

“Displaced by a force to which they yielded and could not resist”¹:
A Historical and Legal Analysis of Mayor and City Counsel of Baltimore v. Charles
Howard et. al.²

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I. Introduction

II. The Historical Context

A. Pre-War Baltimore: Violence, Reform and Growth

i. Politics

ii. Economics

B. April 1861: Baltimore Bursts at the Seams

i. The Pratt Street Riot of April 19th

ii. The Actions of the Police Commissioners and Marshal Kane

C. The Arrests

III. The Case

A. The Controversy

B. The Circuit Court Decision

C. The Court of Appeals Decision

IV. Comparative Analysis: The Commissioners as Enemy Combatants

A. Ex Parte Milligan

B. Ex Parte Quirin

C. Rumsfeld v. Padilla

V. Conclusion

VI. Selected Biographies

A. The Judges and Lawyers

B. The Commissioners

¹ Mayor and City Counsel of Baltimore v. Charles Howard et. al., 20 Md. 335, 357 (Md. 1863).

² 20 Md. at 335.

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I. Introduction

The experience of the Baltimore Police Commissioners is instructive in understanding the state of affairs in Baltimore during the Civil War era. The removal of the commissioners by the Union Army and the subsequent civil trial, *The Mayor and City Council of Baltimore v. Charles Howard*,³ provides a window through which one may examine the historical, legal and political circumstances of the time. The legal status of the commissioners also sheds light on modern legal doctrine related to the detention of American citizens as “enemy combatants” without the benefit of certain constitutional guarantees. By analyzing the *Howard* case with a critical eye, this article will uncover the underlying motivations behind the litigation while clarifying the chaotic events in Baltimore during the Civil War.

II. The Historical Context: Mid-Nineteenth Century Baltimore

Before the outbreak of the Civil War in 1861, the City of Baltimore reaped prosperity while simultaneously edging towards a precarious and uncomfortable position. As the War broke out, Baltimore was cast into disarray. The stories of the four sitting Baltimore City Police Commissioners; President Charles Howard, Treasurer William H. Gatchell, Charles D. Hinks and John W. Davis, are interwoven in the story of Baltimore during this era. Their experiences illustrate the larger history of the city itself.

A. Pre-War Baltimore: Violence, Reform and Growth

As the Civil War approached, Baltimore was expanding into a burgeoning metropolis. Politically, the city was beset by pitched battles between pro-Union and pro-slavery movements, manifest in the conflict between the Democratic Party and the American party. Economically,

³ *Howard*, 20 Md. 335 (Md. 1863).

Baltimore was growing as the manufacturing and labor hub of the Mid-Atlantic and Upper South. All of these changes influenced the rapidly shifting demographics of the city.

i. Politics

Baltimore's unique geographic location bred heated political debate. Halfway between the North and South, Baltimore hosted numerous political conventions and was no stranger to election violence.⁴ It is fitting that this hotbed of political interaction would entertain such a savage political landscape in the years leading up to the resolution of slavery; the most contentious issue in American history. In the decade preceding 1861, competition between the pro-slavery Democratic and pro-Union American parties dominated the political environment in Baltimore. Lincoln's newly formed Republican Party had yet to gain any meaningful support among Maryland voters.⁵ The presidential election of 1860 demonstrated the statewide divide between Unionism and pro-slavery forces. Instead of Lincoln, a plurality of Maryland voters supported the state's rights Democratic Candidate, John C. Breckinridge.⁶ In Baltimore, Breckinridge was second to Constitutional Unionist Candidate John Bell, indicating a slight edge for Unionists in the city.⁷ Only 2,294 votes had been cast for Lincoln in Maryland during the 1860 Presidential election.⁸

The American Party, also known as the "Know Nothing Party", rose to power in Baltimore with the 1854 election of Samuel Hinks as the eighteenth mayor of Baltimore City.⁹

⁴ Baltimore earned the nickname "Mob Town" after the anti-federalist riots of 1812. See, SCOTT SUMPTER SHEADS & DANIEL CARROLL TOOMEY, *BALTIMORE DURING THE CIVIL WAR* 4 (Toomey Press 1997).

⁵ GEORGE WILLIAM BROWN, *BALTIMORE AND THE 19TH OF APRIL 1861* 30 (Johns Hopkins University Press 1887).

⁶ Frank Towers, *Secession in an Urban Context: Municipal Reform and the Coming of the Civil War in Baltimore*, in *FROM MOBTOWN TO CHARM CITY: NEW PERSPECTIVES OF BALTIMORE'S PAST* 92 (Jessica Elfenbein et al. eds., 2002).

⁷ Breckinridge totaled 11,950 votes; Bell received 12, 619 votes. *The Presidential Election: Lincoln Elected President and Hamlin Vice President of the United States*, *THE BALTIMORE SUN*, Nov. 7, 1860.

⁸ Towers, *supra* note 6, at 92.

⁹ JEAN H. BAKER, *AMBIVALENT AMERICANS: THE KNOW-NOTHING PARTY IN MARYLAND* 1 (Johns Hopkins University Press 1977).

Samuel Hinks was the brother of future police commissioner Charles D. Hinks.¹⁰ The Know-Nothings initially organized the party through secret societies formed by protestant groups dedicated to notions of limited immigration, anti-Catholicism and Unionism.¹¹ A year after Samuel Hink's election as mayor of Baltimore, the Know-Nothings scored a series a major victories by electing a comptroller, a lottery commissioner, four of six U.S. congressmen, fifty four of the seventy four open Maryland delegate seats and eight of the eleven contested Senate seats.¹² Democrats had previously controlled Baltimore City elections for the past decade.¹³ In 1858, Know-Nothing candidate Thomas Holliday Hicks¹⁴ took office as the 31st governor of Maryland.¹⁵ At that time the Know-Nothings had reached the zenith of their meteoric rise to power in Maryland.

In opposition to the Know-Nothings, Baltimore's pro-slavery segment consisted of an uneasy coalition of "conservative businessmen, partisan Democrats, an beleaguered immigrant groups that had spent six years battling Know Nothing Rule."¹⁶ These groups united to form the Reform party and challenge the Know-Nothing establishment in the 1859 municipal elections.¹⁷ A group of Baltimore's wealthy elites spearheaded the organization of the Reform party in 1858 under the name the "Civic Reform Association".¹⁸ Aside from pro-slavery ideals, the Reform party derived much its support from popular reaction against the violence and corruption that

¹⁰ Towers, *supra* note 6, at 101.

¹¹ BAKER, *supra* note 9, at 3.

¹² *Id.* at 2.

¹³ *Id.* at 1.

¹⁴ Hicks used his inaugural address to reiterate his support for the anti-immigration Know-Nothing platform, "Our native population is industrious, enterprising and prosperous: yet their industry is burthened and their accumulations eaten up by the support of foreign paupers, annually cast on our shores" The Inaugural Address of Thomas H. Hicks, Governor of Maryland, Delivered in the Senate Chamber, at Annapolis, Wednesday, January 13th, 1858.

¹⁵ BROWN, *supra* note 5, at 34.

¹⁶ *Id.*

¹⁷ BAKER, *supra* note 9, at 2 n. 5 (characterizing the Reform party as the Democrats challenging the Know-Nothings "in the guise of the Reform party", by pointing out that most reformers were "known" Democrats.)

¹⁸ J. THOMAS SCHARF, HISTORY OF BALTIMORE CITY AND COUNTY FROM THE EARLIEST PERIOD TO THE PRESENT DAY 125 (Louis H. Everts 1881).

permeated the Know-Nothing administration of Baltimore City after 1854.¹⁹ Leading up to the 1859 elections Know-Nothings utilized street gangs such as the Tigers, Plug Uglies and Blood Tubs to intimidate Reform candidates and voters.²⁰ Mayor George W. Brown, elected in 1860 as a Reform party candidate, described the Know-Nothing administration of Baltimore as a “reign of terror”.²¹ Charles D. Hinks joined the Reform movement even though his brother served as the first Know-Nothing mayor of Baltimore in 1854.²² Hinks may have suffered the same disillusionment many Baltimoreans suffered after enduring the violence of the past five years of Know-Nothing misadministration.

Following the 1859 election, the Reform party struck back at the Baltimore Know-Nothings through the Maryland Legislature. In 1860, the legislature unseated the ten members of the Baltimore delegation and enacted the “Baltimore Bills”, effectively taking control of the city’s police force and criminal courts.²³ The most notable piece of the legislation was the Metropolitan Police Act of 1860. Reformers and the general public had perceived the police under the Know-Nothings as complicit in the election violence. Many Baltimoreans felt “the police force must, by direct legislation, be removed from the arena of politics”.²⁴ Historical analysis largely concedes that under the Know-Nothings, the police force “became permeated by

¹⁹ Two violent episodes galvanized support for the Reform party, the election riots of 1856, and the murder of Reform Party supporter Adam Barkly Kyle at the hands of Know-Nothing gang members during the municipal elections of 1859. *The Election Riots*, THE BALTIMORE SUN, Nov. 17th, 1856 (“In several parts of the city, the most desperate men were engaged in a bloody contest, supported by hundreds drawn into the melee by excited passion. Firearms were used with all the determination of hostile armies ... and the result of the fray was several killed, a great number badly hurt, and over two hundred men and boys in all, more or less, badly wounded.”); *See also, The Murder of Mr. A.B. Kyle, Jr.*, THE BALTIMORE SUN, Nov. 8th 1859.

²⁰ BAKER, *supra* note 9, at 54 (noting that during an October 27, 1859 procession of Know Nothing supporters, Blood Tub gang members marched alongside Plug Uglies waving banners reading “Reform Movement, Reform Man: If you can vote, I’ll be damned.”)

²¹ BROWN, *supra* note 5, at 34.

²² Future Police Commissioner Charles D. Hinks was elected as the Reform party vice president for the fourteenth ward at a Sept. 8th, 1859 Reform party rally in Monument Square. *See, Great Gathering of the People in Monument Square: The Reform Movement*, THE BALTIMORE SUN, Sep. 8, 1859.

²³ 1860 Md. Laws 11; *See also*, Frank Towers, *Job-Busting at Baltimore Shipyards: Racial Violence in the Civil War Era South*, 66:2 J. SOUTHERN HIST. 221,244 (2000).

²⁴ *A New Police System*, THE BALTIMORE SUN, Nov. 17 1859, at 2.

partisan politics”²⁵ that led to an explosion in violence and corruption in the city.²⁶ In order to remedy this problem and gain an advantageous political position, the Democratic legislature used the 1860 Police Act to install four new police board commissioners with pro-slavery, anti-Know-Nothing views.²⁷ In reaction to the previous allegations of corruption in the police force, the 1860 Police Act gave the new Commissioners a high degree of independence from the Mayor and City Council.²⁸ The board’s autonomy under the 1860 Police Act would later figure be a major legal issue in the *Howard* case.

In this context the central figures of the *Howard* case came to office. Board President Charles Howard was the youngest son of prominent Marylander John Eager Howard.²⁹ Charles Howard was a man whose “tastes and favorite pursuits were altogether those of a private gentleman” but was “called at various times into the service of public”.³⁰ Howard hailed from a leading Democratic family, had been a speaker at the funeral of murdered Reform party member Adam Barkly Kyle and an 1859 Reform candidate.³¹ Howard also maintained close connections with pro-slavery interests through his involvement in the American Colonization Society.³² Charles Howard typified the type of prominent southern-sympathizer through which the

²⁵ CLINTON MCCABE, *HISTORY OF THE BALTIMORE POLICE DEPARTMENT: 1774-1909* 27 (Fleet- McGinley Printers 1909).

²⁶ DE FRANCIS FOLSOM, *OUR POLICE: A HISTORY OF THE BALTIMORE POLICE FORCE FROM THE FIRST WATCHMAN TO THE LATEST APPOINTEE* 29 (J.D. Ehlers & Co. 1888) (noting that “ the [police] force was gradually filled with “Know-nothing” recruits, who, instead of maintaining the peace, became willing tools of violence and riot.”).

²⁷ Towers, *supra* note 6, at 101.

²⁸ MCCABE, *supra* note 25, at 27.

²⁹ THE BIOGRAPHICAL CYCLOPEDIA OF REPRESENTATIVE MEN OF MARYLAND AND DISTRICT OF COLUMBIA 417 (Baltimore: National Biographical Publishing Co. 1879).

³⁰ *Id.*

³¹ Towers, *supra* note 6, at 101.

³² *Id.* See also, Report of the Board of Managers for the Removal of People of Colour: Enclosing a Communication from Charles Howard, Esq. to the Governor of Maryland, Dec. 31, 1834.

