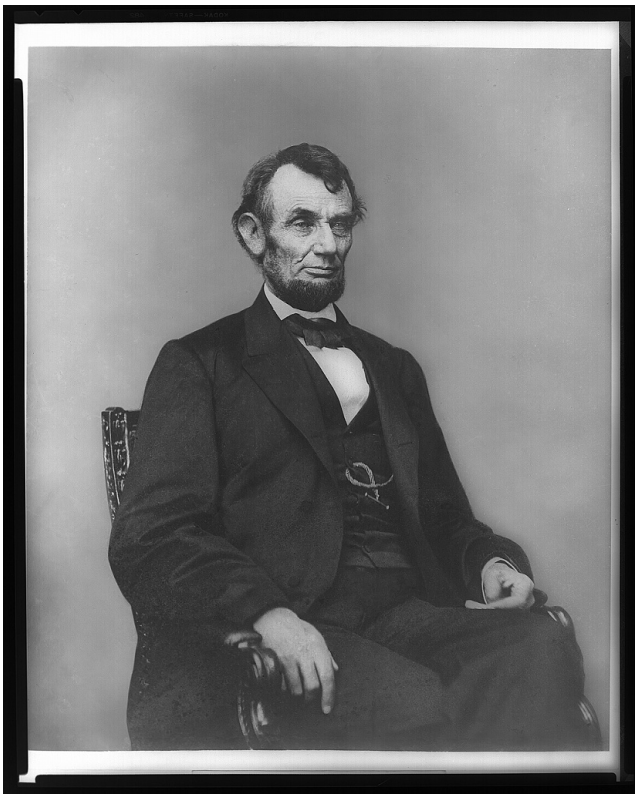
Resources for Public Speaking

The Federal Judiciary During the Civil War



President Abraham Lincoln

Federal Judicial Center
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Though it covered a relatively brief period in the nation's history, the U.S. Civil War (1861–1865) led to several major institutional transformations for the courts, including multiple circuit reorganizations and the replacement of the District of Columbia's highest court. The courts also decided several major cases during and immediately after the war dealing with major issues raised by the conflict. This resource provides suggested talking points, in outline form, for those wishing to speak about the changes the war brought to the federal courts. This outline delineates several of these developments. It begins by discussing the paths taken by federal judges in Southern and border jurisdictions at the war's outbreak. It then discusses Congress's multiple efforts to rationalize the circuit system and restrict the power of Southern states within that system. Finally, it summarizes debates related to martial law and the suspension of habeas corpus, the creation of the Supreme Court of the District of Columbia, the status of the court of claims, and the constitutionality of the Union's naval blockade of Southern ports. In addition to the outline, the resource contains Topic at a Glance, a brief summary in PDF format; a gallery of downloadable images for use in a PowerPoint presentation; links to related resources on the FJC's History of the Federal Judiciary website; a further reading list; and excerpts of historical documents that could be handed out to audience members or incorporated into a presentation.

Topic at a Glance

Introduction. Though it covered a relatively brief period in the nation's history, the U.S. Civil War (1861–1865) led to several major institutional transformations for the courts, including multiple circuit reorganizations and the replacement of the District of Columbia's highest court. The courts also decided several major cases during and immediately after the war dealing with major issues raised by the conflict.

Circuit Reorganization. Because of a longstanding practice of appointing one justice from each circuit, the arrangement of circuits became an increasingly fraught issue as sectional tensions over slavery grew in the years preceding the Civil War. As a result, several states remained outside of the circuit system long after their admission to the Union. By the dawn of the Civil War, moreover, slave states comprised a majority of the circuits but a minority of the population. Congress made multiple radical changes to the circuit system during and immediately after the war. By 1866, Congress had established a nine-circuit system that diminished the influence of Southern states. The Circuit Reorganization Act of 1866 also reduced the Supreme Court to seven seats by stipulating that seats could not be filled as vacancies arose until the number of justices reached seven. However, the Court's membership only fell as low as eight before this aspect of the law was repealed in 1869.

