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The Story of *Ex parte Milligan*: Military Trials, Enemy Combatants, and Congressional Authorization *

A military commission is a court composed of military officers that is used for various purposes, including the trial of enemy forces for violations of the laws of war. In *Ex parte Milligan*, decided a year after the end of the Civil War, the Supreme Court held that the U.S. military had lacked the constitutional authority during the war to try U.S. citizens living in Indiana before a military commission. A majority of five Justices reasoned that it would have been unconstitutional for the military to conduct the trial even if the trial had been authorized by Congress, whereas four concurring Justices merely concluded that the trial was unlawful because it violated restrictions imposed by Congress. Although the decision was issued after the end of the Civil War, it is often cited as a rare and admirable instance in which the Supreme Court invalidated Executive action during wartime in order to protect civil liberties. There has been a renewed focus on the decision after the September 11, 2001 terrorist attacks and the subsequent detention and proposed military trial by the United States of suspected terrorists.

In this chapter, I will describe the historical and legal context in which *Milligan* was decided and consider its implications for presidential power. As I will explain, these implications are highly uncertain and probably quite limited, at least at the level of legal doctrine. Part of the uncertainty stems from the decision’s unacknowledged inconsistency with widespread military practices during and immediately after the Civil War, including most notably the use of military commissions to try thousands of individuals not formally associated with the Confederate army. Many of these military commission cases involved acts of organized violence or destruction of property that were alleged to violate the “laws of war.” The most famous of these cases was the trial at the end of the War, shortly before the Supreme Court decided *Milligan*, of the individuals implicated in the conspiracy to

assassinate President Lincoln. Perhaps because of the particular way in which the government argued the Milligan case — focusing on the bounds of martial law rather than on military jurisdiction over violations of the laws of war — the Court in Milligan did not discuss this widespread military commission practice, and it is unclear to what extent the Court meant to repudiate it.

The Supreme Court’s subsequent treatments of Milligan only add to the uncertainty about its scope. The Court has construed Milligan as applying only to the military detention and trial of “non-belligerents,” but neither Milligan nor the subsequent decisions provide a clear line for distinguishing between belligerents and non-belligerents. One possible approach would be to limit military jurisdiction to individuals covered by the international laws of war, but the petitioners in Milligan were in fact charged with and convicted of violating the laws of war. While the concurring opinion in Milligan was able to avoid some of these complications by focusing on the relationship between Congress and the President, it is unclear whether the concurrence thought that the military commission’s validity depended on affirmative congressional authorization. More generally, the concurrence raises but does not resolve the important question of the circumstances under which congressional authorization will render valid presidential wartime action that would otherwise be unlawful.

Military Detentions and Commissions in the Civil War

The American Civil War officially began on April 12, 1861, with the attack by Confederate forces on Fort Sumter. The war would last approximately four years and result in more American casualties than any other war in history, with over 600,000 dead and many hundreds of thousands injured. In attempting to preserve the Union, President Abraham Lincoln often authorized, or acquiesced in, restrictions on individual liberties. These restrictions included the suspension of the writ of habeas corpus, the declaration of martial law, and the military detention and trial of thousands of individuals not formally associated with the Confederate army. Many of the detentions and trials occurred in Union states that bordered the Confederacy, such as Maryland, Missouri, and Kentucky.

Military commissions are distinct from courts-martial, which have been the usual means of trying U.S. military personnel for criminal offenses. Unlike military commissions, courts-martial have historically been regulated by detailed Articles of War enacted by Congress. In 1775, the Continental Congress enacted 69 Articles of War to regulate the Continental Army. A year later, Congress replaced them with more detailed provisions.

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2 For detailed accounts of the Lincoln administration’s restrictions on civil liberties, see Mark E. Neely, Jr., The Fate of Liberty: Abraham Lincoln and Civil Liberties (1991); William H. Rehnquist, All the Laws But One: Civil Liberties in Wartime 3-137 (1998); and Dean Sprague, Freedom Under Lincoln (1965).

3 Until February 1862, the Union’s military detention policy was supervised by the Secretary of State, William Seward, and after that it was supervised by the Secretary of War, Edwin Stanton. For an engaging account of Lincoln’s cabinet, see Doris Kearns Goodwin, Team of Rivals: The Political Genius of Abraham Lincoln (2005).
essentially adopting the British version of the Articles of War. After the adoption of the Constitution, Congress directed the continued application of the previous Articles of War.\footnote{See 1 Stat. 96, § 4 (1789).} Congress made modest changes to these Articles in 1806, and it was the 1806 code, with some amendments, that was in place during the Civil War.\footnote{See Louis Fisher, Military Tribunals and Presidential Power 7, 22 (2005).} The Articles of War applied to members of the U.S. armed forces, as well as “[w]hosoever shall relie the enemy with money, victuals, or ammunition, or shall knowingly harbor or protect an enemy”; “[w]hosoever shall be convicted of holding correspondence with or giving intelligence to the enemy either directly or indirectly”; “[a]ll suttlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field”; and foreign citizens “who shall be found lurking as spies, in or about the fortifications or encampments of the armies of the United States.”\footnote{An Act for Establishing Rules and Articles for the Government of the Armies of the United States, Arts. 56, 57, 60, § 2, 2 Stat. 359, 366, 371 (1806).}

In contrast with its treatment of courts-martial, Congress has not traditionally regulated the procedural details of military commissions, although the procedures adopted by the military for such commissions have often been similar to those used for courts-martial.\footnote{See Clarence A. Berdahl, War Powers of the Executive in the United States 146-47 (2003); William E. Birkhimer, Military Government and Martial Law 533-34 (3d ed. rev. 1914); William Winthrop, Military Law and Precedents 841-42 (2d ed. 1920). Congress adopted detailed rules governing the use of military commissions to try alleged terrorists in the Military Commissions Act of 2006. See Pub. L. No. 109-366, 120 Stat. 2600 (2006).} Throughout U.S. history, military commissions have been used for three basic purposes: to administer justice in territory occupied by the United States; to replace civilian courts in parts of the United States where martial law has been declared; and to try enemy belligerents for violations of the laws of war.\footnote{See Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2775 (2006) (plurality) (referring to these three purposes); Madsen v. Kinsella, 343 U.S. 341, 346-47 (1952) (“Since our nation’s earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have been called our common-law war courts.”); see also Curtis A. Bradley & Jack L. Goldsmith, The Constitutional Validity of Military Commissions, 5 Green Bag 2d 249 (2002). David Glazier points out that military commissions have also been used “when military forces were beyond the jurisdiction of their national courts, but military law did not authorize trying troops for offenses committed against the local population.” David Glazier, Note, Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission, 89 Va. L. Rev. 2005, 2023 (2003).} The use by the United States of these commissions is sometimes traced back to the Revolutionary War, when President George Washington convened a Board of General Officers to advise him about the guilt and punishment of Major John André of the British army, who was charged with spying.\footnote{See George Washington, Letter Order, Head Quarters, Tappan, Sept. 29, 1780, in 20 The Writings of George Washington 101 (John C. Fitzpatrick ed., 1937); Proceedings of a Board of General Officers Respecting Major John André, Sept. 29, 1780 (Francis Bailey ed. 1780). See also John Evangelist Walsh, The Execution of Major André (2001).} The most extensive use of these commissions prior to the Civil War was in the Mexican-American War in the late 1840s. In addition to using military commissions in that war to punish offenses by and against U.S. soldiers in occupied Mexican territory, General Winfield Scott (who was
commanding general of the Army and would remain in that post until after the outbreak of the Civil War) convened what he called “councils of war” to prosecute instances of guerilla warfare and attempts to induce U.S. soldiers to desert.\(^\text{10}\)

During the Civil War, military commissions were used extensively in the border states, especially in Missouri.\(^\text{11}\) The crimes tried before the commissions included guerilla activities involving organized violence or theft of property, as well as sabotage, such as the destruction of railroads, bridges, and telegraph lines – activities that were considered by the military to be violations of the international laws of war.\(^\text{12}\) Some of the earliest military commissions in Missouri were authorized by General Henry Halleck, who had published a well-regarded treatise on international law shortly before the outbreak of the Civil War.\(^\text{13}\) In his General Orders No. 1, Halleck, who at the time was commanding the Department of Missouri, stated that while military commissions were not to be used to try “civil offenses” when civil courts were operating, “many offenses which in time of peace are civil offenses become in time of war military offenses and are to be tried by a military tribunal even in places where civil tribunals exist.”\(^\text{14}\) He also stated that although treason was “a distinct offense . . . defined by the Constitution and must be tried by courts duly constituted by law,” “certain acts of a treasonable character such as conveying information to the enemy, acting as spies, &c, are military offenses triable by military tribunals and punishable by military authority.”\(^\text{15}\)

Military commissions were also used during the Civil War to try other crimes committed in places where martial law had been declared, most notably but not exclusively in occupied Confederate states and in areas of active combat. Martial law involves the displacement of civilian authority within the United States by military authority. There is no provision in the Constitution for the establishment of martial law, and there was substantial


\(^{11}\) See Neely, The Fate of Liberty, at 168-69.

\(^{12}\) See, e.g., General Orders No. 9 (Mar. 25, 1862), in 2:1 The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies 464 (1894) (guerilla activities); see also Neely, Fate of Liberty, at 42-43; J.G. Randall, Constitutional Problems Under Lincoln 175 (rev. ed. 1951). In 1862, the Union military also tried almost 400 members of the Dakota Sioux by military commission for murder, rape, and robbery committed against settlers during an uprising in Minnesota. See Carol Chomsky, The United States-Dakota War Trials: A Study in Military Injustice, 43 Stan. L. Rev. 13 (1990).

\(^{13}\) See H.W. Halleck, International Law; or, Rules Regulating the Intercourse of States in Peace and War (1861). Halleck’s predecessor in Missouri, General John Frémont, had ordered martial law throughout the state and an emancipation of the secessionists’ slaves. Concerned at that point that linking the war with emancipation would undermine support for the Union in the border states, President Lincoln overturned this order and had Frémont removed from command. Lincoln of course eventually issued his own Emancipation Proclamation.

\(^{14}\) See General Orders No. 1 (Jan. 1, 1862), in 2:1 The War of the Rebellion, at 247, 248. See also S.V. Benét, A Treatise on Military Law and the Practice of Courts-Martial 16 (2d ed. 1862) (endorsing this proposition).

