A Marbury v. Madison Moment on the Eve of the Civil War

Chief Justice Roger Taney and the Kentucky v. Dennison Case

Stephen R. McAllister

Justice Anthony M. Kennedy once observed that an individual Supreme Court Justice may confront his or her "Rubicon" – a controversial case that will shape and perhaps define that Justice's place in history.[1] Similarly, the Court as a whole may face what one could call a *Marbury v. Madison*[2] moment – a controversial case in which the Court's power to "to say what the law is"[3] is at risk, and with it the legitimacy of the Court as the arbiter of legal conflict among other government actors, federal and state.

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[1] Jeffrey Rosen, *The Agonizer*, New Yorker (Nov. 11, 1996) (recounting a report that on the morning the Court decided *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), Justice Kennedy told a reporter that "Sometimes you don't know if you're Caesar about to cross the Rubicon or Captain Queeg cutting your own tow line.").

[2] 5 U.S. (1 Cranch) 137 (1803).

[3] *Id*. at 177.

For Chief Justice Roger Brooke Taney, his own Rubicon was surely *Dred Scott v. Sandford*.[4] This article addresses not that Rubicon, but rather a moment when Taney led his Court through a legal-political minefield as dangerous, perhaps, as the one that confronted Chief Justice John Marshall and his Court in *Marbury* – the case of *Kentucky v. Dennison*.[5] *Dennison* was decided on March 14, 1861, only ten days after President Abraham Lincoln's inauguration and less than a month before Confederate forces fired on Fort Sumter, one of the most volatile periods in both the Court's and the Country's history. It is appropriate to reflect on the case in the year 2011 as we mark its 150th anniversary.

I.
THE FACTS: WILLIS LAGO ASSISTS THE SLAVE CHARLOTTE IN OBTAINING HER FREEDOM

In 1859, a teenage, female slave named Charlotte, reportedly living in Louisville, Kentucky, accompanied her owner, C.W. Nuckols,[6] on a trip to Wheeling, Virginia (not yet West Virginia), where Charlotte's mother lived and Nuckols had business. To get there, they took a train to Cincinnati, Ohio, and that is as far as Charlotte went. In Cincinnati, Charlotte was either taken or aided in her escape by abolitionists who brought her to an Ohio state court which declared her free under Ohio law. Among the abolitionists was one Willis Lago.

Although Nuckols was sued in Ohio, the proceedings that led to the Supreme Court case began in Kentucky, where Nuckols was viewed as the victim.[7] In Kentucky, it was a felony "[i]f any free

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[4] 60 U.S. (19 How.) 393 (1856).

[5] 65 U.S. (24 How.) 66 (1861).

[6] The facts are taken from the following: Carl B. Swisher, *History of the Supreme Court, Volume 5: The Taney Period, 1836-64* (New York: Macmillan, 1974), at 677-90; the Law Library-American Law and Legal Information website (law.jrank.org/pages/12869/Kentucky-v-Dennison.html); and *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 66-67 (1861).

[7] The extradition problem presented actually was part of a multi-decade controver-

person, not having lawful or in good faith a color of claim thereto, shall steal, or shall seduce or entice a slave to leave his owner or possessor; . . . or if in any manner he aid or assist a slave to make his escape, or to attempt to make his escape from such owner or possessor," an offense punishable by imprisonment for "not less than two nor more than twenty years."[8]

A Kentucky grand jury indicted Lago:

> The grand jury of Woodford county . . . accuse Willis Lago, free man of color, of the crime of assisting a slave to escape, &c., committed as follows, namely: the said Willis Lago, free man of color, on the 4th day of October, 1859, in the county aforesaid, not having lawful claim, and not having any color of claim thereto, did seduce and entice Charlotte, a slave, the property of C.W. Nuckols, to leave her owner and possessor, and did aid and assist said slave in an attempt to make her escape from her said owner and possessor, against the peace and dignity of the Commonwealth of Kentucky.[9]

It is not clear from the limited court records why Lago was indicted in Woodford County. Although it appears that Nuckols had a farmstead there, Charlotte reportedly lived in Louisville (well to the west, in Jefferson County) and there is no record of any relevant

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sy that was not limited to Southern Governors seeking extradition of fugitives from Northern states. There were numerous instances of Governors on both sides refusing to extradite either those who assisted escaped slaves (notably William Seward of New York), and those who refused to extradite the "kidnappers" who took former or escaped slaves from Northern states back to Southern states. Swisher, *supra* note 6, at 677-84. For a notable (and uncommon) example of an extradition involving slavery, *see Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). More generally, see Paul Finkelman, *The Strange Career of Race Discrimination in Antebellum Ohio*, 55 Case W. Res. L. Rev. 373 (2004) (describing the history of the extradition disputes); Paul Finkelman, *Race Relations and the United States Constitution: From Fugitive Slaves to Affirmative Action*, 24 Rutgers L.J. 605 (1993) (similar).

