Review Essay

Placing Merryman at the Center of Merryman

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Brian McGinty’s *The Body of John Merryman: Abraham Lincoln and the Suspension of Habeas Corpus* and Jonathan W. White’s *Abraham Lincoln and Treason in the Civil War: The Trials of John Merryman* explore the same well-trodden ground: President Abraham Lincoln’s clash with Chief Justice Roger Taney over Lincoln’s suspension of the writ of habeas corpus during the Civil War. The story is a familiar one to students of Civil War legal and political history. The U.S. Constitution permits the suspension of the writ of habeas corpus—an ancient legal protection designed to ensure that a prisoner’s detention can always be reviewed by a judge—in times of national crisis. Although the Suspension Clause is located in Article I of the Constitution, which lays out the powers belonging to the United States Congress, the Constitution is otherwise silent on the question of where the power of suspension resides. During the Civil War, President Lincoln suspended the writ on his own authority, without prior congressional authorization. Lincoln contended that the president’s authority as commander in chief necessarily included the power to suspend the writ, as only the executive branch could move quickly enough to act decisively in times of national emergency. Congress eventually sanctioned the president’s suspension of the writ, but Chief Justice Roger Taney condemned Lincoln’s self-aggrandizing interpretation of the Suspension Clause in *Ex parte Merryman* in May 1861. After General George Cadwalader, honoring Lincoln’s order suspending the writ, refused to respond to Taney’s command to produce the body of accused traitor John Merryman in federal court, Taney denied the legitimacy of Lincoln’s
actions, arguing that the president had violated the Constitution, both in usurping legislative powers and in denying Merryman due process of law. Lincoln, in his infinite wisdom, chose not to engage Taney on the habeas issue, pointedly ignoring the chief justice’s decision.

As White points out, Lincoln’s confrontation with Taney over the suspension of habeas corpus has hardly been ignored by historians. White and McGinty both promise new insights through the mining of new sources. Instead of “rel[y]ing] almost entirely on the published reports of the case,” these new works base their conclusions “on the original manuscript court records” (White, 2). In some respects, Civil War era legal history has remained insulated from the trends that have gripped the larger field of legal history in recent years. Although there are some exceptions in this regard, the legal history of the Civil War still focuses almost exclusively on the perspective of those in political power and on the decision-making of the elite. White correctly insists that looking more thoroughly at the archival records can shed new light on old questions and correct misimpressions that result from telling the legal history of the Civil War from a “top down” perspective (White, 117).

Of the two books, McGinty’s is less scholarly and more readable. McGinty’s account of the Merryman proceeding departs very little from previous scholarly accounts. McGinty presents Merryman as a conflict between two great legal minds: Lincoln and Taney. As McGinty puts it, “both Taney and Lincoln were lawyers through and through” (McGinty, 15). He traces the great debate on the issue of presidential power to suspend civil liberties in wartime through the lens of personality, focusing on the chief justice and the president as individuals. McGinty’s great strength lies in his ability to tell an engrossing story. The reader is drawn in to the gripping narrative of the potential showdown between Lincoln and Taney, with the fate of the broken nation and constitutional liberty hanging in the balance. McGinty’s narrative retreads familiar ground when he champions the president’s expansive views of presidential power in times of crisis over the petty legalism of the chief justice, and his book is better suited for an undergraduate or general reader audience than is White’s.

In the end, McGinty paints Taney as bold and rebellious—up to a point. As a southern sympathizer but not a secessionist, Taney challenged the president’s authority directly in Merryman, even though Lincoln’s suspension of habeas corpus came in response to full-scale de-

