

Ex Parte Milligan

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Ex parte Milligan - 71 U.S. 2 (1866)

U.S. Supreme Court Ex parte Milligan, 71 U.S. 4 Wall. 2 2 (1866)

Ex parte Milligan

71 U.S. (4 Wall.) 2

SYLLABUS

1. Circuit Courts, as well as the judges thereof, are authorized, by the fourteenth section of the Judiciary Act, to issue the writ of habeas corpus for the purpose of inquiring into the cause of commitment, and they have

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jurisdiction, except in cases where the privilege of the writ is suspended, to hear and determine the question whether the party is entitled to be discharged.

2. The usual course of proceeding is for the court, on the application of the prisoner for a writ of habeas corpus, to issue the writ, and, on its return, to hear and dispose of the case; but where the cause of imprisonment is fully shown by the petition, the court may, without issuing the writ, consider and determine whether, upon the facts presented in the petition, the prisoner, if brought before the court, would be discharged.

3. When the Circuit Court renders a final judgment refusing to discharge the prisoner, he may bring the case here by writ of error, and, if the judges of the Circuit Court, being opposed in opinion, can render no judgment, he may have the point upon which the disagreement happens certified to this tribunal.

4. A petition for a writ of habeas corpus, duly presented, is the institution of a cause on behalf of the petitioner, and the allowance or refusal of the process, as well as the subsequent disposition of the prisoner is matter of law, and not of discretion.

5. A person arrested after the passage of the act of March 3d, 1863, "relating to habeas corpus and regulating judicial proceedings in certain cases," and under the authority of said act, was entitled to his discharge if not indicted or presented by the grand jury convened at the first subsequent term of the Circuit or District Court of the United States for the District.

6. The omission to furnish a list of the persons arrested to the judges of the Circuit or District Court as provided in the said act did not impair the right of said person, if not indicted or presented, to his discharge.

7. Military commissions organized during the late civil war, in a State not invaded and not engaged in rebellion, in which the Federal courts were open, and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict, or sentence for any criminal offence, a citizen who was neither a resident of a rebellious State nor a prisoner of war, nor a person in the military or naval service. And Congress could not invest them with any such power.

8. The guaranty of trial by jury contained in the Constitution was intended for a state of war, as well as a state of peace, and is equally binding upon rulers and people at all times and under all circumstances.

9. The Federal authority having been unopposed in the State of Indiana, and the Federal courts open for the trial of offences and the redress of grievances, the usages of war could not, under the Constitution, afford any sanction for the trial there of a citizen in civil life not connected with the military or naval service, by a military tribunal, for any offence whatever.

10. Cases arising in the land or naval forces, or in the militia in time of war or public danger, are excepted from the necessity of presentment or indictment by a grand jury, and the right of trial by jury in such cases is subject to the same exception.

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11. Neither the President nor Congress nor the Judiciary can disturb any one of the safeguards of civil liberty incorporated into the Constitution except so far as the right is given to suspend in certain cases the privilege of the writ of habeas corpus.

12. A citizen not connected with the military service and a resident in a State where the courts are open and in the proper exercise of their jurisdiction cannot, even when the privilege of the writ of habeas corpus is suspended, be tried, convicted, or sentenced otherwise than by the ordinary courts of law.

13. Suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course, and, on its return, the court decides whether the applicant is denied the right of proceeding any further.

14. A person who is a resident of a loyal State, where he was arrested, who was never resident in any State engaged in rebellion, nor connected with the military or naval service, cannot be regarded as a prisoner of war.

This case came before the court upon a certificate of division from the judges of the Circuit Court for Indiana, on a petition for discharge from unlawful imprisonment.

The case was thus:

An act of Congress -- the Judiciary Act of 1789, [[Footnote 1](#)] section 14 -- enacts that the Circuit Courts of the United States

"Shall have power to issue writs of habeas corpus. And that either of the justices of the Supreme Court, as well as judges of the District Court, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. *Provided,* "

&c.;

Another act -- that of March 3d, 1863, [[Footnote 2](#)] "relating to habeas corpus, and regulating judicial proceedings in certain cases" -- an act passed in the midst of the Rebellion -- makes various provisions in regard to the subject of it.

The first section authorizes the suspension, during the Rebellion, of the writ of habeas corpus, throughout the United States, by the President.

Two following sections limited the authority in certain respects.

