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## Lincoln and Habeas: Of Merryman and Milligan and McCardle

John Yoo\*

Three cases define the Supreme Court's encounter with the Civil War: *Ex parte Merryman*,<sup>1</sup> *Ex parte Milligan*,<sup>2</sup> and *Ex parte McCardle*.<sup>3</sup> All three case names bear the styling "ex parte" because all three were brought on behalf of citizens detained by the armed forces of the Union. All three detainees sought release under the ancient writ of *habeas corpus*, which requires the government to demonstrate to a federal judge the factual and legal grounds for detention.<sup>4</sup> I will explain why the cases of the Civil War did not assume the landmark importance, despite their circumstances and language, as a *Marbury v. Madison*, *McCullough v. Maryland*, or *Brown v. Board of Education*, but instead showed the deferential attitude of the Supreme Court to the other branches of the government during wartime.

Merryman was a Maryland militia officer who had blown up railroad bridges between Washington, D.C. and the North, and was training secessionist troops in the earliest days of the Civil War.<sup>5</sup> Milligan was an alleged member of an insurgent force in Indiana that was sympathetic to the Confederacy.<sup>6</sup> He was tried and sentenced by a military commission—an old form of ad hoc military court established by commanders for the trial of violations of the laws of war and the administration of justice in occupied territory.<sup>7</sup>

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<sup>1</sup> *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

<sup>2</sup> *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

<sup>3</sup> *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868).

<sup>4</sup> BLACK'S LAW DICTIONARY 728 (8th ed. 2004).

<sup>5</sup> See *Merryman*, 17 F. Cas. at 144–46; see also Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 90 (1993) [hereinafter "Paulsen, *The Merryman Power*"].

<sup>6</sup> *Milligan*, 71 U.S. (4 Wall.) at 6.

<sup>7</sup> See Curtis A. Bradley, *The Story of Ex Parte Milligan: Military Trials, Enemy Combatants, and Congressional Authorization*, in PRESIDENTIAL POWER STORIES 93, 95–96, 105–06 (Christopher H. Schroeder & Curtis A. Bradley eds., 2008).

In both *Merryman* and *Milligan*, federal courts ordered the release of the petitioners on the ground that the military had exceeded its constitutional authority.<sup>8</sup> Both contained stirring language about the vitality of constitutional rights even under the pressure of wartime and the need to maintain checks and balances on the executive's wartime powers.<sup>9</sup> In *Merryman*, Chief Justice Taney, writing an opinion in chambers, protested that the military had arrested suspected Confederates in Maryland and refused to recognize civilian authorities without the approval of Congress.<sup>10</sup> Taney had ordered General George Cadwalader, commander of Fort McHenry, to appear in his courtroom on May 27, 1861, and to bring the imprisoned Merryman with him.<sup>11</sup> Cadwalader refused to obey.<sup>12</sup> Taney held the general in contempt of court, but the U.S. Marshal could not gain entry to the fort.<sup>13</sup>

Taney then issued an opinion ordering Merryman's release.<sup>14</sup> The Constitution has "been disregarded and suspended," Taney wrote from his courtroom in Baltimore, "by a military order, supported by force of arms."<sup>15</sup> He warned that "if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws."<sup>16</sup> Instead, Taney proclaimed, "every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found."<sup>17</sup> He ordered the opinion and all of the proceedings sent to the new President. "It will then remain for that high officer, in fulfillment of his constitutional obligation to

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<sup>8</sup> *Merryman*, 17 F. Cas. at 147–48, 152; *Milligan*, 71 U.S. (4 Wall.) at 107.

<sup>9</sup> *Merryman*, 17 F. Cas. at 149–50; *Milligan*, 71 U.S. (4 Wall.) at 118–28.

<sup>10</sup> See MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 10 (1991).

<sup>11</sup> *Merryman*, 17 F. Cas. at 146.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 146–47. For some background on John Merryman and the history of the case, see JAMES F. SIMON, *LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT'S WAR POWERS 186–98* (2006) and Arthur T. Downey, *The Conflict between the Chief Justice and the Chief Executive: Ex Parte Merryman*, 31 J. S. CT. HIST. 262 (2006). For a useful essay on *Milligan*, see Bradley, *supra* note 7. The cases also receive attention in DANIEL FARBER, *LINCOLN'S CONSTITUTION* (2003); JAMES G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* (rev. ed. 1964) (1951). On the experience of Maryland at the outbreak of the Civil War, see generally DEAN SPRAGUE, *FREEDOM UNDER LINCOLN 1–44* (1965); Charles B. Clark, *Baltimore and the Attack on the Sixth Massachusetts Regiment, April 19, 1861*, 56 MD. HIST. MAG. 39 (1961).

<sup>14</sup> *Merryman*, 17 F. Cas. at 146–47.

<sup>15</sup> *Id.* at 152.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

‘take care that the laws be faithfully executed,’ to determine what measures he will take to cause the civil process of the United States to be respected and enforced.”<sup>18</sup>

*Milligan*, decided five years later, sounded a similar theme. Justice Davis declared: “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, and under all circumstances.”<sup>19</sup> Rejecting Attorney General Speed’s argument (and Lincoln’s) that the war gave the executive branch the right to hold Milligan and try him by a military court, the Court responded: “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.”<sup>20</sup> Claims to the contrary risked “anarchy or despotism,” and led from a false assumption, “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.”<sup>21</sup> The Court held that the military could not detain and try Milligan in “the theatre of active military operations” where “the courts are open, and in the proper and unobstructed exercise of their jurisdiction.”<sup>22</sup> Only if a foreign invasion were “actual and present,” rather than threatened, could martial law prevail.<sup>23</sup>

Nevertheless, neither *Merryman* nor *Milligan* has secured a place in the firmament of great Supreme Court decisions. *Merryman* remains unknown to almost all but those scholars who toil in the academic fields of the separation of powers or the early days of the Civil War.<sup>24</sup> As we will see, it did little to delay Lincoln from ordering the detention of suspected Confederate spies, sympathizers, and conspirators behind the Union lines. *Merryman* usually receives attention in work on the early days of the Civil War, filled with stories of the struggle between Unionists and Southern sympathizers in Maryland and the other border states. Rarely do we learn about the legal response to the opinion, which included outright presidential defiance and a

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<sup>18</sup> *Id.* at 153.

<sup>19</sup> *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120–21 (1866).

<sup>20</sup> *Id.* at 121.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 127.

<sup>23</sup> *Id.*

<sup>24</sup> For the most penetrating recent work, see Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L. J. 217 (1994) [hereinafter “Paulsen, *The Most Dangerous Branch*”] and Paulsen, *The Merryman Power*, *supra* note 5.

critique of the role of the Supreme Court in American society. The *Merryman* opinion itself is rarely reproduced in prominent casebooks used for the teaching of constitutional law, which usually relegate the case to a one-paragraph note in discussions of the debate over judicial review.<sup>25</sup>

*Milligan*, on the other hand, has seen a burst of attention in this decade. This is due entirely to the Bush administration's policies in the War on Terror and the associated cases taken up by the Rehnquist Court.<sup>26</sup> Aside from this recent interest in the decision, *Milligan* usually goes unexamined and unremembered. In his Pulitzer Prize-winning book, *The Fate of Liberty: Abraham Lincoln and Civil Liberties*, historian Mark Neely titled a chapter "The Irrelevance of the *Milligan* Decision."<sup>27</sup> Despite the opinion's broad language, for example, military trials continued throughout the occupied South.<sup>28</sup> As Neely observes, scholars were kinder to the decision.<sup>29</sup> The first American encyclopedia on political science, published in 1881, provides an entry on military commissions that holds that they can be used for purposes directly contrary to *Milligan*.<sup>30</sup> In 1890, Professor John Burgess of Columbia University, the leading political scientist on Reconstruction at the turn of the century, wrote: "It is devoutly to be hoped that the decision of the Court may never be subjected to the strain of actual war. If, however, it should be, we may safely predict that it will necessarily be disregarded."<sup>31</sup>

Remembrance of *Merryman* and *Milligan* usually occurs during wartime. Perhaps this should come as no surprise, as that is the context within which they were decided. But they usually do not have much effect. During World War I, neither *Merryman* nor *Milligan* had any direct relevance because no military commissions or detentions occurred on American soil. During World War II, the Supreme Court narrowed *Milligan* to its facts. In *Ex parte Quirin*,<sup>32</sup> the Court upheld the military detention and trial of Nazi saboteurs—one of whom was an American citizen—on the orders of President Franklin Roosevelt.<sup>33</sup> According to the unanimous *Quirin* majority,

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<sup>25</sup> See, e.g., GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (5th ed. 2005) (failing to mention *Merryman* at all).

<sup>26</sup> See Bradley, *supra* note 7, at 93.

<sup>27</sup> NEELY, *supra* note 10, at 160–84.

<sup>28</sup> *Id.* at 176–77.

<sup>29</sup> See *id.* at 179–81.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 181.