[8] See Supreme Court Order in No. 7, Original (Dec. 21, 1861).

[9] 65 U.S. at 67.

events occurring in Woodford County.[10] Presumably, Nuckols prevailed upon his home county to pursue the charge against Lago. In any event, the indictment led to a gubernatorial standoff and an important Supreme Court decision.

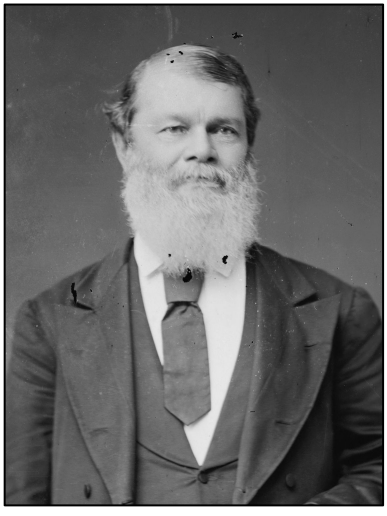
II.
An Attempt at a Diplomatic Resolution Between State Executives Fails

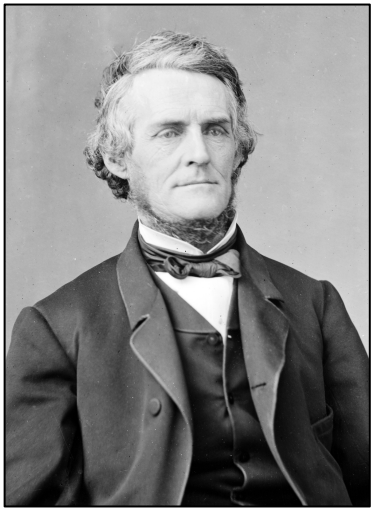
What happened after the indictment is a fascinating display of 19th century "gubernatorial diplomacy." Lago was indicted in October 1859. On February 10, 1860, Kentucky Governor Beriah Magoffin sent Ohio Governor William Dennison a copy of the indictment and a request that Lago be extradited to Kentucky for prosecution.[11] Dennison took his time responding, first asking for a legal opinion from his Attorney General, which Dennison received on April 14, 1860. Even then, he did not actually respond to Magoffin until he sent a short letter dated May 31, 1860.

Dennison's letter is unfailingly civil, addressing Magoffin as "His Excellency," and apologizing for the delayed response, which he attributed to "[m]y absence from home, and that of the attorney general of this State, to whom I submitted the papers for his official examination, and other causes referred to in the accompanying copy of the opinion of that officer." Relying on the legal opinion, Dennison stated simply that "I have now the honor of communicating to your excellency this opinion of the attorney general, which embodies substantially the reasons which have compelled me to decline to surrender Lago in compliance with your requisition." Dennison

[10] Woodford County is located in north central Kentucky, not far from Lexington. In 1994, the "Claiborne W. Nuckols Farmstead" was added to the National Register of Historic sites; it is located a short distance from Versailles, Kentucky, the Woodford County seat. The county is home to Woodford Reserve Bourbon, and notable residents have included Happy Chandler and William Shatner. *See* en.wikipedia.org/wiki/Woodford_County_Kentucky.

[11] The correspondence is printed in the Supreme Court's order directing Governor Dennison to respond to Kentucky's *ex parte* application. *See supra* note 8, at 4-13.





Correspondence between Kentucky Governor Beriah Magoffin (left) and Ohio Governor William Dennison (right) about a slave escape was polite in form, but in content it foreshadowed the war between the states that began while the litigation between their states proceeded.

signed off: "With sentiments of the highest regard, I have the honor to be your obed't serv't."