Martial Law. President Abraham Lincoln argued that the judicial system was not well suited to resolving questions of disloyalty, and he relied on military forces to undertake the arrest, detention and, in many instances, the trial and punishment of Confederate sympathizers. In *Ex parte Merryman* (1861), however, Chief Justice Roger Taney held (either while presiding over the Circuit Court for the District of Maryland or in chambers in his capacity as chief justice) that only Congress had the power to suspend habeas corpus (as the Suspension Clause was located in Article I of the Constitution) and that the executive branch had usurped judicial power by presuming to detain prisoners without a civilian trial. The Lincoln administration initially paid little heed to the decision, though Merryman was eventually turned over to civilian authorities. In 1862, Lincoln empowered military authorities to try "all rebels and insurgents, their aiders and abettors, . . . and all persons discouraging volunteer enlistments[,] resisting

militia drafts, or guilty of any disloyal practice." In 1863, Congress passed legislation ratifying Lincoln's actions but requiring the secretaries of state and war to notify federal trial courts of military detentions made in jurisdictions where habeas corpus had been suspended.

The Supreme Court of the District of Columbia. In the early days of the war, Judge William Merrick of the U.S. Circuit Court for the District of Columbia became the source of repeated criticism for rulings that were perceived to be antagonistic to the war effort (such as orders to release underage soldiers). In 1861, Judge Merrick was briefly placed under military guard and unable to attend court. In 1863, Congress abolished the court, removing Merrick and the other two judges from their positions. (This practice was consistent with the prevailing interpretation of the Good Behavior Clause of Article III at that time.) Congress replaced the circuit court with the Supreme Court of the District of Columbia, which was staffed by four justices, who held Article III status.

Blockades and the Law of War. Throughout much of the war, the Union imposed a naval blockade on many Southern ports. This blockade was dubious under the laws of war, which typically allowed blockades only in conflicts between recognized sovereign states. In *The Prize Cases* (1863), the Supreme Court's 5-4 majority held that a de facto state of war existed between the Union and the Confederacy and that, as such, the government could avail itself of the legal trappings of a belligerent state without conceding the same status to the South.

The Court of Claims. Created in 1855, the Court of Claims heard suits for monetary damages against the United States. Congress had previously heard these claims, but this system produced lengthy delays. In 1863, Congress passed the Court of Claims Act, which added two new judgeships to the court and made an appropriation to satisfy the court's judgments. These judgments were to be transferred to the treasury secretary, who would then "estimate for" payment. The Act also allowed for appeals to the Supreme Court. In *Gordon v. United States* (1865), however, the Court indicated that it could not take claims appeals because these cases were not properly deemed final judicial decisions, as they relied on Treasury action after the court rendered an opinion. After the Supreme Court's decision, Congress amended the statute to make the Court of Claims' judgments final, and the Supreme Court adopted rules permitting appeals. Even so, the court's status as an Article III tribunal remained the subject of debate and confusion until 1962.

Trial by Military Commission. Although more than 4,000 civilians were tried by military commission during the Civil War, the Supreme Court did not have an opportunity to determine the validity of this practice until the year after the war ended. In *Ex parte Milligan* (1866), the Court ruled unconstitutional military trials in jurisdictions where civilian courts were in operation (the case originated in Indiana). Such trials, the Court's majority reasoned, improperly presumed to arrogate to military authorities the judicial power granted to the federal courts by Article III, section 1.

Outline

I. Federal Judges in Confederate Jurisdictions at the War's Outbreak
   A. Thirteen federal judges—nearly a quarter of those then in office—resigned to join the Confederacy in 1861. Most of these were U.S. district judges in Southern jurisdictions who resigned their commissions as their states seceded from the Union.
   B. Judge Thomas Monroe of the border state of Kentucky resigned in 1861 in protest of the actions of Union troops although his state remained part of the Union.
   C. Justice John Campbell Archibald was the only Supreme Court justice to resign to join the Southern cause. He served as assistant secretary of war for the Confederacy from 1862 to 1865.
   D. Three Southern district judges refused to recognize their states' secessions. Judges John Watrous and Thomas Duval, respectively of the Eastern and Western Districts of Texas, were unable to hold court in their jurisdictions but remained loyal to the United States throughout the war. Judge William Marvin of the Southern District of Florida, which was largely held by Union forces, continued to hold court. In 1863, however, he resigned amid allegations that he was a Confederate sympathizer.
   E. Judge West Humphreys, who held commissions on all three of Tennessee's district courts, refused to resign his commission, claiming to continue in office as a Confederate judge. The House of Representatives impeached Humphreys, and the Senate convicted him in 1862, thereby officially removing him from office.

