

The Mayor and the President

by George W. Liebmann

This symposium has unlikely origins. It was in some measure prompted by a recent speech before the Supreme Court Historical Society by the celebrated Professor John Yoo. By way of demonstrating that the policies relating to detention and interrogation with which he is identified were consonant with American traditions, Professor Yoo delivered an address contending that the *Merryman* and *Milligan* cases were aberrations, what Justice Frankfurter called in another context, “derelicts on the waters of the law”. He alleged that “*Merryman* remains unknown to almost all but those scholars who toil in the academic fields of the separation of powers or the early days of the Civil War.”¹

Merryman of course is better known than that. It was the subject of a centennial symposium in the federal district court for Maryland in 1961, addressed by William L. Marbury, Chief Judge Roszel C. Thomsen and Taney’s biographer H.H. Walker Lewis.² It figures prominently in a number of books on executive power in wartime by such as Carl Brent Swisher (1974)³, Clinton Rossiter (1945)⁴, Frederick Bernays Wiener (1940)⁵ and Charles Warren (1935)⁶ that you will not find prominently cited in the recent writings of Professor Yoo, as well as in Chief Justice Rehnquist’s book on the subject.⁷

In 1961, executive detention without trial was not a burning issue. It is now. There is a vast literature, and there is therefore no excuse for another redundant discussion. The remarks of all three speakers today will therefore focus on unpublished documents by or about the contending

protagonists.

John Merryman is frequently depicted as a rogue Confederate, a quasi-terrorist; his imprisonment as a vindication of law and order; “shall all the laws but one go un-executed?”, Lincoln famously inquired. Despite this wonderful rhetoric, it is not clear what “other laws” Lincoln was talking about. There were no federal laws against slavery in Maryland, and few federal laws at all, unless one counts the protective tariff.

Merryman’s initial deed was not a rogue act but an act of policy, conceived by the Mayor of Baltimore, George William Brown; acquiesced in, however reluctantly, by the Governor of Maryland, Thomas Halliday Hicks; having as its immediate object the suppression of further riots and the probable ensuing secession of Maryland and as its further possible consequence the forestalling of civil war. An understanding of what the *Merryman* case was about requires an understanding not of Merryman but of the real author of his deed, George William Brown, then the Mayor of Baltimore.

Brown was born in 1812, the son of a doctor; contrary to the allegations of one historian, he had no connection with the investment banking family. He was educated at Dartmouth and Rutgers, conceiving a dislike of American college life, later decrying college dormitories as seats of dissipation and vice and urging emulation of the European practice in which students live in the town and in Emerson’s words “do not postpone life, but live already.” In 1835 in his early twenties, he organized a militia which under the command of General Sam Smith, the hero of the

Battle of North Point, suppressed the Bank of Maryland riots .Thereafter he played a notable role in curbing the excesses of the Know-Nothing movement (of which Governor Hicks was an adherent) serving as a poll-watcher at considerable risk to life and limb in the murderous 1859 election and thereafter becoming a reform candidate for Mayor in 1860. He was the draftsman of legislation removing the corrupt and violent Baltimore police from municipal to state control.

He had also been a participant in controversies over slavery and the position of free blacks.

In 1842, he had declared: “The policy of the State has been, and its true policy still is, to encourage manumissions; it has not ceased to look forward to the day when, by the voluntary acts of its own citizens, it would be emphatically and without exception a free State, and the harsh measures now proposed against the people of color who are already free are as inconsistent with the real welfare of this Commonwealth as they are at variance with the feelings of humanity.”⁸

In 1842, a series of bills directing against the 25,000 free blacks in Baltimore, which would have limited further manumissions, prohibited blacks from owning real estate, required them to annually register, and banished any convicted of non-capital offenses was defeated by a vote of 15 to 6 in the Maryland Senate after opposition from Brown and others.⁹ In 1846 Brown, together with his brother-in-law and law partner Frederick Brune launched an effort to promote gradual emancipation in Maryland.¹⁰ By the time of the outbreak of the Civil War, about half of Maryland blacks were free blacks, as were 80% of Delaware blacks and 20% of Virginia blacks.. In 1859, Brown again opposed a group of bills, the so-called “Jacobs bills”, directed at