Democratic Party could restore an aura of respectability to the tarnished reputation of the police force.³³

Charles Dent Hinks benefitted from his active participation in the Reform Party with the police commissioner appointment.³⁴ Charles Hinks was a flour and grain merchant, he operated a business with his brother Samuel, the original Know-Nothing Mayor of Baltimore.³⁵ Hinks also had business connections with George P. Kane, whom he would later help appoint as Baltimore Police Marshal. Hinks and Kane were business partners; they were both incorporators of the Corn Exchange Buildings Company in 1860.³⁶ Hinks seems to have evinced a pro-slavery perspective as he was a Reform party member and called for better enforcement of the Fugitive Slave Laws.³⁷

John W. Davis was a solid Democratic Party man that the Legislature trusted to further the interests of the party in Baltimore City. In 1852, Davis was elected to represent Baltimore City as a Democrat in the Maryland House of Delegates.³⁸ Before his appointment to the police board, Davis was clerk to the Baltimore City Court of Common Pleas and a Port of Baltimore customs official, appointed by Democratic President James Buchanan.³⁹

William H. Gatchell was a Democrat but did not “figure prominently in party affairs.”⁴⁰ Gatchell was a lawyer who served as a City Council member in 1838⁴¹ and as clerk to the

³³ FOLSOM, *supra* note 26, at 38. (“Mr. Howard, the president, was a genial gentleman of independent means, possessing the confidence of the entire community”).

³⁴ *See supra* note 22.

³⁵ WILBUR F. COYLE, *THE MAYORS OF BALTIMORE* (Reprinted from *The Baltimore Municipal Journal*, 1919), 89-90, <http://www.msa.md.gov/megafile/msa/speccol/sc3500/sc3520/012400/012475/html/12475bio.html>.

³⁶ SCHARF, *supra* note 18, at 441.

³⁷ Towers, *supra* note 6, at 101.

³⁸ Archives of Maryland, Biographical Series: John W. Davis (1823-1888), MSA SC 3520-1544, <http://www.msa.md.gov/megafile/msa/speccol/sc3500/sc3520/001500/001544/html/01544bio.html>.

³⁹ *Id.*

⁴⁰ FOLSOM, *supra* note 26, at 38.

⁴¹ SCHARF, *supra* note 18, at 193.

Baltimore City Court from 1845 to 1851.⁴² Though not a leading party figure, he did co-own the mouthpiece of the Reform party, the “Exchange” newspaper.⁴³ Not surprisingly, Gatchell reflected the same socio-economic make-up of his fellow commissioners; he was a lawyer and a slaveholder.⁴⁴

Immediately following the appointment of the four new commissioners, then Know-Nothing mayor Thomas Swann challenged the constitutionality of the 1860 Metropolitan Police Act.⁴⁵ This legal challenge was prescient, U.S. Attorney William Price would later serve as counsel for the city in the *Howard* case. Price utilized similar legal arguments in both cases.⁴⁶ The litigation resulted in the Maryland Court of Appeals confirming the constitutionality of the Police Act on April 17, 1860.⁴⁷ In that case, the commissioners benefitted from representation by a prominent legal team, including Severn Teackle Wallace and Reverdy Johnson.⁴⁸ On November 12, 1860, Reformer George William Brown took office as mayor, replacing Thomas Swann.⁴⁹ By the end of 1860, the Democrats had succeeded in retaking control of Baltimore City government.

Once in office, the new police commissioners appointed George Proctor Kane as their Police Marshal. Kane was a successful businessman and slave-owning Democrat.⁵⁰ George Kane harbored a particular distaste for Know-Nothings, as he believed they had defrauded him

⁴² Archives of Maryland, Historical List, Baltimore City Court Clerks 1817-1982, <http://www.msa.md.gov/msa/speccol/sc2600/sc2685/html/bccourtclerk.html>.

⁴³ Towers, *supra* note 6, at 101.

⁴⁴ *Id.*

⁴⁵ FOLSOM, *supra* note 26, at 41.

⁴⁶ *See*, SYNOPSIS OF THE ARGUMENT OF WILLIAM PRICE IN THE CASE OF THE STATE ON THE RELATION OF CHARLES HOWARD AND OTHERS VERSUS THE MAYOR AND CITY COUNSEL OF BALTIMORE (John Murphy and Company 1860); *Cf.*, *Mayor and City Council of Baltimore v. Charles Howard et. al.*, 20 Md. 335 (Md. 1863)

⁴⁷ *The Mayor and City Council of Baltimore v. The State, ex rel, of the Board of Police of Baltimore*, 15 Md. Reports 48, 62 (Md. 1860); *See also, The Police Law Decision of the Court of Appeals: Constitutionality of the Law Unanimously Confirmed*, THE BALTIMORE AMERICAN AND COMMERCIAL ADVERTISER, April 19, 1860 at 1.

⁴⁸ *Id.*

⁴⁹ COYLE, *supra* note 35, at 99.

⁵⁰ DAVID DETZER, *DISSONANCE: THE TURBULENT DAYS BETWEEN FORT SUMTER AND BULL RUN 96* (Houghton Mifflin Harcourt 2007).

of a City Council seat during the 1856 elections.⁵¹ Kane's first order of business was cleansing the police force of political opponents, corrupt officers, and those who harbored pro-Union sympathies. The Metropolitan Police Act of 1860 specifically stipulated that no "Black Republican" was eligible to become a policeman at any level.⁵² The newly appointed police force reflected Kane and the Commissioner's social views, namely that they "kept tabs on the city's African-Americans and Irish immigrants, and sympathized with the city's pro-South activists."⁵³ Reform party mayor George W. Brown described the new commissioners as "men of marked ability and worth" and the police force as "raised to a high degree of discipline under the command of Marshal Kane."⁵⁴ Through the Reform party and the Legislature, the Democrats had succeeded in establishing a police force of almost four hundred armed men⁵⁵ that were for the most part ideologically aligned with the pro-slavery interests in Maryland.

Howard, Gatchell, Hinks and Davis had all found themselves as the police commissioners of Baltimore as the result of almost a decade of political war between the pro-slavery Democratic Party and the pro-Union American party. The simmering ideological conflicts that facilitated their installment to the police board would quickly bring on their undoing.

ii. Economics

In the decades preceding the Civil War, Baltimore's population boomed. In 1790, the census listed Baltimore's population at 13,503.⁵⁶ By 1800, the city's population doubled, making it more populous than Boston.⁵⁷ By 1860, Baltimore was home to 212,000 inhabitants.⁵⁸ From

⁵¹ Towers, *supra* note 6, at 101.

⁵² 1860 Md. Laws 12 ("Provided also; that no Black Republican or endorser or approver of the Helper Book, shall be appointed to any office under said board").

⁵³ DETZER, *supra* note 50, at 97.

⁵⁴ BROWN, *supra* note 5, at 35.

⁵⁵ *Id.*

⁵⁶ DETZER, *supra* note 50, at 90.

⁵⁷ *Id.*

⁵⁸ Towers, *supra* note 6, at 93.

1830 to 1860, Baltimore and Philadelphia were considered to be the largest cities in America behind New York.⁵⁹ Along with this population explosion, Baltimore became a prominent center for trade. A multitude of factors contributed to its success, including its advantageous geographic position, the development of the Baltimore and Ohio Railroad, its thriving merchant class, its diverse and energetic labor force and its agricultural development. Baltimore's economic position mirrored its political position, the city was torn between practical Northern allegiance and ideological Southern sympathy.

Baltimore is advantageously situated as a trade center because of its geographic position and climate. Nineteenth century Historian J. Thomas Scharf described the city as “enjoy[ing] a location the best of any of the Atlantic cities for residence, commerce, trade and manufactures.”⁶⁰ Scharf also highlighted that because of the mild Maryland winters, Baltimore's harbor was “exempt from the extreme cold which annually seals the avenues of Northern commerce.”⁶¹ Though Scharf's praise of Baltimore is effusive and surely exaggerated, the growing city did benefit from its location between the cotton fields of the South and the factories of the North, eventually developing to a major center for trade. Not only was Baltimore well positioned between the North and South, its inland location provided a conduit for goods from the Atlantic headed to the growing Mid-West region.

In order to exploit Baltimore's proximity to the newly developing American West, the Baltimore and Ohio Railroad, America's first railroad, was established in 1828.⁶² During the early 1800's, canals were the primary means of transportation for commercial goods. The dependence on waterways put Baltimore at a competitive disadvantage, as the Patapsco was ill

⁵⁹ DETZER, *supra* note 50, at 90.

⁶⁰ SCHARF, *supra* note 18, at 281.

⁶¹ *Id.* at 282.

⁶² JAMES D. DILTS, *THE GREAT ROAD: THE BUILDING OF THE BALTIMORE AND OHIO, THE NATION'S FIRST RAILROAD, 1828-1853 I* (Stanford University Press 1993).

suites for long distance conveyances.⁶³ Baltimore did not have the natural advantages of New York or Philadelphia, cities that benefited from the Hudson and Susquehanna rivers respectively.⁶⁴ With this in mind, a group of twenty-five enterprising Baltimore businessmen endeavored to create a rail connection between the Atlantic and the Ohio River.⁶⁵ After establishment, the B&O railroad expanded quickly, reaching Harper's Ferry by 1834 and Wheeling, Virginia by 1853.⁶⁶ Before the outbreak of the War, the B&O lines connected to St. Louis, Missouri.⁶⁷ Baltimore benefitted tremendously from the B&O, as commerce through and in the city increased the value of the manufactures and drove the development of the port.⁶⁸ Because the B&O offered access to the Ohio River and the developing western States, Northern goods and Southern raw materials both flowed through Baltimore.

The unmitigated success of the B&O along with Baltimore's economic and population boom may be fairly contributed to the foresight of a competitive merchant class. Despite the competitive advantages of other major East Coast port cities, Baltimore maintained standing as an important commercial center because of the bold embrace of new technology such as the railroad and strong ties with new markets.⁶⁹ Early success led to the development of trading firms such as Robert F. Gilmore and Sons, Robert Garrett and Sons and F.W. Brune & Sons.⁷⁰ In 1860, leading Baltimore authority figures like Commissioner Hinks and Marshal Kane typified

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ DILTS, *supra* note 62, at xvi-xix.

⁶⁷ *Id.* at xix.

⁶⁸ *Id.* at 2; *See also*, Towers, *supra* note 6, at 93 (noting that the value of Baltimore's manufactures increased 700 percent from 1840-1860).

⁶⁹ Joseph Arnold, *Thinking Big About a Big City – Baltimore, 1729-1999*, in FROM MOBTOWN TO CHARM CITY: NEW PERSPECTIVES OF BALTIMORE'S PAST 3 (Jessica Elfenbein et al. eds., 2002).

⁷⁰ SHEADS & TOOMEY, *supra* note 4, at 2. F.W. Brune was the father of lawyer F.W. Brune, Jr. who served as counsel for the Police Commissioners in the *Howard* case. *See infra* Part VI.A.

the Baltimore business elite.⁷¹ Up until the Civil War, and arguably throughout, the elite merchant class actively pursued economic opportunities to sustain the growth of the city.

Before the Civil War, Baltimore served as the center for export of agricultural products as well as a large market for the consumption of those products. In 1860, Maryland agriculture had moved away from a reliance on tobacco farming and moved towards primary production of wheat and corn.⁷² Commissioner Hinks represented this shift, as he was a flour and grain merchant. Since slave labor was less practical for the seasonal harvesting of wheat and corn, a labor market of free blacks developed in tandem with the existing slave system.⁷³ In 1860, Baltimore itself was not a solid bastion for slaveholders, as most of the city's 2,218 slaves worked in domestic service, with almost ninety-seven percent of the slaveholders in the city owning one to five slaves.⁷⁴ However, the slave trade in ante-bellum Maryland was commercially valuable, meaning that some elite Baltimoreans were heavily invested in the interest of continuing the slave trade.⁷⁵

In order to sustain the economic momentum established by Baltimore's merchants and geographic advantages, a large labor force was needed. By 1860, Baltimore was home to the largest industrial workforce of the South.⁷⁶ According to the 1860 census, immigrants from Germany and Ireland made up more than a quarter of the city's population.⁷⁷ The German immigrants predominately held pro-Union views, though some such as F.W. Brune became

⁷¹ See *supra* part II.A.i.; see also, *infra* Part VI.B.

⁷² BARBARA JEANNE FIELDS, *SLAVERY AND FREEDOM ON THE MIDDLE GROUND: MARYLAND DURING THE NINETEENTH CENTURY 5* (Yale University Press 1985) (In 1747, tobacco comprised 90 percent of Maryland aggregate agricultural production. In 1859, that portion fell to 14 percent).