1. McGinty’s source base also includes manuscripts, although White’s archival research is far more exhaustive.
fiance in the state of Maryland. Maryland’s refusal to let Union troops pass through Baltimore, which Lincoln honored, precipitated a new demand to prevent troops from marching through the state. Such a concession would have prevented Lincoln’s soldiers from reaching (and defending) the nation’s capital. Merryman himself had been involved in the burning of bridges so as to prevent Union troops from entering the state. Even though Merryman’s case was hardly a sympathetic one, Taney refused to abide by the president’s directive suspending the writ of habeas corpus. In issuing the *Merryman* opinion and ensuring that it had a wide circulation, the chief justice sought to halt what he saw as the president’s abuse of his authority. Taney even sought to increase the prominence of his opinion by engaging in a judicial sleight of hand, representing that he had heard the case in his capacity as chief justice of the United States rather than as a sitting circuit court judge, thus giving Taney’s views an increased imprimatur of authority. As McGinty puts it, Taney “knew full well that a decision made by the highest judicial officer in the United States would command more attention than that of a circuit judge” (McGinty, 80).

But then Taney lost his nerve. Taney never ordered Merryman’s release following his opinion. He never ordered the arrest of Merryman’s jailer or the president himself. He never precipitated a direct, head-on collision with Lincoln, which meant that the president was ultimately free to ignore Taney’s dictates. Although Taney wrote drafts of hostile opinions on controversial wartime issues such as “judicial salaries, legal tender, and conscription that he could use in court if and when those issues came before him for review” (McGinty, 159), he did not force a showdown with the president. McGinty does not fully explain why Taney’s defiance extended only so far, but one might conclude that Taney’s position as a Supreme Court justice ultimately placed him in a reactive rather than proactive posture when it came to sorting out the constitutional problems precipitated by the Civil War.

McGinty also devotes his attention to President Lincoln’s views on the habeas controversy. Lincoln, according to McGinty, considered Taney’s views when the *Merryman* opinion crossed his desk. Instead of focusing on the placement of the Suspension Clause in Article I of the Constitution, the narrow issue that consumed Taney,2 Lincoln’s

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2. To be sure, McGinty points out, relying on Reverdy Johnson’s defense of Lincoln’s actions, that the Suspension Clause is found in Article I, § 9, rather than in Article I, § 8. Section 8 specifies Congress’s powers, but § 9 sets limits on the powers of the federal government, some of which seem to pertain to branches other than the legislative department.
ultimate response to Taney’s arguments expanded the scope of the inquiry. In his July 4, 1861, message to Congress, Lincoln cast the issue as the very survival of the Union, the Constitution, and the basic notion of a self-governing democracy. McGinty traces the development of Lincoln’s thoughts in drafting the message, underscoring that Lincoln considered it his paramount duty to suspend the writ of habeas corpus in order to carry out the greater task of executing the law and saving the Union. McGinty clearly favors Lincoln’s position on the habeas issue, even over the views of his more legalistic supporters, Attorney General Edward Bates and Senator Reverdy Johnson.

In McGinty’s account, Lincoln appears to be far wiser than his contemporaries: “Lincoln’s own interrogative argument—‘Are all the laws, but one, to go unexecuted, and the government itself go to pieces lest that one be violated?’—was more powerful than either of the other two opinions . . . Lincoln’s question would be remembered by history” (McGinty, 116). Lincoln’s views were sustained by a compliant Congress and a marginally supportive Supreme Court in the *Prize Cases*, but his ultimate vindication came at the hands of the American people, who expressed their assent by reelecting the president in 1864. In McGinty’s opinion, Lincoln managed to navigate the difficulties of his office with grace, refusing to defer unduly to the chief justice’s interpretation of his constitutional duties, thus ensuring that “‘a nation, conceived in liberty, and dedicated to the proposition that all men are created equal’ [can] long endure” (McGinty, 196). In McGinty’s familiar retelling, the president emerges as the hero and the chief justice as the villain of the piece.

