

WHAT COURT (IF ANY) DECIDED *EX PARTE* *MERRYMAN*?—A CORRECTION FOR JUSTICE SOTOMAYOR (AND OTHERS)

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In her 2022 Katzmman Lecture, Justice Sotomayor stated:

[O]nly twice in our history have presidents ignored Supreme Court rulings—imagine that—in two hundred years of history. First, Andrew Jackson permitted states to displace Indians from their sovereign lands and gave them federal support to do so in direct contravention of the Supreme Court’s ruling in *Worcester v. Georgia*, holding that Indian nations were sovereigns and states could not pass laws controlling Indian lands. Second, after Chief Justice Taney ruled [in *Ex parte Merryman*] (in a case he heard alone, not with the full Court, and that was filed with the United States District Court) that President Abraham Lincoln’s unilateral suspension of the writ of habeas corpus was unconstitutional, President Lincoln maintained the suspension and did not release the detainee in question.¹

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¹ Hon. Sonia Sotomayor, Katzmman Lecture, *Reflections about Judicial Independence*, 97 N.Y.U. L. REV. 875, 881 (2022) (footnote omitted). Since 2016, I have explained—again and again—again—that it makes little sense to say that Lincoln defied or even “ignored” Taney’s ruling in *Ex parte Merryman*. Taney never issued any order directing the President, the Executive Branch, the United States Army, or the named defendant—General Cadwalader—to release the habeas corpus applicant: John Merryman. See Seth Barrett Tillman, *Ex parte Merryman: Myth, History, and Scholarship*, 224 MIL. L. REV. 481 (2016), <http://ssrn.com/abstract=2646888>, <https://tinyurl.com/yck97jev>. See generally Seth Barrett Tillman, *Canonical Cases and Other Quodlibets: A Response to Professor Fallon*, 97 TEX. L. REV. ONLINE 13 (2018), <https://ssrn.com/abstract=3246598>, <https://tinyurl.com/289yycc8>; Seth Barrett Tillman, *Merryman Redux: A Response to Professor John Yoo*, 22 CHAP. L. REV. 1 (2019), <https://ssrn.com/abstract=3213353>, <https://tinyurl.com/4kfbfk9>. Likewise, commentators have made a similar argument in regard to *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). See, e.g., Gerard N. Magliocca, *The Gold Clause Cases and Constitutional Necessity*, 64 FLA. L. REV. 1243, 1258 n.88 (2012) (“Many people believe that Andrew Jackson defied Chief Justice Marshall’s ruling in *Worcester v. Georgia*, but that is not true because the Court never issued the mandate in that case.”); Ann Scales & Laura Spitz, *The Jurisprudence of the Military-Industrial Complex*, 1 SEATTLE J. FOR SOC. JUST. 541, 552 n.64 (2003) (“[T]he Court had not entered a final order and the President was under no legal obligation. The private party petitioners did not pursue the litigation.”); see also Richard K. Neumann Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 208 (2007) (“In any event, it was the State of Georgia, not Jackson, who would have to comply with the Supreme Court’s judgment [in *Worcester v. Georgia*], and Georgia did ignore it, which is the point of the supposed Jackson quote.” (emphasis added)).

Here, Justice Sotomayor made three claims. First, she asserted that *Ex parte Merryman*² was decided by Chief Justice Taney acting alone—Sotomayor was correct about that. Second, Sotomayor asserted that *Merryman* was “filed with the United States District Court”—she was not correct about that. And finally, Sotomayor characterized *Merryman* as a Supreme Court case—she was not correct about that either. We all make mistakes—but characterizing a case as a Supreme Court case, when it is plainly not such a case, is odd. One might think Sotomayor, a Supreme Court Justice, would know what cases her own Court had decided. Still, Sotomayor is not alone³—other judges have also asserted that *Merryman* was a

² *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.), <https://tinyurl.com/ms6x7fnd>.

³ Not only is Justice Sotomayor not alone, any number of judges and other commentators have individually voiced inconsistent views on this issue—albeit at different times and in different publications. *Compare infra* note 5 (reporting position of Chief Judge Posner—taking the Supreme Court view), *with infra* note 11 (reporting alternative position of Chief Judge Posner—taking circuit court view); *compare infra* note 6 (reporting position of Judge Napolitano—taking the Supreme Court view), *with infra* note 38 (reporting alternative position of Judge Napolitano—taking the view *Merryman* was issued by a “federal court in Baltimore”); *compare infra* note 11 (reporting position of Chief Justice Frank J. Williams—taking circuit court view), *with infra* note 51 (reporting alternative position of Chief Justice Frank J. Williams—taking the chambers opinion view); *compare infra* note 7 (reporting position of Andrew C. McCarthy—taking the Supreme Court view), *with infra* note 11 (reporting alternative position of Andrew C. McCarthy—taking circuit court view); *compare infra* note 7 (reporting position of Mark E. Neely, Jr.—taking the Supreme Court view), *with infra* note 20 (reporting alternative position of Mark E. Neely, Jr.—taking the district judge view), *with infra* note 34 (reporting alternative position of Mark E. Neely, Jr.—taking the Chief Justice view), *with infra* note 36 (reporting a further alternative position of Mark E. Neely, Jr.—taking a complex view regarding the issue of what court issued *Merryman*); *compare* 1 STEVEN GOW CALABRESI, *THE HISTORY AND GROWTH OF JUDICIAL REVIEW* 130 n.65 (2021) (citing *Merryman* as “17 F. Cas. 144 (C.C.D. Md. 1861)”), *with* Steven G. Calabresi & Justin Braga, *Judge Robert H. Bork and Professor Bruce Ackerman: An Essay on The Tempting of America*, 13 AVE MARIA L. REV. 47, 52 (2015) (reviewing ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990), and Bruce Ackerman, *Robert Bork’s Grand Inquisition*, 99 YALE L.J. 1419 (1990)) (“President Lincoln refused to enforce [the] Chief Justice’s district court ruling”); *compare* BRIAN R. DIRCK, *THE EXECUTIVE BRANCH OF FEDERAL GOVERNMENT: PEOPLE, PROCESS, AND POLITICS* 99 (2007) (asserting that Taney issued *Merryman* “in his capacity as a federal district court judge”), *with* BRIAN R. DIRCK, *WAGING WAR ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS* 88 (2003) (asserting that *Ex parte Merryman* was “issued by the Supreme Court”), *with* BRIAN R. DIRCK, *LINCOLN AND THE CONSTITUTION* 78–79 (2012) (noting the “ambiguities” in regard to “[u]nder what authority . . . Taney hear[d]” *Merryman*); *compare* RICHARD H. FALLON JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1204 (7th ed. 2015) (citing *Merryman* as “17 F.Cas. 144 (C.C.D.Md.1861) (No. 9487), by Chief Justice Taney, sitting as a Circuit Judge”), and Richard H. Fallon, Jr., *Executive Power and the Political Constitution*, 2007 UTAH L. REV. 1, 3 (“Ruling in his capacity as circuit judge, Chief Justice Roger Taney concluded in *Merryman*” (emphasis added)), *with* Richard H. Fallon, Jr., *Political Questions and the Ultra Vires Conundrum*, 87 U. CHI. L. REV. 1481, 1546 (2020) (“Chief Justice Taney issued his ruling in *Merryman* in his capacity as a circuit justice, not on behalf of the Supreme Court as an institution.” (emphasis added)), *with*

Supreme Court decision, including Judge Katherine B. Forrest, in a district court opinion,⁴ as well as both Chief Judge Posner,⁵ a federal appellate judge, and Judge Napolitano,⁶ a state trial court judge, writing extrajudicially. Any number of other judges, academics, and authors have also asserted that *Merryman* was a Supreme Court decision.⁷ The position taken by these commentators (including Justice

Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CALIF. L. REV. 1, 17 n.63 (2003) (citing *Merryman* as: “17 F. Cas. 144 (1861)” absent listing any specific court); compare AMANDA L. TYLER, HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY 357 n.1 (2017) (citing *Merryman* as a decision of “(C.C.D. Md. 1861)”), and Amanda L. Tyler, *Judicial Review in Times of Emergency*, 109 VA. L. REV. 489, 501 n.69 (2023) (“Taney [acted in *Merryman*] in his capacity as a circuit judge.”), with Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 638 n.131 & 687 n.412 (2009) (citing *Merryman* as a decision by “(Taney, Circuit Justice, C.C.D. Md. 1861)”), and Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1457 n.337 (2005) (citing *Merryman* as an “(opinion of Chief Justice Taney as circuit justice)”), with Amanda L. Tyler, *Is Suspension a Political Question*, 59 STAN. L. REV. 333, 343 n.45 (2006) (explaining that “[t]here is a debate over whether the petition in *Merryman* was directed to Taney in his capacity as a Circuit Justice or as Chief Justice”), with Amanda L. Tyler, *Courts and the Executive in Wartime*, 107 CALIF. L. REV. 789, 842 (2019) (“[James C.] Purcell [who drafted Endo’s brief in *Ex parte Endo*] relied upon important earlier Supreme Court habeas decisions in *Ex parte Bollman*, *Ex parte Merryman*, and *Ex parte Milligan* . . .” (emphasis added)). What court (if any) do these distinguished judges and commentators believe decided *Merryman*?

⁴ See *Hedges v. Obama*, 890 F. Supp. 2d 424, 458 (S.D.N.Y. 2012) (Forrest, J.) (“In *Ex parte Merryman* . . . the Supreme Court made clear . . .”).

⁵ See RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 272 (2003) (asserting that *Merryman* is “one of the few cases in which a Supreme Court decision . . . has been openly defied by one of the other branches”).

⁶ See Andrew P. Napolitano, *A Legal History of National Security Law and Individual Rights in the United States*, 8 N.Y.U. J.L. & LIBERTY 396, 406 (2014) (characterizing *Merryman* as a Supreme Court case).

⁷ See, e.g., DANIEL R. COQUILLETTE & BRUCE A. KIMBALL, *ON THE BATTLEFIELD OF MERIT: HARVARD LAW SCHOOL, THE FIRST CENTURY* 268 (2015) (describing *Merryman* as a Supreme Court case); TOM HEAD & DAVID WOLCOTT, *CRIME AND PUNISHMENT IN AMERICA* 88 (2010) (“When a complaint was filed before the Supreme Court on [John Merryman’s] behalf, they ruled in *Ex Parte Merryman* . . .” (emphasis added)); MARK R. LEVIN, *MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA* 128 (2005) (“In *Ex parte Merryman*, Taney, writing for the Court . . .”); JAMES S. PULA, *THE CIVIL WAR FROM ITS ORIGINS TO RECONSTRUCTION* (2019) (describing *Merryman* as a ruling of the “U.S. Supreme Court”); ANDRÁS SAJÓ & RENÁTA UITZ, *THE CONSTITUTION OF FREEDOM: AN INTRODUCTION TO LEGAL CONSTITUTIONALISM* 423 (2017) (characterizing *Merryman* as a “Supreme Court rul[ing]”); SAMUEL WALKER, *CIVIL LIBERTIES IN AMERICA* 155 (2004) (explaining that the “Supreme Court overrule[d] President Lincoln in *Ex Parte Merryman*”); Steven J. Bucklin, *To Preserve these Rights: The Constitution and National Emergencies*, 47 S.D. L. REV. 85, 87 n.17 (2002) (characterizing *Merryman* as a “famous United States Supreme Court opinion”); Ken Gormley, *Conclusion: An Evolving American Presidency*, in *THE PRESIDENTS AND THE CONSTITUTION: A LIVING HISTORY* 623, 651 (Ken Gormley ed., 2016) (characterizing *Merryman* as a Supreme Court ruling); Drew Noble Lanier, *The Political and Legal Status of Persons in the War on Terrorism*, in *STRIKING FIRST: THE PREVENTIVE WAR DOCTRINE AND THE RESHAPING OF U.S. FOREIGN POLICY* 119 (Betty Glad & Chris J. Dolan eds., 2004) (characterizing *Merryman* as a Supreme Court case); Mark E. Neely, Jr., *The Constitution and Civil*

Sotomayor, Chief Judge Posner, Judge Forrest, and Judge Napolitano) is *not* correct. Apparently, the basis for these authors' mistaken inference was that *Merryman* was authored by the Chief Justice of the United States, and it was assumed that his opinion spoke for the Supreme Court as an institution.

