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## The Law (?) of the Lincoln Assassination

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## ARTICLES

### THE LAW(?) OF THE LINCOLN ASSASSINATION

*Martin S. Lederman\**

*Shortly after John Wilkes Booth assassinated Abraham Lincoln on April 14, 1865, President Andrew Johnson directed that Booth's alleged coconspirators be tried in a makeshift military tribunal, rather than in the Article III court that was open for business just a few blocks from Ford's Theatre. Johnson's decision implicated a fundamental constitutional question that was heatedly debated throughout the Civil War: When, if ever, may the federal government circumvent Article III's requirements of a criminal trial by jury with an independent, tenure-protected presiding judge by trying individuals other than members of the armed forces in a wartime military tribunal?*

*That question is significant in the United States' current armed conflicts against nonstate terrorist organizations such as al-Qaeda because Congress has authorized military commissions to try such nonstate enemy forces for domestic-law, war-related offenses. The government and some judges have looked to the Lincoln assassination commission—in the words of one jurist, “the highest-profile and most important U.S. military commission precedent in American history”—as a leading precedent in support of such military jurisdiction, one that purportedly helped to establish a political branch practice that should inform constitutional understandings.*

*As this Article demonstrates, however, such respect for the Lincoln assassination trial as a canonical constitutional precedent would itself be historically anomalous. During and immediately after the Civil War,*

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\* Visiting Professor of Law, Georgetown University Law Center. Thanks to Jessica Bulman-Pozen, Michael Crafts, David Golove, David Pozen, and John Witt for their thoughtful reactions and suggestions, and to Walter Dellinger and David Golove for their many insights on Lincoln as constitutional thinker, lawyer, and actor. Bill Binzel and Roger Cosbey saved me from several historical errors; I am grateful for their generous, eagle-eyed review. For their assistance in locating obscure manuscripts and papers, I am also indebted to the staff at the Library of Congress Manuscript Reading Room; to Colleen Puterbaugh and Laurie Verge at the Surratt Society and the James O. Hall Research Center; to Raffaella Wakeman; and, as always, to Thanh Nguyen, Erie Taniuchi, and the extraordinary team of research librarians at the Georgetown University Law Center Library.

*all three branches engaged repeatedly with the question of the permissible scope of military justice and whether certain wartime exigencies might justify circumvention of Article III's guarantees, but the question resisted resolution; indeed, it was the rare constitutional problem that flummoxed even Lincoln. At war's end, the President and many of his congressional allies appeared to be on the verge of repudiating the system of military tribunals that Lincoln himself had superintended. His assassination, however, prompted his successor to convene the most controversial military trial of them all, a highly unorthodox proceeding that not only revived the heated debate over the constitutional question but also precipitated one of the only instances in the nation's history in which the Executive actually disregarded a judicial order—a presidential suspension of habeas to prevent the Article III courts from adjudicating a challenge to their own displacement. The Article unearths this fascinating but rarely examined chapter in the history of constitutional war powers.*

*The Article then carefully examines the place of the Lincoln trial in the nation's constitutional discourse over the past century and a half and demonstrates that, far from being viewed as a canonical precedent, it has been virtually unthinkable for anyone to rely upon the assassination commission as venerated legal authority. This historical recovery is significant for the ongoing constitutional litigation challenging such military trials. More broadly, this historical survey might also inform current academic and judicial debates about whether and under what circumstances political branch practice, especially high-profile precedents, ought to inform, or "liquidate," the meaning or proper application of the Constitution and when, if ever, asserted exigencies of war might justify deviations from the constitutional norm.*

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### PROLOGUE

“[T]he cause of such mighty changes in the world’s history as we may perhaps never realize.”<sup>1</sup>

The most notorious and consequential crime in American history happened just eight blocks from where I sit, in the heart of the nation’s capital.

An attempt on the President’s life was hardly unforeseeable. Abraham Lincoln had been living in the shadow of such threats for more than four years, ever since the final leg of his train journey from Illinois to Washington in February 1861 was scheduled for the dead of night so as to avoid assassins thought to be lying in wait in Baltimore.<sup>2</sup> Even so, the assassination in Ford’s Theatre, on Good Friday 1865, stunned the nation, both because of its timing and its circumstance.

