wherein “military jurisdiction extended only to members of the armed forces.”²²⁰ Thus, “martial law,” under the English experience (at least post-1688), extended only to (1) the King's legal authority over his own troops; and (2) the authority to use those troops as a defensive force, maintaining public order and keeping the peace, but only by

214. WARSHAUER, *supra* note 34, at 35-36.

215. Sofaer, *supra* note 34, at 242-43.

216. For a detailed summary of the arguments presented to Judge Hall, see *id.* at 244-48. See also WARSHAUER, *supra* note 34, at 38-39 (summarizing Jackson's defense); George M. Dennison, *Martial Law: The Development of a Theory of Emergency Powers, 1776-1861*, 18 AM. J. LEGAL HIST. 52, 62-64 (1974) (detailing statement Jackson attempted to read to Judge Hall).

217. Weida, *supra* note 22, at 1397 n.5 (citing Dennison, *supra* note 216, at 61-62). As Dennison argued, “Duncan's arguments amounted to a fusion of frontier pragmatism and prerogative instrumentalism. . . . During the period of its establishment, martial law superseded all civil authority and any who resisted it subjected themselves to prosecution for violation of the law.” Dennison, *supra* note 216, at 62.

218. See Sofaer, *supra* note 34, at 249 (quoting Madison's view that martial law cannot be justified after immediate necessity of saving country has dissipated).

219. See *Johnson v. Duncan*, 3 Mart. (o.s.) 530, 552-53 (La. 1815) (finding mere presence of military camp within city of New Orleans did not transform entire city into military district even if General Jackson declared it so).

220. Dennison, *supra* note 216, at 55.

supplementing—rather than supplanting—civilian authority.²²¹ The theory on which Jackson imposed martial law in New Orleans, in marked contrast, was the theory of “martial rule”—i.e., that the civil authority had ceased to function because of the imminent threat, and that the military was necessary not only to defend the city from the British, but also to allow the city to operate basic social services and “civil” functions.²²² In short, martial law in New Orleans was martial law *enforcement*. It was an exercise in federal military jurisdiction over civilians—such as Louaillier and Hall—that would not be repeated until the Civil War.

3. The Refund Debates

Although the theory under which Jackson imposed martial law was effectively repudiated by Judge Hall in imposing the contempt fine, it would return to the forefront as the subject of a rancorous and partisan debate in Congress in the early 1840s, all part of an effort—spearheaded by Jackson himself—to have the fine refunded (plus interest).²²³

The refund debates are a fascinating study in the politics of the era and in the deep and bitter political divisions between Democrats and Whigs following the 1840 presidential election. Indeed, as Caleb Crain describes, “it slowly dawned on Jackson’s Democrats that they had been handed a wonderful issue for energizing the base: a war hero was being stiffed by Congress. In the 1842 elections, the refund issue helped them take the House.”²²⁴ For present purposes, however, the debates are significant because Congress took up the very issue that had divided Jackson’s own advisors: whether Jackson had acted outside the Constitution, or whether martial law, as imposed by Jackson, was constitutional *because* it was justified by necessity. Opponents of the bill attempted to include a proviso suggesting that the refund was in no way a repudiation of Judge Hall’s reasoning in finding Jackson in contempt, but rather was simply a token of charity to a destitute and decrepit American hero.²²⁵

221. See, e.g., *id.* (describing English approach to military rule).

222. For helpful discussions of the different categories of martial law, see Henry Winthrop Ballantine, *Qualified Martial Law: A Legislative Proposal* (pts. 1 & 2), 14 MICH. L. REV. 102, 103-05 (1915), 14 MICH. L. REV. 197, 201-10 (1916); and John P. Frank, *Ex Parte Milligan v. The Five Companies: Martial Law in Hawaii*, 44 COLUM. L. REV. 639, 650 (1944). See generally FAIRMAN, *supra* note 22, at 28-49 (defining different meanings of term “martial law”); ROBERT S. RANKIN, *WHEN CIVIL LAW FAILS: MARTIAL LAW AND ITS LEGAL BASIS IN THE UNITED STATES* (1939) (surveying periods of and views on martial law in United States from Jackson through early twentieth century); WINTHROP, *supra* note 22, at 817-32 (describing various forms of martial law in United States, Mexico, and Great Britain).

223. See generally WARSHAUER, *supra* note 34, at 6-12 (describing effort to refund Jackson’s fine). Curiously, the refund debates are entirely omitted from both of David Currie’s otherwise comprehensive studies of the Constitution in Congress during that time period. See generally DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829-1861* (2005); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829-1861* (2005).

224. Crain, *supra* note 34, at 84.

225. See WARSHAUER, *supra* note 34, at 78 (“Jackson historians have surmised that Democrats broached the refund legislation primarily in regard to the general’s dire financial circumstances.”). For

Others saw no need to decide the propriety of Hall's ruling one way or the other.²²⁶ Jackson's supporters, however, cast the issue in stark terms—as the choice between “a British judge and treason on one side—General Jackson and the glorious defence of the country on the other.”²²⁷

Ultimately, with the Democrats back in firm control of the House of Representatives,²²⁸ Congress enacted the refund bill on February 16, 1844, without any qualifying language.²²⁹ As Sofaer describes, “[s]ome piker at Treasury, however, left Jackson's triumph materially incomplete” by miscalculating the amount of interest Jackson was owed.²³⁰ The symbolism, though, was inescapable: the Twenty-eighth Congress had retroactively ratified Jackson's three-month-long imposition of martial law in New Orleans, notwithstanding its unprecedented—and, especially toward the end, unjustifiable—scope.²³¹ In so doing, Congress set a precedent that would be followed, and quickly, at that.