II. Circuit Reorganization
   A. The Circuit System in 1861
      1. When the war broke out in 1861, the federal circuit system had been unchanged with minor exceptions since 1842, despite the introduction of several states in the intervening years.
      2. This lack of activity likely owed much to debates around the slave or free status of new states, as the introduction of either to existing circuits would arguably shift the balance of the circuit system.
      3. The lack of reorganization produced a system in which six states and twelve judicial districts were not part of a circuit.
      4. Slave states comprised a majority of the circuits, despite accounting for a minority of the nation's population.
      5. The Fifth Circuit was noncontiguous, consisting of the states of Louisiana and Alabama.
      6. Although Oregon neighbored California, the former was not in a circuit, whereas the latter had its own. (The 1855 creation of the California Circuit was the primary exception to congressional inaction in the years preceding the war.)
   B. Changes in the circuit system (1862–1866)
      1. Generally
         a. Congress made changes to the judicial circuit system every year from 1862 to 1866. (This outline includes the 1866 reforms as they brought closure to the wartime reorganization efforts.)
         b. Most historians agree that these reorganizations were driven by multiple considerations:

        i. to achieve a more complete and harmonious organization that would include all of the states in the circuit system;
        ii. to redress the South's perceived excessive power over the circuit system (and thus the Supreme Court) by consolidating Southern states into fewer jurisdictions;
        iii. and to allow President Lincoln to appoint Northerners to vacant Supreme Court seats without selecting justices from outside the circuits they would ride in.
2. 1862 Legislation
    a. In 1862, Congress integrated most of the previously excluded districts and states into existing circuits.
    b. North Carolina moved from the Sixth Circuit to the Fourth.
    c. The Fifth Circuit was transformed to include Alabama, Florida, Georgia, Mississippi, and South Carolina.
    d. Congress included Arkansas (which had been in the Ninth Circuit), Kentucky and Tennessee (both of which had been in the Eighth Circuit), Louisiana (which had been in the Fifth Circuit), and Texas (which had not been included in a circuit) in the Sixth Circuit. These changes consolidated Southern states from several circuits into two larger circuits.
    e. Illinois and Michigan were transferred from the Seventh Circuit to the Eighth along with Wisconsin (which had not previously been in a circuit), leaving Indiana and Ohio to comprise the Seventh Circuit.
    f. Congress included Iowa, Kansas, and Minnesota (none of which had been included in a circuit) and Missouri (which had been in the Eighth Circuit) in the Ninth Circuit, transferring Arkansas to the Sixth Circuit and Mississippi to the Fifth Circuit.
    g. In addition to rationalizing the circuit system, these changes permitted President Lincoln to appoint Northerners to multiple Supreme Court vacancies in keeping with a tradition that justices should be selected from states in their circuit.
3. 1863 Legislation
    a. In January 1863, Congress transferred Michigan (which had been in the Eighth Circuit) to the Seventh Circuit, moving Indiana to the Eighth Circuit. It also transferred Wisconsin to the Ninth Circuit.
    b. In March, Congress established the Tenth Circuit, which consisted of California and Oregon.
    c. The creation of the Tenth Circuit also entailed the authorization of a tenth Supreme Court seat (the highest number of authorized seats on the Court to date).
4. 1864 Legislation
    a. Following West Virginia's separation from Virginia in 1863, Congress reorganized the Western District of Virginia as the District of West Virginia, placing West Virginia in the Fourth Circuit.
5. 1865 Legislation

a. Congress placed the new state of Nevada in the Tenth Circuit.

6. 1866 Legislation
    a. The Circuit Reorganization Act of 1866, passed shortly after the Civil War's end, abolished the Tenth Circuit and three Supreme Court seats, with the latter not to be filled once vacated.
    b. Historians have disagreed as to Congress's motives for reducing the Supreme Court's size. Some have argued that Republicans' antipathy to the Court and to new President Andrew Johnson, who had assumed the role after Lincoln's assassination in 1865, led the majority in Congress to enact the reduction as a punitive measure.
    c. Others, noting that both the Supreme Court's existing members and Andrew Johnson approved of the legislation, argue that Congress was motivated primarily by more neutral considerations like efficiency.
    d. In addition to the abolition of the Tenth Circuit and Supreme Court seats, the act reorganized most of the remaining circuits:
        i. It moved Delaware (which had been in the Fourth Circuit) to the Third Circuit.
        ii. It moved South Carolina (which had been in the Fifth Circuit) to the Fourth Circuit.
        iii. It moved Louisiana and Texas (both of which had been in the Sixth Circuit) to the Fifth Circuit.
        iv. It moved Michigan and Ohio (both of which had been in the Seventh Circuit) to the Sixth Circuit.
        v. It moved Illinois and Indiana (both of which had been in the Eighth Circuit), and Wisconsin (which had been in the Ninth Circuit) to the Seventh Circuit.
        vi. It moved Arkansas (which had been in the Sixth Circuit) and Iowa, Kansas, Minnesota, and Missouri (all of which had been in the Ninth Circuit) to the Eighth Circuit.
        vii. It moved California, Nevada, and Oregon (all of which had been in the Tenth Circuit) to the Ninth Circuit.

