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Trial by jury is of such ancient origin and has so long endured that, all too frequently, its permanence as an institution for the trial of alleged offenses against society or the Government seems to be taken for granted. Does not our Federal Constitution provide that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; * * *" (Art. III, Sec. 2)? And, does not our State Constitution guarantee that "Trial by jury shall be as heretofore, and the right thereof remain inviolate" (Art. I, Sec. 6)? Yet, the right to trial by jury has at times been threatened and, particularly, in times of war. Strange as it may seem, such affronts have been no less evident when the war was being waged for the preservation of our free institutions which are designed to secure and maintain the liberties of the people. Our country's history furnishes a number of such instances, one of which is of especial interest and importance.

During the Civil War, one Milligan, a citizen of the United States and a resident of the State of Indiana for twenty years, was accused of activities which, if true, evidenced his disloyalty to the Union in a culpable manner. He was arrested at his home on October 5, 1864, upon orders of the Commanding General of the District of Indiana and was confined in a military prison in Indianapolis. On October 21st following, he was placed on trial before a military commission, convened in Indianapolis on orders of the Commanding General, upon charges preferred by the Judge Advocate of the Northwestern Military Department. The charges embraced (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. The charges were supported by specifications which need not now be detailed. No question of their sufficiency was involved. Milligan had never been a member of the military or naval forces of the United States; nor a resident of a State in rebellion to Federal authority; nor a belligerent. He was convicted by the military commission on all charges and was sentenced to be hanged. The sentence received Executive approval in May of 1865, and was ordered to be carried out on the 19th of that month. On May 10th Milligan had filed in the Circuit Court of the United States for the District of Indiana a petition for a writ of *habeas corpus* alleging that the military commission was without jurisdiction to try him and that the conviction and sentence were therefore void.

The judges of the Circuit Court, being evenly divided in opinion on the issues involved, certified to the Supreme Court of the United States three questions all of which were unanimously answered by that Court in favor of the petitioner's contentions. The Court did divide (five to four) on a question not raised by the facts of the case with respect to the power of the President or Congress to institute such a military commission in an actual theatre of war where the civil courts were not open for the administration of justice. But, as already stated, there was unanimity that the President was without authority to invest a military commission in a State not invaded, not engaged in rebellion and in which the Federal Courts were open, with jurisdiction to try, convict or sentence for a criminal offense a citizen who was neither a resident of a rebel State, nor a prisoner of war, nor in the military or naval forces of the country.

For present purposes, it is unnecessary to enter upon a review of the procedural questions[1] also considered and passed upon by the Supreme Court in Milligan's case. Our immediate concern is as to the right of a non-military and non-belligerent offender in a locality other than an actual theatre of war, where the courts continue to function as usual, to trail by jury.

With respect to that question Mr. Justice Davis, who wrote the majority opinion in the Milligan case, said that "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances"; that a "* * * guarantee of freedom was broken when Milligan was denied a trial by jury"; that "* * * until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack"; and that "*this right* (of trial by jury) — 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 learned Justice then added, —

> "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; and, if this (military) government is continued *after* the courts are reinstated, it

[1]The other questions were (1) whether, in the circumstances shown, *habeas corpus* was available to the petitioner under the provisions of the Act of March 3, 1863, (1 Stat. at Large 81), the *privilege* of the writ having theretofore been suspended by Executive order, (2) whether a petition for *habeas corpus* amounted to the institution of a cause, the allowance or refusal of process wherein raised a reviewable question of law, and (3) whether questions of law could be certified to the Supreme Court for answer upon a record such as was then before the Court.

> 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."

Apart from operating to discharge Milligan from the custody of the military authorities, the decision immediately provoked from a large segment of the Northern press criticisms of the Supreme Court and certain of its members in particular which were both abusive and denunciatory. Appomattox was then but a few months in the past and the hatreds and passions engendred by the late war were still bitter and intense. But is was not long before the decision came to be recognized generally for what it was and is, — "one of the bulwarks of American liberty": see Warren, The Supreme Court of United States History, Vol. 2, p. 427 et seq.