C. *The Dorr War and Luther v. Borden*

Indeed, by the time Congress enacted the refund bill, the Dorr War—America's second significant pre-Civil War experience with martial rule—had already run its course in Rhode Island.²³² Whereas the conflict itself was far more about the authority of *state* governors to impose martial law than about federal military jurisdiction, the subsequent legal machinations provided the federal courts—and especially the Supreme Court—with the opportunity to consider the Jacksonian idea of martial rule and arguments as to its scope and source. Put another way, the Dorr War gave the federal courts the opportunity to reconcile Justice Story's broad pronouncements about the President's authority under the Militia Acts with then-General Jackson's broad

the specific debate over martial law, see *id.* at 185-89.

226. Sofaer, *supra* note 34, at 251 & n.105.

227. CONG. GLOBE, 28th Cong., 1st Sess., 115 (1844) (statement of Rep. McClernand).

228. Indeed, the massive unpopularity of President John Tyler (“His Accidency”), along with the refund issue (and, arguably, the gerrymandering of state legislatures under the Apportionment Act of 1842, ch. 47, 5 Stat. 491), had led to a loss of fifty-four House seats by the Whigs in the 1842 midterms. See Paul E. McGreal, *Unconstitutional Politics*, 76 NOTRE DAME L. REV. 519, 607-09, 616-19 (2001) (describing President Tyler's battles with Congress, his reluctant signing of Apportionment Act, and Whigs' loss of House majority).

229. Act of Feb. 16, 1844, ch. 2, 5 Stat. 651. The House passed the bill on January 8 so that it would coincide with the twenty-ninth anniversary of the Battle of New Orleans, CONG. GLOBE, 28th Cong., 1st Sess. 120 (1844); WARSHAUER, *supra* note 34, at 108-09, although it was not passed by the Senate for another five weeks, CONG. GLOBE, 28th Cong., 1st Sess. at 274.

230. Sofaer, *supra* note 34, at 251-52. Ultimately, Jackson received \$2732.90 rather than the \$5418 to which he was entitled under the bill. *Id.*

231. See RANKIN, *supra* note 222, at 25 (noting that, in effect, Congress upheld General Jackson's imposition of martial law).

232. For a comprehensive summary of the background, see generally DENNISON, *supra* note 35. See also generally John S. Schuchman, *The Political Background of the Political-Question Doctrine: The Judges and the Dorr War*, 16 AM. J. LEGAL HIST. 111 (1972) (considering conduct of Rhode Island judges in context of Dorr movement).

understanding of the scope of martial law.²³³

1. The Dorr War

Briefly, the history: The only colony not to rewrite its constitution at the time of the American Revolution, Rhode Island's suffrage had grown horribly restrictive by the late 1830s, to the point where the electorate consisted of less than forty percent of white males (in contrast, by 1840, every other state allowed all white men to vote).²³⁴ In October 1841, after attempts to reform from within had proven unsuccessful, a group of suffragists, led by Thomas Wilson Dorr, convened the "People's Convention" to draft a new state constitution.²³⁵ At the same time, Rhode Island's "omnipotent"²³⁶ General Assembly convened its own constitutional convention, proposing its own revised charter (the "Freemen's Constitution") that included limited concessions to the suffragists.²³⁷

The Freemen's Constitution was voted down later in the year, while the People's Constitution was overwhelmingly approved, albeit largely from voters who were not eligible to vote under the Royal Charter.²³⁸ The General Assembly refused to recognize the government elected in early 1842 under the People's Constitution, and instead enacted the so-called "Algerine Act" on March 28, 1842.²³⁹ The Act provided for a fine and imprisonment for anyone who voted in the forthcoming elections under the People's Constitution and declared that any person accepting office under the People's Constitution would be deemed guilty of treason and subject to life imprisonment.²⁴⁰ The competing elections went forward as planned, and Rhode Island, from April 20 to May 3, 1842, had two competing state governments.²⁴¹

On May 4, (Charter) Governor King requested military aid from the federal government to put down the "insurrection," to which President Tyler avoided a formal response (although his willingness to use the federal government—and military—to support the Charter government was obvious to all involved).²⁴² After a series of standoffs over the next six weeks, largely provoked by Dorr,²⁴³ the Charter General Assembly proclaimed martial law on June 26,²⁴⁴ after which there were mass arrests and reprisals.²⁴⁵ Tempers eventually cooled, however,

233. On the question of the interaction between the refund debates and the debate over martial law in Rhode Island, see WARSHAUER, *supra* note 34, at 189-91.

234. DENNISON, *supra* note 35, at 26-27.

235. COAKLEY, *supra* note 179, at 120.

236. *Id.*

237. DENNISON, *supra* note 35, at 32-52.

238. *Id.* at 52-59.

239. *Id.*

240. *Id.* at 69-71.

241. *Id.* at 76-77; COAKLEY, *supra* note 178, at 122.

242. See COAKLEY, *supra* note 178, at 122-23 (summarizing requests and Tyler's response).

243. DENNISON, *supra* note 35, at 85-86.

244. For the act proclaiming martial law, see *Luther v. Borden*, 48 U.S. (7 How.) 1, 8-9 (1849).

245. COAKLEY, *supra* note 178, at 125.

and the General Assembly, realizing that change was inevitable, proposed a new constitution in November 1842 that provided for near-universal male suffrage.²⁴⁶

2. *Luther v. Borden*

The incident that gave rise to the biggest legal challenge, however, happened soon after the imposition of martial law—on June 29, 1842—when militiamen under the command of Luther Borden broke into the home of Dorr supporter Martin Luther.²⁴⁷ Luther (and his mother, Rachel) eventually brought suit for trespass as a deliberate attempt (largely at Dorr's urging)²⁴⁸ to force judicial resolution of the question of the legitimacy of the People's Constitution (and the government elected thereunder).²⁴⁹