⁷³ *Id.* at 7.

⁷⁴ *Id.* at 47.

⁷⁵ See generally, RALPH CLAYTON, *CASH FOR BLOOD: THE BALTIMORE TO NEW ORLEANS DOMESTIC SLAVE TRADE* (Heritage Books 2002).

⁷⁶ Towers, *supra* note 6, at 93.

⁷⁷ DETZER, *supra* note 50, at 91.

wealthy and fraternized with the southern-sympathizing elite.⁷⁸ Regardless of political viewpoint, the German immigrants were crucial in maintaining the businesses and manufacturing strength of the city in the pre-war era.⁷⁹ The Irish Catholic immigrants of Baltimore were also important, especially in terms of providing workers for factories. The last major segment of the labor force was the African-American population that was overwhelmingly composed of free blacks.⁸⁰ Competition for work in the factories often led to violence between the free blacks and the Irish.⁸¹

In terms of overall economic effect, the northern and western portions of Maryland were far more influential than the southern regions. In 1850, the capital produced by Baltimore and northern Maryland firms represented a per capita outcome of \$85.13.⁸² In comparison, southern Maryland's per capita output was \$16.02 and the Eastern Shore produced \$10.71 per capita.⁸³ As a result, the city of Baltimore's economic interests were very much aligned with the North even though the sympathies of some prominent citizens were aligned with the South.

B. April 1861: Baltimore Bursts at the Seams

As the Union unraveled and the Confederates attacked Fort Sumter in early April 1861, Baltimore was torn between competing interests. On one hand, Baltimore's economic interests were predicated on coordination with Northern commerce and industrial resources. On the other hand, many of Baltimore's political leaders, elites and common citizens identified with the ideology of the South. Though the former consideration ultimately prevailed, the latter fact

⁷⁸ *Id.*

⁷⁹ Arnold, *supra* note 69, at 7.

⁸⁰ DETZER, *supra* note 50, at 91 (noting that pre-War Baltimore was home to about 25,000 free blacks and about 2,000 slaves); *See also*, FIELDS, *supra* note 72, at 2 (In 1860, there were 74,723 free blacks in Maryland, comprising 45.3 percent of the black population, the remaining percent were slaves).

⁸¹ *See supra* text accompanying note 49 (explaining that partly in order to cut down on violence, the 1860 police force kept a close watch on the Irish and free black residents).

⁸² FIELDS, *supra* note 72, at 17.

⁸³ *Id.*

brought forth a series of events centrally important to the *Howard* case. The Pratt Street Riots of April 19, 1861 were crucial in setting the course for the city and State. The actions of Commissioners Howard, Davis, Hinks and Gatchell during the riots and their aftermath supply a contextual understanding for their subsequent legal claims in the *Howard* case.

i. The Pratt Street Riot of April 19th

The Pratt Street Riots are the subject of considerable historical controversy in that many descriptions or accounts of the riots are colored by political bias.⁸⁴ Despite inconsistencies between sources, an objective summary of the events of April 19, 1861 is possible by identifying events that undoubtedly occurred in contrast to claims that may be unreliable.

It is clear that by mid-April 1861, Baltimore was in a frenzied state.⁸⁵ On April 18th, the news arrived that Virginia had seceded from the Union.⁸⁶ That same day, about 800 Pennsylvania militiamen passed through the city and were met by hostile crowds that hurled both bricks and epithets.⁸⁷ Marshal Kane and the police force successfully protected the Pennsylvanians during that incident.⁸⁸ Rumors circulated the city that more Union soldiers would soon march through the Baltimore.⁸⁹ Concerned pro-slavery citizens called a Southern Rights Convention,⁹⁰ where they voiced strong opposition the presence of federal troops in the city.⁹¹

⁸⁴ See CLEMENT A. EVANS, CONFEDERATE MILITARY HISTORY: A LIBRARY OF CONFEDERATE STATES HISTORY VOL. II 21 (Blue & Grey Press 1899)(describing Union officers as “becoming rattled” and running away from the crowd of Baltimoreans before firing indiscriminately into the crowd); cf. BENJAMIN F. WATSON, ADDRESS, REVIEWS AND EPISODES CHIEFLY CONCERNING THE “OLD SIXTH” MASSACHUSETTS REGIMENT 51-52 (describing the Union soldiers as only firing after enduring extended violent abuse from the “large mob”).

⁸⁵ SCHARF, *supra* note 18, at 788 (“The events which followed the election of President Lincoln – the secession of South Carolina and the Gulf States, the rapid rise of flames of wrath on both sides, the ineffectual efforts to bring about a peaceful settlement – were watched in Baltimore with great excitement.”)

⁸⁶ DETZER, *supra* note 50, at 98.

⁸⁷ SHEADS & TOOMEY, *supra* note 4, at 13.

⁸⁸ *Id.*

⁸⁹ *Northern Troops for Maryland and Virginia*, BALTIMORE SUN, Apr. 18, 1861.

⁹⁰ Commissioner Howard’s son, William Key Howard was elected as a delegate to the convention. *Local Matters, “Southern Rights Convention”*, BALTIMORE SUN, Apr. 18, 1861.

⁹¹ DETZER, *supra* note 50, at 98.

Sensing the tension, Mayor George William Brown made a public statement calling for restraint, reminding citizens of “their common duty to themselves and the laws.”⁹²

On the Morning of April 19, 1861 a thirty-five car train carrying the Sixth Massachusetts regiment and seven companies of unarmed Pennsylvania volunteers arrived at President Street Station in Baltimore.⁹³ The soldiers were en route to defend Washington. In order to board the train to Washington, the troops would have to get to the B&O Station on Camden Street.⁹⁴ The President and Camden stations were connected by tracks on the streets that allowed teams of horses to pull individual railcars between the stations.⁹⁵ The plan was to move the troops down Pratt Street to Camden Street by uncoupling the railcars and using the street tracks. While the soldiers were in the railcars, they could avoid contact with the hostile crowds on the street.⁹⁶ Initially, the plan went smoothly as a number of railcars reached Camden station and the soldiers boarded the Washington train.⁹⁷

Throughout the transfer process, a large crowd gathered along Pratt Street, as well as at the President and Camden stations. The crowds were angry and violent, throwing bricks and stones, and firing small arms. One soldier had his thumb shot off and others were injured by shattered glass.⁹⁸ Along Pratt Street, the increasingly angry mob had laid a number of objects over the tracks, preventing any railcars from reaching Camden Station.⁹⁹ Back at President Street

⁹² *Id.*; BROWN, *supra* note 5, at 36 (The state of affairs became so serious that I, as mayor, issued a proclamation earnestly invoking all good citizens to refrain from every act which could lead to outbreak or violence of any kind... I cannot flatter myself that the appeal produced much effect.”).

⁹³ SHEADS & TOOMEY, *supra* note 4, at 15.

⁹⁴ DETZER, *supra* note 50, at 107.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ SCHARF, *supra* note 18, at 789 (“nine cars reached Camden station safely, and though there was a large and angry crowd assembled there, the men safely transferred to the Washington train.”)

⁹⁸ SHEADS & TOOMEY, *supra* note 4, at 15.

⁹⁹ Jonathan W. White, *Research Notes & Maryland Miscellany: Forty Seven Eyewitness Accounts of the Pratt Street Riot and its Aftermath*, 106 MD. HIST. MAG. 70 (2011).

station, about 230 soldiers of the Massachusetts Sixth remained.¹⁰⁰ Under orders of their senior officer, Captain A.S. Follansbee, the soldiers formed ranks and marched towards Camden Station along with a small detachment of policemen.¹⁰¹ Predictably, the Massachusetts troops were verbally and physically assaulted as they marched. Eyewitness accounts contradict as to exactly who shot first,¹⁰² but the heated confrontation between the soldiers and the mob exploded into a full on battle in the streets of Baltimore. Eventually, the troops were able to reach the Camden Station and leave the city. The riots left at least four soldiers and twelve civilians dead, though some sources report a higher number of deaths.¹⁰³ For the purposes of this paper, the Pratt Street Riot offers a perspective of the environment that lead to the legal controversy involving the Police Commissioners. Importantly, the actions of the Commissioners during and after the riot are crucial for a full understanding of the circumstances of the *Howard* case controversy.

ii. The Actions of the Police Commissioners and Marshal Kane

On the morning of April 19, 1861, the Police Commissioners,¹⁰⁴ Marshal Kane and Mayor Brown were unaware that the Sixth Massachusetts would arrive in Baltimore.¹⁰⁵ In his account of the event, Mayor Brown alleges that the information was “purposely withheld” despite Marshal Kane’s repeated attempts to obtain information via telegraph.¹⁰⁶ Though the Baltimore authorities had no explicit knowledge of the arrival of the Sixth Regiment, the news

¹⁰⁰ *Id.*

¹⁰¹ SHEADS & TOOMEY, *supra* note 4, at 15.

¹⁰² According to Scharf, the commanding officer of the Union soldiers gave the order to fire after the mob threw paving stones at the soldiers. Scharf also includes an anecdote about a Union soldier that attempted to shoot a bystander but the musket misfired, after which the bystander “plunged the bayonet through [the soldier’s] body, apparently in self-defense. SCHARF, *supra* note 18, at 790. In contrast, Detzer writes that as the Union troops moved through the streets, members of the mob fired pistol shots at the soldiers before the order to fire was given. DETZER, *supra* note 50, at 116.

¹⁰³ BROWN, *supra* note 5, at 53; White, *supra* note 99, at 71; DETZER, *supra* note 50, at 125 (noting that some historians have estimated that twelve civilians were killed and over one hundred were wounded.)

¹⁰⁴ Commissioner Charles D. Hinks was not in Baltimore during the riot, any mention of “the Commissioners” in this section excludes Commissioner Hinks. DETZER, *supra* note 50, at 276.

¹⁰⁵ Report of the Police Commissioners to the Honorable General Assembly of Maryland, May 4, 1861 (hereinafter “Commissioner’s Report”); *see also*, BROWN, *supra* note 5, at 43.

¹⁰⁶ *Id.*

was wired to Baltimore at around eight o'clock by an unknown party.¹⁰⁷ Once word of the troops arrival reached the city, angry crowds almost immediately began to form around President Street station.

The first authority figure to be notified of the arrival seems to have been Marshal Kane. Author David Detzer writes that someone from the B&O Railroad contacted Kane and asked for police protection.¹⁰⁸ Since Kane knew the importance of the B&O to the city's interests, he and about forty policemen waited at Camden Street Station at about nine o'clock.¹⁰⁹ At about ten o'clock Mayor Brown and the Police Commissioners received word from Marshal Kane of the arrival of the troops.¹¹⁰ Brown immediately headed to Camden Station with the Howard, Davis and Gatchell in tow.¹¹¹ Kane, Brown and the Commissioners waited at the station as the first group of railcars arrived. As the seventh railcar arrived with broken windows, word arrived to Brown and Commissioner Davis that the mob was tearing up the tracks along Pratt Street.¹¹² Mayor Brown hastened towards President Street station. On Pratt Street, Brown saw soldiers running towards him across the Pratt Street Bridge. The troops were firing over their shoulders towards the angry mob in pursuit. Brown attempted to simultaneously calm the crowd and escort the troops towards the Camden Station.¹¹³ As the troops arrived at Camden Station, Marshal Kane and a force of policemen "came at a run" and "formed a line in front of the mob,

¹⁰⁷ DETZER, *supra* note 50, at 109.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ BROWN, *supra*, note 5, at 48.

¹¹¹ *Id.*

¹¹² *Id.* at 49.

¹¹³ *Id.* at 50-51.

and with drawn revolvers kept it back.”¹¹⁴ According to Brown, Commissioner Davis helped the soldiers onto the train bound for Washington.¹¹⁵

By most accounts Marshal Kane tirelessly attempted to protect the Union soldiers and keep the peace.¹¹⁶ However, Kane was widely known to harbor pro-slavery sympathies. Two central pieces of evidence suggest that though Kane acted to protect the soldiers on April 19th, he was far from a loyal unionist. Later that summer, a grand jury investigation of the riot offered evidence that Kane allowed noted secessionist and instigator George Konig to continue his assault on the union troops and “hurrah for Jefferson Davis and the riot.”¹¹⁷ Following the riot itself, Kane sent a message to Bradley Johnson in Frederick asking for militia members to come to Baltimore to defend against “fresh hordes” of Union soldiers, Kane concluded by stating “we will fight them and whip them, or die.”¹¹⁸ The authorities in Washington were aware of these developments, cementing the perception that Kane was a rebel himself and could not be trusted.

