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Merryman Redux: A Response to Professor John Yoo

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In a recent issue of *Chapman Law Review*, Professor John Yoo wrote, “While FDR did not join *Lincoln’s blatant defiance in declining to obey a judicial order*, [Roosevelt’s] administration regularly proposed laws that ran counter to Supreme Court precedent”¹ My focus in this short, responsive Article is on Professor Yoo’s specific claim regarding Lincoln.

Professor Yoo’s claim is odd—isn’t it? He tells us that Lincoln passively “declin[ed] to obey a judicial order,” but also characterizes Lincoln’s passivity as “blatant defiance.”² Odd. He cites to no particular case, and he cites to no specific judicial order in any case. Very odd. We are all just supposed to know that the case was *Ex parte Merryman*,³ a Civil War case, and the purported judicial order was issued by that old curmudgeon: Chief Justice Roger Brooke Taney.⁴ In a prior publication, in 2015, Professor Yoo wrote that Lincoln had “ignored Taney’s order releasing

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¹ John Yoo, *Franklin Roosevelt and Presidential Power*, 21 CHAP. L. REV. 215, 222 (2018) (emphasis added) (footnote omitted). Professor Yoo has a long line of scholarship making this or similar claims. See John Yoo, *Judicial Supremacy Has Its Limits*, 20 TEX. REV. L. & POL. 1, 24 (2015); John Yoo, *Lincoln and Habeas: of Merryman and Milligan and McCordle*, 12 CHAP. L. REV. 505, 513 (2009); John Yoo, *Lincoln at War*, 38 VT. L. REV. 3, 17–20 (2013); John Yoo, *Merryman and Milligan (and McCordle)*, 34 J. SUP. CT. HIST. 243, 244 (2009); see also Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 820 (2013).

² What would constitute “blatant defiance”? If Lincoln had ordered the Army to arrest the Chief Justice due to the latter’s having issued the *Merryman* opinion that could be fairly characterized as defiance. For a fuller discussion of what constitutes “defiance,” see Seth Barrett Tillman, *Ex parte Merryman: Myth, History, and Scholarship*, 224 MIL. L. REV. 481, 511–13 (2016). Note, several paragraphs or substantial parts of paragraphs of this Article were first published in my 2016 *Military Law Review* publication.

³ See *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.); 4 A COLLECTION OF IN CHAMBERS OPINIONS BY THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 1400–12 (Cynthia Rapp & Ross E. Davies comps., 2004), <http://tinyurl.com/judtw8q> [<http://perma.cc/BM52-FKXU>].

⁴ 4 A COLLECTION OF IN CHAMBERS OPINIONS, *supra* note 3, at 1400.

Merryman.”⁵ “Ignored”—no mention of defiance here. On another occasion, in 2009, Professor Yoo characterized Lincoln’s response to *Merryman* as “outright presidential defiance.”⁶ But here the passive language of “*ignoring*” and “*declining to obey*” was absent. Now, in 2018, Professor Yoo says it is both.⁷ We are down the rabbit hole.

So, which is it?

[A] *Lincoln passively declined to obey a judicial order;*

[B] *Lincoln actively defied the Chief Justice; or*

[C] *Both.*

The correct answer is [D] *None of the Above.*

In 2016, I made an effort to explain why the standard narrative (i.e., the narrative put forth by Professor Yoo and many others) surrounding *Merryman* is wrong. In other words, the standard restatement of the facts, reasoning, and disposition of *Merryman* appearing in many (if not most) law review articles is wrong.⁸ Some people have noticed,⁹ and some people (apparently)

⁵ Yoo, *Judicial Supremacy Has Its Limits*, *supra* note 1, at 24 (emphasis added) (internal citation omitted).

⁶ Yoo, *Lincoln and Habeas: Of Merryman and Milligan and McCardle*, *supra* note 1, at 507.

⁷ See Yoo, *Franklin Roosevelt and Presidential Power*, *supra* note 1, at 222.

⁸ See Tillman, *supra* note 2, at 483. I do not claim to be the first to have noticed the many significant problems with the standard legal narrative. See, e.g., *id.* at 497 n.45 (citing BRIAN MCGINTY, *THE BODY OF JOHN MERRYMAN: ABRAHAM LINCOLN AND THE SUSPENSION OF HABEAS CORPUS* 91–92 (2011); BRUCE A. RAGSDALE, *EX PARTE MERRYMAN AND DEBATES ON CIVIL LIBERTIES DURING THE CIVIL WAR* 4 (2007); JACK STARK, *PROHIBITED GOVERNMENT ACTS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 48 (2002); Frank I. Michelman, *Living with Judicial Supremacy*, 38 *WAKE FOREST L. REV.* 579, 595 n.69 (2003). See generally JONATHAN W. WHITE, *ABRAHAM LINCOLN AND TREASON IN THE CIVIL WAR: THE TRIALS OF JOHN MERRYMAN* (2011). For an entirely different approach to *Merryman*, see generally David Farnham, “*A High and Delicate Trust*”: *How Ignorance and Indignation Combined to Expand President Lincoln’s Claimed Power to Suspend Habeas Corpus in the Case of John Merryman*, 24 *J. S. LEGAL HIST.* 109 (2016).