<sup>32</sup> 317 U.S. 1 (1942).

<sup>33</sup> *Id.* at 20, 47; see also David Danelski, *The Saboteurs' Case*, 1 J. S. CT. HIST. 61 (1996).

*Milligan* stood for the proposition that the military could not apply the laws of war to civilians in areas outside the battlefield where the civilian courts remained open.<sup>34</sup> But it did not apply to those covered by the laws of war, namely combatants.<sup>35</sup> The Court held: “Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war.”<sup>36</sup> *Milligan* most notoriously had no effect on the Court’s decision in *Korematsu v. United States*, which upheld President Roosevelt’s order and Congress’s approval of the military detention of about 120,000 Japanese-Americans for their suspected disloyalty.<sup>37</sup>

*Milligan*’s lack of relevance has continued to this day. In *Hamdi v. Rumsfeld*, a four-Justice plurality upheld the detention of an alleged terrorist, a U.S. citizen captured in Afghanistan, but required judicial review of the detention to protect due process standards.<sup>38</sup> Nevertheless, the *Hamdi* plurality concluded that *Milligan* did not require a civilian trial because it did not apply to prisoners who had joined or associated themselves with enemy forces.<sup>39</sup> Both *Hamdi*, and later *Hamdan v. Rumsfeld*, take *Quirin* as the relevant gloss over the original *Milligan* precedent.<sup>40</sup> Today’s law schools do only slightly better. Most leading casebooks relegate *Milligan* to summary notes of no more than one or two pages.<sup>41</sup> Most concentrate on *Ex parte Quirin*, the case of the Nazi saboteurs tried by military commission or the enemy combatant cases decided in the last four years.<sup>42</sup> Professors probably spend more time teaching students about the Supreme Court’s protections for the national market in milk.<sup>43</sup>

*McCardle*, which provides the epilogue to our story, involved a Vicksburg, Mississippi newspaper editor tried by a military commission for publishing “incendiary and libelous” articles calling for violence against Union authorities.<sup>44</sup> Because of *Milligan*, Congress stripped the Supreme Court of jurisdiction in *McCardle* and prevented the Court from reviewing the

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<sup>34</sup> *Quirin*, 317 U.S. at 45–46.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 45.

<sup>37</sup> See *Korematsu v. United States*, 323 U.S. 214, 219–20 (1944).

<sup>38</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 509–10 (2004).

<sup>39</sup> *Id.* at 521–22.

<sup>40</sup> *Id.* at 522; *Hamdan v. Rumsfeld*, 548 U.S. 557, 590–93 (2006).

<sup>41</sup> See, e.g., STONE, ET AL., *supra* note 25, at 386–87, 396–97.

<sup>42</sup> See, e.g., *id.* at 383–98.

<sup>43</sup> See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *United States v. Carolene Prod. Co.*, 304 U.S. 144 (1938); *Nebbia v. New York*, 291 U.S. 502 (1934).

<sup>44</sup> See *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868).

constitutionality of Military Reconstruction.<sup>45</sup> Without going too much into the details of *McCardle*, the decision may help us understand why *Merryman* and *Milligan* failed to revolutionize the judicial role in wartime.

### I.

Lincoln faced national security challenges that have never confronted another American president. This was true with the Civil War *in toto*, the deadliest, most destructive war in our history,<sup>46</sup> where American fought American, and brother fought brother. It was also true in the personal sense. Except for James Madison's flight from the capital in the face of British invaders in 1814, the nation's government has never been under the direct threat of immediate attack as it was during the Civil War.<sup>47</sup> When the South seceded, Washington, D.C. was the mid-nineteenth century version of West Berlin—an island of freedom surrounded by a sea of enemy territory. On the one side lay Virginia, the very capital of the Confederacy.<sup>48</sup> You can see General Robert E. Lee's ancestral home in Arlington from downtown Washington. On the other three sides was Maryland, a slave state that had voted for John Breckinridge of Kentucky (as had all of the states of the Deep South) in the 1860 election.<sup>49</sup> The only rail links between the North and the nation's capital passed through Maryland.<sup>50</sup> Throughout the Civil War, and even as late as 1864, Confederate forces would periodically threaten the capital with attack.<sup>51</sup>

That precarious strategic situation made it imperative that the Union secure the Border States such as Maryland. Lincoln reportedly said, for example, that while he welcomed God's support, he must have Kentucky's.<sup>52</sup> He could just as easily have said that of Maryland. It was the necessity to ensure that Maryland remained in the Union that led to *Merryman*.<sup>53</sup> When Fort Sumter fell, it appeared to Northerners that Maryland might join the states of the upper South in secession.<sup>54</sup> Sumter

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<sup>45</sup> Jesse Choper & John Yoo, *Wartime Process: A Dialogue on Congressional Power to Remove Issues from the Federal Courts*, 95 CAL. L. REV. 1243, 1254 (2007).

<sup>46</sup> See C. Vann Woodward, *Editor's Introduction* to JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* xvii, xviii–xix (1988).

<sup>47</sup> See MCPHERSON, *supra* note 46, at 285–86.

<sup>48</sup> *Id.* at 284–85.

<sup>49</sup> See *id.* at 230, 232, 284–85.

<sup>50</sup> *Id.* at 284–85, 287.

<sup>51</sup> See generally *id.*

<sup>52</sup> CHARLES PIERCE ROLAND, *AN AMERICAN ILIAD: THE STORY OF THE CIVIL WAR* 42 (2002).

<sup>53</sup> See Paulsen, *The Most Dangerous Branch*, *supra* note 24, at 278.

<sup>54</sup> NEELY, *supra* note 10, at 4.

surrendered on April 14, 1861; the next day Lincoln issued a proclamation requesting 75,000 volunteers to suppress the rebellion and enforce federal law.<sup>55</sup> Lincoln's intention to use force to compel the Southern states to return to the Union prompted Virginia, North Carolina, Tennessee, and Arkansas to secede.<sup>56</sup> Sentiment to follow their example in Maryland was strong. Maryland's governor and Baltimore's mayor telegraphed Lincoln to warn him to "[s]end no troops here."<sup>57</sup> Lincoln even had to travel secretly through Baltimore on his way to his inauguration.<sup>58</sup>

Maryland's resistance quickly turned violent. Rushing to defend Washington, D.C. on April 19, the Sixth Massachusetts regiment was attacked by a secessionist mob as it switched railroad lines in Baltimore.<sup>59</sup> Four soldiers and a dozen civilians were killed.<sup>60</sup> For the following week, Maryland rebels succeeded in isolating the capital from the North.<sup>61</sup> The mayor and chief of police in Baltimore ordered the destruction of the railroad bridges running to the North.<sup>62</sup> Secessionists cut the telegraph lines between the North and the capital.<sup>63</sup> Washington officials expected a Confederate attack on the defenseless capital at any moment.<sup>64</sup> It was not until April 25 that reinforcements from New York arrived, and only then by bypassing Baltimore to the east.<sup>65</sup>

Meanwhile, Lincoln and his advisors worried about how to keep Maryland in the Union.<sup>66</sup> At first, Lincoln presented his homespun humor, but within it was a steely determination. On April 22, when a delegation of the Baltimore YMCA came to see him and asked that he stop federal troop movements and make peace with the Confederacy, Lincoln exclaimed that they "would have me break my oath and surrender the Government without a blow. There is no Washington in that—no Jackson in that—no manhood nor honor in that."<sup>67</sup> He explained that in order to

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<sup>55</sup> Proclamation Calling Militia and Convening Congress, (Apr. 15, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 331–32 (Roy P. Basler et al. eds., 1953); DAVID HERBERT DONALD, LINCOLN 296 (1995).

<sup>56</sup> MCPHERSON, *supra* note 46, at 278–82.

<sup>57</sup> DONALD, *supra* note 55, at 297.

<sup>58</sup> Paulsen, *The Merryman Power*, *supra* note 5, at 90.

<sup>59</sup> MCPHERSON, *supra* note 46, at 285.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> DONALD, *supra* note 55, at 299.

