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# CHIEF JUSTICE TANEY AND THE PUBLICATION OF COURT OPINIONS

*by*

ALFONS J. BEITZINGER\*

Of the many opinions which Roger B. Taney wrote during his twenty-eight years as Chief Justice of the United States Supreme Court, his pronouncements in the Dred Scott case in 1857, and in the Booth cases in 1859, met with the greatest popular disapproval. In the Dred Scott case, Taney, speaking for a badly divided court, declared that Congress lacked power under the Constitution to prohibit slavery in the territories.<sup>1</sup> In the Booth cases, Taney, speaking for a unanimous court, proclaimed the power of the federal government to enforce its laws without state interference, defended the power of the court to review decisions of the highest state courts, and pronounced the constitutionality of the fugitive slave law of 1850.<sup>2</sup>

The decision in each of these cases was followed by an intramural altercation stemming from an order issued by Taney which directed the clerk of the court not to deliver copies of his opinions to any person prior to their appearance in the official court reports. Confronting each other in the first dispute were Taney and Associate Justice Benjamin R. Curtis. The principals in the second dispute were Taney and Attorney General Jeremiah S. Black.

The story of Taney's quarrel with Curtis is well known.<sup>3</sup> The episode began when Curtis, on the same day that he filed his dissenting opinion in the Dred Scott case, departed from the usual practice by giving a copy to a Boston newspaper which promptly published it.<sup>4</sup> When a relative of Curtis followed up this action by requesting a copy of Taney's opinion, the Chief Justice's anger mounted. He ordered the clerk, William Thomas Carroll, not to remit a copy to anyone except the court reporter. No one not specifically authorized was to have access to his opinion until it appeared in the official court reports.<sup>5</sup>

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<sup>1</sup> Dred Scott v. Sanford, 19 How. 393 (1857).

<sup>2</sup> Ableman v. Booth and United States v. Booth, 21 How. 506 (1859).

<sup>3</sup> The correspondence was published in CURTIS, MEMOIR OF BENJAMIN ROBBINS CURTIS I 211-230. The fullest account of the episode is in SWISHER, ROGER B. TANEY 512-516 (1936). See also 1 NEVINS, THE EMERGENCE OF LINCOLN 115-116.

<sup>4</sup> CURTIS, MEMOIR OF BENJAMIN ROBBINS CURTIS I 211 (hereinafter cited as MEMOIR).

<sup>5</sup> Letter from Taney to Curtis, Apr. 28, 1857, cited in CURTIS, MEMOIR 211.

Having heard that Taney's opinion had not been filed, despite a court rule that such action follow immediately upon oral delivery, and that it was being materially altered, Curtis wrote to Carroll requesting a copy. When met with refusal on the basis of Taney's order, which had now been formalized in writing and agreed to by Justices Wayne and Daniel, Curtis protested that the order should not apply to a member of the court. An unpleasant exchange of letters followed in which Taney, after denying that he had made substantial changes in his opinion, explained that the order was intended to prevent dissemination of "garbled and mutilated" versions. He advised Curtis that he could only have access to a copy if it were to be used by him in discharge of his official duties. This, Taney thought, was obviously not the reason for Curtis' request.<sup>6</sup>

In 1859, the same order, now apparently generalized to cover all opinions, set off the altercation with Black. Appended to the original transcript of the record of the Booth cases in the office of the Clerk of the U. S. Supreme Court are a number of documents in the form of memoranda drawn up by Carroll, the clerk, a note written by Black, and a letter written by Taney, which bring to light this hitherto unknown episode.<sup>7</sup>

In the morning of April 26, 1859, fifty-one days after the court had decided the Booth cases, Black went to Carroll's office and requested a copy of Taney's opinion. In Carroll's absence, the assistant clerk informed Black that under Taney's order no opinion could be given to him prior to its official publication.<sup>8</sup> Infuriated, Black wrote out the following note which he addressed to Carroll and left for him to file.