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The second section required that lists of all persons, being citizens of States in which the administration of the laws had continued unimpaired in the Federal courts, who were then held, or might thereafter be held, as prisoners of the United States, under the authority of the President, otherwise than as prisoners of war, should be furnished by the Secretary of State and Secretary of War to the judges of the Circuit and District Courts. These lists were to contain the names of all persons, residing within their respective jurisdictions, charged with violation of national law. And it was required, in cases where the grand jury in attendance

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

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

This act made it the duty of the District Attorney of the United States to attend examinations on petitions for discharge.

By proclamation, [[Footnote 3](#)] dated the 15th September following,

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the President, reciting this statute, suspended the privilege of the writ in the cases where, by his authority, military, naval, and civil officers of the United States

"hold persons in their custody either as prisoners of war, spies, or aiders and abettors of the enemy, . . . or belonging to the land or naval force of the United States, or otherwise amenable to military law, or the rules and articles of war, or the rules or regulations prescribed for the military or naval services, by authority of the President, or for resisting a draft, or for any other offence against the military or naval service."

With both these statutes and this proclamation in force, Lamdin P. Milligan, a citizen of the United States, and a resident and citizen of the State of Indiana, was arrested on the 5th day of October, 1864, at his home in the said State, by the order of Brevet Major-General Hovey, military commandant of the District of Indiana, and by the same authority confined in a military prison at or near Indianapolis, the capital of the State. On the 21st day of the same month, he was placed on trial before a "military commission," convened at Indianapolis, by order of the said General, upon the following charges, preferred by Major Burnett, Judge Advocate of the Northwestern Military Department, namely:

1. "Conspiracy against the Government of the United States;"
2. "Affording aid and comfort to rebels against the authority of the United States;"
3. "Inciting insurrection;"
4. "Disloyal practices;" and
5. "Violation of the laws of war."

Under each of these charges, there were various specifications. The substance of them was joining and aiding, at different times between October, 1863, and August, 1864, a secret society known as the Order of American Knights or Sons of Liberty, for the purpose of overthrowing the Government and duly constituted authorities of the United States; holding communication with the enemy; conspiring to seize munitions of war stored in the arsenals; to liberate

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prisoners of war, &c.; resisting the draft, &c.; . . .

"at a period of war and armed rebellion against the authority of the United States, at or near Indianapolis [and various other places specified] in Indiana, a State within the military lines of the army of the United States and the theatre of military operations, and which had been and was constantly threatened to be invaded by the enemy."

These were amplified and stated with various circumstances.

An objection by him to the authority of the commission to try him being overruled, Milligan was found guilty on all the charges, and sentenced to suffer death by hanging, and this sentence, having been approved, he was ordered to be executed on Friday, the 19th of May, 1865.

On the 10th of that same May, 1865, Milligan filed his petition in the Circuit Court of the United States for the District of Indiana, by which, or by the documents appended to which as exhibits, the above facts appeared. These exhibits consisted of the order for the commission; the charges and specifications; the findings and sentence of the court, with a statement of the fact that the sentence was approved by the President of the United States, who directed that it should "be carried into execution without delay;" all "by order of the Secretary of War."

The petition set forth the additional fact that, while the petitioner was held and detained, as already mentioned, in military custody (and more than twenty days after his arrest), a grand jury of the Circuit Court of the United States for the District of Indiana was convened at Indianapolis, his said place of confinement, and duly empaneled, charged, and sworn for said district, held its sittings, and finally adjourned without having found any bill of indictment, or made any presentment whatever against him. That at no time had he been in the military service of the United States, or in any way connected with the land or naval force, or the militia in actual service; nor within the limits of any State whose citizens were engaged in rebellion against the United States, at any time during the war, but, during all the time aforesaid, and for twenty years last past, he had been an

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inhabitant, resident, and citizen of Indiana. And so that it had been

"wholly out of his power to have acquired belligerent rights or to have placed himself in such relation to the government as to have enabled him to violate the laws of war."

The record, in stating who appeared in the Circuit Court, ran thus:

"Be it remembered, that on the 10th day of May, A.D. 1865, in the court aforesaid, before the judges aforesaid, comes Jonathan W. Gorden, Esq., of counsel for said Milligan, and files here, in open court, the petition of said Milligan, to be discharged. . . . At the same time comes John Hanna, Esquire, the attorney prosecuting the pleas of the United States in this behalf. And thereupon, by agreement, this application is submitted to the court, and day is given, &c.;"

The prayer of the petition was that, under the already mentioned act of Congress of March 3d, 1863, the petitioner might be brought before the court and either turned over to the proper civil tribunal to be proceeded with according to the law of the land or discharged from custody altogether.