The enclosed opinion of Ohio Attorney General Christopher P. Wolcott emphasized that the charge against Lago was not a crime in Ohio. Wolcott framed the question presented as "whether, under the federal Constitution, one State is under an obligation to surrender its citizens or residents to any other State, on the charge that they have committed an offence not known to the laws of the former; nor affecting the public safety; nor regarded as malum in se by the general judgment and conscience of civilized nations." Regarding the federal Extradition Clause,[12] Wolcott concluded that "[t]his question must, in my opinion, be resolved against the existence of

[12] U.S. Const., art. IV, § 2, cl. 2 ("A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.").

any such obligation." He argued that the "right rule, in my opinion, is that which holds the power to be limited to such acts as constitute either treason or felony by the common law as that stood when the Constitution was adopted, or which are regarded as crimes by the usages and laws of all civilized nations." Wolcott also pointed out that his predecessor had given the same advice to a previous Governor who had refused extradition "in a case substantially similar to the one now presented," and thus Wolcott's advice to Dennison "is conformable to the ancient and settled usage of" Ohio.

Magoffin replied promptly to Dennison's refusal to deliver Lago. In a letter dated June 4, 1860, he first expressed his surprise at Dennison's denial of the extradition request, and posited that the delayed response was not due to time commitments and absence from Ohio but, rather, the result of doubt about the validity of Dennison's legal position: "May I not, in charity, indulge the hope, that [your delay] was because of your reluctance to violate the Constitution of the United States, and the act of Congress passed to carry it into effect, both of which imperatively demand that the fugitive shall be surrendered?" After explaining Kentucky's legal position, Magoffin asks, "Shall the rights of a sovereign State of the confederacy, her laws, and her institutions, be respected?" After quoting Justice Joseph Story on extradition, Magoffin asserts:

> It is sufficient to say that the federal Constitution was the work of delegates whose almost entire constituency were citizens of slave States. It may, in truth, be said that the Constitution was the work of slaveholders; that their wisdom, moderation, and prudence gave it to us. Non-slave-holding States were then the exception, not the rule. The organic law of the nation recognized by its provisions, in unmistakable terms, the right to slave property, some of which provisions were designed for its protection.[13]

Taking issue with Wolcott's advice that denying Kentucky's request was in conformance with the ancient rule in Ohio, Magoffin accused Ohio of ingratitude:

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[13] See Order in No. 7 Original, *supra* note 8, at 11-12.

> I am not aware how ancient the rule may be with you, but I am satisfied that it was not in vogue when Kentuckians ran with alacrity to the rescue of your people against the assaults of British invaders, and their more savage allies. And it cannot be that ingratitude is a characteristic of your constituents.

Magoffin closed with the threat that Dennison's legal position would lead to "a dissolution of the Union." Although he professed that "I have the honor to be, your ob't serv't," Magoffin added a notable P.S.:

> Under a sense of duty to the people I have the honor to represent, and in view of the large number of slaves annually enticed away from their owners by emissaries sent from Ohio, whom you refuse to surrender, I shall cause this correspondence to be published.[14]

Dennison made no reported response to Magoffin's June 4 letter.

III.
THE LITIGATION BEGINS *EX PARTE*, BUT SOON INVOLVES TWO STATE SOVEREIGNS

Kentucky's next step was to file an *ex parte* petition for a writ of mandamus in the U.S. Supreme Court in the fall of 1860, invoking the Court's original jurisdiction. On December 21, 1860, the Court issued an order providing that the petition

> is hereby set down for argument on this day three weeks, to wit, Friday, the eleventh day of January, 1861; and it is further ordered, that the clerk of this court do forthwith send a copy of this order, and of the petition and exhibits herein, to be served on his excellency William Dennison, governor of Ohio.[15]

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[14] *Id*. at 13.

[15] *Id*. at 1.

The case was not argued on January 11, 1861, but instead on February 20 and 21.[16] In the meantime, Kentucky filed an 11-page brief on February 13, and Ohio responded with a 15-page brief on February 19. Kentucky's brief, filed by J.W. Stevenson, Humphrey Marshall, and a lawyer identified only as "Cooper," argued that (1) Governor Dennison was the proper defendant in the case as the chief executive of Ohio, (2) mandamus was the proper remedy, (3) the Supreme Court had jurisdiction over this interstate dispute, and (4) that both the law of nations and the Constitution's Extradition Clause imposed an obligation on Ohio to render fugitives from justice to Kentucky upon request.[17]

