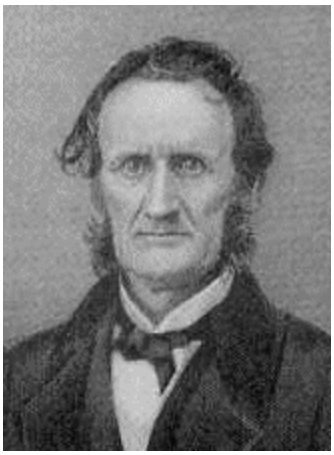
Ex Parte Milligan
1866



Lambdin P. Milligan

A Trial Account

In July of 1861, President Abraham Lincoln gave a speech to Congress in which he argued that in times of war the federal government must, in some cases, suspend the civil liberties of its citizens. Lincoln was concerns were most directed towards those who would conspire with the Confederate states to disrupt the Union's war efforts. Prior to this speech Lincoln had already been executing this plan by suspending the writ of habeas corpus in areas most at risk, beginning first with Maryland and Washington D.C. after issuing an executive order in April. Later the suspension would spread to other areas of the Union to allow the military to respond quickly to any possible threats to the nation's security. Congress would approve of Lincoln's actions in August of that year, and later in the War, they would pass the Habeas Act in March of 1863 which gave Lincoln more authority to suspend the writ of habeas corpus in an effort to protect national security. This act was a reinforcement of an executive order Lincoln had issued in September of 1862.

The suspension of this civil liberty was challenged first by John Merryman in May of 1861. Merryman had been arrested and accused of aiding the Confederacy by burning bridges in Maryland, thus preventing Union troops to move quickly into Washington D.C. to defend the city from an attack. Merryman was held in a military prison, but Merryman argued that he had the right to a trial in a federal court. In the case *Ex parte*

Merryman, Chief Justice Taney ruled that the President had no constitutional right to suspend the writ of habeas corpus, only Congress had such right, and thus ordered Merryman released from prison. Lincoln ignored the decision and then proceeded to get the support of Congress retroactively. In his address in July of 1861 he gained the support of Congress in order to justify the treatment Merryman. Merryman remained in prison but was never brought to trial.

Another attempt to challenge the federal government's suspension of the writ of habeas corpus occurred in Ohio in 1863. Clement Vallandigham was arrested for giving an anti-war speech and detained by and tried by a military commission. His appeal to the Supreme Court was denied. The Supreme Court stated that they had no jurisdiction, citing the Lieber Code created in 1863 to outline the jurisdiction of military tribunals.

In August of 1864 Union officials raided the printing shop of Harrison Dodd in Indiana. Dodd was the suspected ring leader of the Indiana faction of the Order of the Sons of Liberty. The Sons of Liberty were made up of "Butternuts" or "Copperheads" who sympathized with the Confederate causes. This paramilitary organization had previously been know as the Knights of the Golden Circle and later the Order of American Knights. During the raid the Union army found several boxes of ammunition. They placed Dodd and others under arrest. General Alvin Hovey created a 12 man military commission to hear cases against these men in September. Dodd managed to escape to Canada before the conclusion of his trial, where the Sons of Liberty were known to have received much of their financial backing. Five others were tried, however, by the commission including William Bowles, Horace Heffren, Stephen Horsey, Andrew Humphreys, and Lambdin Milligan. The groups was charged with conspiracy against the government of the United States and other war crimes centered on sympathizing with the enemy. The military court found the five men guilty and sentenced three of them to death, including Milligan.

Throughout the war Indiana had not seen much action. Besides an occasional raid by Confederates, the state had managed to stay safely in the hands of the Union. The Union government was fully functional in the state, including its federal court system. Milligan appealed to the U.S. circuit court in Indiana for a writ of habeas corpus. He believed his treatment had been unconstitutional and asked for a trial by jury in a civil court. He even appealed to Lincoln's Secreatay of war, Edwin Stanton whom Milligan had taken the bar together prior to the war

While awaiting to hear about his appeal, President Lincoln was assassinated and Andrew Johnson became president. Johnson issued a stay of execution then later amended the sentence to life in prison. The Supreme Court decided to hear the case after the Circuit Court for the District Indiana could not decide on three major questions. Judge David McDonald, the federal district judge for Indiana, and Justice David Davis of the Supreme Court asked the Supreme Court to decide whether or not the military commission had jurisdiction in this case and whether the federal government could suspend the rights guaranteed by the 5th and 6th amendments during wartime.

Arguments for the case, Ex parte Milligan began on March 6, 1866. By then the Civil War had been over for nearly a year. Attorney General James Speed led the group representing

the federal government. Among the counsel for Milligan was James A. Garfield, the future president of the United States. Speed argued that the rights of the constitution were granted in times of peace and that in times of war the most law of the land was the safety of the people. Garfield disagreed, stating that the rights of the Constitution could not be suspended and that such actions could threaten the existence of America.

The Court decided unanimously in favor of Milligan. Justice David Davis presented the opinion of the Court and Chief Justice Salmon Chase presenting a concurring opinion. Since the civilian courts in Indiana were fully operational and open, the military tribunal had no jurisdiction. To this point Chase disagreed. He believed that Congress did have the power to grant jurisdiction to military commissions even if the civilian courts were open. But since Indiana was not under any direct threat and had not been invaded by the enemy such power could not been granted in this case. Further, in such cases the court said that neither the President nor Congress had the power to suspend the rights given to citizens in the Fifth and Sixth amendments.

After being released, Milligan filed a civil suit against General Hovey for false imprisonment. He won the case, but was awarded only five dollars, a far cry from the $500,000 he had sought. Milligan returned home to Huntington, Indiana to practice law.

CHRONOLOGY

August, 1835	Belton County in Eastern Ohio, Lambdin P. Milligan and Edwin M. Stanton pass the law exam and are admitted to the bar.
April, 1861	Lincoln suspends Habeas Corpus
September 22, 1862	Lincoln issues Emancipation Proclamation
September 24, 1862	Lincoln announces martial law and trial in military courts for persons discouraging volunteer enlistments, or guilty of disloyal practice, overriding civil courts
October 1863	Milligan allegedly conspires with Indiana Copperheads to overthrow government.
October 5, 1864	Milligan arrested in his home.
October 21, 1864	Milligan is brought before a military commission in Indianapolis.
April 9, 1865	Surrender at Appomattox Court House. The Civil War ends.
May 10, 1865	Milligan appeals his sentence on the grounds that a civilian grand jury heard evidence against him and failed to indict.
May 19, 1865	Milligan sentenced to hang on this date. Luckily for Milligan, the Civil war had ended.
March 1866	ExParte Milligan argued in the Supreme Court
April 3, 1866	Ex Parte Milligan case decided in Washington, D.C.
April 12, 1866	Milligan and co conspirators released

BIOGRAPHIES OF IMPORTANT PARTICIPANTS

The Order of American Knights

The Order of American Knights was a copperhead paramilitary organization that was active during the Civil War Era. The organization, formerly known as the Knights of the Golden Circle was sometimes referred to as the Sons of Liberty. While the members often met clandestinely, the organization was of no secret to the press, the citizenry and to politicians both north and south of the Ohio River.

Rumors circulated in 1864 that the Confederate sympathizers in the Order of American Knights were conspiring to free southern prisoners of war held in northern prisons. In Ohio, the conspirators hoped to capture the *Michigan*, a gun boat on Lake Erie. They were scheming to use the boat to help free Rebel prisoners held at Johnson's Island. The freed prisoners would then form a new Confederate army that would operate in the heart of the North. This plan, and many similar plans, never materialized.

Lambdin P. Milligan was an officer in the Order of American Knights. His Indiana outfit plotted to free Confederate soldiers locked up in Indiana prisons. The freed prisoners would then seize an arsenal and wreak havoc in the Hoosier State. The Knights is named in the case against Milligan, described as an organization whose purpose is to overthrow the government and to conspire with the enemy.

Salmon P. Chase

Salmon P. Chase was admitted to the bar in 1829 and began practice in Cincinnati, Ohio, in 1830. Elected to the Senate in 1849 as a member of the Free Soil Party, Chase served until 1855. He was elected governor of Ohio as a Free Soiler but reelected as a member of the party of Lincoln. In 1860, he was elected to the United States Senate only to resign two days later to become the Secretary of the Treasury under Lincoln.

In Cincinnati, Chase became involved with more than his legal practice. A deeply religious man, he became involved in temperance affairs. He was also associated with abolitionism and defended editor James Birney, who had been arrested for aiding runaway slaves. Chase soon began to defend runaway slaves themselves and believed that Africans deserved freedom and civil rights.

During Chase's time as Secretary of the Treasury, he became known as "Old Mr. Greenbacks" for placing his face on the one dollar bill. His challenge as Secretary was to find a way to finance the Civil War. Chase sought the nomination for the office of President in 1860 and 1864 and lost to Lincoln both times. This may have led to disagreements between the President and the Secretary. In spite of these contentious feelings, Lincoln respected Chase and nominated him to replace Roger Taney as Chief Justice after his death in 1864.