\(^{15}\) 2:1 The War of the Rebellion, at 248. In some of the early military commission trials in Missouri that pre-dated General Orders No. 1, individuals were prosecuted for “treason,” but Halleck overturned the treason convictions on the ground that “such charges were not triable by a military commission.” 2:1 The War of the Rebellion, at 405. See also Neely, Fate of Liberty, at 43.
uncertainty during the Civil War about the circumstances under which it could be imposed. General Andrew Jackson had controversially imposed martial law in New Orleans at the end of the War of 1812, and used it as a basis for imprisoning a newspaper editor who criticized his actions, and also a federal judge who issued a writ of habeas corpus in favor of the editor.16 At the state level, martial law was declared by the Rhode Island legislature in 1842 in response to the Dorr Rebellion (an effort to overthrow Rhode Island’s charter government), and the Supreme Court approvingly stated that “if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State, as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority.”17

Congress passed a number of statutes during the Civil War that were relevant to military detentions and the use of military commissions. In August 1861, Congress retroactively approved Lincoln’s military actions during the first few months of the War.18 In March 1863, Congress passed a Habeas Act that would play an important role in the Milligan case. This statute authorized the President to suspend the writ of habeas corpus “in any case throughout the United States, or any part thereof” “whenever, in his judgment, the public safety may require it.”19 However, the statute also directed the Secretary of State and the Secretary of War to furnish to the federal courts a list of all persons within their jurisdiction who are “citizens of states in which the administration of the laws has continued unimpaired in the said Federal courts” and are being held by the military “otherwise than as prisoners of war.”20 The statute further provided that whenever a grand jury has terminated its session without indicting persons on the list within its jurisdiction, the judge shall “make an order that any such prisoner desiring a discharge from said imprisonment be brought before him to be discharged,” provided that the prisoner has taken an oath of allegiance to the United States and has promised not to give aid and comfort to the rebellion.21 If the Secretary of State or the Secretary of War refused or failed to furnish the list of such prisoners, the statute provided that a prisoner could nevertheless petition for a discharge on the same grounds – that is, that the grand jury had met and had not indicted him.22

Congress also passed several statutes during the Civil War referring to the use of military commissions. In 1862, Congress authorized the President to appoint, with the advice

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16 See Matthew Warshauer, Andrew Jackson and the Politics of Martial Law: Nationalism, Civil Liberties, and Partisanship (2006). After the judge was released from custody, he fined Jackson $1,000 for contempt of court, which Jackson paid out of his own pocket. Years later, Congress reimbursed Jackson with interest.


18 See 12 Stat. 326, § 3 (1861).


20 Id., § 2.

21 Id.

22 Id., § 3.
and consent of the Senate, a Judge Advocate General “to whose office shall be returned, for revision, the records and proceedings of all courts-martial and military commissions, and where a record shall be kept of all proceedings had thereupon.”

In 1863, Congress provided that various crimes committed by U.S. military personnel “shall be punishable by the sentence of a general court-martial or military commission” and that spies “shall be trial by a general court-martial or military commission, and shall, upon conviction, suffer death.” In 1864, Congress specifically authorized military commanders to carry into execution the sentences of military commissions “against guerilla marauders for robbery, arson, burglary, rape, assault with intent to commit rape, and for violation of the laws and customs of war, as well as sentences against spies, mutineers, deserters, and murderers.”

The influential “Lieber Code,” adopted by the Union army in 1863, also had potential relevance to both military detentions and the use of military commissions. Francis Lieber, a German-American scholar who taught at Columbia Law School, assisted the Union War Department during the Civil War by drafting legal guidelines for the army. The most famous of these guidelines, *Instructions for the Government of Armies of the United States in the Field*, also known as the “Lieber Code,” was adopted by the army on April 24, 1863 as General Orders No. 100. The Lieber Code sets forth detailed rules governing a variety of topics, including martial law, military jurisdiction, and the treatment of prisoners of war, and it became the foundation for later treaties governing the conduct of troops during wartime, including the Hague Conventions on Land Warfare. It was “the first instance in western history in which the government of a sovereign nation established formal guidelines for its army’s conduct toward its enemies.”

The Code distinguishes between combatants who are entitled to the privileges of being a prisoner of war, and those who are not. A prisoner of war, according to the Code, is “a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation.” Although prisoners of war can be imprisoned, the Code states that “they are to be subjected to no other intentional suffering or indignity.” It also states that “the modern law of war permits no longer the use of any violence against prisoners in order to extort . . . desired information, or to punish them for having given false information.” Another privilege of being a prisoner of war, the Code explains, is that they cannot be punished for having taken part in hostilities. The Code makes clear that these
privileges do not apply, however, to various types of individuals, such as guerillas, spies, and saboteurs. \(^{32}\)

As for military trials, the Lieber Code notes that there are two types of military jurisdiction: “First, that which is conferred and defined by statute; second, that which is derived from the common law of war.”\(^{33}\) Within the U.S. army, the Code explains, the first type of jurisdiction is exercised by courts-martial, “while cases which do not come within the Rules and Articles of War, or the jurisdiction conferred by statute on courts-martial, are tried by military commissions.”\(^{34}\) The Code thus expressly recognized the propriety of using military commissions, although it did not address the limits of their jurisdiction.

Lieber addressed the subject of military commissions again in 1864, in commenting on the views of a military panel, headed by General John Dix, that reviewed the detention of certain blockade runners. The panel concluded that the blockade runners should be released, reasoning that “no persons except such as are in the military or naval service of the United States are subject to trial by military courts, spies only excepted; and that, except in districts under martial law, a military commission cannot try any person whatsoever not in the U.S. military or naval service for any offense whatever.”\(^{35}\) Dix subsequently indicated that he would like to hear Lieber’s answer to the question, “Can any military court or commission, in a department not under martial law, take cognizance of, and try a citizen for, any violation of the law of war, such citizen not being connected in any wise with the military service of the United States?” In response, Lieber maintained that “undoubtedly a citizen under these conditions can, or rather must, be tried by military courts, because there is no other way to try him and repress the crime which may endanger the whole country.”\(^{36}\)

In sum, during the Civil War thousands of individuals not formally associated with the Confederate army were tried by military commissions. This practice was supported to some extent by Congress, and also by the influential Lieber Code. The proper boundaries of military commission jurisdiction, however, were uncertain, and Congress’s 1863 Habeas Act appeared to provide a basis for judicial release of military detainees who did not qualify as prisoners of war.

**Merryman and Vallandigham**

A number of individuals detained or tried by the Union military sought to challenge the legality of the military’s action in federal court by filing petitions for writs of habeas

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\(^{32}\) Id. at 60 (Arts. 82-84). Before completing this Code, Lieber had provided the army with an essay entitled *Guerrilla Parties Considered with Reference to the Laws and Usages of War*, in which he described in more detail the nature of guerillas and other irregular fighters. See id. at 31-44.

\(^{33}\) Hartigan, Lieber’s Code, at 47 (Art. 13).

\(^{34}\) Id. at 48 (Art. 13).


corpus. Two cases in particular provide an important backdrop to the Milligan case: Ex parte Merryman, and Ex parte Vallandigham. The events at issue in Merryman occurred at the outset of the war. On April 15, 1861, two days after Union forces surrendered at Fort Sumter, and with Congress out of session, President Lincoln issued a proclamation calling 75,000 state militia into national service, and also calling for a special session of Congress to convene on July 4.37 Two days later, Virginia seceded from the Union, and there was a genuine fear that Maryland would also secede, in which case Washington, D.C. would be surrounded by enemy territory. On April 19, a large mob of Confederate sympathizers in Baltimore attacked a group of soldiers from Massachusetts as they were passing through on their way to Washington. Four soldiers and twelve residents of Baltimore were killed in the resulting conflict.38 Secessionists in Maryland then proceeded to destroy railroad bridges and telegraph lines linking Washington with the North.

On April 27, Lincoln authorized Winfield Scott, the commanding general of the army, to suspend the writ of habeas corpus along a military supply line between Philadelphia and Washington.39 Petitioning for a writ of habeas corpus is a means by which a person held in government custody can seek to have a court examine the legality of their detention, and the Constitution states that “[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”40 Under Lincoln’s authorization, the writ could be suspended personally by Scott “or through the officer in command at the point where the resistance occurs.” The army subsequently arrested a number of suspected secessionists and imprisoned them at Fort McHenry in Baltimore. One of them was John Merryman, a lieutenant in a Maryland cavalry unit accused of participating in the burning of railroad bridges after the Baltimore riots.

Merryman filed a petition for a writ of habeas corpus with the U.S. Circuit Court for the District of Maryland in Baltimore. Eighty-four-year-old Chief Justice Taney, the Circuit Justice, granted the writ and directed the commanding officer at Fort McHenry, George Cadwalader, to bring Merryman before the court.41 When Cadwalader failed to do so, Taney,
without hearing argument from counsel, issued an opinion holding that only Congress had the authority to suspend the writ. Taney also suggested in his opinion that, because Merryman was “not subject to the rules and articles of war,” he could be detained and tried only by civilian authorities. Taney did not explain, however, why someone who had allegedly engaged in sabotage designed to impede the movement of troops during a war could not be prosecuted by the military for violating the laws of war.

Despite Taney’s decision, the military did not immediately release Merryman, although he was eventually released on bail and was never tried on any charges. In his address to the special session of Congress on July 4, 1861, Lincoln implicitly referred to the Merryman decision and famously asked, “are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?” He also stated that his Attorney General, Edward Bates, was preparing an opinion concerning the president’s authority to suspend the writ of habeas corpus, which was in fact completed the following day. In that opinion, Bates sweepingly reasoned that “the President must, of necessity, be the sole judge, both of the exigency which requires him to act, and of the manner in which it is most prudent for him to employ the powers entrusted to him, to enable him to discharge his constitutional and legal duty – that is, to suppress the insurrection and execute the laws,” and that, because the Judiciary and Executive are coordinate branches, “no court or judge can take cognizance of the political acts of the President, or undertake to revise and reverse his political decisions.”

After the suspension of the writ of habeas corpus in Maryland, Lincoln subsequently authorized suspension of the writ in parts of Florida, along a military line from New York to Washington, and then along a military line from Bangor, Maine to Washington. In September 1862, he issued a more general proclamation subjecting to martial law “all Rebels and Insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid

844-50 (1974). Referring to this case, Taney reportedly told the mayor of Baltimore, “I am an old man, a very old man, but perhaps I was preserved for this occasion.”