General Grant had taken Richmond a fortnight earlier, and it had been only five days since General Lee had surrendered on behalf of the Army of Northern Virginia at the McLean residence in Appomattox Court House. Finally, thankfully, the elusive peace was at hand. Lincoln himself, the previous month, set the tone for the imminent recon-

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1. Letter from Edward Curtis to His Mother (Apr. 22, 1865), *in* Edward Curtis, *The Post-Mortem in the Case of President Lincoln*, *Louisville Courier-J.*, Apr. 19, 1903, § 5, at 4.

2. See William Hanchett, *The Lincoln Murder Conspiracies* 21–30 (1983); see also William A. Tidwell et al., *Come Retribution: The Confederate Secret Service and the Assassination of Lincoln* 226–32 (1988) (recounting threats to Lincoln during his travel to Washington in 1861). There was good reason to fear such threats in proximity to the nation’s capital. Lincoln received less than three percent of the vote in Maryland in 1860, see *The Tribune Almanac and Political Register* 1861, at 49 (New York, J.F. Cleveland compiler, 1861), and less than one percent of the vote in present-day Virginia, see *id.* at 50–51 (showing that Lincoln received 1,929 total votes in Virginia, over 1,200 of which were from counties in what is now West Virginia).

ciliation: In a succinct, solemn inaugural address, marked by a surprising equanimity, the President recognized that the warring sides were bound together by a shared fate according to God's unknowable design. Without invoking a word of triumph, let alone retribution, he famously declared that the time had come to "bind up the nation's wounds," "[w]ith malice toward none; with charity for all."<sup>3</sup> Lincoln thereby began to mark the path to repair and reconciliation in the wake of the acute enmity that had torn the nation apart.

And so it was that on Thursday evening, April 13, just before the start of the Easter weekend, the District of Columbia was in a state of almost mystical reverie and wonder:

The very heavens seemed to have come down, and the stars twinkled in a sort of faded way, as if the solar system was out of order, and earth had become the great luminary. Everybody illuminated. Every flag was flung out, windows were gay with many devices, and gorgeous lanterns danced on their ropes along the walls in a fantastic way, as if the fairies were holding holiday inside.<sup>4</sup>

How incongruous it was, then, that the devastating blow should be drawn the next day, at that very moment of collective relief following years of dread and unimaginable bloodshed—just as it appeared that the nation was emerging from the abyss. "Where, half an hour before, the faces of wayfarers [on the streets of Washington] had reflected joy over thoughts of Appomattox, the fall of Richmond and the surrender of Johnston, now all was blanched horror . . . ."<sup>5</sup>

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3. President Abraham Lincoln, Second Inaugural Address, Cong. Globe, 39th Cong., Special Senate Sess. 1424–25 (1865); see also Garry Wills, Lincoln's Greatest Speech, *Atlantic* (Sept. 1999), <http://www.theatlantic.com/magazine/archive/1999/09/lincolns-greatest-speech/306551/> [<http://perma.cc/ZC3E-J4DH>] ("[Lincoln] asked others to recognize in the intractability of events the disposing hand of a God with darker, more compelling purposes than any man or group of men could foresee. This lesson, learned from the war, he meant to apply to the equally intractable problems of the peace.").

4. The Grand Display Last Night, Wash. Evening Star, Apr. 14, 1865, at 1 (on file with the *Columbia Law Review*). At the War Department, an elaborate fixture of gas jets contributed to the otherworldly nature of the evening: "[H]igh over all, as if suspended by unseen hands from above, in letters of softly subdued light, hung the sweet and healing word, 'PEACE.'" Frank Abial Flower, Edwin McMasters Stanton: The Autocrat of Rebellion, *Emancipation, and Reconstruction* 274 (1905).