⁹ Prominent commentators, in law and other fields, discussing, quoting, or citing my 2016 *Military Law Review* article include: RANDY E. BARNETT & JOSH BLACKMAN, *CONSTITUTIONAL STRUCTURE: CASES IN CONTEXT* 532 & n.4 (3d ed. 2018); PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 314 n.89, 317 & n.90 (7th ed. 2018); LOUIS FISHER, *SUPREME COURT EXPANSION OF PRESIDENTIAL POWER: UNCONSTITUTIONAL LEANINGS* 41 n.124 (2017); ERIC M. FREEDMAN, *MAKING HABEAS WORK: A LEGAL HISTORY* 145 n.19 (2018); PETER CHARLES HOFFER, *UNCIVIL WARRIORS: THE LAWYERS’ CIVIL WAR* 199 n.1 (2018); MICHAEL STOKES PAULSEN ET AL., *THE CONSTITUTION OF THE UNITED STATES* 403 (3d ed. 2017); 3 WILLIAM J. RICH, *MODERN CONSTITUTIONAL LAW Conduct of the War* § 38.34 n.12 (3d ed. 2017); 1 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 6.13(b)(i) n.12 (5th ed. 2017); PETER M. SHANE ET AL., *SEPARATION OF*

have not.¹⁰ The issue here is more than historical curiosity, as interesting and important as that may be. Rather, the issue here relates to the intellectual claim (made by some) that past presidents—including icons such as President Lincoln—knowingly defied or ignored (that is, “declin[ed] to obey”) federal judicial orders, and whether Lincoln’s conduct provides a model or precedent, albeit if only during war-time or other emergency. My view is that Lincoln’s *Merryman*-related conduct furnishes no such model. Here is why.

POWERS LAW: CASES AND MATERIALS 1124 (4th ed. 2018); Josh Blackman, *The Irrepressible Myths of Cooper v. Aaron*, 107 GEO. L.J. (forthcoming June 2019) (manuscript at 11 n.71), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3142846; Daniel A. Farber, *Lincoln, Presidential Power, and the Rule of Law*, 113 NW. U. L. REV. 667, 682 nn.80–83, 684 n.94, 685 n.98 (2018); Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 492 n.146 (2018); Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism and ‘Faithful Execution’: Two Legal Conclusions*, 17 GEO. J.L. & PUB. POL’Y (forthcoming June 2019) (manuscript at 22 n.123), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3177968; Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 694 n.30 (2018); James E. Pfander & Jessica Dwinell, *A Declaratory Theory of State Accountability*, 102 VA. L. REV. 153, 184 n.123, 186 n.133 (2016); John Fabian Witt, *A Lost Theory of American Emergency Constitutionalism*, 36 LAW & HIST. REV. 551, 569 n.84 (2018); Chase Harrington, Note, *Zivotofsky II and National Security Decisionmaking at the Lowest Ebb*, 66 DUKE L.J. 1599, 1610 n.80 (2017); Peter William Bautz, *Lincoln’s Long Shadow: Recreating the Legal Debate over Habeas Corpus, 1861–1863*, at 21 n.99 (May 2018) (unpublished M.A. thesis, University of Virginia, Department of History) (on file with the University of Virginia), <https://tinyurl.com/y96uy8ys>; Tanja Porčnik, *Imperial Presidency Redux?: Presidential War Powers and the Bush Administration* 68, 69, 123 (2016) (unpublished M.A. thesis, University of Ljubljana, Slovenia, Faculty of Social Sciences), http://dk.fdv.uni-lj.si/magistrska/pdfs/mag_porcnik-tanja.pdf [<http://perma.cc/G3C8-DP9Y>]; U.S.C.A. CONST. art. I, § 9, cl. 2 (West 2018); U.S.C.S. CONST. art. I, § 9, cl. 2 (LexisNexis 2018); Al Mackey, *Did President Lincoln Defy a Court Order by Chief Justice Taney?*, STUDENT AM. CIVIL WAR (Oct. 17, 2016), <https://studycivilwar.wordpress.com/2016/10/17/did-president-lincoln-defy-a-court-order-by-chief-justice-taney/> [<http://perma.cc/XJ9L-AL4K>]; Frank J. Williams, *Fall 2016 Lincoln in the News*, ABRAHAM LINCOLN BICENTENNIAL FOUND., <http://www.lincolnbicentennial.org/lincoln-news/fall-2016> [<http://perma.cc/5ZEX-78TQ>]; Allen C. Guelzo, *Syllabus for Princeton University’s Politics 488: Secession, the Civil War, and the Constitution 4* (Spring Semester 2018) (on file with author).