Liberties Under Lincoln, in OUR LINCOLN: NEW PERSPECTIVES ON LINCOLN AND HIS WORLD 37, 37 (Eric Foner ed., 2008) (characterizing *Merryman* as an “opinion from the United States Supreme Court”); *id.* at 39 (“*Ex parte Merryman* . . . stands as one of the most poorly understood of decisions to come from the Supreme Court.”); James D. Hardy, *Judging Lincoln*, 5(2) CIVIL WAR BOOK REVIEW 1, 2 (reviewing [CHIEF JUSTICE] FRANK J. WILLIAMS, *JUDGING LINCOLN* (2002)) (“The [Supreme] Court sustained Lincoln in the *Prize Cases* (1863) and reversed him in *Ex Parte Merryman* (1861) . . .” (first emphasis added)); *see also, e.g.*, NICOLAS GACHON, *ABRAHAM LINCOLN AND THE U.S. CONSTITUTION, 1861–1865 / THE PRESIDENTIAL WAR* 53 (2022) (discussing *Merryman* in a chapter titled: *The Supreme Court to the rescue of civil liberty*), <https://tinyurl.com/yc62md2s>; LUIS KUTNER, *WORLD HABEAS CORPUS* 86 (1962) (“*Merryman* petitioned the Supreme Court for a Writ . . .”); MICHAEL STOKES PAULSEN & LUKE PAULSEN, *THE CONSTITUTION: AN INTRODUCTION* 177 (2015) (“Lincoln understood the Constitution *not* necessarily to mean whatever the Supreme Court said it meant concerning slavery and national authority (*Dred Scott*) or concerning presidential power in wartime (*Ex parte Merryman*).”); *id.* at 171 & 309 (same); Allen C. Guelzo, *Restoring the Proclamation: Abraham Lincoln, Confiscation, and Emancipation in the Civil War Era*, 50 *How. L.J.* 397, 410 (2007) (“Lincoln had already defied one attempt at Supreme Court meddling in 1861 in *Ex parte Merryman* . . .”); Tiffany Middleton, *How to Read a U.S. Supreme Court Opinion*, 77 *Soc. EDUC.* 32, 34 (Jan./Feb. 2013) (discussing *Ex parte Merryman* in a post on U.S. Supreme Court opinions); John Yoo, *Lincoln and Habeas: of Merryman and Milligan and McCardle*, 12 *CHAP. L. REV.* 505, 505 (2009) (“Three cases define the Supreme Court’s encounter with the [American] Civil War: *Ex parte Merryman*, *Ex parte Milligan*, and *Ex parte McCardle*.” (first emphasis added)); Andrew C. McCarthy, *The President Needs to Invoke the Constitution’s Wartime Provisions*, *USA TODAY*, July 2010, at 22, 24 (characterizing *Merryman* as a Supreme Court decision); Susan Navarro Smelcer, *The Evolution of Dissent in the United States Supreme Court* 96 (Emory University, Political Science, PhD dissertation, 2015) (characterizing *Merryman* as the Supreme “Court’s challenge to Lincoln’s suspension”); *id.* (“The conflict in *Ex parte Merryman* was not the last between the [Supreme] Court and the other branches during the War or in the period immediately following.”); Brian Duignan, *Select Decisions of the United States Supreme Court*, *BRITANNICA* (last accessed Dec. 26, 2022), <https://tinyurl.com/2v4xuffd> (listing *Merryman* among other U.S. Supreme Court cases); Robert Longley, *Why Bush and Lincoln Both Suspended Habeas Corpus*, *THOUGHTCo.* (Nov. 2, 2022), <https://tinyurl.com/3usk5fmn> (“Taney . . . issued a writ of habeas corpus demanding that the U.S. Military bring *Merryman* before the Supreme Court.”); *How to Read a U.S. Supreme Court Opinion*, *AMERICAN BAR ASSOCIATION* (May 4, 2022), <https://tinyurl.com/832zekyk>, <https://tinyurl.com/enmy3ms8> (discussing *Ex parte Merryman* in a publication on U.S. Supreme Court opinions); *cf., e.g.*, NOAH FELDMAN, *THE BROKEN CONSTITUTION / LINCOLN, SLAVERY, AND THE REFOUNDING OF AMERICA* 191 (2021) (suggesting that *Merryman*’s counsel “may even have hoped that the Supreme Court itself would act on [Merryman’s] petition”); Jerome Barron, *Decision without Power—The Dilemma of the Supreme Court*, 40 *N.D. L. REV.* 57, 61 n.6 (1964) (citing *Merryman* as a decision of “(Sup. Ct. 1861)”; Frank W. Dunham, Jr., *Where Moussaoui Meets Hamdi*, 183 *MIL. L. REV.* 151, 156 (2005) (affirming, absent documentary support, that “[r]ather than adher[ing] to [Taney’s] ruling, Lincoln appealed [*Merryman*] to the full Supreme Court”).

Others have asserted that *Merryman* was a decision of the United States Circuit Court for the District of Maryland—the local intermediate federal appellate court. Chief Justice Rehnquist,⁸ Judge Diane Wood,⁹ a federal appellate judge, and two federal district court judges¹⁰ took this position, as well as any number of other domestic judges, foreign judges, academics, and authors.¹¹ (It is possible that

⁸ See [CHIEF JUSTICE] WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 44 (1998) (noting that, in *Merryman*, Taney “was speaking only as a member of a circuit court”).

⁹ [Judge] Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, 460 n.30 (2003) (“Chief Justice Roger Taney, sitting on the Circuit Court for Maryland, in *Ex parte Merryman* . . . questioned the President’s authority . . .”).

¹⁰ See Hon. Roy K. Altman, *Foreword*, 76 U. MIAMI L. REV. 929, 932 n.15 (2022) (suggesting the possibility, and counterfactually, that John Merryman “petitioned the circuit court, which then *assigned the case to Taney*” (emphasis added)); [Judge] Sherrill Halbert, *The Suspension of the Writ of Habeas Corpus by President Lincoln*, 2 AM. J. LEGAL HIST. 95, 99 (1958) (“Taney took jurisdiction in this case as a Circuit Judge . . .”).

¹¹ See, e.g., In the Matter of the Petition for Habeas Corpus of Benigno S. Aquino, Jr. v. Hon. Juan Ponce Enrile, Secretary of National Defense, G.R. No. L-35546 (Supreme Court Philippines Sept. 17, 1974) (Castro, J.) (characterizing *Merryman* as a “Circuit Court” decision), https://lawphil.net/judjuris/juri1974/sep1974/gr_1_35546_1974.html; WILLIAM S. CHURCH, *A TREATISE OF THE WRIT OF HABEAS CORPUS* 39 (San Francisco, Bancroft-Whitney Co. 1886) (explaining that *Merryman* was heard in “the United States circuit court of [Maryland]”); LAURA F. EDWARDS, *A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION* 22 (2015) (asserting that Taney heard *Merryman* as a “federal circuit court judge”); FALLON ET AL., *supra* note 3, at 1204 (citing *Merryman* as “17 F.Cas. 144 (C.C.D.Md.1861) (No. 9487), by Chief Justice Taney, sitting as a Circuit Judge”); BENJAMIN GINSBERG, *PRESIDENTIAL GOVERNMENT* 34, 287 (2016) (stating that Taney, in *Merryman*, sat as a “federal circuit court judge”); H. LEON GREENE, *NORTHERN DUTY, SOUTHERN HEART*/GEORGE PROCTOR KANE’S CIVIL WAR 128 (2023) (indicating that Taney, in *Merryman*, sat as a “federal circuit court judge”); MARK C. MILLER, *THE VIEW OF THE COURTS FROM THE HILL: INTERACTIONS BETWEEN CONGRESS AND THE FEDERAL JUDICIARY* 57 (2000) (“[John] Merryman filed for a writ of habeas corpus with the U.S. Court of Appeals in Maryland . . .”); JAMES P. PFIFFNER, *POWER PLAY: THE BUSH PRESIDENCY AND THE CONSTITUTION* 95 (2008) (noting that in *Merryman*, “Chief Justice Roger Taney . . . was sitting as a circuit judge”); [CHIEF JUDGE] RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 188 n.50 (2001) (citing *Merryman* as “(Cir. Ct. D. Md. 1861)”); CHRISTIAN G. SAMITO, *CHANGES IN LAW AND SOCIETY DURING THE CIVIL WAR AND RECONSTRUCTION* 59 & 63 (2009) (asserting that, in *Merryman*, Taney sat as a “judge of the U.S. Circuit Court for the District of Maryland”); JAMES F. SIMON, *LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT’S WAR POWERS* 190 (2006) (“[I]n fact, [Taney in *Merryman*] was acting in his capacity as a circuit court judge.”); JONATHAN W. WHITE, *ABRAHAM LINCOLN AND TREASON IN THE CIVIL WAR: THE TRIALS OF JOHN MERRYMAN* 42 (2011) (concluding that “records confirm that the [*Merryman*] case was a circuit court decision”); [CHIEF JUSTICE] FRANK J. WILLIAMS, *JUDGING LINCOLN* 63 (2002) (“Taney . . . took jurisdiction as a circuit judge.”); Senator Ted Cruz, *The Obama Administration’s Unprecedented Lawlessness*, 38 HARV. J.L. & PUB. POL’Y 63, 80 (2015) (asserting that, in *Merryman*, “Chief Justice Taney, [was] sitting by designation as a circuit court judge”); Kate Evans, *Immigration Detainers, Local Discretion, and State Law’s Historical Constraints*, 84 BROOK. L. REV. 1085, 1129 n.285 (2019) (characterizing *Merryman* as a “Circuit Court of Maryland” decision); 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. OF S. LEGAL HIST. 109, 110 n.8 (2016) (affirming that Taney "had issued the writ as a Circuit Judge and not as a Supreme Court justice"); Paul Finkelman, *"Hooted Down the Page of History": Reconsidering The Greatness of Chief Justice Taney*, 19(1) J. SUP. CT. HIST. 83, 98 (1994) (explaining that in "*Ex parte Merryman* Taney [ruled] in his capacity as circuit court judge"); David B. Kopel, *Lyman Trumbull: Author of the Thirteenth Amendment, Author of the Civil Rights Act, and the First Second Amendment Lawyer*, 47 LOY. U. CHI. L.J. 1117, 1145 (2016) (explaining that "in *Ex parte Merryman*, in which Taney was circuit-riding and sitting as a Circuit Court Judge" (second emphasis added)); David Landau et al., *Federalism for the Worst Case*, 105 IOWA L. REV. 1187, 1238 (2020) (characterizing *Merryman* as a "circuit court" decision); James Landman, *You Should Have the Body: Understanding Habeas Corpus*, 72 SOC. EDUC. 99, 101 (Mar. 2008) (explaining that "Taney [was] sitting as a circuit court judge"), <https://tinyurl.com/2p96arrn>; Michael Les Benedict, *"The Perpetuation of Our Political Institutions": Lincoln, the Powers of the Commander in Chief, and the Constitution*, 29 CARDOZO L. REV. 927, 950 (2008) (characterizing *Merryman* as a "circuit court case"); Wayne McCormack, *Threats to Judicial Independence: Traditional Transitions Challenged*, in CHALLENGED JUSTICE: IN PURSUIT OF JUDICIAL INDEPENDENCE 37, 42 (Shimon Shetreet et al., eds., 2021) (noting that "Taney [was] sitting not as a Supreme Court Justice but as a United States Circuit Court Judge"); Steven L. Schwarcz, *Rollover Risk: Ideating a U.S. Debt Default*, 55 B.C. L. REV. 1, 25 (2014) (characterizing *Merryman* as a decision of the "Circuit Court for the District of Maryland"); Jason H. Silverman, *The Odd Couple of American Legal History*, 10 GREEN BAG 2D 511, 517 (2007) (characterizing *Merryman* as "a federal circuit court case"); Tyler, *Judicial Review in Times of Emergency*, *supra* note 3, at 501 n.69 ("Taney [acted in *Merryman*] in his capacity as a circuit judge."); Jonathan W. White, *The Strangely Insignificant Role of the U.S. Supreme Court in the Civil War*, 3 J. CIVIL WAR ERA 211, 218 (2013) ("Taney was sitting as a circuit justice in the U.S. Circuit Court for the District of Maryland, but he made his opinion appear to be that of a Supreme Court justice 'at chambers.'"); [Chief Justice] Frank J. Williams, *Abraham Lincoln and Civil Liberties: Then & Now—The Southern Rebellion and September 11*, 60 N.Y.U. ANN. SURVEY OF AM. L. 463, 474 (2004) ("This time, [in *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864)] unlike *Merryman*, the circuit court agreed with the suspension." (third emphasis added)); Kenneth Holland & Matthew Woessner, *Taney, Roger B.*, in ENCYCLOPEDIA OF THE SUPREME COURT 742, 744 (David Schultz ed., 2d ed. 2021) (explaining that "Taney in *Ex parte Merryman*, Circuit Court, District of Maryland (1861), issued the writ"); Zac Frank, *Elizabeth Cheney, Bush Legal Counsel*, SLATE (Jan. 29, 2009, 1:00 PM), <https://tinyurl.com/4peksdma> ("Correction, Jan. 30, 2009: This article originally referred to *Ex Parte Merryman* as a Supreme Court case. It was a circuit court order written by Roger Taney, the [C]hief [J]ustice of the Supreme Court, who was sitting on the circuit court at the time."); Allen Guelzo, *Ex parte Merryman (1861)*, CONSTITUTING AMERICA (last accessed Dec. 29, 2022), <https://tinyurl.com/4rwe6t9h> ("Taney issued [*Merryman*] in his co-capacity as a federal circuit judge, but prefaced it as being issued from his U.S. Supreme Court chambers as though it were the product of a full hearing before the Supreme Court."); *infra* note 26 (collecting authority asserting that *Merryman* was a decision of the "Fourth Circuit"); see also, e.g., 2 JAMES BRADLEY THAYER, CASES ON CONSTITUTIONAL LAW 2361 (Cambridge, George H. Kent 1895) (reporting: "Ex parte John Merryman. Circuit Court of the United States for Maryland."); Fallon, *Executive Power and the Political Constitution*, *supra* note 3, at 3 ("Ruling in his capacity as circuit judge, Chief Justice Roger Taney concluded in *Merryman* that . . ."); Deborah Pearlstein, *Contemporary Lessons from the Age-Old*