5. Curtis, *supra* note 1.

What made the murder even more shocking was that the blow arrived not from what remained of the Confederate Army, in a theater of war, but instead under the most banal of circumstances, in a theater of a much more ordinary kind, and at the hand of a common actor, not yet twenty-seven years of age. While no one was paying him any mind, John Wilkes Booth crept from behind the President, brandishing a tiny pistol to terrifying effect—the fatal shot timed to coincide with the audience’s predictable reaction to the play’s surest laugh-line.<sup>6</sup>



The derringer that John Wilkes Booth used to kill Abraham Lincoln (Source: Library of Congress, Prints & Photographs Division, photograph by Carol M. Highsmith, LC-DIG-highsm-04710).

Few could have imagined, on that peaceful spring evening, that a “little black mass no bigger than the end of [a] finger—dull, motionless and harmless [might be] the cause of such mighty changes in the world’s history as we may perhaps never realize.”<sup>7</sup>

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6. See Tom Taylor, *Our American Cousin* act 3, sc. 2, at 37 (1858) (“Well, I guess I know enough to turn you inside out, old gal—you sockdologizing old man-trap.”); John Rudy, *Sockdologizing: Finally Laughing at the Lincoln Assassination*, *Interpreting the Civil War* (May 14, 2013), <http://www.civilwarconnect.com/2013/05/sockdologizing.html> [<http://perma.cc/QNU5-8CLR>] (explaining that the laughs came at the expense of the buffoonish character hurling the insult); see also Sarah Vowell, *Assassination Vacation* 46 (2005) (“It is a comfort of sorts to know that the bullet hit Lincoln mid-guffaw. Considering how the war had weighed on him, at least his last conscious moment was a hoot.”).

7. Letter from Edward Curtis to His Mother, *supra* note 1. The quotation is from a remarkable passage penned by a twenty-six-year-old Army surgeon who assisted in the President’s autopsy at the White House the next morning. In a letter to his mother a week after the autopsy, Edward Curtis described the scene:

As dramatic and consequential as the assassination may have been, however, it was also—both in form and as a matter of law—a standard-issue homicide, of the sort the criminal justice system routinely handled. In the ordinary course, then, those suspected of the crime would have

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The room . . . contained but little furniture: a large heavily-curtained bed, a sofa or two, bureau, wardrobe and chairs comprised all there was. Seated around the room were several general officers and some civilians, silent or conversing in whispers, and to one side, stretched upon a rough framework of boards and covered only with sheets and towels, lay, cold and immovable, what but a few hours before was the soul of a great nation. The Surgeon General was walking up and down the room when I arrived, and detailed to me the history of the case. He said that the President showed most wonderful tenacity of life, and, had not his wound been necessarily mortal, might have survived an injury to which most men would succumb.

. . . Dr. Woodward and I proceeded to open the head and remove the brain down to the track of the ball. The latter had entered a little to the left of the median line at the back of the head, had passed almost directly forward through the center of the brain and lodged. Not finding it readily, we proceeded to remove the entire brain: when, as I was lifting the latter from the cavity of the skull, suddenly the bullet dropped out through my fingers and fell, breaking the solemn silence of the room with its clatter, into an empty basin that was standing beneath. There it lay upon the white china, a little black mass no bigger than the end of my finger—dull, motionless and harmless, yet the cause of such mighty changes in the world's history as we may perhaps never realize.

Our examination over, I proposed to the Surgeon General to weigh the brain, since the comparative weight of the brains of men distinguished for intellect is a matter of great scientific interest. . . .

. . . [W]hile the embalmers were working over the body, silently, in one corner of the room, I prepared the brain for weighing. As I looked at the mass of soft gray and white substance that I was carefully washing, it was impossible to realize that it was that mere clay upon whose workings but the day before rested the hopes of the nation. I felt more profoundly impressed than ever with the mystery of that unknown something which may be named 'vital spark' as well as anything else, whose absence or presence makes all the immeasurable difference between an inert mass of matter owing obedience to no laws but those governing the physical and chemical forces of the universe, and, on the other hand, a living brain by whose silent, subtle machinery a world may be ruled.