In the name and by the direction of the President and for the public use in a matter of great and pressing importance I demand a copy of the opinion of the Supreme Court delivered by the Chief Justice in the cases of the *U.S. v. Booth* and *Ableman v. Booth* at the last term. Regarding this as a public record I respectfully suggest that I have a legal right to have it for the purpose referred to.<sup>9</sup>

Alarmed, the assistant clerk immediately telegraphed Taney, who was then holding a session of his circuit court in Baltimore, asking what

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<sup>6</sup> Letters from Curtis to Carroll, Apr. 9, 1857, from Carroll to Curtis, Apr. 6 and 14, 1857, from Curtis to Taney, Apr. 18, May 13, and June 16, 1857, and from Taney to Curtis, Apr. 28, June 11, and June 20, 1857, cited in CURTIS, MEMOIR 212-229. For Taney's written order to Carroll, dated Apr. 6, 1857 and countersigned by Wayne and Daniel, see CURTIS, MEMOIR 218.

<sup>7</sup> Transcript of record, *Ableman v. Booth* and *United States v. Booth*, 21 How. 506 (1859). Original copy in office of Clerk of the Supreme Court of the United States.

<sup>8</sup> Memorandum of Wm. Thos. Carroll, dated Apr. 26, 1859, *ibid.*

<sup>9</sup> J. S. Black, Atty. Genl., to the Clerk of the Supreme Court of the United States or his Deputy in Charge of the records, Apr. 26, 1859, *ibid.*

should be done. Taney promptly wired back directing that a copy of his opinion be given to Black.<sup>10</sup>

The next day, Black requested Carroll to send him the mandates in the Booth cases, along with two more certified copies of the opinion. Carroll promised to send the mandates but decided to consult with Taney before handing out any more copies of the opinion. Rushing to Baltimore, he told Taney all that had transpired. Taney then ordered him to furnish two copies of the opinion to Black and one to President Buchanan.<sup>11</sup>

Early in the evening of April 28, 1859, Carroll went to the White House and delivered a copy of the opinion to Buchanan. He noted in a memorandum that Buchanan remarked to him upon the occasion that "the Supreme Court and the Executive should stand shoulder to shoulder in such a crisis, that united they might be able to resist the fanaticism of both the North and the South and that he (Buchanan) had determined to execute the decrees of that court with all the force and power that the constitution and laws placed at his disposal."<sup>12</sup>

That same day, Taney addressed the following letter to Carroll:

I was greatly surprised at the protest of the Attorney General which you showed me last night, and which he thought proper to file in your office after he was informed by your clerks that they were acting in obedience to my order. I presume he must have done this upon some sudden impulse, and upon consideration will withdraw it. For if it is not withdrawn it will be my duty to file a vindication of the order: and to bring the subject before the court at its next session so that you may not again have any difficulty or controversy as to your duty on such an occasion. I fully and entirely approve of your conduct in this matter and of that of your clerks when you were absent from the office. And you will please say so to them.

As the Attorney General has been pleased to make his charge against the court, by filing the protest in your office I reply through the same channel: and request you to show this letter to him: and at the same time to say to him, that in ordering the copy of the opinion to be given to him it was for the purpose only of aiding him in the discharge of his official duties: and in the confidence that he would take care that it should not be published, until it is reported and published by the officer appointed by law to perform that duty and who is responsible to the court for the manner in which it is executed. It was with this understanding that I allowed a copy of my opinion in the case of Dred Scott to be given to Gov. Walker, before it was published by the Reporter—because he was about to go to Kansas, and needed it in the discharge of his official duties. And a copy of any opinion would be given to any public officer who desired to have it to guide or assist him in his public duties upon application to the presiding officer of the court: but always in the confidence that he would not suffer it to be published, until reported and published by the proper officer.<sup>13</sup>

Armed with Taney's letter, Carroll went to Black, two days later,

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<sup>10</sup> Memorandum of Wm. Thos. Carroll, dated Apr. 26, 1859, *ibid.* Telegram from Taney to D. W. Middleton, Apr. 26, 1859, *ibid.*

<sup>11</sup> Memorandum of Wm. Thos. Carroll, dated Apr. 26, 1859, *ibid.*

<sup>12</sup> Memoranda of Wm. Thos. Carroll, dated Apr. 28, 30, 1859, *ibid.*

<sup>13</sup> Taney to Carroll, Apr. 28, 1859, *ibid.*

and informed him of Buchanan's remarks. Stating that he presumed those were equally his feelings, he suggested to Black the propriety of his recalling his note of protest. He added that he had not yet filed it and wished not to do so inasmuch as he felt confident that if it were filed, Taney would file a vindication of his order and in all probability, bring the subject to the attention of the court at its next term. At no time in his remarks did Carroll find it necessary to produce Taney's letter or even allude to its existence.