42 See Ex parte Merryman, 17 F. Cas. 144 (Case No. 9, 487) (C.C.D. Md. 1861). Taney noted that the habeas corpus suspension clause was in Article I of the Constitution, which “is devoted to the legislative department of the United States, and has not the slightest reference to the executive department.” 17 F. Cas. at 148. In Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004), discussed below, all the Justices on the Court appeared to assume, consistent with Taney’s opinion, that only Congress has the authority to suspend the writ of habeas corpus. But cf. Daniel Farber, Lincoln’s Constitution 163 (2003) (“[O]n balance Lincoln’s [suspension] of habeas in areas of insurrection or actual war should be considered constitutionally appropriate, at least in the absence of any contrary action by Congress.”).

43 Message to Congress in Special Session of July 4, 1861, in 4 The Collected Works of Abraham Lincoln, at 421, 430. Chief Justice Rehnquist used this reference to “all the laws but one” as the title for his book on civil liberties during wartime.

44 10 Op. Atty. Gen. 74, 17, 21 (July 5, 1861). Troubles continued in Maryland. In September 1861, fearing that the Maryland legislature would vote to secede, Lincoln had the army arrest thirty-one secessionist members of the legislature as well as the mayor of Baltimore. See McPherson, Battle Cry of Freedom, at 289; Neely, The Fate of Liberty, at 14-18.
and comfort to Rebels against the authority of the United States.” The proclamation further suspended the writ of habeas corpus with respect to “all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority or by the sentence of any Court Martial or Military Commission.” As noted above, Congress in 1863 expressly authorized Lincoln to suspend the writ, and he soon exercised that authority throughout the United States with respect to “cases where, by the authority of the President of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy.”

A controversial case subsequently arose in Ohio. Clement Vallandigham, a former congressman and vocal opponent of the war, was arrested by the military in May 1863 after giving an inflammatory anti-war speech at a rally in Mount Vernon, Ohio. He was tried by a military commission for violating General Order No. 38, issued by General Ambrose Burnside (the commander of the military district that included Ohio), which prohibited “declaring sympathy for the enemy.” Vallandigham was convicted by the commission and was sentenced to be imprisoned until the end of the war. He petitioned for a writ of habeas corpus in the U.S. Circuit Court for the Southern District of Ohio, but the court denied relief, reasoning that President Lincoln (and, by extension, his military commanders) had the authority “to arrest persons who, by their mischievous acts of disloyalty, impede or endanger the military operations of the government.” President Lincoln subsequently commuted Vallandigham’s sentence to banishment to the Confederacy, effectively mooting an appeal of the habeas decision. Counsel for Vallandigham then tried to appeal directly from the military commission decision to the Supreme Court. The Court held, however, that it had no

46 Id. at 437. In addition to calling up the militia and authorizing suspension of the writ of habeas corpus, another early action by Lincoln was to order a blockade of Confederate ports, an action approved after the fact by Congress. See Proclamation of a Blockade (April 19, 1861), in 4 The Collected Works of Abraham Lincoln, at 338-39. In an 1863 decision, The Prize Cases, the Supreme Court upheld the President’s authority to impose the blockade. See 67 U.S. 635 (1863). A five-Justice majority of the Court reasoned that when the United States is faced with invasion, “whether the hostile party be a foreign invader, or States organized in rebellion,” the President as Commander in Chief “is not only authorized but bound to resist force by force.” Id. at 668. The majority also reasoned that, even if congressional authorization had been needed, Congress’s after-the-fact approval of the blockade was sufficient to cure any constitutional problem. Id. at 671. For additional discussion of this case, see Swisher, History of the Supreme Court, ch. 34; [chapter by Tom Lee and Michael Ramsey].
47 Proclamation No. 7 of 1863, reprinted in 13 Stat. 734.
48 See Ex parte Vallandigham, 28 F. Cas. 874, 922 (C.C.S.D. Ohio 1863).
49 In arresting and trying Vallandigham, General Burnside acted without first notifying or obtaining specific authorization from the President, but Lincoln decided not to repudiate Burnside’s actions and instead opted for commutation of the sentence. See Message from Abraham Lincoln to Ambrose E. Burnside (May 29, 1863), in 6 Collected Works of Lincoln, at 237. In defending the government’s actions in Vallandigham, Lincoln asked in a letter, “Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wiley agitator who induces him to desert?” Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863), in 6 Collected Works of Lincoln, at 266.
jurisdiction to review a decision by a military commission. In doing so, the Court quoted approvingly from the Lieber Code with respect to the difference between court-martial and military commission jurisdiction, and observed that “[t]hese jurisdictions are applicable, not only to war with foreign nations, but to a rebellion, when a part of a country wages war against its legitimate government, seeking to throw off all allegiance to it, to set up a government of its own.”

Whatever one may think of the government’s actions in Merryman, its actions in Vallandigham were more problematic, and they were regarded that way at the time. Unlike John Merryman, Clement Vallandigham was not alleged to have participated in or planned any hostilities against the United States. Instead, he was tried simply for engaging in speech, without any proof that it was likely to cause imminent harm. In addition to raising obvious First Amendment concerns, the government could not argue that such a trial fell within the ostensible jurisdiction of military commissions to try violations of the laws of war and instead had to rely simply on a claim of military necessity. In the subsequent Milligan case, with facts falling somewhere between those of Merryman and Vallandigham, the Supreme Court would finally address the issue of military jurisdiction over individuals who are not formally part of either side’s armed forces.

The Military Commission Trial in Milligan

The Milligan case arose out of Indiana. While not experiencing the level of insurrection or guerilla activity experienced in Kentucky and Missouri, Indiana was threatened at times with invasion by Confederate forces, and it was organized into a military district in March 1863. In June and July 1863, Confederate General John Morgan and his cavalry unit made guerilla incursions into Indiana and Ohio, in what became known as “Morgan’s Raid.” Indiana’s powerful governor, Oliver Morton, worked closely with the military commander in addressing threats to the state.

Indiana also had large numbers of Confederate sympathizers, called “Copperheads” or “Butternuts.” Some of them joined secret societies, probably the largest of which was the

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51 68 U.S. at 249. Vallandigham subsequently escaped from the South by running the Union naval blockade and made his way to Canada, where he unsuccessfully campaigned in absentia as the Democratic candidate for governor of Ohio. He returned to the United States in 1864, and, even though that made him subject to arrest, the Lincoln administration decided to ignore him.

52 It is important to keep in mind, however, that First Amendment doctrine was much less developed during the Civil War than it is today. See Farber, Lincoln’s Constitution, at 171-72.

53 See 1 William Dudley Foulke, Life of Oliver P. Morton (1899); Kenneth M. Stampp, Indiana Politics During the Civil War (1949).

54 See Wood Gray, The Hidden Civil War: The Story of the Copperheads (1942); Frank L. Klement, The Copperheads in the Middle West (1960); Gilbert Tredway, Democratic Opposition to the Lincoln Administration in Indiana (1973); Jennifer L. Weber, Copperheads: The Rise and Fall of Lincoln’s Opponents
Knights of the Golden Circle, which was reorganized as the Order of American Knights in 1863, and then again in 1864 as the Order of the Sons of Liberty. In addition to elaborate rituals, this organization had a paramilitary structure, and Clement Vallandigham was eventually elected as its figurehead Supreme Commander (while he was still a fugitive in Canada). The Grand Commander in Indiana was a printer by the name of Harrison Dodd. The organization apparently had communications with, and received financial support from, Confederate representatives in Canada.\footnote{For a description of the rituals, see 1 Foulke, Life of Morton, at 387-90. One of their key passwords was “Nu-oh-lac,” which is “Calhoun” (as in John Calhoun) spelled backwards. Id. at 390; see also Klaus, The Milligan Case, at 277.}

Union agents had infiltrated the organization, and on August 20, 1864, they raided Dodd’s printing shop and discovered thirty-two boxes of arms and ammunition. They subsequently arrested a number of individuals involved in the Sons of Liberty, including Dodd. In September 1864, the newly-appointed military commander for Indiana, General Alvin Hovey, appointed a military commission of seven officers for the purpose of trying Dodd “and such other prisoners as may be brought before it.”\footnote{General Henry Carrington, the military commander for Indiana when Dodd and others were apprehended, favored trying them in civilian court, but Governor Morton and Secretary of War Stanton favored a military trial, and Carrington was replaced by General Hovey, who supported the use of a military trial. See 1 Foulke, Life of Morton, at 419.} Five officers were later added to the commission, for a total of twelve. Trial proceedings were initiated against Dodd on September 17, but during the course of the trial he escaped to Canada. On October 10, he was convicted in absentia and sentenced to death.

Five other individuals were subsequently placed on trial before the military commission: William Bowles, Horace Heffren, Stephen Horsey, Andrew Humphreys, and Lambdin Milligan. The defendants were charged with the following offenses: conspiracy against the government of the United States; giving aid and comfort to rebels against the authority of the United States; inciting insurrection; disloyal practices; and violation of the laws of war.\footnote{See Klaus, The Milligan Case, at 32; 1 Foulke, Life of Morton, at 398, 408. See also Oscar A. Kinchen, Confederate Operations in Canada and the North: A Little-Known Phase of the American Civil War (1970).} Among other things, these charges were based on allegations that the defendants were part of a conspiracy to seize federal and state arsenals in several states and release Confederate prisoners in those states and provide them with arms, after which they would join up with Confederate forces in Kentucky and Missouri.\footnote{See The Milligan Case 67-73 (Samuel Klaus ed. 1929).}

The military commission trial took place from late October through early December 1864. The defendants were tried jointly. Each of them was represented by counsel, and
detailed records were kept of the proceedings. In the midst of the trial, Heffren agreed to testify against the other defendants, and the charges against him were withdrawn.

The government presented fourteen witnesses (including Heffren). The evidence showed that the defendants were all active members of the Order of the American Knights a/k/a the Order of the Sons of Liberty. There was also evidence that some members of the organization (most notably Dodd and Joshua Bullitt, a judge in Kentucky) had plans to engage in military activities in support of the Confederacy, including the release of Confederate prisoners. A newspaper editor who had been recruited by the organization testified, for example:

“[Dodd] said that arrangements had been made to release the prisoners on Johnson’s Island; at Camp Chase, near Columbus, Ohio; at Camp Morton, and also at Camp Douglas, and that the prisoners at Camp Douglas, after their release, were to go over and release those at Rock Island. At the same time there was to be an uprising at Louisville, at which the Government stores, etc., were to be seized.”

