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# Civil Liberty and the Civil War: The Indianapolis Treason Trials

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# Civil Liberty and the Civil War: The Indianapolis Treason Trials†

REMARKS OF THE CHIEF JUSTICE OF THE UNITED STATES, WILLIAM REHNQUIST*

To those of you who may be asking yourselves, "Why, on the verge of the twenty-first century, should we look back at events that happened during the Civil War nearly a century and a half ago?" I would offer several replies. In the first place, the political events of the Civil War are of considerable interest in their own right. The cast of characters on the stage at that time—Abraham Lincoln; William H. Seward, Lincoln's rival for the Presidential nomination in 1860 whom Lincoln later appointed Secretary of State; Edwin M. Stanton, a remarkably able Secretary of War, and others—make it a lively story.

But the subject of the Civil War is of more than just historical interest. The Civil War was the first time that the United States government mobilized for a major war effort, and a major war effort necessarily results in the curtailment of some civil liberties. The Civil War era produced the first important civil liberties decision from the Supreme Court of the United States—the case of *Ex parte Milligan*,[1] decided in 1866. The ramifications of the *Milligan* case are with us to this day. And, the case is of particular interest here in Indiana, because it arose out of what historians call the Indianapolis treason trials, which took place in your state capital in the fall of 1864.

Finally, it probably is easier to discuss the limits of civil liberties during war time when there is no war, rather than when conflict is raging. There is an oft-quoted Latin maxim: *silent leges inter arma*, which has been loosely translated to mean that in time of war the laws are silent and the guns speak. Peacetime offers an opportunity for detached reflection on these important governmental questions which are not so calmly discussed in the midst of a war.

Even those of you who didn't major in American history will recall that Abraham Lincoln was inaugurated as President on March 4, 1861. At this time the seven states of what was called the "Lower South"—South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas—had seceded from the Union. But the four states of the "Upper South"—Virginia, North Carolina, Tennessee, and Arkansas—had not yet joined the original seven. The next tier of states—both working northward geographically, and considering their likelihood of secession—were the three so-called "border states"—Missouri, Kentucky, and Maryland. Lincoln thought it essential to keep the border states in the Union.

For six weeks after Lincoln's inauguration, the situation remained precariously balanced while the Administration tried to make up its mind whether to attempt to reprovision Fort Sumter, a Union fort located in the harbor of Charleston, South Carolina. When the federal government did finally make the attempt, it was turned back, and the batteries in Charleston Harbor began firing on Fort

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* These remarks were delivered at the Indiana University School of Law—Bloomington on Monday, October 28, 1996.

1. 71 U.S. (4 Wall.) 2 (1866).

Sumter. On April 14, the Union garrison in the fort surrendered. The next day, Abraham Lincoln issued a proclamation calling for 75,000 volunteers to put down the rebellion.

Soon after Lincoln issued his proclamation, the four states of the "Upper South" seceded and joined the Confederacy. They had been playing a waiting game, but each was determined that if the Union attempted to "coerce" the Confederacy, they would secede. Their secession dramatically changed the military status of the nation's capital in Washington. When only the states of the "Lower South" had seceded, the border between the Confederate states and the United States was the southern border of North Carolina. But after Fort Sumter, that border was the Potomac River which separates Maryland from Virginia. Washington went from being an interior capital to a capital on the very frontier of the Union, raising the definite possibility of raids and even investment and capture by the Confederate forces.

Lincoln, fully aware of this danger, was most anxious that the 75,000 volunteers for whom he had called would arrive in Washington and defend the city against a possible Confederate attack. The North, as a whole, had rallied to Lincoln's call to arms, and new volunteer regiments and brigades were oversubscribed. But the only rail connections from the North into Washington ran through the city of Baltimore, forty miles to the northeast.

