

Ex Parte Merryman

In the Federal Circuit Court for the District of Maryland

R. B. Taney, Chief Justice

April 1861

Hey, gang. This is such an unusual and historically interesting case that it had to be included in our study of War Powers. For starters, you will recall that in the early days the Supreme Court Justices also served contemporaneously as Circuit Court judges. This case did not reach the Supreme Court. It is a Circuit Court ruling (i.e., a trial court ruling) for the Federal Circuit Court sitting in Maryland. Yet, the judge on the case is none other than the Chief Justice of the Supreme Court, Roger B. Taney! As an aside, when he took office as Chief Justice, who do you think he replaced? John Marshall! Sit back and enjoy...this is a real eye opener!

Arrest of John Merryman and Proceedings Thereon.

1861, May 25 John Merryman, of Baltimore County, Md., was arrested, charged with holding a commission—as lieutenant in a company avowing its purpose of armed hostility against the Government; with being in communication with the rebels, and with various acts of treason. He was lodged in Fort McHenry, in command of Gen. Geo. Cadwalader. Merryman at once forwarded a petition to Chief Justice Roger B. Taney, reciting his arrest, and praying for a writ of *habeas corpus* and a hearing.

habeas corpus ad subjiciendum — a Latin phrase meaning “you should produce or have the person to be subjected to examination.” It sounds like a “bad thing” for “the person” who is the subject of it. However, in practice, it means the legal right of a person to not be arrested without reason or cause and to not be held or punished by government without getting a fair hearing in court and an opportunity to defend himself. **Please read Article I, §9, cl. 2 of your Constitution.** Can *habeas corpus* be suspended? When? By whom?

The writ was issued for the 27th, to which **General Cadwalader declined to respond, alleging, among other things, that he was duly authorized by the President of the United States to suspend the writ of *habeas corpus* for the public safety.** May 27, the Chief Justice issued a writ of attachment, directing United States Marshal Bonifant to produce the body of General Cadwalader on Tuesday, May 28th, "to answer for his contempt in refusing to produce the body of John Merryman." May 28th, the Marshal replied that he proceeded to the fort to serve the writ, that he was not permitted to enter the

gate, and that he was informed "there was not answer to his writ."

Before the Chief Justice of the Supreme Court...at Chambers.

Lest we forget, this situation presented a Constitutional crisis of a magnitude perhaps unknown before or since. Think about it. The Chief Justice of the Supreme Court, acting as a trial judge, issued an order to bring Merryman to his court to look into the basis for Merryman's detention. Less than two months into the Civil War, the Commander in charge of holding Merryman at Fort McHenry refused to surrender him based upon the President's order. Taney then ordered that Commander to be brought before him on contempt charges, but the Federal Marshall was not permitted to get beyond the gate at Fort McHenry. What would happen in the midst of Constitutional chaos?

The...Judiciary Act of 1789...renders effectual for the citizen the constitutional privilege of the *habeas corpus*. That act gives to the Courts of the United States...power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment...

The petition presents the following case: The petitioner resides in Maryland, in Baltimore county. While peaceably in his own house, with his family, it was at two o'clock, on the morning of the 25th of May, 1861, entered by an armed force, professing to act under military orders. He was then compelled to rise from his bed, taken into custody, and conveyed to Fort McHenry, where he is imprisoned by the commanding officer, without warrant from any lawful authority.

The commander of the fort, Gen. George Cadwalader, by whom he is detained in confinement, in his return to the writ, does not deny any of the facts alleged in the petition. He states that the prisoner was arrested by order of Gen. Keim, of Pennsylvania, and conducted as a prisoner to Fort McHenry by his order, and placed in his (Gen. Cadwalader's) custody, to be there detained by him as a prisoner.

A copy of the warrant, or order, under which the prisoner was arrested, was demanded by his counsel, and refused. And it is not alleged in the return that any specific act, constituting an offense against the laws of the United States, has been charged against him upon oath; but he appears to have been arrested upon general charges of treason and rebellion, without proof, and without giving the names of the witnesses, or specifying the acts, which, in the judgment of the military officer, constituted these crimes. **And having the prisoner thus in custody upon these vague and unsupported accusa-**

tions, he [that is, Commander Cadwalader] refuses to obey the writ of *habeas corpus*, upon the ground that he is duly authorized by the President to suspend it.