¹⁰ See, e.g., Yoo, *Franklin Roosevelt and Presidential Power*, *supra* note 1, at 222. Even post-2016, Professor John Yoo is not alone. See, e.g., RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 113 (2018) (“Lincoln oversaw and defended the defiance by Union military officers of a ruling by Chief Justice Roger B. Taney in *Ex parte Merryman*. Taney claimed the power to free an alleged Confederate collaborator in the state of Maryland, where the Union army had effectively imposed martial law and detained him without trial.” (footnote omitted)); Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 504 (2018) (“In *Ex parte Merryman*, Lincoln supported Union military officers in defying a writ of habeas corpus, issued by Chief Justice Roger Taney, in the early days of the Civil War.” (footnote omitted)); cf., e.g., Michael Stokes Paulsen, *The Propriety of Presidential Impeachments, Past and Present*, LAW & LIBERTY (July 19, 2018), <http://www.libertylawsite.org/2018/07/19/the-propryety-of-presidential-impeachments-past-and-present/> [<http://perma.cc/Z8QQ-TLN8>].

SHORT OVERVIEW OF *EX PARTE MERRYMAN*

The court¹¹ issued three orders in *Merryman*. But to understand what gave rise to those three judicial orders, one has to know the facts that initially brought about the litigation.

A. *Merryman*: The Facts

Following the 1860 election of Abraham Lincoln, the parade of state secession would begin. During April 1861, Fort Sumter had fallen.¹² Even Washington, the nation's capital, was threatened by Confederate armies, disloyal state militias, and irregular combatants, not to mention disloyal civilians, assassins, and spies. To secure the capital, President Lincoln directed Union troops to proceed to Washington through Maryland, a border state.¹³ Mobs in Maryland had attacked Union troops; bridges and railway lines had been destroyed; telegraph wires to the capital had been cut.¹⁴ Why these attacks? Why all this destruction of infrastructure? No doubt different actors had different motives. Chance and disorder—the children of mob rule—certainly played some role. But it seems likely that some (perhaps many) sought to slow down or prevent the arrival of loyal troops to secure Washington and, perhaps, to secure federal military installations in Maryland, such as Fort McHenry in Baltimore. (Certainly these were the natural, expected, and probable consequences of the attacks, even if these results were not specifically intended by the actors involved.) Lincoln responded. On April 27, 1861, in order to secure the movement of Union troops through Maryland, President Lincoln issued an order delegating authority to General Winfield Scott to suspend the writ of habeas corpus.¹⁵ Lincoln's order cited no statutory basis for his decision.¹⁶

11 What court issued the decision in *Ex parte Merryman*? Some commentators say Taney was acting for the federal Circuit Court for the District of Maryland; other commentators say *Merryman* was issued as an in-chambers opinion under a special grant of authority under the Judiciary Act of 1789. I take the latter view. See A COLLECTION OF IN CHAMBERS OPINIONS, *supra* note 3, at 1400; Tillman, *supra* note 2, at 504 nn.55–56. Whatever else *Merryman* was, it was not a Supreme Court case—for that reason, I use “court,” rather than “Court” in the main text of this Article.

12 See Tillman, *supra* note 2, at 483 n.4.

13 See *id.* at 483 n.6.

14 See *id.*

15 The Constitution states: “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.” U.S. CONST. art. I, § 9, cl. 2 (emphasis added). President Lincoln's order, issued on April 27, 1861, only purported to give General Scott authority “to suspend the writ of habeas corpus.” See Abraham Lincoln, Order to General Scott (Apr. 27, 1861), in 6 COMPLETE WORKS OF ABRAHAM LINCOLN, 1860–1861, at 258, 258 (John G. Nicolay & John Hay eds., N.Y., The Lamb Publishing Co. new ed. 1894) (reproducing Lincoln's order); Tillman, *supra* note 2, at 527 & n.116 (same). *But see* AMANDA L. TYLER, HABEAS CORPUS

IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY 358 n.3 (2017) (characterizing Lincoln's April 27, 1861 order as a suspension of the "privilege"). But in his July 4, 1861 message to Congress, Lincoln recharacterized his prior order as permitting suspension of the "*privilege* of the writ of habeas corpus." Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 6 COMPLETE WORKS, *supra*, at 297, 308 (emphasis omitted) (emphasis added). The difference between suspending the writ and suspending the privilege of the writ is night-and-day. See, e.g., *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 130–31 (1866) (Davis, J.) ("The suspension of the privilege of the writ of habeas corpus does *not* suspend the writ itself." (emphasis omitted) (emphasis added)); see also, e.g., *Ex parte* Benedict, 3 F. Cas. 159, 174 (N.D.N.Y. 1862) (No. 1292) (Hall, J.) ("Such a suspension may prevent the prisoner's discharge; but it leaves untouched the question of the illegality of his arrest, imprisonment, and deportation. If these are unlawful, the marshal and others engaged in these arrests are liable in damages in a civil prosecution; such damages to be assessed by a jury of the country."). *But cf.*, e.g., *Ex parte* Zimmerman, 132 F.2d 442, 445 (9th Cir. 1942) (Healy, J.) ("It is little to the purpose to attempt here an analysis of distinctions between suspension of the privilege and suspension of the writ."). It is not particularly surprising that these distinctions are no longer understood, as this and much else relating to the Constitution's original public meaning was forgotten even as early as Lincoln's day, and, in regard to a few constitutional provisions and language, sometimes far earlier. But it is curious how few even notice there is a puzzle to be solved or a past to be explained. See, e.g., 1 BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 25 (1968) ("This *Milligan* language has been repeated in more recent cases. One may wonder, nevertheless, whether there is [a] basis for the claimed distinction between suspension of the privilege and suspension of the writ." (footnote omitted) (citing *Zimmerman*, 132 F.2d at 445)); Trevor W. Morrison, Hamdi's *Habeas* Puzzle: *Suspension as Authorization*, 91 CORNELL L. REV. 411, 423 n.73 (2006) ("The text of the Suspension Clause makes clear that it is the 'Privilege of the Writ,' not the writ itself, that may be suspended. . . . Nevertheless, courts and commentators tend to refer colloquially to 'suspending the writ' or 'suspending habeas,' . . ." (citing *Milligan*, 71 U.S. at 130–31)); Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1535 n.3 (2007) ("[S]uspending the writ' and 'suspending habeas' are common shorthands for suspending the privilege of the writ, and I will use them here." (citing *Milligan*, 71 U.S. at 130–31)); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 979 (1998) (asserting that the *Milligan* Court's "distinction [between the privilege and the writ] cuts against the conventional phrase, 'suspension of the writ,' which nonetheless has brevity in its favor"). *But see*, e.g., William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1853 n.255 (2008) (pointing out the same textual distinction regarding the "privilege" of the writ and the writ itself, but not resolving the distinction); Jeffrey D. Jackson, *The Power to Suspend Habeas Corpus: An Answer from the Arguments Surrounding Ex parte Merryman*, 34 U. BALT. L. REV. 11, 24 (2004) ("The general consensus, even prior to the Civil War, was that suspension did not mean that habeas corpus itself was suspended, but rather that the privilege guarded by the writ was suspended." (citing WILLIAM S. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS 42 (photo. reprt. 1997) (1893))); Tor Ekeland, Note, *Suspending Habeas Corpus: Article I, Section 9, Clause 2, of the United States Constitution and the War on Terror*, 74 FORDHAM L. REV. 1475, 1496 (2005) ("The privilege of the writ can be construed as separate from the writ itself; the privilege may be viewed as the ends ('discharge, bail, or a speedy trial') and the writ itself as merely the means towards this end." (quoting WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 141–42, 171 n.121 (1980))); Note, *Developments in the Law: Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1265–66 (1970) (denominating the *Milligan* Court's discussion of the Suspension Clause's "privilege of the writ" language as "cryptic," and suggesting that "the [*Milligan*] Court saw the 'privilege' as the further proceedings and the eventual discharge. By the 'writ' the Court meant what is referred to today as a show cause order, *i.e.*, not an order to produce the body but a preliminary request for a 'return,' or written justification of the detention." (footnote omitted)); Bautz, *supra* note 9 *passim* (collecting some early authorities addressing the distinction). Compare, e.g., Emily Calhoun, *The Accounting: Habeas Corpus and Enemy Combatants*, 79 U. COLO. L. REV. 77, 121–22 n.216 (2008) (citing *Milligan* for the proposition

that habeas jurisprudence distinguishes executive accountability goals from remedial goals and phases of habeas litigation), with John Harrison, *The Original Meaning of the Habeas Corpus Suspension Clause 3* (University of Virginia School of Law Public Law & Legal Theory Paper Series 2018-47, Aug. 23, 2018), <https://www.ssrn.com/abstract=3227985> (“A suspension of the privilege of the writ of habeas corpus is legislation granting the executive extremely broad discretion to detain.”), with *id.* at 40 (“[T]he privilege of the writ of habeas corpus is the legal interest that the writ characteristically protects. To suspend that privilege is to contract that legal interest temporarily.”), with Lee Kovarsky, *Prisoners and Habeas Privileges under the Fourteenth Amendment*, 67 VAND. L. REV. 609, 614–15 (2014) (“The privilege is a prisoner’s entitlement to ask that the habeas power be exercised.”), and Amanda L. Tyler, *Is Suspension A Political Question*, 59 STAN. L. REV. 333, 396–97 (2006) (conflating the initial and subsequent phases of habeas litigation, but still citing *Milligan* without explanation).