this is also the position of Justice Alito and others on today's Supreme Court.¹²⁾

Prize Cases: *A Comment on the Civil War in U.S. Foreign Relations Law*, 53 S. LOUIS U. L.J. 73, 83 n.52 (2008) (“*Merryman* was decided by Chief Justice Taney while sitting with the Circuit Court of the District of Maryland.”); James F. Simon, *Lincoln and Chief Justice Taney*, 35(3) J. SUP. CT. HIST. 225, 236 (2010) (explaining that Taney issued the *ex parte* writ “in his capacity as a circuit court judge”); *cf.*, e.g., ALBERT BUSHNELL HART, SALMON PORTLAND CHASE 326 (Boston, Houghton, Mifflin and Company 1899) (indicating that Taney, in *Merryman*, was “sitting alone on the Circuit bench”); HAROLD M. HYMAN, THE RECONSTRUCTION JUSTICE OF SALMON P. CHASE 124 (1997) (characterizing *Merryman* as a “circuit opinion”); Robert J. Pushaw, Jr., *Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic*, 84 NOTRE DAME L. REV. 1975, 1990 (2009) (“John Merryman, filed a habeas writ to the appropriate Circuit Court, where Chief Justice Taney sat.” (emphasis added)); Geoffrey R. Stone, *Civil Liberties in Wartime*, 28(3) J. SUP. CT. HIST. 215, 220 (2003) (“The judge assigned to hear [John] Merryman’s petition was Chief Justice Roger B. Taney.” (emphasis added)); John Harrison, *Would All the Laws But One be Close Enough for Government Work*, 2 GREEN BAG 2D 333, 334 (1999) (reviewing [CHIEF JUSTICE] WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998)) (“Chief Justice Taney, apparently sitting on the Circuit Court, ordered Merryman released”); Andrew C. McCarthy, *How the sausage was made*, 41(6) THE NEW CRITERION 55, 58 (2023) (reviewing BRAD SNYDER, DEMOCRATIC JUSTICE: FELIX FRANKFURTER, THE SUPREME COURT, AND THE MAKING OF THE LIBERAL ESTABLISHMENT (2022)) (“Taney, acting as a circuit judge, ruled”); *Judicial Review of Executive Orders*, FEDERAL JUDICIAL CENTER (last accessed Dec. 18, 2022), <https://tinyurl.com/3hbj4266> (“In *Ex parte Merryman* (1861), Chief Justice Roger Taney, sitting on the U.S. circuit court in Maryland, held that the power to suspend the writ rested exclusively with Congress.”); *Ex Parte Merryman / United States law case [1861]*, BRITANNICA (last accessed Dec. 26, 2022), <https://tinyurl.com/4r36tcmp> (explaining that “Supreme Court Chief Justice Roger B. Taney, sitting as a federal circuit court judge [in *Merryman*]”). See generally An Act to amend the Judicial System of the United States, ch. 31, § 4, 2 Stat. 156, 157 (1802) (providing that the “districts of Maryland and Delaware shall constitute the fourth circuit”), <https://tinyurl.com/4aj7dma3>. This 1802 statute was famous for repealing the 1801 Midnight Judges Act. See *infra* note 47 (citing Midnight Judges Act). The statutory circuits controlled circuit riding duties by the Justices and also when term would be held. Nevertheless, from this time until the Evarts Act (1891), a *different* circuit court of appeals met in each state.

¹² See *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1978 (2020) (Alito, J.) (citing *Merryman* as a decision of “(CCD Md. 1861)”; see also *Parisi v. Davidson*, 405 U.S. 34, 47 (1972) (Douglas, J., concurring) (citing *Merryman* as a decision of “(CC Md. 1861)”; *cf.* *Beras v. Johnson*, 978 F.3d 246, 258 (5th Cir. 2020) (Oldham, J., concurring) (citing *Merryman* as a decision of “(C.C.D. Md. 1861)”; *Zweibon v. Mitchell*, 516 F.2d 594, 627 (D.C. Cir. 1975) (Skelly Wright, J.) (citing *Merryman* as a decision of “(C.C.Md.1861)”; *U. S. ex rel. Martinez-Angosto v. Mason*, 344 F.2d 673, 685 (2d Cir. 1965) (Marshall, J.) (citing *Merryman* as a decision of “(C.C.Maryland 1861)”). If these Justices and judges meant that *Merryman* was a decision of the federal Circuit Court for the District of Maryland, then they erred. Why? Because, as the *Bluebook* explains, a parenthetical’s referring to a court identifies the “deciding court,” and *Merryman* was not decided by the federal circuit court. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 55 (Columbia Law Review Ass’n et al. eds., 17th ed. 2000). Nevertheless, this ambiguous language within these citations is arguably helpful. Why? Because *Merryman*, in fact, was adjudicated within the confines of the territory

The position of these commentators (including Chief Justice Rehnquist and several other federal judges) is *not* correct. Apparently, the basis for these authors' mistaken inference was that *Merryman* is usually cited as a circuit court decision,¹³ presumably because Taney chose to leave his final written opinion of the case with the clerk for the United States Circuit Court for the District of Maryland with directions that his opinion be filed with the circuit court's records and transmitted to President Lincoln. As a result, Taney's opinion has been reported, on many, if not most, occasions (e.g., in the *Federal Cases* reporter) as a circuit court case.¹⁴

of the federal Circuit Court for the District of Maryland—even if not a decision of the federal circuit court. See generally An Act to amend the Judicial System of the United States (1802), *supra* note 11 (providing that the “districts of Maryland and Delaware shall constitute the fourth circuit”); *Ex parte Merryman*, 17 F. Cas. 144, 145 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.) (reproducing litigation-related affidavits, including two certified by “John Hanan, U.S. Commissioner” who was “appointed by the circuit court of the United States, in and for the Fourth circuit and district of Maryland, to take affidavits”).

¹³ *Merryman* is usually cited along the lines of: “*Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.).” See also Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 578 n.2 (2008) (“Taney’s oral opinion denying that a president could suspend the writ without congressional authorization was subsequently published as a federal circuit court opinion.” (emphasis added)); cf. Katherine L. Vaughns, *Of Civil Wrongs and Rights: Kiyemba v. Obama and the Meaning of Freedom, Separation of Powers, and the Rule of Law Ten Years after 9/11*, 20 ASIAN AM. L.J. 7, 20 n.92 (2013) (“*Ex Parte Merryman* was technically issued as an opinion of the Circuit Court for the District of Maryland.” (second emphasis added)). But see Jeffrey D. Jackson, *The Power to Suspend Habeas Corpus: An Answer from the Arguments Surrounding Ex Parte Merryman*, 34 U. BALT. L. REV. 11, 17 n.41 (2004) (“However, it is not at all clear that this characterization of Taney acting as a circuit court judge is correct.”).

¹⁴ See *Merryman*, 17 F. Cas. at 144 (providing in the caption of the case’s report: “Circuit Court, D. Maryland.”); see also *id.* at 153 (“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.”); BRIAN MCGINTY, *THE BODY OF JOHN MERRYMAN: ABRAHAM LINCOLN AND THE SUSPENSION OF HABEAS CORPUS* 176 (2011) (affirming that part of the cause of the (subsequent) confusion surrounding *Merryman*’s status as a federal circuit court case sprung from Taney’s using the clerk of the circuit court during and at the close of the proceedings); WHITE, *supra* note 11, at 42 (suggesting that the circuit court’s clerk having taken control of the final written opinion, having transmitted it to Lincoln, and having filed it with the circuit court’s records—all “confirm that the case was a circuit court decision”). Volume 17 of *Federal Cases*, the traditional reporter currently and long used for citing to *Merryman*, was published by West Publishing Company in 1895. See 17 THE FEDERAL CASES COMPRISING CASES ARGUED AND DETERMINED IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES 144, 144 (St. Paul, West Publishing Co. 1895) (providing in the caption of *Merryman*’s report: “Circuit Court, D. Maryland.”), <https://tinyurl.com/mvu5z92w>; MCGINTY, *supra*, at 176 & 224 n.12 (affirming that part of the cause of the (subsequent) confusion surrounding *Merryman*’s status as a federal circuit court case sprung from *Merryman*’s later appearing in the *Federal Cases* reporter). The report of *Merryman* in *Federal Cases* relied upon an earlier report of the case which had appeared in “Taney, 246”—also known as *Campbell’s Reports*. See JAMES MASON CAMPBELL, *REPORTS OF CASES AT LAW AND EQUITY AND IN THE ADMIRALTY DETERMINED IN THE CIRCUIT COURT OF THE UNITED*

Still, there are (other) good reasons contemporaries might have been confused on this point. Why? First, during the initial public *Merryman* hearing, on May 27, 1861, both Chief Justice Taney, the circuit justice for Maryland, and William F. Giles, the single federal district court judge for Maryland, appeared on the bench.¹⁵ Having two judges on the bench might have led the public to believe they were hearing a federal circuit court case. However, on May 28, 1861, the date of the final *Merryman* hearing, Judge Giles did not appear on the bench with Taney, nor did Judge Giles participate in deciding *Merryman*.¹⁶ Second, both public *Merryman* hearings, on May 27 and May 28, 1861, were held in the room where federal circuit court hearings had been and were regularly held.¹⁷ This too was likely to have led

STATES FOR THE DISTRICT OF MARYLAND BY ROGER BROOKE TANEY / APRIL TERM 1836 TO APRIL TERM 1861, at 246 (Philadelphia, Kay & Brother 1871) (providing in the caption of *Merryman*'s report: "Circuit Court, April Term, 1861"), <https://tinyurl.com/9ehd8vrf>. Professor Hartnett points to two 1861 reports of *Merryman* which captioned the case as a circuit court decision. See Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251, 280 n.126 (2005) ("Two contemporary reports denominate the case as decided in chambers, not in the April 1861 term of the Circuit Court for the District of Maryland, although they also denominate it as decided in the Circuit Court. See *Ex parte Merryman*, AM. L. REG. & U. PA. L. REV., 1861, at 524 (providing caption 'In the United States Circuit Court, Chambers, Baltimore, Maryland. Before Taney, Chief Justice'); 3 W. L. MONTHLY 461, 461 (1861) (providing caption 'U.S. Circuit Court—At Chambers. Baltimore, Md. . . . Before Hon. Roger B. Taney, Chief Justice of the United States.')."). As to Taney's original *Merryman* decision, a PDF is available on the website of the Maryland state archives. 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), <https://tinyurl.com/2cdpd8w5>, <https://perma.cc/SQ7V-2EFU>.