*Id.* Writing in 1903, Curtis added this understated observation from his examination of Lincoln's brain:

The weighing of the brain . . . gave approximate results only, since there had been some loss of brain substance, in consequence of the wound, during the hours of life after the shooting. But the figures, such as they were, seemed to show that the brain weight was not above the ordinary for a man of Mr. Lincoln's size.

Curtis, *supra* note 1.



been tried before a local jury, for violations of criminal law offenses,<sup>8</sup> in a building less than five blocks from Ford's Theatre: the magisterial Old City Hall at 5th and E Streets NW, which housed the Supreme Court of the District of Columbia, a federal court established pursuant to Article III of the Constitution. Such a federal criminal trial for an attack on a President would not have been unprecedented. Thirty years earlier, Old City Hall had been the site of the trial of Richard Lawrence, who had attempted to assassinate President Andrew Jackson as he emerged from the Capitol Rotunda.<sup>9</sup> In the days immediately following Lincoln's tragic death, there was every reason to assume that the same courthouse would once again host such a trial, before pro-Union Article III judges of the D.C. Supreme Court whom President Lincoln himself had handpicked when that court was established to replace the old Circuit Court of the District of Columbia.<sup>10</sup>

Yet instead of seeking criminal court indictments against those thought to be responsible for Lincoln's killing, the nascent Johnson Administration turned its sights two miles southward, to a thin peninsula bisecting the Potomac River (into what are today separately designated as the Anacostia and Potomac Rivers). At the tip of that peninsula, Greenleaf Point, lay the old, underutilized United States Arsenal, which had once been a federal penitentiary.<sup>11</sup> The Administration chose that imposing, nondescript building as the site of a most extraordinary, unorthodox adjudicatory proceeding, one that raised fundamental

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8. In particular, they might have been charged with abetting "wilful murder" in a "district . . . under the sole and exclusive jurisdiction of the United States," an offense established by the first Congress. See An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 3, 1 Stat. 112, 113 (1790).

9. See *United States v. Lawrence*, 26 F. Cas. 887, 887 (C.C.D.C. 1835) (No. 15,577).

10. See *infra* note 360 (discussing the 1863 statute that replaced the D.C. Circuit Court and the local criminal court with the Supreme Court for the District of Columbia, to which Lincoln immediately appointed four pro-Union judges).

11. See Michael W. Kauffman, *American Brutus: John Wilkes Booth and the Lincoln Conspiracies* 331 (2004) [hereinafter Kauffman, *American Brutus*]; Edward Steers, Jr., *Blood on the Moon: The Assassination of Abraham Lincoln* 214 (2001) [hereinafter Steers, *Blood on the Moon*]; Mike Kauffman, *Fort Lesley McNair and the Lincoln Conspirators*, 80 *Lincoln Herald* 176, 176–80 (1978) [hereinafter Kauffman, *Fort Lesley McNair*]. See generally John Elliott, *The Washington D.C. Arsenal Penitentiary, Part 1: The Pre-Trial Period (1831–1862)*, *A Little Touch of History* (July 2, 2009), <http://awesometalks.wordpress.com/2009/08/02/the-washington-d-c-arsenal-penitentiary-part-1-of-3/> [<http://perma.cc/ZM3W-CXYL>] (discussing the history of the Washington Arsenal Penitentiary). In 1862, Lincoln had ordered that the Arsenal be transferred to the War Department for the warehousing of military supplies; virtually all of its prisoners were sent elsewhere. Kauffman, *Fort Lesley McNair*, *supra*, at 177–78; see also Kauffman, *American Brutus*, *supra*, at 463 n.6; Steers, *Blood on the Moon*, *supra*, at 214. Today, Greenleaf Point is the site of Army post Fort McNair, which hosts the National Defense University. Fort McNair History, Joint Base Myer-Henderson Hall, <http://www.jbmhh.army.mil/web/jbmhh/AboutJBMHH/FortMcNairHistory.html> [<http://perma.cc/TT3W-MD77>] (last visited Oct. 6, 2017).

constitutional questions concerning the proper balance between civil and military authorities.