worsening the status of free blacks.¹¹

George William Brown was elected Mayor of Baltimore on a reform ticket at the 1860 election, defeating a Know-Nothing candidate. In the Presidential election, most of Brown's supporters backed Breckinridge, the Southern Democrat, while most of the Know-Nothings supported the Constitutional Union ticket of Bell and Everett. "My present inclination is to vote for Bell and Everett tho' I dislike the company in which it will place me. Breckinridge and Walker seem to me to be only better than Lincoln and Hamlin, inasmuch as if I must choose between a southern sectional party and a northern one I should prefer the former. And Douglas has no charm for me whatever."¹² On his inauguration, Brown declared "The election of a President, however unacceptable he may be to any portion of the republic, can afford no justification for its disruption."¹³ Brown took a dim view of Lincoln's oft-delivered 'house divided' speech: "The founders of the Constitution of the United States had built a house which was divided against itself from the beginning...Here was an irreconcilable conflict between the Constitution and the future President...It matters not that Mr. Lincoln, after his election...held out the olive branch to the nation..[he] was not known then as he is known now, and, moreover, his term of office would be but four years." The conduct of the war redeemed Lincoln's prophecy that "every drop of blood drawn by the lash shall be paid by another drawn by the sword."¹⁴

Lincoln snuck through Baltimore on a night train on his way to his inauguration, leaving Brown

waiting in vain at the station, an act “which helped to feed the flame of excitement which..was burning too high all over the land.” Two months later, after the bombardment of Fort Sumter, a Baltimore mob attacked federal troops en route between the President and Camden Street stations. Brown marched at the head of the column for several minutes “holding high an umbrella to identify himself and to protect the soldiers with his person.” A northern captain declared that “Mayor Brown attested the sincerity of his desire to preserve the peace.” He then sent a telegram to the President requesting “that no more troops be permitted or ordered by the Government to pass through the city.” That evening, upon his order and that of the Governor, the Canton, Gunpowder and Back River bridges were destroyed, together with the Melville and Relay House bridges on the Harrisburg line and two wooden bridges at Cockeysville, an act which almost ended the Civil War before it began. On the following day, a message from Lincoln declared “For the future troops must be brought here, but I make no point of bringing them through Baltimore.”

On April 21, Brown and three other Baltimoreans met with Lincoln, his cabinet and the Union Commander, Gen. Winfield Scott, at the White House. Lincoln declared that the troops were for defensive purposes and not for use against Maryland or the South. The historian Matthew Page Andrews declared: “President Lincoln’s promises on behalf of the Federal government, and their contrary fulfilment when the government was in a position to force its will, left an unfavorable opinion [which] persisted in Maryland for more than half a century.” Brown according to his memoir told the President that his call for troops was regarded as “an act of war upon the South and a violation of its constitutional rights. . . Mr. Lincoln was greatly moved, and springing up from his chair walked backward and forward throughout his apartment. He said with great feeling, ‘Mr.

Brown, I am not a learned man!’ that his proclamation had not been correctly understood; that he had no intention of bringing on war, but that his purpose was to defend the capital.”¹⁵ Brown agreed not to interfere with troops marching around Baltimore, and Lincoln after another meeting later in the day withdrew troops about to march through it, later telling Sen. Reverdy Johnson: “Our men are not moles, and cannot dig under the earth; they are not birds, and cannot fly through the air.”. The historian Allan Nevins observed: “It was an extraordinary spectacle, this of the President of the United States and the general of its armies parleying with a mayor and suspending the right of national troops to march through his city to save Washington.” In the confusion prevailing in Washington, Secretary of War Chase urged that secession be permitted and Governor Hicks unsuccessfully proposed mediation by the British minister, Lord Lyons. It is generally agreed that had Brown and Hicks urged Maryland’s secession, it would have taken place.

A month later, John Merryman, a participant in the blowing of the railroad bridges, was detained by federal troops, leading to the issuance of a writ of habeas corpus. Brown was in the courtroom and congratulated Chief Justice Taney. “He then told me that he knew that his own imprisonment had been a matter of consultation, but that the danger had passed, and he warned me, from information that he had received, that my time would come.” On May 12, federal troops occupied Baltimore. Brown refused to oust the police commissioners and on September 11 declared “I recognize in the action of the Government of the United States in the matter in question nothing but the assertion of superior force.” On the following day, he was arrested by federal troops after vainly demanding to see a warrant. On September 15, Lincoln issued a statement to the Baltimore Advertiser: “in all cases the Government is in possession of tangible and unmistakable evidence

which will, when made public, be satisfactory to every loyal citizen.” This promise was never kept.