Ohio's brief, filed by Attorney General Wolcott, focused almost exclusively on a single proposition: that the Supreme Court lacked the constitutional authority to resolve the case. Indeed, the first argument in the Ohio brief is that the "Government of the United States is one of limited and enumerated powers."[18] The second argument, which is then rephrased and repeated to the end of the brief, is that the "judicial department of the Federal Government, sharing of necessity the intrinsic quality which marks that Government in its unity, is also one of limited and specific powers . . . ."[19] Interestingly, the Ohio brief cites *Marbury v. Madison* at least four times in arguing that the Court lacks power to resolve the dispute,[20] and it also cites a number of other famous constitutional cases, many of which today are understood as assertions of federal judicial power

[16] The Court's opinion states that "[u]pon the motion being made, the court ordered notice of it to be served on the Governor and Attorney General of Ohio, to appear on a day mentioned in the notice. The Attorney General of Ohio appeared, but under a protest, made by order of the Governor of Ohio, against the jurisdiction of the court to issue the mandamus moved for." 65 U.S. (24 How.) 66, 70 (1861).

[17] Brief for the State of Kentucky in *Kentucky v. Dennison*, No. 7 Original Docket, December Term, 1860.

[18] Brief for the State of Ohio in *Kentucky v. Dennison*, No. 7 Original Docket, December Term, 1860, at 2.

[19] *Id*. at 3.

[20] *Id*. at 5, 8, 14, 15.

rather than limitations or restrictions.[21] Ohio concluded its brief:

> The results now attained demonstrate that the controversy which the present application seeks to inaugurate is, in its form and in its essence, in its whole and in its every part and element, beyond the utmost sweep of the jurisdiction of this Court. The power to compose this national and political strife does not reside in this tribunal; the pursuing party cannot cross its threshold; the party pursued is without the reach of its arm; the subject of the difference has been excluded from its action; and the writ which it is solicited to grant has been denied to it as a method for the exercise of its original jurisdiction.[22]

As is not uncommon in case reports of this era, the *U.S. Reports* contains lengthy summaries of the two days of oral argument, with the following introduction by the Reporter: "The great importance of the principles involved in this case has induced the reporter to allow a large space to the arguments of the respective counsel."[23] Certainly, at "the time when this case was argued . . . there was an element of unrealism in considering coercion of the states, or of their governors" because many of the "states of the Deep South had already proclaimed their secession from the Union, their representatives in Congress had said their farewells, and other states and representatives were about to go," including Kentucky.[24]

Interestingly, both parties invoked *Marbury v. Madison* at oral argument, although Kentucky did so only to distinguish the case, arguing that mandamus was improper in *Marbury* because "the act of 1789 was unconstitutional, in so far as it disturbed the constitutional

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[21] Examples include *Gibbons v. Ogden*, *Hayburn's Case*, *Cohens v. Virginia*, *Chisholm v. Georgia*, and *Martin v. Hunter's Lessee*. *See* Ohio Brief, *supra* note 18, at 2, 3, 5, 12.

[22] Ohio Brief, *supra* note 18, at 15.

[23] 65 U.S. (24 How.) 66, 70-71 (1861). Kentucky's petition for mandamus was read to the Court by Thomas B. Monroe, Jr., Kentucky's secretary of state and the son of Thomas B. Monroe, Sr., then a sitting federal district judge in Kentucky who in turn was the son-in-law of then-sitting Supreme Court Justice Robert Cooper Grier. Swisher, *supra* note 6, at 687.

[24] Swisher, *supra* note 6, at 688.

distribution of the judicial power of this court," purporting to give the Court original jurisdiction "whereas the case belonged to it only under its appellate jurisdiction."[25] Ohio, in contrast, hammered away on *Marbury*, repeatedly arguing that the Supreme Court's mandamus authority was limited to issuing the writ against lower federal courts as part of the Court's appellate jurisdiction.[26]

The author is unaware of contemporary news accounts of the oral arguments, though they may well exist. Unfortunately, transcripts and recordings of the Supreme Court's proceedings were still decades away, so we will never know with what eloquence, skill, and passion the lawyers for Kentucky and Ohio orally contested the issues. We do know, however, what Chief Justice Taney and a unanimous Court had to say about the case.

IV.
THE TANEY COURT'S MARBURY V. MADISON MOMENT

Chief Justice Taney's unanimous opinion for the Court was announced on March 14, 1861, a mere three weeks after the oral argument, and the last day of the December 1860 Term. The opinion first disposed of two procedural objections Ohio had raised – that there was not original jurisdiction over the case and that Governor Dennison was not a proper party to the proceeding – holding that both claims were clearly precluded by precedent dating back to 1792.[27] The Court then proceeded to the Extradition Clause.