Herein lay a problem: there were numerous Confederate sympathizers in Baltimore, and the city itself, at that time, had a reputation for unruliness—it was known as "Mob City." Three rail lines—one from Philadelphia and the northeast, another from Harrisburg and the northwest, and the B&O from the west, converged in the city or close to it. To complicate matters further, it was necessary for passengers en route from Philadelphia to Washington to change depots. Shortly after troops from the northeast arrived in Baltimore, a riot broke out while troops were in transit from one depot to another. Some of the troops were riding in railroad cars drawn by horses through the downtown streets of the city, while others were marching in military formation through those same streets. A hostile crowd pelted the troops with stones, who in turn fired shots into the crowd. Several soldiers and several bystanders were killed.

That night, the chief of police in Baltimore, who was a Confederate sympathizer, and the Mayor of Baltimore, who was a less open one, spearheaded a group of Confederate sympathizers who blew up the railroad bridges leading into Baltimore from the north.

Troop movements through Baltimore were temporarily suspended, so troops bound for Washington were sent by ship from a point on Chesapeake Bay above Baltimore to Annapolis, from which point they traveled to Washington over land. But this alternative route was not a satisfactory substitute for the main lines of the railroads, and Lincoln believed that the loss of the rail connection through Baltimore seriously threatened the safety of Washington. Urged on by Secretary Seward, he took the first step to curtail a civil liberty. He authorized General Winfield Scott, commander-in-chief of the Army, to suspend the writ of habeas corpus at any point he deemed necessary along the rail line from Philadelphia to Washington.

Several weeks later, federal troops arrested a man named Merryman, whom authorities suspected of being a major actor in the dynamiting of the railroad

bridges. No sooner was he confined in Fort McHenry than he sued out a writ of habeas corpus. The following day, Chief Justice Roger Taney, sitting as a circuit judge in Baltimore, ordered the government to show cause why Merryman should not be released. A representative of the commandant appeared in court for the government to advise Taney that the writ of habeas corpus had been suspended, and asked for time to consult with the government in Washington. Taney refused, and issued an attachment—a form of arrest—for the commandant of Fort McHenry. The next day, the marshal reported that in his effort to serve the writ he had been denied admission to the fort. Taney then issued an opinion in the case declaring that the President alone did not have the authority to suspend the writ of habeas corpus—only Congress could do that—and holding that Merryman's confinement was illegal. The Chief Justice, knowing that he could not enforce his order, sent a copy of it to Lincoln.

Lincoln ignored the order, but in his address to the special session of Congress which he had called to meet on July 4, 1861, he adverted to it in these words:

> Must [the laws] be allowed to finally fail of execution even had it been perfectly clear that by the use of the means necessary to their execution some single law, made in such extreme tenderness of the citizens' liberty that practically it relieves more of the guilty than of the innocent, should to a very limited extent be violated? To state the question more directly, are all the laws *but one* to go unexecuted, and the government itself go to pieces less that one be violated?[2]

Lincoln, with his usual incisiveness, put his finger on the debate that inevitably surrounds issues of civil liberties in war time.

The provision of the Constitution dealing with habeas corpus is found in Article I, dealing with the legislative power vested in Congress, and provides that the writ of habeas corpus shall not be suspended unless in time of war or rebellion the public safety shall require it. The question of whether only Congress may suspend it has never been authoritatively answered to this day, but the Lincoln Administration proceeded to arrest and detain persons suspected of disloyal activities. People so detained, including the mayor of Baltimore and the chief of police, were first imprisoned at Fort Lafayette in New York harbor—a hardship post as prisons went. They were later transferred to less harsh facilities at Fort Warren in Boston. All of the arrests and detentions in 1861 were initiated by Secretary of State William Seward—a rather unusual official in whom to repose such duties, but one who apparently welcomed them.