The lawsuits were filed in the U.S. Circuit Court for the District of Rhode Island, before the Circuit Justice who had himself authored *Mott*—Joseph Story.²⁵⁰ Although Story's decision is unreported, as summarized by Professor Dennison, Story relied on the Jackson precedent for the notion that martial law (and military jurisdiction) could extend beyond the soldiers themselves. He instructed the jury that legal liability could only be found if officers acted without authority and that the legislative imposition of martial law in Rhode Island had provided sufficient authority to justify Borden's actions.²⁵¹ In Story's words:

Martial law is the law of war. It is a resort to the military authority in cases where the civil authority is not sufficient for the maintenance of the laws, and it gives to legally appointed military officers summary power, for the purpose of restoring tranquility and sustaining the State. . . . They are to judge the degree of force which the necessity of the exigency demands; and there is no limit to their exercise of the power conferred upon them by the law martial, except the nature and character of the exigency.²⁵²

But Story's decisions in the two *Luther* cases, among the last of his distinguished judicial career, were ultimately pro forma—part of an apparently agreed upon strategy to provoke review by the full Supreme Court.²⁵³

246. *Id.*; DENNISON, *supra* note 35, at 98-99.

247. *Luther*, 48 U.S. (7 How.) at 34-35; DENNISON, *supra* note 35, at 12-13.

248. Dorr's own attempt to force Supreme Court review of the issue in late 1844, after his treason conviction was affirmed by the Rhode Island Supreme Court, failed. *Ex parte Dorr*, 44 U.S. (3 How.) 103, 106 (1844). See generally DENNISON, *supra* note 35, at 99-108 (summarizing Dorr's plight).

249. See DENNISON, *supra* note 35, at 141-48 (providing overview of interactions—and coordination—between Dorr and Luther).

250. Story was himself deeply conflicted over the legal issues raised by the Dorr War. See R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* 360, 365 (1985) (discussing conflict between Story's nationalist beliefs and his state sovereignty legal arguments).

251. See DENNISON, *supra* note 35, at 148-54 (summarizing proceedings before Justice Story).

252. WARSHAUER, *supra* note 34, at 191.

253. See DENNISON, *supra* note 35, at 154 (discussing Story's manufactured division of opinion). Chief Justice Taney, in the one paragraph devoted to Rachel Luther's case, took issue with such manipulation of the docket. *Luther v. Borden*, 48 U.S. (7 How.) 1, 47-48 (1849). See generally G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 28 n.134 (2005) (summarizing Story's

By the time *Luther v. Borden* reached the U.S. Supreme Court in early 1848,²⁵⁴ the political climate had changed markedly.²⁵⁵ Chief Justice Taney waited until after the 1848 elections to issue his decision²⁵⁶ that famously concluded that the Guarantee Clause's promise of federal protection against "domestic violence" was nonjusticiable and held that Congress had delegated to the President the authority to make that decision through the 1795 Militia Act.²⁵⁷ More to the point, Taney also suggested, albeit in dicta, that the Charter government's imposition of martial law had been lawful:

In relation to the act of the legislature declaring martial law, it is not necessary in the case before us to inquire to what extent, nor under what circumstances, that power may be exercised by a State. Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the State authorities. And, unquestionably, a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State, as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition.²⁵⁸

Thus, Taney—the same Taney who would so formalistically reject Lincoln's suspension of habeas corpus twelve years later²⁵⁹—combined two critical ideas into one holding: that the Militia Acts delegated to the President the authority to

feigned division—and Taney's rejection thereof).

254. For an explanation of why over four years lapsed between Story's November 15, 1843 decision and oral argument before the Supreme Court in late January 1848, see DENNISON, *supra* note 35, at 155-56; and George M. Dennison, *Thomas Wilson Dorr: Counsel of Record in Luther v. Borden*, 15 ST. LOUIS U. L.J. 398, 417-24 (1971).

255. See DENNISON, *supra* note 35, at 169-74 (noting changing circumstances during election year).

256. *Id.* at 170-71. The decision was issued on January 3, 1849.

257. *Luther*, 48 U.S. (7 How.) at 42-45.

258. *Id.* at 45. Taney also took a far longer view than Story had in *Mott* of the potential for subsequent judicial review, suggesting that if courts had the power to review the President's determination to call out the militia, "the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order." *Id.* at 43.

259. See *supra* Part II.A for a discussion of Taney's opinion in *Merryman*.

decide when use of the militia was necessary to protect the states against "domestic violence," and that martial law could lawfully include the subjection of civilians to military jurisdiction as a means of suppressing civil unrest.²⁶⁰ The majority opinion in *Luther*, in short, combined Story's *Mott* opinion with Story's *Luther* opinion and, in the process, embraced the Jacksonian conception of martial rule.

No one understood the significance of Taney's holding better than Justice Levi Woodbury (who replaced Story both on the Court and as Circuit Justice for Rhode Island), the lone dissenter in *Luther*.²⁶¹ Woodbury, who otherwise agreed with Taney's majority opinion, took serious issue with his discussion of martial law.²⁶² Instead, Woodbury was careful to distinguish among the different classes of martial law and believed that the "punitive" martial law adopted by the Charter General Assembly, itself an iteration of the Jacksonian view of martial rule, was wholly unwarranted (and anathema to American democracy):

It looks, certainly, like pretty bold doctrine in a constitutional government, that, even in time of legitimate war, the legislature can properly suspend or abolish all constitutional restrictions, as martial law does, and lay all the personal and political rights of the people at their feet. But bolder still is it to justify a claim to this tremendous power in any State, or in any of its officers, on the occurrence merely of some domestic violence.²⁶³

Martial law of the kind that existed in Rhode Island simply was not consistent with the U.S. Constitution, Woodbury argued, for "[b]y it, every citizen, instead of reposing under the shield of known and fixed laws as to his liberty, property, and life, exists with a rope round his neck, subject to be hung up by a military despot at the next lamp-post, under the sentence of some drum-head court-martial."²⁶⁴

And yet, that was the result championed by the *Luther* majority, a result that, as Dennison argues, "altered the American law of emergency powers,

260. Nor did it matter to Taney that the militia had never formally been called out. See *Luther*, 48 U.S. (7 How.) at 44 ("It is true that in this case the militia were not called out by the President. . . . The interference of the President, [though], by announcing his determination, was as effectual as if the militia had been assembled under his orders. And it should be equally authoritative.").