<sup>66</sup> *Id.*

<sup>67</sup> Reply to Baltimore Committee (Apr. 22, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 55, at 341–42.



defend the capital, Union troops must cross Maryland. “Our men are not moles, and can’t dig under the earth; they are not birds, and can’t fly through the air. . . . Keep your rowdies in Baltimore,” he warned, “and there will be no bloodshed.”<sup>68</sup> Lincoln took a prudent attitude toward the Maryland state government. When the Maryland legislature met on April 26, General Winfield Scott proposed to arrest them rather than let them secede.<sup>69</sup> Lincoln, however, ordered him off to await the outcome of their deliberations; if they did vote to secede, he ordered Scott “to the bombardment of their cities—and in the extremist necessity, the suspension of the writ of habeas corpus.”<sup>70</sup> Lincoln’s April 25 order appears to be the first official mention of the idea of suspending the writ, and its tie to the other option of bombarding Maryland cities reflects the extreme pressures on the President. Luckily, the legislature did nothing.<sup>71</sup>

Nevertheless, concerns about rebel marauders and the security of the rail link between Washington and Maryland led Lincoln to take that step of “extremist necessity” just two days later. In an order to General Scott, the President declared:

You are engaged in repressing an insurrection against the laws of the United States. If at any point on or in the vicinity of the military line, which is now 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 . . . are authorized to suspend that writ.<sup>72</sup>

Scott immediately authorized the commanders in Pennsylvania, Maryland, Delaware, and Washington to suspend the writ if necessary.<sup>73</sup> Neither Lincoln nor Scott publicized the order, nor did they issue it as a public proclamation, nor was it sent to the courts or Congress at the time.<sup>74</sup> Lincoln would publicly suspend the writ in Florida in a public proclamation on May 10.<sup>75</sup>

John Merryman was one of the Maryland citizens swept up by Union troops after the suspension of habeas corpus.<sup>76</sup> He was

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<sup>68</sup> *Id.*

<sup>69</sup> DONALD, *supra* note 55, at 299.

<sup>70</sup> Abraham Lincoln to Winfield Scott (Apr. 25, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 55, at 344.

<sup>71</sup> DONALD, *supra* note 55, at 299.

<sup>72</sup> Abraham Lincoln to Winfield Scott (Apr. 27, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 55, at 347.

<sup>73</sup> 1 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 567–68 (Nat’l Historical Soc’y, 2d ser. 1971) (1894).

<sup>74</sup> NEELY, *supra* note 10, at 9.

<sup>75</sup> Proclamation Suspending Writ of Habeas Corpus in Florida (May 10, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 55, at 364–65.

<sup>76</sup> DONALD, *supra* note 55, at 299.

a farmer, state legislator, and an officer in the Maryland militia.<sup>77</sup> Union officers accused him of drilling a secessionist cavalry unit that had participated in the destruction of the railroad bridges and telegraph lines leading to the North in April.<sup>78</sup> Troops arrested him at his home on May 25, 1861 and imprisoned him at Fort McHenry.<sup>79</sup> Merryman immediately petitioned for a writ of habeas corpus directly with Chief Justice Taney in chambers at the Supreme Court, rather than to the federal court in Baltimore.<sup>80</sup> In one of those happy historical coincidences, historian Carl Swisher reports that Merryman's father and Taney had gone to Dickinson College together.<sup>81</sup> Chief Justice Taney, of course, was a Marylander who had become Andrew Jackson's Attorney General and then Secretary of the Treasury during the great Bank War.<sup>82</sup> As Chief Justice, he wrote the majority opinion in *Dred Scott v. Sandford*, which, by holding the Compromise of 1850 unconstitutional, hastened the coming of the Civil War.<sup>83</sup>

Taney moved with alacrity to defend Merryman's rights, but with little success. He personally rushed to Baltimore to take up the case rather than wait in the capital. The very next day, he issued a writ to General George Cadwalader, commander of Fort McHenry, to appear before him and to bring Merryman with him.<sup>84</sup>

Cadwalader was no simple-minded soldier, but the son of a distinguished Philadelphia family.<sup>85</sup> Law and War ran in his blood. He was a peculiar American breed of soldier-lawyer in the tradition of Colonel Alexander Hamilton and General Henry Halleck. His grandfather, John Cadwalader, was a brigadier-general in command of Pennsylvania troops during the Revolutionary War.<sup>86</sup> He had served under Washington at the battles of Trenton and Princeton.<sup>87</sup> He was supposed to support Washington's crossing of the Delaware, but couldn't get his

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<sup>77</sup> Paulsen, *The Merryman Power*, *supra* note 5, at 90.

<sup>78</sup> *Id.*

<sup>79</sup> CARL B. SWISHER, *THE TANEY PERIOD 1836-64*, 5 *THE OLIVER WENDELL DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 844 (1974).

<sup>80</sup> See NEELY, *supra* note 10, at 10.

<sup>81</sup> SWISHER, *supra* note 79, at 845.

<sup>82</sup> BERNARD C. STEINER, *LIFE OF ROGER BROOKE TANEY: CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT* 7-8, 100-02, 144 (Gaunt, Inc. reprint 1997).

<sup>83</sup> Paul Finkelman, *Scott v. Sandford: The Court's Most Dreadful Case and How it Changed History*, 82 *CHI.-KENT L. REV.* 3, 13 (2007).

<sup>84</sup> *Ex parte Merryman*, 17 F. Cas. 144, 146 (C.C.D. Md. 1861) (No. 9487).

<sup>85</sup> See generally The Historical Society of Pennsylvania, Collection 1454, Cadwalader Family Papers (2007), available at <http://www.hsp.org/files/findingaid1454cadwaladerpart1.pdf>.

<sup>86</sup> *Id.* at 2-3.

<sup>87</sup> *Id.* at 3.

artillery across the frozen river.<sup>88</sup> His father, Thomas Cadwalader, graduated from the University of Pennsylvania, entered the bar, and reached the rank of major general in command of the First Division of the Pennsylvania militia during the War of 1812.<sup>89</sup> The pressure was on for son George. Born in Philadelphia in 1806, he went to Penn like his father, graduated at the ripe old age of 17, and was later admitted to the bar.<sup>90</sup> He became a general and served with distinction in the Mexican-American War of 1848.<sup>91</sup> His brother was a federal district judge in Philadelphia at the outbreak of the Civil War.<sup>92</sup>

Cadwalader sent an aide to Taney's courtroom in full military regalia to notify the Chief Justice that neither he nor Merryman would appear.<sup>93</sup> The aide relayed Cadwalader's response, that "he is duly authorized by the president of the United States . . . to suspend the writ of habeas corpus, for the public safety."<sup>94</sup> Although a "high and delicate trust," and one to be exercised "with judgment and discretion," the General claimed his instructions were "that in times of civil strife, errors, if any, should be on the side of the safety of the country."<sup>95</sup> He asked for a postponement of the proceedings until he could receive instructions from President Lincoln.<sup>96</sup> Taney instead issued an immediate contempt order against Cadwalader.<sup>97</sup> But the U.S. Marshal was denied entry at the gate of the fort.<sup>98</sup>

Taney was left to issue an opinion, which sought to pull the heart out of Lincoln's energetic response to the fall of Fort Sumter. The Constitution's discussion of the suspension occurs in one sentence, in Article I, Section 9, and it does so in the passive voice: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."<sup>99</sup> Taney held that the Suspension Clause's placement in the Article where Congress's powers lay, and judicial commentary since ratification,

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<sup>88</sup> *Id.* at 3–4.

<sup>89</sup> *Id.* at 3–4.

<sup>90</sup> *Id.* at 5; see also 1 ENCYCLOPEDIA OF THE AMERICAN CIVIL WAR: A POLITICAL SOCIAL, AND MILITARY HISTORY 335 (David Stephen Heidler, Jeanne T. Heidler, & David J. Coles eds., 2000).

<sup>91</sup> The Historical Society of Pennsylvania, *supra* note 85, at 5.

<sup>92</sup> *Id.*

<sup>93</sup> *Ex parte Merryman*, 17 F. Cas. 144, 146 (C.C.D. Md. 1861) (No. 9487); see also Swisher, *supra* note 79, at 845.

<sup>94</sup> *Merryman*, 17 F. Cas. at 146.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 147.

<sup>99</sup> U.S. CONST. art. 1, § 9.

recognized that only Congress could suspend the writ.<sup>100</sup> If military detention without trial were permitted to continue, Taney wrote, “the people of the United States are no longer living under a government of laws.”<sup>101</sup> Without congressional suspension, “every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.”<sup>102</sup> Taney’s opinion not only found Lincoln’s suspension unconstitutional, but it clearly questioned the legal bases for Lincoln’s other unilateral responses to secession, such as the calling up of volunteers, the imposition of a blockade on Southern ports, and the withdrawal of funds from the Treasury to raise an army.<sup>103</sup>

Taney’s decision in *Merryman* was not just an attack on Lincoln’s suspension of the writ, but upon the President’s right to interpret the Constitution. Lincoln had come to office criticizing the Supreme Court for its decision in *Dred Scott*.<sup>104</sup> During the Lincoln-Douglas debates, he had argued that the Court’s decision only applied to slave and owner in the case itself, and not to any other cases.<sup>105</sup> In his First Inaugural Address, Lincoln declared that “if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.”<sup>106</sup> The Court had lost immense prestige, at least with Republicans, who rejected the idea of judicial supremacy behind the decision in *Dred Scott* and suspected the federal courts of supporting slavery and the South.<sup>107</sup>

For Taney, however, the President’s oath to uphold the Constitution required him to carry out the Supreme Court’s orders.<sup>108</sup> The *Merryman* decision was another declaration of judicial supremacy in interpreting the Constitution, to be expected of the Justice who wrote *Dred Scott*, though perhaps not from President Andrew Jackson’s former attorney general. Taney clearly wanted to dramatize the conflict between the

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<sup>100</sup> *Merryman*, 17 F. Cas. at 148.