Newspaper publishers did not escape the government's watchful eye either. The Administration was especially concerned about the New York press, which had a disproportionate impact on the rest of the country. In that era before press wire services, newspapers in smaller cities frequently simply reprinted stories which had been run earlier in the metropolitan press. In New York, the *Tribune*, the *Herald*, and the *Times* generally supported the Northern war effort, but several other papers did not. In August 1861, a Grand Jury sitting in New York was outraged by an article in the New York *Journal of Commerce*—a paper

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2. Address by Abraham Lincoln to Special Session of Congress (July 4, 1861), *in* THE COLLECTED WORKS OF ABRAHAM LINCOLN 430 (Roy B. Basler ed., 1953).

which opposed the war—that listed over one hundred Northern newspapers opposed to "the present unholy war." The *Journal of Commerce* frequently editorialized in no uncertain words about the malfeasance of the Administration.

The grand jurors inquired of the presiding judge whether such vituperative criticism was subject to indictment. Because the Grand Jury was about to be discharged, the judge did not oblige. Nevertheless, the jurors simply requested that a list of several New York newspapers, including the *Journal of Commerce*, be called to the attention of the next Grand Jury. They had heard no evidence, and received no legal instructions from the judge; they simply made a "presentment"—a written notice taken by a Grand Jury of what it believes to be an indictable offense.

On this thin reed, the Administration proceeded to act. Postmaster General Montgomery Blair directed the Postmaster in New York to exclude from the mails the five newspapers named by the Grand Jury. This was significant because the newspapers of that day were almost entirely dependent upon the mails for their circulation. Gerald Hallock, the part owner and editor of the *Journal of Commerce*, was obliged to negotiate with the Post Office Department to see what the paper would have to do to regain its right to use of the mails. The Post Office Department told him that he must sell his ownership in the newspaper. Hallock reluctantly agreed, and retired, thereby depriving the paper of its principal editorialist opposing the war. The *New York News*, owned by Benjamin Wood, brother of New York Mayor Fernando Wood, decided to fight the ban against his paper. He sought to send its edition south and west by private express, and hired newsboys to deliver the paper locally. The government ordered U.S. Marshals to seize all copies of the paper. In fact one newsboy in Connecticut was arrested for having hawked it. Eventually Wood, too, gave up.

Remarkably, other New York newspapers did not rally round the sheets that the government was suppressing. Instead of crying out that the First Amendment rights of these papers had been abridged—as they would surely do today—their rivals simply gloated. James Gordon Bennett's *Herald* was "*gratified*" to report the death of the *News*, and the *Times* observed that Ben Wood should be thankful he could "walk the streets."

Even clergy were subject to detention for perceived disloyalty. Perhaps the most egregious example was that of the Reverend J.R. Stewart, the Episcopal rector at St. Paul's Church in Alexandria, Virginia, who was undoubtedly a southern sympathizer. For two Sundays in a row, he had omitted the customary Episcopal prayer for the President of the United States in the course of the service. On the second of these occasions, he was arrested in the pulpit of the church, and briefly detained until cooler heads prevailed.

In early 1862, Edwin Stanton succeeded the incompetent Simon Cameron as Secretary of War. He persuaded Lincoln to transfer the security functions to his Department, and to issue a general amnesty for those imprisoned if they would swear loyalty to the Union. But under Stanton, arrests and detentions continued. It turned out that he did not so much disapprove of the earlier arrests in principle; rather he disapproved of them as having been made by the *Secretary of State* rather than the *Secretary of War*.

In the summer of 1862, Congress enacted the first draft law, and Lincoln and Stanton issued executive proclamations suspending the writ of habeas corpus for

those accused of various crimes. These proclamations not only authorized detention, but also authorized trials of the miscreants before military commissions instead of civil courts.

These proclamations introduced an entirely new element into the civil liberties equation. Suspension of habeas corpus permitted detention, but release usually followed in a few months. But if a defendant was actually tried and sentenced by a military commission, not merely temporary detention but a long prison term might well await him. Thus came the second question debated during the Civil War—could civilians outside of the war zone be tried before a military commission, or could they insist on being tried in the civil courts?