The case, then, is simply this: A military officer residing in Pennsylvania issues an order to arrest a citizen of Maryland, upon vague and indefinite charges, without any proof, so far as appears. Under this order his house is entered in the night; he is seized as a prisoner, and conveyed to Fort McHenry, and there kept in close confinement. And **when a *habeas corpus* is served on the commanding officer, requiring him to produce the prisoner before a Justice of the Supreme Court, in order that he may examine into the legality of the imprisonment, the answer of the officer is that he is authorized by the President to suspend the writ of *habeas corpus* at his discretion, and, in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ.**

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

No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the President claimed this power, and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise, for I had supposed [that all believe the privilege of the writ could not be suspended **except by act of Congress**].

When the conspiracy of which Aaron Burr was the head became so formidable, and was so extensively ramified to justify, in Mr. Jefferson's opinion, the suspension of the writ, he claimed, on his part, no power to suspend it, but communicated his opinion to Congress, with all the proofs in his possession, in order that Congress might exercise its discretion upon the subject, and determine whether the public safety required it. And in the debate which took place upon the subject, no one suggested that Mr. Jefferson might exercise the power himself, if, in his opinion, the public safety demanded it.

Having, therefore, regarded the question as too plain and too well settled to be open to dispute, if the commanding officer had stated that upon his own responsibility, and in the exercise of his own discretion, he refused obedience to the writ, I should have contented myself with referring to the clause in the Constitution, and to the construction it received from every jurist and

statesman of that day, when the case of Burr was before them. **But being thus officially notified that the privilege of the writ has been suspended under the orders and by the authority of the President, and believing as I do that the President has exercised a power which he does not possess under the Constitution, a proper respect for the high office he fills requires me to state plainly and fully the grounds of my opinion, in order to show that I have not ventured to question the legality of this act without a careful and deliberate examination of the whole subject.**

The clause in the Constitution which authorizes the suspension of the privilege of the writ of *habeas corpus* is in the **ninth section** of the **first article**.

This article is devoted to the Legislative Department of the United States, and has not the slightest reference to the Executive Department. It begins by providing "that all legislative powers therein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." And after prescribing the manner in which these two branches of the legislative department shall be chosen, it proceeds to enumerate specifically the legislative powers which it thereby grants, and legislative powers which it expressly prohibits, and, at the conclusion of this specification, a clause is inserted giving Congress "the power to make all laws which may be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any department or office thereof."

The power of legislation granted by this latter clause is by its word carefully confined to the specific objects before enumerated. But as this limitation was unavoidably somewhat indefinite, it was deemed necessary to guard more effectually certain great cardinal principles essential to the liberty of the citizen and to the rights and equality of the States by denying to Congress, in express terms, any power of legislation over them. It was apprehended, it seems, that such legislation might be attempted under the pretext that it was necessary and proper to carry into execution the powers granted; and it was determined that there should be no room to doubt, where rights of such vital importance were concerned, and, accordingly **this clause is immediately followed by an enumeration of certain subjects to which the powers of legislation shall not extend**; and the great importance which the framers of the Constitution attached to the privilege of the writ of *habeas corpus*, to protect the liberty of the citizen, is proved by the fact that its suspension, except in cases of invasion and rebellion, is first in the list of prohibited powers; and even in these cases the power is denied and its exercise prohibited unless the public safety shall require it. It is true that in the cases mentioned **Congress is of necessity the**

judge of whether the public safety does or does not require it; and its judgment is conclusive. But the introduction of these words is a standing admonition to the legislative body of the danger of suspending it and of the extreme caution they should exercise before they give the Government of the United States such power over the liberty of a citizen.

It is the second article of the Constitution that provides for the organization of the Executive Department, and enumerates the powers conferred on it, and prescribes its duties. And if the high power over the liberty of the citizens now claimed was intended to be conferred on the President, it would undoubtedly be found in plain words in this article. But there is not a word in it that can furnish the slightest ground to justify the exercise of the power.

The article begins by declaring that the Executive power shall be vested in a President of the United States of America, to hold his office during the term of four years, and then proceeds to prescribe the mode of election, and to specify in precise and plain words the powers delegated to him and the duties imposed upon him. And **the short term for which he is elected, and the narrow limits to which his power is confined, show the jealousy and apprehensions of future danger which the framers of the Constitution felt in relation to that department of the Government**, and how carefully they withheld from it many of the powers belonging to the executive branch of the English Government which were considered as dangerous to the liberty of the subject, and conferred (as that in clear and specific terms) those powers only which were deemed essential to secure the successful operation of the Government.