At the hearing of the petition in the Circuit Court, the opinions of the judges were opposed upon the following questions:

- I. On the facts stated in the petition and exhibits, ought a writ of habeas corpus to be issued according to the prayer of said petitioner?
- II. On the facts stated in the petition and exhibits, ought the said Milligan to be discharged from custody as in said petition prayed?
- III. Whether, upon the facts stated in the petition and exhibits, the military commission had jurisdiction legally to try and sentence said Milligan in manner and form, as in said petition and exhibit is stated?

And these questions were certified to this court under the provisions of the act of Congress of April 29th, 1802, [[Footnote 4](#)] an act

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which provides

"that whenever any question shall occur before a Circuit Court upon which the opinions of the judges shall be opposed, the point upon which the disagreement

shall happen shall, during the same term, upon the request of *either party* or their counsel, be stated under the direction of the judges and certified under the seal of the court to the Supreme Court, at their next session to be held thereafter, and shall by the said court be *finally* decided, and the decision of the Supreme Court and their order in the premises shall be remitted to the Circuit Court and be there entered of record, and shall have effect according to the nature of the said judgment and order; *Provided*, That nothing herein contained shall prevent the cause from proceeding if, in the opinion of the court, further proceedings can be had without prejudice to the merits."

The three several questions above mentioned were argued at the last term. And along with them, an additional question raised in this court, namely:

IV. A question of jurisdiction, as -- 1. Whether the Circuit Court had jurisdiction to hear the case there presented? -- 2. Whether the case sent up here by certificate of division was so sent up in conformity with the intention of the act of 1802? in other words, whether this court had jurisdiction of the questions raised by the certificate?

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Mr. Justice DAVIS delivered the opinion of the court.

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

On the 21st day of October, 1864, he was brought before a military commission, convened at Indianapolis by order of General Hovey, tried on certain charges and

specifications, found guilty, and sentenced to be hanged, and the sentence ordered to be executed on Friday, the 19th day of May, 1865.

On the 2d day of January, 1865, after the proceedings of the military commission were at an end, the Circuit Court of the United States for Indiana met at Indianapolis and empaneled a grand jury, who were charged to inquire

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whether the laws of the United States had been violated. and, if so, to make presentments. The court adjourned on the 27th day of January, having, prior thereto, discharged from further service the grand jury, who did not find any bill of indictment or make any presentment against Milligan for any offence whatever, and, in fact, since his imprisonment, no bill of indictment has been found or presentment made against him by any grand jury of the United States.

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

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

With the petition were filed the order for the commission, the charges and specifications, the findings of the court, with the order of the War Department reciting that the sentence was approved by the President of the United States, and directing that it be carried into execution without delay. The petition was presented and filed in open court by the counsel for Milligan; at the same time, the District Attorney of the United States for Indiana appeared and, by the agreement of

counsel, the application was submitted to the court. The opinions of the judges of the Circuit Court were opposed on three questions, which are certified to the Supreme Court:

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

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

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

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

During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power, and feelings and interests prevailed which are happily terminated. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment. We approach the investigation of this case fully sensible of the magnitude of the inquiry and the necessity of full and cautious deliberation.

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

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

"that whenever any question shall occur before a Circuit Court upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the judges and certified under the seal of the court to the Supreme Court at their next session to be held thereafter, and shall by the said court be finally decided, and the decision of the

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Supreme Court and their order in the premises shall be remitted to the Circuit Court and be there entered of record, and shall have effect according to the nature of the said judgment and order: *Provided*, That nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, further proceedings can be had without prejudice to the merits."

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

It was admitted at the bar that the Circuit Court had jurisdiction to entertain the application for the writ of habeas corpus and to hear and determine it, and it could not be denied, for the power is expressly given in the 14th section of the Judiciary Act of 1789, as well as in the later act of 1863. Chief Justice Marshall, in *Bollman's* case, [[Footnote 5](#)] construed this branch of the Judiciary Act to authorize the courts as well as the judges to issue the writ for the purpose of inquiring into the cause of the commitment, and this construction has never been departed from. But it is maintained with earnestness and ability that a certificate of division of opinion can occur only in a *cause*, and that the proceeding by a party moving for a writ of habeas corpus does not become a cause *until after the writ has been issued and a return made*.