Before a military commission, a defendant was denied many of the procedural rights guaranteed by the Bill of Rights to the Constitution. There was no right of jury trial—with its attendant guarantees of a jury composed of local citizenry and of a unanimous verdict requirement. A military commission could be composed of officers from anywhere in the country, and could convict by a majority vote in non-capital cases. To impose the death sentence, however, required a two-thirds vote.

But it was not just procedural rights that might be denied by a military commission. What law was the commission to apply? Was it limited to defendants who were charged with having violated the federal criminal code, or could it apply the much more general and vague notions of martial law?

The Indianapolis treason trials, held in the fall of 1864, starkly posed these questions. Immediately after Fort Sumter, the states of the old Northwest—Ohio, Indiana, and Illinois—had loyally supported Lincoln's call for volunteers. Subsequent events, however, disillusioned a good number of the citizens of these states. Traditionally, farmers there had shipped their farm produce to market down the Mississippi River to New Orleans, where it was transshipped to the east coast or to Europe. But the secession of the southern states closed this route, and the farmers were forced to ship their produce by rail to the east coast. The railroads were owned by easterners, and midwestern farmers felt they were gouged by excessively high rates.

In September 1862, Lincoln issued his Emancipation Proclamation, freeing slaves in Confederate territory. What had started out as a war to preserve the Union now seemed to become a war to end slavery. Most of the midwesterners who had voted for Lincoln in 1860 had agreed with his platform plank that said slavery would not be disturbed where it already existed, but it should not be allowed to spread further into the territories. But there were not many abolitionists—people who believed that slavery should be simply forbidden nationwide—in this part of the country. This distinction was particularly true in Indiana, which was described as the most southern of the northern states.

In the election of 1862, which came shortly after the Emancipation Proclamation, this sentiment was reflected as Democrats gained control of state legislatures in both Illinois and Indiana. The electoral result here in Indiana produced a complete standoff between Governor Oliver P. Morton, a strong-willed Republican, and the Democratic legislature.

Eighteen sixty-three and 1864 were years of bloody conflict on the battlefield. After the battle of Gettysburg in July 1863, it became clear that the South could not win the war and by force of arms establish a separate nation. But enormous

battlefield casualties continued, and even increased as U.S. Grant and Robert E. Lee slugged it out in Virginia. A war weariness began to be felt in the North, caused not by fear of military defeat but by concern that military victory would not be worth the price. The Democratic party split into two camps on this issue—the "war Democrats" supported the northern war effort, while the "peace Democrats" (called "copperheads" by their Union opponents) favored a negotiated peace. Among their other activities, the copperheads formed secret societies, and it was the activities of these societies which led to the Indianapolis treason trials.

In August 1864, military authorities raided the offices of an Indianapolis man named Harrison H. Dodd and found guns, ammunition, and incriminating documents. Based on this evidence, Dodd, Lambdin P. Milligan, a lawyer from Huntington, Indiana, and three others were charged with conspiracy against the government of the United States, conspiracy to aid the rebellion, and conspiracy to overthrow the government of the United States. The federal government decided to try these defendants before a military commission, rather than a civil court, and the trial began in the federal courthouse in Indianapolis in September 1864.

The defendants were an oddly assorted lot. Harrison H. Dodd, the ringleader, on whose premises the guns and ammunition had been found, was born and raised in upstate New York. As a youth, he had moved to Toledo where he became treasurer of a local trade association. In 1856, he joined his brother in Indianapolis, where they formed a partnership in a printing business. Concerned with what he regarded as excesses on the part of the military authorities in Indiana during the Civil War, Dodd became active in the Democratic party. In the summer of 1863, he assumed the leadership in Indiana of a secret society known as the Order of American Knights.

Lambdin P. Milligan was a lawyer in Huntington, Indiana, where his legal abilities were well recognized. He had been born in Ohio, but moved to Indiana and had, like Dodd, become active in Democratic politics. Milligan had a firm belief in the correctness of his own opinions, and vehemently insisted that he could only be tried in a civil court and not before a military commission.