"Looking to the language of the clause, it is difficult to comprehend how any doubt could have arisen as to its meaning and construction."[28] The Court opined that Dennison's suggestion that the Clause did not encompass offenses not recognized in the State to which a fugitive has fled "would render the clause useless for any

[25] 65 U.S. at 73-74.

[26] *Id*. at 88, 90, 94-95.

[27] *Id*. at 95-98.

[28] *Id*. at 99.

practical purpose." Indeed, under "such a vague and indefinite construction, the article would not be a bond of peace and union, but a constant source of controversy and irritating discussion."[29] "Looking, therefore, to the words of the Constitution . . . the conclusion is irresistible, that this compact . . . included, and was intended to include, every offence made punishable by the law of the State in which it was committed" and the Clause thus "gives the right to the Executive authority of the State to demand the fugitive from the Executive authority of the State in which he is found." This, the Court held, was "an absolute right" from which it followed there is "a correlative obligation to deliver."[30]

The Court lastly turned to the 1793 federal statute that purported to implement the Clause, addressing the "grave and important" question whether Congress had the power to compel a State Governor to act. Although the statute used mandatory language ("it shall be the duty"), the Court held that Congress could not have used the words "as mandatory and compulsory, but as declaratory of the moral duty which this compact created." Indeed, the Court opined, there was no "clause or provision in the Constitution which arms the Government of the United States" with the power to compel a Governor to act.[31] Thus, the Court ultimately concluded that the "performance of [the extradition] duty . . . is left to depend on the fidelity of the State Executive to the compact entered into with the other States . . . ."[32] "[I]f the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him."[33]

In the course of the research for this article, three interesting

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[29] *Id*. at 102.

[30] *Id*. at 103.

[31] *Id*. at 107.

[32] *Id*. at 109.

[33] *Id*. at 109-110. For scholarly commentary, *see, e.g.*, Swisher, *supra* note 6, at 686-90; Earl Maltz, *Slavery and the Supreme Court, 1825-1861* (U. Press Kansas 2009), at 291-98; David P. Currie, *The Constitution in the Supreme Court: Article IV and Federal Powers*, 1983 Duke L.J. 695, 705-10 (1983).

documents turned up in the case file located at the National Archives. The first is a printed draft opinion with handwritten edits, presumably made by Chief Justice Taney. The revisions are very few in number and generally very minor. One substantive revision related to the 1793 statute. In discussing how "in the early days of the Government, Congress relied with confidence upon the cooperation and support of the States," Taney added a clause at the end of the sentence, perhaps to emphasize the importance of comity between the States, declaring that Congress was accustomed to receive the States' support "upon principles of comity, and from a sense of mutual and common interest, where no such duty was imposed by the Constitution."[34]

The only other substantive revision was the deletion of four sentences from the second-to-last paragraph of the opinion, sentences that discussed whether the 1793 Act imposed a legally enforceable duty on Governors to extradite fugitives. The deleted sentences commented that persons who "rescue the fugitives are punishable by fine and imprisonment" but that "no penalty is inflicted on the executive officer of the State for neglect or refusal to order the arrest," that if the Governor's duty was truly "ministerial only," then "it would follow that [Congress] possessed the power to enforce its performance," and finally that "no such right is claimed in any provision of the law."[35]

The other interesting documents in the case file are (1) a handwritten draft of the final version of the opinion, running to 29 pages, and (2) a printed final version, with the handwritten notation and signature on the top: "Correct Copy – approved by R B Taney."[36] Why there would be a handwritten version of the final draft, when there is also a printed draft version showing handwritten revisions, is a puzzle.

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[34] *Cf.* 65 U.S. at 108, with printed draft opinion with handwritten revisions, at 8, located in the case files in the National Archives.

[35] Draft printed opinion with revisions, at 9; the corresponding paragraph in the published opinion is 65 U.S. at 109.

[36] Handwritten final version; printed final version with notation, both located in the National Archives case files.