<sup>101</sup> *Id.* at 152.

<sup>102</sup> *Id.* at 152.

<sup>103</sup> *See id.* at 149; SIMON, *supra* note 13, at 200.

<sup>104</sup> ROY P. BASLER, ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 22–23, 396 (1946)

<sup>105</sup> *See id.* at 417–18.

<sup>106</sup> Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 55, at 262, 268.

<sup>107</sup> *See* SIMON, *supra* note 13, at 138–39.

<sup>108</sup> *See* BERNARD C. STEINER, LIFE OF ROGER BROOKE TANEY: CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT 497–98 (Greenwood Press 1970) (1922).

President and the judiciary. He appeared before a crowd at the Baltimore courthouse to receive General Cadwalader's response, and declared that the general was defying the law and that he too might be under military arrest soon.<sup>109</sup>

Public response to Chief Justice Taney's decision in the North was, for the most part, withering. "The Chief Justice takes sides with traitors, throwing around them the sheltering protection of the ermine," thundered the *New York Tribune*, probably the North's most influential newspaper.<sup>110</sup> "When treason stalks abroad in arms, let decrepit Judges give place to men capable of detecting and crushing it."<sup>111</sup> It claimed that Taney had engaged in "a gross perversion of [the Court's] powers to employ [the writ of habeas corpus] as the protecting shield of rebels against a constitutional government."<sup>112</sup> It concluded that "[n]o Judge whose heart was loyal to the Constitution would have given such aid and comfort to public enemies."<sup>113</sup> Nor did *The New York Times* display much charity to the elderly Chief Justice: "Too feeble to wield the sword against the Constitution, too old and palsied and weak to march in the ranks of rebellion and fight against the Union, he uses the powers of his office to serve the cause of the traitors."<sup>114</sup> A few Republican organs supported Taney, concluding that although Lincoln's actions may be necessary, the Court should not bless them, but instead should enter the violation of the Constitution on the record, "to stand as a warning, in more peaceful times yet to come, that here is an act, the necessity of which was the justification, and which is not to be made a precedent at any time when the public exigency is less pressing."<sup>115</sup>

Lincoln answered Taney, and the widespread claims of executive dictatorship, in his message to the special session of Congress on July 4, 1861.<sup>116</sup> Lincoln stressed that the Confederacy had fired the first shot before Lincoln or the national government had taken any action that might threaten slavery.<sup>117</sup> The South's action, therefore, was not the response to any unconstitutional action of the government, but an effort to

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<sup>109</sup> See *id.* at 492–94.

<sup>110</sup> 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 369 (rev. ed. 1926) (1922).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 369–70.

<sup>113</sup> *Id.* at 370.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 370–71.

<sup>116</sup> Message to Congress in Special Session (July 4, 1861), in 4 *THE COLLECTED WORKS OF ABRAHAM LINCOLN*, *supra* note 55, at 421–41.

<sup>117</sup> *Id.* at 423–26.

overturn the results of democratic elections and a rejection of the constitutional processes of “time, discussion, and the ballot box.”<sup>118</sup> In response, Lincoln argued, “no choice was left but to call out the war power of the Government; and so to resist force, employed for its destruction, by force, for its preservation.”<sup>119</sup> Lincoln claimed he had responded with the support of public opinion: “These measures, whether strictly legal or not, were ventured upon, under what appeared to be a popular demand, and a public necessity; trusting, then as now, that Congress would readily ratify them.”<sup>120</sup> Lincoln avoided the question whether he had acted unconstitutionally, but justified his actions on Congress’s political support after the fact: “It is believed that nothing has been done beyond the constitutional competency of Congress.”<sup>121</sup> That summer, Congress enacted a statute, not explicitly authorizing war against the South, but rather declaring that Lincoln’s actions taken that spring “respecting the army and navy of the United States, and calling out or relating to the militia or volunteers from the States, are hereby approved and in all respects legalized and made valid, . . . as if they had been issued and done” by Congress.<sup>122</sup>

Lincoln directly responded to the Chief Justice too, but not by name. He acknowledged that the “legality and propriety” of the suspension has been questioned, and that the “attention of the country” had been directed to his presidential duty “to take care that the laws be faithfully executed.”<sup>123</sup> He made a nod toward the idea that the government could violate a single law, if that act would save the country: “Are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?”<sup>124</sup> Lincoln argued that he would break his oath to preserve, protect, and defend the Constitution if he blindly obeyed one provision above the survival of the Republic.<sup>125</sup> But Lincoln was too good a lawyer to rely solely on claims of a Lockean prerogative.<sup>126</sup> He claimed that the Suspension Clause’s passive tense left open the question of who could suspend the writ:

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<sup>118</sup> *Id.* at 425.

<sup>119</sup> *Id.* at 426 (footnotes omitted).

<sup>120</sup> *Id.* at 429.

<sup>121</sup> *Id.*

<sup>122</sup> Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 326 (1861).

<sup>123</sup> Message to Congress in Special Session, *supra* note 116, at 429–30 (internal quotations omitted).

<sup>124</sup> *Id.* at 430.

<sup>125</sup> *Id.*

<sup>126</sup> JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 37–38 (2005).

[A]s the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented . . . by the rebellion.<sup>127</sup>

Lincoln promised a legal opinion from Attorney General Bates to provide a more complete justification,<sup>128</sup> which was issued the next day.<sup>129</sup> Drawing on *The Federalist*, Bates's opinion argued that each branch of the government was coordinate and could independently exercise its unique constitutional powers free from the orders of the other.<sup>130</sup>

Taney lost his confrontation with Lincoln. The administration continued the system of military detentions. Later that summer, Lincoln ordered the detention of Maryland legislators, the step he would not take in April.<sup>131</sup> In October, the administration expanded the authority of generals to suspend habeas corpus from Washington all the way up "the military line" to Maine.<sup>132</sup> Lincoln delegated to Secretary of State William Seward the supervision of military arrests in the first year of the war.<sup>133</sup> Seward allegedly told the British ambassador to the United States that he could "ring a [little] bell on his desk" and arrest any citizen in the nation—"[c]ould even the Queen of England do as much?"<sup>134</sup> Despite this anecdote, the most reliable estimates indicate that the government detained 864 civilians—approximately half were from the border states, while a third were Southerners—until the War Department took over detentions in 1862.<sup>135</sup> President Lincoln would suspend habeas nationwide on September 24, 1862, two days after releasing the preliminary Emancipation Proclamation, in a move to prevent opposition to the first conscription law.<sup>136</sup> Congress did not enact a law authorizing the suspension of habeas corpus and instituting a system of review until March 3, 1863, finally curing the defect claimed by *Milligan*.<sup>137</sup> Historian James G. Randall,

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<sup>127</sup> Message to Congress in Special Session, *supra* note 116, at 430–31.

<sup>128</sup> *Id.* at 431.

<sup>129</sup> 10 Op. Att'y Gen. 74 (1861).

<sup>130</sup> *Id.* at 81–86.

<sup>131</sup> NEELY, *supra* note 10, at 15.

<sup>132</sup> *Id.* at 14.

<sup>133</sup> *Id.* at 19.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 24–26.

<sup>136</sup> Proclamation Suspending the Writ of Habeas Corpus, Sept. 24, 1862, in 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 55, at 436–37. See also NEELY, *supra* note 10, at 52.

<sup>137</sup> See NEELY, *supra* note 10, at 68; see also Act of Mar. 8, 1863, ch. 81, 12 Stat. 755 (1863).

author of the widely read *Constitutional Problems Under Lincoln*, estimated that the Lincoln administration detained approximately 13,500 civilian prisoners.<sup>138</sup> Neely's more recent work puts the number at about 12,600, though the records are incomplete.<sup>139</sup>

Supporters of the Union came to believe that these measures saved Maryland from secession.<sup>140</sup> *Merryman* had become a footnote to the start of the war, rather than a landmark for the development of internal security policies during the War.<sup>141</sup> Writing on *Merryman*, Harvard historian Charles Warren observed that the lack of popular support for the Court depressed the Chief Justice.<sup>142</sup> Writing in 1863, Taney despaired that the Court would not "ever be again restored to the authority and rank which the Constitution intended to confer upon it."<sup>143</sup> He concluded that the "supremacy of the military power over the civil seems to be established, and the public mind has acquiesced in it and sanctioned it."<sup>144</sup> Nevertheless, Warren argued, if Taney had lived another four years, he would have seen his opinion followed to the full in *Ex parte Milligan*. "Never did a fearless Judge receive a more swift or more complete vindication," Warren wrote.<sup>145</sup>

But did he?

## II.

*Milligan* was not just a vindication of *Merryman*, but a dramatic expansion of it. *Merryman* had demanded that Congress suspend the writ of habeas corpus.<sup>146</sup> *Milligan* addressed a broader question: even if the writ were suspended, can the President and Congress subject civilians behind the lines to military trials when the civilian courts are open and functioning?<sup>147</sup> Unlike *Merryman*, *Milligan* did not reach the Justices under the pressure of secession and sabotage, but came up after the assassination of President Lincoln and Lee's surrender at Appomattox.<sup>148</sup> Yet *Milligan* drove the courts into

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<sup>138</sup> NEELY, *supra* note 10, at 115.