Chase was busy as a Supreme Court justice. He administered the oath of office to Andrew Johnson and later presided over his impeachment trial. He confirmed the pardon of Confederate President Jefferson Davis in 1868. Chase presided over the Milligan case which challenged the right of military courts to hear cases against civilians. In this case, Chase argued that Congress intended to insure civil trials when it adopted the Habeas Corpus Act of 1863 and thusly Milligan had been wrongly tried. Other cases presided over by Chase include Ex parte Garland and Cummings v. Missouri, both in 1867. These cases overturned laws that required loyalty oaths from Southerners. Chase was the only justice to dissent in a case involving the right of women to practice law. The court ruled that states that did not allow women to practice law were not in violation of the 14th Amendment.

After suffering a stroke and other medical issues, Chase died in 1873.

Lambdin P. Milligan

Lambdin P. Milligan studied law in Ohio and moved to Huntington County, Indiana after passing the bar. Milligan had success as a lawyer and became a popular figure among his peers. He hosted dinners for local politicians and dignitaries and through his practice, represented the interest of railroad companies. He was a supporter of states rights, a democrat and admired the ideas and work of Thomas Jefferson. .

At the eve of the Civil War, Milligan's southern sympathies were known to the press and to politicians. When Indiana Governor Morton answered Lincoln's calls for more volunteers for the Union army, Milligan discouraged enlistments. Milligan's opposition to the war attracted attention in Indiana and according to Alan Nevins article "*The Case of the Copperhead Conspirator,"* the Indianapolis Journal castigated Milligan in "burning terms."

Milligan rode the wave of sectional politics. He loudly protested the Civil War and became known for his membership in the Copperhead group, the Order of American Knights. The Knights called for an immediate end to the Civil War. Privately, they allegedly conspired to overthrow the government, attack northern prison camps to release southern prisoners and wreak havoc in the North. Lambdin Milligan was a ranking official in the Knights.

Milligan was followed by federal agents. They watched for any support he may give to the cause of the Northwestern Confederacy. On October 5th, 1864, Milligan was arrested from his home for his involvement in a conspiracy to free Confederate soldiers from Indiana prison camps. The arresting order was given by major General Hovey, the military commandant of the District of Indiana. The charges against Milligan included conspiracy against the government, affording aid and comfort to the enemy, inciting insurrection, disloyal practices and violating the rules of war.

On October 21st, 1864, Milligan was tried in a military court and sentenced, along with conspirators, to hang. The Secretary of War, Edwin M. Stanton attended school with Milligan and the unlikely pair graduated from the same class.

Milligan appealed his case. The Supreme Court ruled that military courts could not try civilians in areas where civil courts were open. After being spared his life by the court, Milligan returned to his law practice in Indiana.

David Davis

After studying law at Massachusetts and at Yale University, David Davis moved to Bloomington, Illinois to practice law. Davis was a lawyer, judge and a politician, serving in the Illinois state house, attending the republican Convention as a delegate in 1860 and serving as Lincoln's campaign manager. Davis also presided over the 8th Circuit court in Illinois, the same circuit where Lincoln practiced. The two men traveled the circuit together, and Davis heard 87 cases tried by Lincoln without a jury. Davis decided 47 of those cases against Lincoln. Davis was considered a close friend of Lincoln and would not hesitate to offer advice or ask for favors. After Lincoln's assassination, Davis served as his estates administrator.

In 1862, Lincoln appointed Davis to the United States Supreme Court. Davis wrote the opinion for the court in the Ex Parte Milligan case. In this case, Davis took the position that the constitution prohibited military trials of civilians where civil courts remained open. Martial law, Davis wrote, was only permissible "in the theater of active military operations." Davis emphasized that the Constitution was not suspended in the time of emergency. Davis noted that the Constitution was "a law for rulers and people equally in time of war and peace."

Benjamin Butler

Benjamin Butler studied law at Waterville College in Maine and was admitted to the bar in 1840. After becoming a member of the state house of Massachusetts in 1853 and the state senate in 1859, he was a delegate to the Democratic national conventions both in Baltimore and Charleston in 1860. Butler supported John Breckenridge in the election of 1860.

Butler entered the Union army in 1861as a brigadier general and was quickly promoted to major general. He was assigned to the command of Fort Monroe in Virginia. Soon, runaway slaves began to appear at Butler's doorstep. The runaways, seeking protection, helped catapult Butler into a national figure. When slave owners demanded the return of their property under Fugitive Slave Laws, Butler refused on the grounds that he considered the slaves to be contraband of war. Butler was one of the few generals who advocated the recruitment of African Americans to the Union army.

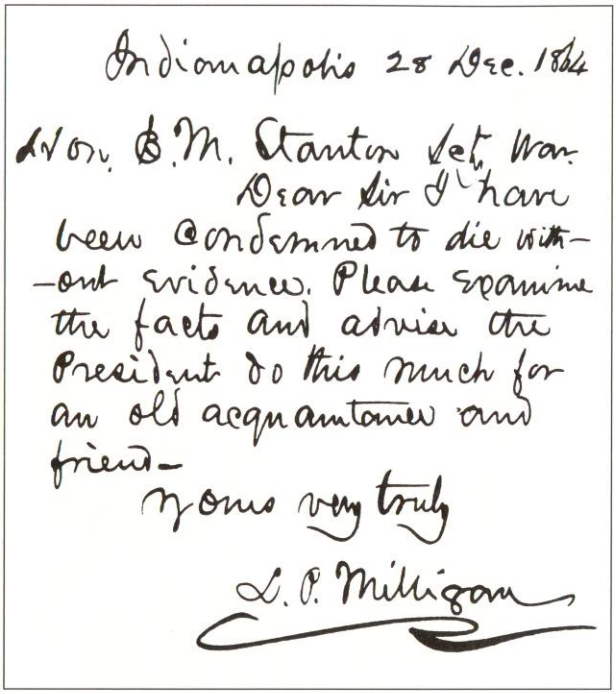
Benjamin Butler continued to make headlines when he was sent to the Mississippi coast in 1862. He was nicknamed "The Beast" by the citizens of the Crescent City, due to his

alleged harsh treatment of citizens and captured Rebel soldiers. Butler's image is known to be painted on chamber pots for issuing General Orders 28, threatening to treat women who made contemptuous remarks and gestures to Union soldiers as common whores. Confederate President Jefferson Davis issued a statement that Butler be treated as an outlaw for inciting African slaves to insurrection, and ordered that Butler be hung immediately upon capture.

Butler had established a track record for the treatment of insurgents and rebels. In the Milligan trial, Butler argued that the government was gentle in its treatment of civil liberties during the War Between the States. He believed that in time of war, the government should have increased power when dealing in matters of national security.

After the war, Butler associated himself with the Radical Republicans. Butler argued in Congress that Southern plantations should be taken from their owners and given to former slaves. He supported the plight of former slaves, Irish immigrants and fought against the rise of the Ku Klux Klan.

SELECTED IMAGES



Indianapolis 28 Dec. 1864

Hon. E. M. Stanton Sec. War

Dear Sir I have been condemned to die without evidence. Please examine the facts and advise the President do this much for an old acquaintance and friend—

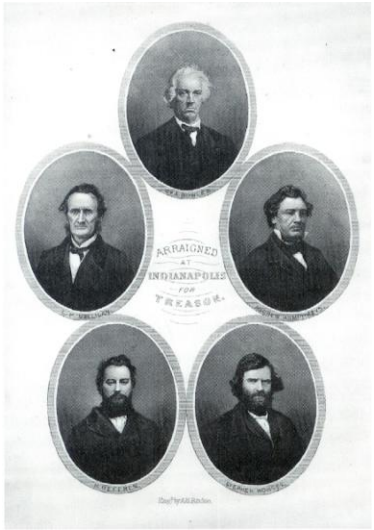
Yours very truly

L. P. Milligan

Letter written from Lambdin P. Milligan to Secretary of War Edwin Stanton from his prison cell in Indiana. Milligan asked Stanton to help him get his appeal heard. The two had previously met while taking the bar exam prior to the Civil War.

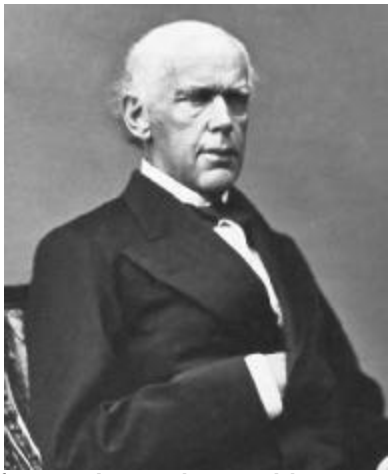
Photo of the military commission who convicted Milligan and four others.

Lambdin P. Milligan

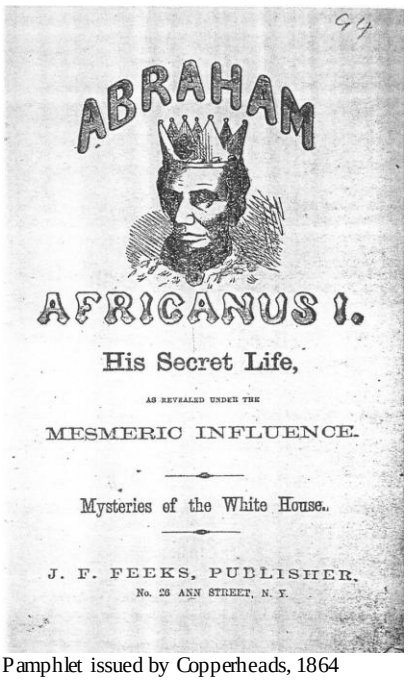


Clockwise starting from top: Bowles, Humphreys, Horsey, Heffren, and Milligan. These five men were tried and convicted by the 12 member military commission.