Brown’s detention became an almost immediate embarrassment to the administration. Within two weeks, Secretary Seward offered to release him if he would take the oath of allegiance, resign as Mayor, and agree to reside in a Northern city. On January 10, 1862, Brown responded: “I cannot consistently with my ideas of propriety by accepting a renewal of the parole place myself in the position of seeming to acquiesce in a prolonged and illegal banishment from my home and duties.” These conditions, and milder ones later offered were rejected by Brown on February 15, 1862 as constituting a confession of guilt. “I have committed no offense. I want no pardon. When I go out, I want to go out honorable.”¹⁶ Petitions on his behalf were signed by members of the Sixth Massachusetts Regiment. The Mayor was given a thirty-day parole to attend to business matters, but at the end of the thirty days he re-appeared and demanded to be put back in his cell. A general amnesty was proclaimed in February 1862, but he was refused release, having again declined to resign his office. “There probably never will be a period in which it will be as important bravely to maintain the principles of constitutional liberty as it is now, where these principles are assailed by the military and civil power of the government of the U.S. backed, I am ashamed to say, by the influence of those who have been eminent for learning, wisdom, and patriotism.”¹⁷ The detention of the Fort Warren prisoners was an issue in the 1862 elections, in which the Democrats gained 31 seats. Following the expiration of his Mayoral term, and after 15 months of incarceration, Brown and the remaining Maryland prisoners were released without conditions, leading the New York lawyer David Dudley Field to declare that the electorate had executed Justice Taney’s writ.¹⁸ In 1863, in a case argued by Brown, the Maryland Court of Appeals declared that the militarily

displaced police commissioners retained their rights under State law.¹⁹ Brown, and some of his imprisoned compatriots, an historian of the Civil War has noted, “were guilty of little more than Southern sympathies or lukewarm unionism. They were victims of the obsessive quest for security that arises in time of war, especially civil war.”²⁰ Twenty members of the Maryland legislature were arrested; and the November 1861 state elections were rigged by the military.²¹ Marylanders cannot be heard to proclaim about the prospects of dictatorship in the United States: “It can’t happen here.” It already has.

Lincoln had been elected by a plurality, but less than 40%, of the national vote, and had a minuscule share of the vote in Baltimore (3%) and Maryland (2%). Even his most ardent apologists concede his vacillation during the four-month interregnum preceding his inauguration, in which he effectively sabotaged the so-called Crittenden compromise which would have constitutionally guaranteed slavery where it existed and permitted some expansion.²²

The critical event in the rush to war was Lincoln’s call for Northern troops on April 15, the day following the surrender of Fort Sumter “to redress wrongs long enough endured.” “What these wrongs were”, Brown dryly observed in his memoir, “is not stated.” This was the event that propelled Virginia, North Carolina, Arkansas and Tennessee out of the Union, and that provoked the April 19 Baltimore riot. South Carolina had seceded on December 20, but until April there was no rush of Upper South states to join her.

Brown’s view as to the result of the war was expressed in his memoir: “I feel that I am living in a different land from that in which I was born and under a different Constitution, and that new perils

have arisen sufficient to cause great anxiety. . . Vast fortunes, which astonish the world, have suddenly been acquired, very many by means of more than doubtful honesty, while the fortunes themselves are so used as to benefit neither the possessors nor the country. Republican simplicity has ceased to be a reality, except where it exists as a survival in rural districts, and is hardly now mentioned even as a phrase. It has been superseded by republican luxury and ostentation. The mass of the people, who cannot afford to indulge in either, are sorely tempted to covet both. The individual man does not rely, as he formerly did, on his own strength and manhood. . . In combinations, the individual counts for little, and is but little concerned with his own moral responsibility. . . In many ways there is a dangerous tendency toward to ward the centralization of power in the National Government, with little opposition on the part of the people. . . The administration of cities has grown more and more extravagant and corrupt.” Brown’s last venture into politics in 1885 at the age of 73 was an effort to break the power of the Gorman-Rasin ring which dominated Baltimore well into the 20th century; the mayoral election was widely judged to have been stolen from him, and gave rise to the adoption of the Australian ballot in Maryland,