There would be no trial of the assassin himself, for John Wilkes Booth was already dead—killed in a standoff with the Union Army at Garrett’s Farm in Virginia, twelve days after he murdered the President.<sup>12</sup> The next day, April 27, 1865, Booth’s body was brought to the Arsenal in the dead of night and ignominiously buried beneath a storage room,<sup>13</sup> where it would remain until transferred to the Booth family plot in Baltimore four years later.<sup>14</sup> Nor could the government try John Surratt, probably Booth’s most trusted confidant in the plot, for Surratt had fled to Canada, and from there to England and then Italy, where he served with the papal Zouaves.<sup>15</sup> Within two weeks of the crime, however, eight other suspected confederates of Booth and Surratt were arrested and placed in military custody—some in the Old Capitol Prison in the District of Columbia (at First and A Streets NE), others on two ironclad ships, the *U.S.S. Montauk* and the *U.S.S. Saugus*, anchored in the Washington Navy Yard in the District.<sup>16</sup> On April 30, the Army transferred the alleged accomplices to an area of the Arsenal penitentiary that had been closed for years, where they were detained in squalid conditions, most of them forced to wear stifling canvas hoods.<sup>17</sup>

The next day, May 1, 1865, President Johnson signed an order authorizing trial of the alleged accomplices in a makeshift military commission.<sup>18</sup> Commission proceedings commenced on May 9, less than four weeks after the shooting,<sup>19</sup> and trial began in earnest on May 12, after the

12. See Kauffman, *American Brutus*, supra note 11, at 309–20.

13. See *id.* at 322–25, 463 n.6; Steers, *Blood on the Moon*, supra note 11, at 256–57.

14. See Kauffman, *American Brutus*, supra note 11, at 391; Steers, *Blood on the Moon*, supra note 11, at 257–59.

15. See Elizabeth D. Leonard, *Lincoln’s Avengers: Justice, Revenge, and Reunion After the Civil War 187–89* (2004) [hereinafter Leonard, *Lincoln’s Avengers*]. Surratt was later apprehended in Egypt and returned to the United States, where he was tried before a federal civilian jury in the D.C. Supreme Court in 1867. See *infra* section III.F.2.a.

16. See Roy Z. Chamlee, Jr., *Lincoln’s Assassins: A Complete Account of Their Capture, Trial, and Punishment* 147, 167 (1990); Kauffman, *American Brutus*, supra note 11, at 329–31; Leonard, *Lincoln’s Avengers*, supra note 15, at 39, 48, 59; Steers, *Blood on the Moon*, supra note 11, at 209.

17. See Chamlee, supra note 16, at 194–97; see also John Elliott, *The Washington D.C. Arsenal Penitentiary, Part 2: The Trial and Execution Period (1865–1869)*, *A Little Touch of History* (Aug. 4, 2009), <http://awesometalks.wordpress.com/2009/08/04/the-washington-d-c-arsenal-penitentiary-part-2-of-3/> [<http://perma.cc/JH5K-578U>] [hereinafter Elliott, *The Washington D.C. Arsenal Penitentiary, Part 2*].

18. *The Assassination of President Lincoln and the Trial of the Conspirators* 17 (Cincinnati, Benn Pitman compiler, 1865) [hereinafter Pitman]. In section II.B of this Article, I describe the Cabinet debates and the one-sentence legal opinion of the Attorney General that paved the path for Johnson’s decision. See *infra* section II.B.

19. Pitman, supra note 18, at 18.

accused were afforded an opportunity to secure counsel.<sup>20</sup> The eight individuals who appeared before the military commission were a motley collection of secondary figures, with a variety of actual or alleged connections to the crime:

- Lewis Powell (alias Paine or Payne) brutally attacked Secretary of State William Henry Seward at the same hour that Booth shot Lincoln.<sup>21</sup>
- George Atzerodt was assigned by Booth to kill Vice President Johnson, but for reasons that remain unknown—probably some combination of fear, conscience, and alcohol—he did not make an attempt on Johnson’s life.<sup>22</sup>
- David Herold was Booth’s aide, with whom he rendezvoused in his flight from the capital; Herold surrendered to the Army troops at Garrett’s Farm, where Booth was killed, on April 26.<sup>23</sup>
- Samuel Arnold and Michael O’Laughlen had furtively plotted with Booth several months earlier to kidnap (not kill) the President and take Lincoln to Richmond, where the President was to be used as leverage to secure a prisoner exchange.<sup>24</sup> The plotters abandoned that absurd idea some weeks later, and Arnold and (most likely) O’Laughlen had nothing more to do with the events of April 14.<sup>25</sup>
- Edman Spangler, a stagehand at Ford’s Theatre, held Booth’s horse in an alley while the actor was inside the theater, without knowledge of what Booth was up to.<sup>26</sup>

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20. *Id.*

21. See Kauffman, *American Brutus*, *supra* note 11, at 350–52; Leonard, *Lincoln’s Avengers*, *supra* note 15, at 5–7, 39–42, 115–18; Betty Ownsbey, *Lewis Thornton Powell, Alias Lewis Payne*, *in* *The Trial: The Assassination of President Lincoln and the Trial of the Conspirators*, at lxxii–lxxvii (Edward Steers Jr. ed., 2003) [hereinafter *The Trial*].

22. See Leonard, *Lincoln’s Avengers*, *supra* note 15, at 45–48, 114–15; William H. Rehnquist, *All the Laws but One* 155–56 (1998); Edward Steers Jr., *George Atzerodt*, *in* *The Trial*, *supra* note 21, at lxvi–lxxi.

23. See Leonard, *Lincoln’s Avengers*, *supra* note 15, at 36–39, 113–14; Rehnquist, *supra* note 22, at 157–58.

24. See Leonard, *Lincoln’s Avengers*, *supra* note 15, at 48–51; Rehnquist, *supra* note 22, at 160–61.

25. See Leonard, *Lincoln’s Avengers*, *supra* note 15, at 53, 122–24; Percy E. Martin, *Samuel Arnold and Michael O’Laughlen*, *in* *The Trial*, *supra* note 21, at lxxxviii–xcvi.

26. See Leonard, *Lincoln’s Avengers*, *supra* note 15, at 54–59, 124–25; Rehnquist, *supra* note 22, at 158–60; Betty J. Ownsbey, *Edman Spangler*, *in* *The Trial*, *supra* note 21, at xlvi–li. There was one piece of evidence suggesting that Spangler abetted Booth’s flight from justice: A carpenter at the theater, who had briefly chased after Booth, testified that Spangler implored him not to reveal which way the culprit had fled. See Pitman, *supra* note 18, at 97 (testimony of Jacob Ritterspaugh).

- Mary Surratt, John's mother, owned a boardinghouse on H Street in Washington where the conspirators met and plotted (and where the Wok 'n' Roll restaurant now sits), as well as a tavern in Surrattsville (now Clinton), Maryland, where Booth and Herold stopped on their flight from Washington. Surratt likely knew that something nefarious was afoot, although to this day it is uncertain whether she was aware of the details.<sup>27</sup>
- Finally, Samuel Mudd was a Charles County, Maryland, physician, former slave owner, and staunch Confederate supporter, who had had several previous, suspicious dealings with Booth and Surratt. Booth and Herold stopped at Mudd's farm on the night of their escape, where Mudd set Booth's broken leg and offered the two men food and shelter for the night. He also showed them a little-known swamp route that would lead them to the Potomac so that they could cross into Virginia. (It is vigorously disputed, to this day, whether and to what extent Mudd knew what Booth had done earlier on Friday evening.)<sup>28</sup>

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27. See Leonard, *Lincoln's Avengers*, supra note 15, at 42–45, 108–09, 118–22; Rehnquist, supra note 22, at 162–65; Laurie Verge, *Mary Elizabeth Surratt*, in *The Trial*, supra note 21, at lii–lix.

28. See Leonard, *Lincoln's Avengers*, supra note 15, at 59–63, 111–12, 125–28; Rehnquist, supra note 22, at 166–67; Edward Steers Jr., *Samuel Alexander Mudd*, in *The Trial*, supra note 21, at lxxix–lxxxvii.