- ¹⁵ See *The Habeas Corpus Case*, THE SOUTH (Baltimore, Md.), May 28, 1861, at 2 (reporting that Taney explained that Judge Giles "was present at yesterday morning's hearing at [Taney's] special request, to afford [Taney] the aid of [Giles'] counsel, but as the writ of attachment had been issued by himself [Taney], in his capacity as Chief Justice of the United States, Judge Giles did not conceive it to be requisite that he should be present this morning [on May 28, 1861], unless at [Taney's] request. . . ."), <https://tinyurl.com/4a59xfu>; see also MCGINTY, *supra* note 14, at 28 (same); *id.* at 74–75 (explaining that Taney regularly "presided [over federal circuit court cases in Baltimore] in conjunction with the U.S. district judge for the District of Maryland, William F. Giles").
- ¹⁶ Giles' name nowhere appears in the report of *Merryman* in *Federal Cases*. See *Merryman*, 17 F. Cas. *passim*; see also MCGINTY, *supra* note 14, at 176 (explaining that Judge "Giles did not participate in the [*Merryman*] decision"); *supra* note 15.
- ¹⁷ See *Merryman*, 17 F. Cas. at 146 (noting that Taney's order stated that the writ was "returnable . . . at the circuit court room, in the Masonic Hall, in the city of Baltimore"); *id.* (noting that the clerk issued the writ, which stated that the defendant was to appear with John Merryman in the "United States court-room, in the Masonic Hall, in the city of Baltimore"); *City Intelligence: The Habeas Corpus Case*, THE [BALTIMORE] DAILY EXCHANGE, May 29, 1861, at 1 (reporting that "[a]t an early hour of the day, the United States Circuit Court building was besieged by an immense crowd"); see also MCGINTY, *supra* note 14, at 176 ("Taney heard *Merryman* 'in the courtroom of the [federal] circuit court in Baltimore.'"); *cf.* CHARLES GROVE HAINES & FOSTER H. SHERWOOD, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1835–1864*, at 457 (1957) (noting that Taney's writ directed Cadwalader to produce John Merryman "in the Baltimore circuit court"—an ambiguous statement which might refer to a federal or state

the public to believe they were hearing a federal circuit court case. One also notes that some of those who have adopted the *Merryman*-was-a-circuit-court-decision position, including one federal district court judge writing extrajudicially, have also indicated that *Merryman* was heard as an appeal of a lower court decision,¹⁸ but the basis for such a view remains obscure.¹⁹

Others have asserted that *Merryman* was a district court decision—in effect, a decision of the United State District Court for the District of Maryland.²⁰

court, a building, or both); 3 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY, 1856–1918*, at 90 (1922) (noting that in *Merryman*, “Taney [was] sitting in the United States Circuit Court”—which might refer to the building, or the court, or both); Robert Eugene Cushman, *History of the Supreme Court in Resumé*, 7 MINN. L. REV. 275, 289 (1922) (noting that in *Merryman*, “Taney [was] sitting in the circuit court”—which might refer to the building, or the court, or both).

¹⁸ See, e.g., JOSHUA E. KASTENBERG, *A CONFEDERATE IN CONGRESS: THE CIVIL WAR TREASON TRIAL OF BENJAMIN GWINN HARRIS* 44 (2022) (asserting that *Merryman* first took his case to Judge Giles, the Maryland federal district court judge, and then *Merryman* “appealed directly to Chief Justice Taney”); THOMAS C. MACKEY, *OPPOSING LINCOLN: CLEMENT L. VALLANDIGHAM, PRESIDENTIAL POWER, AND THE LEGAL BATTLE OVER DISSENT IN WARTIME* 59 (2020) (characterizing Taney’s *Merryman* decision as a decision of the “federal circuit court” on appeal from a prior federal district court decision); [Judge] Stephen M. Orlofsky, *Judicial Independence in the Age of Trump*, NEW JERSEY LAWYER 24, 25 (June 2018) (“A district court judge in Maryland issued a writ for the benefit of John Merryman nonetheless. When it was not respected, Merryman appealed to Taney as the circuit judge for Maryland.”), <https://tinyurl.com/5ar3ywh7>; Peter David Finn, *Emergency and Modernity: Contextualizing the Contemporary Debate* 80–81 (National University of Singapore, Department of Political Science, PhD dissertation, 2017) (describing *Merryman* as first having been heard by Judge Giles, who issued the writ, which was ignored by the commander of Fort McHenry, and then the case “made its way to the United States Supreme Court where Chief Justice Roger B. Taney wrote the majority opinion”); see also HARRY A. EZRATTY, *BALTIMORE IN THE CIVIL WAR: THE PRATT STREET RIOT AND A CITY OCCUPIED*, ch. 18 (2010) (asserting that Taney heard *Merryman* after prior federal district court proceedings).

¹⁹ See Jonathan W. White, Book Review, 11 J. CIVIL WAR ERA 579, 581 (2021) (reviewing THOMAS C. MACKEY, *OPPOSING LINCOLN: CLEMENT L. VALLANDIGHAM, PRESIDENTIAL POWER, AND THE LEGAL BATTLE OVER DISSENT IN WARTIME* (2020)) (“*Merryman* was not an appeal from a federal district court.”); see also *infra* notes 20–24 (showing that *Merryman* was heard by Taney as a trial judge).

²⁰ See, e.g., DOROTHY DENNEEN & JAMES M. VOLO, *DAILY LIFE IN CIVIL WAR AMERICA* 370 (2d ed. 2009) (characterizing *Merryman* as a “federal district court” decision); GEORGE KATEB, *LINCOLN’S POLITICAL THOUGHT* 148 (2015) (“*Ex parte Merryman* . . . [was issued] pursuant to Taney’s role as a district court judge”); MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 10 (1991) (explaining that Taney issued *Merryman* while “on circuit as a district judge”); JACK STARK, *PROHIBITED GOVERNMENT ACTS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 22 (2002) (asserting that Taney in *Merryman* “presid[ed] over” “a federal district court”); John W. Bagby et al., *Medical Martial Law: Towards a More Effective Pandemic Policy*, 47 S. ILL. U. L.J. 1, 33 (2022) (characterizing *Merryman* as a decision of the “Maryland Federal District Court”); P. Banerjee, *A Comparative Analysis Of The Use Of Emergency Powers In The United States Of America (“U.S.”) And India*, 6 INDIAN POL. & L. REV. J. 286, 289 (2021) (characterizing *Merryman* as a decision of the “Federal District Court of Maryland”), <https://tinyurl.com/yab78e4r>; Dale Carpenter, *Dishonorable Disobedience*, THE VOLOKH CONSPIRACY—REASON (Sept. 3, 2015, 10:49 PM), <https://tinyurl.com/4fnuhn5> (discussing Lincoln’s “failure to follow a district

Indeed, Justice Sotomayor hinted at this possibility,²¹ as has Judge Salmon, a judge on the Maryland Court of Special Appeals²² and other

court order in *Ex Parte Merryman*"); Noah Feldman, *Hold Your Tongue: This Isn't a 'Constitutional Crisis,'* BLOOMBERG: OPINION (May 12, 2017, 18:14 IST), <https://tinyurl.com/4hbuphwa> (explaining that Taney, in *Merryman*, was "sitting as a district judge"); *Emergency Powers*, LEGAL INFORMATION INSTITUTE (Nov. 2022), <https://tinyurl.com/bde9vfm> (characterizing *Merryman* as a decision of the "Federal District Court of Maryland"); see also *The Impeachment Trial of President Abraham Lincoln*, 40 ARIZ. L. REV. 351, 367 (1998) (reporting Mark E. Neely, Jr. stating, in mock cross examination, "Taney, sitting in the Baltimore District Court, held that the president had no power to suspend the Writ . . ."); cf. LOUIS FISHER, CONG. RESEARCH SERV., RL32458, MILITARY TRIBUNALS: HISTORICAL PATTERNS AND LESSONS 22 n.145 (2004) (discussing *Merryman*, and citing "(D.C. Md. 1861)"), <https://tinyurl.com/4563jzkw>; Captain Brian C. Baldrate, *The Supreme Court's Role in Defining the Jurisdiction of Military Tribunals: A Study, Critique, and Proposal for Hamdan v. Rumsfeld*, 186 MIL. L. REV. 1, 37 n.235 (2005) (discussing *Merryman*, and citing "(D.C. Md. 1861)"); Frances M. Clarke & Rebecca Jo Plant, *No Minor Matter: Underage Soldiers, Parents, and the Nationalization of Habeas Corpus in Civil War America*, 35(4) LAW & HIST. REV. 881, 891 n.21 (2017) ("Merryman's case never came to trial. As a capital offense, it had to be tried by the United States District Court in Baltimore, over which Taney presided.").

²¹ See Sotomayor, *supra* note 1, at 881 (asserting that *Merryman* was "filed with the United States District Court"). I see no good basis for Sotomayor's assertion that *Merryman* was "filed" with district court for Maryland. Taney's written opinion and other historical records establish that *Merryman* was not initially filed with any court—instead, John Merryman's Maryland counsel, George M. Gill and George H. Williams, presented (or, at least, sent) Merryman's habeas corpus petition to Chief Justice Taney at Taney's Washington home. See MCGINTY, *supra* note 14, at 76 (explaining that the "petition and supporting affidavits arrived at Taney's Washington home"); Arthur T. Downey, *The Conflict between the Chief Justice and the Chief Executive: Ex parte Merryman*, 31(3) J. SUP. CT. HIST. 262, 262 (2006) (explaining that Merryman's petition was presented to "Taney at his home in Washington"). When the case ended, Taney expressly directed that his "opinion [was to be] filed and recorded in the [C]ircuit [C]ourt of the United States for the [D]istrict of Maryland . . ." *Ex parte Merryman*, 17 F. Cas. 144, 153 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.). At some later stage, the case file was transferred to (or, perhaps, inherited by) the United States District Court for the District of Maryland. And the case file, including Taney's opinion, was subsequently borrowed by the Maryland state archives. See ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES): JOHN MERRYMAN (1824–1881), <https://tinyurl.com/bdfeze5x>, <https://tinyurl.com/2cdpd8w5> (noting that "*Ex Parte Merryman*, orig[i]nal [sic] case papers [were] borrowed from the Federal District Court"). Compare WHITE, *supra* note 11, at 42 (explaining, in 2011, that "the [case] records are still with the clerk's office at the U.S. District Court for the District of Maryland"), with E-mail from the Maryland State Archives to Seth Barrett Tillman (Jan. 4, 2022) (explaining, in 2022, that "the originals are housed here at the Maryland State Archives for preservation, but still are under the ownership of the U.S. District Court"). To be clear, *Merryman* was not "filed" with the district court by Merryman's lawyers, nor by the presiding judge. At some stage, perhaps long after the case became a final judgment and appeared in the reporters, the stale records of the case were put in the possession of the district court, and that court put those records in its files.