He is elected, as I have already said, for the brief term of four years, and is made personally responsible, by impeachment, for malfeasance in office. He is, from necessity, and the nature of his duties, the Commander—in—Chief of the army and navy, and of the militia, when called into actual service. But no appropriation for the support of the army can be made by Congress for a longer term than two years, so that it is in the power of the succeeding House of Representatives to withhold the appropriation for its support, and thus disband it, if, in their judgment, the President used or designed to use it for improper purposes. And although the militia, when in actual service, are under his command, yet the appointment of the officers is reserved to the States, as a security against the use of the military power for purposes dangerous to the liberties of the people, or the rights of the States.

So, too, his powers in relation to the civil duties and authority necessarily conferred on him are carefully restricted, as well as those belonging to his

military character. **He cannot** appoint the ordinary officers of Government, nor make a treaty with a foreign nation or Indian tribe without the advice and consent of the Senate, **and cannot** appoint even inferior officers unless he is authorized by an act of Congress to do so. **He is not empowered** to arrest any one charged with an offence against the United States, and whom he may, from the evidence before him, believe to be guilty; **nor can he authorize** any officer, civil or military, to exercise this power, for the fifth article of the amendments to the Constitution expressly provides that no person "shall be deprived of life, liberty, or property without due process of law;" that is, judicial process. And even if the privilege of the writ of *habeas corpus* was suspended by act of Congress, and a party not subject to the rules and articles of war was afterwards arrested and imprisoned by regular judicial process, he could not be detained in prison or brought to trial before a military tribunal, for the article in the Amendments to the Constitution immediately following the one above referred to — that is, the sixth article — provides that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

And the only power, therefore, which the President possesses, where the "life, liberty, or property" of a private citizen is concerned, is the power and duty prescribed in the third section of the second article, which requires "that he shall take care that the laws be faithfully executed." He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution as they are expounded and adjudged by the coordinate branch of the Government to which that duty is assigned by the Constitution. It is thus made his duty to come in aid of the judicial authority, if it shall be resisted by a force too strong to be overcome without the assistance of the Executive arm. But in exercising this power, he acts in subordination to judicial authority, assisting it to execute its process 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 privilege of the writ of *habeas corpus*, or arrest a citizen, except in aid of the judicial power. He certainly does not faithfully execute the laws if he takes upon

himself legislative power by suspending the writ of *habeas corpus* — and the judicial power, also, by arresting and imprisoning a person without due process of law. Nor can any argument be drawn from the nature of sovereignty, or the necessities of government for self—defense, in times of tumult and danger. The Government of the United States is one of delegated and limited powers. It derives its existence and authority altogether from the Constitution, and neither of its branches — executive, legislative or judicial — can exercise any of the powers of government beyond those specified and granted. For the tenth article of the amendments to the Constitution, in express terms, provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

...Blackstone, in his *Commentaries*, (1st vol., 137,) states it in the following words:

"To make imprisonment lawful, it must be either by process from the courts of judicature or by warrant from some legal officer having authority to commit to prison."

And the people of the United Colonies, who had themselves lived under its protection while they were British subjects, were well aware of the necessity of this safeguard for their personal liberty. And no one can believe that in framing the Government intended to guard still more efficiently the rights and the liberties of the citizens against executive encroachment and oppression, they would have conferred on the President a power which the history of England had proved to be dangerous and oppressive in the hands of the Crown, and which the people of England had compelled it to surrender after a long and obstinate struggle on the part of the English Executive to usurp and retain it...

While the value set upon this writ in England has been so great that the removal of the abuses which embarrassed its employment have been looked upon as almost a new grant of liberty to the subject, it is not to be wondered at that the continuance of the writ thus made effective should have been the object of the most jealous care. Accordingly, no power in England short of that of Parliament, can suspend or authorize the suspension of the writ of *habeas corpus*. I quote again from Blackstone (1 Comm., 136:) "But the happiness of our Constitution is, that it is not left to the executive power to determine when the danger of the State is so great as to render this measure expedient. It is the Parliament only or legislative power that, whenever it sees proper, can authorize the Crown, by suspending the *habeas corpus* for a short and limited time, to imprison suspected persons without giving any reason for so doing."

And if the President of the United States may suspend the writ, then the Constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen than the people of England have thought it safe to entrust to the Crown — a power which the Queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign even in the reign of Charles the First.