<sup>139</sup> *Id.* at 130.

<sup>140</sup> *Id.* at 29–30.

<sup>141</sup> *See id.* at 29–34.

<sup>142</sup> 3 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES History* 95–96 (1922).

<sup>143</sup> *Id.* at 96.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *See Ex parte Merryman*, 17 F. Cas. 144, 148–52 (C.C.D. Md. 1861) (No. 9,487).

<sup>147</sup> *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

<sup>148</sup> General Robert E. Lee surrendered the Confederate Army of Northern Virginia to General Ulysses S. Grant in the town of Appomattox, Virginia on April 9, 1865. BURKE



conflict once more with the political branches; this time not with the President, but with Congress.

*Milligan* took place in the midst of inter-branch strife over Reconstruction.<sup>149</sup> The issues were complex, and centrally involved the Constitution. If the Confederacy were considered an enemy nation, the laws of war permitted recaptured territory to be subject to occupation by Union military authorities.<sup>150</sup> But if the Southern states had never left the Union, as Lincoln had argued from the beginning, then they could claim an immediate restoration of their political rights.<sup>151</sup> They could again pass their own laws, run their own courts and police, and exercise their rights in the federal government, which could have included voting on the appropriations for the army and blocking legislation to protect the new freedmen. In the unprecedented circumstances of the Civil War, there were no rules for the re-admission of rebellious states to the Union or how much authority the national government could exercise in occupied territory.<sup>152</sup>

*Milligan* came to the Court just as President Johnson and radical Republicans in Congress were reaching their fateful split over Reconstruction policy. Johnson sought relatively lenient conditions for re-admission of the Southern states to the Union. He declared the war over in December 1865 and allowed Southern states to re-establish governments, sometimes with former Confederates in positions of power.<sup>153</sup> Johnson also offered amnesty to those who swore an oath of loyalty to the Union.<sup>154</sup> He did not demand of the Southern states any more protections for the freedmen than ratification of the Thirteenth Amendment—meaning that the rights of the former slaves would be governed by state law—and did not require states to grant them suffrage.<sup>155</sup> Southern states responded by adopting new

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DAVIS, TO APPOMATTOX 402 (1959). President Lincoln was assassinated on April 14, 1865. 3 WARREN, *supra* note 142, at 140.

<sup>149</sup> 3 WARREN, *supra* note 142, at 140.

<sup>150</sup> See WILLIAM WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES 244–49 (Lawbook Exch. 10th ed. 2002) (1871).

<sup>151</sup> See *id.* at 248–49.

<sup>152</sup> For a review of the issues, see ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 176–280 (1988); MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863-1869 (1974); HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 282–306 (1973); HERMAN BELZ, RECONSTRUCTING THE UNION: THEORY AND POLICY DURING THE CIVIL WAR (1969).

<sup>153</sup> See ALBERT E. CASTEL, THE PRESIDENCY OF ANDREW JOHNSON, at 49–52, 56 (1979); FONER, *supra* note 152, at 185–99 (1988); JOHN HOPE FRANKLIN, RECONSTRUCTION: AFTER THE CIVIL WAR 54–55 (Daniel J. Boorstin ed., 1961).

<sup>154</sup> FRANKLIN, *supra* note 153, at 29–30.

<sup>155</sup> CASTEL, *supra* note 153, at 44–45; FONER, *supra* note 152, at 239–40.

constitutions that recognized the end of slavery, but little more. Their legislatures quickly enacted “Black Codes” which sought to keep the freedmen in a state of second-class citizenship by restricting their economic and political rights.<sup>156</sup> They held elections that sent Congressmen and Senators, including former Confederate Vice President Alexander Stephens and former generals and officials of the Confederacy, to the sitting of the 39th Congress in December 1865.<sup>157</sup> Johnson sought a swift reunion of the sundered Union by using the powers of Lincoln’s energetic executive, which would set Reconstruction policy, to restore the respect for state sovereignty of the antebellum Constitution.

Congress would have little of it and refused to seat the elected representatives of the new Southern governments.<sup>158</sup> Radical Republicans wanted to provide the freedmen with a level of economic and political equality denied them by the Southern governments. In April 1866, Congress enacted the Civil Rights and Freedman Bureau bills over President Johnson’s veto.<sup>159</sup> Radicals also believed that military government had to continue in the South because Union troops were the surest guarantee for the security and rights of the freedmen when state governments in the South could not be trusted.<sup>160</sup> President Johnson went to the country to oppose the radicals, but the 1866 midterm elections gave them a tremendous victory.<sup>161</sup> In less than two years, they would use their majority to place the South under military government, strip the Supreme Court of jurisdiction, and bring Johnson within one vote in the Senate of being the only President impeached and removed from office.<sup>162</sup>

*Milligan* came to the Court in the midst of this strife, and had a significant impact on the struggle, but its origins reached back two years to the tentative months when Abraham Lincoln’s

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<sup>156</sup> CASTEL, *supra* note 153, at 47–48; FONER, *supra* note 152, at 199–201.

<sup>157</sup> See John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 452–53 & n.372 (2001); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1066–67 & n.100 (1984).

<sup>158</sup> See CASTEL, *supra* note 153, at 55; CHARLES FAIRMAN, 6 OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 117 (Paul A. Freund ed., 1971); FONER, *supra* note 152, at 239.

<sup>159</sup> CASTEL, *supra* note 153, at 70–71, 75; see also FAIRMAN, *supra* note 158, at 125–28.

<sup>160</sup> See FONER, *supra* note 152, at 273–76.

<sup>161</sup> See *id.* at 267; see also MICHAEL LES BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON 15–16 (1973) [hereinafter “BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON”].

<sup>162</sup> See FONER, *supra* note 152, at 273–75; CASTEL, *supra* note 153, at 192; BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON, *supra* note 161, at 92–93.

re-election had been in doubt.<sup>163</sup> Lambdin Milligan was an Indiana Copperhead Democrat who wanted peace with the Confederacy.<sup>164</sup> In an odd coincidence he had joined the Ohio Bar and placed first in the same examination as Edwin Stanton, who would become Lincoln's Secretary of War and would approve Milligan's detention and conviction.<sup>165</sup> Milligan fervently believed that secession was legal and that Lincoln and the Union had overstepped their constitutional authority in waging the Civil War.<sup>166</sup> He took an active role in Democratic politics in Indiana and ran for the party's 1864 nomination for governor, but his strict anti-war position lost.<sup>167</sup>

His opposition apparently went beyond political measures. Milligan organized the secret Democrat society, known as the Order of American Knights, or the Sons of Liberty.<sup>168</sup> With Indianapolis printer Harrison Horton Dodd as the Grand Commander, Milligan was appointed a "major general" of the Sons of Liberty along with a few other prominent Democrats in the state.<sup>169</sup> Although they planned attacks on prisoner of war camps, rebellion against Union authority, and establishment of an independent Northwestern Confederacy, none of these plans came to fruition.<sup>170</sup> That did not stop Dodd, however, from accepting money from Confederate spies in Canada to pay for the planned revolt.<sup>171</sup> Acting on a tip by an informant, Union officers found 400 revolvers and ammunition at Dodd's printing shop.<sup>172</sup>

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<sup>163</sup> Kenneth M. Stampf, *The Milligan Case and the Election of 1864 in Indiana*, 31 MISS. VALLEY HIST. REV. 41, 41–42 (1944)

<sup>164</sup> See Frank L. Klement, *The Indianapolis Treason Trials and Ex Parte Milligan*, in AMERICAN POLITICAL TRIALS 104 (Michal R. Belknap ed., 1981) [hereinafter "Klement, *The Indianapolis Treason Trials*"]; Allan Nevins, *The Case of the Copperhead Conspirator*, in QUARRELS THAT HAVE SHAPED THE CONSTITUTION 90 (John A. Garrety ed., 1962), at 109–110.

<sup>165</sup> Klement, *The Indianapolis Treason Trials*, *supra* note 164, at 104.

<sup>166</sup> *Id.*

<sup>167</sup> No good biography exists of Milligan, but there are several helpful articles about him and his case. See, e.g., Darwin Kelley, *Lambdin P. Milligan's Appeal for State's Rights and Constitutional Liberty during the Civil War*, 66 IND. MAG. HISTORY 263 (1970); Klement, *supra* note 165; Allan Nevins, *supra* note 164; Stampf, *supra* note 163. A short book is DARWIN KELLEY, MILLIGAN'S FIGHT AGAINST LINCOLN (1973). For a broader examination of political opposition to Lincoln in the Midwest, see FRANK L. KLEMENT, THE COPPERHEADS IN THE MIDDLE WEST (1960).