This was the world that Lincoln made, a fact that cannot be disguised by his magnificent rhetoric, his martyrdom, or by victor’s history. Those who consider that matters might have been different had Lincoln lived overlook the tendency of revolutions to devour their own. To the picture of the nation painted in Brown’s memoir may be added two other costs. The death toll imposed by the war on the South was unmatched until French losses in World War I: at least 18% of the male population of military age, three times the proportionate losses of the North.²³

The economic costs imposed on the South were even more severe, and not only as a result of the systematic destruction of its limited industry as a matter of Northern military policy. Much of its leadership class fled to the North, or abroad; more than a few Baltimore lawyers of the last half of the nineteenth century had southern origins . The costs in optimism and confidence have only recently begun to be counted, most recently in a notable book by the current President of Harvard University, the Virginian Drew Gilpin Faust. The thirty years following the Civil War began with the disenfranchisement of ex-Confederates, legitimated, lest we forget, by sections 2 and 3 of the Fourteenth Amendment, making possible not only the fiscal excesses of reconstruction state governments (local government debt quadrupled between 1860 and 1880)²⁴ but also, what is less appreciated, a congressionally ordained economic policy founded on the gold standard, the national market, and the protective tariff. In 1876 the South traded acquiescence in the election of the business-friendly President Hayes and his suppression of railroad strikes and ensuing industrial servitude in the North for the withdrawal of Northern troops; a similar bargain was struck in 1890 when the Democrats in Congress, then led by Senator Arthur Pue Gorman of Maryland defeated the Force Bill, the last serious effort at reconstruction, and the Blair education bill,²⁵ in exchange for acquiescence in a new higher tariff. The pertinent volume of the Cambridge Economic History of the United States notes that “southern whites gained social regulation in exchange for a wide open field for capital.” The period from 1877 to 1900 was a period of “interregional distribution from south to north. . . a regional project with national pretensions.”²⁶ By 1945, the per capita income of Connecticut was six times that of Mississippi, a ratio since reduced to 1.6 to 1 by the effects of section 14(b) of the Taft-Hartley Act, black flight northward, the civil rights laws, and large military spending in the South.

Patriotism—pride in American institutions—began to be replaced by nationalism: in Faust’s words: “the nation’s value and importance were both derived from and proved by the human price paid for its survival. . . . executing obligations to the dead and their mourners required vast expansion of the federal budget and bureaucracy.”²⁷

Lincoln, to be sure, emancipated the slaves. But the twin forces of the Enlightenment and the Industrial Revolution gave rise to emancipation in all other Western nations, the last being Brazil in 1885, though some have contended that the invention of the cotton gin might have prolonged slavery in the United States.²⁸ Slavery was succeeded by a hundred years of peonage, redeemed only by a rise in the black literacy rate from less than 10% in 1865 to 18.6% in 1870 and 55% in 1890²⁹, almost entirely as a result of northern philanthropy and the efforts of blacks themselves. In his unpublished concurring opinion in *Brown v. Board of Education*, Justice Jackson would have rested the overruling opinion on this change in factual background: “Tested by the pace of history the rise is one of the swiftest and most dramatic advances in the annals of man”,³⁰ a proposition more flattering to all concerned and more persuasive than Chief Justice Warren’s invocation of Kenneth Clark’s paper doll experiments.

The Civil War, like all wars, was, in the words of the Italian diplomat Carlo Sforza, “a school of hatreds and calumnies”; ‘waving the bloody shirt’ infects American politics still. The overheated rhetoric and social utopianism of both sides is summarized in Edmund Wilson’s *Patriotic Gore*. In its aftermath, Judge Brown remained the constructive reformer. He was convinced that “the seceding states should have been allowed to depart in peace and. . . believed that afterwards the necessities