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

It is true that it is usual for a court, on application for a writ of habeas corpus, to issue the writ, and, on the return, to dispose of the case, but the court can elect to waive the issuing of the writ and consider whether, upon the facts presented in the petition, the prisoner, if brought before it, could be discharged. One of the very points on which the case of Tobias Watkins, reported in 3 Peters, [[Footnote 6](#)] turned was

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whether, if the writ was issued, the petitioner would be remanded upon the case which he had made.

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

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

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

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

one.

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

The act of 1802 so changed the judicial system that the Circuit Court, instead of three, was composed of two judges, and, without this provision or a kindred one, if the judges differed, the difference would remain, the question be unsettled, and justice denied. The decisions of this court upon the provisions of this section have been numerous. In *United States v. Daniel*, [[Footnote 7](#)] the court, in holding that a division

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of the judges on a motion for a new trial could not be certified, say: "That the question must be one which arises in a cause depending before the court relative to a proceeding belonging to the cause." Testing Milligan's case by this rule of law, is it not apparent that it is rightfully here, and that we are compelled to answer the questions on which the judges below were opposed in opinion? If, in the sense of the law, the proceeding for the writ of habeas corpus was the " *cause* " of the party applying for it, then it is evident that the "cause" was pending before the court, and that the questions certified arose out of it, belonged to it, and were matters of right, and not of discretion.

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

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

-- and he says,

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

In any legal sense, action, suit, and cause, are convertible terms. Milligan supposed he had a right to test the validity of his trial and sentence, and the proceeding which he set in operation for that purpose was his "cause" or "suit." It was the only one by which he could recover his liberty. He was powerless to do more; he could neither instruct the judges nor control their action, and should not suffer, because, without fault of his, they were unable to render a judgment. But the true meaning to the term "suit" has been given by this court. One of the questions in *Weston v. City Council of Charleston*, [[Footnote 8](#)] was whether a writ of prohibition was a suit, and Chief Justice Marshall says:

"The

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

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

Again, in *Cohens v. Virginia*, [[Footnote 9](#)] he says: "In law language, a suit is the prosecution of some demand in a court of justice." Also,

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

When Milligan demanded his release by the proceeding relating to habeas corpus, he commenced a suit, and he has since prosecuted it in all the ways known to the law. One of the questions in *Holmes v. Jennison, et al.*, [[Footnote 10](#)] was whether, under the 25th section of the Judiciary Act, a proceeding for a writ of habeas corpus was a "suit." Chief Justice Taney held that,

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

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

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

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

Such a literal and technical construction would defeat the very purpose the legislature had in view, which was to enable

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any party to bring the case here when the point in controversy was a matter of right, and not of discretion, and the words "either party," in order to prevent a failure of justice, must be construed as words of enlargement, and not of restriction. Although this case is here *ex parte*, it was not considered by the court below without notice having been given to the party supposed to have an interest in the detention of the prisoner. The statements of the record show that this is not only a fair, but conclusive, inference. When the counsel for Milligan presented to the court the petition for the writ of habeas corpus, Mr. Hanna, the District Attorney for Indiana, also appeared, and, by agreement, the application was submitted to the court, who took the case under advisement, and on the next day announced their inability to agree, and made the certificate. It is clear that Mr. Hanna did not represent the petitioner, and why is his appearance entered? It admits of no other solution than this -- that he was informed of the application, and appeared on

behalf of the government to contest it. The government was the prosecutor of Milligan, who claimed that his imprisonment was illegal and sought, in the only way he could, to recover his liberty. The case was a grave one, and the court unquestionably directed that the law officer of the government should be informed of it. He very properly appeared, and, as the facts were uncontroverted and the difficulty was in the application of the law, there was no useful purpose to be obtained in issuing the writ. The cause was therefore submitted to the court for their consideration and determination.

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

In interpreting a law, the motives which must have operated with the legislature in passing it are proper to be considered. This law was passed in a time of great national peril, when our heritage of free government was in danger.