My view is that suspension of the *evidentiary* privilege of the writ of habeas corpus precludes a court (or even an Executive Branch officer) from taking cognizance of a party’s *pleading* (or invoking) the writ (once granted to that party by that court or any other court of record) in subsequent contempt and enforcement proceedings (and, perhaps, in other collateral and ancillary proceedings). For example, *Merryman II* (i.e., granting an order to serve an attachment for contempt where the defendant failed to produce the prisoner-plaintiff). Suspending the writ (as opposed to suspending the privilege of the writ) precludes a court from granting the writ, on the merits, in the first instance. For example, *Merryman I* (i.e., an *ex parte* habeas order to produce a prisoner), or a *Merryman III*-like order (i.e., a habeas order to release a prisoner—albeit, of course, this did not actually happen in *Merryman*). When both the writ and/or the privilege of the writ are suspended, federal courts (having general federal question jurisdiction) will still have jurisdiction to determine if the suspension or suspensions themselves are constitutional—unless Congress has validly stripped the federal courts of jurisdiction to do so. The scope of Congress’s power to engage in such jurisdiction stripping is a complex subject, and one well beyond the scope of this Article. See, e.g., Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1398 (1953) (“[W]here statutory jurisdiction to issue the writ obtains, but the privilege of it has been suspended in particular circumstances, the Court has declared itself ready to consider the validity of the suspension and, if it is found invalid, of the detention.”); Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251, 289 (2005). See generally *Battaglia v. Gen. Motors Corp.*, 169 F.2d 254 (2d Cir. 1948) (Chase, J.). Recently, the Suspension Clause has received renewed interest and full-length treatment in books, but the meaning of the clause’s text, its actual words—they remain largely an undiscovered country. See generally, e.g., TYLER, *supra*, at 3–4, 15, 99, 123, 133, 359 (taking a historical approach absent textual analysis); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 678 n.372 (2009) (citing Neuman, *supra*, at 979 favorably). But see, e.g., Baude, *supra*, at 1853 n.255; but cf., e.g., Bautz, *supra* note 9 *passim*.

I have put down some truly remarkable support for my position here in another paper which this Article is too small to contain. Cf. Seth Barrett Tillman, *A Play on the Suspension Clause*, NEW REFORM CLUB (Aug. 11, 2016, 4:04 PM), <https://reformclub.blogspot.com/2016/08/a-play-on-suspension-clause.html> [<http://perma.cc/HP6M-YTBJ>]. Indeed, I submitted a prior draft of this lengthy footnote as my abstract to the Tenth Annual Originalism Works-in-Progress Conference. See *Tenth Annual Hugh & Hazel Darling Foundation Originalism Works-in-Progress Conference*, UNIVERSITY OF SAN DIEGO SCHOOL OF LAW (last visited July 27, 2018), http://www.sandiego.edu/events/law/detail.php?_focus=66934 [<http://perma.cc/RXD9-FA8C>]; see also Seth Barrett Tillman, *What is the “Privilege” of the Writ of Habeas Corpus?*, NEW REFORM CLUB (July 27, 2018, 2:41 AM), <https://tinyurl.com/ycupmlu7> [<http://perma.cc/Y695-PLGV>].

¹⁶ See Tillman, *supra* note 2, at 485. Here and throughout this Article, I quote freely from my 2016 *Military Law Review* publication. See *id.* at 483–85.

B. *Merryman I*: The Ex Parte Order to Produce the Prisoner

John Merryman was from a long-established land-owning and politically connected Maryland family, as was his wife. At the outbreak of the Civil War, he had already been elected to public office as a member and president of the Baltimore County Commission.¹⁷ Rightly or not, federal military authorities suspected John Merryman of being an officer of a pro-secession militia group which allegedly had conspired to destroy (and did destroy) bridges and railway lines. As a result, at around 2:00 AM, on Saturday, May 25, 1861, United States Army personnel seized Merryman, and they subsequently transferred him to and detained him at Fort McHenry in Maryland.¹⁸ The next day—Sunday, May 26, 1861—Merryman’s Maryland counsel, George M. Gill and George H. Williams, presented Merryman’s habeas corpus petition to Chief Justice Roger Brooke Taney at the Chief Justice’s Washington home.¹⁹ Later that day, Sunday, May 26, 1861, the Chief Justice issued an ex parte order, *Merryman I*, directing General George Cadwalader, the only named defendant and the Army officer having overall command of the military district including Fort McHenry: (i) to appear before Chief Justice Taney the next day—on Monday, May 27, 1861 at 11:00 AM—in a court room in Baltimore; (ii) to explain the legal basis for Merryman’s detention by military authorities; and (iii) to “produce”²⁰ (as opposed to “release”) the body of John Merryman at that hearing.²¹

The writ, i.e., *Merryman I*, was issued by Chief Justice Taney and served by the United States Marshal on General Cadwalader the same day: Sunday, May 26, 1861, at around 5:30 PM.²² The hearing was scheduled for Monday, May 27, 1861, at 11:00 AM. As a result, Cadwalader, a Pennsylvania native, had less than one full business day: (i) to consult (much less coordinate) with the United States Attorney for Maryland, with the Attorney General in Washington, and with the Army’s law officers; and (ii) to find a private attorney in the Maryland bar to represent his personal interests in high-stakes litigation.²³ As a result, it is not entirely surprising that Cadwalader chose not to attend the May 27, 1861 hearing. Instead, he sent Colonel R. M. Lee.²⁴ At the hearing, Colonel Lee presented the court with a

¹⁷ See *id.* at 485 & n.11.

¹⁸ See *id.* at 487 & n.13.

¹⁹ See *id.* at 488 & n.14.

²⁰ *Ex parte Merryman*, 17 F. Cas. 144, 145 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.).

²¹ See Tillman, *supra* note 2, at 488.