Supreme Court Justice David Davis issued the majority opinion



Chief Justice Salmon P. Chase issued the concurring opinion



Pamphlet issued by Copperheads, 1864

Political Cartoon showing Republican response to Copperheads. First published in 1863

Harper's Weekly August 1863 depicting Morgan's Raid in Ohio thought to be orchestrated by the Knights of the Golden Circle. The Raid also ran through Indiana. The Knights of the Golden Cirlce were the predecessors of the Sons of Liberty of which Lambdin P. Milligan was accused to be apart of in 1865.

OPINIONS OF THE SUPREME COURT

DAVIS, J., Opinion of the Court

Mr. Justice DAVIS delivered the opinion of the court.

On the 10th day of May, 1865, Lambdin P. Milligan presented a petition to the Circuit Court of the United States for the District of Indiana to be discharged from an alleged unlawful imprisonment. The case made by the petition is this: Milligan is a citizen of the United States; has lived for twenty years in Indiana, and, at the time of the grievances complained of, was not, and never had been, in the military or naval service of the United States. On the 5th day of October, 1864, while at home, he was arrested by order of General Alvin P. Hovey, commanding the military district of Indiana, and has ever since been kept in close confinement.

On the 21st day of October, 1864, he was brought before a military commission, convened at Indianapolis by order of General Hovey, tried on certain charges and specifications, found guilty, and sentenced to be hanged, and the sentence ordered to be executed on Friday, the 19th day of May, 1865.

On the 2d day of January, 1865, after the proceedings of the military commission were at an end, the Circuit Court of the United States for Indiana met at Indianapolis and empaneled a grand jury, who were charged to inquire [p108] whether the laws of the United States had been violated. and, if so, to make presentments. The court adjourned on the 27th day of January, having, prior thereto, discharged from further service the grand jury, who did not find any bill of indictment or make any presentment against Milligan for any offence whatever, and, in fact, since his imprisonment, no bill of indictment has been found or presentment made against him by any grand jury of the United States.

Milligan insists that said military commission had no jurisdiction to try him upon the charges preferred, or upon any charges whatever, because he was a citizen of the United States and the State of Indiana, and had not been, since the commencement of the late Rebellion, a resident of any of the States whose citizens were arrayed against the government, and that the right of trial by jury was guaranteed to him by the Constitution of the United States.

The prayer of the petition was that, under the act of Congress approved March 3d, 1863, entitled, "An act relating to habeas corpus and regulating judicial proceedings in certain cases," he may be brought before the court and either turned over to the proper civil tribunal to be proceeded against according to the law of the land or discharged from custody altogether.

With the petition were filed the order for the commission, the charges and specifications, the findings of the court, with the order of the War Department reciting that the sentence was approved by the President of the United States, and directing that it be carried into execution without delay. The petition was presented and filed in open court by the counsel for Milligan; at the same time, the District Attorney of the United States for Indiana appeared and, by the agreement of counsel, the application was submitted to the court. The opinions of the judges of the Circuit Court were opposed on three questions, which are certified to the Supreme Court:

1st. "On the facts stated in said petition and exhibits, ought a writ of habeas corpus to be issued?" [p109]

2d. "On the facts stated in said petition and exhibits, ought the said Lambdin P. Milligan to be discharged from custody as in said petition prayed?"

3d. "Whether, upon the facts stated in said petition and exhibits, the military commission mentioned therein had jurisdiction legally to try and sentence said Milligan in manner and form as in said petition and exhibits is stated?"

The importance of the main question presented by this record cannot be overstated, for it involves the very framework of the government and the fundamental principles of American liberty.

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. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment. We approach the investigation of this case fully sensible of the magnitude of the inquiry and the necessity of full and cautious deliberation.

But we are met with a preliminary objection. It is insisted that the Circuit Court of Indiana had no authority to certify these questions, and that we are without jurisdiction to hear and determine them.

The sixth section of the "Act to amend the judicial system of the United States," approved April 29, 1802, declares

that whenever any question shall occur before a Circuit Court upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the judges and certified under the seal of the court to the Supreme Court at their next session to be held thereafter, and shall by the said court be finally decided, and the decision of the **[p110]** Supreme Court and their order in the premises shall be remitted to the Circuit Court and be there entered of record, and shall have effect according to the nature of the said judgment and order: *Provided*, That nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, further proceedings can be had without prejudice to the merits.

It is under this provision of law that a Circuit Court has authority to certify any question to the Supreme Court for adjudication. The inquiry, therefore, is, whether the case of Milligan is brought within its terms.

It was admitted at the bar that the Circuit Court had jurisdiction to entertain the application for the writ of habeas corpus and to hear and determine it, and it could not be denied, for the power is expressly given in the 14th section of the Judiciary Act of 1789, as well as in the later act of 1863. Chief Justice Marshall, in Bollman's case,[n5] construed this branch of the Judiciary Act to authorize the courts as well as the judges to issue the writ for the purpose of inquiring into the cause of the commitment, and this construction has never been departed from. But it is maintained with earnestness and ability that a certificate of division of opinion can occur only in a *cause*, and that the proceeding by a party moving for a writ of habeas corpus does not become a cause *until after the writ has been issued and a return made*.

Independently of the provisions of the act of Congress of March 3, 1863, relating to habeas corpus, on which the petitioner bases his claim for relief and which we will presently consider, can this position be sustained?

It is true that it is usual for a court, on application for a writ of habeas corpus, to issue the writ, and, on the return, to dispose of the case, but the court can elect to waive the issuing of the writ and consider whether, upon the facts presented in the petition, the prisoner, if brought before it, could be

discharged. One of the very points on which the case of Tobias Watkins, reported in 3 Peters,[n6] turned was [p111] whether, if the writ was issued, the petitioner would be remanded upon the case which he had made.

The Chief Justice, in delivering the opinion of the court, said:

The cause of imprisonment is shown as fully by the petitioner as it could appear on the return of the writ; consequently, the writ ought not to be awarded if the court is satisfied that the prisoner would be remanded to prison.

The judges of the Circuit Court of Indiana were therefore warranted by an express decision of this court in refusing the writ if satisfied that the prisoner. on his own showing. was rightfully detained.

But, it is contended, if they differed about the lawfulness of the imprisonment, and could render no judgment, the prisoner is remediless, and cannot have the disputed question certified under the act of 1802. His remedy is complete by writ of error or appeal, if the court renders a final judgment refusing to discharge him; but if he should be so unfortunate as to be placed in the predicament of having the court divided on the question whether he should live or die, he is hopeless, and without remedy. He wishes the vital question settled not by a single judge at his chambers, but by the highest tribunal known to the Constitution, and yet the privilege is denied him because the Circuit Court consists of two judges, instead of one.

Such a result was not in the contemplation of the legislature of 1802, and the language used by it cannot be construed to mean any such thing. The clause under consideration was introduced to further the ends of justice by obtaining a speedy settlement of important questions where the judges might be opposed in opinion.

The act of 1802 so changed the judicial system that the Circuit Court, instead of three, was composed of two judges, and, without this provision or a kindred one, if the judges differed, the difference would remain, the question be unsettled, and justice denied. The decisions of this court upon the provisions of this section have been numerous. In *United States v. Daniel*,[n7] the court, in holding that a division [p112] of the judges on a motion for a new trial could not be certified, say: "That the question must be one which arises in a cause depending before the court relative to a proceeding belonging to the cause." Testing Milligan's case by this rule of law, is it not apparent that it is rightfully here, and that we are compelled to answer the questions on which the judges below were opposed in opinion? If, in the sense of the law, the proceeding for the writ of habeas corpus was the "*cause*" of the party applying for it, then it is evident that the "cause" was pending before the court, and that the questions certified arose out of it, belonged to it, and were matters of right, and not of discretion.

But it is argued that the proceeding does not ripen into a cause until there are two parties to it.

This we deny. It was the *cause* of Milligan when the petition was presented to the Circuit Court. It would have been the *cause* of both parties if the court had issued the writ and brought those who held Milligan in custody before it. Webster defines the word "cause" thus: "A suit or action in court; any legal process which a party institutes to obtain his demand, or by which he seeks his right, or supposed right" -- and he says,

this is a legal, scriptural, and popular use of the word, coinciding nearly with case, from *cado*, and action, from *ago*, to urge and drive.

In any legal sense, action, suit, and cause, are convertible terms. Milligan supposed he had a right to test the validity of his trial and sentence, and the proceeding which he set in operation for that purpose was his "cause" or "suit." It was the only one by which he could recover his liberty. He was

powerless to do more; he could neither instruct the judges nor control their action, and should not suffer, because, without fault of his, they were unable to render a judgment. But the true meaning to the term "suit" has been given by this court. One of the questions in *Weston v. City Council of Charleston*,[n8] was whether a writ of prohibition was a suit, and Chief Justice Marshall says:

The **[p113]** term is certainly a comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords him.