On the evening of the 19th, Mayor Brown and the Police Commissioners met to chart a course of action. Among the concerns of the group was the status of Marshal Kane as well as the possibility of more troops passing through the city and spurring more violence.¹¹⁹ The Commissioners and Brown were aware that Kane appeared from the outside to be acting as a

¹¹⁴ *Id.* at 51.

¹¹⁵ BROWN, *supra*, note 5, at 52; FOLSOM, *supra* note 26, at 54 (“Police Commissioner Davis assisted in protecting the soldiery while they were entering the cars. Some muskets were pointed out of the windows by the troops, but Commissioner Davis earnestly objected to this as likely to bring on a renewal of the fight, and consequently the blinds were closed.”).

¹¹⁶ *See e.g.*, Letter to Marshal Kane from Colonel Jones, April 28, 1861 (“I am, with my command much indebted to you [Kane]. Many, many thanks for the Christian conduct of the authorities in Baltimore in this truly unfortunate affair.”)

¹¹⁷ White, *supra* note 99, at 79 (Police Officer Robert B. Meads testified that he “saw Geo [sic] Konig with a revolver, hurrahing J.D. and cursing the soldiers, hindering a man from coupling cars. Saw Kane put his arm around Konig’s neck and whisper something in his ear. Konig immediately the went on to hurrah J.D. and the riot generally in Kane’s presence.”)

¹¹⁸ “Street run red with Maryland blood; send expresses over the mountains of Maryland and Virginia for the riflemen to come without delay. Fresh hordes will be down on us tomorrow. We will fight them and whip them, or die” *See*, SHEADS & TOOMEY, *supra* note 4, at 19-20.

¹¹⁹ *See*, Commissioner’s Report.

secessionist. The group came to the conclusion that though keeping Kane in office would look like treason to Washington, his power to control the secessionist elements of the city was necessary.¹²⁰ According to Charles Howard's report to the Maryland Legislature, the group was also concerned about more violence if additional troops entered the city. With the apparent blessing of Governor Hicks, Mayor Brown and the Commissioners decided to order the burning of railroad bridges to the north of the city.¹²¹ Following the order, a detachment of Maryland militia and Baltimore police disabled the bridges north of the city.¹²² By keeping Kane as Police Marshal and burning the bridges, the Mayor and Commissioners gave the impression that they supported the rebellion and were dedicated to stopping federal troops from reaching Washington.

After the chaotic events of the 19th, several events took place that further incriminated the Mayor and Police Commissioners as possibly disloyal to the Union. On April 20th, the police commissioners formed a large group of militia and placed them under the command of known Confederate sympathizer Issac R. Trimble.¹²³ Soon after, the Maryland Militia began to convalesce in Baltimore City, confederate flags and regalia were worn in public and strains of "Dixie" echoed through the streets.¹²⁴ At that time, the lone federal force in the city was a small garrison in Fort McHenry, under the command of Captain John Robinson.¹²⁵

¹²⁰ "On one hand...the services of Colonel Kane were indispensable because no one could control as he the secessionist element... on the other hand... The authorities in Washington, while he was at the head of the police, could no longer have any confidence in the police...The former consideration prevailed." BROWN, *supra* note 5, at 70.

¹²¹ "The board were equally unanimous in their judgment that ... it was [the board's] duty to the city and the State of Maryland to adopt any measures whatever that might be necessary, at such a juncture, to prevent immediate arrival in the city of further bodies of troops ... by disabling some of the bridges on both roads" Commissioner's Report.

¹²² EVANS, *supra* note 84, at 23.

¹²³ BROWN, *supra* note 5, at 63 (Trimble later went on to serve as a Major General in the Confederate Army); *see also*, EVANS, *supra* note 84, at 23 (estimating that Trimble commanded as many as 15,000 Maryland soldiers in the days following the Pratt Street riot).

¹²⁴ *Id* at 64-64; *see also*, *War Spirit on Saturday*, BALTIMORE AM., Apr. 22, 1861

¹²⁵ John C. Robinson, *Baltimore in 1861*, MAG. OF AM. HIST. XIV (1885).

Commissioner Howard dispatched Commissioner Davis to the fort bearing word that the Fort may come under attack.¹²⁶ Howard's letter offered the protection of the Maryland militia in defending the fort from "lawless and disorderly characters."¹²⁷ Robinson was thoroughly suspicious of any large group of armed men approaching the fort, especially the Maryland militia he suspected of disloyalty. In order to demonstrate the strength of the fort, Robinson showed Davis a large mortar aimed at the city and warned that if any militia approached the fort, he would open fire on the city.¹²⁸ Robinson states that Davis replied "I assure you, Captain Robinson, if there is a woman or child killed in that city, there will not be one of you left alive here, sir."¹²⁹ Davis writes that he replied "If you do that, and if a woman or child is killed, there will be nothing left of you but your brass buttons to tell who you were."¹³⁰ Regardless of the exact wording, it was clear to Robinson that Commissioner Davis was in a militant mood; this impression was undoubtedly passed along to Washington.

After the Pratt Street riot and the immediate aftermath, the Police Commissioners appeared to be opposed to the Union objective of quickly moving troops to Washington. Although the Commissioners and Mayor Brown attempted to justify their actions as aimed at peacekeeping, federal authorities surely interpreted them as suspicious and bellicose.

C. The Arrests

On May 13, federal troops occupied Baltimore city under the command of General Benjamin Butler.¹³¹ Soon after, Southern-leaning Baltimoreans were forced to flee south.¹³² On

¹²⁶ The Sun reported that "On Saturday night, a rumor that [Ft. McHenry] was to be attacked kept a great many people on the streets until morning." *Civil War: Intense Excitement in Baltimore*, BALTIMORE SUN, Apr. 22, 1861.

¹²⁷ DETZER, *supra* note 50, at 158.

¹²⁸ *Id*

¹²⁹ Robinson, *supra* note 125.

¹³⁰ BROWN, *supra* note 5, at 69.

¹³¹ SCHARF, *supra* note 18, at 131. Banks occupied the city without orders. Ultimately, General Nathaniel P. Banks was appointed to command the Federal troops in Baltimore. BROWN, *supra* note 5, at 97.

June 27th, Marshal Kane was arrested and imprisoned in Ft. McHenry, the Police Commissioners were suspended at that time.¹³³ Four days later, the Commissioners were arrested and taken to Ft. McHenry.¹³⁴ General Banks appointed a new police board and police force that served directly under the military authorities.¹³⁵ The removal raises the question of why did the federal authorities find it necessary to remove the Police Commissioners three months after Baltimore was firmly under military control?

The official reason for the arrest of the Commissioners was never publically disclosed. According to the Baltimore Sun, “The arrest yesterday morning of the Commissioners of Police is announced by General Banks to have taken place in pursuance of instructions from Washington, and we suppose that it must have been based on some information not made public.”¹³⁶ The Sun goes on to speculate, “some vague notion prevails ... that a plot or device of some sort has been in the process of development in Baltimore, inconsistent with the loyalty of the State implied in her relation to the Union.”¹³⁷ It seems that the general consensus among Baltimoreans was that the Commissioners were wrongfully suspended and arrested.¹³⁸ In General Banks’ June 27 Proclamation, he claimed that Marshal Kane was arrested and the Commissioners suspended because of their knowledge of “hidden deposits of arms and ammunition” and their “encourage[ment of] contraband with men at war with the government.”¹³⁹ Federal authorities claimed that the headquarters of the Commissioners

¹³² See, SHEADS & TOOMEY, *supra* note 4, at 32 (describing the days after the occupation of Baltimore when “many members of the Maryland Guard [militia] went south” with weapons looted from the Carroll Hall armory).

¹³³ *Military Rule in Baltimore*, BALTIMORE SUN, Jun. 28, 1861.

¹³⁴ *Arrest of the Board of Police Commissioners*, BALTIMORE SUN, July 2, 1861.

¹³⁵ FOLSOM, *supra* note 26, at 58.

¹³⁶ *Arrest of the Board of Police Commissioners*, BALTIMORE SUN, July 2, 1861.

¹³⁷ *Id.*

¹³⁸ See, *The Case Stated*, BALTIMORE SUN, AUG. 3, 1861.

¹³⁹ Proclamation to the People of the City of Baltimore, General Banks, Headquarters: Department of Annapolis, Jun. 27, 1861.

“resembled, in some respects, a concealed arsenal.”¹⁴⁰ Based on the proclamation, the federal government or the Army perceived that Kane and the Commissioners were trafficking weapons to the South. Since the initial occupation of Baltimore, federal troops had seized a number of weapons caches.¹⁴¹ General Banks was so concerned with arms trafficking he requested a special Calvary unit “to suppress the contraband trade on the back roads leading southward.”¹⁴² On June 7th, Governor Hicks issued a proclamation ordering all Maryland citizens to deliver State arms to federal authorities.¹⁴³ The general fear of arms defection to the South underscores the background concern about weapons trafficking in the *Howard* case itself.¹⁴⁴

Along with the federal concerns about gunrunning on the part of Kane and the Commissioners, the political position of the Board most likely prejudiced the ultimate decision for removal. There was no question that the Board was comprised of pro-slavery Democrats. Howard, Gatchell, Davis and Hinks had previously expressed support for slavery or Southern rights.¹⁴⁵ Charles Howard was also connected to pro-South groups through family ties, his son McHenry Howard was a member of the Maryland Guard who had attempted to steal arms from the Carroll Hall Armory when General Butler occupied the city.¹⁴⁶

Along with the Commissioner’s questionable political positions, federal authorities were most likely concerned about the actions of the Board and Kane after the Pratt Street riots. Notwithstanding the efforts of the Commissioners, Kane and Brown to protect the Massachusetts

¹⁴⁰ *Memorial of the Commissioners*, BALTIMORE SUN, Jul. 18, 1861.

¹⁴¹ See, SCHARF, *supra* note 18, at 132-33.

¹⁴² Charles B. Clark, *The Suppression and Control of Maryland: 1861-1863*, 54 MD. HIST. MAG. 241, 246 (1959).

¹⁴³ SCHARF, *supra* note 18, at 132-33. (The purpose of Hick’s proclamation was “to warn and enjoin upon all citizens of Baltimore, the loyal as well as the disloyal, having in their hands and possession any arms and accoutrements belonging to the State, to surrender and deliver up the same.”)

¹⁴⁴ See *infra* Part III.A.

¹⁴⁵ See *supra* Part II.A.i.

¹⁴⁶ McHenry Howard ultimately joined the Confederate Army and was captured late in the war. MCHENRY HOWARD, RECOLLECTIONS OF A MARYLAND CONFEDERATE SOLDIER AND STAFF OFFICER 13-14 (William and Wilkins Co. 1914).

troops, their actions after April 19th surely raised concerns in Washington. The Commissioners kept Kane as Marshall despite his incendiary message to Bradley Johnson.¹⁴⁷ Unionist Congressman Francis Thomas suggested that the Commissioners were “unworthy of their positions” because they sanctioned Kane’s actions.¹⁴⁸ During a debate in the U.S. House of Representatives, Republican Thaddeus Stevens described Kane as a traitor and “said the police board was made up of the same type of characters.”¹⁴⁹ The Commissioners and Brown were instrumental in the destruction of railroad bridges to the north of the city. Finally, the Board of Police, with Charles Howard at the head, mobilized a fighting force of 15,000 men under the command of known Southern-sympathizer Issac Trimble. When all of the above factors are viewed in combination, decision for removal becomes more logical. Whether or not the gun smuggling scheme was real, the removal was reasonable when viewed from the perspective of a suspicious federal government on full war footing.

When initially informed of the June 27 suspension of power, the Board of Commissioners “protested (the mayor uniting) in a dignified and becoming manner.”¹⁵⁰ The Commissioners were arrested during the early morning hours of July 1st. Commissioner Davis was the first arrested.¹⁵¹ Union soldiers from a Philadelphia regiment based in the city arrived at Davis’s home and transported him to Fort McHenry.¹⁵² Board President Howard, William Gatchell and Charles Hinks were arrested later and taken to Fort McHenry as well.¹⁵³ Three days after their imprisonment, Charles Hinks was released on parol because of “failing health.”¹⁵⁴ It is possible

¹⁴⁷ See *supra* Part II.B.ii.

¹⁴⁸ Charles Branch Clark, *Politics in Maryland During the Civil War*, 37:2 MD. HIST. MAG. 171, 178 (1942).