In addition, there was at least hearsay evidence that some members of the organization had communications with, and received support from, representatives of the Confederacy. The former Grand Secretary of the organization testified, for example, that he had heard from Dodd that Dodd had met with Confederate representatives in Canada. A government informant who had infiltrated the organization further testified that, at Bullitt’s direction, there were communications between the organization and Confederate guerillas in Kentucky about capturing Louisville.

A number of witnesses specifically tied Bowles to the plans developed by Dodd and Bullitt. There was also some evidence indicating that Horsey had been involved in plans to overthrow the state government of Indiana by, among other things, assassinating Governor Morton. The evidence against Humphreys and Milligan was less direct and primarily consisted of testimony that they had both received military titles in the organization and had been present at meetings at which military plans may have been discussed. There was more mitigating evidence, however, with respect to Humphreys. Heffren testified, for example, that Humphreys had advised him to quit the organization and that Humphreys “was for his country right or wrong, and for the Constitution as it was.” Another witness testified that Humphreys had “said he had not understood that it was a military organization; and as soon as

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60 Id. at 293.
61 Id. at 276.
62 Id. at 316.
63 See, e.g., id. at 293, 304, 306, 316-18, 334-35. There was also testimony that Bowles, Dodd, Bullitt, and others worked to develop “Greek fire” – an incendiary device containing a highly flammable oil – that would be used for the destruction of government property. See id. at 305-07; see also id. at 356-58.
64 See id. at 283-85, 286-87.
65 Id. at 348.
he learned what were the purposes of the organization, he said he would have nothing more to do with it.”

The military commission found each of the defendants guilty on all charges. It sentenced Bowles, Milligan, and Horsey to be hanged, but sentenced Humphreys only to imprisonment with hard labor during the rest of the war. General Hovey approved the sentences, except that he commuted Humphreys’ sentence to parole on the ground that “the evidence does not show that the said Andrew Humphreys took any active part or committed any overt acts which were calculated to incite an insurrection or aid the conspiracy.” There is some evidence that Lincoln was inclined to commute the death sentences, but he was assassinated before this could occur. President Andrew Johnson subsequently approved the sentences and directed that the executions be carried out on May 19, 1865. As discussed below, Johnson had earlier that month directed that persons implicated in Lincoln’s assassination be tried by military commission.

On May 10, 1865, the three prisoners filed petitions for writs of habeas corpus with the Circuit Court for the District of Indiana, in Indianapolis. Their cases were heard by Judge David McDonald, the federal district judge for Indiana, and Justice David Davis of the Supreme Court. The two judges subsequently stated that they had opposing views on several questions: (1) Should the writs of habeas corpus be issued? (2) Should the petitioners be discharged? and (3) Did the military commission have jurisdiction to try them? Pursuant to a jurisdictional statute in place at the time, the judges certified these three questions to the Supreme Court.

In the meantime, President Johnson (at the urging of Governor Morton) had commuted the sentences of the three petitioners to life imprisonment with hard labor.

**Arguments before the Supreme Court**

The *Milligan* case was heard by the Supreme Court in the spring of 1866. There were nine Justices sitting on the Court during that Term, although, pursuant to an 1863 statute, there were ten positions on the Court at the time. Five of the nine Justices then sitting (Chief Justice Salmon Chase, Justice David Davis, Justice Stephen Field, Justice Samuel Miller, and Justice Noah Swayne) had been appointed to the Court by President Lincoln. Chase, who had served as Secretary of the Treasury under Lincoln, had replaced Taney, who died in 1864.

The lawyers for the government were James Speed, a Kentucky lawyer and state legislator whom Lincoln had appointed as Attorney General in 1864 (replacing Edward Bates); Benjamin Butler, a Massachusetts lawyer and state legislator who had served as an officer in the army and had engaged in controversial actions in New Orleans that earned him the nickname “the Beast,” and who would later be elected to the U.S. House of

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66 Id. at 401.
67 2:8 War of the Rebellion, at 11.
69 See 2 Stat. 156, 159, § 6 (1802).
Representatives and become Governor of Massachusetts; and Henry Stanbery, a former Ohio attorney general who would later serve as Attorney General under President Johnson. The lawyers for the petitioners were David Dudley Field, a New York lawyer and law reformer and the older brother of then-sitting Justice Stephen Field; Jeremiah Black, a Pennsylvania lawyer who had been a judge on the Pennsylvania Supreme Court and had served as Attorney General under President Buchanan; and James Garfield, who had served as an officer in the army and was at the time of the case a member of the House of Representatives, and who would go on to become President (and, like Lincoln, be assassinated). According to most accounts, the petitioners had a stronger team of lawyers than did the government.  

By modern standards, the briefs in the Supreme Court are surprisingly short – eight pages for the petitioners and fifteen pages for the government. At that time, the Court placed much more emphasis on oral argument than it does today, and it allowed counsel to argue the Milligan case for more than six days, during the period from March 5-13, 1866. The arguments were held in what had formerly been the Senate chamber of the Capitol, which the Supreme Court occupied from 1860 until it moved into its current building in 1935.

In both its brief and oral argument, the government emphasized a purported link between martial law and the use of military commissions, asserting that military commissions were proper to try “not offenses against military law by soldiers and sailors, nor breaches of the common laws of war by belligerents, but the quality of the acts which are the proper subject of restraint by martial law.” Strangely, given the number of military commission cases in the Civil War based on alleged violations of the laws of war, the government asserted that “[i]nfractions of the laws of war can only be punished or remedied by retaliation, negotiation, or an appeal to the opinion of nations.” In addition to waiving off what was probably its strongest argument for the use of the commission in this case, the government also made sweeping claims about executive authority during wartime, contending that after the start of a war, the President “is the sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration,” and that “[d]uring the war his powers must be without limit.” In the alternative, however, the government argued that the petitioners were prisoners of war and thus were not covered by the 1863 Habeas Act. Finally, the government contended that even if the petitioners could not be tried in a military commission, it was at least proper to hold them in military detention until the end of hostilities.

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70 See, e.g., Fairman, History of the Supreme Court, at 201-04; Rehnquist, All the Laws But One, 119-20.
71 Klaus, The Milligan Case, at 87.
72 Id. Although a violation of the laws of war was only one of a number of charges in Milligan, that was true in many of the military commission cases brought during the Civil War.
73 Klaus, The Milligan Case, at 90.
74 Id. at 91.
75 See id. at 92. Hostilities were over by the time the case was heard by the Supreme Court, but the government may have been concerned about the possibility of civil damages for the prior detention.
Counsel for the petitioners argued that the jurisdiction of military tribunals “extends only to persons mustered into the military service, and such other classes of persons [such as spies] as are, by express provisions of law, made subject to the rules and articles of war.”  They also emphasized that Indiana was neither enemy territory nor a place of active combat, that the civil courts were “open and unobstructed” in Indiana, and that the petitioners could have been tried in those courts for violating various statutes. In answer to the argument that those who assist the rebellion can be considered part of the enemy, petitioners’ counsel argued that “[t]his convenient rule would outlaw every citizen the moment he is charged with a political offense[,] [b]ut political offenders are precisely the class of persons who most need the protection of a court and jury, for the prosecutions against them are most likely to be unfounded both in fact and in law.” With respect to the argument that, if nothing else, the petitioners could be detained by the military until the end of hostilities, petitioners’ counsel argued that “[t]he answer to this is, that the petitioners were never enlisted, commissioned, or mustered in the service of the Confederacy; nor had they been within the Rebel lines, or within any theatre of active military operations; nor had they been in any way recognized by the Rebel authorities as in their service.”

The Supreme Court’s Decision

On April 3, 1866, Chief Justice Chase announced that the Court had concluded, based on the facts presented in the petitions and exhibits, that writs of habeas corpus should be issued, that the petitioners should be discharged from military custody, and that the military commission had lacked jurisdiction to try them. The Chief Justice also stated that the opinion of the Court explaining these conclusions would be delivered during the Court’s next term, “when such of the dissenting judges as see fit to do so will state their ground of dissent.” The petitioners were released from military detention a week later, on April 10.

The Court subsequently issued its opinions in the case on December 17, 1866. All nine Justices agreed with the three conclusions set forth in the Court’s April 3 announcement, including the conclusion that the military commission had lacked jurisdiction. The Justices disagreed, however, over whether the military commission was inherently unconstitutional or was invalid merely because unauthorized by Congress.

In an opinion by Justice Davis that focused on Milligan’s petition, a five-Justice majority concluded that Milligan could not constitutionally be tried by military commission. After addressing various jurisdictional issues, the majority described the central question as follows:

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76 Id. at 97.
77 Id. at 140.
78 Id. at 118.
79 Id. at 224.
80 Id.
“Milligan, not a resident of one of the rebellious states, or a prisoner of war, but a
citizen of Indiana for twenty years past, and never in the military or naval service is,
while at his home, arrested by the military power of the United States, imprisoned,
and, on certain criminal charges preferred against him, tried, convicted, and sentenced
to be hanged by a military commission, organized under the direction of the military
commander of the military district of Indiana. Had this tribunal the legal power and
authority to try and punish this man?”

The majority observed that “[n]o graver question was ever considered by this court, nor one
which more nearly concerns the rights of the whole people; for it is the birthright of every
American citizen when charged with crime, to be tried and punished according to law.”

After reciting various constitutional rights that apply to criminal trials, the majority
asked, “Have any of the rights guaranteed by the Constitution been violated in the case of
Milligan? and if so, what are they?” Instead of immediately addressing this question,
however, the majority first proceeded to inquire into the military commission’s source of
authority. The majority reasoned that the commission could not exercise the federal judicial
power provided for in Article III of the Constitution because the commission was “not
ordained and established by Congress, and not composed of judges appointed during good
behavior.” The majority also concluded that the laws of war could not serve as the source
of the commission’s authority because these laws “can never be applied to citizens in states
which have upheld the authority of the government, and where the courts are open and their
process unobstructed.” This would be true, the majority reasoned, even if Congress had
purported to authorize the use of military commissions for such citizens: “Congress could
grant no such power; and to the honor of our national legislature be it said, it has never been
provoked by the state of the country even to attempt its exercise.”