Certainly Milligan pursued the only remedy which the law afforded him.

Again, in *Cohens v. Virginia*,[n9] he says: "In law language, a suit is the prosecution of some demand in a court of justice." Also,

To commence a suit is to demand something by the institution of process in a court of justice, and to prosecute the suit is to continue that demand.

When Milligan demanded his release by the proceeding relating to habeas corpus, he commenced a suit, and he has since prosecuted it in all the ways known to the law. One of the questions in *Holmes v. Jennison, et al.*,[n10] was whether, under the 25th section of the Judiciary Act, a proceeding for a writ of habeas corpus was a "suit." Chief Justice Taney held that,

if a party is unlawfully imprisoned, the writ of habeas corpus is his appropriate legal remedy. It is his suit in court to recover his liberty.

There was much diversity of opinion on another ground of jurisdiction, but that, in the sense of the 25th section of the Judiciary Act, the proceeding by habeas corpus was a suit was not controverted by any except Baldwin, Justice, and he thought that "suit" and "cause," as used in the section, mean the same thing.

The court do not say that a return must be made and the parties appear and begin to try the case before it is a suit. When the petition is filed and the writ prayed for, it is a *suit* -- the suit of the party making the application. If it is a suit under the 25th section of the Judiciary Act when the proceedings are begun, it is, by all the analogies of the law, equally a suit under the 6th section of the act of 1802.

But it is argued that there must be two parties to the suit, because the point is to be stated upon the request of "either party or their counsel."

Such a literal and technical construction would defeat the very purpose the legislature had in view, which was to enable [p114] any party to bring the case here when the point in controversy was a matter of right, and not of discretion, and the words "either party," in order to prevent a failure of justice, must be construed as words of enlargement, and not of restriction. Although this case is here *ex parte*, it was not considered by the court below without notice having been given to the party supposed to have an interest in the detention of the prisoner. The statements of the record show that this is not only a fair, but conclusive, inference. When the counsel for Milligan presented to the court the petition for the writ of habeas corpus, Mr. Hanna, the District Attorney for Indiana, also appeared, and, by agreement, the application was submitted to the court, who took the case under advisement, and on the next day announced their inability to agree, and made the certificate. It is clear that Mr. Hanna did not represent the petitioner, and why is his appearance entered? It admits of no other solution than this -- that he was informed of the application, and appeared on behalf of the government to contest it. The government was the prosecutor of Milligan, who claimed that his imprisonment was illegal and sought, in the only way he could, to recover his liberty. The case was a grave one, and the court unquestionably directed that the law officer of the government should be informed of it. He very properly appeared, and, as the facts were uncontroverted and the difficulty was in the application of the law, there was no useful purpose to be obtained in issuing the writ. The cause was therefore submitted to the court for their consideration and determination.

But Milligan claimed his discharge from custody by virtue of the act of Congress "relating to habeas corpus, and regulating judicial proceedings in certain cases," approved March 3d, 1863. Did that act confer jurisdiction on the Circuit Court of Indiana to hear this case?

In interpreting a law, the motives which must have operated with the legislature in passing it are proper to be considered. This law was passed in a time of great national peril, when our heritage of free government was in danger. [p115] An armed rebellion against the national authority, of greater proportions than history affords an example of, was raging, and the public safety required that the privilege of the writ of habeas corpus should be suspended. The President had practically suspended it, and detained suspected persons in custody without trial, but his authority to do this was questioned. It was claimed that Congress alone could exercise this power, and that the legislature, and not the President, should judge of the political considerations on which the right to suspend it rested. The privilege of this great writ had never before been withheld from the citizen, and, as the exigence of the times demanded immediate action, it was of the highest importance that the lawfulness of the suspension should be fully established. It was under these circumstances, which were such as to arrest the attention of the country, that this law was passed. The President was authorized by it to suspend the privilege of the writ of habeas corpus whenever, in his judgment, the public safety required, and he did, by proclamation, bearing date the 15th of September, 1863, reciting, among other things, the authority of this statute, suspend it. The suspension of the writ does not authorize the arrest of anyone, but simply denies to one arrested the privilege of this writ in order to obtain his liberty.

It is proper therefore to inquire under what circumstances the courts could rightfully refuse to grant this writ, and when the citizen was at liberty to invoke its aid.

The second and third sections of the law are explicit on these points. The language used is plain and direct, and the meaning of the Congress cannot be mistaken. The public safety demanded, if the President thought proper to arrest a suspected person, that he should not be required to give the cause of his detention on return to a writ of habeas corpus. But it was not contemplated that such person should be detained in custody beyond a certain fixed period unless certain judicial proceedings, known to the common law, were commenced against him. The Secretaries of State and War were directed to furnish to the judges of the courts of the [p116] United States a list of the names of all parties, not prisoners of war, resident in their respective jurisdictions, who then were or afterwards should be held in custody by the authority of the President, and who were citizens of states in which the administration of the laws in the Federal tribunals was unimpaired. After the list was furnished, if a grand jury of the district convened and adjourned, and did not indict or present one of the persons thus named, he was entitled to his discharge, and it was the duty of the judge of the court to order him brought before him to be discharged if he desired it. The refusal or omission to furnish the list could not operate to the injury of anyone who was not indicted or presented by the grand jury, for, if twenty days had elapsed from the time of his arrest and the termination of the session of the grand jury, he was equally entitled to his discharge as if the list were furnished, and any credible person, on petition verified by affidavit, could obtain the judge's order for that purpose.

Milligan, in his application to be released from imprisonment, averred the existence of every fact necessary under the terms of this law to give the Circuit Court of Indiana jurisdiction. If he was detained in custody by the order of the President otherwise than as a prisoner of war, if he was a citizen of Indiana and had never been in the military or naval service, and the grand jury of the district had met, after he had been arrested, for a period of twenty days, and adjourned without taking any proceedings against him, then the court had the right to entertain his petition and determine the lawfulness of his imprisonment. Because the word "court" is not found in the body of the second section, it was argued at the bar that the application should have been made to a judge of the court, and not to the court itself; but this is not so, for power is expressly conferred in the last proviso of the section on the court equally with a judge of it to discharge from imprisonment. It was the manifest design of Congress to secure a certain remedy by which anyone deprived of liberty could obtain it if there was a judicial failure to find cause of offence against him. Courts are [p117] not, always in session, and can adjourn on the discharge of the grand jury, and before those who are in confinement could take proper steps to procure their liberation. To provide for this

contingency, authority was given to the judges out of court to grant relief to any party who could show that, under the law, he should be no longer restrained of his liberty.

It was insisted that Milligan's case was defective because it did not state that the list was furnished to the judges, and therefore it was impossible to say under which section of the act it was presented.

It is not easy to see how this omission could affect the question of jurisdiction. Milligan could not know that the list was furnished, unless the judges volunteered to tell him, for the law did not require that any record should be made of it or anybody but the judges informed of it. Why aver the fact when the truth of the matter was apparent to the court without an averment? How can Milligan be harmed by the absence of the averment when he states that he was under arrest for more than sixty days before the court and grand jury, which should have considered his case, met at Indianapolis? It is apparent therefore that, under the Habeas Corpus Act of 1863, the Circuit Court of Indiana had complete jurisdiction to adjudicate upon this case, and, if the judges could not agree on questions vital to the progress of the cause, they had the authority (as we have shown in a previous part of this opinion), and it was their duty, to certify those questions of disagreement to this court for final decision. It was argued that a final decision on the questions presented ought not to be made, because the parties who were directly concerned in the arrest and detention of Milligan were not before the court, and their rights might be prejudiced by the answer which should be given to those questions. But this court cannot know what return will be made to the writ of habeas corpus when issued, and it is very clear that no one is concluded upon any question that may be raised to that return. In the sense of the law of 1802 which authorized a certificate of division, a final decision [p118] means final upon the points certified, final upon the court below, so that it is estopped from any adverse ruling in all the subsequent proceedings of the cause.

But it is said that this case is ended, as the presumption is that Milligan was hanged in pursuance of the order of the President.

Although we have no judicial information on the subject, yet the inference is that he is alive, for otherwise learned counsel would not appear for him and urge this court to decide his case. It can never be, in this country of written constitution and laws, with a judicial department to interpret them, that any chief magistrate would be so far forgetful of his duty as to order the execution of a man who denied the jurisdiction that tried and convicted him after his case was before Federal judges with power to decide it, who, being unable to agree on the grave questions involved, had, according to known law, sent it to the Supreme Court of the United States for decision. But even the suggestion is injurious to the Executive, and we dismiss it from further consideration. There is therefore nothing to hinder this court from an investigation of the merits of this controversy.

The controlling question in the case is this: upon the facts stated in Milligan's petition and the exhibits filed, had the military commission mentioned in it jurisdiction legally to try and sentence him? 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?