But I am not left to form my judgment upon this great question from analogies between the English Government and our own, or the commentaries of English jurists, or the decisions of English courts, although upon this subject they are entitled to the highest respect, and are justly regarded and received as authoritative by our courts of justice. To guide me to a right conclusion, I have the *Commentaries on the Constitution of the United States* of the late Mr. Justice Story, not only one of the most eminent jurists of the age, but for a long time one of the brightest ornaments of the Supreme Court of the United States, and also the clear and authoritative decision of that Court itself, given more than half a century since, and conclusively establishing the principles I have above stated. Mr. Justice Story, speaking in his *Commentaries*, of the *habeas corpus* clause in the Constitution, says:

"It is obvious that cases of a peculiar emergency may arise, which may justify, nay, even require, the temporary suspension of any right to the writ. But as it has frequently happened in foreign countries, and even in England, that the writ has, upon various pretexts and occasions, been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design, and sometimes because they were forgotten, **the right to suspend it is expressly confined to cases of rebellion or invasion, where the public safety may require it.** A very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused in bad times to the worst of purposes. Hitherto no suspension of the writ has ever been authorized by Congress since the establishment of the Constitution. **It would seem, as the power is given to Congress to suspend the writ of *habeas corpus* in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body.**"

And Chief Justice Marshall, in delivering the opinion of the Supreme Court in the case *Ex parte Bollman and Swartwout*, uses this decisive language:

"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.** That question depends on political considerations, on which the Legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws."

I can add nothing to these clear and emphatic words of my great predecessor.

But the documents before me show that the military authority in this case has gone far beyond the mere suspension of the privilege of the writ of *habeas corpus*. It has, by force of arms, thrust aside the judicial authorities and officers to whom the Constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers. For at the time these proceedings were had against John Merryman, the District Judge of Maryland — the commissioner appointed under the act of Congress — the District Attorney and the Marshal, all resided in the city of Baltimore, a few miles only from the home of the prisoner. Up to that time there had never been the slightest resistance or obstruction to the process of any Court or judicial officer of the United States in Maryland, except by the military authority. And if a military officer, or any other person, had reason to believe that the prisoner had committed any offence against the laws of the United States, it was his duty to give information of the fact and the evidence to support it to the District Attorney, and it would then have become the duty of that officer to bring the matter before the District Judge or Commissioner, and if there was sufficient legal evidence to justify his arrest, the Judge or Commissioner would have issued his warrant to the Marshal to arrest him, and, upon the hearing of the party, would have held him to bail, or committed him for trial, according to the character of the offense as it appeared in the testimony, or would have discharged him immediately if there was not sufficient evidence to support the accusation. There was no danger of any obstruction or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military. And yet, under these circumstances, a military officer, stationed in Pennsylvania, without giving any information to the District Attorney, and without any application to the judicial authorities, assumes to himself the judicial power in the District of Maryland; undertakes to decide what constitutes the crime of treason or rebellion; what evidence (if, indeed, he required any) is sufficient to support the accusation and justify the commitment; and commits the party, without having a hearing even before himself, to close custody in a strongly garrisoned fort, to be there held, it would seem, during the pleasure of those who committed him.

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

And these great and fundamental laws, which Congress itself could not suspend, have been disregarded and suspended, like the writ of *habeas corpus*, by a military order, supported by force of arms. Such is the case now before me; and I can only say that if the authority which the Constitution has confided to the judiciary department and judicial officers may thus upon any pretext or under any circumstances be usurped by the military power at its discretion, the people of the United States are no longer living under a Government of laws, but every citizen holds life, liberty, and property at the will and pleasure of the army officer in whose military district he may happen to be found.

In such a case my duty was too plain to be mistaken. **I have exercised all the**



power which the Constitution and laws confer on me, but that power has been resisted by a force too strong for me to overcome.

It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him. **I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the Circuit Court of the United States for the District of Maryland, and direct the clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer, in fulfilment of his constitutional obligation to "take care that the laws be faithfully executed," to determine**

what measures he will take to cause the civil process of the United States to be respected and enforced...

Given that Justice Taney could not himself overcome the military force of the Union, it would appear he attempted to embarrass President Lincoln into “doing the right thing.”

NOTE: Abraham Lincoln is likely at the top of the list of the most revered Presidents. He rounded up 12,000 citizens, disregarded habeas corpus and threw away the key during the Civil War. He won “his” war.