The majority further noted that the government had not shown that it was necessary to
try Milligan in a military commission. The majority explained that Congress had provided for
criminal penalties for the offenses in question; that the Circuit Court in Indiana was open and
operating peacefully; and that its judges and juries were not unduly biased against
prosecution. As a result, “[t]he government had no right to conclude that Milligan, if guilty,
would not receive in that court merited punishment; for its records disclose that it was
constantly engaged in the trial of similar offences, and was never interrupted in its
administration of criminal justice.”

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81 Ex parte Milligan, 71 U.S. 2, 118 (1866).
82 Id. at 118-19.
83 Id. at 121.
84 Id. at 122.
85 Id. at 121.
86 Id. at 122.
87 Id.
At this point, the majority returned to the individual rights protections of the Constitution and reasoned that, in using a military commission to try Milligan, the government had violated his right to a jury trial. The majority expressed the view that “if ideas can be expressed in words, and language has any meaning, this right – one of the most valuable in a free country – is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service.”

The majority further described the jury trial right as “a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity.”

The majority next rejected the argument that the use of the commission here could be justified by the imposition of martial law. While acknowledging that martial law could displace civilian law in some circumstances during wartime, the majority rejected the argument that the application of martial law was subject to the complete discretion of the Executive Branch. If this were true, said the majority, “republican government is a failure, and there is an end to liberty regulated by law.” The majority reasoned that martial law could not be imposed where the courts are open and unobstructed, and that it must be confined to the “the locality of actual war.”

It was therefore improper to impose martial law in Indiana, explained the majority, since the courts there were operating effectively, and the state, although it had been invaded in the past and was threatened with invasion, was not actually being invaded at the time of Milligan’s arrest.

Finally, the majority concluded that Milligan was entitled to relief from detention pursuant to the terms of the 1863 Habeas Act. Milligan could not be considered a prisoner of war under that Act, reasoned the majority, because “he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion.” The majority further noted that Milligan “was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war.” “If he cannot enjoy the immunities attaching to the character of a prisoner of war,” the majority asked rhetorically, “how can he be subject to their pains and penalties?”

In a concurring opinion authored by Chief Justice Chase, four Justices agreed that Milligan was entitled to relief under the 1863 Habeas Act, but they disagreed with the majority that the military commission proceeding would have been invalid if authorized by Congress. With respect to the 1863 Habeas Act, the concurrence noted that Milligan was detained under authority of the President, other than as a prisoner of war, when a grand jury met in Indiana, and he was not indicted by the grand jury. Under the terms of the Act, therefore, he was entitled both to petition for habeas corpus relief and to be released from

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88 Id. at 123.
89 Id.
90 Id. at 124.
91 Id. at 127.
92 Id. at 131.
93 Id.
94 Id.
military custody. The military commission’s lack of jurisdiction to try Milligan “is an unavoidable inference” from these conclusions, reasoned the concurrence, since “[t]he military commission could not have jurisdiction to try and sentence Milligan, if he could not be detained in prison under his original arrest or under sentence, after the close of a session of the grand jury without indictment or other proceeding against him.”

Despite these conclusions, the concurrence expressed the view that “Congress had power, though not exercised, to authorize the military commission which was held in Indiana.” The concurrence noted that, at the time of Milligan’s arrest, Indiana “was a military district, was the theatre of military operations, had been actually invaded, and was constantly threatened with invasion.” It also noted that it appeared that “a powerful secret association, composed of citizens and others, existed within the state, under military organization, conspiring against the draft, and plotting insurrection, the liberation of the prisoners of war at various depots, the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government.” Under those circumstances, the concurrence did not “doubt that, in such a time of public danger, Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy.” The mere fact that the civilian courts were open and functioning did not eliminate this power, the concurrence argued, because the courts “might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators.” Finally, the concurrence criticized the majority for potentially foreclosing Congress’s ability to indemnify the officers involved in the petitioners’ detention and trial.

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There are puzzling aspects to both the majority opinion and the concurrence. Most importantly, it is not clear why the majority chose to opine about whether Congress could have authorized the military commission, since, as the concurrence pointed out, Congress had not done so. One possibility, noted with alarm at the time, was that the Court was signaling to Congress that it would restrict Congress’s authority to engage in military reconstruction of the South. In any event, the majority’s unnecessary resolution of a constitutional issue, in a case concerning the war powers of the national government, seems

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95 Id. at 135, 136.
96 Id. at 137.
97 Id. at 140.
98 Id.
99 Id.
100 Id. at 140-41.
101 Id. at 136.
102 See Rehnquist, All the Laws But One at 137 (noting that Milligan “would have been a sounder decision, and much more widely approved at the time, had it not gone out of its way to declare that Congress had no authority to do that which it never tried to do”).
questionable by contemporary standards. It is also unclear to what extent the majority opinion is directed to the use of military commissions to try the enemy for violations of the laws of war, as opposed to their use to administer justice under martial law. The government, as discussed above, strangely failed to rely on the law of war argument.

As for the concurrence, it is unclear whether it thought that the invalidity of the military commission stemmed from a violation of congressional restrictions or a lack of affirmative congressional authorization. On the one hand, its reliance on what it construed as congressional restrictions in the 1863 Habeas Act might suggest that it was not addressing whether the commission would be valid in the absence of such restrictions. On the other hand, the concurrence’s argument that Congress could authorize the commission might suggest that it thought such authorization was necessary. This distinction between presidential action that violates congressional restrictions and presidential action that lacks congressional authorization is of central importance, as Justice Jackson would point out many years later in his concurrence in the Youngstown steel seizure case.

Contemporary Reactions and Subsequent Developments

After being released from military custody, Bowles and Milligan were arrested based on a federal court indictment but were released on their own recognizance. The charges against them were eventually dropped. Milligan subsequently filed a civil suit against General Hovey and the members of the military commission, and he prevailed, although he was awarded only nominal damages because a statute of limitations was found to bar much of his claim. The court allowed the suit to proceed even though Congress had retroactively approved Lincoln’s various military actions in the Civil War, including his use of military commissions, concluding that, in light of the constitutional analysis by the majority in Milligan, this statute could not bar the suit.

Although Milligan is widely praised today as a landmark decision protecting civil liberties, it was highly controversial at the time. As Charles Warren noted in his history of the Supreme Court, “[t]his famous decision has been so long recognized as one of the bulwarks of American liberty that it is difficult to realize now the storm of invective and opprobrium.

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103 The concurrence’s conclusion that the commission trial violated the restrictions in the 1863 Habeas Act is debatable, given that the restrictions were directed to the suspension of the writ of habeas corpus rather than the use of military trials. See Fairman, History of the Supreme Court, at 210. David Currie responds that, “[i]n light of the Court’s familiar principle of construing statutes if possible to avoid having to find government action unconstitutional . . . Chase’s position seems entirely reasonable.” David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789-1888, at 291 n.25 (1985). The constitutional avoidance principle, however, is usually applied in order to avoid finding that a statute is unconstitutional, not as a basis for construing an otherwise valid statute to prohibit unconstitutional action by the Executive.

104 See Milligan v. Hovey, 17 F. Cas. 380 (C.C.D. Ind. 1871).


106 See 17 F. Cas. at 381 (“If an act is prohibited by the constitution, and it is beyond the power of congress to authorize it, then it may be said the wrong done by the act is not subject to complete indemnity by congress, because then the prohibition of the constitution to protect private rights would be without effect.”).
which burst upon the Court at the time when it was first made public.”107 Editorials in major Republican newspapers accused the Court of undermining the Union, and they commonly compared the decision to the infamous 1857 Dred Scott decision, in which the Supreme Court had held that Congress lacked the constitutional authority in the Missouri Compromise to confer freedom on slaves who were moved by their owners to non-slave states or territories.108 The New York Times, for example, criticized the majority opinion in Milligan for having thrown “the great weight of its influence into the scale of those who assailed the Union, and step after step impugned the constitutionality of nearly every thing that was done to uphold it.”109 The New York Herald caustically stated that “[t]his constitutional twaddle of Mr. Justice Davis will no more stand the fire of public opinion than the Dred Scott decision.”110 Scholarly opinion was also critical. The new American Law Review, while condemning the harsh criticism of the Court as disrespectful to the institution, nevertheless expressed the view that the Justices had “failed in their duty” by discussing an issue that was not presented by the case.111 Democratic and Southern newspapers, by contrast, generally applauded the decision.112

The fears of Radical Republicans that Milligan would undermine Reconstruction appeared to be quickly realized when President Andrew Johnson and some lower court judges started relying on Milligan to cancel military trials in the South.113 Congressional concerns about the Supreme Court’s restrictive approach to congressional authority ultimately led Congress to reduce the number of positions on the Court from ten to seven, and then to restrict the Court’s appellate jurisdiction, a restriction applied by the Court in Ex parte McCardle.114 In that case, McCardle, a newspaper editor in Mississippi, was arrested by U.S. army officials after writing articles critical of Reconstruction. He brought an action in federal court for habeas corpus relief. Relying on Milligan, he argued that the Military Reconstruction Act, which allowed trials of civilians by military courts in the South even though the civil courts were open, was unconstitutional. The Circuit Court denied relief, and McCardle appealed to the Supreme Court. Soon after his case was argued, Congress (over President Johnson’s veto) repealed a recent statute that had specifically authorized appeals to

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110 See Summary of Events, Milligan’s Case, 1 Am. L. Rev. 572, 573 (1867).