²² See *id.* at 499 n.47.

²³ See *id.*

²⁴ See *id.* at 512 n.73.

signed response from Cadwalader laying out the General's defense. For example, Cadwalader argued that habeas corpus had been lawfully suspended under presidential authority. Cadwalader's response also sought a postponement to seek additional direction from the President if the court should determine that Cadwalader's defense was insufficient. Furthermore, Cadwalader did not produce Merryman at the hearing as he was instructed to do by Chief Justice Taney's *ex parte* order.²⁵

C. *Merryman II*: The Attachment

Because General Cadwalader, the named defendant, failed to produce Merryman, Chief Justice Taney, on May 27, 1861, directed the United States Marshal to serve an attachment for contempt on Cadwalader.²⁶ The Marshal sought to serve the attachment on the morning of Tuesday, May 28, 1861 at Fort McHenry, but the Marshal was not admitted. *Many at the time, including perhaps Chief Justice Taney and others since, believed, and continue to believe, that this was a Cromwellian civilian-military confrontation.*²⁷ In other words, the military authorities prevailed not as a matter of established legal right as determined by the courts, but because the Army (which was acting under the direction of the President) had greater firepower than the United States Marshal (who was serving the attachment order under instructions from the Chief Justice). As a result, the Marshal left the Fort.²⁸ He reached the courthouse prior to noon on May 28, 1861, and he came without Cadwalader and Merryman.²⁹

D. *Merryman III*: The Final Order

In his opinion, Chief Justice Taney expressed the view that the President had no unilateral power to suspend habeas corpus. In other words, under the Constitution, only Congress can suspend habeas corpus. He also took the position that “[a] military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offence against the laws of the United States, except in aid of the judicial authority, and subject to its control.”³⁰ For those reasons, he concluded: “It is, therefore, very

²⁵ *See id.* at 489–90.

²⁶ *See id.* at 490.

²⁷ *See id.*

²⁸ *See id.* at 491 n.25.

²⁹ *See id.* at 490–91.

³⁰ *Merryman*, 17 F. Cas. 144, 145 & 147 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.).

clear that John Merryman, the petitioner, is entitled to be set at liberty and discharged immediately from imprisonment.”³¹

Noting that his attachment order, *Merryman II*, “ha[d] been resisted by a force too strong for me [Taney] to overcome,”³² Chief Justice Taney’s final judicial order did not command Cadwalader, Lincoln, the Army, or anyone else to release Merryman. Instead, Chief Justice Taney’s final order directed the clerk of the Circuit Court for the District of Maryland to transmit a copy of the proceedings and his opinion to President Lincoln, where it would “remain for that high officer, in fulfilment of his constitutional obligation to ‘take care that the laws be faithfully executed,’ to determine what measures he will take to cause the civil process of the United States to be respected and enforced.”³³ Merryman was not released as a consequence of Chief Justice Taney’s decision, nor was he brought before a military tribunal. Instead, Merryman remained detained at Fort McHenry until he was transferred to the federal civilian authorities, and then he was indicted for treason in the District Court for Maryland on July 10, 1861. He was released on bail on or about July 13, 1861. Merryman was never brought to trial.³⁴

Again, Chief Justice Taney delivered an oral opinion on May 28, 1861, which ended live proceedings in court. Subsequently, on Saturday, June 1, 1861, he filed an extensive written opinion. The written opinion was put on file with the United States Circuit Court for the District of Maryland.³⁵

Chief Justice Taney’s final order (not his opinion) stated:

I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the [C]ircuit [C]ourt of the United States for the [D]istrict of Maryland, and direct the clerk to transmit a copy, under seal, to the [P]resident 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.³⁶

³¹ *Id.* at 147; Tillman, *supra* note 2, at 492.

³² *Merryman*, 17 F. Cas. at 153.

³³ *Id.* (quoting the Take Care Clause).

³⁴ See Tillman, *supra* note 2, at 493.

³⁵ See *id.* at 491–92.

³⁶ *Merryman*, 17 F. Cas. at 153 (quoting the Take Care Clause) (emphasis added). This is the order as reported in *Federal Cases*. The report of the order in the case’s file (storing the original documents) in the Maryland state archives is even more limited than what is reported in *Federal Cases*. See *1 June 1861, Order that opinion be filed and recorded in the Circuit Court of the United States for the District of Maryland, directing the Clerk transmit a copy under seal to the President of the United States*, ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES): JOHN MERRYMAN (1824–1881) (last visited July 13, 2018), <https://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/001500/001543/html/casepapers.html>.

In short, Chief Justice Taney's final judicial order, *Merryman III*, did not command Cadwalader or anyone else to release Merryman. Instead, Chief Justice Taney's final order meekly directed the clerk of the Circuit Court for the District of Maryland merely to transmit a copy of the proceedings and his (i.e., the Chief Justice's) opinion to President Lincoln.³⁷ The express language of the order itself left it to the President to determine the scope of his own response.