261. For a useful discussion of Woodbury's short but important tenure on the Court, see William D. Bader et al., *The Jurisprudence of Levi Woodbury*, 18 VT. L. REV. 261, 285-309 (1994).

262. *Luther*, 48 U.S. (7 How.) at 51 (Woodbury, J., dissenting) ("This difference, however, between me and my brethren extends only to the points in issue concerning martial law.").

263. *Id.* at 70. Woodbury also rejected the argument that the Charter Assembly had not actually imposed martial rule. See *id.* at 60 ("[T]hey not only said, *eo nomine*, that they established 'martial law,' but they put in operation its principles; principles not relating merely to imprisonment, like the suspension of the habeas corpus, but forms of arrest without warrant, breaking into houses where no offenders were found, and acting exclusively under military orders rather than civil precepts."). For a more detailed and eloquent analysis of Woodbury's dissent, see Mitchell Gordon, *Adjusting the Rear-View Mirror: Rethinking the Use of History in Supreme Court Jurisprudence*, 89 MARQ. L. REV. 475, 501-13 (2006); and Vladeck, *supra* note 25, at 173-74.

264. *Luther*, 48 U.S. (7 How.) at 62 (Woodbury, J., dissenting).

although few seemed aware of the change.”²⁶⁵ Nowhere is the evolution of martial law better encapsulated than an 1857 opinion by Attorney General Caleb Cushing, arguing that the Governor of Washington had improperly imposed martial law in response to a territorial conflict with Native Americans.²⁶⁶ The opinion was rife with suggestions, however, that martial law *was* compatible with the Constitution, when properly imposed by the federal government. Specifically, Cushing observed:

When martial law is proclaimed under circumstances of assumed necessity, the proclamation must be regarded as the statement of an existing fact, rather than the legal creation of that fact. In a beleaguered city, for instance, the state of siege lawfully exists, because the city is beleaguered; and the proclamation of martial law, in such case, is but notice and authentication of a fact,—that civil authority has become suspended, of itself, by the force of circumstances, and that by the same force of circumstances the military power has had devolved upon it, without having authoritatively assumed, the supreme control of affairs, in the care of the public safety and conservation. Such, it would seem, is the true explanation of the proclamation of martial law at New Orleans by General Jackson.²⁶⁷

Thus, martial law, on Cushing’s view, existed *irrespective* of the proclamation of such. Martial law existed if the civil authorities were unable to execute the laws, and if the military were necessary to preserve order, which is why the power to impose martial law followed from the power to call out the militia and the regular armed forces in the first place.

Finally, Cushing suggested an important—and previously neglected—issue by pointing to the relationship between martial law, on Jackson’s view, and habeas corpus:

How intimate the relation is, or may be, between the proclamation of martial law and the suspension of the writ of *habeas corpus*, is evinced by the particular facts of the case before me,—it appearing, as well by the report of the Governor as by that of Chief Justice Lander, that the very object, for which martial law was proclaimed, was to prevent the use of the writ in behalf of certain persons held in confinement by the military authority, on the charge of treasonable intercourse with hostile Indians. That, however, is but one of the consequences of martial law, and by no means the largest or gravest of those consequences; since, according to every definition of martial law, it suspends, for the time being, all the laws of the land, and substitutes in their place no law, that is, the mere will of the military commander.²⁶⁸

265. Dennison, *supra* note 216, at 76. “The decision in the *Luther* cases ratified what had been in process since the thirties, the establishment of prerogative governmental powers under an institutionalist bias.” *Id.* at 77.

266. See *Martial Law*, 8 Op. Att’y Gen. 365, 374 (1857) (stating that martial law is not legal power of Governor of Washington).

267. *Id.* at 374.

268. *Id.* at 373-74.

Although Judge Smalley nowhere cited Cushing's opinion in his decision in *Field*, the logic is entirely comparable. Relying on *Luther* and *Mott*, Smalley added the one piece missing from Cushing's analysis: the authority to call out the military—and to thereby *impose* martial law—was statutory. The only remaining question was whether the imposition of martial law was justified by necessity, and that decision, according to Chief Justice Taney (of all people), was the President's to make, and the President's alone.

D. Merryman's Alternative Justification

Of course, even if Smalley was correct in *Field*, it is still possible, if not likely, that Taney was correct in *Ex parte Merryman*,²⁶⁹ for, as Judge Smalley himself noted with respect to *Merryman*, "[t]he president had not then proclaimed martial law."²⁷⁰ But if Attorney General Cushing's opinion²⁷¹ was also correct, then a proclamation from President Lincoln was not itself determinative of whether martial law had been obtained in Baltimore. The only relevant question was who was in charge in Baltimore—the civilian authorities or the military?

Given the history traced above, that question answers itself. If not beforehand, then by May 13, when Union troops entered and occupied Baltimore, a state of martial law existed in and around the city.²⁷² Indeed, as Randall observed in 1926, "the emergency, as interpreted by the Lincoln administration, was precisely that for which the use of militia had been expressly authorized."²⁷³ If so, then when Taney considered Merryman's habeas petition in late May, Lincoln's suspension of habeas corpus was, in fact, pursuant to the existence of a state of martial law and was therefore authorized by Congress on the logic of *Mott* and *Luther*. Convoluted as it may seem, if *Field*'s reasoning was correct (which, as we will return to shortly, is a big "if"), and if Cushing's opinion concerning the existence of martial law was also correct, then Taney was wrong—not on the law, but on the facts.