¹⁴⁹ *Id.* at 179.

¹⁵⁰ SCHARF, *supra* note 18, at 133.

¹⁵¹ FOLSOM, *supra* note 26, at 57.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ BROWN, *supra* note 5, at 99; see also, *Local Matters: Health of Police Commissioner Hinks*, BALTIMORE SUN, Jul. 3, 1861.

that Hinks' absence during the April riot played a part in the ultimate decision to release him. Hinks' freedom would later figure prominently into the *Howard* case. On August 6th, the Commissioners were notified that the Steamer *Adelaide* would transport them to an undisclosed location.¹⁵⁵ The Commissioners were transported to Fort Lafayette, New York and ultimately ended up at Fort Warren in Boston. The transfer from Fort McHenry was probably due to overcrowding and concerns about proximity to the Baltimore and the Confederate States. In September, General Dix¹⁵⁶ expressed his reservations to General McClellan that he did not have "ample room" and the prisoners at Fort McHenry were "too near a great town, in which are multitudes who sympathize with them."¹⁵⁷ In mid-September, Maryland's pro-South leaders were mostly arrested, including members of the legislature and Mayor Brown.¹⁵⁸

The Commissioners issued a series of protests against their incarceration, beginning with a memorial to the U.S. Congress on July 16th.¹⁵⁹ In the memorial, the Commissioners explain that they did not recognize the authority of any other police force and they have since voted to disband the Baltimore police force, "intending to leave the city without any police protection whatsoever."¹⁶⁰ The memorial goes on to claim that the Commissioners are still in control of the police force until their terms expire or the Maryland Legislature explicitly removes them.¹⁶¹ The Commissioners also issued a report to the Maryland Legislature on July 29th.¹⁶² The report reiterated the Commissioner's objections to their imprisonment as well as their conviction that

¹⁵⁵ *Charles Howard, Wm. H. Gatchell, John W. Davis and Geo. Wm. Brown*, BALTIMORE SUN, Aug. 6, 1861.

¹⁵⁶ General Dix took command of Baltimore on July 24, 1861. MORGAN DIX, MEMOIRS OF JOHN ADAMS DIX: VOL II 25 (Harper & Brothers 1883).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 32 (Dix notes that the Maryland Legislature had to be arrested in order to avoid secession); *see also*, BROWN, *supra* note 5, at 102.

¹⁵⁹ *Memorial of the Commissioners*, BALTIMORE SUN, Jul. 18, 1861.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Charles Howard, Wm. H. Gatchell, John W. Davis and Geo. Wm. Brown*, BALTIMORE SUN, Aug. 6, 1861 (Severn T. Wallis delivered the report).

they could not recognize the replacement police without “directly violating both the letter and the spirit of the law.”¹⁶³ The Commissioners also attempted to petition for Habeas Corpus while imprisoned in Fort Lafayette, the Fort’s commander disregarded the petition.¹⁶⁴ Charles Howard wrote to Secretary of War Cameron from Fort Lafayette to object to his treatment, noting that “I have written this letter on my bed, sitting on the floor, upon a carpet bag, there being neither table, chair, stool or bench in the room.”¹⁶⁵ Throughout August 1861, Howard continually wrote to Cameron and Secretary of State Seward to protest the conditions of his confinement.¹⁶⁶ Regardless of their personal and legal protests the Commissioners had little actual recourse, the final words of their memorial aptly summed up their situation, “[The Commissioners] have no other recourse against arbitrary power and military force, and they demand, as a matter of right, that their case be ... lawfully heard and determined.”¹⁶⁷

III. The Case

The Commissioners eventually got their day in court. However, the issue was not whether their arrest and suspension of duties was constitutional. The *Howard* case arose out of a questionable financial transaction between the imprisoned Commissioners and Commissioner Hinks. The replacement pro-Union Mayor, John Lee Chapman and his City Counsel brought legal action to enjoin the Commissioners from using funds granted to them in the 1860 Metropolitan Police Act. It is highly likely that the legal action was brought under the suspicion that the Commissioners were misappropriating the police funds to aid the rebellion. The Baltimore City Circuit Court and the Maryland Court of Appeals found that Commissioner

¹⁶³ *Id.*

¹⁶⁴ *The Baltimore Police Commissioners Writ of Habeas – Col. Burke Declines to Obey*, BALTIMORE SUN, Aug. 12, 1861.

¹⁶⁵ FRANK KEY HOWARD, *FOURTEEN MONTHS IN AMERICAN BASTILLES* 21-22 (Kelly, Hedian & Piet 1863).

¹⁶⁶ *Id.* at 21-26. William Gatchell also wrote a short letter to his wife in which he described his conditions as “uncomfortable” and instructing that she should not write him “until I give you notice, for at present we are cut off from all communication with our friends, except writing to them, and our letters are inspected.” *Id.* at 27.

¹⁶⁷ *Memorial of the Commissioners*, BALTIMORE SUN, Jul. 18, 1861.

Hinks had a right to the funds because he and the other Commissioners remained the legal police board up until February 1862.

A. The Controversy

By early February 1862, Commissioners Howard, Gatchell and Davis were held prisoner in Fort Warren near Boston. Fort Warren was a large fort located on an island in the waters of Boston harbor. Commissioner Howard, Gatchell and Davis lived together in one of the upper rooms of one of the casemates of the fort.¹⁶⁸ Marshal Kane and Mayor Brown were interned in a nearby room.¹⁶⁹ On February 6th, Board treasurer William Gatchell drew “at Fort Warren a check on the fund in said Bank in favor of Charles D. Hinks” for one thousand dollars.¹⁷⁰ The payment was ostensibly for the salary owed to Hinks for the period of August 6, 1861 to February 6, 1861. Hinks received the check from Gatchell and attempted to cash the it on February 8th at the Farmer’s and Planter’s Bank of Baltimore. The bank refused to cash Hinks’ check because of notification from the Mayor and City Council of Baltimore.¹⁷¹ On April 4, 1862, the Mayor and City Council filed a complaint with the Circuit Court of Baltimore City requesting that the court to enjoin former Commissioners from accessing the remaining undrawn money in the police fund.¹⁷²

Under the 1860 Metropolitan Police Act, the Baltimore Police commissioners had a broad degree of independence from the Mayor and City Council of Baltimore.¹⁷³ This was largely a reaction from past corruption between the Mayor and the Police Board in the Know-

¹⁶⁸ FRANK KEY HOWARD, *supra* note 165, at 54.

¹⁶⁹ *Id.*

¹⁷⁰ *Mayor and City Council of the City of Baltimore, et al. v. Charles Howard, et al.*, 20 Md. 335, 337 (Md. 1863).

¹⁷¹ At the time of the controversy, the Mayor of Baltimore was Unionist John Lee Chapman who was appointed after the arrest of George William Brown. SCHARF, *supra* note 18, at 187.

¹⁷² *Howard*, 20 Md. 335 at 336.

¹⁷³ “No ordinance heretofore passed, or that shall hereafter be passed by the Mayor and City Council of Baltimore, shall in any manner conflict or interfere with the powers or the exercise of the powers of the Board of Police of the city of Baltimore hereinafter created.” 1860 Md. Laws, 7.

Nothing era. The 1860 Police Act established a funding scheme where the Commissioners estimated the amount of funds necessary for their duties and reported the estimate to the Mayor and City Council.¹⁷⁴ The Mayor and City Council were then responsible for raising the amount “without delay.”¹⁷⁵ The 1860 Act also provides for a special fund for “extra compensation” of policemen in cases of “gallantry and good conduct on extraordinary occasions.”¹⁷⁶ It is unclear which fund is at issue in the *Howard* case but the Circuit Court made clear that the money had been “received by the said board upon the requisitions which they were authorized to make upon the register for police purposes.”¹⁷⁷ In other words, the Police Board was given the discretion to disburse the funds as they saw fit, without interference from the Mayor and City Council. At the time of the Commissioner’s arrest in July of 1861, the police fund balance was \$8,700. By February 1862, the fund balance had dropped to \$2,800.¹⁷⁸ The Mayor and City Council not only sought to prevent Hinks from collecting the \$1,000 paid by Gatchell, but also to force the Bank to pay over the remaining fund to the City.

On February 12, 1862, the Maryland Legislature passed an Act (The Revocation Act)¹⁷⁹ revoking the power of the former Police Commissioners to control the police fund created by the 1860 Act.¹⁸⁰ The Revocation Act also authorized the payment of the police force appointed by the military in 1861.¹⁸¹ On February 18, 1862 the Maryland Legislature passed another Act (The Establishment Act)¹⁸² that established a new Board of Police Commissioners and police force.¹⁸³

¹⁷⁴ 1860 Md. Laws 16.

¹⁷⁵ *Id.*

¹⁷⁶ 1860 Md. Laws 13.

¹⁷⁷ *Howard*, 20 Md. 335 at 338.

¹⁷⁸ *Id.* at 337.

¹⁷⁹ For the purposes of clarity, the Act of the Maryland Legislature passed on February 12, 1862 will be referred to as the “Revocation Act”.

¹⁸⁰ 1862 Md. Laws 119.

¹⁸¹ *Id.* at Section 1.

¹⁸² For the purposes of clarity, the Act of the Maryland Legislature passed on February 18, 1862 will be referred to as the “Establishment Act”.

The facts of the *Howard* case pose a threshold question; why was Mayor Chapman concerned enough about the police fund to litigate for control of the remaining money? Concededly, the \$2,800 remaining in the fund was no small amount in 1862.¹⁸⁴ Mayor Chapman may have been opposed to the prospect of paying both the old and new Police boards at the same time. There is some evidence that the City was in a precarious financial condition; in 1862 the City owed the State of Maryland over \$200,000 in unpaid taxes.¹⁸⁵ Yet in this context, \$2,800 hardly seems to be of major consequence to the City. Considering the excited state of the city of Baltimore in 1862, there may have been a more urgent motivation behind the Mayor's legal action; concerns about weapons trafficking.

One of the major factors leading to the arrest was the federal concern about the Commissioner's access to arms and the possibility that they were channeling them to the Confederacy.¹⁸⁶ Since the police fund was under the direct control of the Commissioners and they seemed to be able to issue checks from Fort Warren, it is possible that Union authorities were concerned about the use of the police fund to buy weapons for the South. The decision, complaints and arguments only make slight mention of the \$5,900 spent from the fund between July 1861 and February 1862. Gatchell, Howard and Davis may have paid themselves from the fund, but that would still be suspicious to the authorities as they could still use their salary to purchase weapons. The fund was insufficient to pay the entirety of the former police force; there were about 400 members, with ordinary policemen earning ten dollars per week.¹⁸⁷ It is unclear

¹⁸³ 1862 Md. Laws 138.

¹⁸⁴ The official CPI inflation calculator from the Bureau of Labor Statistics only reaches back to 1913, in that year \$2,800 had the purchasing power of \$64,038.26 in 2011. It is safe to assume that 51 years before that, \$2,800 was substantial amount of money. Bureau of Labor Statistics CPI Inflation Calculator, <http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=2%2C800&year1=1913&year2=2011>.

¹⁸⁵ Annual Report of the Comptroller, 1862, Volume 226, Preface 13, at xiii. <http://aomol.net/000001/000226/html/am226p--13.html>.

¹⁸⁶ See *supra* Part II.C.

¹⁸⁷ 1860 Md. Laws 12.

where the rest of the police fund ended up, but it is entirely understandable that Mayor Chapman and the federal authorities would want to prevent the Commissioners from accessing the remaining funds, for whatever purpose.

B. The Circuit Court Decision

When Mayor Chapman's complaint came before Judge William Krebs of the Baltimore City Circuit Court, the Commissioners were still imprisoned in Fort Warren.¹⁸⁸ The record is unclear on whether counsel for the Commissioners was present, though the injunction was also directed against the Farmers and Planters Bank of Baltimore.¹⁸⁹ When the case came before the Court of Appeals, F.W. Brune and George William Brown represented the Commissioners.¹⁹⁰ Brown was in Fort Warren with the Commissioners but its possible that F.W. Brune or Commissioner Hinks appeared before Judge Krebs.

Mayor Chapman's argument relied on the 1862 Revocation and Establishment Acts, passed by the Maryland legislature on February 12th and 18th, 1862.¹⁹¹ The Establishment Act officially established a new Police Board, replacing Howard, Davis, Gatchell and Hinks with Samuel Hinds and Nicholas L. Woods.¹⁹² The complaint argued that because the Commissioners were removed by the military in July 1861, and a new force was established, the City was entitled to the police fund.¹⁹³ Furthermore, the Mayor alleged that the fund was public property and was not subject to the individual control of the Commissioners.¹⁹⁴ The Mayor's complaint

¹⁸⁸ See *Proceedings of the Courts*, BALTIMORE SUN, Feb. 8, 1862.