V.
FINAL CHAPTERS: TANEY'S LEGACY, DENNISON'S FUTURE, AND THE EXTRADITION CLAUSE

A. Chief Justice Taney After Kentucky v. Dennison

Primarily because of *Dred Scott*, history has not been terribly kind to Chief Justice Taney, though some biographers have defended the *Dennison* decision. For example, one described Taney's role in *Dennison*: "Neither the thoughts nor the style of any one of his opinions are ever tinctured in the slightest degree by the circumstances of the case. Never, perhaps, was so calm a judgment given to a judicial magistrate."[37] Another portrayed Taney as a protector of federalism: "When the relations between the States and the national government were involved, he was as careful to enforce the limitations on the power of the national government as he was to protect the constitutional sphere of power delegated to it," and thus *Dennison* was "consistent with Taney's theory of the actual sovereignty of the States."[38] Perhaps the most thoughtful assessment of *Dennison* appears in a biography from the 1930s:

> The decision saved the court from much embarrassment. It put the abolitionist governor of Ohio in the wrong, yet avoided the necessity of issuing a mandamus which probably would not have been obeyed. From the point of view of good public policy furthermore, as well as of good constitutional theory, it was probably best to refrain from asserting the legal obligation to surrender any fugitive whenever another state demanded it.[39]

Some also may enjoy Justice Scalia's assessment of Chief Justice Taney:

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[37] Samuel Tyler, Memoir of Roger Brooke Taney, LL.D. at 417 (Baltimore: John Murphy & Co. 1872).

[38] Charles W. Smith, Jr., *Roger B. Taney: Jacksonian Jurist*, at 101-02 (New York: Da Capo Press 1973) (also characterizes "Taney's slavery decisions" as "State's rights decisions," *id*. at 151).

[39] Carl Brent Swisher, *Roger B. Taney*, at 545-46 (New York: MacMillan Co. 1936).

> There comes vividly to mind a portrait . . . that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82nd year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott*. He is all in black, sitting in a shadowed red armchair . . . . He sits facing the viewer and staring straight out. There seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way . . . . But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by Dred Scott cannot help believing that he had that case – its already apparent consequences for the Court and its soon-to-be-played-out consequences for the Nation – burning on his mind.[40]

Taney did not live to see the end of the Civil War, passing away in October 1864.

B. Governor Dennison's Future

As a Governor, Dennison did not last long, serving only one two-year term, from 1860 – 1862. His loyalty to the Republican Party, however, was rewarded when he was named chairman of the national convention in 1864, and then President Lincoln appointed him Postmaster General. A January 28, 1865 *Harper's Weekly* article lauded the latter appointment as "peculiarly fitting," declaring that "the country may be assured that [Dennison] will honestly and industriously perform" his duties because in "the execution of his duties as Governor Mr. Dennison never consulted his own ease."[41]

In fact, Dennison was present at Lincoln's bedside after the President was struck by an assassin's bullet on the night of April 14, 1865. The official brochure that the National Park Service provides to Ford's Theatre visitors includes an illustration from the May 6, 1865 *Harper's Weekly*, showing Dennison (among other cabinet members, physicians, and the President's son) standing near Lincoln's right shoulder as the President lies dying in the early morning

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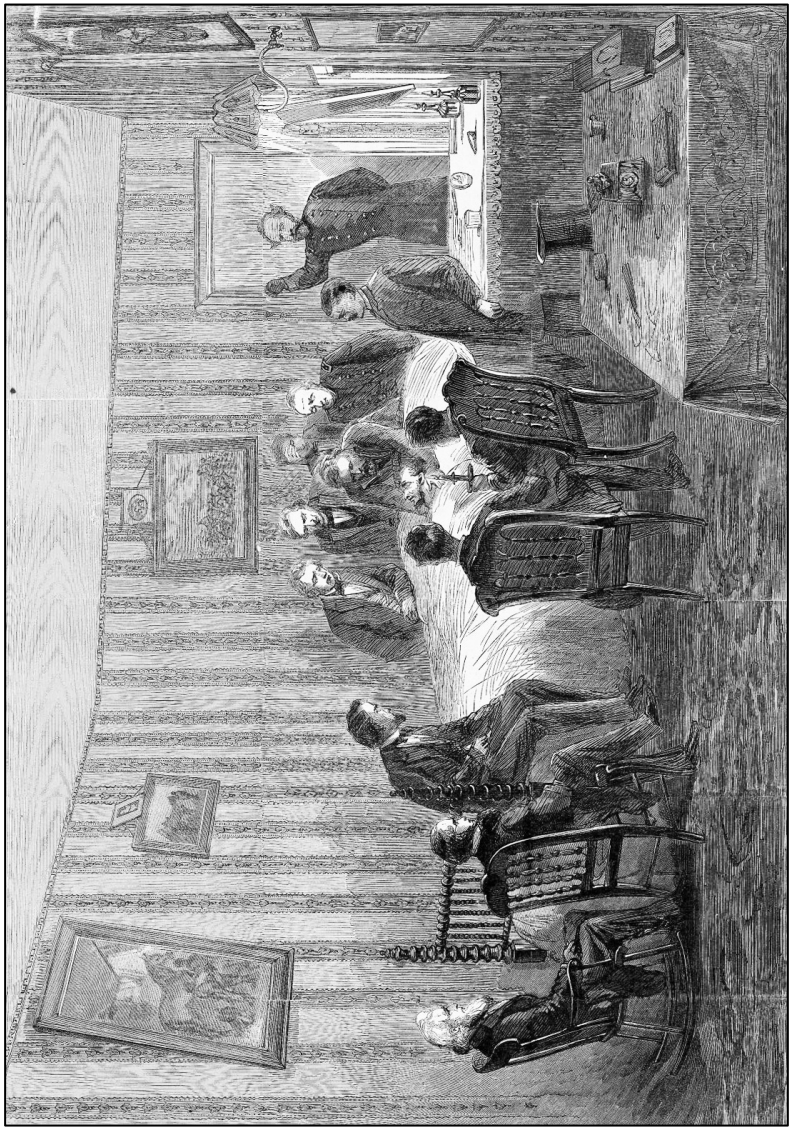
[40] *Planned Parenthood v. Casey*, 505 U.S. 833, 1001-02 (1992) (Scalia, J., dissenting).