III. Martial Law and Habeas Corpus

A. Beginning in April 1861, the Lincoln administration imposed martial law and suspended habeas corpus in many parts of the country. These policies were controversial during and immediately after the war.

B. President Lincoln argued that the judicial system was not well suited to resolving questions of disloyalty and relied on military forces to undertake the arrest, detention and, in many instances, the trial and punishment of Confederate sympathizers.

C. The Supreme Court did not hear a case determining the legality of either martial law or the suspension of habeas corpus until after the war (*see* "Trial by Military Commission," below).

D. In *Ex parte Merryman* (1861), however, Chief Justice Roger Taney held that only Congress had the power to suspend habeas corpus (as the Suspension Clause was

located in Article I of the Constitution) and that the executive branch had usurped judicial power by presuming to detain prisoners without a civilian trial.

E. Historians debate whether Chief Justice Taney issued this decision as a circuit justice presiding over the Circuit Court for the District of Maryland, or in chambers in his capacity as chief justice.
F. The Lincoln administration seemed initially to pay little heed to the decision, though Merryman was eventually turned over to civilian authorities.
G. In July 1861, Congress passed legislation authorizing the president to employ military forces to enforce the law and suppress rebellion whenever he deemed ordinary law enforcement measures insufficient.
H. This legislation, however, did not directly authorize the suspension of habeas corpus.
I. In 1862, Lincoln empowered military authorities to try "all rebels and insurgents, their aiders and abettors, . . . and all persons discouraging volunteer enlistments[,] resisting militia drafts, or guilty of any disloyal practice."
J. In 1863, Congress passed legislation ratifying Lincoln's actions but requiring the departments of war and state to notify federal trial courts of military detentions made in jurisdictions where habeas corpus had been suspended.

IV. The Supreme Court of the District of Columbia

A. While most circuit courts were presided over by a combination of district judges and Supreme Court justices riding circuit prior to 1869, the District of Columbia's circuit court had its own circuit judges since 1801.
B. This circuit court exercised the same federal jurisdiction as other circuit courts, as well as some local trial and appellate jurisdiction.
C. One of the court's judges, William Merrick, became the source of repeated criticism for rulings that were perceived to be antagonistic to the war effort (such as orders to release underage soldiers).
D. In 1861, Judge Merrick was briefly placed under military guard against his wishes and was unable to attend court.
E. In 1863, Congress abolished the court, removing Merrick and the other two judges from their positions. (This practice was consistent with the prevailing interpretation of the Good Behavior Clause of Article III at that time.)
F. Congress replaced the circuit court with the Supreme Court of the District of Columbia (SCDC), staffed by four justices who held positions consistent with Article III's tenure and appointment provisions.
G. The SCDC, which initially exercised the same jurisdiction as its predecessor but eventually assumed an exclusively federal docket, became the U.S. District Court for the District of Columbia in 1936.

V. Blockades and the Law of War

A. Throughout much of the Civil War, the Union imposed a naval blockade on many Southern ports.
B. As part of the blockade, the navy captured several ships attempting to supply Southern ports and brought them back to the United States as prizes.
C. In separate actions in several jurisdictions, the ships' original owners sued to challenge the validity of these confiscations.

D. Many of these suits involved the claim that, under the law of war, blockades were valid only in wars between sovereign states.
E. Since the Union refused to recognize the Confederacy's sovereignty, some argued the blockade was invalid.
F. The Supreme Court heard a consolidated appeal of these cases in *The Prize Cases* (1863).
G. The Court's 5-4 majority held that a de facto state of war existed between the Union and Confederacy and that, as such, the government could avail itself of the legal trappings of a belligerent state without conceding the same status to the South.
H. The dissenters would have invalidated the blockade based on the lack of a formal war between sovereign states at the time Lincoln ordered the blockade.