<sup>168</sup> See Nevins, *supra* note 164, at 111.

<sup>169</sup> J. HOLT, REPORT OF THE JUDGE ADVOCATE GENERAL ON THE "ORDER OF AMERICAN KNIGHTS," OR "THE SONS OF LIBERTY": A WESTERN CONSPIRACY IN AID OF THE SOUTHERN REBELLION 4 (1864).

<sup>170</sup> See Klement, *The Indianapolis Treason Trials*, *supra* note 164, at 106; Stampf *supra* note 163, at 48.

<sup>171</sup> Klement, *The Indianapolis Treason Trials*, *supra* note 164, at 107.

<sup>172</sup> WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 96–98 (1998).

The conspiracy suited the needs of the powerful Republican Governor, Oliver Morton. Worried about his re-election and the fate of the Republican Party in the 1864 elections, Morton ordered the arrest of Milligan and his fellow conspirators.<sup>173</sup> Morton appears to have urged a military trial because its proceedings would run through the election season.<sup>174</sup> Successfully draping Indiana Democrats in the mantle of disloyalty, Morton won re-election by a comfortable margin in October,<sup>175</sup> as did Lincoln in November,<sup>176</sup> no doubt helped more by Sherman's capture of Atlanta than anything.<sup>177</sup>

At the end of the proceedings, a military commission of seven army officers convicted four of the conspirators.<sup>178</sup> It sentenced three of them, including Milligan, to death.<sup>179</sup> It had not helped that the ringleader, Dodd, escaped from his room above the post-office and made it to Canada, and that one of Milligan's comrades had turned informant.<sup>180</sup> With his re-election secure, however, Governor Morton decided to recommend commutation of their sentences to the military authorities, who remained unmoved.<sup>181</sup> His opponent in the election, Democrat Joseph E. McDonald, a former congressman and state attorney general, journeyed to Washington to personally meet with Lincoln to plead for clemency.<sup>182</sup> Lincoln read over the trial record, found some errors, and told McDonald that there would be "such a jubilee over yonder" in Virginia—anticipating Lee's surrender to Grant—that "we shall none of us want any more killing done."<sup>183</sup> He promised McDonald, "I will still keep them in prison awhile to keep them from killing the new government."<sup>184</sup> Lincoln's assassination on Good Friday, April 14, 1865, prevented him from keeping his promise.<sup>185</sup> President Johnson, who had convened a military commission to quickly try and execute the assassins, was in no mood for mercy and approved the death sentences of Milligan and his co-defendants.<sup>186</sup>

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<sup>173</sup> Klement, *The Indianapolis Treason Trials*, *supra* note 164, at 107–08.

<sup>174</sup> See Stampp, *supra* note 163, at 51–52.

<sup>175</sup> See Klement, *The Indianapolis Treason Trials*, *supra* note 164, at 110.

<sup>176</sup> *Id.* at 113.

<sup>177</sup> DONALD, *supra* note 55, at 531.

<sup>178</sup> See Klement, *The Indianapolis Treason Trials*, *supra* note 164, at 108, 114.

<sup>179</sup> *Id.* at 459.

<sup>180</sup> *Id.* at 458.

<sup>181</sup> *Id.* at 459–60.

<sup>182</sup> Klement, *The Indianapolis Treason Trials*, *supra* note 164, at 104; see also IND. REPUBLICAN STATE CENT. COMM., OLIVER P. MORTON OF INDIANA: SKETCH OF HIS LIFE AND PUBLIC SERVICE 48 (1876) (detailing the re-election of Governor Morton).

<sup>183</sup> FAIRMAN, *supra* note 158, at 197.

<sup>184</sup> *Id.*

<sup>185</sup> See *id.*; DONALD, *supra* note 55, at 596–99.

<sup>186</sup> FAIRMAN, *supra* note 158, at 196–97.

On May 10, Milligan filed for a writ of habeas corpus in the federal circuit court in Indianapolis.<sup>187</sup> The next day, the two federal judges on circuit—Justice David Davis and Judge David McDonald—sent a remarkable letter to the President.<sup>188</sup> They asked that Johnson delay execution of the sentence until the federal courts had time to determine whether military commissions had jurisdiction over civilians unconnected to the military.<sup>189</sup> Unlike Chief Justice Taney, they did not appear to believe that they had the authority to order the President to suspend the executions. Instead, they argued that allowing the executions would open the government to the charge of oppression and would be a stain on the national character.<sup>190</sup> They also doubted the wisdom of the policy. The judges did not question “the guilt of these men” or “that their trial had a most salutary effect on the public mind by developing and defeating a most dangerous and wicked conspiracy against our government.”<sup>191</sup> Rather, they argued that the trial had achieved its purpose and that Indiana was now “quiet and peaceable.”<sup>192</sup> Executing Milligan and his comrades now would only make them “political martyrs.”<sup>193</sup> Stanton also put in a plea for his former bar mate.<sup>194</sup> Johnson ultimately commuted Milligan’s sentence to life imprisonment.<sup>195</sup>

The two judges on the circuit sent the case to the Supreme Court, which heard oral arguments on March 5, 1866.<sup>196</sup> Milligan’s counsel added three shrewdly chosen co-counsel: Jeremiah Black, who had been Chief Justice of the Pennsylvania Supreme Court, Attorney General and Secretary of State in the Buchanan administration, and had been defeated for confirmation to the Supreme Court in 1861 by one vote;<sup>197</sup> James A. Garfield, a brigadier general during the opening years of the Civil War at age 31, Republican congressman from Ohio, and future President;<sup>198</sup> and David Dudley Field, brother of sitting Justice Stephen J. Field and father of the Field Code that would

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<sup>187</sup> *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 7 (1866).

<sup>188</sup> See FAIRMAN, *supra* note 158, at 197–98.

<sup>189</sup> *Id.* at 198.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 198–99.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> Klement, *The Indianapolis Treason Trials*, *supra* note 164, at 115.

<sup>195</sup> *Id.* at 116.

<sup>196</sup> FAIRMAN, *supra* note 158, at 199–200.

<sup>197</sup> See *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 9 (1866); Derek P. Langhauser, Commentary, *An Essay: Nominations to the Supreme Court of the United States: Historical Lessons for Today's Debate*, 205 EDUC. L. REP. 553, 568 (West 2006).

<sup>198</sup> IRA RUTKOW, JAMES A. GARFIELD 15–16 (2006); FAIRMAN, *supra* note 158, at 143; Castel, *supra* note 153, at 19.

be the basis of American civil procedure in the nineteenth century.<sup>199</sup> As Milligan's chances rose with these choices, the government's odds dropped with its own. In addition to Attorney General James Speed, who was not thought of as an able oral advocate,<sup>200</sup> the government added Henry Stanbery, who would replace Speed as Attorney General that summer and would be nominated by Johnson to a seat on the Supreme Court;<sup>201</sup> and, inexplicably, General Benjamin Butler, a Massachusetts lawyer who had won notoriety for his tough occupation government of the City of New Orleans.<sup>202</sup> Butler, for example, had issued General Order No. 28 that declared that any woman who showed disrespect to a Union soldier or officer would be treated as "a woman of the town plying her avocation."<sup>203</sup> He would be known as "Beast Butler" throughout the South for decades.<sup>204</sup> After an unsuccessful military career, Butler would be elected to the House of Representatives and would be the lead House prosecutor of the Johnson impeachment before the Senate.<sup>205</sup>

The transcript of oral argument is lengthy, occupying sixty-two pages of the U.S. Reports.<sup>206</sup> Each side received three hours of time; not exactly the days accorded Daniel Webster, but a luxury under today's standards.<sup>207</sup> On April 3, 1866, the Court announced that it was ordering the release of Milligan, who went free on April 10.<sup>208</sup> However, the Court did not release its opinion until December.<sup>209</sup> Justice Davis wrote for the Court that these new tribunals had no jurisdiction over a citizen who was not a resident of one of the rebellious states, not a prisoner of war, and not in the armed forces of the Confederacy or the Union.<sup>210</sup> The law of war, which applied to combatants and the battlefield, held no sway over "citizens in states which have upheld the authority of the government, and where the courts

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<sup>199</sup> FAIRMAN, *supra* note 158, at 4; LAWRENCE M. FRIEDMAN, *HISTORY OF AMERICAN LAW* 340 (1973).

<sup>200</sup> See FAIRMAN, *supra* note 158, at 201.

<sup>201</sup> Congress reacted by decreasing the size of the Court by one seat. Keith E. Whittington, *Presidents, Senates, and Failed Supreme Court Nominations*, 2006 SUP. CT. REV. 401, 427 (2006).

<sup>202</sup> FONER, *supra* note 152, at 45, 491–92.

<sup>203</sup> ENCYCLOPEDIA OF THE AMERICAN CIVIL WAR, *supra* note 90, at 2335.

<sup>204</sup> See SHELBY FOOTE, *THE CIVIL WAR: A NARRATIVE, FREDERICKSBURG TO MERIDIAN* 105 (1963).