V. FIELD'S MODERN SIGNIFICANCE: THE SCOPE OF MARTIAL LAW

Of course, the implications of this analysis are profoundly disturbing. Martial law exists whether it is proclaimed as such or not, and its existence, once proclaimed, is unreviewable.²⁷⁴ The potential substantive scope of martial law is, at once, breathtaking and difficult to reconcile with the most fundamental American constitutional precepts.

Nor has America's limited post-Civil War experience with martial law

269. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

270. *Ex parte Field*, 9 F. Cas. 1, 9 (C.C.D. Vt. 1862) (No. 4761).

271. 8 Op. Att'y Gen. 365.

272. See *supra* note 108 and accompanying text for a discussion of martial law in Baltimore.

273. RANDALL, *supra* note 3, at 243.

274. Presumably, in the absence of a proclamation, a court would have the power at least to decide whether martial law existed *de facto*.

provided much in the way of further clarification of the questions raised herein. Although federal troops have been called out pursuant to the Militia Acts on a number of occasions,²⁷⁵ most recently in the aftermath of the 1992 Rodney King riots in Los Angeles,²⁷⁶ martial law has only been imposed at the state and territorial levels in the 140 years since the Civil War. The Supreme Court, even when it has confronted the issue—as in *Moyer v. Peabody*,²⁷⁷ *Sterling v. Constantin*,²⁷⁸ and *Duncan v. Kahanamoku*²⁷⁹—has done little to clarify the prerequisites to the imposition of such crisis authority.²⁸⁰ It has, however,

275. See generally CLAYTON D. LAURIE & RONALD H. COLE, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1877-1945* (1997) (documenting military involvement in domestic disorders from Chicago riots of 1877 to Detroit riots of 1943); PAUL J. SCHEIPS, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1945-1992* (2005) (documenting military involvement in domestic disorders from desegregation of schools in 1950s to 1992 Los Angeles riots).

276. See Proclamation No. 6427, 57 Fed. Reg. 19,359 (May 1, 1992) (announcing President's demand for peaceful end to Los Angeles riots); Exec. Order No. 12,804, 57 Fed. Reg. 19,361 (May 5, 1992) (initiating use of military forces in furtherance of President's demand). The federal government considered the Insurrection Act but ultimately did not invoke its authority thereunder in its response to Hurricane Katrina. See Eric Lipton et al., *Political Issues Snarled Plans for Troop Aid*, N.Y. TIMES, Sept. 9, 2005, at A1 (noting political concern over "ousting a Southern governor of another party from command of her National Guard"). But see Nicholas Lemann, *Insurrection*, NEW YORKER, Sept. 26, 2005, at 67 (suggesting that Insurrection Act has most often been invoked to resolve race-based clashes between state and federal authority and arguing on that ground that Insurrection Act *should* have been invoked).

277. 212 U.S. 78 (1909). *Moyer* concerned the invocation of martial law by the Governor of Colorado, pursuant to an act of the Colorado legislature, to put down a miners' strike. *Moyer*, 212 U.S. at 82-83. Relying on the combination of the legislative act and the Governor's authority under the state constitution, Justice Holmes upheld the detention of the petitioning miner as a necessary incident to the valid imposition of martial law. *Id.* at 84-86. In describing the extent of the Governor's power to declare martial law, Holmes concluded:

[The act delegating authority to the Governor to suppress insurrections] means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist, and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief.

Id. at 84-85.

278. 287 U.S. 378 (1932). Chief Justice Hughes was at pains to emphasize that the Court in *Constantin* was *not* deciding any significant question as to the scope of martial law or the nature of the exigency proclaimed by the Governor of Texas. *Constantin*, 287 U.S. at 401-02.

279. 327 U.S. 304 (1946). Considering the scope of martial law in Hawaii during World War II, the Supreme Court made clear that it was not considering "the power of the military simply to arrest and detain civilians interfering with a necessary military function at a time of turbulence and danger from insurrection or war." *Duncan*, 327 U.S. at 314. Indeed, *Duncan* sought to distinguish between that type of martial law and the type at issue in Hawaii, where military courts had also been used to try civilian offenses. As Justice Black concluded, "[t]he phrase 'martial law' as employed in [the Hawaiian Organic Act], . . . while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals." *Id.* at 324.

280. *Constantin*, at least, *did* suggest that courts have the authority to review exigency, echoing

suggested that it did not actually mean what it said in *Ex parte Milligan*²⁸¹—i.e., that “[m]artial law . . . destroys every guarantee of the Constitution, and effectually renders the ‘military independent of and superior to the civil power’ Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.”²⁸²

For better or worse, American constitutional law *does* recognize the concept of martial rule, at least in dire emergencies when the civil authorities simply cannot function, as in New Orleans in 1815 and Baltimore in 1861. But, as importantly, the authority from which martial rule derives is the President’s authority to call out the military to respond to domestic crises, and that authority is *statutory*, and not constitutional. As such, as open-ended and limitless as martial rule might potentially be, there is no constitutional argument against Congress’s authority to interpose substantive limitations on the circumstances in which the military can be called out to enforce the laws.²⁸³ Congress has legislated in the field since 1792 and has placed both procedural and substantive preconditions on the President’s authority for just as long.²⁸⁴ Whether the current framework sufficiently delineates the circumstances wherein the military can be called out, and whether the substantive scope of the government’s authority is sufficiently reviewable, are the questions to which this Article now turns.

A. *The Modern Insurrection Act*

Today, the “Insurrection Act” is actually five different provisions of Title 10 of the United States Code,²⁸⁵ the two most important of which are 10 U.S.C. §§ 331 and 332. Indeed, partially in response to Hurricane Katrina, Congress rewrote § 333 as part of the 2007 Department of Defense Authorization Act.²⁸⁶ As relevant here, the provision currently provides for the domestic use of military forces in two situations. First, the President can call forth the military to:

(A) restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition in any

Justice Story’s conclusion to similar effect in *Mott*. See *Constantin*, 287 U.S. at 401 (“What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.”).