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An armed rebellion against the national authority, of greater proportions than history affords an example of, was raging, and the public safety required that the privilege of the writ of habeas corpus should be suspended. The President had practically suspended it, and detained suspected persons in custody without trial, but his authority to do this was questioned. It was claimed that Congress alone could exercise this power, and that the legislature, and not the President, should judge of the political considerations on which the right to suspend it rested. The privilege of this great writ had never before been withheld from the citizen, and, as the exigence of the times demanded immediate action, it was of the highest importance that the lawfulness of the suspension should be fully established. It was under these circumstances, which were such as to arrest the attention of the country, that this law was passed. The President was authorized by it to suspend the privilege of the writ of habeas corpus whenever, in his judgment, the public safety required, and he did, by proclamation, bearing date the 15th of September,

1863, reciting, among other things, the authority of this statute, suspend it. The suspension of the writ does not authorize the arrest of anyone, but simply denies to one arrested the privilege of this writ in order to obtain his liberty.

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

The second and third sections of the law are explicit on these points. The language used is plain and direct, and the meaning of the Congress cannot be mistaken. The public safety demanded, if the President thought proper to arrest a suspected person, that he should not be required to give the cause of his detention on return to a writ of habeas corpus. But it was not contemplated that such person should be detained in custody beyond a certain fixed period unless certain judicial proceedings, known to the common law, were commenced against him. The Secretaries of State and War were directed to furnish to the judges of the courts of the

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United States a list of the names of all parties, not prisoners of war, resident in their respective jurisdictions, who then were or afterwards should be held in custody by the authority of the President, and who were citizens of states in which the administration of the laws in the Federal tribunals was unimpaired. After the list was furnished, if a grand jury of the district convened and adjourned, and did not indict or present one of the persons thus named, he was entitled to his discharge, and it was the duty of the judge of the court to order him brought before him to be discharged if he desired it. The refusal or omission to furnish the list could not operate to the injury of anyone who was not indicted or presented by the grand jury, for, if twenty days had elapsed from the time of his arrest and the termination of the session of the grand jury, he was equally entitled to his discharge as if the list were furnished, and any credible person, on petition verified by affidavit, could obtain the judge's order for that purpose.

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

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not, always in session, and can adjourn on the discharge of the grand jury, and before those who are in confinement could take proper steps to procure their liberation. To provide for this contingency, authority was given to the judges out of court to grant relief to any party who could show that, under the law, he should be no longer restrained of his liberty.

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

It is not easy to see how this omission could affect the question of jurisdiction. Milligan could not know that the list was furnished, unless the judges volunteered to tell him, for the law did not require that any record should be made of it or anybody but the judges informed of it. Why aver the fact when the truth of the matter was apparent to the court without an averment? How can Milligan be harmed by the absence of the averment when he states that he was under arrest

for more than sixty days before the court and grand jury, which should have considered his case, met at Indianapolis? It is apparent therefore that, under the Habeas Corpus Act of 1863, the Circuit Court of Indiana had complete jurisdiction to adjudicate upon this case, and, if the judges could not agree on questions vital to the progress of the cause, they had the authority (as we have shown in a previous part of this opinion), and it was their duty, to certify those questions of disagreement to this court for final decision. It was argued that a final decision on the questions presented ought not to be made, because the parties who were directly concerned in the arrest and detention of Milligan were not before the court, and their rights might be prejudiced by the answer which should be given to those questions. But this court cannot know what return will be made to the writ of habeas corpus when issued, and it is very clear that no one is concluded upon any question that may be raised to that return. In the sense of the law of 1802 which authorized a certificate of division, a final decision

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means final upon the points certified, final upon the court below, so that it is estopped from any adverse ruling in all the subsequent proceedings of the cause.

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

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

The controlling question in the case is this: upon the facts stated in Milligan's petition and the exhibits filed, had the military commission mentioned in it jurisdiction legally to try and sentence him? Milligan, not a resident of one of the rebellious states or a prisoner of war, but a citizen of Indiana for twenty years past and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of the military commander of the military district of Indiana. Had this tribunal the legal power and authority to try and punish this man?

No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole

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people, for it is the birthright of every American citizen when charged with crime to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and, if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be or how much his crimes may have shocked the sense of justice of the country or endangered its safety. By the protection of the law, human rights are secured; withdraw that protection and they are at the mercy of wicked rulers or the clamor of an excited people. If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle, and secured in a written constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it, this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct to leave room for misconstruction or doubt of their true meaning. Those

applicable to this case are found in that clause of the original Constitution which says "That the trial of all crimes, except in case of impeachment, shall be by jury," and in the fourth, fifth, and sixth articles of the amendments. The fourth proclaims the right to be secure in person and effects against unreasonable search and seizure, and directs that a judicial warrant shall not issue "without proof of probable cause supported by oath or affirmation." The fifth declares

"that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor be deprived

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of life, liberty, or property without due process of law."