of the situation and their own interest would induce them to return, severally perhaps, to the old Union, but with slavery peacefully abolished, for, in the nature of things, I knew that slavery could not last forever.” He restrained Maryland’s 1867 Constitutional Convention from abolishing the new public education system and successfully protested against a proposal to disqualify blacks as witnesses: “are they to be deprived of the only way of maintaining rights? Is this not monstrous?” He helped frame the founding documents of the Peabody Library, the Enoch Pratt Free Library and the Johns Hopkins University, where his influence as trustee gave rise to the emulation of German research universities, no part of the design that Daniel Coit Gilman followed at the University of California before coming to Baltimore and falling under the influence of Brown. He also was a founder of this library, the Library Company of the Baltimore Bar and of the Maryland Historical Society. As a judge he was instrumental in the admission to the Maryland bar of Everett Waring, Maryland’s first black lawyer, and he opposed the exclusion of blacks from the Maryland Law School. When the late Vice President Henry Wilson lay in state at the Baltimore City Hall in 1875 and the black leader Frederick Douglass came as one of the official guests, “Judge Brown was quick to note that he was ignored, and taking his arm took him to the refreshment tables and presented him to the other Maryland officials.” He urged reform of the Baltimore school board to eliminate election by wards, a reform adopted ten years after his death.

Brown’s voluntary immolation for fourteen months in the so-called Northern Bastilles was an act of high principle, whose sole purpose was the vindication of the principles of *Merryman*. He had no great faith in the forcible or revolutionary transformation of the social system, but a passionate belief in three propositions later asserted by Justice Jackson which resonate in our own time:”men have

discovered no technique for long preserving free government save that the executive be under the law, and that the law be made by parliamentary deliberations.”³¹ “Emergency powers are consistent with free government only where their control is lodged elsewhere than in the Executive that authorizes them.”³² “Procedural due process must be a specialized function within the competence of the judiciary on which they do not bend before political branches of the government, as they should on matters of policy.”³³ The barons at Runnymede were not apportioned according to the principles of *Reynolds v. Sims*, and the ban on imprisonment “but by lawful judgment of peers or by the law of the land”³⁴ did not encompass the rules of *Miranda* and *Escobedo*, but the rights they won are the vital rights, as Brown and Taney saw quite clearly. Without freedom from fear for political actors, democracy is impossible and social justice unlikely, a lesson lost in today’s world where we compromise our own institutions in cases involving American citizens while propagating electoral ceremonies in largely illiterate nations where curbs on the executive and independent courts are unknown.

Brown’s faith was summarized by another constructive reformer who few remember and who was also defeated, for a time, by a rhetorical politician. Few today affectionately recall Woodrow Wilson’s Red Scare of 1919-1921 and the Treaty of Versailles, but Charles Evans Hughes’ insurance and public utility reforms in New York, his sponsorship of the Washington Disarmament Conference and the Dawes Plan, his successful opposition to the expulsion of Socialists from the New York legislature, his opinions initiating constitutional protections for civil rights, free speech and freedom of religion and his resistance to the court-packing plan and protection of federalism in *Erie v. Tompkins* and other cases live on. It was Hughes who said: “There is no lack of schemes for the

regeneration of society, schemes not infrequently of a sort which would not be needed by a society capable of freely adopting them. The construction of a theoretical paradise is the easiest of human efforts. The familiar method is to establish the perfect or almost perfect state, and then to fashion human beings to fit it. This is a far lighter undertaking than the necessary and unspectacular task, taking human nature as it is and is likely to remain, of contriving improvements that are workable.”³⁵

1. J. Yoo, “ *Merryman and Milligan (and Mc Cardle)*,” 34 J. Supreme Court History 243 (2009).
- 2.”*Ex Parte Merryman*: Proceedings of Court Day May 26, 1961,” 56 Maryland Historical Magazine 384-98 (1961).
3. C. Swisher, *History of the Supreme Court of the United States: The Taney Period, 1836-64* (New York: Macmillan, 1974), 844-53.
4. C. Rossiter, *Constitutional Dictatorship* (Princeton: Princeton U., 1945), 227.
5. F. Weiner, *A Practical Manual of Martial Law* (Harrisburg: Military Service Publishing Company, 1940), sec.76 (“At present it seems generally conceded that on the point of who might suspend the privilege of the writ, Taney was right and Lincoln was wrong.”)
6. 2 C. Warren, *The Supreme Court in United States History* (Boston: Little Brown, 1935), 368-74.
7. W. Rehnquist, *All the Laws but One* (New York: Vintage, 1998), 32-45.
8. George William Brown, 1842, quoted in R. E. L. Marshall, “George William Brown”, Address to the Lawyers’ Round Table, November 6, 1937, 7.
9. Baltimore Republican, September 7 and 8, 1890; J. Brackett, *The Negro in Maryland*(Baltimore: Johns Hopkins U., 1889), 242-47. See also “Report of the Committee on the Coloured Population,” Maryland Legislative Documents, Document H, 1841; Journal of Proceedings, House of Delegates, 1841, 414; Baltimore American and Baltimore Sun, February-