281. 71 U.S. (4 Wall.) 2 (1886).

282. *Ex parte Milligan*, 71 U.S. (4 Wall.) at 124-25.

283. For a summary of the current debate over the so-called “Commander-in-Chief override” and its interaction with Congress’s constitutional regulatory powers, see Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 TRANSNAT’L L. & CONTEMP. PROBS. 933, 950-63 (2007).

284. See *supra* Part IV.A for a discussion of the 1792, 1795, and 1807 Militia Acts.

285. 10 U.S.C.A. §§ 331-335 (West 1998 & Supp. 2007).

286. See John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 1076(a), 120 Stat. 2083, 2404-05 (2006) (pronouncing standard that enables discharge of military forces in response to domestic disturbances).

State or possession of the United States, the President determines that—

(i) domestic violence has occurred to such an extent that the constituted authorities of the State or possession are incapable of maintaining public order; and

(ii) such violence results in a condition described in paragraph (2)
²⁸⁷

Second, the military can be called forth to “suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy if such insurrection, violation, combination, or conspiracy results in a condition described in paragraph (2).”²⁸⁸

In addition, the Act requires the President to provide notice to Congress whenever he uses the authority under § 333(a)(1)(A)—to “restore public order”—“as soon as practicable after the determination and every 14 days thereafter during the duration of the exercise of that authority.”²⁸⁹ The Act also retains the dispersal proclamation requirement dating back to the 1792 Calling Forth Act, codified today at 10 U.S.C. § 334.²⁹⁰ Although the Conference Report accompanying the 2006 amendment to the Insurrection Act contains a detailed description of the amendment,²⁹¹ it provides no explanation for the amendment’s rationale. As some commentators have suggested, the amendment appears to be “more of a clarification than a modification. . . . [I]dentifying a particular set of causes for non-organized domestic violence (epidemic, terrorist attack, or natural disaster) and clearly indicating that the President can act in those cases [as well].”²⁹²

287. 10 U.S.C.A. § 333(a)(1)(A) (West Supp. 2007). “Paragraph (2)” provides that a “condition” triggering the statute is one that:

(A) so hinders the execution of the laws of a State or possession, as applicable, and of the United States within that State or possession, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State or possession are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(B) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

Id. § 333(a)(2).

288. *Id.* § 333(a)(1)(B).

289. *Id.* § 333(a)(1)(A), (b).

290. *Id.* § 334 (“Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents or those obstructing the enforcement of the laws to disperse and retire peaceably to their abodes within a limited time.”).

291. See H.R. REP. NO. 109-702, at 819-20 (2006) (Conf. Rep.) (discussing 2006 amendment to Insurrection Act).

292. Posting of Bobby Chesney to National Security Advisors, Amending the Insurrection Act, http://natseclaw.typepad.com/natseclaw/2006/11/amending_the_in.html (Nov. 8, 2006, 10:12 AM). To be fair, I do believe that the modifications to the Insurrection Act bespeak a dangerously broad delegation of authority to the President. I agree with Professor Chesney’s characterization of the 2006 amendment, though, because—as I have written previously—the statute *already* delegated such authority. See Vladeck, *supra* note 25, at 193 (arguing that “[a] reading of the Militia Acts suggests that

Regardless of the purpose of the 2006 amendment to the Insurrection Act, one point seems abundantly clear: Congress is both aware of its ability to provide procedural and substantive prerequisites to the exercise of the President's calling forth power, and it is willing to exercise that authority. Moreover, the new notice requirement—requiring the President to notify Congress when he calls out the military under § 333(a)(1)(A) “as soon as practicable after the determination and every 14 days thereafter,”²⁹³ suggests a restored role for congressional oversight, along the lines of the thirty-day (later sixty-day) time limit in the early iterations of the Insurrection Act.²⁹⁴

But the current form of the Insurrection Act otherwise provides no further insight into the central question at issue: whether there are preconditions to the imposition of martial rule, either before or after the military is called out. Instead, as summarized above, what precedents exist suggest that such conditions are not subject to statutory definition but rather are based on the particular exigencies of the situation, especially the extent to which civil authority is able effectively to function.

B. *The Reviewability Question*

In a way, the ill-defined nature of the point past which the Insurrection Act authorizes the imposition of martial rule puts that much more pressure on the ex post question of reviewability: are courts to have any role in determining whether, in fact, the exigency justified the supplanting of civilian authority? First, as Justice Story expressed in *Mott*:

If the fact of the existence of the exigency were averred, it would be traversable, and of course might be passed upon by a jury; and thus the legality of the orders of the President would depend, not on his own judgment of the facts, but upon the finding of those facts upon the proofs submitted to a jury.²⁹⁵

Second, as Chief Justice Hughes suggested in *Constantin*:

When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. To such a case the federal judicial power extends and, so extending, the court has all the authority appropriate to its exercise.²⁹⁶

In contrast, of course, is Story's own statement in *Mott* that “[t]he law does not provide for any appeal from the judgment of the President, or for any right

the President would have broad authority to respond to a crisis . . . by declaring martial law and suspending civil authority”).

293. 10 U.S.C.A. § 333(b).

294. See *supra* note 176 and accompanying text for a discussion of the time limits in the 1792, 1795, and 1861 Acts.

295. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 33 (1827).