As explained, Professor Yoo's claim is that "Lincoln's [conduct amounted to] blatant defiance in declining to obey a judicial order."³⁸ To be clear, Professor Yoo's claim is not that Cadwalader, Lincoln's military subordinate, disobeyed a court order. (Such a claim would be true: Cadwalader did disobey *Merryman I*: the ex parte order—albeit, Cadwalader's conduct can be explained as consistent with standard practices in the context of ex parte temporary restraining orders.³⁹) Nor is Professor Yoo's claim that Lincoln authorized the suspension of the writ of habeas corpus *prior* to Merryman's seizure by the Army. (Such a claim would be true: Lincoln, in fact, did authorize such a suspension—albeit, its legal validity can be questioned.) Rather, Professor Yoo's claim is that *after* Chief Justice Taney issued an order (*Merryman I*, *Merryman II*, and/or *Merryman III*), Lincoln "declin[ed] to obey" it, and that such inactivity can be fairly characterized as "blatant defiance."

The only defendant in *Merryman* was General Cadwalader. Lincoln was not a named party in *Merryman*. Lincoln was not served with process. Lincoln had no meaningful notice and opportunity to be heard during the judicial proceedings while they were ongoing.⁴⁰ Indeed, there is no good evidence that Lincoln even knew of the proceedings until May 30, 1861—after live judicial proceedings had ended on May 28, 1861.⁴¹ Likewise, Lincoln would not have received the final order, *Merryman III*, along with Chief Justice Taney's written opinion, from the clerk of the court, until on or after June 1, 1861, when the final order was signed and filed with the circuit court—again all after live judicial proceedings had ended on May 28, 1861.⁴² As a general rule, a stranger to a lawsuit—a non-party—a person who had no opportunity to be

³⁷ See Tillman, *supra* note 2, at 492.

³⁸ Yoo, *Franklin Roosevelt and Presidential Power*, *supra* note 1, at 222.

³⁹ See Tillman, *supra* note 2, at 515–18.

⁴⁰ See *id.* at 495 n.44.

⁴¹ Albeit, it is possible that Lincoln read newspaper reports of *Merryman* on the evening of May 27, 1861 or that Lincoln received correspondence from Army law officers as early as the 27th. Neither of which amounts to *notice and the opportunity to be heard* in the sense of how that phrase is ordinarily used. See *id.* at 500 n.49.

⁴² See *id.* at 498–500, 499 n.48, 537.

heard—is not bound to obey any judicial order issued in such a lawsuit.⁴³ As a non-party, Lincoln no more “ignored” or “declin[ed] to obey” the three judicial orders in *Merryman* than did Jefferson Davis, or you, or me.⁴⁴ Suggesting that Lincoln “defi[ed]” such an order is strange, and characterizing Lincoln’s conduct as “blatant defiance” is stranger still. If the thrust of Professor Yoo’s claim was that Lincoln had been in privity⁴⁵ with Cadwalader, and for that reason accountable for Cadwalader’s conduct or culpable for his (i.e., Lincoln’s) own failure to conform to Chief Justice Taney’s orders, such an argument has yet to be made by Professor Yoo or by anyone else.

I suspect that the real gravamen of Professor Yoo’s position is not that Lincoln was a party (or in privity with a party) and formally bound by the orders as a party (or privy) might be.⁴⁶ Rather, I suspect that Professor Yoo’s position is that, under the Take Care Clause, President Lincoln, as General Cadwalader’s ultimate superior at the top of the chain of command, had ongoing supervisory responsibility for Cadwalader’s conduct—before, during, and after the conclusion of *Merryman*.⁴⁷ Is it really so obvious that a superior’s failure to supervise a subordinate, where the subordinate acts lawlessly, should be characterized as “defiance,” much less “blatant defiance”? If this is Professor Yoo’s position, it is, at the very least, undertheorized. What the exact scope of the President’s duties (if any) under the Take Care Clause remains unsettled even today—it was certainly unsettled in 1861—and even assuming that any judicially cognizable duties (as opposed to abstract, non-justiciable, or aspirational political obligations) flow from that constitutional provision, any such duties must have been greatly attenuated under the conditions faced by Lincoln during a political crisis and a hot civil war. Characterizing Lincoln’s conduct as “blatant defiance,” and making that charge stick, requires more, much more, than Professor Yoo’s *ipse dixit*.

⁴³ See *Martin v. Wilks*, 490 U.S. 755, 761 (1989) (Rehnquist, C.J.); see also *D’Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 176 (1850) (Catron, J.).

⁴⁴ In 2016, after some six hours of closely proofreading the penultimate draft of my *Military Law Review* article with me, my Irish legal research assistant left my office and said: “I am going home now—where I intend to ignore the Chief Justice’s order.” See Tillman, *supra* note 2, at 481 n.* (thanking Paul Brady LLB). He got it.

⁴⁵ See generally *Martin*, 490 U.S. *passim*.

⁴⁶ There is no occasion to address whether Lincoln violated Chief Justice Taney’s opinion. Even assuming that one can defy an opinion, whatever that might mean, Professor Yoo has made no such claim. Professor Yoo’s article spoke to declining to obey and defying a judicial order, not an opinion. See Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126 (1999) (“The operative legal act performed by a court is the entry of a judgment; an opinion is simply an explanation of reasons for that judgment.”).