Horace Heffren was also active in Democratic politics. Although early on he had served in the Union forces, he left the service and won a seat as a Democrat in the Indiana legislature. He was described by one of his political opponents as "a disgusting compound of whiskey, grease, vulgarity, and cowardice."

The oldest of the defendants was William Bowles, who was in his eighties. He had been a captain in the Mexican War, but his sympathies with the South in the Civil War were well known. His wife was from New Orleans, and after their marriage, they brought a number of slaves with them to Indiana. An Indiana law forbidding slavery, however, eventually required them to send their slaves back to Louisiana. Bowles was by now one of the wealthiest men in Indiana; he was a physician, and a large landowner in the area of French Lick Springs.

Andrew Humphreys and Stephen Horsey had none of the prominence of the other defendants. Humphreys was active in local politics in his part of the state, while Horsey engaged in farming and other odd jobs.

Much of the evidence was circumstantial, hearsay, and not overly persuasive, especially in regard to Milligan's culpability. But some of the evidence revealed

contacts between some members of the charged conspiracy and Confederate agents in Canada as well as an aborted plan to seize a federal arsenal and free Confederate prisoners held in a military camp near Chicago. Concealed guns and ammunition had been delivered to Dodd, who escaped and fled to Canada before his trial was completed. The evidence as to another conspirator, William Bowles, would very likely have been sufficient to convict him in a civil court. The same cannot be said of the other defendants. One of them turned state's evidence during the trial, and the military commission found all four of the remaining defendants guilty and sentenced three of them to hang.

They had been tried in the fall of 1864, before the presidential election of that year. However, by the time the military commission rendered its decision at the end of 1864, Lincoln had won re-election by a substantial margin, Atlanta had fallen to the Union troops, and Sherman was on his way to Savannah. The end of the war appeared much closer. Public sentiment began to change from a desire for harsh penalties to a desire for leniency. Lawyers for the convicted defendants pleaded their case before Lincoln, who had to approve all death sentences imposed by military courts, and he gave them reason to think that he would in due time set aside the sentence. But in April 1865, Lincoln was assassinated by John Wilkes Booth at Ford's Theater in Washington, and Andrew Johnson succeeded to the Presidency. Johnson was at first determined to treat the Confederate leaders harshly, and ordered that the sentence be carried out. The defendants then sued out a writ of habeas corpus in federal court in Indianapolis, and under the procedures which then prevailed, the case went to the Supreme Court under the name of *Ex parte Milligan.*

In January 1866, the Supreme Court granted a motion to advance the *Milligan* case on its docket, thus indicating that it regarded the case as one of great importance. Argument was set for the beginning of March, and several counsel for each side argued the case before the Court for six days. The government was singularly unfortunate in its representation before the Court. The burden of its case was carried by James Speed, one of the least competent Attorneys General in the history of that office, and Benjamin Butler, who combined a sharp legal mind with a reputation for self-promotion and dubious ethical practices. One of the principal arguments made by the government was that the Bill of Rights to the Constitution—the first ten amendments which guarantee free speech, free press, and numerous rights to those criminally charged—had no application in time of war. The *Milligan* petitioners were ably represented by the young James A. Garfield, a future President of the United States, and David Dudley Field, a leader of the New York bar. The basic argument of the petitioners was that, even in time of war, civilians could not be tried before a military commission so long as the civil courts were open for business.

Five of the nine Justices of the Court at this time had been appointed by Abraham Lincoln: Chief Justice Salmon P. Chase, and Justices Noah Swayne of Ohio, Samuel Freeman Miller of Iowa, David Davis of Illinois, and Stephen Field of California. The other four had been appointed by one or the other of Lincoln's Democratic predecessors—James Wayne of Georgia, nearly thirty years earlier had been appointed by Andrew Jackson; Samuel Nelson of New York, by John Tyler; Robert Grier of Pennsylvania, by James K. Polk; and Nathan Clifford of Maine, by James Buchanan. Court watchers were naturally

interested to see how this interesting mix of Justices would react to the important questions presented to them by this case.