<sup>205</sup> William H. Rehnquist, *The Impeachment Clause: A Wild Card in the Constitution*, 85 NW. U. L. REV. 903, 916 (1991).

<sup>206</sup> See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 22–84 (1866).

<sup>207</sup> FAIRMAN, *supra* note 158, at 200.

<sup>208</sup> *THE MILLIGAN CASE* 44 (Samuel Klaus ed., 1997).

<sup>209</sup> FAIRMAN, *supra* note 158, at 214.

<sup>210</sup> See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 124–27 (1866); FAIRMAN, *supra* note 158, at 197–99; see also Klement, *The Indianapolis Treason Trials*, *supra* note 164, at 116–17.

are open and their process unobstructed.”<sup>211</sup> The Bill of Rights demanded that Milligan receive a jury trial in federal court for violations of civilian law, and these provisions could not be waived in the face of emergency.<sup>212</sup> “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.”<sup>213</sup> Neither the President nor Congress, therefore, could impose martial law that overrode the constitutional protections in a criminal trial, except in cases of actual invasion in which the “courts and civil authorities are overthrown.”<sup>214</sup> What was good for the occupation of Virginia, Davis concluded, was not good for Indiana.<sup>215</sup>

Chief Justice Chase wrote a concurring opinion joined by three other Justices.<sup>216</sup> He found that Milligan fell within the Habeas Corpus Act of 1863, which had authorized Lincoln to suspend the writ of habeas corpus.<sup>217</sup> The Act required the military to supply the courts with lists of prisoners, and to release the prisoners if a grand jury did not choose to indict them of a crime.<sup>218</sup> Milligan had not been indicted by a grand jury, so he was entitled under the statute to go free. Chase refused to reach the question of whether the President and Congress together could authorize the use of military commissions in wartime: “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 districts such great and imminent public danger exists as justifies the authorization of military tribunals.”<sup>219</sup> Chase would have allowed Congress to authorize military tribunals in wartime even when the courts were open; a necessity, he argued, because the courts might prove incompetent to stop threatened danger or judicial officers might be aligned with the rebels.<sup>220</sup>

It was not the judgment in *Milligan* that was particularly objectionable, but rather the reasoning of the Court’s opinion. Congress’s authority was not directly presented in *Milligan*.

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<sup>211</sup> *Id.* at 121.

<sup>212</sup> *Id.* at 125–26.

<sup>213</sup> *Id.* at 125.

<sup>214</sup> *Id.* at 126.

<sup>215</sup> *Id.* at 127.

<sup>216</sup> *Id.* at 132 (Chase, C.J., concurring).

<sup>217</sup> *Id.* at 133–34.

<sup>218</sup> *Id.* at 133.

<sup>219</sup> *Id.* at 140.

<sup>220</sup> *Id.* at 140–41.

Justice Davis's desire to address its scope, and to limit it in such broad terms, immediately plunged the Court into the maelstrom of Reconstruction politics. When the Court announced the opinion in December, its implications for congressional plans for Reconstruction were obvious to all. *Milligan* suggested that any continuation of military occupation in the South was unconstitutional, and signaled that Republicans would have to count the judiciary among their opponents.<sup>221</sup> The Republicans immediately recognized *Milligan* as a challenge, with Thaddeus Stevens declaring it to be a "most injurious and iniquitous decision [that] has rendered immediate action by Congress upon the question of the establishment of governments in the rebel States absolutely indispensable."<sup>222</sup> "In the conflict of principle thus evoked, the States which sustained the cause of the Union will recognize an old foe with a new face," wrote *The New York Times*.<sup>223</sup> "The Supreme Court, we regret to find, throws the great weight of its influence into the scale of those who assailed the Union and step after step impugned the constitutionality of nearly everything that was done to uphold it."<sup>224</sup> Comparing *Milligan* to *Dred Scott*, *Harper's Weekly* declared that the decision "is not a judicial opinion; it is a political act."<sup>225</sup> The *New York Herald* raised the idea of reforming the Court: "a reconstruction of the Supreme Court, adapted to the paramount decisions of the war, looms up into bold relief, on a question of vital importance."<sup>226</sup>

Just as Republican papers attacked *Milligan*, Democratic papers praised it. The *National Intelligencer*, which often represented the views of the Johnson administration, attacked the Court's critics: "[A]s in war times, these monopolists of patriotism denounced those who upheld the sacred liberties of the citizen as guaranteed by the Constitution, so now, in the midst of peace, they assail those who maintain the rights of the States as guaranteed by that same instrument."<sup>227</sup> Democrats in Congress similarly interpreted *Milligan* as requiring a quick re-admission of the Southern States to the Union and decried the Republican vitriol hurled at the Court. Aaron Harding criticized the Republicans for their "attempt to bring into ridicule and contempt the last refuge of liberty [the Supreme Court] for the

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<sup>221</sup> See *id.* at 124–25; CONG. GLOBE, 39th Cong., 2d Sess. 251 (1865).

<sup>222</sup> CONG. GLOBE, 39th Cong., 2d Sess. 251 (1865).

<sup>223</sup> 3 WARREN, *supra* note 142, at 151.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 154.

<sup>226</sup> *Id.* at 153.

<sup>227</sup> *Id.* at 157.



oppressed.”<sup>228</sup> Michael Kerr went further, accusing the Republicans in Congress of attempting to “govern this country without the aid of the unrepresented States, the Constitution, or the Supreme Court.”<sup>229</sup> It was no favor to the Supreme Court when, on the anniversary of the Battle of New Orleans, it was toasted at a Democratic party dinner as “the great conservative power of the government; never more needed or better appreciated than now.”<sup>230</sup> Johnson’s annual message to Congress, delivered in December 1866, had asked for the immediate re-admission of the Southern states because they had met his condition of adopting the Thirteenth Amendment.<sup>231</sup> The new Republican majorities ignored him. Now Johnson and his Democrat allies sought to project the image that the Court was on their side.

The possibility that the Court would throw its weight behind Johnson worried congressional Republicans. They nonetheless proceeded with their plans for Reconstruction and, on March 2, 1867, passed a Reconstruction Act that required the adoption of black suffrage, new constitutions adopted by majority vote, and ratification of the Fourteenth Amendment before the Southern states would regain their representation in Congress.<sup>232</sup> To guarantee the equal rights of the freedmen, Congress created five military districts in the former Confederacy to provide military protection.<sup>233</sup> The army would have the duty to protect all persons, to suppress insurrections, disorder, and violence, and to punish those who disturbed the peace.<sup>234</sup> A supplementary Act gave the military commanders the authority to remove state officers who impeded Reconstruction.<sup>235</sup> Johnson vetoed the Act and in his message argued that with the surrender of the Confederacy, the war powers of the government had ended, and the Southern states had resumed their place in the constitutional structure.<sup>236</sup> He also claimed that military occupation of the South violated *Milligan*.<sup>237</sup> Congress overrode Johnson’s veto on the very same day by far more than the two-thirds majorities required: 135 to 48 in the House, and 38 to 10 in the Senate.<sup>238</sup>

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<sup>228</sup> CONG. GLOBE, 39th Cong., 2d Sess. 1167 (1865).

<sup>229</sup> *Id.* at 624.

<sup>230</sup> FAIRMAN, *supra* note 158, at 222–23.

<sup>231</sup> CONG. GLOBE, 39th Cong., 2d Sess. 1–5 (1866).

<sup>232</sup> Act of Mar. 2, 1867, ch. 153, 14 Stat. 428, 428–29; *see also* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 139 (1993).

<sup>233</sup> SCHWARTZ, *supra* note 232, at 139.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> FAIRMAN, *supra* note 158, at 307–08.

<sup>237</sup> *Id.* at 308.

<sup>238</sup> *Id.* at 308–09.

Enforcement of the Reconstruction Act produced the first demonstration of *Milligan's* desuetude as military commissions continued in the South. From the end of the war until January 1, 1869, the Union army conducted 1,435 military trials, though they steadily declined throughout this period.<sup>239</sup> Some of them involved cases from the war, some from Reconstruction; some were of Southern civilians, some were of Union soldiers. The Reconstruction Act allowed military commanders to use commissions to try civilians when the civilian courts were thought to be inadequate. Military governors became embroiled in reviewing state enforcement of the laws governing everyday life. They suspended various laws, such as debt collection, that were being enforced in a discriminatory manner by state officials, and substituted military enforcement when state authorities applied criminal and civil laws unjustly. This state of affairs did not end until all of the Southern states rejoined the Union.<sup>240</sup> Some lower federal courts relied upon *Milligan* to stop these military commission trials, but the record shows that they were unsuccessful in preventing their widespread use in the South.<sup>241</sup>

In the first year of Reconstruction, the Supreme Court studiously refused to entertain cases by states, such as Mississippi and Georgia, challenging the constitutionality of military government in the South.<sup>242</sup> One might say that Congress had even sought the cooperation of the other two branches in Reconstruction—the reliance on military governors recognized President Johnson's paramount role, and Congress had expanded habeas jurisdiction in a February 1867 law designed to allow freedmen to seek the protection of the federal courts.<sup>243</sup> But that changed with the case of *Ex parte McCardle*.<sup>244</sup> Colonel William McCardle, the editor of the *Vicksburg Times*, vituperatively attacked Reconstruction. In one editorial he called the military governors “each and all infamous, cowardly, and abandoned villains,” and in others he called for resistance to the military, Southern government by whites only, and opposition to the Fourteenth Amendment.<sup>245</sup> Union officers arrested McCardle on November 8, 1867, and brought him before a military commission to face trial for inciting insurrection,

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<sup>239</sup> NEELY, *supra* note 10, at 176–77.