¹⁸⁹ Brune's firm most likely represented the Farmer's and Planter's Bank. See, GEORGE W. HOWARD, THE MONUMENTAL CITY: ITS PAST HISTORY AND PRESENT RESOURCES 599 (J.D. EHLERS & CO. 1873).

¹⁹⁰ Brown and Brune were law partners, see GEORGE W. HOWARD, *supra* note 189, at 599.

¹⁹¹ 1862 Md. Laws 138.

¹⁹² *Howard*, 20 Md. 335 at 338.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 339-40.

also alleged that under the Revocation Act, the Commissioners could not lawfully access the police fund.¹⁹⁵

Judge Krebs began his analysis by referring to the Establishment Act. The Establishment Act changed the Police Board in a number of respects, it reduced the number of Commissioners from four to two and authorized the new Commissioners to establish a permanent police force.¹⁹⁶ Krebs rejected the Mayor's argument that the Establishment Act transferred control of the police fund to the city, finding that under the original 1860 Police Act, the Commissioners were free to exercise independent control over the police fund.¹⁹⁷ The Establishment Act did not "in express terms" grant title of the fund to the Mayor and City Council.¹⁹⁸ Judge Krebs chose a narrow interpretation of the Establishment Act, requiring explicit language in the Act that passed title of the police fund to the Mayor. Krebs goes on to explain that "I have sought in vain for some language ... in these sections from which title or control [of the police fund] could ... be derived."¹⁹⁹

Even though the Establishment Act did not mention the police fund explicitly, the Mayor's complaint also relied on the Revocation Act. Mayor Chapman argued that revocation implied that the police fund must pass to the Mayor and City Council. Judge Krebs rejected this argument as well, once again pointing out the lack of explicit language in the Act. The Revocation Act concededly annulled the power of Howard, Gatchell, Hinks and Davis to access the police fund, but did not grant Mayor Chapman and the City Council power over the fund. Krebs interprets the Revocation Act as simply repealing the portions of the 1860 Police Act that

¹⁹⁵ *Id.* at 341-42.

¹⁹⁶ 1862 Md. Laws 138.

¹⁹⁷ *Howard*, 20 Md. at 339-40.

¹⁹⁸ *Id.* at 340.

¹⁹⁹ *Id.*

granted the former Commissioners control of the fund.²⁰⁰ The Revocation Act directed the Mayor and City Council to pay the new police force out of “any monies in the hands of said Mayor and City Council.”²⁰¹ But Krebs makes clear that at the time of the Revocation Act, the police fund was not in the hands of the Mayor and City Council, therefore they had no claim to control the fund.²⁰² Finally, Krebs observes that when the Revocation Act was passed, the City held a large budget for funding police purposes, the police fund in question was much smaller and not the object of the Act.²⁰³ Krebs attempted to divine the intent of the legislature in creating the Revocation Act, he assumed that the Revocation Act was intended not to apply to the police fund so that the Commissioners could have an opportunity to “settle their accounts, as required by law.”²⁰⁴ In the end, the Circuit Court refused to grant Mayor Chapman’s injunction.

C. The Court of Appeals Decision

After the unfavorable judgment in the Baltimore City Circuit Court, Mayor Chapman and the City Council requested the injunction before the Maryland Court of Appeals. Former Mayor George W. Brown represented the Commissioners, along with his law partner F.W. Brune. U.S. Attorney William Price represented the Mayor and City Council.²⁰⁵ Price’s involvement in the case highlights the degree of federal involvement with the *Howard* case. It is plausible that Price was brought on to litigate because the case was of significance to the Union authorities. The case was decided on December 11, 1863 by a three-judge panel comprised of Judges

²⁰⁰ “It by no means follows, that the Mayor and City Council or the commissioners appointed under the late law [new commissioners] are entitled to receive and appropriate [the police fund].” *Howard*, 20 Md. at 342.

²⁰¹ 1862 Md. Laws 119.

²⁰² The Revocation Act granted the Mayor and City Council control over funds they are authorized to receive and appropriate “not moneys which the commissioners had taken out of the hands of the Mayor and City Council, and had deposited in their names in the bank.” *Howard*, 20 Md. at 343.

²⁰³ *Id.*

²⁰⁴ *Id.* at 344.

²⁰⁵ See Dan Friedman, *The History of the Baltimore City Solicitors*, <http://www.msa.md.gov/msa/speccol/sc2600/sc2685/text/solicitors.pdf>

Goldsborough, Bowie and Bartol.²⁰⁶ In an opinion written by Judge Goldsborough, the Court of Appeals ultimately affirmed Judge Krebs' refusal to grant the injunction, finding that Charles D. Hinks was entitled to his salary but that the Commissioners could no longer control the police fund after that appropriation.²⁰⁷ Interestingly, Charles D. Hinks died the same day the Court of Appeals decided the case.²⁰⁸ Perhaps Hinks' death demonstrates that the object of the extensive litigation was not simply his salary but related to deeper issues of national security and treason.

William Price's argument began with a broad defense of President's Lincoln power to suspend habeas corpus and detain the Commissioners.²⁰⁹ Price cited *Luther v. Borden*²¹⁰ in what seems to be a vague attempt to invoke the political question doctrine. There is also a reference to *Martin v. Mott*²¹¹ that seems directed towards justifying Lincoln's actions as part of military necessity in extreme circumstances. Price's most effective argument is his use of Article I of the Constitution, which states, "The privilege of the writ of habeas corpus shall not be suspended, unless when in Cases of Rebellion ... the public Safety may require it."²¹² Brown and Brune do not elaborate on their assertion that the removal of the Commissioners was "without authority of law."²¹³ Though this is by far the most important historical and constitutional question presented, the Court of Appeals dodges it entirely.²¹⁴ This paper will analyze the constitutional concerns through a comparative analysis in the subsequent section.²¹⁵

²⁰⁶ *Howard*, 20 Md. at 335.

²⁰⁷ *Id.* at 356.

²⁰⁸ J. Thomas Scharf lists Charles D. Hinks' death as occurring on December 11, 1863. SCHARF, *supra* note 18, at 800.

²⁰⁹ *Howard*, 20 Md. at 345.

²¹⁰ 48 U.S. 1 (1849).

²¹¹ 25 U.S. 12 (1827).

²¹² U.S. CONST. art. I, § 9, cl. 2.

²¹³ *Howard*, 20 Md. at 352.

²¹⁴ *Howard*, 20 Md. at 345 (1863) (reporter note).

²¹⁵ See *infra* part IV.

Price pivots from the constitutional discussion to an appraisal of the status of the Commissioners after their removal in July 1861.²¹⁶ After the new police were established by the military, “the City of Baltimore had no concern, nor can she be justly held liable to pay two police establishments at the same time.”²¹⁷ Since the Commissioners never rendered the services they sought pay for because they were removed by the rightful authority of the President, the city was not liable for Hinks’ salary. Price cites a New York Chancery Court decision²¹⁸ for the proposition that “there cannot be an officer de facto and one de jure in possession of the same office at the same time.”²¹⁹ Price then points out that the 1860 Metropolitan Police Act does not explicitly mention the police fund. The 1862 Establishment Act was intended to completely replace the old Commissioners and does not explicitly mention the funds either. According to Price, the vague language of both statutes demonstrates an implicit intent that all powers, including control of the police fund, should transfer to the new commissioners or the Mayor.²²⁰ The Revocation Act further reveals the legislative intent, the Act “contemplates the very contingency which has given rise to this case, and it settles it.”²²¹

In the final sentences of his written argument, Price glosses over a key point that the Court of Appeals uses as the basis for affirming the decision of the lower court. The check to Gatchell was issued on February 6th, 1862. The Revocation Act was passed on February 12th, 1862. Price attempts to downplay this temporal inconsistency by acknowledging, “The bill was introduced before the check was drawn, though passed afterwards.”²²² However, even if the legislature intended to include the police fund in the Revocation Act, the Act was not in force

²¹⁶ *Howard*, 20 Md. at 346.

²¹⁷ *Id.*

²¹⁸ *Boardman v. Holliday*, 10 Paige Ch. 223 (N.Y. Ch. 1858).

²¹⁹ *Howard*, 20 Md. at 347.

²²⁰ *Id.* at 351.

²²¹ *Id.*

²²² *Id.*

until after Gatchell drew the check. Brown and Brune clearly and concisely attack this discrepancy in their written argument.²²³ Brown and Brune follow up by citing a prior case from the Court of Appeals for the proposition that statutes cannot be retroactive without “perfectly obvious” legislative intent.²²⁴

The Court of Appeals not only agreed that the Revocation Act was not in effect at the time the check was drawn but also that the Commissioners were legally in office though imprisoned by federal authorities. This legal conclusion is somewhat extraordinary and reflects the sympathies of the Judges. According to Goldsborough, the Commissioners were “displaced by a force to which they yielded and could not resist.”²²⁵ This phrase elegantly reflects the underlying indignation of many Marylanders. Obviously the federal government had trampled on the rights of prominent Marylanders during those turbulent times. The outcome of the *Howard* case was probably seen as a minor victory for many imprisoned Marylanders cloaked in the authority of statutory and legislative interpretation.

IV. Comparative Analysis: The Commissioners as Enemy Combatants

In *Mayor and City Council of Baltimore v. Howard*,²²⁶ both sides arguments extended to questions of the President Lincoln’s power to remove the Commissioners under the Constitution, however the Court of Appeals did not “consider or pronounce” on the issue.²²⁷ The question of presidential powers to arrest and detain American citizens in a time of war remains a contentious

²²³ “That said Act of 1862, ch. 111, [The Revocation Act] was not passed until the 12th of February 1862, after said appropriation was made, and could not have a retroactive effect so as to impair the rights of said Hinks, even if it had been its purpose so to do, which it manifestly is not, for the second section of said Act repeals so much of Article 4 of the Code, as authorizes said board to use, draw for or disburse, any of the funds provided under said Article, but does not attempt to invalidate any previous Act of said board.” *Id.* at 353.

²²⁴ *Macgruder v. Carroll*, 4 Md. 335, 336 (1853) (finding a statute that referred to estate administration could not have retroactive effect).

²²⁵ *Howard*, 20 Md. 357.

²²⁶ 20 Md. 335 (1863).

²²⁷ *Howard*, 20 Md. 335, 345 (1863) (reporter note).

legal issue today. In order to cast some light on the modern doctrine, a brief review of the status of the Commissioners under the major precedents in this area of law is warranted.²²⁸

A. Ex Parte Milligan

In *Ex Parte Milligan*,²²⁹ Lamdin Milligan, a U.S. Citizen in Indiana, was arrested by federal military authorities for alleged membership in an organization known as the Sons of Liberty. The Sons of Liberty were allegedly engaged in planning an attack on federal prison camps in Indiana.²³⁰ A military commission formally charged Milligan; the counts included “aiding insurrection” and “disloyal practices”.²³¹ On May 19, 1865, Milligan was sentenced to death. That same day Milligan appealed to the Federal District Court for Indiana, claiming he was denied habeas corpus and challenging the legality of his trial by military commission.²³² On appeal, the Supreme Court addressed the question of whether a U.S. citizen could be charged by military commission for alleged disloyal acts.

The Court found that American citizens could not be tried by military commission in States “which have upheld the authority of the government, and where the courts are open and their process unobstructed.”²³³ Basically, citizens must be tried in civilian courts in States where access to the courts remains open. The Court also found the suspension of habeas corpus by President Lincoln constitutional, and that Congress had the power to authorize trial of citizens by military commission in courts with open courts systems.²³⁴ Finally, Milligan did not qualify as a prisoner of war, as he was not associated with the Confederate military, nor was he a resident of

²²⁸ This section does not contain an analysis of *Korematsu v. United States*, 323 U.S. 214 (1944), since the Court’s decision in that case centers on racial discrimination under the 14th amendment.

²²⁹ 71 U.S. 2 (1866).

²³⁰ *Id.* at 6.

²³¹ *Id.*

²³² *Id.* at 8.

²³³ *Id.* at 121.