VI. The Court of Claims

A. Created in 1855, the Court of Claims heard suits for monetary damages against the United States. Congress had previously heard these claims, but this system produced lengthy delays.
B. In the Court's early years, Congress still had to approve its judgments, which often amounted to a *de novo* review.
C. Believing this system would be too inefficient to handle the large number of claims likely to be generated by the war effort, Lincoln called on Congress to give the court more autonomy in his first annual message to Congress.
D. In 1863, Congress passed the Court of Claims Act, which added two new judgeships to the court and made an appropriation to satisfy the court's judgments. These judgments were to be transferred to the secretary of the treasury, who would then "estimate for" payment. The Act also allowed for appeals to the Supreme Court.
E. In *Gordon v. United States* (1865), however, the Court indicated that it could not take claims appeals.
F. Chief Justice Taney originally wrote an opinion for the Court that reasoned the Court of Claims was essentially a legislative rather than a judicial body. However, that opinion was lost shortly before Taney's death.
G. Taney's successor, Chief Justice Salmon Chase, wrote a narrower opinion that focused on the lack of finality in claims judgments because of the need for the Treasury Department to estimate for payments. (Chief Justice Chase had served as treasury secretary until shortly before his judicial appointment.)
H. After the Court's decision, Congress amended the statute to make the Court of Claims's judgments final, and the Supreme Court adopted rules permitting appeals.

VII. Trial by Military Commission

A. Although more than 4,000 civilians were tried by military commission during the Civil War, the Supreme Court did not have an opportunity to determine the validity of this practice until the year after the war ended.
B. *Ex parte Milligan* (1866) involved the military conviction of a Confederate sympathizer in Indiana.
C. Justice David Davis's majority opinion ruled unconstitutional military trials in jurisdictions where civilian courts were in operation. Such trials, Justice Davis reasoned, improperly presumed to arrogate to military authorities the judicial power granted to the federal courts by Article III, section 1.

D. In his concurring opinion, Chief Justice Salmon Chase reasoned that such trials could be legitimate exercises of the political branches' war powers but that these powers were not applicable in *Milligan*.

VIII. Conclusion

A. The U.S. Civil War was a transformative event for America as a nation and for the federal courts.

B. At the war's outset, judges in Southern and border jurisdictions had to choose whether to remain with the Union or to join the Confederate cause.

C. Congress repeatedly reformed the geographical circuit system, eventually settling on the fundamental basis of a system that proved enduring, aside from the reintroduction of the Tenth Circuit in 1929 and the Eleventh Circuit in 1980.

D. Finally, the courts themselves had to reckon with difficult legal questions posed by a mass conflict on home soil, including the legality of the Union's blockade of Southern ports and the constitutionality of trial-by-military-commission for civilians.

Related FJC Resources

Ragsdale, Bruce A. Ex parte Merryman *and Debates on Civil Liberties During the Civil War*. Washington, D.C.: Federal Judicial Center, 2007.

Further Reading

Blair, William A. *With Malice toward Some: Treason and Loyalty in the Civil War Era*. Chapel Hill, NC: University of North Carolina Press, 2014.

Bowman, Winston. "A Brief History of the Court of Claims." *The Federal Lawyer* 63, no. 10 (Dec. 2016): 46–51.

Edwards, Laura F. *A Legal History of the Civil War and Reconstruction: A Nation of Rights.* New York: University of Cambridge Press, 2015.

Farber, Daniel. *Lincoln's Constitution*. Chicago: University of Chicago Press, 2003.

McGinty, Brian. *Lincoln and the Court*. Cambridge, MA: Harvard University Press, 2008.

_____. *The Body of John Merryman: Abraham Lincoln and the Suspension of Habeas Corpus*. Cambridge, MA: Harvard University Press, 2011.

Nicoletti, Cynthia. "The American Civil War as a Trial by Battle." *Law and History Review* 28 (Feb. 2010): 71–110.

Witt, John Fabian. *Lincoln's Code: The Laws of War in American History*. New York: Free Press, 2012.

Historical Documents

Abraham Lincoln, First Annual Message to Congress, December 3, 1861.