A few weeks after the argument, at the close of its term in April, the Court entered an order that the writ of habeas corpus sought by Milligan and the others should be granted, but that opinions in the case would not be filed until the beginning of the next term in December 1866.

At that time, two opinions were filed: an opinion for the majority of the Court by Justice David Davis, and an opinion for four concurring Justices by Chief Justice Salmon P. Chase. All the Justices agreed that the trial of these defendants by a military commission was invalid. But they divided five to four on their reasoning. The five Justice majority basically adopted the position of the petitioners and held that a United States citizen not in the armed forces could not be tried before a military commission even in time of war if the civil courts were open for business. According to the majority, as the federal court in Indianapolis had been open for business throughout the war, these defendants should have been tried there, rather than before a military commission. The majority opinion relied on the definition of judicial power in Article III of the Constitution, and on the Sixth Amendment guarantee of the right to jury trial.

The concurring Justices held that a law passed by Congress in 1863 allowed those suspected of disloyal activity to be detained, but only until a Grand Jury had an opportunity to indict them. If the Grand Jury indicted, they were to be tried in the civil courts; if it did not, they were to be released. Thus, in effect, these Justices said Congress itself had ruled out trials of civilians by a military commission.

All members of the Court joined in rejecting the government's argument that the Bill of Rights simply did not apply in wartime. The majority opinion contains a somewhat rhetorical passage for which it is justly famous:

> 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. 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.[3]

The majority opinion went on to say that neither the President nor Congress could authorize trial of civilians before military commissions in territory where the civil courts were open. This was the baldest sort of *dicta*—a statement made which is not necessary to decide the case—and it was at this point that the concurring Justices parted company with the majority. Nobody contended that Congress had affirmatively authorized trials of civilians by military commission, and therefore it was totally unnecessary for the Court to express any opinion on that subject. It was the President who had sought to authorize such trials and

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3. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120-21 (1866).

therefore the majority had legitimately dealt with that question and should have confined itself to it.

The four concurring Justices took the majority to task for indulging in this *dicta*, and went on to express their own opinion that Congress, had it chosen to do so, could have authorized trials of certain civilians by military commission in a state such as Indiana, which had been invaded by Confederate forces and subjected to a widespread conspiracy.

Predictably, the decision angered many in the North, and was hailed by many in the South. A respected law review of the time expressed a moderately critical view in this language:

> [H]ad [the Court], in truth, simply adhered to their plain duty as judges,—they could have united in one opinion on this most important case, we deem the course they saw fit to adopt matter for great regret. Instead of approaching the subject of the powers of the co-ordinate branches of the government as one of great delicacy, which they were loath to consider . . . they have seemed eager to go beyond the record, and not only to state the reason of their present judgment, but to lay down the principles on which they would decide other questions, not now before them, involving the gravest and highest powers of Congress. They have seemed to forget how all-important it is for the preservation of their influence that they should confine themselves to their duties as judges between the parties in a particular case; how certainly the jealousy of the co-ordinate departments of the government and of the people would be excited by any attempt on their part to exceed their constitutional functions; and how, the more a case before the Supreme Court assumes a political aspect, the more cautious should the judges be to confine themselves within their proper limits.[4]

The primary reason for the Supreme Court's practice of refraining from deciding a constitutional question unless it is necessary to reach a decision is the "delicacy" involved when one branch of government declares the action of a co-ordinate branch of that government invalid. But an additional reason for caution is that unnecessary *obiter dicta* come back to haunt the Court in future cases. Some of the *dicta* in the *Milligan* opinion did just that in *Ex parte Quirin*,[5] a case that arose during the Second World War.

While the United States and Germany were at war in 1942, Richard Quirin and seven other German soldiers were trained in the use of explosives and secret writing at a sabotage school near Berlin and set on a mission to destroy war industries in the United States. Four of them were transported by German submarine to Amagansett Beach on Long Island. They landed under cover of darkness in June 1942, carrying a supply of explosives and incendiary devices. At the moment of landing they wore German uniforms, but they immediately buried their uniforms on the beach and went in civilian dress to New York City.