296. *Sterling v. Constantin*, 287 U.S. 378, 398 (1932) (citation omitted). “What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.” *Id.* at 401.

in subordinate officers to review his decision, and in effect defeat it,"²⁹⁷ and Chief Justice Taney's statement in *Luther*, relied on by Judge Smalley in *Field*, that "if the President in exercising this power shall fall into error, or invade the rights of the people of the State, it would be in the power of Congress to apply the proper remedy. But the courts must administer the law as they find it."²⁹⁸

In an important recent article,²⁹⁹ Professor Amanda Tyler grappled with an analogous question in the context of the Constitution's Suspension Clause,³⁰⁰ expositing a forceful argument that satisfaction of the Suspension Clause's substantive preconditions—"Cases of Rebellion or Invasion [where] the public Safety may require it"³⁰¹—is justiciable and is not a political question.³⁰² While much of her analysis is applicable here, especially the suggestion that the real issue is the standard of review, and not the availability *vel non*,³⁰³ martial rule presents one additional problem that "pure" suspension claims do not: if, substantively, martial rule is premised on the inoperability of civilian authority, or at least civilian *judicial* authority, the courts may not even be physically able to hear a challenge to the condition, let alone to assess its substantive merits. Moreover, the point in time at which the civilian courts are able to reconvene and entertain challenges to the imposition of martial rule may well be the very point at which martial rule is, by definition, no longer appropriate.³⁰⁴ Thus, there is a substantial element of circularity inherent in the reviewability question.

But Story may have had it right in *Mott*—even if the substantive prerequisites for calling forth the military and imposing martial rule are not reviewable *at the time*, they may well be reviewable after the fact, either as part-and-parcel of a claim for damages³⁰⁵ or in the context of a defense to a criminal prosecution. After all, that judicial review is not always available is not, of itself,

297. *Mott*, 25 U.S. (12 Wheat.) at 31.

298. *Luther v. Borden*, 48 U.S. (7 How.) 1, 45 (1849).

299. Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333 (2006).

300. U.S. CONST. art. I, § 9, cl. 2.

301. *Id.*

302. Tyler, *supra* note 299, at 380-402. Tyler was largely responding to the argument advanced by Justice Scalia in his *Hamdi* dissent that, by literal operation of the Suspension Clause, courts will not be able to review suspensions for substantive constitutionality. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 577-78 (2004) (Scalia, J., dissenting) (finding review of habeas corpus suspension to be beyond Supreme Court's constitutionally mandated role).

303. See, e.g., Tyler, *supra* note 299, at 408-12 (arguing assertions of Suspension Clause are subject to judicial review).

304. Cf. Brandon L. Garrett & Tania Tetlow, *Criminal Justice Collapse: The Constitution After Hurricane Katrina*, 56 DUKE L.J. 127, 145-55 (2006) (summarizing collapse of criminal justice system after Hurricane Katrina and legal issues arising out of system's inoperability).

305. Of course, Justice Story was writing before *Preiser v. Rodriguez*, 411 U.S. 475 (1973), *Heck v. Humphrey*, 512 U.S. 477 (1994), and the current doctrinal view that damages actions cannot be used to collaterally attack detention. See generally *Docken v. Chase*, 393 F.3d 1024 (9th Cir. 2004) (reviewing cases establishing habeas corpus as exclusive federal vehicle for prisoners challenging fact or duration of detention). But whatever their scope, *Heck* and *Preiser* appear not to apply where detainees are no longer "in custody" for purposes of the federal habeas statute, cf. *Wilkinson v. Dotson*, 544 U.S. 74, 81-83 (2005) (holding challengers not seeking immediate or speedier release from custody are not constrained to habeas relief), as might well be the case *after* an emergency.

an argument against judicial review as a general matter.

Indeed, taking the 1815 New Orleans episode as one example, the legal regime worked largely as one might hope it would: Jackson imposed martial law given the widely recognized necessity for such; the process of the courts was suspended for the duration of the episode; and once civil authority was restored, the courts reviewed Jackson's actions and held him in contempt. Moreover, Congress subsequently refunded the contempt fine, expressing at least implicit after-the-fact ratification of the imposition of martial rule.³⁰⁶ In a way, then, America's first experience with martial rule might also be the best example of checks and balances operating as they should, even during crisis times.

C. *The Field Theory: Martial Law and Habeas Corpus Today*

Finally, coming full circle, we return to the potential implications of *Ex parte Field*.³⁰⁷ On *Field's* rationale, where martial law is validly imposed, suspensions of the writ of habeas corpus are necessarily coincident. Immediately, there are two odd inconsistencies between such a rule and contemporary constitutional jurisprudence: First, there is the "superclear" statement rule that the Supreme Court has adopted where Congress seeks to interfere with the courts' jurisdiction to entertain habeas petitions.³⁰⁸ Not only is the Insurrection Act silent as to habeas, but it is silent as to the very power at the heart of this debate and that from which the power to suspend habeas must derive—martial law.³⁰⁹ Furthermore, because the President's power to impose martial rule is, per the above analysis, entirely statutory, there can be no serious argument that the martial law power overrides the constitutional limitations imposed by the Suspension Clause. Instead, the question becomes whether the Insurrection Act validly *invokes* the Suspension Clause.

At the same time, Congress has repeatedly reenacted and amended the Insurrection Act under and in light of its prevailing understanding, as interpreted in *Mott*, *Luther*, and, later, the *Prize Cases*,³¹⁰ and as analogized to the state-

306. See also, e.g., *Milligan v. Hovey*, 17 F. Cas. 380, 383 (C.C.D. Ind. 1871) (No. 9605) (awarding nominal damages in suit brought by the detainee in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)).

307. 9 F. Cas. 1 (C.C.D. Vt. 1862) (No. 4761).

308. See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 299-300, 308-14 (2001) (finding suspension of habeas review to come only with express congressional statement of that intent); see also *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 11-16 (D.D.C. 2006) (analyzing whether Military Commissions Act of 2006 is valid suspension of habeas corpus, and, if so, whether it violates Suspension Clause); cf. Stephen I. Vladeck, Case Comment, *Non-Self-Executing Treaties and the Suspension Clause After St. Cyr*, 113 YALE L.J. 2007, 2007-09 (2004) (assessing some implications of *St. Cyr's* "superclear" statement rule).