²² See *Hayfields, Inc. v. Valleys Planning Council, Inc.*, 716 A.2d 311, 315 n.5 (Md. App. 1998) (Salmon, J.) (citing *Merryman* as a decision of "D. Md."). "D. Md." is the standard modern form of citation for the United States District Court for the District of Maryland. If Judge Salmon meant that *Merryman* was a decision of the federal district court for the District of Maryland, then he erred. Why? Because, as the *Bluebook* explains, a

authors.²³ The position of these commentators (including Justice Sotomayor and Judge Salmon) is *not* correct. Apparently, the basis for these authors' mistaken inference was that *Merryman* was decided by a court of first instance or trial court,²⁴ and in the modern federal judicial system, it is the district courts which customarily function as the court of first instance or trial court.

So, which was it?²⁵ Was *Ex parte Merryman* a decision of:

parenthetical's referring to a court identifies the "deciding court," and *Merryman* was not decided by the federal district court. THE BLUEBOOK, *supra* note 12, at 55. Nevertheless, this ambiguous language within this citation is arguably helpful. Why? Because *Merryman*, in fact, was adjudicated within the confines of the territory of the federal district court for the District of Maryland—even if not a decision of the federal district court. Judge Salmon sat on the Maryland Court of Special Appeals. In 2022, in consequence of a constitutional amendment, that court was renamed the Appellate Court of Maryland. See *Supreme Court of Maryland*, MARYLAND COURTS (last accessed Dec. 21, 2022), <https://www.courts.state.md.us/coappeals>.

²³ See, e.g., SUSAN N. HERMAN, ADVANCED INTRODUCTION TO US CIVIL LIBERTIES 26 n.6 (2023) (discussing *Merryman*, and citing "(D. Md. 1861)"); Eric Berger, *Of Law and Legacies*, 65 DRAKE L. REV. 949, 954 n.12 (2017) (discussing *Merryman*, and citing "(D. Md. 1861)"); James P. George, *Jurisdictional Implications in the Reduced Funding of Lower Federal Courts*, 25 REV. OF LITIG. 1, 64 n.297 (2006) (discussing *Merryman*, and citing "(D. Md. 1861)"); Eugene V. Rostow, *The Japanese-American Cases—A Disaster*, 54 YALE L.J. 489, 511 n.58 (1945) (citing *Merryman* as a decision of "(D. Md. 1861)"); George Rutherglen, *Structural Uncertainty over Habeas Corpus & the Jurisdiction of Military Tribunals*, 5 GREEN BAG 2D 397, 398 n.4 (2002) (citing *Merryman* as a decision of "(D. Md. 1861)"); Robert L. Tsai, *Manufactured Emergencies*, 129 YALE L.J. FORUM 590, 596 n.22 (Feb. 15, 2020) (citing *Merryman* as a decision of "(D. Md. 1861)"); Ingrid Brunk Wuerth, *The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War*, 98 NW. U. L. REV. 1567, 1611 n.256 (2004) (citing *Merryman* as a decision of "(D. Md. 1861)"); Adrienne Lee Benson, Note, *Routine Emergencies*, 90 N.Y.U. L. REV. 1662, 1675 n.55 (2015) (citing *Merryman* as a decision of "(D. Md. 1861)"); Scott J. Shackelford, *Habeas Corpus Writ of Liberty, Boumediene and Beyond*, 57 CLEV. ST. L. REV. 671, 678 n.54 (2009) (reviewing ROBERT SEARLES WALKER, *HABEAS CORPUS WRIT OF LIBERTY* (2006)) (citing *Merryman* as a decision of "(D. Md. 1861)").

²⁴ See also 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 6.13(b)(i) n.12 (5th ed. 2022) ("The [*Merryman*] case did not reach the Supreme Court, but the trial judge was Chief Justice Taney."); James A. Dueholm, *Lincoln's Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis*, 29(2) J. OF THE ABRAHAM LINCOLN ASS'N 47, 48 (2008) (explaining that "*Merryman*'s lawyer promptly petitioned Chief Justice Roger Brooke Taney, sitting as a trial judge . . ." (emphasis added)); Michael J. Gerhardt, *Presidential Defiance and the Courts*, 12 HARV. L. & POL'Y REV. 67, 76 (2018) (affirming that "[i]n his opinion as a trial judge in the matter, then-Judge Taney ruled"); *supra* notes 20–23 (collecting authority).

²⁵ But cf. Stephen I. Vladeck, *The Field Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 80 TEMPLE L. REV. 391, 392 n.2 (2007) (characterizing the question posed in the instant Article (and elsewhere) as a "seemingly pedantic historical footnote"); Steve Vladeck, *SCOTUS Trivia: Circuit Justice or Chief Justice, In Chambers?*, ONE FIRST (Feb. 20, 2023), <https://tinyurl.com/59rx6mhz> ("Speaking of the Supreme Court and the [American] Civil War, in the battle for nerdiest debate among [f]ederal [c]ourts scholars, the dispute over the specific capacity in which Chief Justice Taney decided *Ex parte Merryman* has to be up there."). Professor Vladeck repeats

- (a) the Supreme Court of the United States;
- (b) the United States Circuit Court for the District of Maryland;
- (c) the United States Court of Appeals for the Fourth Circuit;²⁶

all too many of the usual historical myths: e.g., “Merryman was a former Maryland legislator [?] and Confederate sympathizer [?] accused [?] of being part of an organized plot to prevent Union troops from being sent through Baltimore to reinforce Washington in late April 1861 [?]” and “[w]hen Merryman was arrested by federal troops and sent to Fort McHenry for detention, his father [?] (who just happened to have been Taney’s college roommate [? and !]) promptly asked the Chief Justice, no friend of Lincoln’s, for a writ of habeas corpus.” *Id.* But see Merryman, 17 F. Cas. at 146 (reporting Cadwalader’s written return, i.e., his response, to Taney’s habeas writ as stating that Merryman was “charged with various acts of treason” absent any specific mention of events during April 1861 or events in Baltimore); ‘Merryman, John, of Hayfields,’ in 1 THE BIOGRAPHICAL CYCLOPEDIA OF REPRESENTATIVE MEN OF MARYLAND AND DISTRICT OF COLUMBIA 312, 313 (Baltimore, National Biographical Publishing Company 1879) (noting that Merryman was a member of the Maryland legislature in 1874—absent any indication of prior membership), <https://tinyurl.com/mtf43mbk>; *id.* at 312 (explaining that shortly before Merryman’s seizure by the U.S. Army, Merryman “was introduced to [U.S.] Major Belger, and offered to render him or the [Union] troops any service required; and if necessary would slaughter his [Merryman’s] cattle to supply the [Union troops] with food”); WHITE, *supra* note 11 *passim* (reporting Merryman’s post-American Civil War service in the state legislature, and not reporting any 1861 or pre-1861 service); ‘John Merryman’ in Francis B. Culver, *Merryman Family*, 10(3) MR. HIST. MAG. 286, 296–297 (Sept. 1915) (noting that Merryman was a member of the state legislature in 1874—absent any indication of prior membership), <https://tinyurl.com/4es42enp>; Vladeck, *The Field Theory*, *supra*, at 408 (noting that Merryman “was elected to the Maryland House of Delegates in 1874” (emphasis added)); but see also MCGINTY, *supra* note 14, at 59–60 (describing Merryman’s failed 1855 campaign for a state legislative seat). But see generally Tillman, *Ex parte Merryman: Myth, History, and Scholarship*, *supra* note 1, at 485 n.11, 486 n.12, 487–88 (contesting *Ex parte Merryman*’s many myths—including several of those raised by Vladeck and others). For what it is worth, Merryman was elected to the Maryland lower house in 1873, for a term which, apparently, began in 1874. See *General Assembly of Maryland*, THE MARYLAND UNION, Nov. 13, 1873, at 2 (reporting Merryman’s election to the House of Delegates as a Democratic-Conservative for Baltimore County); *General Assembly of Maryland*, MONTGOMERY COUNTY SENTINEL, Nov. 14, 1873, at 3 (same). Finally, Vladeck’s claim that Merryman’s father and Chief Justice Taney were “college roommate[s]” is novel. I suppose Vladeck’s claim is built on Paulsen’s claim and Yoo’s claim that Merryman’s father and Taney attended Dickinson’s College “together”. Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 90 n.27 (1993) (citing SWISHER, *infra*); Yoo, *supra* note 7, at 513 & n.81 (citing SWISHER, *infra*). Both Paulsen and Yoo relied on Swisher. But Swisher does not report that the two attended “together;” rather, Swisher only reports that the two “attended Dickinson College during the same period.” 5 CARL B. SWISHER, THE OLIVER WENDELL HOLMES DEVISE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836–64, at 845 (1974) (emphasis added). And Swisher’s modest historical claim’s basis, documentary or otherwise, remains obscure. Indeed, modern research suggests that Swisher was in error. See WHITE, *supra* note 11, at 130 n.1 (explaining that “Dickinson College has no record of Merryman’s father, Nicholas Rogers Merryman, attending”). See generally D.M. Lucas & J.G. Wigmore, *The Broken Telephone Effect*, 22(2) CANADIAN SOC’Y OF FORENSIC SCI. J. 225 (1989), <https://tinyurl.com/2rh6vez1>.

²⁶ Some have reported *Merryman* as a Fourth Circuit decision. See, e.g., ROBERT SEARLES

- (d) the United States District Court for the District of Maryland; or,
- (e) the Supreme Court of Maryland?²⁷

Of course, the correct answer is: (f) none of the above.²⁸

WALKER, HABEAS CORPUS WRIT OF LIBERTY 116 (rev. ed. 2006) (asserting that, in *Merryman*, Taney sat “as the presiding judge of the Fourth Circuit Court of Appeals”); Downey, *supra* note 21, at 269 (asserting that in *Merryman*, Taney was “[w]riting for the Fourth Circuit”); see also United Nations International Human Rights Instruments: United States 40 (Jan. 16, 2006) (noting that, in *Merryman*, “Chief Justice Taney [was] sitting as a Circuit Judge for the 4th Circuit”), <https://tinyurl.com/r2rx87yd>; RICHARD J. ELLIS, THE DEVELOPMENT OF THE AMERICAN PRESIDENCY 413 & 560 n.35 (2012) (characterizing Taney as “hearing [*Merryman*], in his capacity as chief judge of the fourth circuit”); MCGINTY, *supra* note 14, at 229 (indicating that *Merryman* was filed in “May 1861 in [the] United States Circuit Court for the Fourth Circuit”); *id.* at 230 (same). But the earliest decisions reported on Westlaw for the United States Court of Appeals for the Fourth Circuit are from 1892. See, e.g., *The Steam Tug Luckenbach v. The Georgia*, 50 F. 129 (4th Cir. Apr. 12, 1892). See generally An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes (the Evarts Act), ch. 517, 26 Stat. 826 (1891), <https://tinyurl.com/5e5c2h49>; *supra* note 11 (discussing pre-*Merryman* federal circuits and judicial circuit riding duties).

²⁷ See *Perlman v. Lieutenant-Colonel Piché*, 41 Dominion Law Reports 147 [34] (Cour Supérieure du Québec 1918) (Bruneau J) (asserting that *Merryman* was a decision of “la Cour suprême du Maryland”), also reported in 54 LES RAPPORTS JUDICIAIRES DE QUÉBEC 170, 183 (Jean-Joseph Beauchamp rédacteur en chef, 1918). During the American Civil War, the highest state court in Maryland was the Court of Appeals of Maryland. In 2022, in consequence of a constitutional amendment, that court was renamed the Supreme Court of Maryland. See *Supreme Court of Maryland*, MARYLAND COURTS (last accessed Dec. 21, 2022), <https://www.courts.state.md.us/coappeals>.