[41] Harper's Weekly, p. 1 (January 28, 1865).



hours of April 15, 1865, in the Petersen House across the street from the theatre. Dennison remained an important Ohio and national political figure until at least 1880; he passed away in 1882.[42]

[42] *See* www.ohiohistory.org/onlinedoc/ohgovernment/governors/dennison.

C. Kentucky v. Dennison and the Extradition Clause

Finally, what of the case itself and the legal principles it established? For 125 years, commentators could with confidence declare that "the decision . . . still stands as determining that although it is the duty of governors to surrender fugitives from justice . . . they may not be coerced into doing so,"[43] that "Taney's decision in this case has become the accepted interpretation of the law,"[44] and that "there is little likelihood that the time-honored *Dennison* rationale will be overruled in the extradition context."[45] But not all Supreme Court cases, even *Marbury v. Madison* moments, stand for all time, and *Dennison* met its demise in 1987, in a dispute between Puerto Rico and Iowa. An Iowa man charged with multiple felonies in Puerto Rico fled to his home state, where the Governor denied Puerto Rico's extradition request.

The Supreme Court overruled *Dennison*. In an opinion by Justice Thurgood Marshall, the Court noted that "for over 125 years, *Kentucky v. Dennison* has stood for two propositions: first, that the Extradition Clause creates a mandatory duty to deliver fugitives upon proper demand; and second, that the federal courts have no authority under the Constitution to compel performance of this ministerial duty of delivery."[46] The Court had no quarrel with the first proposition, about which "the passage of time has revealed no occasion for doubt." But the Court with relative ease held that the second principle "rests upon a foundation with which time and the currents of constitutional change have dealt much less favorably." Thus, the Court overruled *Dennison*: "*Kentucky v. Dennison* is the product of another time. . . . [It] is fundamentally incompatible with more than a century of constitutional development."[47]

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[43] Swisher, *supra* note 6, at 690.

[44] Smith, *supra* note 38, at 101 n. 70.

[45] Comment, *Interstate Rendition: Executive Practices and the Effects of Discretion*, 66 Yale L.J. 97, 112 (1956).

[46] *Puerto Rico v. Branstad*, 483 U.S. 219, 226 (1987).

[47] *Id.* at 227, 230.

What was a *Marbury v. Madison* moment in 1861, when the Court perhaps understandably and even reasonably decided not to challenge a state Governor, no longer gave the Court the slightest qualm 125 years later. Considered ex ante, it is not obvious whether the Court was right or wrong to do what it did in 1861, especially given that the principle regarding a Governor's duty to extradite fugitives was equally applicable to Southern as well as Northern Governors. In any event, one can certainly understand the impetus for the Court's unanimous decision. And, perhaps, with 150 years of perspective, one can also give Chief Justice Taney the benefit of the doubt on *Dennison*, without lessening any of the condemnation for *Dred Scott*.

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