309. In contrast, many state constitutions and statutes expressly refer to martial law. See Weida, *supra* note 22, at 1422 nn.214-15 (statutes); *id.* at 1421 n.208 (constitutions).

310. 67 U.S. (2 Black) 635 (1863). Although the *Prize Cases* turned largely on the 1795 and 1807 Militia Acts, the issue there was the President's authority to blockade the South at the outset of the Civil War and not the authority to supplant civilian authority with the military. For a discussion, see Vladeck, *supra* note 25, at 177-80.

authority cases from the early twentieth century.³¹¹ As such, it might be something of a stretch to believe that a court would invalidate a martial law-based suspension of habeas on the ground that the Insurrection Act is an insufficiently clear statement of congressional intent thereto.

Second, and perhaps more troubling, is the potential incompatibility of a martial law-based suspension of habeas with the Suspension Clause itself. While the Suspension Clause contemplates suspension “when in Cases of Rebellion or Invasion the public Safety may require it,” martial law could theoretically be imposed in response to a *natural* disaster, which would hardly be a case of “Rebellion” or “Invasion.” Indeed, to whatever extent this understanding of the Insurrection Act was implicit prior to 2006, the 2006 amendments codified this very distinction.³¹² And the Calling Forth Clause itself contemplates the calling out of the militia “to execute the Laws of the Union” in addition to the use of the militia to “suppress Insurrections” or “repel Invasions.”³¹³ This, ultimately, may be the critical point, for the near overlap of the provisions suggests that the use of the military “to execute the Laws of the Union” was *not* intended to also sanction the coincident suspension of habeas corpus.³¹⁴ At most, the overlap would suggest that the *Field* theory could only apply in cases where the military was employed to suppress insurrections and repel invasions—if it stretches that far in the first place.

I do not mean to leave this most important question unanswered. Rather, my hope is to shed new light on the idea at the heart of *Field*, to situate it within the prevailing statutory framework, and to explain how *Field*, if correct, would raise fundamental constitutional questions that have not heretofore been considered. What is more, *Merryman*, likely owing to Chief Justice Taney’s result-oriented approach, never seriously grappled with this alternative basis, one that might have allowed both Taney and the administration to save face. Much of what we today take for granted about the Suspension Clause likely cuts against the theory on which Judge Smalley relied in *Field*. That is not to say, though, that he was wrong based on then-extant precedent. To the contrary, it is entirely possible that *Field* was right in 1862 but did not survive *Milligan* and its jeremiad against martial rule.³¹⁵ That, perhaps, is the real question, but if one thing is clear, it is that no one to date has seriously sought out its resolution.

VI. CONCLUSION

In his separate opinion in *Ex parte Milligan*, Chief Justice Chase provided perhaps the most succinct explanation to be found in the *United States Reports* of the different types of military jurisdiction:

311. See *supra* notes 277-79 and accompanying text for a discussion of the state-authority cases.

312. 10 U.S.C. §§ 333-335 (West Supp. 2007).

313. U.S. CONST. art. I, § 8, cl. 15.

314. Cf. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 788-802 (1999) (surveying strength of constitutional arguments based on coordinated readings of distinct provisions).

315. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121-23 (1866) (accusing military tribunal of circumventing constitutional protections).

There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under MILITARY LAW, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as MILITARY GOVERNMENT, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated MARTIAL LAW PROPER, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.³¹⁶

This Article has been concerned almost exclusively with the last of these categories, and has suggested (1) that the authority to impose such “martial law” is constitutionally grounded in Article I’s Calling Forth Clause and has been delegated to the President by the “Insurrection Act”; (2) that the suspension of habeas corpus, if a necessary incident to the imposition of such martial law, would raise serious constitutional questions beyond those considered in *Field*; (3) that, if *Field* was correct, President Lincoln was not acting unilaterally whenever, during the Civil War, he suspended habeas corpus pursuant to the imposition or existence of martial law; and (4) that Lincoln *may* therefore have been acting pursuant to statutory authority when he suspended habeas corpus in and around Baltimore in early 1861. Chief Justice Taney may well have been correct that the President does not have inherent constitutional authority to suspend habeas corpus, but that may not have mattered in *Merryman* itself.

The harder question, going forward, is how courts might resolve conflicts between military and civilian authority after, or toward the end of, a crisis situation.³¹⁷ We can hope, however fervently, that the Republic never finds itself in such a trying and precarious situation. But there is simply no question that the

316. *Id.* at 141-42 (Chase, C.J., concurring in the judgment).

317. To borrow an example from Hollywood (and one that I have used before), at the end of the 1998 movie *The Siege* is a wonderful—if melodramatic—portrayal of such a conflict. Denzel Washington, playing the Assistant Special Agent in Charge of the New York Federal Bureau of Investigation (“FBI”) office, attempts to serve a writ of habeas corpus on (and arrest) Bruce Willis, who plays the General in command of the U.S. Army forces that had imposed martial rule in Brooklyn and detained thousands of Arab Americans after an escalating series of terrorist attacks. Willis initially has his troops train their weapons on Washington and the other FBI agents attempting to serve the writ, only to eventually order his troops to stand down and surrender himself to civilian authority. *THE SIEGE* (20th Century Fox 1998).

government would be empowered to act appropriately in such a crisis, and to act decisively. It is more the potential abuse of authority in the *aftermath* of the emergency,³¹⁸ and not during the emergency itself, that should give pause to even the most ardent defenders of prerogative power.

318. Cf. Stephen I. Vladeck, *Ludecke's Lengthening Shadow: The Disturbing Prospect of War Without End*, 2 J. NAT'L SECURITY L. & POL'Y 53 (2006) (summarizing problems raised by questions as to temporal scope of war powers).