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

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

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

Time has proven the discernment of our ancestors, for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper, and that the principles of constitutional liberty would be in peril unless established by irrevocable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times

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and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false, for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority.

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

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

jurisdiction."

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

It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that, in Indiana, the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances, and no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life in nowise

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connected with the military service. Congress could grant no such power, and, to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was therefore infringed when Milligan was tried by a court not ordained and established by Congress and not composed of judges appointed during good behavior.

Why was he not delivered to the Circuit Court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it, because Congress had declared penalties against the offences charged, provided for their punishment, and directed that court to hear and determine them. And soon after this military tribunal was ended, the Circuit Court met, peacefully transacted its business, and adjourned. It needed no bayonets to protect it, and required no military aid to execute its judgments. It was held in a state, eminently distinguished for patriotism, by judges commissioned during the Rebellion, who were provided with juries, upright, intelligent, and selected by a marshal appointed by the President. The government had no right to conclude that Milligan, if guilty, would not receive in that court merited punishment, for its records disclose that it was constantly engaged in the trial of similar offences, and was never interrupted in its

administration of criminal justice. If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty because he "conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection," the law said arrest him, confine him closely, render him powerless to do further mischief, and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended.

Another guarantee of freedom was broken when Milligan was denied a trial by jury. The great minds of the country

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

The discipline necessary to the efficiency of the army and navy required other and swifter modes of trial than are furnished by the common law courts, and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences

committed while the party is in the military or naval service. Everyone connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. *All other persons*, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity. When peace prevails, and the authority of the government is undisputed,

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there is no difficulty of preserving the safeguards of liberty, for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion -- if the passions of men are aroused and the restraints of law weakened, if not disregarded -- these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.

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

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

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

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together; the antagonism is irreconcilable, and, in the conflict, one or the other must perish.

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

It is essential to the safety of every government that, in a great crisis like the one we have just passed through, there should be a power somewhere of suspending the writ of habeas corpus. In every war, there are men of previously good

character wicked enough to counsel their fellow-citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies, and their influence may lead to dangerous combinations. In the emergency of the times, an immediate public investigation according to law may not be possible, and yet the period to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the persons arrested

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

It will be borne in mind that this is not a question of the power to proclaim martial law when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on states in rebellion to cripple their resources and quell the insurrection. The jurisdiction claimed is much more extensive. The necessities of the service during the late Rebellion required that the loyal states should be placed within the limits of certain military districts and commanders appointed in them, and it is urged that this, in a military sense, constituted them the theater of military

operations, and as, in this case, Indiana had been and was again threatened with invasion by the enemy, the occasion was furnished to establish martial law. The conclusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On her soil there was no hostile foot; if once invaded, that invasion was at an end, and, with

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it, all pretext for martial law. Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present, the invasion real, such as effectually closes the courts and deposes the civil administration.

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

It follows from what has been said on this subject that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society, and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration, for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion, it could have been enforced in

Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed and justice was always administered. And so, in the case of a foreign invasion, martial rule may become a necessity in one state when, in another, it would be "mere lawless violence."

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

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

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

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

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

So sensitive were our Revolutionary fathers on this subject, although Boston was almost in a state of siege, when General Gage issued his proclamation of martial

law, they spoke of it as an "attempt to supersede the course of the common law, and, instead thereof, to publish and order the use of martial law." The Virginia Assembly also denounced a similar measure on the part of Governor Dunmore

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

In some parts of the country, during the war of 1812, our officers made arbitrary arrests and, by military tribunals, tried citizens who were not in the military service. These arrests

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and trials, when brought to the notice of the courts, were uniformly condemned as illegal. The cases of *Smith v. Shaw* and *McConnell v. Hampden* (reported in 12 Johnson [[Footnote 11](#)]) are illustrations, which we cite not only for the principles they determine but on account of the distinguished jurists concerned in the decisions, one of whom for many years occupied a seat on this bench.