Both McGinty and White are fascinated by the question of whether Taney issued his opinion in *Merryman* in his capacity as a circuit court judge or as a Supreme Court justice. McGinty insists convincingly that Taney acted as an *individual* Supreme Court justice, exercising original jurisdiction in a habeas case pursuant to Section 14 of the Judiciary Act of 1789. White is less than persuasive when he contends to the contrary that “the fact that the records are still with the clerk’s office at the U.S. District Court . . . rather than in the records of the Supreme Court . . . is clear evidence of *Ex parte Merryman*’s provenance as a lower federal court decision” (White, 42). The fact remains that Taney exploited the fuzziness of the law on the issue of federal judges’ authority to hear habeas corpus petitions. Both McGinty and White might have benefited from increased attention to the normal functioning of habeas petitions in the Civil War era. Confusion had surrounded the issue of the Supreme Court’s ability to assert jurisdiction in habeas cases since the tortured reasoning in the 1807 Marshall-Court decision in *Ex parte*
Bollman, as White points out (White, 41). As Charles Fairman’s study of the Supreme Court during Reconstruction has demonstrated, this very issue occupied the attention of the Supreme Court in the late-1860s, when Chief Justice Salmon P. Chase even reexamined *Marbury v. Madison*’s basic holding that the original jurisdiction of the Supreme Court cannot be increased in the context of habeas cases.\(^3\)

White’s book is an impressive scholarly achievement, breaking new ground in the familiar territory of Lincoln’s controversial decision to suspend habeas corpus protections during the Civil War. Rather than focusing his attention primarily on Lincoln and Taney, White points his historical lens at John Merryman himself, federal prosecutors in the attorney general’s office, and little-known congressmen who drafted legislation designed to thwart the president’s attempts to suspend not just the writ of habeas corpus but also the operation of civilian tribunals and the constitutional protections afforded to criminal defendants. Much like Mark Neely before him, White aims to tell the story of Lincoln’s civil liberties violations from a ground-up perspective, training his eye on those who influenced, implemented, or responded to the president’s policies and not on Lincoln himself. This approach affords White the opportunity to uncover new and important details about Merryman’s legal battles, based on a prodigious archival research effort. In burning Maryland bridges, Merryman acted under orders from the pro-secession forces in his state, White tells us. Merryman also fought back against his oppressors, filing a civil suit against his jailer, General Cadwalader, in state court for $50,000, presumably under a common-law theory of false imprisonment (White does not mention the basis of Merryman’s complaint). This suit caused no small amount of trepidation in the Lincoln administration; Cadwalader’s counsel told Secretary of War Edwin Stanton that the case “‘[i]nvolv[ed] grave questions; & is likely to become a leading case’” (White, 90). The administration struck back, urging Congress to immunize officials’ actions from private suit, making people under treason indictments ineligible for presidential pardon, and most directly, causing the Northern Central Railway Company to file a suit of its own against Merryman for damages arising out of his bridge-burning activities.

White’s painstaking attention to detail is on particular display in Chapter 3, in which he reveals the difficulty that the attorney general, his subordinates, and local U.S. attorneys faced in proving treason against the disloyal during the American Civil War. By carefully

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reading the correspondence within the attorney general’s office, White is able to re-create the day-to-day struggle of Attorney General Edward Bates in prosecuting treason against the United States. As White demonstrates, these attorneys were beset with problems, ranging from inadequate personnel, disloyal or tepidly loyal prosecutors, judges, and juries, and a bewilderingly chaotic system of military arrests for civilian crimes that the attorney general was ultimately powerless to prevent. White also presents a convincing reinterpretation of the Habeas Corpus Act of 1863. While most historians, including McGinty, have read Congress’s actions as endorsing Lincoln’s unilateral suspension of habeas corpus in 1861, White argues that the act was the product of congressional compromise between the president’s supporters and detractors. As such, the act sanctioned the president’s suspension of the writ but also sought to put a stop to the Lincoln administration’s alleged abuses by commanding the president to submit lists of prisoners and the charges against them. The law also authorized the removal of damage suits against federal officials to federal court and provided defendant jailers with a defense to such charges if they had acted under official orders, although Congress refused to bar such suits altogether. Congress’s Habeas Act accordingly presented Lincoln with considerable obstacles, which the president overcame by simply ignoring its reporting requirements.