No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole [p119] people, for it is the birthright of every American citizen when charged with crime to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and, if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be or how much his crimes may have shocked the sense of justice of the country or endangered its safety. By the protection of the law, human rights are secured; withdraw that protection and they are at the mercy of wicked rulers or the clamor of an excited people. If there was law to justify this military trial, it is not our province to interfere; if there was

not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle, and secured in a written constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it, this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct to leave room for misconstruction or doubt of their true meaning. Those applicable to this case are found in that clause of the original Constitution which says "That the trial of all crimes, except in case of impeachment, shall be by jury," and in the fourth, fifth, and sixth articles of the amendments. The fourth proclaims the right to be secure in person and effects against unreasonable search and seizure, and directs that a judicial warrant shall not issue "without proof of probable cause supported by oath or affirmation." The fifth declares

that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor be deprived **[p120]** of life, liberty, or property without due process of law.

And the sixth guarantees the right of trial by jury, in such manner and with such regulations that, with upright judges, impartial juries, and an able bar, the innocent will be saved and the guilty punished. It is in these words:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

These securities for personal liberty thus embodied were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that, when the original Constitution was proposed for adoption, it encountered severe opposition, and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.

Time has proven the discernment of our ancestors, for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper, and that the principles of constitutional liberty would be in peril unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times [p121] and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false, for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority.

Have any of the rights guaranteed by the Constitution been violated in the case of Milligan?, and, if so, what are they?

Every trial involves the exercise of judicial power, and from what source did the military commission that tried him derive their authority? Certainly no part of judicial power of the country was conferred on them, because the Constitution expressly vests it "in one supreme court and such inferior courts as the Congress may from time to time ordain and establish," and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President, because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws, and there is "no unwritten criminal code to which resort can be had as a source of jurisdiction."

But it is said that the jurisdiction is complete under the "laws and usages of war."

It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they 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 court has judicial knowledge that, in Indiana, the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances, and no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life in nowise [p122] connected with the military service. 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. One of the plainest constitutional provisions was therefore infringed when Milligan was tried by a court not ordained and established by Congress and not composed of judges appointed during good behavior.

Why was he not delivered to the Circuit Court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it, because Congress had declared penalties against the offences charged, provided for their punishment, and directed that court to hear and determine them. And soon after this military tribunal was ended, the Circuit Court met, peacefully transacted its business, and adjourned. It needed no bayonets to protect it, and required no military aid to execute its judgments. It was held in a state, eminently distinguished for patriotism, by judges commissioned during the Rebellion, who were provided with juries, upright, intelligent, and selected by a marshal appointed by the President. The 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. If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty because he "conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection," the law said arrest him, confine him closely, render him powerless to do further mischief, and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended.

Another guarantee of freedom was broken when Milligan was denied a trial by jury. The great minds of the country [p123] have differed on the correct interpretation to be given to various provisions of the Federal Constitution, and judicial decision has been often invoked to settle their true meaning; but, until recently, no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is *now* assailed, but 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 everyone accused of crime who is not attached to the army or navy or militia in actual service. The sixth amendment affirms that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury," language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment or presentment before anyone can be held to answer for high crimes, "*excepts* cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger," and the framers of the Constitution doubtless meant to limit the right of trial by jury in the sixth amendment to those persons who were subject to indictment or presentment in the fifth.

The discipline necessary to the efficiency of the army and navy required other and swifter modes of trial than are furnished by the common law courts, and, in pursuance of the power conferred by

the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or naval service. Everyone connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. *All other persons,* citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is 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. When peace prevails, and the authority of the government is undisputed, [p124] there is no difficulty of preserving the safeguards of liberty, for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion -- if the passions of men are aroused and the restraints of law weakened, if not disregarded -- these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.

It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that, in a time of war, the commander of an armed force (if, in his opinion, the exigencies of the country demand it, and of which he is to judge) has the power, within the lines of his military district, to suspend all civil rights and their remedies and subject citizens, as well as soldiers to the rule of *his will,* and, in the exercise of his lawful authority, cannot be restrained except by his superior officer or the President of the United States.

If this position is sound to the extent claimed, then, when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons as he thinks right and proper, without fixed or certain rules.

The statement of this proposition shows its importance, for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law established on such a basis destroys every guarantee of the Constitution, and effectually renders the "military independent of and superior to the civil power" -- the attempt to do which by the King of Great Britain was deemed by our fathers such an offence that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure [p125] together; the antagonism is irreconcilable, and, in the conflict, one or the other must perish.

This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln, and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew -- the history of the world told them -- the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued human foresight could not tell, and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this and other equally weighty reasons, they secured the inheritance they had fought to maintain by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President or Congress or the Judiciary disturb, except the one concerning the writ of habeas corpus.

It is essential to the safety of every government that, in a great crisis like the one we have just passed through, there should be a power somewhere of suspending the writ of habeas corpus. In every war, there are men of previously good character wicked enough to counsel their fellow-citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies, and their influence may lead to dangerous combinations. In the emergency of the times, an immediate public investigation according to law may not be possible, and yet the period to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands

that the government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the persons arrested [p126] in answer to a writ of habeas corpus. The Constitution goes no further. It does not say, after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of the common law; if it had intended this result, it was easy, by the use of direct words, to have accomplished it. The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable. But it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so.

It will be borne in mind that this is not a question of the power to proclaim martial law when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on states in rebellion to cripple their resources and quell the insurrection. The jurisdiction claimed is much more extensive. The necessities of the service during the late Rebellion required that the loyal states should be placed within the limits of certain military districts and commanders appointed in them, and it is urged that this, in a military sense, constituted them the theater of military operations, and as, in this case, Indiana had been and was again threatened with invasion by the enemy, the occasion was furnished to establish martial law. The conclusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On her soil there was no hostile foot; if once invaded, that invasion was at an end, and, with [p127] it, all pretext for martial law. Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present, the invasion real, such as effectually closes the courts and deposes the civil administration.

It is difficult to see how the *safety* for the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as a military tribunal, and as there could be no wish to convict except on sufficient legal evidence, surely an ordained and establish court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law.

It follows from what has been said on this subject that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society, and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration, for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion, it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed and justice was always administered. And so, in the case of a foreign invasion, martial rule may become a necessity in one state when, in another, it would be "mere lawless violence." [p128]

We are not without precedents in English and American history illustrating our views of this question, but it is hardly necessary to make particular reference to them.

From the first year of the reign of Edward the Third, when the Parliament of England reversed the attainder of the Earl of Lancaster because he could have been tried by the courts of the realm, and declared

that, in time of peace, no man ought to be adjudged to death for treason or any other offence without being arraigned and held to answer, and that regularly when the king's courts are open it is a time of peace in judgment of law,

down to the present day, martial law, as claimed in this case, has been condemned by all respectable English jurists as contrary to the fundamental laws of the land and subversive of the liberty of the subject.

During the present century, an instructive debate on this question occurred in Parliament, occasioned by the trial and conviction by court-martial, at Demerara, of the Rev. John Smith, a missionary to the negroes, on the alleged ground of aiding and abetting a formidable rebellion in that colony. Those eminent statesmen Lord Brougham and Sir James Mackintosh participated in that debate, and denounced the trial as illegal because it did not appear that the courts of law in Demerara could not try offences, and that, "when the laws can act, every other mode of punishing supposed crimes is itself an enormous crime."

So sensitive were our Revolutionary fathers on this subject, although Boston was almost in a state of siege, when General Gage issued his proclamation of martial law, they spoke of it as an "attempt to supersede the course of the common law, and, instead thereof, to publish and order the use of martial law." The Virginia Assembly also denounced a similar measure on the part of Governor Dunmore

as an assumed power which the king himself cannot exercise, because it annuls the law of the land and introduces the most execrable of all systems, martial law.

In some parts of the country, during the war of 1812, our officers made arbitrary arrests and, by military tribunals, tried citizens who were not in the military service. These arrests [p129] and trials, when brought to the notice of the courts, were uniformly condemned as illegal. The cases of *Smith v. Shaw* and *McConnell v. Hampden* (reported in 12 Johnson[n11]) are illustrations, which we cite not only for the principles they determine but on account of the distinguished jurists concerned in the decisions, one of whom for many years occupied a seat on this bench.

It is contended, that *Luther v. Borden*, decided by this court, is an authority for the claim of martial law advanced in this case. The decision is misapprehended. That case grew out of the attempt in Rhode Island to supersede the old colonial government by a revolutionary proceeding. Rhode Island, until that period, had no other form of local government than the charter granted by King Charles II in 1663, and, as that limited the right of suffrage, and did not provide for its own amendment, many citizens became dissatisfied because the legislature would not afford the relief in their power, and, without the authority of law, formed a new and independent constitution and proceeded to assert its authority by force of arms. The old government resisted this, and, as the rebellion was formidable, called out the militia to subdue it and passed an act declaring martial law. Borden, in the military service of the old government, broke open the house of Luther, who supported the new, in order to arrest him. Luther brought suit against Borden, and the question was whether, under the constitution and laws of the state, Borden was justified. This court held that a state "may use its military power to put down an armed insurrection too strong to be controlled by the civil authority," and, if the legislature of Rhode Island thought the period so great as to require the use of its military forces and the declaration of martial law, there was no ground on which this court could question its authority, and, as Borden acted under military orders of the charter government, which had been recognized by the political power of the country, and was upheld by the state judiciary, he was justified in breaking [p130] into and entering Luther's house. This is the extent of the decision. There was no question in issue about the power of declaring martial law under the Federal Constitution, and the court did not consider it necessary even to inquire "to what extent nor under what circumstances that power may by exercised by a state."