²⁸ See generally BRUCE A. RAGSDALE, EX PARTE MERRYMAN AND DEBATES ON CIVIL LIBERTIES DURING THE CIVIL WAR 10–11 (Federal Judicial History Office 2007) (discussing alternative theories of Taney’s jurisdiction in *Merryman*), <https://tinyurl.com/djd582yb>; *id.* at 11 (“Taney realized that his jurisdictional authority in *Ex parte Merryman* was irrelevant, since he was exercising no judicial power apart from the orders to file the records of the proceedings and to send a copy to President Lincoln.”). Still, Ragsdale does not consider that Taney’s efforts to cite *Cadwalader* for contempt required a sound basis for federal jurisdiction. Justice Scalia, possibly in an effort to square-the-*Merryman*-circle, cited *Merryman* as a decision of “(C.D.Md. 1861)”. *Hamdi v. Rumsfeld*, 542 U.S. 507, 562 (2009) (Scalia, J., dissenting); see also *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 14 (D.D.C. 2006) (Robertson, J.) (citing *Merryman* as a decision of “(CD Md. 1861)”; Eric A. Posner, *Political Trials in Domestic and International Law*, 55 DUKE L.J. 75, 79 n.5 (2005) (citing *Merryman* as a decision of “(C.D. Md. 1861)”). Scalia et al.’s form of citation is not pellucidly clear. For yet another less than entirely clear form of citation, see Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 892 n.67 (2007) (citing *Merryman* as a decision of “(Cir Ct Md 1861)” as appearing in the *Federal Cases* reporter). However, “Cir Ct Md” might also refer to the Maryland state trial court of general jurisdiction. See, e.g., *Circuit Courts*, MARYLAND COURTS (last accessed Mar. 28, 2023), <https://www.courts.state.md.us/circuit>; see also Arthur John Keeffe, *Practicing Lawyer’s Guide to the Current Law Magazines*, 48 A.B.A. J. 491, 491 (1962) (noting that during the American Civil War, federal authorities arrested Judge James L. Bartol of the Maryland Court of Appeals and Judge Richard Bennett Carmichael of the Maryland Circuit Court, and the “latter was arrested while conducting court”).

So what did happen? Taney decided *Merryman* under special authority granted by the Judiciary Act of 1789 to all Article III judges and Justices. Section 14 of the act stated: “And that either of the *justices of the supreme court*, as well as *judges of the district courts*, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment.”²⁹ This position is confirmed by Chief Justice Taney’s own words in *Merryman*. Taney wrote: “The application in this case for a writ of habeas corpus is made *to me* under the 14th section of the judiciary Act of 1789 [1 Stat. 81], which renders effectual for the citizen the constitutional privilege of the writ of habeas corpus.”³⁰ This understanding of the actual procedural posture of *Merryman* has been recognized by some (but not all) Justices³¹ and commentators,³² along with some of the earliest reports of the case.³³

²⁹ An Act to establish the Judicial Courts of the United States, ch. 20, § 14, 1 Stat. 73, 81–82 (1789) (emphases added), <https://tinyurl.com/24796edk>; CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 20 (expanded ed. 1976) (explaining that in *Merryman*, the Chief Justice was “pure and simple, acting under section 14 of the Judiciary Act of 1789”); see also *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 80 (1807) (Marshall, C.J.) (discussing Section 14 and stating: “the first sentence [of Section 14] vests this power [to grant habeas corpus] in all the courts of the United States; but as those courts are not always in session, the second sentence vests it in every justice or judge of the United States”). Under the 1789 Act, judges were not appointed by the President to circuit courts. Rather, each circuit court was composed of the local federal district court judge and whichever Justice of the Supreme Court “rode” circuit for that circuit.

³⁰ *Merryman*, 17 F. Cas. at 147 (emphasis added) (bracketed language in the original).

³¹ [JUSTICE] SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 349 n.1 (New York, Banks and Brothers Law Publishers 1891) (noting that Taney was “sitting at chambers”), <https://tinyurl.com/38hxpjz3>.

³² See HAINES & SHERWOOD, *supra* note 17, at 458 (explaining that *Merryman* was issued “at Chambers” and that Taney spoke “in the first person”); *id.* (explaining that the power to issue the writ of habeas corpus under the Judiciary Act of 1789 extended to “[t]he courts of the United States and each justice of the Supreme Court, as well as every district judge”); Hartnett, *supra* note 14, at 279–81 (explaining that *Merryman* was a chambers decision, and not a Supreme Court decision); see also MCGINTY, *supra* note 14, at 80–81 (arguing that Taney acted in an “individual capacit[y]”); Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587, 638 n.142 (1949) (“In *Ex parte Merryman*, . . . Taney acted alone as Justice of the Supreme Court—not as a judge holding the circuit court”); cf. Ira Brad Matetsky, *The History of Publication of U.S. Supreme Court Justices’ In-Chambers Opinions*, 6 J. L. 19, 20 (2016) (“For much of the nineteenth century, the Great Writ could be granted by the Supreme Court, the Circuit Court, the District Court, or by a Justice or Judge of any of them acting individually.” (emphasis in the original)). Professor Randall wrote: “The *Merryman* decision was not that of the Supreme Court; but it was an opinion of one member of the Court, Taney, in a case which he heard while on circuit. Furthermore, it was in chambers, not in open court, that the decision was rendered.” JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 131 (1926) (emphasis added), <https://tinyurl.com/phjfech2>. It is true that the initial May 26, 1861 hearing was “not in open court”—it was *ex parte* (and so the *Merryman* case was named). But the two subsequent hearings—on May 27 and May 28, 1861—were in open court.

³³ See, e.g., GEORGE WILLIAM BROWN, BALTIMORE AND THE NINETEENTH OF APRIL, 1861 / A STUDY OF THE WAR, App’x III, at 139 (Baltimore, Johns Hopkins University 1887)

In other words, Taney was acting as a Justice on or riding circuit,³⁴ but he was not acting as a Justice or judge for the local federal circuit court or any other duly constituted court.³⁵ Indeed, as Professor Jonathan White explains, Chief Justice Taney, in developing his draft *Merryman* opinion, “crossed out ‘the court’ and inserted ‘a judicial tribunal’ in pen. Taney then crossed out ‘a judicial tribunal’ and ‘I’ and [instead] inserted in pencil ‘a justice of the Sup. Court’ and ‘he’”³⁶

(reproducing *Campbell*’s report and captioning the case as: “Before the Chief Justice of the Supreme Court of the United States, at Chambers”), <https://tinyurl.com/2tjjukff>, <https://tinyurl.com/32px89nb>; CAMPBELL, *supra* note 14, at 246 (reporting, in a 1871 publication, in *Merryman*’s syllabus that Taney’s *ex parte* order “was issued by the Chief Justice of the United States, sitting at chambers”); *The Habeas Corpus Case / Opinion of the Chief Justice of the United States*, THE WORLD (N.Y.), June 4, 1861, at 3 (captioning the case as “Before the Chief Justice of the Supreme Court of the United States, at Chambers”); *The Habeas Corpus Case / Opinion of the Chief Justice of the United States*, WEEKLY NATIONAL INTELLIGENCER (Washington, D.C.), June 8, 1861, at 4 (captioning the case as “Before the Chief Justice of the Supreme Court of the United States, at Chambers”); *The Merryman Case*, THE CRISIS (Columbus, Ohio), June 13, 1861, at 2 (explaining that the case was “*Before the Chief-Justice of the Supreme Court of the United States, at Chambers*” and “filed by Chief-Justice Taney . . . in ‘the Circuit Court of the United States’”). The latter Ohio newspaper article perfectly captures *Merryman*’s procedural posture.

³⁴ See Halliday & White, *supra* note 13, at 578 n.2 (“Taney himself treated his *Merryman* opinion as one issued by the Chief Justice of the United States as a Supreme Court Justice, not in his capacity as a federal circuit court judge.”); see also *The Impeachment Trial of President Abraham Lincoln*, *supra* note 20, at 367 (reporting Mark E. Neely, Jr. stating, in mock cross examination, that “we can consider [*Merryman*] a precedent from the Chief Justice of the Supreme Court”).

³⁵ An expansive meaning for “court” might include *ex parte* and in chambers proceedings, even where the adjudicator is not acting as part of any ongoing, institutionalized, permanent judicial body. In other words, Article III’s “court” language extends even to “courts” which meet on an *ad hoc* basis and have no permanent location at which to keep records, including pleading, briefs, orders, opinions, dockets, etc. Here, I am using “duly constituted court” to refer to a narrower meaning for “court”. In other words, a “duly constituted court” is a named judicial body, with a continuous existence, meeting in a fixed place (or set of places), maintaining records at those places, and available to do business on an announced calendar of dates or sessions. Albeit, these specific characteristics are not permanently “fixed”—they may be modified by the legal system. See, e.g., *supra* notes 22 & 27 (explaining how two courts’ names were changed by a constitutional amendment). Given that occasionally issued chambers opinions had no assigned place to be maintained, it made good sense for Taney to leave instructions for his *Merryman* decision to be filed with the federal Circuit Court—the nearest court of record. Cf. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL 296–97 (2014) (opining on the meaning of “court of record”).

³⁶ WHITE, *supra* note 11, at 41. The conclusions Professor White draws from these changes to Taney’s draft opinion are entirely different from mine. See *id.* at 41–42 (“Taney made these changes so that he could appear as a Supreme Court justice in chambers rather than as a justice riding circuit, but the initial drafts reveal Taney’s awareness that he was presiding over a session of a circuit court.”); White, *supra* note 11, at 218 (asserting that “Taney . . . made his opinion appear to be that of a Supreme Court justice ‘at chambers’”); see also MCGINTY, *supra* note 14, at 176 (explaining that the “later confusion about the capacity in which [Taney] acted resulted at least in part from his muddying of the record. . . . [Taney] is at least partly responsible for the resulting confusion”); MARK E. NEELY JR., LINCOLN AND THE TRIUMPH OF THE NATION: CONSTITUTIONAL CONFLICT IN THE

Taney issued his oral opinion in *Merryman* from the bench while he was on or riding circuit,³⁷ that is, away from his home chambers which was in the nation's capital, but not in his capacity as a circuit court judge or as a judge of the circuit court. Because Taney's power to decide *Merryman* was a special statutory authority committed to him as an individual Supreme Court Justice, that is, because he was not acting for any duly constituted court,³⁸ his decision is properly characterized

AMERICAN CIVIL WAR 96 (2011) ("Taney might have fallen victim to his own attempt to describe the [*Merryman*] decision as one from the Supreme Court (in chambers)."); Guelzo, *supra* note 11 ("Taney issued [*Merryman*] in his co-capacity as a federal circuit judge, but prefaced it as being issued from his U.S. Supreme Court chambers as though it were the product of a full hearing before the Supreme Court." (including Professor Jonathan White's *Abraham Lincoln and Treason in the Civil War* in the bibliography to Professor Guelzo's weblog post)); cf. William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1856 (2008) (taking the position that Taney's jurisdiction in *Merryman* was "not entirely clear"). See generally Cynthia Nicoletti, *Placing Merryman at the Center of Merryman*, 34(2) J. OF THE ABRAHAM LINCOLN ASS'N 71, 74 (2013) (reviewing BRIAN MCGINTY, *THE BODY OF JOHN MERRYMAN* (2011), and JONATHAN W. WHITE, *ABRAHAM LINCOLN AND TREASON IN THE CIVIL WAR* (2011)) (concluding that White's position is "less than persuasive" but agreeing that "Taney exploited the fuzziness of the law on the issue of federal judges' authority to hear habeas corpus petitions" (emphasis added)). Instead of her using charged language such as "exploited," Nicoletti might have been on stronger ground had she entertained the possibility that Taney was as uncertain then, as we are today, as to the scope of his lawful jurisdiction and authority. See Locks v. Commanding Gen., Sixth Army, 89 S. Ct. 31, 32 (1968) (Douglas, J., in chambers) ("Article I, s 9, of the Constitution provides that [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.' It may be that in time that provision will justify the issuance of a writ of habeas corpus by an individual Justice. *The point, however, has never been decided . . .*" (emphasis added)); RAGSDALE, *supra* note 28, at 10–11 (discussing alternative theories of Taney's jurisdiction in *Merryman*).