It is contended, that *Luther v. Borden*, decided by this court, is an authority for the claim of martial law advanced in this case. The decision is misapprehended. That case grew out of the attempt in Rhode Island to supersede the old colonial government by a revolutionary proceeding. Rhode Island, until that period, had no other form of local government than the charter granted by King Charles II in 1663, and, as that limited the right of suffrage, and did not provide for its own amendment, many citizens became dissatisfied because the legislature would not afford the relief in their power, and, without the authority of law, formed a new and independent constitution and proceeded to assert its authority by force of arms. The old government resisted this, and, as the rebellion was formidable, called out the militia to subdue it and passed an act declaring martial law. Borden, in the military service of the old government, broke open the house of Luther, who supported the new, in order to arrest him. Luther brought suit against Borden, and the question was whether, under the constitution and laws of the state, Borden was justified. This court held that a state "may use its military power to put down

an armed insurrection too strong to be controlled by the civil authority," and, if the legislature of Rhode Island thought the period so great as to require the use of its military forces and the declaration of martial law, there was no ground on which this court could question its authority, and, as Borden acted under military orders of the charter government, which had been recognized by the political power of the country, and was upheld by the state judiciary, he was justified in breaking

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into and entering Luther's house. This is the extent of the decision. There was no question in issue about the power of declaring martial law under the Federal Constitution, and the court did not consider it necessary even to inquire "to what extent nor under what circumstances that power may be exercised by a state."

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

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

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

laws to meet the crisis, and as our highest civil duty is to serve our country when in danger, the late war has proved that rigorous laws, when necessary, will be cheerfully obeyed by a patriotic people, struggling to preserve the rich blessings of a free government.

The two remaining questions in this case must be answered in the affirmative. The suspension of the privilege of the

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writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course, and, on the return made to it, the court decides whether the party applying is denied the right of proceeding any further with it.

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

But it is insisted that Milligan was a prisoner of war, and therefore excluded from the privileges of the statute. It is not easy to see how he can be treated as a prisoner of war when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion. If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offence, he cannot

plead the rights of war, for he was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?

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

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[[Footnote 1](#)]

1 Stat at Large 81.

[[Footnote 2](#)]

12 *id.* 755.

[[Footnote 3](#)]

13 Stat. at Large 734.

[[Footnote 4](#)]

2 Stat. at Large 159.

[[Footnote 5](#)]

[8 U. S. 4](#) Cranch 75.

[[Footnote 6](#)]

Page [28 U. S. 193](#) .

[[Footnote 7](#)]

[19 U. S. 6](#) Wheaton 542.

[[Footnote 8](#)]

[27 U. S. 2](#) Peters 449.

[[Footnote 9](#)]

[19 U. S. 6](#) Wheaton 264.

[[Footnote 10](#)]

[39 U. S. 14](#) Peters 540.

[[Footnote 11](#)]

Pages 257 and 234.

The CHIEF JUSTICE delivered the following opinion.

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

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

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

The crimes with which Milligan was charged were of the gravest character, and the petition and exhibits in the record, which must here be taken as true, admit his

guilt. But whatever his desert of punishment may be, it is more important to the country and to every citizen that he should not be punished under an illegal sentence, sanctioned by this court of last resort, than that he should be punished at all. The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict, even upon the guilty, unauthorized though merited justice.

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

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

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

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

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

The second section required that lists of all persons, being citizens of states in which the administration of the laws had continued unimpaired in the Federal courts, who were then held or might thereafter be held as prisoners of the United

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

The third section provided, in case lists of persons other

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

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

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

The holding of the Circuit and District Courts of the United States in Indiana had been uninterrupted. The administration of the laws in the Federal courts had remained unimpaired. Milligan was imprisoned under the authority of the

President, and was not a prisoner of war. No list of prisoners had been furnished to the judges, either of the District or Circuit Courts, as required by the law. A grand jury had attended the Circuit Courts of the Indiana district while Milligan was there imprisoned, and had closed its session without finding any indictment or presentment or otherwise proceeding against the prisoner.

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

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

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

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

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

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

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

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

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

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

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The military commission could not have jurisdiction to try and sentence Milligan if he could not be detained in prison under his original arrest or under sentence after the close of a session of the grand jury without indictment or other proceeding against him.