The remaining four who had been trained at the sabotage school were taken by another German submarine to Ponte Vedra Beach, Florida. They too landed in German uniform, but proceeded to Jacksonville in civilian dress. All eight saboteurs were ultimately arrested by the FBI in New York or Chicago.

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4. *Summary of Events*, 1 AM. L. REV. 37, 38 (1867).
5. 317 U.S. 1 (1942).

President Franklin Roosevelt appointed a military commission to try Quirin and his cohorts for offenses against the laws of war and the Articles of War enacted by Congress, and he directed that the defendants have no access to civil courts. While they were being tried by the military commission, which sentenced all of them to death, they petitioned the Supreme Court of the United States for review of the procedures under which they were being tried. The Supreme Court convened in a special term on July 29, 1942, to hear arguments in their case.

One of the principal arguments made by able counsel for the petitioners was that, at the time of their trial, the civil courts throughout the United States were open and there had been no invasion of any part of the country. Therefore, relying on the *Milligan* case, the petitioners argued that the government could not resort to trial by a military commission. Counsel noted that one of the petitioners, Herbert Haupt, had been born in the United States and was a United States citizen. At the conclusion of the arguments in the case, and after deliberation, the Court on July 31st announced its ruling upholding the government's position, but its full opinion did not come down until October 1942. In that opinion the Court stated:

> Petitioners, and especially petitioner Haupt, stress the pronouncement of this Court in the *Milligan* case, . . . that the law of war "can never be applied to citizens and states which have upheld the authority of the government, and where the courts are open and their process unobstructed." . . . We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that 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 save as . . . martial law might be constitutionally established.
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> The Court's opinion is inapplicable to the case presented by the present record. We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries . . . .[6]

Thus, the Court had to retreat from the *dicta* of *Milligan*. The *Milligan* decision is justly celebrated for its rejection of the government's position that the Bill of Rights has no application in wartime. It would have been a sounder decision, and much more widely approved at the time, had it not gone out of its way to declare that Congress had no authority to do what it never tried to do.

What can we learn from all of this? The least defensible of the Administration's actions was the suppression of dissent in the press or from the pulpit. As for trials of civilians by military commissions, the answer is less clear. Did the fact that the *Milligan* case was decided more than a year after the end of the Civil War affect the way in which it was decided? Did the fact that the *Quirin* case was decided in the truly dark days for America of World War II—the summer of 1942—affect the way it was decided? Perhaps even landmark decisions such as the *Quirin* and *Milligan* cases cannot totally gainsay the Latin maxim *silent leges inter arma.*

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6. *Id.* at 45-46.

As for Abraham Lincoln, he himself did not approve in advance most of the arrests, detentions, and trials before military commissions which took place during the Civil War. His cabinet secretaries and other advisors did that, but Lincoln acquiesced in almost all of their decisions. In this respect, he seems to me to have acted similarly to the way President Franklin Roosevelt did during the Second World War. Lincoln felt that the great task of his Administration was to preserve the Union. If he could do it by following the Constitution, he would; but if he had to choose between preserving the Union and obeying the Constitution, he would quite willingly choose the former course.

To an audience consisting of many law students, lawyers and judges, this may seem a condemnation, but it is not intended to be so. Neither Abraham Lincoln during the Civil War, Woodrow Wilson during the First World War, nor Franklin Roosevelt during the Second World War, could by any manner or means be described as strong supporters of civil liberties. It may be that during wartime emergencies it is in the nature of the presidency to focus on accomplishing political and strategic ends without too much regard for any resulting breaches in the shield which the Constitution gives to civil liberties. Perhaps it may be best that the courts reserve their serious consideration of questions of civil liberties which arise during wartime until after the war is over. At any rate, these are questions worth thinking about not only in wartime but in peacetime as well.