We do not deem it important to examine further the adjudged cases, and shall therefore conclude without any additional reference to authorities.

To the third question, then, on which the judges below were opposed in opinion, an answer in the negative must be returned.

It is proper to say, although Milligan's trial and conviction by a military commission was illegal, yet, if guilty of the crimes imputed to him, and his guilt had been ascertained by an established court and impartial jury, he deserved severe punishment. Open resistance to the measures deemed necessary to subdue a great rebellion, by those who enjoy the protection of government, and have not the excuse even of prejudice of section to plead in their favor, is wicked; but that resistance becomes an enormous crime when it assumes the form of a secret political organization, armed to oppose the laws, and seeks by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war and thus overthrow the power of the United States. Conspiracies like these, at such a juncture, are extremely perilous, and those concerned in them are dangerous enemies to their country, and should receive the heaviest penalties of the law as an example to deter others from similar criminal conduct. It is said the severity of the laws caused them; but Congress was obliged to enact severe laws to meet the crisis, and as our highest civil duty is to serve our country when in danger, the late war has proved that rigorous laws, when necessary, will be cheerfully obeyed by a patriotic people, struggling to preserve the rich blessings of a free government.

The two remaining questions in this case must be answered in the affirmative. The suspension of the privilege of the [p131] writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course, and, on the return made to it, the court decides whether the party applying is denied the right of proceeding any further with it.

If the military trial of Milligan was contrary to law, then he was entitled, on the facts stated in his petition, to be discharged from custody by the terms of the act of Congress of March 3d, 1863. The provisions of this law having been considered in a previous part of this opinion, we will not restate the views there presented. Milligan avers he was a citizen of Indiana, not in the military or naval service, and was detained in close confinement, by order of the President, from the 5th day of October, 1864, until the 2d day of January, 1865, when the Circuit Court for the District of Indiana, with a grand jury, convened in session at Indianapolis, and afterwards, on the 27th day of the same month, adjourned without finding an indictment or presentment against him. If these averments were true (and their truth is conceded for the purposes of this case), the court was required to liberate him on taking certain oaths prescribed by the law, and entering into recognizance for his good behavior.

But it is insisted that Milligan was a prisoner of war, and therefore excluded from the privileges of the statute. It is not easy to see how he can be treated as a prisoner of war when 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. If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offence, he cannot plead the rights of war, for he 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, how can he be subject to their pains and penalties?

This case, as well as the kindred cases of Bowles and Horsey, were disposed of at the last term, and the proper orders were entered of record. There is therefore no additional entry required.

CHASE, C.J., Separate Opinion

The CHIEF JUSTICE delivered the following opinion.

Four members of the court, concurring with their brethren in the order heretofore made in this cause, but unable to concur in some important particulars with the opinion which has just been read, think it their duty to make a separate statement of their views of the whole case.

We do not doubt that the Circuit Court for the District of Indiana had jurisdiction of the petition of Milligan for the writ of habeas corpus.

Whether this court has jurisdiction upon the certificate of division admits of more question. The construction of the act authorizing such certificates, which has hitherto prevailed here, denies jurisdiction in cases where the certificate brings up the whole cause before the court. But none of the adjudicated cases is exactly in point, and we are willing to resolve whatever doubt may exist in favor of the earliest possible answers to questions involving life and liberty. We agree, therefore, that this court may properly answer questions certified in such a case as that before us.

The crimes with which Milligan was charged were of the gravest character, and the petition and exhibits in the record, which must here be taken as true, admit his guilt. But whatever his desert of punishment may be, it is more important to the country and to every citizen that he should not be punished under an illegal sentence, sanctioned by this court of last resort, than that he should be punished at all. The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict, even upon the guilty, unauthorized though merited justice.

The trial and sentence of Milligan were by military commission convened in Indiana during the fall of 1864. The action of the commission had been under consideration by President Lincoln for some time when he himself became the victim of an abhorred conspiracy. It was approved by his successor in May, 1865, and the sentence was ordered to be carried into execution. The proceedings therefore had the fullest sanction of the executive department of the government. [p133]

This sanction requires the most respectful and the most careful consideration of this court. The sentence which it supports must not be set aside except upon the clearest conviction that it cannot be reconciled with the Constitution and the constitutional legislation of Congress.

We must inquire, then, what constitutional or statutory provisions have relation to this military proceeding.

The act of Congress of March 3d, 1863, comprises all the legislation which seems to require consideration in this connection. The constitutionality of this act has not been questioned and is not doubted.

The first section authorized the suspension, during the Rebellion, of the writ of habeas corpus throughout the United States by the President. The two next sections limited this authority in important respects.

The second section required that lists of all persons, being citizens of states in which the administration of the laws had continued unimpaired in the Federal courts, who were then held or might thereafter be held as prisoners of the United States, under the authority of the President, otherwise than as prisoners of war, should be furnished to the judges of the Circuit and District Courts. The lists transmitted to the judges were to contain the names of all persons, residing within their respective jurisdictions,

charged with violation of national law. And it was required, in cases where the grand jury in attendance upon any of these courts should terminate its session without proceeding by indictment or otherwise against any prisoner named in the list, that the judge of the court should forthwith make an order that such prisoner, desiring a discharge, should be brought before him or the court to be discharged on entering into recognizance, if required, to keep the peace and for good behavior, or to appear, as the court might direct, to be further dealt with according to law. Every officer of the United States having custody of such prisoners was required to obey and execute the judge's order under penalty, for refusal or delay, of fine and imprisonment.

The third section provided, in case lists of persons other [p134] than prisoners of war then held in confinement, or thereafter arrested, should not be furnished within twenty days after the passage of the act, or, in cases of subsequent arrest, within twenty days after the time of arrest, that any citizen, after the termination of a session of the grand jury without indictment or presentment, might, by petition alleging the facts and verified by oath, obtain the judge's order of discharge in favor of any person so imprisoned on the terms and conditions prescribed in the second section.

It was made the duty of the District Attorney of the United States to attend examinations on petitions for discharge.

It was under this act that Milligan petitioned the Circuit Court for the District of Indiana for discharge from imprisonment.

The holding of the Circuit and District Courts of the United States in Indiana had been uninterrupted. The administration of the laws in the Federal courts had remained unimpaired. Milligan was imprisoned under the authority of the President, and was not a prisoner of war. No list of prisoners had been furnished to the judges, either of the District or Circuit Courts, as required by the law. A grand jury had attended the Circuit Courts of the Indiana district while Milligan was there imprisoned, and had closed its session without finding any indictment or presentment or otherwise proceeding against the prisoner.

His case was thus brought within the precise letter and intent of the act of Congress, unless it can be said that Milligan was not imprisoned by authority of the President, and nothing of this sort was claimed in argument on the part of the government.

It is clear upon this statement that the Circuit Court was bound to hear Milligan's petition for the writ of habeas corpus, called in the act an order to bring the prisoner before the judge or the court, and to issue the writ, or, in the language of the act, to make the order.

The first question, therefore -- ought the writ to issue? -- must be answered in the affirmative. [p135]

And it is equally clear that he was entitled to the discharge prayed for.

It must be borne in mind that the prayer of the petition was not for an absolute discharge, but to be delivered from military custody and imprisonment, and if found probably guilty of any offence, to be turned over to the proper tribunal for inquiry and punishment, or, if not found thus probably guilty, to be discharged altogether.

And the express terms of the act of Congress required this action of the court. The prisoner must be discharged on giving such recognizance as the court should require, not only for good behavior, but for appearance, as directed by the court, to answer and be further dealt with according to law.

The first section of the act authorized the suspension of the writ of habeas corpus generally throughout the United States. The second and third sections limited this suspension, in certain cases, within

states where the administration of justice by the Federal courts remained unimpaired. In these cases, the writ was still to issue, and, under it, the prisoner was entitled to his discharge by a circuit or district judge or court unless held to bail for appearance to answer charges. No other judge or court could make an order of discharge under the writ. Except under the circumstances pointed out by the act, neither circuit nor district judge or court could make such an order. But under those circumstances, the writ must be issued, and the relief from imprisonment directed by the act must be afforded. The commands of the act were positive, and left no discretion to court or judge.

An affirmative answer must therefore be given to the second question, namely: ought Milligan to be discharged according to the prayer of the petition?

That the third question, namely: had the military commission in Indiana, under the facts stated, jurisdiction to try and sentence Milligan? must be answered negatively is an unavoidable inference from affirmative answers to the other two. [p136]

The 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.

Indeed, the act seems to have been framed on purpose to secure the trial of all offences of citizens by civil tribunals in states where these tribunals were not interrupted in the regular exercise of their functions.

Under it, in such states, the privilege of the writ might be suspended. Any person regarded as dangerous to the public safety might be arrested and detained until after the session of a grand jury. Until after such session, no person arrested could have the benefit of the writ, and even then no such person could be discharged except on such terms, as to future appearance, as the court might impose. These provisions obviously contemplate no other trial or sentence than that of a civil court, and we could not assert the legality of a trial and sentence by a military commission, under the circumstances specified in the act and described in the petition, without disregarding the plain directions of Congress.