111 The Richmond Enquirer, for example, praised the decision. See Neely, Fate of Liberty, at 176.

112 See Warren, The Supreme Court, at 164-65.

113 See 74 U.S. (7 Wall.) 506 (1868). Charles Fairman observes that “the needless breadth of the language in Milligan should be reckoned as the starting point in the sequence of actions and reactions that led to the statute of March 27, 1868, whereby Congress took away the Court’s jurisdiction in Ex parte McCardle, deliberately to forestall a decision on the constitutionality of the Reconstruction Acts.” Fairman, History of the Supreme Court, at 237.
the Supreme Court in habeas cases. Because of this repeal, the Supreme Court dismissed the appeal for lack of jurisdiction.\footnote{115}{See Fairman, History of the Supreme Court, ch. 10. While this case was pending before the Supreme Court, Chief Justice Chase was presiding over congressional impeachment proceedings against President Johnson. In a subsequent decision, the Court held that the repeal of the Court’s appellate jurisdiction over habeas cases had not eliminated the Court’s ability to hear habeas cases under a different jurisdictional provision. See Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1869).}

Notwithstanding \textit{Milligan} and Johnson’s initial reliance on it, military commissions were used extensively during Reconstruction. Mark Neely reports that “[f]rom the end of April 1865 to January 1, 1869, another 1,435 such [military commission] trials occurred – and still more in 1869 and 1870.”\footnote{116}{Neely, \textit{Fate of Liberty}, at 176-77. See also Detlev F. Vagts, \textit{Military Commissions: A Concise History}, 101 Am. J. Int’l L. 35, 39-41 (2007).} These commissions were often used to try what we would today call acts of terrorism – organized violence by groups such as the Ku Klux Klan against blacks, unionists, and federal officials and troops.\footnote{117}{See Detlev F. Vagts, \textit{Military Commissions: The Forgotten Reconstruction Chapter}, 57 Am. U. L. Rev. (forthcoming 2007). In fact, the federal commander in Louisiana and Texas during Reconstruction, Philip Sheridan, in looking back on this period, specifically used the word “terrorism.” See Philip Sheridan, \textit{Personal Memoirs of Philip Sheridan} 262 (1881, reprinted 1999) (“Therefore, when outrages and murders grew frequent, and the aid of military power was an absolute necessity for the protection of life, I employed it unhesitatingly, the guilty parties being brought to trial before military commissions and for a time at least, there occurred a halt in the march of terrorism inaugurated by the people whom [President] Johnson had deluded.”). See also Nicholas Lemann, \textit{Redemption: The Last Battle of the Civil War} (2007).}

The \textit{Milligan} case was decided against the backdrop of a military commission trial of the individuals implicated in the assassination of President Lincoln. Lincoln was shot by John Wilkes Booth on the night of April 14, 1865, while attending a play at Ford’s Theatre in Washington, D.C., and he died the next morning. That same night, Booth’s co-conspirators attempted to assassinate the Secretary of State, William Seward, and they also had plans to assassinate both the Vice-President, Andrew Johnson, and General Ulysses S. Grant, although those plans were not carried out. By the time of these events, Robert E. Lee had already surrendered his forces in Appomattox, and the Confederacy was effectively defeated, although General Joseph Johnston’s surrender in North Carolina (with a larger army than Lee’s) was still a couple of weeks away and there were still fears that the Confederacy might resort to guerilla warfare. Booth was subsequently killed by Union soldiers after being cornered on a farm in Virginia, but the government arrested eight other individuals in connection with the assassination, including Samuel Mudd, a doctor who knew Booth and had set his broken leg after the assassination, and who had misled authorities when they were searching for Booth.\footnote{118}{For detailed accounts of the assassination and the subsequent search for Booth and his co-conspirators, see Michael W. Kauffman, \textit{American Brutus: John Wilkes Booth and the Lincoln Conspiracies} (2004); Edward Steers, Jr., \textit{Blood on the Moon: The Assassination of Abraham Lincoln} (2001); James L. Swanson, \textit{Manhunt: The 12-Day Chase for Lincoln’s Killer} (2006). Another alleged conspirator, John Surratt, was captured in Egypt in 1866 and was tried in a civilian court. The trial ended in a hung jury, and the government eventually dropped all charges against him.}
President Johnson decided to have the Lincoln conspirators tried by a nine-member military commission, the legal propriety of which was endorsed in an opinion by Attorney General James Speed issued in July 1865, prior to the *Milligan* decision. ¹¹⁹ In his opinion, Speed described two types of enemies: “[o]pen, active participants in hostilities,” and “[s]ecret, but active participants, as spies, brigands, bushwackers, jayhawkers, war rebels, and assassins.” ¹²⁰ He reasoned that, just as the laws of war allow for the use of military commissions to try open, active enemies, they allow for the use of such commissions to try secret, active enemies. The mere fact that the civil courts are operating, he further argued, is no barrier to such a trial:

“The civil courts have no more right to prevent the military, in time of war, from trying an offender against the laws of war than they have a right to interfere with and prevent a battle. A battle may be lawfully fought in the very view and presence of a court; so a spy, a bandit, or other offender against the law of war may be tried, and tried lawfully, when and where the civil courts are open and transacting the usual business.” ¹²¹

As discussed above, in subsequently arguing the *Milligan* case, for some reason neither Speed nor the other lawyers representing the government made this law of war argument. ¹²²

All of the Lincoln conspirators were found guilty. ¹²³ Four of them were sentenced to death and were quickly executed. The four others, including Mudd, were sentenced to imprisonment at Fort Jefferson on the Dry Tortugas islands off the coast of Florida. Shortly after *Milligan* was decided, Mudd invoked the decision in petitioning for a writ of habeas corpus. In denying the application, the federal district court in Florida reasoned that, unlike in *Milligan*, the petitioners in this case had been tried for a military offense. ¹²⁴ The court reasoned that the President was assassinated “not from private animosity, nor any other reason than a desire to impair the effectiveness of military operations, and enable the rebellion to establish itself into a Government” and that “the act was committed in a fortified city, which


¹²⁰ Id. at 9.

¹²¹ Id. at 31-32.

¹²² Benjamin Butler appears to have played a lead role in formulating the government’s approach to the merits in *Milligan*. See Klaus, The Milligan Case, at 84 n.* (indicating that Stanbery argued only the jurisdictional issues); id. at 209 (indicating that Butler presented the reply argument for the government).

¹²³ For a transcript of the proceedings and discussions of the trial, see The Trial: The Assassination of President Lincoln and the Trial of the Conspirators (Edward Steers ed., 2003) (reprinting transcript published by Benn Pitman in 1865).

¹²⁴ See Ex parte Mudd, 17 F. Cas. 954 (S.D. Fla. 1868), authenticated copy available in Westlaw. More than a century later, Mudd’s grandson and great-grandson made an effort to have the military commission decision overturned with respect to Mudd, arguing (based on *Milligan*) that the commission had lacked jurisdiction to try him. The Secretary of the Army rejected this argument, and the federal district court in Washington, D.C. held that the Secretary’s decision was not arbitrary, capricious, or not in accordance with law for purposes of the Administrative Procedure Act. See Mudd v. Caldera, 134 F. Supp. 2d 138, 145-46 (D.D.C. 2001), appeal dismissed, Mudd v. White, 309 F.3d 819 (D.C. Cir. 2002).
had been invaded during the war, and to the northward as well as the southward of which battles had many times been fought; which was the headquarters of all the armies of the United States, from which daily and hourly went military orders.” President Johnson subsequently pardoned Mudd as a result of assistance he provided to medical officers during an epidemic of yellow fever at the Florida prison.125

Subsequent Supreme Court Discussions of Milligan

The Supreme Court did not have occasion to review the Milligan precedent in any detail until the Ex parte Quirin case decided during World War II.126 In Quirin, eight agents of Nazi Germany, all of whom had previous ties to the United States and two of whom may have been U.S. citizens, had surreptitiously entered the United States with plans to commit acts of sabotage. After they were arrested, the saboteurs were tried by a military commission and a number of them were sentenced to death.127

The Court in Quirin held that the military commission trial was valid. The Court reasoned that “[a]n important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.”128 The Court further reasoned that it was unnecessary in this case to determine the extent to which the President acting alone had the power to create military commissions, because the Court found that, in the 1916 Articles of War, Congress had authorized the establishment of such commissions to try violations of the laws of war.129

125 A military commission was also used in 1865 to conduct a war crimes trial of Henry Wirz, the commandant of the prisoner of war camp in Andersonville, Georgia, where over 12,000 Union soldiers died of disease and malnutrition. See Lewis L. Laska & James M. Smith, Hell and the Devil: Andersonville and the Trial of Captain Henry Wirz, C.S.A., 1865, 68 Mil. L. Rev. 77 (1975).

126 See 317 U.S. 1 (1942).


128 317 U.S. at 28-29.

129 The Court’s conclusion that Congress had affirmatively authorized the use of military commissions is questionable. The Court relied on Article 15 of the 1916 revisions to the Articles of War, which provided that the statutory jurisdiction for courts martial “shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions.” Articles of War of 1916, art. 15, 39 Stat. 650, 653 (1916). Both the text and the legislative history of Article 15 suggest that Congress was making clear that it was recognizing a preexisting presidential authority to establish military commissions, not that it was affirmatively authorizing them. See Bradley & Goldsmith, The Constitutional Validity of Military Commissions, at 252-53; see also Hamdan, 126 S. Ct. at 2774 (referring to the Court’s “controversial characterization” of Article 15 in Quirin). Importantly, however, in revising and re-codifying the Articles of War in 1950 as the Uniform Code of Military Justice (UCMJ), Congress used language nearly identical to what was in Article 15, see 10 U.S.C. § 821, and the legislative history of the UCMJ indicates that Congress was attempting to preserve the Supreme Court’s interpretation of that Article in Quirin. See Bradley & Goldsmith, supra, at 253.
In explaining the category of individuals who may be tried before a military commission, the Court in *Quirin* distinguished between lawful and unlawful combatants:

“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.”

The Court also made clear that the authority to try unlawful combatants before a military commission exists even when the unlawful combatant is a U.S. citizen: “Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war.”

The petitioners in *Quirin* relied heavily on *Milligan*. In distinguishing *Milligan*, the Court in *Quirin* asserted that the petitioners in *Milligan* were not “part of or associated with the armed forces of the enemy” and were therefore “non-belligerent[s],” and it construed the statement in *Milligan* about the inapplicability of the law of war as limited to the facts of that particular case. By contrast, said the Court in *Quirin*, the petitioners before it were “plainly” within “the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war.”

The Court’s distinction of *Milligan* is problematic. The petitioners in *Milligan* were in fact alleged to be “associated with” enemy armed forces, and they were specifically charged with (and convicted by a military commission of) violating the laws of war. While the petitioners in *Milligan* were not formal members of the enemy’s armed forces, that was also true, it turns out, of most of the petitioners in *Quirin*, and historical practice suggests that the laws of war extend beyond such formal membership. In another place in its opinion, the Court in *Quirin* appears to be aware that the petitioners in *Milligan* were charged with violating the laws of war, but it suggests that the conduct at issue in *Milligan* nevertheless did not qualify for trial by military commission:

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130 317 U.S. at 31. See also In re Yamashita, 327 U.S. 1, 11 (1946); Johnson v. Eisentrager, 339 U.S. 763, 786 (1950); Colepaugh v. Looney, 235 F.2d 429, 431-32 (10th Cir. 1956).