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

Under it, in such states, the privilege of the writ might be suspended. Any person regarded as dangerous to the public safety might be arrested and detained until after the session of a grand jury. Until after such session, no person arrested could have the benefit of the writ, and even then no such person could be discharged except on such terms, as to future appearance, as the court might impose. These provisions obviously contemplate no other trial or sentence than that of a civil

court, and we could not assert the legality of a trial and sentence by a military commission, under the circumstances specified in the act and described in the petition, without disregarding the plain directions of Congress.

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

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

We cannot agree to this.

We agree in the proposition that no department of the

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government of the United States -- neither President, nor Congress, nor the Courts -- possesses any power not given by the Constitution.

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

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

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

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

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

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

Nor, in our judgment, does the fifth, or any other amendment, abridge that power. "Cases arising in the land and naval forces, or in the militia in actual service in time of war

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or public danger," are expressly excepted from the fifth amendment, "that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," and it is admitted that the exception applies to the other amendments as well as to the fifth.

Now we understand this exception to have the same import and effect as if the powers of Congress in relation to the government of the army and navy and the militia had been recited in the amendment, and cases within those powers had been expressly excepted from its operation. The states, most jealous of encroachments upon the liberties of the citizen, when proposing additional

safeguards in the form of amendments, excluded specifically from their effect cases arising in the government of the land and naval forces. Thus, Massachusetts proposed that

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

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

We think, therefore, that the power of Congress in the government of the land and naval forces and of the militia is not at all affected by the fifth or any other amendment. It is not necessary to attempt any precise definition of the boundaries of this power. But may it not be said that government

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includes protection and defence, as well as the regulation of internal administration? And is it impossible to imagine cases in which citizens conspiring or attempting the destruction or great injury of the national forces may be subjected by Congress to military trial and punishment in the just exercise of this undoubted constitutional power? Congress is but the agent of the nation, and does not the security of individuals against the abuse of this, as of every other, power depend on the intelligence and virtue of the people, on their zeal for public and private liberty, upon official responsibility secured by law, and upon the frequency

of elections, rather than upon doubtful constructions of legislative powers?

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

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

The power to make the necessary laws is in Congress, the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaigns, nor can the President,

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or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.

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

Where peace exists, the laws of peace must prevail. What we do maintain is that, when the nation is involved in war, and some portions of the country are invaded,

and all are exposed to invasion, it is within the power of Congress to determine in what states or district such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army or against the public safety.

In Indiana, for example, at the time of the arrest of Milligan and his co-conspirators, it is established by the papers in the record, that the state was a military district, was the theatre of military operations, had been actually invaded, and was constantly threatened with invasion. It appears also that a powerful secret association, composed of citizens and others, existed within the state, under military organization, conspiring against the draft and plotting insurrection, the liberation of the prisoners of war at various depots, the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government.

We cannot doubt that, in such a time of public danger, Congress had power under the Constitution to provide for the organization of a military commission and for trial by that commission of persons engaged in this conspiracy. The fact that the Federal courts were open was regarded by Congress as a sufficient reason for not exercising the power, but that fact could not deprive Congress of the right to exercise it. Those courts might be open and undisturbed in the execution

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of their functions, and yet wholly incompetent to avert threatened danger or to punish, with adequate promptitude and certainty, the guilty conspirators.

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

We have confined ourselves to the question of power. It was for Congress to determine the question of expediency. And Congress did determine it. That body did not see fit to authorize trials by military commission in Indiana, but, by the

strongest implication, prohibited them. With that prohibition we are satisfied, and should have remained silent if the answers to the questions certified had been put on that ground, without denial of the existence of a power which we believe to be constitutional and important to the public safety -- a denial which, as we have already suggested, seems to draw in question the power of Congress to protect from prosecution the members of military commissions who acted in obedience to their superior officers and whose action, whether warranted by law or not, was approved by that upright and patriotic President under whose administration the Republic was rescued from threatened destruction.

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

There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war, another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated

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as belligerents, and a third to be exercised in time of invasion or insurrection within the limits of the United States or during rebellion within the limits of states maintaining adherence to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under MILITARY LAW, and is found in acts of Congress prescribing rules and articles of war or otherwise providing for the government of the national forces; the second may be distinguished as MILITARY GOVERNMENT, superseding, as far as may be deemed expedient, the local law and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress, while the third may be denominated MARTIAL LAW PROPER, and is called into

action by Congress, or temporarily, when the action of Congress cannot be invited, and, in the case of justifying or excusing peril, by the President in times of insurrection or invasion or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.

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

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

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

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