We agree therefore that the first two questions certified must receive affirmative answers, and the last a negative. We do not doubt that the positive provisions of the act of Congress require such answers. We do not think it necessary to look beyond these provisions. In them, we find sufficient and controlling reasons for our conclusions.

But the opinion which has just been read goes further, and, as we understand it, asserts not only that the military commission held in Indiana was not authorized by Congress, but that it was not in the power of Congress to authorize it, from which it may be thought to follow that Congress has no power to indemnify the officers who composed the commission against liability in civil courts for acting as members of it.

We cannot agree to this.

We agree in the proposition that no department of the [p137] government of the United States -- neither President, nor Congress, nor the Courts -- possesses any power not given by the Constitution.

We assent fully to all that is said in the opinion of the inestimable value of the trial by jury, and of the other constitutional safeguards of civil liberty. And we concur also in what is said of the writ of habeas corpus and of its suspension, with two reservations: (1) that, in our judgment, when the writ is suspended, the Executive is authorized to arrest, as well as to detain, and (2) that there are cases in which, the privilege of the writ being suspended, trial and punishment by military commission, in states where civil courts are open, may be authorized by Congress, as well as arrest and detention.

We think that Congress had power, though not exercised, to authorize the military commission which was held in Indiana.

We do not think it necessary to discuss at large the grounds of our conclusions. We will briefly indicate some of them.

The Constitution itself provides for military government, as well as for civil government. And we do not understand it to be claimed that the civil safeguards of the Constitution have application in cases within the proper sphere of the former.

What, then, is that proper sphere? Congress has power to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the land and naval forces, and to provide for governing such part of the militia as may be in the service of the United States.

It is not denied that the power to make rules for the government of the army and navy is a power to provide for trial and punishment by military courts without a jury. It has been so understood and exercised from the adoption of the Constitution to the present time.

Nor, in our judgment, does the fifth, or any other amendment, abridge that power. "Cases arising in the land and naval forces, or in the militia in actual service in time of war [p138] or public danger," are expressly excepted from the fifth amendment, "that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," and it is admitted that the exception applies to the other amendments as well as to the fifth.

Now we understand this exception to have the same import and effect as if the powers of Congress in relation to the government of the army and navy and the militia had been recited in the amendment, and cases within those powers had been expressly excepted from its operation. The states, most jealous of encroachments upon the liberties of the citizen, when proposing additional safeguards in the form of amendments, excluded specifically from their effect cases arising in the government of the land and naval forces. Thus, Massachusetts proposed that

no person shall be tried for any crime by which he would incur an infamous punishment or loss of life until he be first indicted by a grand jury except in such cases as may arise in the government and regulation of the land forces.

The exception in similar amendments proposed by New York, Maryland, and Virginia was in the same or equivalent terms. The amendments proposed by the states were considered by the first Congress, and such as were approved in substance were put in form and proposed by that body to the states. Among those thus proposed and subsequently ratified was that which now stands as the fifth amendment of the Constitution. We cannot doubt that this amendment was intended to have the same force and effect as the amendment proposed by the states. We cannot agree to a construction which will impose on the exception in the fifth amendment a sense other than that obviously indicated by action of the state conventions.

We think, therefore, that the power of Congress in the government of the land and naval forces and of the militia is not at all affected by the fifth or any other amendment. It is not necessary to attempt any precise definition of the boundaries of this power. But may it not be said that government [p139] includes protection and defence, as well as the regulation of internal administration? And is it impossible to imagine cases in which citizens conspiring or attempting the destruction or great injury of the national forces may be subjected by Congress to military trial and punishment in the just exercise of this undoubted constitutional power? Congress is but the agent of the nation, and does not the security of individuals against the abuse of this, as of every other, power depend on the intelligence and virtue of the people, on their zeal for public and private liberty, upon official responsibility secured by law, and upon the frequency of elections, rather than upon doubtful constructions of legislative powers?

But we do not put our opinion that Congress might authorize such a military commission as was held in Indiana upon the power to provide for the government of the national forces.

Congress has the power not only to raise and support and govern armies, but to declare war. It has therefore the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature and by the principles of our institutions.

The power to make the necessary laws is in Congress, the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaigns, nor can the President, [p140] or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.

We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists.

Where peace exists, the laws of peace must prevail. What we do maintain is that, when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or district such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army or against the public safety.

In Indiana, for example, at the time of the arrest of Milligan and his co-conspirators, it is established by the papers in the record, that the state was a military district, was the theatre of military operations, had been actually invaded, and was constantly threatened with invasion. It appears also 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.

We cannot 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 fact that the Federal courts were open was regarded by Congress as a sufficient reason for not exercising the power, but that fact could not deprive Congress of the right to exercise it. Those courts might be open and undisturbed in the execution [p141] of their functions, and yet wholly incompetent to avert threatened danger or to punish, with adequate promptitude and certainty, the guilty conspirators.

In Indiana, the judges and officers of the courts were loyal to the government. But it might have been otherwise. In times of rebellion and civil war, it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels, and courts their most efficient allies.

We have confined ourselves to the question of power. It was for Congress to determine the question of expediency. And Congress did determine it. That body did not see fit to authorize trials by military commission in Indiana, but, by the strongest implication, prohibited them. With that prohibition we are satisfied, and should have remained silent if the answers to the questions certified had been put on that ground, without denial of the existence of a power which we believe to be constitutional and important to the public safety -- a denial which, as we have already suggested, seems to draw in question the power of

Congress to protect from prosecution the members of military commissions who acted in obedience to their superior officers and whose action, whether warranted by law or not, was approved by that upright and patriotic President under whose administration the Republic was rescued from threatened destruction.

We have thus far said little of martial law, nor do we propose to say much. What we have already said sufficiently indicates our opinion that there is no law for the government of the citizens, the armies or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution. And wherever our army or navy may go beyond our territorial limits, neither can go beyond the authority of the President or the legislation of Congress.

There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war, another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated [p142] as belligerents, and a third to be exercised in time of invasion or insurrection within the limits of the United States or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under MILITARY LAW, and is found in acts of Congress prescribing rules and articles of war or otherwise providing for the government of the national forces; the second may be distinguished as MILITARY GOVERNMENT, superseding, as far as may be deemed expedient, the local law and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress, while the third may be denominated MARTIAL LAW PROPER, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and, in the case of justifying or excusing peril, by the President in times of insurrection or invasion or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.

We think that the power of Congress, in such times and in such localities, to authorize trials for crimes against the security and safety of the national forces may be derived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces.

We have no apprehension that this power, under our American system of government, in which all official authority is derived from the people and exercised under direct responsibility to the people, is more likely to be abused than the power to regulate commerce or the power to borrow money. And we are unwilling to give our assent by silence to expressions of opinion which seem to us calculated, though not intended, to cripple the constitutional powers of the government, and to augment the public dangers in times of invasion and rebellion.

Mr. Justice WAYNE, Mr. Justice SWAYNE, and Mr. Justice MILLER concur with me in these views.

Contemporary Reactions and Responses

Exert from *The Story of Ex Parte Milligan: Military Trials, Enemy Combatants, and Congressional Authorization* by Curtis A. Bradley

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 which burst upon the Court at the time when it was first made public."

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. 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." 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." 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. Democratic and Southern newspapers, by contrast, generally applauded the decision.

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. 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*. 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 the Supreme Court in habeas cases. Because of this repeal, the Supreme Court dismissed the appeal for lack of jurisdiction.

Notwithstanding *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." 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.

Important Documents regarding Writs of Habeas Corpus and the Civil War

President Lincoln's Executive Order 1861

The COMMANDING GENERAL OF THE ARMY OF THE UNITED STATES

You are engaged in suppressing an insurrection against the laws of the United States. If at any point on or in the vicinity of any military, line which is now or which shall be used between the city of Philadelphia and the city of Washington you find resistance which renders it necessary to suspend the writ of *habeas corpus* for the public safety, you personally, or through the officer in command at the point where resistance occurs, are authorized to suspend that writ.

Given under my hand and the seal of the United States, at the city of Washington, this 27th day of April, 1861, and of the Independence of the United States the eighty-fifth.

ABRAHAM LINCOLN. By the President of the United States:

WILLIAM H. SEWARD, *Secretary of State* .

President Lincoln's Message to Congress in Special Session

http://teachingamericanhistory.org/library/index.asp?document=1063

President Lincoln's Executive Order September 1862

By the President of the United States of America
A Proclamation

Whereas it has become necessarry to call into service not only volunteers, but also portions of the militia of the States by draft in order to suppress the insurrection existing in the United States, and disloyal persons are not adequately restrained by the ordinary processes of law from hindering this measure and from giving aid and comfort in various ways to the insurrection:

Now, therefore, be it ordered, first, that during the existing insurrection, and as a necessary measure for suppressing the same, all rebels and insurgents, their aiders and abettors, within the United States, and all persons discouraging volunteer enlistments, resisting militia draft or guilty of any disloyal practice affording aid and comfort to rebels against the authority of the United States, shall be subject to martial law and liable to trial and punishment by courts-martial or military commissions; second, that the writ of *habeas corpus* is suspended in 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.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington, this 24th day of September, A.D. 1862, and of the Independence of the United States the eighty-seventh.