But White’s analysis falters in places, particularly when it comes to critical legal intricacies. The Habeas Corpus Act of 1863 permitted the removal of suits against federal officers to federal court. White claims that removal was possible in Merryman’s suit because “Cadwalader was a Pennsylvanian” (White, 92)—that is, due to federal court jurisdiction based on diversity of citizenship. But in fact the 1863 act sanctioned removal to federal court regardless of the diversity of citizenship of the parties; federal court jurisdiction was premised on the existence of a federal question, based on the interpretation of the federal habeas act. Prior to 1875, there was no general federal question jurisdiction in the federal courts; Congress had to sanction such jurisdiction through individual statutes, as it did in the Habeas Act. What did this paucity of nineteenth-century federal court jurisdiction mean in the context of the Civil War? Merryman’s suit against Cadwalader suggests that the relative anemia of federal court jurisdiction

5. The statute also strikingly authorized federal court jurisdiction on the basis of the existence of a federal question in a defendant’s answer, a departure from today’s rule that jurisdiction must exist on the face of the complaint.
proved to be a substantial barrier to the robust functioning of the federal government. Litigants could and did use state court proceedings to stymie federal imperatives, and state judges often proved hostile to national authority in this area (White, 119). White’s book could have benefited in this regard from attention to Alison LaCroix’s recent work on federal court jurisdiction as the battleground of early American federalism. As White mentions in passing but does not pursue, the subsequent development of the law of “qualified immunity” is crucial in explaining federal officials’ exposure to potential liability based on their official actions during the Civil War (White, 121).

At the same time, White’s take on the grounds of Merryman’s potential defense to a treason charge is not entirely convincing. According to White, in order to sustain a treason charge against Merryman, the government would have to prove that he “had acted with traitorous intent,” rather than with the avowed purpose of defending his state against federal invasion. Merryman’s counsel could accordingly have defended his suit, White contends, by arguing that his conduct in destroying railroads did not amount to an overt act of treason, as required by the Treason Act of 1790 and the Constitution itself. According to White, because “the federal courts has consistently narrowed the definition of treason between 1807 and 1851 to exclude riots unless they were part of a larger treasonable conspiracy ‘for the purpose of overthrowing the government by force and arms,’” a treason charge against Merryman would be difficult to sustain (White, 60, 61). This was because it was not clear that Merryman and his fellow Maryland bridge burners had acted to “organize a conspiracy that sought to overthrow the government.” In other words, White argues, the government would have to demonstrate not just that Merryman intended to burn railroad bridges in order to protect his home state from potential federal invasion, but that he had planned to overthrow the government in undertaking these actions. But despite White’s assertions to the contrary, based on a thin evidentiary basis (White, 142 n. 61), the law of treason had not narrowed to this extent. Whether Merryman’s attorneys characterized his actions as defense of his home state against Yankee marauders or as active overthrow of the U.S. government, either intent was sufficient to prove treason, as Merryman’s overt acts took place on April 19, 1861, after Lincoln had called 75,000 troops to defend against the armed rebellion at Fort Sumter. Thwarting the national government’s efforts to suppress armed insurrection could not reasonably be characterized

as benign self-defense. If U.S. Attorney William Price complained to Attorney General Bates about the problems of proving treason in Merryman’s case, these complications arose because the tepid Unionism of Maryland judges, juries, and prosecutors made them difficult to convince and not because of technical deficiencies in the law of treason.

But these are minor quibbles. White has written a fine book that uses previously untapped resources to shed new light on old questions. His focus on Merryman himself rather than on the larger personalities of Lincoln and Taney does indeed give us a new perspective on civil liberties in the Civil War. White also connects his story to some of the larger questions of Civil War legal history, including the inadequacy of ordinary judicial proceedings for the weighty issues engendered by the war and the proper scope of the president’s authority in times of extreme crisis. But one wishes he had engaged with some of the broader concerns of nineteenth-century legal historians. White’s discussion of historiography is confined solely to Civil War topics. But what is the significance of the Merryman episode in the larger scope of legal and constitutional developments in the nineteenth century? This query aside, White has broken new ground in the field of Civil War history, correcting the impulse to tell the story of Ex parte Merryman solely from the perspective of the president and the chief justice. While Brian McGinty’s book tells the tale in a familiar way, the engaging quality of his narrative makes his work an ideal choice for undergraduates and general readers alike.