<sup>240</sup> *Id.* at 178–79.

<sup>241</sup> See 3 WARREN, *supra* note 142, at 164–65.

<sup>242</sup> See, e.g., *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867) (dismissed as political question); *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867) (same).

<sup>243</sup> Habeas Corpus Act of 1867, 14 Stat. 385 (1867).

<sup>244</sup> 74 U.S. (7 Wall.) 506 (1868).

<sup>245</sup> SCHWARTZ, *supra* note 232, at 140; William W. Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229, 236 n.42 (1973).

disorder, and violence and impeding Reconstruction.<sup>246</sup> When the federal district court denied McCardle's petition for a writ of habeas corpus, he appealed to the Supreme Court under the new 1867 habeas law.<sup>247</sup>

When the Supreme Court announced that it would hear *Ex parte McCardle* in January 1868, it was apparent that a test of the constitutionality of the Reconstruction Act was on the way.<sup>248</sup> It was no coincidence that McCardle was represented by Milligan's lawyers.<sup>249</sup> The Johnson administration made its views known by refusing to defend the statute.<sup>250</sup> General Grant arranged for the Army to be represented by Lyman Trumbull and Matthew Carpenter, two Republican Senators who had played important roles in the consideration of the Reconstruction Amendments.<sup>251</sup> To illustrate the depths to which the Court had become embroiled in the fight over Reconstruction, one of the days of oral argument was interrupted when Chief Justice Chase had to leave to preside over the organization of President Johnson's impeachment trial in the Senate.<sup>252</sup>

Reports from oral argument suggested that the Court was sympathetic to McCardle's argument that the Reconstruction Act violated *Milligan*.<sup>253</sup> Congress responded swiftly. In January and February of 1868, it considered legislation requiring that six Justices agree before the Court could strike down federal legislation.<sup>254</sup> The House passed the bill, but the Senate could not reach a consensus.<sup>255</sup> However, after the end of oral argument in *McCardle*, Congress overrode President Johnson's veto and removed the Supreme Court's appellate jurisdiction over habeas corpus appeals under the 1867 statute.<sup>256</sup> Only after Johnson's acquittal, and Grant's election to the Presidency, did the Court announce in 1869 that it accepted the stripping of its jurisdiction and would not reach the merits of the *McCardle* petition.<sup>257</sup> Thus, *Milligan* became the motivating factor that led

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<sup>246</sup> *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 322 (1867); SCHROEDER-LEIN & ZUCZEK, *supra* note 235, at 184.

<sup>247</sup> SCHWARTZ, *supra* note 232, at 140.

<sup>248</sup> *Id.*; FAIRMAN, *supra* note 158, at 449–50.

<sup>249</sup> See *McCardle*, 73 U.S. (6 Wall.) at 323; *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 9 (1866).

<sup>250</sup> See HYMAN, *supra* note 152, at 504.

<sup>251</sup> *Id.*

<sup>252</sup> FAIRMAN, *supra* note 158, at 455.

<sup>253</sup> *Id.*

<sup>254</sup> See CONG. GLOBE, 39th Cong., 2d Sess. 478 (1868).

<sup>255</sup> Stanley I. Kutler, *Ex Parte McCardle: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered*, 72 AM. HIST. REV. 835, 838 (1967).

<sup>256</sup> Van Alstyne, *supra* note 245, at 240.

<sup>257</sup> *Id.* at 243–44 (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 512–15 (1868)).

to the only clear example of congressional jurisdiction-stripping in the Court's history.<sup>258</sup>

### III.

In concluding, it is worth putting forth some hypotheses about why the Court's decisions in *Merryman* and *Milligan* sparked such sharp reactions from the political branches. In *Merryman*, Chief Justice Taney issued a writ to President Lincoln, who refused to follow it—probably the only unambiguous example of a President of the United States refusing to obey an order of the federal judiciary. Despite the praise for *Milligan* in later years, it prompted Congress to enact the only clear example of jurisdiction-stripping in the Court's history. Along with the Jeffersonian impeachment of Justice Samuel Chase<sup>259</sup> and President Franklin Roosevelt's court-packing plan,<sup>260</sup> these Civil War episodes remain among the most direct challenges to the Supreme Court's authority by the elected branches of government.

Most of the blame surely lies with the Justices themselves. In *Milligan*, the majority could have resolved the case on the narrow statutory ground that the Habeas Corpus Act required release, an outcome that would probably have received the approval of a unanimous Court. Instead, Justice Davis's majority stretched to address a constitutional question with obvious implications for the great struggle between President Johnson and the Reconstruction Congress. The Court may have believed that it was helping to settle the matter, but it only contributed to the political instability and constitutional conflict over the occupation of the South. Its views did not prevail, as military government continued over the former states of the Confederacy until the Compromise of 1877 removed Union troops in exchange for finding Republican Rutherford Hayes the winner of the 1876 presidential election.<sup>261</sup> The Court would have been better served by following the doctrine of judicial restraint, best expressed by Justice Brandeis in *Ashwander v. Tennessee Valley Authority*,<sup>262</sup> to interpret statutory questions to avoid constitutional questions.

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<sup>258</sup> For a contrary view, see STANLEY I. KUTLER, *JUDICIAL POWER AND RECONSTRUCTION POLITICS* (1968); Van Alstyne, *supra* note 245.

<sup>259</sup> See RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 76–82 (1971).

<sup>260</sup> See WILLIAM LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 83–84 (1995).

<sup>261</sup> Vincent P. DeSantis, *Rutherford B. Hayes and the Removal of the Troops and the End of the Reconstruction*, in *REGION, RACE AND RECONSTRUCTION: ESSAYS IN HONOR OF C. VANN WOODWARD* 417, 417–18 (J. Morgan Kousser & James McPherson eds., 1982).

<sup>262</sup> 297 U.S. 288, 356 (1936) (Brandeis, J., concurring).

Deciding *Milligan* only on the application of the Habeas Corpus Act would have kept the Court out of a constitutional confrontation between the political branches that it could not settle.

*Merryman* tells a different story. Like Davis, Chief Justice Taney sought to insert the federal courts into the great constitutional controversy of the day. Taney, of course, had a history of overreaching. He had wanted to settle the question of slavery in the territories in *Dred Scott*, but instead only accelerated the movement toward Civil War. *Merryman*, however, unlike *Milligan*, presented no obvious statutory or jurisdictional means to evade the constitutional question of whether the President could suspend habeas corpus during a period of rebellion without the consent of Congress. *Merryman* was an American citizen held by the executive branch without criminal charge; he had a right to appeal to a federal court to require the government to explain the legal basis for his detention.

Taney's mistake was that he gave Lincoln no time to organize the federal government's response to the unprecedented challenge of secession. Civil War was a calamity unlike any that the nation had faced before or since. Taney deliberately sought out a constitutional confrontation with the executive branch during the chaotic circumstances of the first weeks of the war, when the very security of the capital city was at stake. It would have been understandable and reasonable if Taney had given President Lincoln the benefit of the doubt and allowed the military time to restore the security of the Baltimore-Washington, D.C. area before pressing forward with *Merryman*. Taney, however, believed that the Supreme Court had the final and immediate authority to resolve the constitutional question of habeas suspension, regardless of the circumstances.<sup>263</sup>

Despite their different settings, both *Merryman* and *Milligan* have that in common. The terrible divisions of the Civil War, and the Taney Court's role in hastening its coming, had not yet weaned the Justices from their attachment to judicial supremacy. *Merryman* and *Milligan* displayed a remarkable lack of deference to the political branches during wartime. War is the subject under which the structural advantages of the President and Congress are at their height, and where the courts have the least competence.<sup>264</sup> War involves unpredictability and uncertainty,

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<sup>263</sup> See *Ex parte Merryman*, 17 F.Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

<sup>264</sup> My views on the separation of powers in wartime can be found in YOO, *supra* note 126.

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unforeseen circumstances, difficult tradeoffs between competing values, and, in a Civil War, the highest of stakes. While some believe that the courts should still decide cases challenging government authority without taking account of wartime conditions, this approach ignores the costs of judicial intervention, not only to the war effort but also to the Court. *Merryman* and *Milligan* reveal the wages of judicial supremacy, not just to the President and Congress, but to the institution of the Supreme Court as well.