However, in the case of the German saboteurs who landed clandestinely from enemy submarines on the Atlantic coast in June 1942 and who were tried and convicted by a military commission, the Attorney General urged upon the Supreme Court a limitation or restriction of the doctrine of the Milligan case to the end that a wider discretion might be accorded the Executive in the matter of the detention and trial of "persons suspected of hostile associations" in wartime: see *Ex Parte Quirin,* 317 U. S. 1. But, no such relaxation was appropriate to the circumstances even if it could ever be considered justifiable. The saboteurs were belligerents in the pay and under the orders of an enemy government.[2] They had entered our country in military uniform of the enemy and, upon landing, had immediately discarded such clothing for civilian dress, the better to conceal their identity for their hostile purposes. They carried with them explosives, fuses and incendiary and timing devices for their intended use in destroying munitions plants and military establishments in this country which they were under orders from the German High Command to do. Chief Justice Stone, speaking for the Supreme Court, after pointing out (p. 45) the distinction between the Milligan case and the saboteurs' case, held (p. 46), "* * * that those particular acts [committed by the saboteurs] constitute an offense against the law of war which the Constitution authorizes to be tried by military commission." Incidentally, Chief Justice Stone took occasion to reiterate a dictum of Chief Justice Chase in his separate opinion in the Milligan case by saying (p. 25) that "Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty."

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[2]Only the petitioner Haupt claimed United States citizenship on the basis of his parents' naturalization during Haupt's minority. Born in Germany, he had been brought to this country at the age of five by his parents, but, upon attaining his majority, he returned to Germany and thereafter showed his allegiance to that country. In view of the offenses charged and proven against the saboteurs (violations of the law of war), the Supreme Court found it unnecessary to resolve Haupt's claim to citizenship.

Where, however, a resident, not attached to this country's military or naval forces and not a belligerent or a prisoner of war, is charged with an offense in a State not embraced in an actual theatre of war and where the courts are open for the proper and unhampered exercise of their judicial functions, the rule of the Milligan case stands unimpaired and secures to such offender his constitutional right to a trial by jury: see *Duncan v. Kahanamoku,* — U. S. — (decided February 25, 1946), and the concurring opinion of Mr. Justice Murphy on the present day vigor of the Milligan case. A year following the Supreme Court's decision in *Ex Parte Quirin,* supra, the United States District Court for the Eastern District of Pennsylvania, in an able opinion by Judge Ganey, held that the Philadelphia area was not in an actual theatre of war and, in reliance upon the rule in the Milligan case, thereupon invalidated an expulsion order arbitrarily entered by the Military Commander of the District against a German-born naturalized citizen of the United States without open charge or judicial hearing: see *Olga Schueller v. Drum, Lieutenant General,* 51 Fed. Supp. 383.

Although there is language in *Hirabayashi v. United States,* 320 U. S. 81, 93, from which it might be inferred that the Executive has an almost absolute right in wartime to determine the immediacy and pendency of the danger from without which justifies martial rule and the suspension of civil rights, yet the allowable limits of military discretion in such regard and whether or not they have been overstepped in a particular case still remain judicial questions where courts are open and functioning: *Sterling v. Constantin,* 287 U. S. 378, 401.[8] So long as that is so, the "open court" criterion for determining the nonpresence of "an actual theatre of war" will properly endure. And, if we faithfully follow the teaching of the Milligan case, martial rule will never be permitted to exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction.

[8]In the case of *Korematsu v. United States,* 323 U. S. 214, the Supreme Court by a six to three vote sustained a conviction in a Federal Court of California of a native-born American citizen of Japanese ancestry for his failure to obey an order of the Military Commander of the District that he evacuate his home and enter an Assembly Center, — "a euphemism for a prison" as Mr. Justice Roberts pointed out, in his dissent, on the basis of the Commanding General's report to the Secretary of War. Why the reasonableness of the order did not raise a judicial question in the attending circumstances (cf. *Sterling v. Constantin,* supra; also *Duncan v. Kahanamoku,* supra) does not appear. And, it is more than difficult to understand how the disobeyed order could have been thought to be other than a flagrant violation of the petitioner's rights. It would seem that the sound constitutional view was the one taken by the three separate dissenters.