²³⁴ *Ex Parte Milligan*, 71 U.S. 137.

a Confederate State.²³⁵

The facts of the removal of the Baltimore police commissioners differ significantly from the arrest of Milligan. Milligan was actually charged and tried by a military commission, the Commissioners were never charged nor were they tried in any court. Assuming that the Commissioners would have been charged on grounds similar to Milligan, the *Milligan* precedent would apply in that the Maryland courts were technically open during 1861. Had the military sought to charge Howard and the others for conspiracy, they would have had to file the criminal charges in a Maryland federal or state court. Like Milligan, the Commissioners could not be considered “belligerents” or “combatants” because they were not formally associated with a Confederate State. Had *Milligan* been decided prior to the arrest of the Commissioners, the decision would uphold the deprivation of habeas rights but also foreclose prosecution by a military tribunal.

B. Ex Parte Quirin

More than 50 years after *Milligan*, the Supreme Court once again addressed the issue of whether American citizens could be detained as enemy combatants in *Ex Parte Quirin*.²³⁶ Like *Milligan* and the removal of the Baltimore Commissioners, *Quirin* was decided in the midst of a great war. However, *Quirin* was decided during World War II, when the hostilities largely took place overseas. At least one of the defendants in *Quirin* was born in Germany and subsequently immigrated to the United States. His status as a U.S. citizen was contested and ultimately not addressed by the Court.²³⁷ The case involved seven people, all detained by military authorities on suspicion of planning acts of sabotage in the United States. After the saboteurs were arrested, President Roosevelt issued a proclamation that authorized trial by military commission for those

²³⁵ *Id.* at 131.

²³⁶ 371 U.S. 1 (1942).

²³⁷ *Id.* at 20 – 21.

“who have entered upon the territory of the United States as part of an invasion or predatory incursion, or who have entered in order to commit sabotage, espionage or other hostile or warlike acts.”²³⁸

The court upheld the constitutionality of Roosevelt’s proclamation and summarily denied habeas corpus to Quirin and his associates.²³⁹ The more interesting portion of the decision involves the Court’s analysis of the legal status of the saboteurs as enemy combatants or private citizens. In *Quirin*, the Supreme Court distinguished *Milligan* on the grounds that the captured saboteurs were in fact enemy combatants under the laws of war.²⁴⁰ By using the laws of war as a guide, the Court classified the saboteurs as more like combatants than members of the peaceful population. Since lawful combatants are subject to trial by military commission, unlawful combatants are also subject to the same procedures.²⁴¹

If the Baltimore Commissioners were hypothetically subject to the *Quirin* standard, they would still be entitled to a trial before a civil court. Taking the *Quirin* classification into account, the Commissioners were more like members of the peaceful population rather than combatants in any sense. The only way the Commissioners would be subject to trial by military tribunal would be if the state offered some compelling evidence that they were actively involved in some sort of conspiracy to send weapons to the South. Even under the heightened *Quirin* standard, the Baltimore Commissioners were entitled to habeas rights or at least a fair adjudication before a civilian court.

²³⁸ Proclamation No. 2561, of July 2, 1942, 7 Fed. Reg. 5101, 56 Stat. 1964.

²³⁹ *Quirin*, 317 U.S. at 37-38.

²⁴⁰ Jennifer K. Elsea, *Detention of American Citizens as Enemy Combatants*, CRS Report for Congress, Feb. 24, 2005.

²⁴¹ Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.” *Id.* at 30-31.

C. Rumsfeld v. Padilla

The recent Supreme Court decision *Rumsfeld v. Padilla*²⁴² also holds some relevance to the removal of the Commissioners in 1861. *Padilla* occurred during the height of the “War on Terror” during the second Bush administration. Padilla, an American citizen, was arrested as a result of a grand jury investigation into the September 11th attacks.²⁴³ Padilla was initially held under federal criminal custody but then transferred to military custody after an order from President Bush that designated Padilla as an enemy combatant.²⁴⁴ The Second Circuit found that Padilla was entitled to a right of habeas corpus and his detention by military authorities was unconstitutional. The Supreme Court did not address the question of whether Padilla was entitled to a right of habeas corpus because it held that the federal courts lacked jurisdiction over Padilla’s case.²⁴⁵ Essentially, the proper respondent was not Secretary of Defense Donald Rumsfeld but rather the commander of the military base where Padilla was held.²⁴⁶ However, the ruling did overturn the Second Circuit decision and Padilla remained in military custody.

Padilla resembles the removal of the Baltimore Commissioners in some respects, though the circumstances are different in key respects. Like the Commissioners, Padilla was a U.S. citizen eventually detained by military authority. However, the Commissioners were removed during a Civil War, rather than the more amorphous “War on Terror.” Had the Commissioners been charged as enemy combatants and sought relief from a civilian court, it is possible that the reviewing court would find they lacked jurisdiction. The decision may have rested on whether the Commissioners directed their legal action against the Government or the commander of Fort

²⁴² 542 U.S. 426 (2004).

²⁴³ *Id.* at 430.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 427.

²⁴⁶ *Id.* at 435.

Warren in particular. The general takeaway for the purposes of this analysis is that the legal questions surrounding the Commissioner's imprisonment were novel concepts in 1861. Bearing in mind the procedural difficulties present in *Padilla*, some 140 years later, it is not surprising the Commissioners chose to pursue no legal action at all.

V. Conclusion

The Baltimore Police Commissioners are representative of many Baltimoreans during the Civil War era. Politically, economically and socially, the Commissioners reflected the state of affairs in Baltimore before and during the 1860's. Their treatment at the hands of federal authorities demonstrates the means through which Maryland was compelled to remain in the Union. The removal brings forth unique legal concepts that are still tested and debated in the modern era. The *Howard* case itself stands as a window through which one can view contemporary attitudes about the occupation of Baltimore, as well as underlying concerns about ongoing disloyalty of Southern-sympathizing Baltimoreans. The Court of Appeals description of the Commissioners as "compelled by a force to which they yielded and could not resist"²⁴⁷ is a powerful sentiment that can be interpreted to apply to the entire city of Baltimore during the Civil War era.

²⁴⁷ *Howard*, 20 Md. at 357.

VI. Selected Biographies

A. The Judges and Lawyers

Judge William George Krebs (1802 – 1866)

William George Krebs was the first judge appointed to the Circuit Court for Baltimore City when it was created in 1853, his term ended in November 1863.²⁴⁸ Krebs served as a member of the Baltimore City Council in 1823 – 1824, 1826 – 1827 and 1841 – 1842.²⁴⁹ Judge Krebs died on April 24, 1866.²⁵⁰

Judge Brice John Goldsborough (1803-1867)

Brice John Goldsborough was born on May 30, 1803 in Cambridge Maryland.²⁵¹ Goldsborough studied at St. Johns College in Annapolis and studied law under Col. Smith of Winchester, Virginia.²⁵² During the War of 1812, Goldsborough served as a drummer boy.²⁵³ Judge Goldsborough served as a Maryland Delegate and a judge on the Dorchester County Court before he was appointed to the Court of Appeals in 1860. Judge Goldsborough died in 1867, he had two children.²⁵⁴

William Price

William Price served as the Baltimore City Solicitor from 1865-1866.²⁵⁵ Price served as a member of the Maryland House of Delegates from 1861-1862, and later as United States Attorney for the District of Maryland from 1862-1865 and from 1866-1867.²⁵⁶ From 1865 –

²⁴⁸ HISTORIES OF THE BENCH & BAR OF BALTIMORE CITY 58 (Baltimore Courthouse and Law Museum Foundation 1997).

²⁴⁹ SCHARF, *supra* note 18, at 188-92.

²⁵⁰ *Id.* at 802.

²⁵¹ Archives of Maryland, Biographical Series: Brice John Goldsborough, *MSA SC 3520-13622*, <http://www.msa.md.gov/megafile/msa/speccol/sc3500/sc3520/013600/013622/html/13622bio.html>

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *See*, Friedman, *supra* note 205, at 6.

²⁵⁶ *Id.*

1866 and 1867 – 1869, Price served as the clerk to the U.S. Circuit Court in Baltimore.²⁵⁷



F. W. Brune

Frederick W. Brune, Jr. (1813 – 1878)

Illustration Source: GEORGE W. HOWARD, *THE MONUMENTAL CITY, ITS PAST HISTORY AND PRESENT RESOURCES* 599 (J.D. EHLERS & Co. 1873).

Frederick W. Brune was born on January 26, 1813.²⁵⁸ Brune was named after his father, a prominent merchant in Baltimore who emigrated from Germany in the late 18th century.²⁵⁹ Brune studied law at Harvard and returned to Baltimore, he was admitted to the Bar in 1834.²⁶⁰ In 1838, Brune formed a law practice with George W.

Brown, they represented the Commissioners in the *Howard* case. Brune's firm also represented the Farmer's and Planter's Bank.²⁶¹ In 1853, Brune married Emily S. Barton and had four children. Along with his law partners, Brune helped create the first digest of Maryland Reports. Brune never took an active role in politics, mostly dedicating himself to legal work.²⁶² Brune died suddenly of pneumonia on July 18, 1878.

²⁵⁷ SCHARF, *supra* note 18, at 729.

²⁵⁸ GEORGE W. HOWARD, *supra* note 189, at 599.

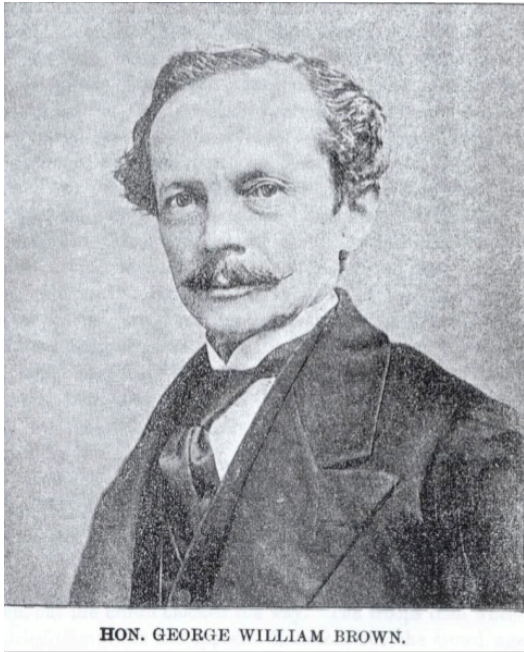
²⁵⁹ *Id.* at 820.

²⁶⁰ *Id.* at 599.

²⁶¹ *Id.* at 601.

²⁶² *Id.*

George William Brown (1812 – 1890)



Photograph Source: DE FRANCIS FOLSOM, OUR POLICE: A HISTORY OF THE BALTIMORE POLICE FORCE FROM THE FIRST WATCHMAN TO THE LATEST APPOINTEE 29 (J.D. Ehlers & Co. 1888).

George William Brown was born in Baltimore City on October 13, 1812.²⁶³ Brown was educated at Rutgers College in New Jersey.²⁶⁴ In 1839, he married into the Brune family²⁶⁵ and began a law practice with F.W. Brune Jr., co-counsel in the *Howard* case. Brown became mayor of Baltimore in 1860 but and was arrested in removed in 1861. Brown spent more than a year in prison along with the Baltimore Police Commissioners until his release in November 1862.²⁶⁶ Upon his return to Baltimore, Brown continued his legal career, serving as Chief Justice on the Supreme Bench of Baltimore City from 1872 until his death.²⁶⁷ In 1885, Brown issued an opinion permitting Everett Waring to become the first African-American admitted to the Maryland Bar.²⁶⁸ George Brown was also a major philanthropist, serving on the board of trustees of many organizations including the Peabody Institute. Brown was also an original founder of the Maryland Historical Society²⁶⁹ and served on the faculty at the University of Maryland School of Law.²⁷⁰ George Brown died on September 8, 1890.²⁷¹

²⁶³ Archives of Maryland: Biographical Series, George William Brown, *MSA SC 3520-2830*, <http://www.msa.md.gov/megafile/msa/speccol/sc3500/sc3520/002800/002830/html/2830bio.html>

²⁶⁴ *Id.*

²⁶⁵ Brown married F.W. Brune's sister. See GEORGE W. HOWARD, *supra* note 189, at 599.

²⁶⁶ *The Release of Maryland Political Prisoners*, BALTIMORE SUN, December 2, 1862.