⁴⁷ See U.S. CONST. art. II, § 3 (Take Care Clause).

Finally, which order does Professor Yoo think Lincoln “declin[ed] to obey” and “blatantly def[ied]”? As to *Merryman I* and *Merryman II*, by May 30, 1861, when Lincoln first had a report of the case,⁴⁸ live judicial proceedings had already ended and actual compliance with these preliminary orders (as written) was no longer feasible. It was no longer possible to “produce” John Merryman at the hearing—which is what *Merryman I* demanded—because the hearing had already ended. Likewise, once the final order had been issued, once litigation had ended, *Merryman II*—the attachment for civil contempt—was a legal nullity.⁴⁹ More importantly, compliance was no longer possible: the attachment order demanded that Cadwalader appear before Chief Justice Taney on May 28, 1861, at noon. After May 28, 1861, compliance with this order—as written—was no longer possible. What about *Merryman III*? Did Lincoln “decline to obey” or “blatantly defy” that order? The simple answer is “no.” Again, Lincoln was not a party—so he had no obligation to obey any order. More importantly, the order did not direct Lincoln (or anyone else) to take any specific course of conduct in regard to John Merryman (or any other habeas applicant).⁵⁰ So any critique of Lincoln’s conduct based on his (purported) passively failing to obey or his (purported) actively “defy[ing],” much less “blatantly defy[ing],” the *Merryman III* order, makes little sense. To be clear, this interpretation of *Merryman III*, i.e., that Lincoln could not have defied the order because no concrete relief was awarded, is not some modern invention. This view was well understood by Lincoln’s contemporaries. During the Civil War, judges, other than Chief Justice Taney, sitting on federal and state courts, self-consciously followed the *Merryman* precedent, which they understood as granting the habeas applicant no concrete relief.⁵¹ Likewise, in responding to President Lincoln’s and the public’s concerns surrounding *Merryman*, Attorney General Bates’s July

⁴⁸ Lincoln received a report from the United States Attorney for Maryland on May 30, 1861. See Tillman, *supra* note 2, at 499 n.48.

⁴⁹ See *id.* at 523 & n.103; Philip A. Hostak, Note, International Union, United Mine Workers v. Bagwell: A Paradigm Shift in the Distinction Between Civil and Criminal Contempt, 81 CORNELL L. REV. 181, 185 & n.26 (1995) (“[I]f the underlying controversy giving rise to a civil contempt action is settled or is otherwise terminated, the contempt proceeding becomes moot, and the sanctions must end.” (citing *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 452 (1911) (Lamar, J.))).

⁵⁰ See Tillman, *supra* note 2, at 492.

⁵¹ See *Ex parte McQuillon*, 16 F. Cas. 347, 348 (S.D.N.Y. 1861) (No. 8294) (Betts, J.) (“[Judge Betts] would, however, follow out that case [*Merryman*], but would express no opinion whatever, as it would be indecorous on his part to oppose the [C]hief [J]ustice. He would therefore decline taking any action on the writ at all.” (emphasis added)); *In re Kemp*, 16 Wis. 359, 371 (1863) (Dixon, C.J.) (“I deem it advisable, adhering to the precedent set by other courts and judges under like circumstances, and out of respect to the national authorities, to withhold [granting habeas relief] until they shall have had time to consider what steps they should properly take in the case.” (emphasis added)).

5, 1861 memorandum only addressed the President's obligations in situations analogous to *Merryman I*, i.e., the ex parte preliminary production order. On its face, Bates's memorandum did not address final orders like *Merryman III*.⁵² There was simply no need to do so because Lincoln's conduct in relation to the final judicial order was legal in all respects, and obviously so.

Academics should welcome debate—even when our own views are subjected to the closest scrutiny and critique. But when our views are contradicted, with novel argument and new evidence, our response ought not be to continue as if nothing has changed. Now it may be that the new *Merryman* narrative,⁵³ and I, have failed (and will continue to fail) to convince Professor Yoo. But if that is so, I hope he will tell us (or, at least, me) why. If I have convinced him, I would urge him to tell his audience: all those who have swallowed the *Merryman*-red-pill-to-historical-&-legal-wonderland. Of course, there is a third possibility—Professor Yoo is not sure. And that would be the most interesting result of all.

⁵² Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74 (July 5, 1861) (Bates, A.G.). Bates's memorandum addressed two questions:

1. In the present time of a great and dangerous insurrection, has the President the discretionary power to cause to be arrested and held in custody, persons known to have criminal intercourse with the insurgents, or persons against whom there is probable cause for suspicion of such criminal complicity?

2. In such cases of arrest, is the President justified in refusing to obey a writ of *habeas corpus* issued by a court or a judge, requiring him or his agent to produce the body of the prisoner, and show the cause of his caption and detention, to be adjudged and disposed of by such court or judge?

Id. at 75 (emphasis added).

⁵³ See *supra* note 8 (collecting authorities).