No longer angry, Black thanked Carroll for the suggestion and withdrew his note but not before the careful clerk made a copy of it and filed it away in the case record.<sup>14</sup>

The temperamental Black's course in this episode may have been dictated by a desire to serve the mandates in the Booth cases on the Wisconsin Supreme Court as soon as possible. But that seems unlikely when one realizes that he had already waited over fifty days since Taney delivered the opinion orally and then waited three months after he received the two certified copies of the opinion and eleven weeks after the publication of the official reports before he actually moved to serve the mandates.<sup>15</sup>

Apparently the "matter of great and pressing importance" referred to in Black's note was the need forced upon him to answer a request for advice from a federal marshal in Ohio who was then confronted with a situation similar to that which had given rise to the Booth cases. On the very day that he wrote his indignant note, Black addressed a letter to the marshal in which, because of his inability to include an authenticated copy of Taney's opinion, he could only mention it while giving his advice in accordance therewith.<sup>16</sup>

The fact that Taney's order was still in force in 1859 casts doubt on the validity of Curtis' belief that it was originally devised because the Chief Justice's opinion in the Dred Scott case was not ready for publication when delivered.<sup>17</sup> The opinion may not have been ready but it appears that the real reason for the order was Taney's desire to prevent the misrepresentations, misunderstandings and political exploitation which accompanied premature and unofficial publications of court opinions. His

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<sup>14</sup> Memorandum of Wm. Thos. Carroll, Apr. 30, 1859, *ibid.*

<sup>15</sup> Taney's opinion was delivered on Mar. 8, 1857. Black requested a copy on Apr. 26, 1857. The official reports appeared on or about May 20, 1859 and Black instructed that the mandates be filed in a letter to D. A. J. Upham on Aug. 4, 1859. See ATTY. GEN. LTR. BK. B-2, 219.

<sup>16</sup> Black to M. Johnson, Apr. 26, 1859, James Buchanan MSS, Penn. Historical Society Library. Reprinted in *Washington Constitution*, June 7, 1859.

<sup>17</sup> CURTIS, MEMOIR 260.

orderly judicial mind brought him to conclude that only the unbiased, verified official publications in the court reports could save the court's dignity and insure a fair presentation of its views "to the sober and enlightened judgment of the public."<sup>18</sup> In the great majority of cases this approach was in tune with reality. But in cases with great political overtones, which, in addition, might be of great importance for purposes of law enforcement, it was completely unrealistic. As Curtis pointed out in the Dred Scott dispute, an immediate publication of the opinions would have better served Taney's purpose.<sup>19</sup> In fact, Taney, admitted as much, in a reply to Curtis, although contending that such course could only have been pursued upon an affirmative vote by a majority of the court and that Curtis' independent action precluded such action.<sup>20</sup>

One can sympathize with Black, the nation's chief law officer and legal adviser, in his demand for access to a vital public record. At a time when the law was being freely flouted at both the North and the South, prompt implementation of the constitution and the law as expounded by the court, was essential. With authenticated copies of the opinion inaccessible to law enforcement officers and lower federal courts during the two and one-half month period between oral delivery and official publication, effective law enforcement was handicapped.

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<sup>18</sup> Letter from Taney to Curtis, June 11, 1857, cited in CURTIS, MEMOIR 223.

<sup>19</sup> Letter from Curtis to Taney, May 13, 1857, cited in CURTIS, MEMOIR 219.

<sup>20</sup> Letter from Taney to Curtis, June 11, 1857, cited in CURTIS, MEMOIR 223-225.