President Lincoln's message to Congress identified the fundamental challenges that secession and Civil War presented to the federal judiciary. The organization of the federal circuits and the appointment of Supreme Court justices were so dependent on notions of geographical balance that the "revolt" of eleven states made it impossible for Lincoln to follow customary practices in selecting nominees for the three vacancies on the Supreme Court. Those vacancies furthermore raised the controversial subject of the South's disproportionate influence on the Supreme Court. Lincoln understood that he needed to balance his own support for the appointment of more justices from the Northern states against his recognition that the eventual reintegration of the Southern states would depend on Southerners' confidence in the Supreme Court. Like many others, Lincoln found the circuit organization and the absence of circuit courts in many states to be unjust and impractical. His succinct outline of three options for reorganizing the federal judiciary gave little sense of the divisions of opinion that would delay congressional action for another thirty years.

There are three vacancies on the bench of the Supreme Court – two by the decease of Justices Daniel and McLean and one by the resignation of Justice Campbell. I have so far forborne making nominations to fill these vacancies for reasons which I will now state.Two of the out-going judges resided within the States now overrun by revolt, so that if successors were appointed in the same localities they could not now serve upon their circuits; and many of the most competent men there probably would not take the personal hazard of accepting to serve, even here, upon the Supreme bench. I have been unwilling to throw all the appointments northward, thus disabling myself from doing justice to the South on the return of peace; although I may remark that to transfer to the North one which has heretofore been in the South would not, with reference to territory and population, be unjust.

During the long and brilliant judicial career of Judge McLean his circuit grew into an empire – altogether too large for any one judge to give the courts therein more than a nominal attendance – rising in population from 1,470,018 in 1830 to 6,151,405 in 1860.

Besides this, the country generally has outgrown our present judicial system. If uniformity was at all intended, the system requires that all the States shall be accommodated with circuit courts, attended by Supreme judges, while, in fact, Wisconsin, Minnesota, Iowa, Kansas, Florida, Texas, California, and Oregon have never had any such courts. Nor can this well be remedied without a change in the system, because the adding of judges to the Supreme Court, enough for the accommodation of all parts of the country with circuit courts, would create a court altogether too numerous for a judicial body of any sort. And the evil, if it be one, will increase as new States come into the Union. Circuit courts are useful or they are not useful. If useful, no State should be denied them; if not useful, no State should have them. Let them be provided for all or abolished as to all.

Three modifications occur to me, either of which, I think, would be an improvement upon our present system. Let the Supreme Court be of convenient number in every event; then, first, let the whole country be divided into circuits of convenient size, the Supreme judges to serve in a number of them corresponding to their own number, and independent circuit judges be provided for all the rest; or, secondly, let the Supreme judges be relieved from circuit duties and circuit judges provided for all the

circuits; or, thirdly, dispense with circuit courts altogether, leaving the judicial functions wholly to the district courts and an independent Supreme Court. . . .

[Document Source: Richardson, James D., ed. A Compilation of the Messages and Papers of the Presidents, 1789–1897. Washington, DC: Government Printing Office (1897), 6:49.]

***Ex parte Merryman* (1861), opinion of Chief Justice Roger Taney.**

According to Chief Justice Taney, President Lincoln's unpublished order to suspend habeas corpus was a radical departure from well-established principles of law. Taney emphasized how the arrest and detainment of Merryman foreshadowed the arbitrary rule of a military government, unchecked by any constitutional guarantees of civil liberties. Taney's narrative of the arrest portrayed Merryman as an innocent citizen, seized in the peace of his own home and dragged away in the middle of the night by officers with no legal authority to detain him. Taney's review of English and American legal traditions put Lincoln at odds with the greatest legal minds of both countries. The Chief Justice argued that the powers of the executive were narrowly circumscribed by the Constitution and, in matters related to law enforcement, subordinate to the judiciary. But rather than assist the judiciary in enforcing laws, the military had swept aside the judicial power of the federal government and gone beyond the suspension of habeas corpus to threaten the civil liberties protected by the Bill of Rights. Taney maintained that the force of arms prevented him from carrying out his constitutional duties, and he challenged the president to restore constitutional order and due process of law.

. . . I understand that the President not only claims the right to suspend the writ of Habeas Corpus himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey Judicial process that may be served upon him.

No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the President claimed this power, and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise. For I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands that the privilege of the writ could not be suspended, except by act of Congress. . . .