131 317 U.S. at 37. After the *Quirin* decision, Justice Frankfurter solicited the views of Frederick Bernays Wiener, an expert on military law, about the Court’s reasoning. Wiener wrote three letters back to Frankfurter, in which he agreed with the Court’s reasoning with respect to the applicability of the laws of war to U.S. citizens and the limited nature of the *Milligan* precedent, but disagreed with the Court’s construction of the Articles of War. See Fisher, Nazi Saboteurs on Trial, at 129-33; letters on file with the author dated Nov. 5, 1942; Aug. 1, 1943; and Jan. 13, 1944. Wiener stated approvingly that, with the *Quirin* decision, “[t]he majority opinion in the *Milligan* case, which stated, quite gratuitously, that Congress could never authorize the trial of civilians by military commission in peaceful territory where the courts are open, is limited to the actual facts of the case.” Letter dated Aug. 1, 1943, at 2.


133 317 U.S. at 45-46.

134 Only two of the eight saboteurs were German soldiers. All of the saboteurs were issued German uniforms to wear while coming ashore from the submarines, however, so that they could attempt to claim POW status in the event that they were immediately captured. See Fisher, Nazi Saboteurs on Trial, at 23.
“We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury. It was upon such grounds that the Court denied the right to proceed by military tribunal in Ex parte Milligan, supra. But as we shall show, these petitioners were charged with an offense against the law of war which the Constitution does not require to be tried by jury.”

This distinction is both cryptic and conclusory, since it does not explain why the conduct at issue in Milligan either was not recognized by U.S. courts as a violation of the law of war or (relatedly) was triable only by jury.

There are of course other differences between Milligan and Quirin. Perhaps most notably, the petitioners in Milligan, unlike the petitioners in Quirin, did not travel from enemy territory into friendly territory. It is unclear, however, how much weight should be given to this distinction of travel, given that an enemy agent could be as dangerous, or even more dangerous, if they resided within friendly territory. A better distinction may be that, unlike the petitioners in Quirin, the petitioners in Milligan did not receive directions from the enemy and thus may not have been agents of the enemy, although the record on this is not entirely clear, since representatives of the Confederacy appear to have had communications with, and provided financial support to, the petitioners’ paramilitary organization.

Milligan was invoked in another World War II decision, Duncan v. Kahanamoku, this time for its reasoning about the proper use of martial law. In that case, the Territorial Governor of Hawaii placed the territory under martial law after the attack on Pearl Harbor, and for several years thereafter military courts tried civilians for ordinary crimes such as assault and embezzlement, even though the territorial courts were open and functioning. In doing so, the Governor relied on the Hawaiian Organic Act, a federal statute that authorized the imposition of martial law “in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it.” In concluding that the Act did not authorize the military trials in question, the Court reasoned that “when Congress passed the Hawaiian Organic Act and authorized the establishment of ‘martial law’ it had in mind and did not wish to exceed the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions prior to the time Congress passed the Organic Act.”

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135 317 U.S. at 29 (emphasis added)
136 Frederick Bernays Wiener emphasized this distinction in one of the letters he sent to Justice Frankfurter concerning the Quirin decision. See Letter from Frederick Bernays Wiener dated Aug. 1, 1943, at 3 (“Milligan, though hostile to the Union, was no invader; he was merely what today we should call a Fifth Columnist.”).
137 327 U.S. 304 (1946).
138 Id. at 324.
of the laws of war, the Court did not address the potential tension between *Milligan* and *Quirin*. Indeed, the Court emphasized that the case before it did not involve “the well-established power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others charged with violating the laws of war.”

Even with respect to the treatment of individuals who were indisputably civilians, *Milligan* was not always applied vigorously during World War II. Most notably, it did not stop the Supreme Court from issuing its infamous decision in *Korematsu v. United States*, which upheld the authority of the government to relocate individuals of Japanese ancestry from the West Coast (and prosecute them in federal court if they did not comply). Without mentioning *Milligan*, the Court deferred to the judgment of military authorities that forced relocation was warranted to prevent spying and sabotage. To be sure, the Court in *Ex parte Endo*, decided the same day as *Korematsu*, ordered the release of a concededly loyal Japanese-American citizen from a relocation center, on the ground that there had been no clear authorization of her detention. Importantly, however, the Court distinguished the case before it from both *Milligan* and *Quirin*:

“It should be noted at the outset that we do not have here a question such as was presented in *Ex parte Milligan*, 4 Wall. 2, or in *Ex parte Quirin*, 317 U.S. 1, where the jurisdiction of military tribunals to try persons according to the law of war was challenged in *habeas corpus* proceedings. Mitsuye Endo is detained by a civilian agency, the War Relocation Authority, not by the military. Moreover, the evacuation program was not left exclusively to the military; the Authority was given a large measure of responsibility for its execution and Congress made its enforcement subject to civil penalties . . . . Accordingly, no questions of military law are involved.”

A plurality of the Court did rely on *Milligan* in a 1957 decision, *Reid v. Covert*. In that case, two wives of U.S. servicemen stationed overseas were tried by military courts-martial for allegedly killing their husbands, pursuant to authorization from both Congress and an international agreement. In disapproving the use of courts-martial in this situation, a plurality of the Court observed that “*Ex parte Milligan* . . . one of the great landmarks in this Court’s history, held that military authorities were without power to try civilians not in the military or naval service by declaring martial law in an area where the civil administration was not deposed and the courts were not closed.” This invocation of *Milligan* is similar to that in *Duncan*—as a limitation on the use of “martial law” as a basis for having military courts try what are otherwise ordinary crimes committed by civilians. There was little

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139 Id. at 313-14 (emphasis added).
141 323 U.S. 283 (1944).
142 Id. at 297-98.
143 354 U.S. 1 (1957).
144 Id. at 30-31.
question that the wives in *Reid* were civilians, or that their crimes were ordinary crimes. As noted above, however, the circumstances of *Milligan* are much less clear on these points.

This is where the line of precedent stood with respect to the military trial of U.S. citizens not in the U.S. armed forces prior to the current war on terrorism. The *Milligan* decision generally disallowed the use of military trials for civilian U.S. citizens, but it did not provide a clear test for distinguishing between civilians and combatants. The *Quirin* decision made clear that enemy combatants may be tried by military commission for violating the laws of war, even if they happen to be U.S. citizens, but the Court glossed over inconvenient facts in distinguishing *Milligan*. Although the majority in *Milligan* extended its reasoning even to the hypothetical situation in which Congress approves the use of a military commission, that reasoning was heavily criticized at the time and was undercut by the Court’s focus on congressional authorization (or the lack thereof) in *Quirin*, *Duncan*, *Korematsu*, and *Endo*.145

**Milligan and the War on Terrorism**

There has been a renewed focus on *Milligan* in the wake of the September 11, 2001 attacks, in which members of the al Qaeda terrorist organization hijacked four civilian airliners and crashed them into the World Trade Center in New York, the Pentagon near Washington, D.C., and a field in Pennsylvania. A week after the attacks, Congress enacted an Authorization for Use of Military Force (AUMF) that broadly authorized the President to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”146 Soon thereafter, the United States initiated significant military operations in Afghanistan that ultimately resulted in the overthrow of the ruling Taliban government in that country, which had been harboring leaders of al Qaeda.

In November 2001, after combat operations had begun in Afghanistan, President Bush issued a military order authorizing the detention and trial of individuals where there was reason to believe that the individual either “is or was a member of the organization known as al Qaida,” “has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy,” or “has knowingly harbored one or more [of these] individuals.”147 As legal support for this order, the President invoked the AUMF, provisions in the Uniform Code of Military Justice, and his Commander in Chief authority. The U.S.


military subsequently detained hundreds of foreign citizens at the Guantánamo naval base in Cuba as “enemy combatants” in the war on terrorism, and it sought to try some of them in military commissions. The government also detained several individuals as enemy combatants within the United States, including two U.S. citizens, Yaser Hamdi and José Padilla, and a foreign citizen, Ali Saleh Kahlah Al-Marri.

Hamdi was captured while allegedly fighting with Taliban forces in Afghanistan. Although he was initially sent to the Guantánamo naval base, he was transferred to a naval brig in the United States after it was discovered that he was a U.S. citizen. His father filed a petition for a writ of habeas corpus on his behalf, and the case made its way up to the Supreme Court. In *Hamdi v. Rumsfeld*, a four-Justice plurality of the Court, along with Justice Thomas, concluded that the government had the authority to detain Hamdi as an enemy combatant, as long as it gave him notice of the basis for his classification and an opportunity to contest the factual basis for the classification before a neutral decisionmaker. The plurality made clear that it was deciding only the government’s ability to detain individuals who, like Hamdi, were “part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.”

The plurality reasoned that, in stating that the President could use “all necessary and appropriate force,” the AUMF had authorized the President to engage in the “fundamental incidents of waging war,” including detention of the enemy. The plurality also reasoned that individuals fighting with the Taliban “are individuals Congress sought to target in passing the AUMF.” Relying heavily on *Quirin*, the plurality concluded that the detention authority extended even to U.S. citizens, since “[a] citizen, no less than an alien, can be ‘part of or supporting forces hostile to the United States or coalition partners’ and ‘engaged in an armed conflict against the United States,’ . . .; such a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict.”

The plurality distinguished *Milligan* on the ground that “Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there.” It further noted that, “[h]ad Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different.” The plurality also reasoned that *Milligan* had to be viewed in light of the decision in *Quirin*, a unanimous opinion that “both postdates and clarifies Milligan, providing

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149 Id. at 516.
150 Id. at 519.
151 Id. at 518.
152 Id. at 519.
153 Id. at 522.
154 Id.
us with the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances.”

By contrast, Justice Scalia argued in dissent that a U.S. citizen who is not serving in the U.S. armed forces could be subjected to military detention only if the writ of habeas corpus were validly suspended, pursuant to the Suspension Clause of the Constitution. Justice Scalia relied heavily on Milligan, arguing that “the reasoning and conclusion of Milligan logically cover the present case” and that “if the law of war cannot be applied to citizens where courts are open, then Hamdi’s imprisonment without criminal trial is no less unlawful than Milligan’s trial by military tribunal.” He also noted that the petitioners in Milligan had been tried “for offenses that included conspiring to overthrow the Government, seize munitions, and liberate prisoners of war,” but the Court had nevertheless rejected the government’s claim that military jurisdiction was proper. Finally, Justice Scalia argued that the Court in Quirin had incorrectly described Milligan, which he said stood for the proposition that “[t]hough treason often occurred in wartime, there was, absent provision for special treatment in a congressional suspension of the writ, no exception to the right to trial by jury for citizens who could be called ‘belligerents’ or ‘prisoners of war.’”