³⁷ See, e.g., J.G. RANDALL & DAVID DONALD, *THE CIVIL WAR AND RECONSTRUCTION* 302 n.2 (2d ed. 1961) ("The mistake is sometimes made of attributing the *Merryman* decision to the Supreme Court of the United States; but it was the opinion of one member of the court while on circuit duty." (emphases added) (citation omitted)); *supra* note 32 (collecting other authority from Randall). To be sure, *Merryman* was decided over the course of May 27 and 28, 1861, while Taney was in Baltimore, Maryland. However, on May 26, 1861, Taney had already held an *ex parte* hearing, in the presence of Merryman's attorneys, in his (i.e., Taney's) home in the capital. That *ex parte* hearing concluded with the Chief Justice's granting an order directing General Cadwalader, the named defendant and commander of Fort McHenry, to produce John Merryman for a hearing, to be held the next day in Baltimore. See *infra* notes 45–48 and accompanying text (recounting facts and procedural posture of *Merryman*). Although Taney announced his decision in public at the conclusion of the May 28, 1861 proceedings, his full written opinion was not finalized and filed with the Clerk of the Circuit Court until June 1, 1861. See ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES): JOHN MERRYMAN (1824–1881), <https://tinyurl.com/2cdpd8w5> (dating Taney's final order and opinion "1 June 1861"); MCGINTY, *supra* note 14, at 86 (same). By June 1, 1861, it would appear that Taney had already left Baltimore and returned home. Query: Should *Merryman* be dated when it was decided in open court: May 1861? Or should *Merryman* be dated when Taney's full opinion was finalized and filed with the clerk: June 1861?

³⁸ But see ANDREW P. NAPOLITANO, *SUICIDE PACT* 44 (2014) ("[John] Merryman's attorney sought a writ of habeas corpus from the federal court in Baltimore." (emphasis added)); WHITE, *supra* note 11, at 42 (concluding that *Merryman* is properly characterized as a

as “at chambers”. The characterization of *Merryman* as “in chambers” or “at chambers” or a “chambers” decision is the correct one. Indeed, it is how Taney characterized his *Merryman* decision.³⁹ Nevertheless, this characterization has led to confusion for several reasons.⁴⁰

“lower federal court decision” (emphasis added)); William R. Casto, *Robert Jackson’s Critique of Trump v. Hawaii*, 94 ST. JOHN’S L. REV. 335, 348 n.99 (2020) (explaining that in *Merryman* “Taney was sitting on a lower court, as many sitting Supreme Court Justices did at the time” (emphasis added)); Hon. Justice Michelle Gordon AC, *The Integrity of Courts: Political Culture and a Culture of Politics*, 44 MELB. U. L. REV. 863, 872 (2021) (“[Taney] therefore issued the writ and demanded that Merryman be brought before the [c]ourt in Baltimore the following day.” (emphasis added)); Halbert, *supra* note 10, at 99–100 (characterizing *Merryman* as an opinion “of a Federal Court”); Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation*, 17 GEO. J.L. & PUB. POL’Y 463, 484 n.119 (2019) (reviewing GARY LAWSON & GUY SEIDMAN, “A GREAT POWER OF ATTORNEY”: UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017)) (characterizing *Merryman* as a “lower court opinion” (emphasis added)); *but see also* George, *supra* note 23, at 64 (Lincoln’s actions were “rebuked in *Ex parte Merryman* where Chief Justice Taney (in a lower court while riding circuit) ruled” (second emphasis added)); Henry T. Greely, *COVID-19 immunity certificates: science, ethics, policy, and law*, 7(1) J. OF L. & BIOSCIENCES 1, 22 n.68 (2020) (characterizing *Merryman* as an “opinion in a lower federal court” (emphasis added)); Anil Kovvali, *A Modest Proposal for Justice Scalia’s Seat*, 102 VA. L. REV. ONLINE 1, 4 (2016) (“For much of the Supreme Court’s history, the Justices rode circuit, traveling about the country and deciding cases in the capacity of lower court judges. For example, the famous case of *Ex parte Merryman*” (emphasis added)).

³⁹ The handwritten original of Taney’s *Merryman* opinion plainly captions the case as: “*Ex parte John Merryman / Before the [C]hief Justice of the Supreme Court of the United States. At Chambers.*” 1 June 1861, *Opinion of Justice Taney*, ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES): JOHN MERRYMAN (1824–1881) (last visited Dec. 25, 2022), <http://tinyurl.com/hjeg3k4>; *see* SWISHER, *supra* note 25, at 848 & n.25 (same); *see also id.* at 846–47 (explaining that Taney, while on the bench during *Merryman* proceedings, explained that “this was not a session of the Circuit Court but was a session at chambers by the Chief Justice of the Supreme Court”). *But compare* FELDMAN, *supra* note 7, at 191 (stating, absent any citation to primary documents or other authority, that: Taney “was leaving some room for ambiguity about the capacity in which he himself was sitting. . . . The ambiguity would remain throughout the case, and has never been satisfactorily resolved.”), *and supra* note 36 (collecting authority), *with* ANTHONY GREGORY, THE POWER OF HABEAS CORPUS IN AMERICA 94 n.8 (2013) (“Taney seems deliberately to have described himself solely by his Supreme Court position in documents concerning [*Merryman*]”), Matetsky, *supra* note 32, at 20 n.5 (“[I]t appears that [in *Merryman*,] Chief Justice Taney felt quite strongly that he was sitting as a Supreme Court Justice rather than exercising his Circuit Court responsibilities”), *and supra* notes 32–34 (collecting authority from Professor Fairman and others supporting the “at chambers” position). It appears that Attorney General Edward Bates took the position that Taney’s *Merryman* decision was in chambers. *See* Edward Bates, Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att’y Gen. 74, 86–87 (1861) (“I think it will hardly be seriously affirmed, that a judge, at chambers, can entertain an appeal, in any form, from a decision of the President of the United States—and especially in a case purely political.”).

⁴⁰ Those who read only appellate case law sometimes fail to appreciate that fast-paced trial court proceedings often show that the parties are confused about the facts and that the record they produce is equally confusing. In *Merryman*, for example, General

First, some object to characterizing *Merryman* as a chambers decision because they believe *Merryman* was a decision of the Circuit Court for the District of Maryland. Admittedly, *Merryman* looks like a circuit decision for a variety of reasons. First, its two public hearings—on May 27 and May 28, 1861—were held in the federal circuit court’s courtroom.⁴¹ However, a courtroom is just that—a room can be used for many purposes and even by other courts. Second, during the first public hearing, on May 27, 1861, two federal judges appeared on the bench: Chief Justice Taney and Judge Giles, the Maryland federal district court judge. But, Giles did not appear on the bench with Taney on the second day, nor is there any indication that Giles joined or dissented from Taney’s opinion as part of a two-judge panel.⁴² Third, the *Merryman* decision appeared in the *Federal Cases* reporter, which *primarily* reported circuit court (and district court) decisions.⁴³ *Primarily*, but not *exclusively*. And finally, Taney co-opted the circuit court’s clerk during *Merryman*’s proceedings, including issuing an express instruction to put his written opinion on file with the records of the circuit court.⁴⁴ Of course, this latter instruction is something Taney need not have ordered had *Merryman* been a run-of-the-mill circuit court decision.

Second, Taney’s Supreme Court chambers was in Washington, District of Columbia. *But no Merryman proceedings were actually heard there—in Taney’s chambers in the capital district.* Instead, on May 26, 1861, Taney received *Merryman*’s lawyers’ submission in his home, and not in his chambers. After reviewing that submission, and while still in his home, Taney issued a writ of habeas corpus: an *ex parte* order directing the defendant, General Cadwalader, to produce (but not release⁴⁵) John Merryman for the May 27, 1861 hearing, which was to be held in the Baltimore circuit court courtroom. Furthermore, *Merryman* was decided and announced from the bench, on May 28, 1861, while Taney was physically in

Cadwalader, who was also a lawyer, was summoned to appear and to respond to Taney’s writ on less than one day’s notice. See SWISHER, *supra* note 25, at 845. Some of the papers Cadwalader received were signed or witnessed by Thomas Spicer, the clerk of the circuit court. See Tillman, *Ex parte Merryman: Myth, History, and Scholarship*, *supra* note 1, at 497 n.45, 499 n.47, 519 n.91, 523. But Cadwalader’s written response to the writ indicates that he believed Spicer was clerk of the Supreme Court of the United States. *Id.* at 497–98 n.45. At that time, the clerk of the Supreme Court was William T. Carroll, not Spicer. See Terence Walz, *If Walls Could Talk: The Supreme Court and DACOR Bacon House Two Centuries of Connections*, 47(1) J. SUP. CT. HIST. 20, 22 (2022) (identifying Carroll as clerk of the Supreme Court from 1828 to 1863). Of course, the careful reader should be particularly alert for such historical discrepancies when a case is adjudicated during the pressures and fog of war. See Tillman, *Canonical Cases and Other Quodlibets: A Response to Professor Fallon*, *supra* note 1, at 21 (responding to Professor Fallon’s suggestion that the timing of the Supreme Court’s announcements in *Ex parte Quirin* was a “breach of ordinary protocol” with: “Is it really so surprising that at the start of the United States’ entrance into a world war there might be a break in ‘ordinary’ [Supreme Court] protocol applying to mundane civil disputes during peacetime conditions?”).

⁴¹ See *supra* note 17 (collecting authority).

⁴² See *supra* notes 15 & 16 (collecting authority).

⁴³ See *supra* note 14 (collecting authority).

⁴⁴ *Id.* (collecting authority); see *supra* notes 37 & 40.

⁴⁵ Tillman, *Ex parte Merryman: Myth, History, and Scholarship*, *supra* note 1, at 495–500; see also *supra* note 1 (collecting authority).

Maryland,⁴⁶ and not in his District of Columbia chambers. All this has led some to doubt the propriety of characterizing *Merryman* as a “chambers” decision.

Third, *Merryman* included three separate hearings. As explained, the first hearing was an *ex parte* May 26, 1861 hearing in Taney’s home in the capital. The second hearing, on May 27, 1861,⁴⁷ was in Baltimore. This hearing was not *ex parte*—both parties had notice and both parties were represented—at least in some fashion.⁴⁸ Furthermore, the May 27, 1861 hearing was open to the public, as was the third and final hearing, which was held in the same Baltimore courtroom on May 28, 1861. Traditionally, an “in chambers” proceeding is one conducted “a. in the privacy of a judge’s chambers[; or,] b. in a court not open to the public.”⁴⁹ But neither of these definitions squarely applied to the *ex parte Merryman* hearing held on May 26, 1861 in Taney’s home, nor to the public *Merryman* hearings held on May 27 and 28, 1861 in the circuit court courtroom in Baltimore. These circumstances have led some to doubt the propriety of characterizing *Merryman* as a “chambers” decision.

⁴⁶ See Tillman, *Ex parte Merryman: Myth, History, and Scholarship*, *supra* note 1, at 483–94.