And the only power therefore which the President possesses, where the "life, liberty, or property" of a private citizen is concerned, is the power and duty prescribed in the 3rd section of the 2nd Article, which requires "Th at he Shall take care that the laws be faithfully executed." He is not authorized to execute them himself or through agents or officers civil or military appointed by himself, but he is to take care that they be faithfully carried into Execution as they are expounded and adjudged of by the Coordinate Branch of the Government to which that duty is assigned by the Constitution. It is thus made his duty to come in aid of the judicial authority, if it shall be resisted by a force too strong to be overcome without the assistance of the Executive arm. But in Exercising this power he acts in subordination to judicial authority, assisting it to Execute its process & enforce its judgments. . . .

But the documents before me show that the military authority, in this case has gone far beyond the mere suspension of the privilege of the writ of Habeas Corpus. It has, by force of arms, thrust aside the judicial authorities and officers to whom the Constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be

administered and executed by military officers. For at the time these proceedings were had against John Merryman, the District Judge of Maryland, the Commissioner appointed under the act of Congress; the District Attorney, and the Marshal, all resided in the city of Baltimore, a few miles only from the home of the prisoner. Up to that time there had never been the slightest resistance or obstruction to the process of any court, or judicial officer of the United States in Maryland, except by the military authority. And if a military officer, or any other person, had reason to believe that the prisoner had committed any offence against the laws of the United States, it was his duty to give information of the fact, and the evidence to support it, to the District Attorney; and it would then have become the duty of that officer to bring the matter before the District Judge or Commissioner, and if there was sufficient legal evidence to justify his arrest, the Judge or Commissioner would have issued his warrant to the Marshal, to arrest him; and upon the hearing of the case, would have held him to bail, or committed him for trial, according to the character of the offense, as it appeared in the testimony, or would have discharged him immediately, if there was not sufficient evidence to support the accusation. There was no danger of any obstruction, or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military. And yet under these circumstances a military officer, stationed in Pennsylvania, without giving any information to the District Attorney, and without any application to the judicial authorities, assumes to himself the judicial power, in the District of Maryland, undertakes to decide what constitutes the crime of Treason, or rebellion, what evidence (if, indeed, he required any) is sufficient to support the accusation, and justify the commitment, and commits the party, without a hearing even before himself, to close custody in a strongly garrisoned Fort, to be there held, it would seem, during the pleasure of those who committed him.

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

It provides that the party accused shall be entitled to a speedy trial in a court of justice.

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

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

obligation to “take care that the laws be faithfully executed,” to determine what measures he will take to cause the civil process of the United States to be respected, and enforced.

[Document Source: *Ex parte Merryman*, 17 F. Cas. 144 (CCD Md. 1861)].

Supreme Court of the United States, majority opinion in *The Prize Cases* (1863)

The Prize Cases involved challenges to the legality of the Union naval blockade of Southern ports. The Court’s 5-4 majority held that a de facto state of war existed between the Union and Confederacy and that, as such, the government could avail itself of the legal trappings of a belligerent state without conceding the same status to the South.

. . . Let us enquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force.

War has been well defined to be, "That state in which a nation prosecutes its right by force."

The parties belligerent in a public war are independent nations. But it is not necessary, to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other.

Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents -- the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory, have declared their independence, have cast off their allegiance, have organized armies, have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. They claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars. . . .

The law of nations is also called the law of nature; it is founded on the common consent, as well as the common sense, of the world. It contains no such anomalous doctrine as that which this Court are now for the first time desired to pronounce, to-wit, that insurgents who have risen in rebellion against their sovereign, expelled her Courts, established a revolutionary government, organized armies, and commenced hostilities are not enemies because they are traitors, and a war levied on the Government by traitors, in order to dismember and destroy it, is not a war because it is an "insurrection."

Whether the President, in fulfilling his duties as Commander-in-chief in suppressing an insurrection, has met with such armed hostile resistance and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this

power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure under the circumstances peculiar to the case. . . .

If it were necessary to the technical existence of a war that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency. And finally, in 1861, we find Congress "ex majore cautela" and in anticipation of such astute objections, passing an act

"approving, legalizing, and making valid all the acts, proclamations, and orders of the President, &c., as if they had been issued and done under the previous express authority and direction of the Congress of the United States."

Without admitting that such an act was necessary under the circumstances, it is plain that, if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that . . . this ratification has operated to perfectly cure the defect.

[Document Source: *The Prize Cases*, 67 U.S. 635 (1863)].