The other U.S. citizen to have been detained as an enemy combatant in the war on terrorism is Jose Padilla. Padilla was apprehended by the FBI at Chicago’s O’Hare airport after arriving from Pakistan, and it was alleged at that time that he had come to the United States with the intention of developing and detonating a “dirty” (i.e., radiological) bomb. Although originally detained by civilian authorities, Padilla was subsequently deemed an enemy combatant and was transferred to military custody. His case also made its way up to the Supreme Court, but the Court concluded that he had filed his habeas corpus petition in the wrong judicial district, so he had to refile it and start over. At this point, the government supplemented its allegations against him, contending that he had received training in al Qaeda camps in Afghanistan, had been there during the post-September 11 fighting, had escaped with other members of al Qaeda into Pakistan, had received further weapons and explosives training in Pakistan, and had come to the United States with the intention of blowing up

155 Id. at 523.
156 542 U.S. at 554-58 (Scalia, J., dissenting).
157 Id. at 567.
158 Id.
159 Id. at 571. See also Carlton F.W. Larson, The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem, 154 U. Pa. L. Rev. 863 (2006). The Constitution states that treason against the United States “shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort,” and it provides that “[n]o person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.” U.S. Const. art. III, § 3. Courts have held that the Treason Clause does not apply to crimes, such as seditious conspiracy, that involve legal elements different from treason. See, e.g., United States v. Rahman, 189 F.3d 88 (2d Cir. 1999); United States v. Rodriguez, 803 F.2d 318 (7th Cir. 1986). See also Ex parte Quirin, 317 U.S. at 38 (reasoning that the international law crime of passing behind enemy lines out of uniform with hostile intent was an offense that was “distinct from the crime of treason defined in Article III, § 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other”).
apartment buildings. Based on these allegations, the U.S. Court of Appeals for the Fourth Circuit held that Padilla could be held as an enemy combatant. The court reasoned that, “[l]ike Hamdi, Padilla associated with forces hostile to the United States in Afghanistan” and that “his detention is no less necessary than was Hamdi’s in order to prevent his return to the battlefield.” As for Milligan, the Fourth Circuit reasoned that Quirin had “confirmed that Milligan does not extend to enemy combatants,” and that, as a result, “Milligan is inapposite here because Padilla, unlike Milligan, associated with, and has taken up arms against the forces of the United States on behalf of, an enemy of the United States.” The Supreme Court never reviewed this decision because, while Padilla’s petition for a writ of certiorari was pending before the Court, the government transferred him back to civilian custody and proceeded to try him on criminal charges.

Courts continue to debate the implications of Milligan. In a case decided after Hamdi, a different panel of the Fourth Circuit relied on Milligan in holding that Ali Saleh Kahlah Al-Marri, a Qatari citizen who was studying in the United States and was alleged to have traveled to this country with the intent of carrying out terrorist attacks on behalf of al Qaeda, could not be held by the military as an enemy combatant. In a 2-1 decision, the Fourth Circuit reasoned that the AUMF did not authorize the military detention of Al-Marri because, unlike the petitioners in Quirin, Hamdi, and Padilla, Al-Marri was not alleged to have been affiliated with the military arm of an enemy government: “Hamdi and Padilla ground their holdings on this central teaching from Quirin, i.e., enemy combatant status rests on an individual’s affiliation during wartime with the ‘military arm of the enemy government.’ . . . In Quirin that enemy government was the German Reich; in Hamdi and Padilla, it was the Taliban government of Afghanistan.” The court also asserted that “Quirin, Hamdi, and Padilla all emphasize that Milligan’s teaching – that our Constitution does not permit the Government to subject civilians within the United States to military jurisdiction – remains good law.”

There are reasons to question the Fourth Circuit’s application of “Milligan’s teaching.” The majority in Al-Marri assumes that the enemy for these purposes must be a government, even though the AUMF identifies the organization that plotted the September 11 attacks (i.e., al Qaeda) as part of the enemy. Moreover, in its 2006 decision, Hamdan v. Rumsfeld, the Supreme Court assumed that the United States was involved in an armed conflict with al Qaeda, and on that basis imposed certain limitations on the use of military commissions stemming from the laws of war. In addition, contrary to what the majority

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161 See Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005).
162 Id. at 391-92.
163 Id. at 396-97.
164 See Padilla v. Hanft, 547 U.S. 1062 (2006) (Kennedy, J., concurring in the denial of certiorari). In August 2007, Padilla was convicted on several counts, including conspiracy to commit violence outside the United States.
166 Id. at 182 (emphasis in original).
167 In Hamdan, the Court held that the military commission system that President Bush had established after the September 11 attacks was invalid because it violated statutory requirements in the Uniform Code of Military Justice for the use of military commissions. These requirements included compliance with procedural
asserted in Al-Marri, Padilla was alleged to be affiliated primarily with al Qaeda, not the Taliban.\textsuperscript{168} If al Qaeda can in fact be the enemy for purposes of the detention analysis, then it is not clear that Milligan applies, at least in the way that it was interpreted by the Supreme Court in Quirin and by the plurality in Hamdi. As the dissenting judge explained in Al-Marri: “Milligan did not associate himself with a rebellious State with which the United States was at war. In this case, the unrebutted evidence shows that al-Marri associated himself with and became an agent of al Qaeda, the organization targeted by the AUMF and the enemy with which the United States is at war.”\textsuperscript{169} (In August 2007, the Fourth Circuit granted rehearing en banc in this case.)

If nothing else, a consideration of Milligan’s implications for the war on terrorism illustrates the limitations of judicial precedent. The implications of Milligan for military jurisdiction were unclear even at the time it was decided, a problem exacerbated by the particular way in which the government litigated the appeal. Applying the decision a century and a half later, not to an internal Civil War but to a global struggle against Islamic fundamentalists, in the wake of significant intervening precedent, leaves substantial room for judicial discretion. This discretion may in turn suggest the desirability of prompting Congress to regulate these important policy questions, especially after the immediate crisis has subsided.

\textit{Conclusion}

The Milligan decision illustrates a fundamental tension in the law governing presidential power that is still with us in the war in terrorism. In light of Milligan, as well as Duncan and Reid, it is settled that, except in emergency circumstances, the military lacks jurisdiction to try civilians for domestic crimes. The extent of military jurisdiction over violations of the laws of war by non-traditional combatants, however, is much less clear. In the Civil War, the boundaries between civilian and military jurisdiction were strained by the existence of guerilla fighters, saboteurs, and paramilitary conspiracies. These boundaries are under even greater strain in the war on terrorism, in light of the non-state character of the principal enemy.

Milligan was decided after the Civil War was over, and the majority opinion all but acknowledges that its decision may not have been possible during the war.\textsuperscript{170} The end of the war may have liberated the majority too much. The majority’s unnecessary statements about protections in the laws of war, which the Court said encompassed at least the minimum protections set forth in Common Article 3 of the Geneva Conventions. Common Article 3 applies to conflicts "not of an international character," and the Court reasoned that the conflict between the United States and al Qaeda qualified as such a conflict. See 126 S. Ct. at 2795-96. See also [chapter by Dawn Johnsen on Hamdan].

\textsuperscript{168} 423 F.3d at 389-90.

\textsuperscript{169} 487 F.3d at 198 (Hudson, J., dissenting).

\textsuperscript{170} See 71 U.S. at 109 (“During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Then, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated.”).
congressional power were heavily criticized at the time and are probably unrealistic as statements about how the law is likely to be applied by courts in times of crisis. John Burgess, who held the Lieber Chair of Political Science at Columbia University, stated in 1890 that “[i]t is devoutly to be hoped that the decision of the Court [in Milligan] may never be subjected to the strain of actual war. If, however, it should be, we may safely predict that it will necessarily be disregarded.”

Indeed, as discussed, the Supreme Court largely disregarded Milligan in Quirin, Korematsu, and Hamdi.

The political situation at the time of Milligan may also limit its contemporary relevance. In 1866, the branch of the federal government most likely to restrict civil liberties was the Reconstruction Congress, not the Executive, which may explain why the Supreme Court went out of its way to discuss limitations on Congress’s authority. President Johnson, by contrast, seemed to embrace the decision, only to be overridden (and almost removed from office) by the legislature. The threat to liberties came not from an aggrandizing Executive, but from an aggrandizing Congress. In the war on terrorism, by contrast, most commentators have assumed that it is Executive rather than Legislative power that is the principal threat to civil liberties.

Despite these limitations, Milligan is an important decision. It, along with Youngstown and Hamdan, provides a precedential counterweight to claims of unlimited government authority in wartime. Its insistence that “[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace,” even if overly idealistic, may inspire judges, if not to block government action entirely, then at least to insist on procedural limitations or clear congressional authorization. Indeed, this appears to be precisely the strategy that the Supreme Court has pursued in the war on terrorism.

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1 John W. Burgess, Political Science and Comparative Constitutional Law 251 (1891).

2 See also Edward S. Corwin, The President: Office and Powers 165 (1940) (“[Milligan] shows, to be sure, that two or three years after a grave emergency has been safely weathered and the country has reaped the benefit of the extraordinary measures which it evoked, a judicial remedy may be forthcoming for some of the individual grievances which these produced, and a few scoundrels like Milligan himself escape a deserved hangman’s noose – but it shows little more.”); Fairman, The Law of Martial Rule, at 1287 (“If the problem were to arise today it seems fair to assume that the Supreme Court would not hold to the letter of Justice Davis’ opinion.”); Clinton Rossiter, The Supreme Court and the Commander in Chief 35, 39 (1951) (“No justice has ever altered his opinion in a case of liberty against authority because counsel for liberty recited Ex parte Milligan . . . . [T]he law of the Constitution is what Lincoln did in the crisis, and not what the Court said later.”).

3 71 U.S. at 120.

4 In Hamdi, while allowing the military detention of a U.S. citizen, the plurality insisted that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens,” 542 U.S. at 536, and it imposed procedural requirements for the detention. In Hamdan, the Court broadly construed provisions in the Uniform Code of Military Justice as imposing limitations on the use of military commissions, and therefore required the President to obtain congressional authorization before deviating from those limitations (which Congress subsequently provided in the Military Commissions Act of 2006).