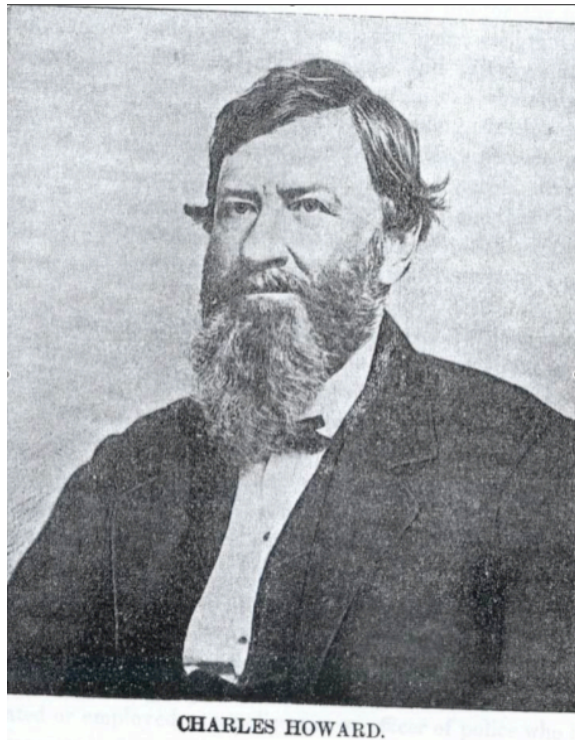
²⁶⁷ Archives of Maryland: Biographical Series, George William Brown, *MSA SC 3520-2830*, <http://www.msa.md.gov/megafile/msa/speccol/sc3500/sc3520/002800/002830/html/2830bio.html>

²⁶⁸ J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF A BLACK LAWYER, 1844-1944* 144 (U. Penn. Press 1993).

²⁶⁹ *Id.*

²⁷⁰ See, David Hoffman, *The University of Maryland School of Law: The First Fifty Years, 1869 – 1919*.

B. The Commissioners



Pictures and Photographs of the Commissioners: DE FRANCIS FOLSOM, OUR POLICE: A HISTORY OF THE BALTIMORE POLICE FORCE FROM THE FIRST WATCHMAN TO THE LATEST APPOINTEE 29 (J.D. Ehlers & Co. 1888).

Charles Howard (1802 – 1869)

Charles Howard was born on April 25, 1802 to prominent Revolutionary War figure Col. John Eager Howard.²⁷² He was the youngest of six sons.²⁷³ Howard served as the President of the Baltimore and Susquehanna Railroad Company before entering public service.²⁷⁴ During his career, Charles Howard was active in the management and maintenance of several benevolent associations, including the Peabody Foundation, the Baltimore Poor Association and the Asylum for the Blind. Howard was also active as a member and president of the American Colonization Society, he advocated the removal of slaves and free blacks from the United States.²⁷⁵ Howard served as Chief Judge on Orphan's Court of Baltimore City from 1848 – 1851. From 1853 – 1854, Howard served as the City Collector. Howard was also an active member of the Reform Movement of 1860 before his appointment to the Board of Police Commissioners.²⁷⁶ In July 1861, Charles Howard was arrested by federal Authorities and initially imprisoned at Ft. McHenry, then Fort Lafayette and

²⁷¹ Archives of Maryland: Biographical Series, George William Brown, *MSA SC 3520-2830*, <http://www.msa.md.gov/megafile/msa/speccol/sc3500/sc3520/002800/002830/html/2830bio.html>.

²⁷² THE BIOGRAPHICAL CYCLOPEDIA OF REPRESENTATIVE MEN OF MARYLAND AND DISTRICT OF COLUMBIA 417 (Baltimore: National Biographical Publishing Co. 1879).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ See, Report of the Board of Managers for the Removal of People of Colour: Enclosing a Communication from Charles Howard, Esq. to the Governor of Maryland, Dec. 31, 1834.

²⁷⁶ *Id.*

finally Ft. Warren. Howard had at least two sons; Frank Key Howard and McHenry Howard. Francis Key Howard was the editor of the *Baltimore Exchange* in 1861. Francis was arrested in mid-September 1861 imprisoned for almost eighteen months in Forts Fayette and Warren with his father.²⁷⁷ McHenry Howard was a member of the Maryland Guard militia and subsequently fought for the Confederacy before his capture late in the war.²⁷⁸ Charles Howard was released from Fort Warren in November of 1862, he was confined by federal authorities for seventeen months.²⁷⁹ Howard died on June 18, 1869.²⁸⁰

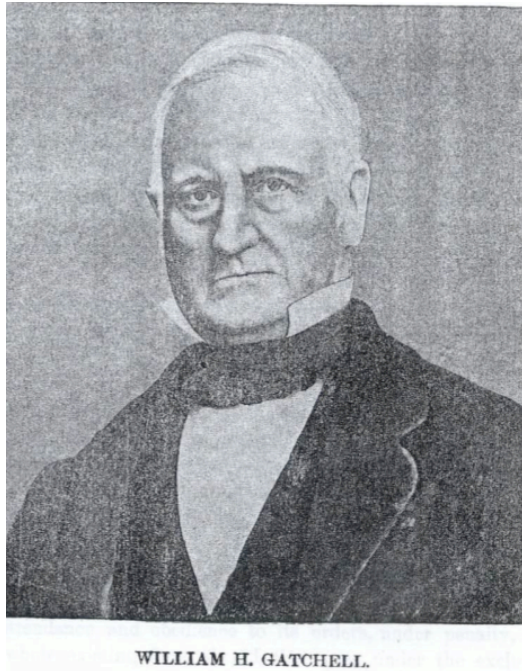
²⁷⁷ SCHARF, *supra* note 18, at 137; *see generally*, FRANK KEY HOWARD, *supra* note 165.

²⁷⁸ MCHENRY HOWARD, *RECOLLECTIONS OF A MARYLAND CONFEDERATE SOLDIER AND STAFF OFFICER* 13-14 (William and Wilkins Co. 1914).

²⁷⁹ *The Release of Maryland Political Prisoners*, BALTIMORE SUN, December 2, 1862.

²⁸⁰ THE BIOGRAPHICAL CYCLOPEDIA OF REPRESENTATIVE MEN OF MARYLAND AND DISTRICT OF COLUMBIA 417 (Baltimore: National Biographical Publishing Co. 1879).

William H. Gatchell (1798-1878)



William Gatchell was a lawyer and slaveholder²⁸¹ who served as a City Council member in 1827 and 1838.²⁸² Gatchell was a Democrat.²⁸³ He was also clerk to the Baltimore City Court from 1845 to 1851.²⁸⁴ In 1860, Gatchell co-owned the mouthpiece of the Reform party, the “Exchange” newspaper.²⁸⁵ Gatchell was appointed treasurer of the Baltimore City Board of Police Commissioners in 1860. In July 1861, Gatchell was removed by federal authorities and imprisoned along with his fellow commissioners.

Gatchell was released from Fort Warren in November 1862.²⁸⁶ In 1873, Gatchell served as the clerk to a city commission that managed engineering projects for the Jones Falls.²⁸⁷ Gatchell was also a judge on the Baltimore City Appeal Tax Court at the time of his death in 1878.²⁸⁸

²⁸¹ Towers, *supra* note 6, at 101.

²⁸² SCHARF, *supra* note 18, at 193.

²⁸³ FOLSOM, *supra* note 26, at 38.

²⁸⁴ Archives of Maryland, Historical List, Baltimore City Court Clerks 1817-1982, <http://www.msa.md.gov/msa/speccol/sc2600/sc2685/html/bccourtclerk.html>.

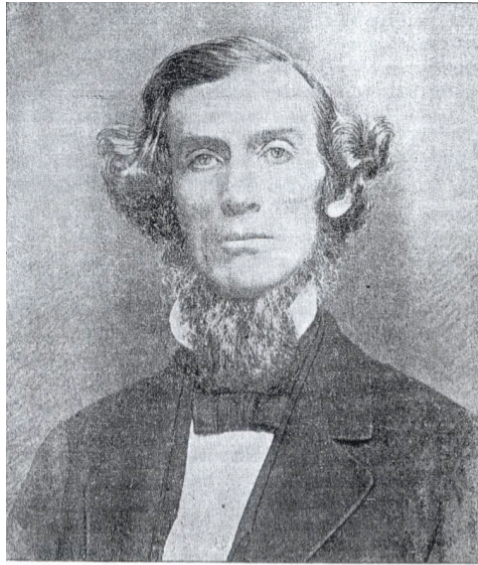
²⁸⁵ Towers, *supra* note 6, at 101.

²⁸⁶ *The Release of Maryland Political Prisoners*, BALTIMORE SUN, December 2, 1862.

²⁸⁷ SCHARF, *supra* note 18, at 211.

²⁸⁸ *Id.* at 799.

Charles D. Hinks



CHARLES D. HINKS.

Charles Dent Hinks was a prominent flour and grain merchant²⁸⁹ and brother of Baltimore's first Know-Nothing mayor, Samuel Hinks.²⁹⁰ Charles Hinks and his brother established a flour and grain commission under the name C.D. Hinks and Company.²⁹¹ Hinks was an incorporator of Baltimore's Corn Exchange Buildings Company. In 1860, Hinks was appointed to the Baltimore City Board of Police Commissioners. Hinks was arrested along with the other commissioners in July 1861, but released two days later because of his failing health.²⁹² Hinks was at the center of the *Howard* case controversy, he received the \$1000 check in question. Hinks died on December 11, 1863, the same day the Maryland Court of Appeals decided the *Howard* case.²⁹³

²⁸⁹ See, SCHARF, *supra* note 18, at 415.

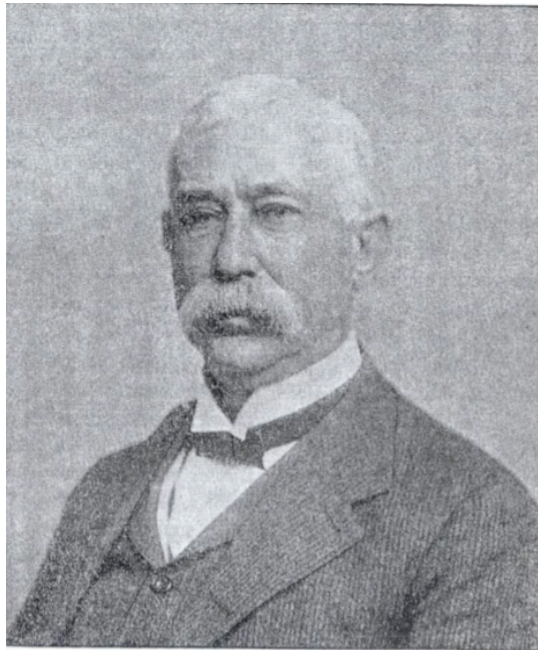
²⁹⁰ Towers, *supra* note 6, at 101

²⁹¹ Archives of Maryland, Biographical Series: Samuel Hinks, <http://www.msa.md.gov/megafile/msa/speccol/sc3500/sc3520/012400/012475/html/12475bio.html>.

²⁹² *Local Matters: Health of Police Commissioner Hinks*, BALTIMORE SUN, Jul. 3, 1861.

²⁹³ SCHARF, *supra* note 18, at 800.

John W. Davis (1823 – 1888)



HON. JOHN W. DAVIS.

John W. Davis was born on Light Street in Baltimore in February 1823.²⁹⁴ Davis sold newspapers as a young boy and claimed to be the first newsboy in Baltimore.²⁹⁵ At 27, Davis owned a commercial wharf. Davis later worked as the assistant paymaster for the B&O Railroad and in 1877 a general agent for the North Central Railroad.²⁹⁶ By 1881 Davis was vice president of the B&O Railroad, then serving as President of the railroad until his death.²⁹⁷

Aside from a successful commercial career Davis was devoted to public service. In 1852, Davis was elected to the Maryland House of Delegates. Before his appointment to the police board, Davis was clerk to the Baltimore City Court of Common Pleas and a Port of Baltimore customs official, appointed by Democratic President James Buchanan.²⁹⁸ Davis was appointed as a Baltimore City Police Commissioner in 1860 and arrested in July 1861; he was imprisoned in Fort McHenry, Fort Lafayette and Fort Warren before his release in November 1862.²⁹⁹ After he returned, Davis was Treasurer of the State of Maryland from 1872-1874. Davis then served as Baltimore City Sheriff in 1867 and once again

²⁹⁴ Archives of Maryland, *Biographical Series: John W. Davis (1823-1888)*, MSA SC 3520-1544, <http://www.msa.md.gov/megafile/msa/speccol/sc3500/sc3520/001500/001544/html/01544bio.html>.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *The Release of Maryland Political Prisoners*, BALTIMORE SUN, December 2, 1862.

as Police Commissioner from 1870-1884.³⁰⁰ John W. Davis died in November 1888, he had seven children.³⁰¹

³⁰⁰ Archives of Maryland, *Biographical Series: John W. Davis (1823-1888)*, MSA SC 3520-1544, <http://www.msa.md.gov/megafile/msa/speccol/sc3500/sc3520/001500/001544/html/01544bio.html>.

³⁰¹ *Id.*