ABRAHAM LINCOLN By the President:

WILLIAM H. SEWARD, *Secretary of State*.

Habeas Corpus Act of 1863

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of ***habeas corpus*** in any case throughout the United States, or any part thereof. And whenever and wherever the said privilege shall be suspended, as aforesaid, no military or other officer shall be compelled, in answer to any writ of ***habeas corpus***, to return the body of any person or persons detained by him by authority of the President; but upon the certificate, under oath, of the officer having charge of any one so detained that such person is detained by him as a prisoner under authority of the President, further proceedings under the writ of ***habeas corpus*** shall be suspended by the judge or court having issued the said writ, so long as said suspension by the President shall remain in force, and said rebellion continue.

Sec. 2. And be it further enacted, That the Secretary of State and the Secretary of War be, and they are hereby, directed, as soon as may be practicable, to furnish to the judges of the circuit and district courts of the United States and of the District of Columbia a list of the names of all persons, citizens of states in which the administration of the laws has continued unimpaired in the said Federal courts, who are now, or may hereafter be, held as prisoners of the United States, by order or authority of the President of the United States or either of said Secretaries, in any fort, arsenal, or other place, as state or political prisoners, or otherwise than as prisoners of war; the said list to contain the names of all those who reside in the respective jurisdictions of said judges, or who may be deemed by the said Secretaries, or either of them, to have violated any law of the United States in any of said jurisdictions, and also the date of each arrest; the Secretary of State to furnish a list of such persons as are imprisoned by the order or authority of the President, acting through the State Department, and the Secretary of War a list of such as are imprisoned by the order or authority of the President, acting through the Department of War. And in all cases where a grand jury, having attended any of said courts having jurisdiction in the premises, after the passage of this ***act***, and after the furnishing of said list, as aforesaid has terminated its session without finding an indictment or presentment, or other proceeding against any such person, it shall be the duty of the judge of said court forthwith to make an order that any such prisoner desiring a discharge from said imprisonment be brought before him to be discharged; and every officer of the United States having custody of such prisoner is hereby directed immediately to obey and execute said judge's order; and in case he shall delay or refuse so to do, he shall be subject to indictment for a misdemeanor, and be punished by a fine of not less than five hundred dollars and imprisonment in the common jail for a period not less than six months, in the discretion of the court: Provided however, That no person shall be discharged by virtue of the provisions of this ***act*** until after he or she shall have taken an

oath of allegiance to the Government of the United States, and to support the Constitution thereof; and that he or she will not hereafter in any way encourage or give aid and comfort to the present rebellion, or the supporters thereof: And provided, also, That the judge or court before whom such person may be brought, before discharging him or her from imprisonment, shall have power, on examination of the case, and, if the public safety shall require it, shall be required to cause him or her to enter into recognizance, with or without surety, in a sum to be fixed by said judge or court, to keep the peace and be of good behavior towards the United States and its citizens, and from time to time, and at such times as such judge or court may direct, appear before said judge or court to be further dealt with, according to law, as the circumstances may require. And it shall be the duty of the district attorney of the United States to attend such examination before the judge.

Sec. 3. And be it further enacted, That in case any of such prisoners shall be under indictment or presentment for any offence against the laws of the United States, and by existing laws bail or a recognizance may be taken for the appearance for trial of such person, it shall be the duty of said judge at once to discharge such person upon bail or recognizance for trial as aforesaid. And in case the said Secretaries of State and Was shall for any reason refuse or omit to furnish the said list of persons held as prisoners as aforesaid at the time of the passage of this ***act*** within twenty days thereafter, and of such persons as hereafter maybe arrested within twenty days from the time of the arrest, any citizen may, after a grand jury shall have terminated its session without finding an indictment or presentment, as provided in the second section of this ***act***, by a petition alleging the facts aforesaid touching any of the persons so as aforesaid imprisoned, supported by the oath of such petitioner or any other credible person, obtain and be entitled to have the said judge's order to discharge such prisoner on the same terms and conditions prescribed in the second section of this ***act***: Provided, however, That the said judge shall be satisfied such allegations are true.

Sec. 4. And be it further enacted, That any order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all courts to any action or prosecution, civil or criminal, pending, or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or ***acts*** omitted to be done, under and by virtue of such order, or under color of any law of Congress, and such defence may be made by special plea, or under the general issue.

Sec. 5. And be it further enacted, That if any suit or prosecution, civil or criminal, has been or shall be commenced in any state court against any officer, civil or military, or against any other person, for any arrest of imprisonment made, or other trespasses or wrongs done or committed, or any ***act*** omitted to be done, at anytime during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any ***act*** of Congress, and the defendant shall, at the time of entering his appearance in such court, or if such appearance shall have been entered before the passage of this ***act***, then at the next session of the court in which such suit or prosecution is pending, file a petition, stating the facts and verified by affidavit, for the removal of the cause for trial at the next circuit court of the United States, to be

holden in the district where the suit is pending, and offer good and sufficient surety for his filing in such court, on the first day of its session, copies of such process and other proceedings against him, and also for his appearing in such court and entering special bail in the cause, if special bail was originally required therein. It shall then be the duty of the state court to accept the surety and proceed no further in the cause or prosecution, and the bail that shall have been originally taken shall be discharged. And such copies being filed as aforesaid in such court of the United States, the cause shall proceed therein in the same manner as if it had been brought in said court by original process, whatever may be the amount in dispute or the damages claimed, or whatever the citizenship of the parties, any former law to the contrary notwithstanding. And any attachment of the goods or estate of the defendant by the original process shall hold the goods or estate so attached to answer the final judgment in the same manner as by the laws of such state they would have been holden to answer final judgment had it been rendered in the court in which the suit or prosecution was commenced. And it shall be lawful in any such action or prosecution which may be now pending, or hereafter commenced, before any state court whatever, for any cause aforesaid, after final judgment, for either party to remove and transfer, by appeal, such case during the session or terms of said court at which the same shall have taken place, from such court to the next circuit court of the United States to be held in the district in which such appeal shall be taken, in manner aforesaid. And it shall be duty of the person taking such appeal to produce and file in the said circuit court attested copies of the process, proceedings, and judgment in such cause; and it shall also be competent for either party, within six months after the rendition of a judgment in any such cause, by writ of error or other process, to remove the same to the circuit court of the United States of that district in which such judgment shall have been rendered; and the said circuit court shall thereupon proceed to try and determine the facts and the law in such action, in the same manner as if the same had been there originally commenced, the judgment, in such case notwithstanding. And any bail which may have been taken, or property attached, shall be holden on the final judgment of the said circuit court in such action, in the same manner as if no such removal and transfer had been made, aforesaid. And the state court, from which any such action, civil or criminal, may be removed and transferred as aforesaid, upon the parties giving good and sufficient security for the prosecution thereof, shall allow the same to be removed and transferred, and proceed no further in the case: Provided, however, That if the party aforesaid shall fail duly to enter the removal and transfer, as aforesaid, in the circuit court of the United States, agreeably to this ***act***, state court, by which judgment shall have been rendered, and from which the transfer and removal shall have been made, as aforesaid, shall be authorized, on motion for that purpose, to issue execution, and to carry into effect any such judgment, the same as if no such removal and transfer had been made. And provided also, That no such appeal or writ of error shall be allowed in any criminal action or prosecution where final judgment shall have been rendered in favor of the defendant or respondent by the state court. And if in any suit hereafter commenced the plaintiff is nonsuited or judgment pass against him, the defendant shall recover double costs.

Sec. 6. And be it further enacted, That any suit or prosecution described in this ***act***, in which final judgment may be rendered in the circuit court, may be carried by writ of error to the supreme court, whatever may be the amount of said judgment.

Sec. 7. And be it further enacted, That no suit or prosecution, civil or criminal, shall be maintained for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or ***act*** omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or by or under any ***act*** of Congress, unless the same shall have been commenced within two years next after such arrest, imprisonment, trespass, or wrong may have been done or committed or ***act*** may have been omitted to be done: Provided, That in no case shall the limitation herein provided commence to run until the passage of this ***act***, so that no party shall, by virtue of this ***act***, be debarred of his remedy by suit or prosecution until two years from and after the passage of this ***act***.

Approved, March 3, ***1863***.

The Lieber Code of 1863

http://www.civilwarhome.com/liebercode.htm

EDUCATIONAL RESOURCES

A lesson plan involving the a re-enactment of the trials, including the military tribunal and the civil suit after the Supreme Court case

http://www.in.gov/judiciary/citc/lessons/harrison-day-2007/ftwayne-milligan.html

A lesson plan involving the comparison of this case to the Ex Parte Quirin case including an exercise which has students connect the events involving treatment of terror suspects in recent years to these two cases

http://www.gilderlehrman.org/historynow/04_2008/lp2.php

A lesson plan involving the use of primary sources, including the letter written by Milligan to Stanton, to complete an analysis worksheet as well as an exercise involving student research to connect the Milligan decision to more recent events in American history.

http://www.historyofsupremecourt.org/resources/lp_defines_Milligan.htm

A power point presentation which links the Milligan decision to recent events involving the war on terror

http://www.americanhistorykck.org/media/sec_inst/ppt/exparte.ppt#256,1,Ex parte Milligan (1866)

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