⁴⁷ The May 27, 1861 date of the first *Merryman* hearing in Maryland does not appear consistent with the announced term or session dates for the Circuit Court for the District of Maryland. See An Act to provide for the more convenient organization of the Courts of the United States (a/k/a The Midnight Judges Act), ch. 4, § 7, 2 Stat. 89, 91 (1801) (“The circuit court of the fourth circuit, at Baltimore, in and for the district of Maryland, on the twentieth day of March and fifth day of November . . .”), <https://tinyurl.com/4v4fehrf>, amended by An Act to Amend the Judicial System of the United States, ch. 34, § 2, 5 Stat. 176, 177 (1837) (mandating that the circuit court should meet “in the district of Maryland, at Baltimore, on the first Monday of April and the first Monday of October, annually”), amended by An Act to change the time of holding the United States Circuit Court in the District of East Tennessee and the District of Maryland, ch. 193, § 1, 5 Stat. 308 (1838) (mandating that “the Circuit Courts of the United States for the District of Maryland shall be held at Baltimore on the first Monday of November annually”). But see Phillip W. Magness, *Between Evidence, Rumor, and Perception: Marshal Lamon and the “Plot” to Arrest Chief Justice Taney*, 42 J. SUP. CT. HIST. 133, 134 (2017) (“The elderly Chief Justice . . . was fulfilling his circuit court duties in Baltimore when Merryman’s petition arrived on his bench.” (emphasis added)). It would appear that, other than *Merryman*, the only other reported federal cases decided in Maryland in 1861 were: *United States v. The F.W. Johnston*, 25 F. Cas. 1232 (D. Md. Sept. Term, 1861) (Giles, J.), and *United States v. The Arcola*, 24 F. Cas. 849 (D. Md. Oct. Term, 1861) (Giles, J.). There is no indication among the published decisions (other than, perhaps, *Merryman* itself) that the Circuit Court for the District of Maryland met for any April 1861 term. Nor have I discovered any newspaper articles from April 1861 suggesting that the federal circuit court met in April 1861 in Baltimore. See GENEALOGY BANK (last accessed Jan. 28, 2023), <https://www.genealogybank.com/>. But cf. DAVID M. SILVER, LINCOLN’S SUPREME COURT 32 (reissue 1998) (1956) (“Taney continued to hold circuit court in Baltimore after he had disposed of the Merryman case . . .”).

⁴⁸ Merryman was represented by counsel. By contrast, Cadwalader sent his aide-de-camp: Colonel R.M. Lee. See, e.g., *Ex parte Merryman*, 17 F. Cas. 144, 146 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.); MCGINTY, *supra* note 14, at 11. But see *Affairs in Baltimore*, N.Y. TIMES, May 29, 1861, at 1 (reporting that “Major Belger” attended the hearing on May 27, 1861 for Cadwalader, and also reporting that Major Belger read Cadwalader’s response to the court), <https://tinyurl.com/23yj274u>.

⁴⁹ COLLINS ENGLISH DICTIONARY, <https://tinyurl.com/b94ecv36> (definition of “in chambers”).

Finally, in modern times, “chambers” opinions by Justices of the Supreme Court are primarily “dispos[itions] of an application by a party for interim relief, e.g., for a stay of the judgment of the court below, for vacation of a stay, or for a temporary injunction”⁵⁰ as part of a wider, prior, imminent, and/or ongoing appeal to the Supreme Court. In such circumstances, the individual Justice is acting on behalf of the Court as a whole, and as such, a decision of a single Justice *is* a decision of the Supreme Court of the United States.⁵¹ *Merryman*, by contrast, was not such a decision. Not only was *Merryman* not a decision in the process of being appealed to the Supreme Court, it was not even possible, for either of the parties,⁵² to appeal Taney’s final order in *Merryman* to the Supreme Court!⁵³ In other words,

⁵⁰ *In-Chambers Opinions*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/opinions/in-chambers.aspx>; see also, e.g., *Locks v. Commanding Gen., Sixth Army*, 89 S. Ct. 31, 32 (1968) (Douglas, J., in chambers) (“But apart from granting stays arranging bail, and providing for other ancillary relief, an individual Justice of this Court has *no power to dispose of cases on the merits*.” (emphasis added)).

⁵¹ Although a decision of a single Justice on an application for interim relief is a Supreme Court decision, it carries different persuasive force and precedential effect in contrast to a merits decision of the full Court. See, e.g., Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1010 n.167 (2005) (“Actions by single Justices are generally not considered to have precedential value”); see also [Chief Justice] Frank J. Williams & Nicole J. Benjamin, *Military Trials of Terrorists: From the Lincoln Conspiracy to the Guantanamo Inmates*, 39 N. KY. L. REV. 609, 615 (2012) (“Unfortunately for Chief Justice Taney, his words carried no precedential value as an in-chambers opinion.”). A confederate state court has also addressed this issue. See *Ex parte Walton*, 60 N.C. 350, 1864 WL 4848, at *6 (1864) (Pearson, C.J.) (“The question is, does that decision settle the law or should it be overruled? I am aware that, in the opinion of the Secretary of War [for the Confederacy] and of his Excellency, Gov. Vance, the decision of a single Judge on *habeas corpus* questions is only binding in the particular case” (emphasis in the original)); *id.* at *9 (suggesting that “a ‘judgment of discharge [by a single judge],’ on *habeas corpus*, will, as heretofore, be treated as binding only in the particular case”).

⁵² Taney issued no final order *against* General Cadwalader: the named defendant. Thus, as the prevailing party, neither Cadwalader, nor the government in Cadwalader’s name, could take any appeal. See Tillman, *Ex parte Merryman: Myth, History, and Scholarship*, *supra* note 1, at 506–08 (expounding on the aggrieved party rule); *infra* note 53 (explaining why *Merryman* could not take any appeal).

⁵³ See Tillman, *Ex parte Merryman: Myth, History, and Scholarship*, *supra* note 1, at 506–08 (arguing that, in 1861, no statute provided any appeal to the Supreme Court from a chambers habeas decision); see also *In re Metzger*, 46 U.S. (5 How.) 176, 191 (1847) (McLean, J.) (“This Court can exercise no power in an appellate form over decisions made at his chambers by a *Justice of this Court* or a judge of the district court.” (emphasis added)); McGINTY, *supra* note 14, at 176 (explaining that in *Merryman* no appeal was possible because “[d]ecisions of individual justices in chambers [were] not appealable to the full court”); REHNQUIST, *supra* note 8, at 44 (noting “significant procedural obstacles to such an appeal [in *Ex parte Merryman*] as the law then stood”). Professor Vladeck takes the view that “nothing at all turns on this debate (except the correct *Bluebook* citation form for Taney’s published opinion in *Ex parte Merryman*).” Steve Vladeck, *SCOTUS Trivia: Circuit Justice or Chief Justice, In Chambers?*, ONE FIRST (Feb. 20, 2023), <https://tinyurl.com/59rx6mhz>. Not true. For example, both a circuit court and a district court are courts of record. If *Merryman* had been issued by either such court, the decision would have had precedential effect—even if not binding precedent. On the other hand, if *Merryman*, was merely issued in chambers, then its precedential effect is

it is not now widely appreciated that the prevailing modern understanding of what a “chambers” decision is, has changed substantially from what a “chambers” decision was in the mid-nineteenth century. This too has led some to doubt the propriety of characterizing *Merryman* as a “chambers” decision.

less than clear. *See supra* note 51. Moreover, many have criticized the parties for failing to appeal Taney’s *Merryman* decision to the Supreme Court. *See* [JUSTICE] STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 16 (2015) (“[Lincoln] did not release John Merryman. Neither did he appeal the ruling, *as he might have done.*” (emphasis added)); HAROLD H. BRUFF, *UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION* 135 (2015) (“Lincoln should either have let Merryman go or appealed the order to release him.”); THOMAS J. DILORENZO, *LINCOLN UNMASKED: WHAT YOU’RE NOT SUPPOSED TO KNOW ABOUT DISHONEST ABE* 93 (2006) (“The Lincoln administration could have appealed the chief justice’s ruling, but it chose to simply ignore it”); PAULSEN & PAULSEN, *supra* note 7, at 171 (“Lincoln defied Taney’s unilateral order . . . declining even to appeal Taney’s order to the full Supreme Court.”); Richard H. Fallon, Jr., *Executive Power and the Political Constitution*, 2007 UTAH L. REV. 1, 22 (“[T]ake the best-known example . . . Lincoln defied the court in *Merryman* without bothering to appeal” (footnote omitted)); 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, 39 (2003) (noting that “Merryman did not appeal his incarceration to the full Supreme Court”); Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227, 1285 (2008) (“[Lincoln] did not obey Taney’s order, nor did his administration seek any sort of appeal to the full Supreme Court.”); Paulsen, *The Merryman Power*, *supra* note 25, at 92 (posing the question whether Lincoln was “required [in *Merryman*] either to comply or to seek review and reversal by the full Supreme Court”); *see also* White, *supra* note 11, at 218 (“An appeal to the [full] Supreme Court, in other words, would have been imprudent.”). *cf. supra* note 19 (collecting authority affirming, incorrectly, that Taney’s *Merryman* decision was heard as an appeal from a district court decision); Dunham, *supra* note 7, at 156 (suggesting, absent documentary support, Lincoln appealed Taney’s decision to the full Supreme Court). However, an appeal of Taney’s *Merryman* decision to the full Supreme Court was only possible if it was a federal circuit court decision—a forum from which such an appeal was provided for by federal statute. On the other hand, if *Merryman* was a chambers decision, then the better view is that no such appeal was provided for by federal statute at that time, and it follows that any criticism directed to the parties for failing to appeal was then and remains now an intellectual nonstarter. *See* THE FEDERALIST NO. 63, at 338 (James Madison) (J.R. Pole ed., 2005) (“Responsibility in order to be reasonable must be limited to objects within the power of the responsible party”); C.H. MCILWAIN, *CONSTITUTIONALISM AND THE CHANGING WORLD* 282 (1939) (“[T]here can be no responsibility without power and there should be no power without responsibility.”); ENOCH POWELL, M.P. (for South Down, N.I.), *Christianity and the Curse of Cain, in WRESTLING WITH THE ANGEL* 13 (1977) (“No one can be responsible for what he does not control.”); J. ENOCH POWELL, M.P. (for Wolverhampton, South-West, Eng.), *SHADOW SECRETARY OF STATE FOR DEFENCE, Speech at Wolverhampton* (Dec. 12, 1966), in *FREEDOM AND REALITY* 197, 199, 260 (John Wood ed., 1969) (“[R]esponsibility’ depends upon the prior question of power”).

For all the reasons above, I suggest that, to avoid future confusion, citations to *Merryman* should eschew referencing the Circuit Court for the District of Maryland and the customary reporter: *Federal Cases*.⁵⁴ The traditional form of citation has only led to substantial confusion. Instead, I suggest *Merryman* should be cited by referencing the modern reporter for in chambers decisions by Justices of the Supreme Court: Cynthia Rapp and Ross E. Davies' *A Collection of In Chambers Opinions by the Justices of the Supreme Court of the United States*.⁵⁵

⁵⁴ See, e.g., *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.); *supra* notes 3 & 13 (collecting authority); *infra* note 55 (collecting authority). Westlaw reports over 500 domestic and foreign cases, trial and appellate court documents, and secondary sources citing *Merryman* in the *Federal Cases* reporter at “17 F. Cas. 144”. See THE FEDERAL CASES COMPRISING CASES ARGUED AND DETERMINED IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES, *supra* note 14, at 144.

⁵⁵ See *Ex parte Merryman* (1861) (Taney, C.J.), in 4 (pt. 1) A COLLECTION OF IN CHAMBERS OPINIONS BY THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 1400–12 (Cynthia Rapp & Ross E. Davies, compilers, 2004), <http://tinyurl.com/judtw8q>. See generally *supra* note 1 (collecting authority). No doubt, one could craft other helpful forms of citation. See, e.g., *Bissonette v. Haig*, 776 F.2d 1384, 1391 (8th Cir. 1985) (Arnold, J.) (citing *Merryman* as “17 Fed. Cas. 144 (No. 9487) (Taney, C.J., in chambers) (1861)”). Quite correctly, Judge Arnold eschews citing *Merryman* as a circuit court decision. Like Judge Arnold, a few sources cite to *Merryman* absent listing any specific court. See, e.g., PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING / CASES AND MATERIALS 223 (4th ed. 2000) (citing *Merryman* as: “17 F. Cas. 144 (1861)”; Fallon, Marbury and the Constitutional Mind, *supra* note 3, at 17 n.63 (citing *Merryman* as: “17 F. Cas. 144 (1861)”; Dennis J. Hutchinson, *Lincoln the “Dictator,”* 55 S.D. L. REV. 284, 290 n.25 (2010) (citing *Merryman* as: “17 F. Cas. 144 (1861)”). In a certain sense, these latter citations, although somewhat unhelpful or incomplete, are technically correct—no duly constituted court decided *Ex parte Merryman*.