- March 1842; I. Berlin, *Slaves Without Masters* (New York: Pantheon, 1975), 210-12.
10. H. Adams, "An Account of George William Brown's Services to Education, Literature and Historical Science," (1890)(typescript), in JHU, Herbert Baxter Adams Papers, Series 5, Box 43, see also *Baltimore Sun*, February 26, 1846; March 4, 1846.
11. L. Graham, *Baltimore: The Nineteenth Century Black Capital* (Washington: University Press of America, 1982), 154-55.
12. GWB to Frederick Brune, June 13, 1860, Brune-Randall Papers, Maryland Historical Society.
13. Sources for unattributed quotations will be found in G. Liebmann, "George William Brown: A Fearless Independent" in *Six Lost Leaders: Prophets of Civil Society* (Lanham, Md.: Lexington Books, 2001), chapter 1.
14. Quoted in E. Wilson, *Patriotic Gore: Studies in the Literature and History of the American Civil War* (New York: Oxford, 1966), 106.
15. GWB, *Baltimore and the Nineteenth of April 1861* (Baltimore: Johns Hopkins U., 1887), 73-4.
16. GWB to Frederick Brune, February 15, 1862.
17. GWB to Charles Welch, February 6, 1862
18. D. Donald, *Lincoln* (New York: Simon and Schuster, 1995), 382-823.
19. *Baltimore v. Howard*, 20 Md. 335, 357 (1863)).
20. J. Mc Pherson, *Battle Cry of Freedom: The Civil War Era* (New York: Oxford, 1988), 289-90.
21. D. Sprague, *Freedom Under Lincoln* (Boston: Houghton Mifflin, 1985), ch.18.
22. H. Holzer, *Lincoln: President Elect: Abraham Lincoln and the Great Secession Winter, 1860-1861* (New York: Simon and Schuster, 2008).
23. D. Faust, *This Republic of Suffering: Death and the American Civil War* (New York: Vintage, 2009), 273-74.
24. See M. Summers, *Railroads, Reconstruction and the Gospel of Prosperity: Aid Under the Radical Republicans 1865-1877* (Princeton: Princeton U., 1984).
25. H. Socolofsky and A. Spetter, *The Presidency of Benjamin Harrison* (Topeka: U. Press of Kansas, 1987), 65-69, see A. Going, "The South and the Blair Education Bill, 57 *Miss. Valley*

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26. R. Beasol, *The Political Economy of American Industrialization, 1877-1900* (Cambridge: Cambridge U., 2000)

27. Faust, *supra.*,268.

28. See A. Schlesinger, "The Causes of the Civil War," in *The Politics of Hope* (Boston: Houghton Mifflin, 1963), ch.3

29. M. Bellesiles, *1877: America's Year of Living Violently* (New York: New Press, 2010), 57, citing A. Frago, *The History of Literacy in American Life and Thought: The Nadir, 1877-1901* (New York: Dial Press, 1954).

30. Quoted in "Supreme Court Law Clerks' Recollections of *Brown v. Board of Education*," 78 *St. John's L.Rev.*515 (2004), see Library of Congress, Robert H. Jackson Papers, Brown File, March 15, 1954.

31. *Youngstown Sheet and Tube Company v. Sawyer*, 343 U.S.579, 655 (Jackson, J., concurring).

32. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S.579, 652 (1952)(Jackson, J., concurring).

33. *Shaughnessy v. Mezei*, 345 U.S.206, 224-25(1953)(Jackson, J., dissenting).

34. *Magna Carta*, clause 39.

35. "Chief Justice Hughes Addresses the Judicial Conference of the Fourth Circuit," 18 *American Bar Association Journal* 445 (1932).