The building on H Street, between 6th and 7th Streets NW, that once was the Surratt boardinghouse where Booth and his confederates plotted (Source: Library of Congress, Prints & Photographs Division, LC-DIG-cwpbh-03432).

The tribunal that stood in judgment of these eight individuals bore little resemblance to the D.C. Supreme Court two miles to the north. It was a makeshift court, convened in an ersatz courtroom, measuring approximately forty feet by twenty-seven feet, on the third floor of the Arsenal.<sup>29</sup> Most importantly, the entity that would resolve the fate of the accused was entirely the creation of, and was administered by, the War Department. There was no judge. A panel of nine military officers, most of whom had no legal training, served as “members” of the commission.<sup>30</sup> They were detailed to the court by another military officer,

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29. See Kauffman, *Fort Lesley McNair*, *supra* note 11, at 180. Today, most of the old Penitentiary is long gone, but the portion in which the trial was convened remains, as a smaller building known as Grant Hall. The trial courtroom has recently been recreated on the third floor and is open to public viewing four times a year. See Pub. Affairs Office, U.S. Army Joint Base Myer-Henderson Hall, JBM-HH Announces Quarterly Grant Hall Public Open House, U.S. Army (Jan. 29, 2016), [http://www.army.mil/article/146900/jbm\\_hh\\_announces\\_quarterly\\_grant\\_hall\\_public\\_open\\_house](http://www.army.mil/article/146900/jbm_hh_announces_quarterly_grant_hall_public_open_house) [<http://perma.cc/SS2M-MW57>].

30. War Dep’t, *Special Orders*, No. 211 (May 6, 1865), reprinted in Pitman, *supra* note 18, at 17. One member was an attorney: Major General Lew Wallace, who would later become Governor of the New Mexico territory and then the U.S. Minister to the Ottoman

Assistant Adjutant-General W.A. Nichols, who presumably acted with input from, and probably at the direction of, the Secretary of War Edwin Stanton and/or the esteemed Judge Advocate General Joseph Holt.<sup>31</sup>

Secretary Stanton himself helped draft the single, elaborate charge against the defendants.<sup>32</sup> Judge Advocate General Holt also drafted and preferred the charge,<sup>33</sup> prosecuted the case, and effectively controlled the trial, assisted by two Assistant Judge Advocates, Representative John Bingham and Brevet Colonel Henry Burnett.<sup>34</sup> The commission itself nominally decided legal questions that arose at trial, following confidential deliberations in which the members were advised by none other than Holt, Bingham, and Burnett—that is, by the prosecutors themselves.<sup>35</sup> This was, in other words, an executive proceeding, through and through—indeed, one in which military officers played all the governmental roles and in which there was scant separation between the prosecution and the finders of fact. Holt “had great latitude for shaping events in the courtroom to suit his own vision of justice, which was hardly distinguishable at this point from revenge.”<sup>36</sup>

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Empire. See Kauffman, *American Brutus*, supra note 11, at 369. He is most famous for having written the historical adventure story *Ben-Hur: A Tale of the Christ* in 1880.

31. See Pitman, supra note 18, at 17; see also Leonard, *Lincoln’s Avengers*, supra note 15, at 67–68.

32. See 93 Papers of Joseph Holt 264–68 (Library of Congress) (draft of charges in Stanton’s handwriting).

33. See *id.* at 257–59, 263, 269–70 (drafts of charges in Holt’s handwriting and later drafts with his handwritten insertions); see also Leonard, *Lincoln’s Avengers*, supra note 15, at 70–71; *infra* note 404 (quoting from the charge).

34. See Kauffman, *American Brutus*, supra note 11, at 338. Burnett had been the chief prosecutor of the military commission trial of “copperheads” Lambdin Milligan and others in Indiana, see *The Milligan Case* 35, 251 (Samuel Klaus ed., 1929), a proceeding that will play a prominent role in our story. See *infra* Part III. Bingham went on to become the principal author of Section 1 of the Fourteenth Amendment, see Gerard N. Magliocca, *American Founding Son: John Bingham and the Invention of the Fourteenth Amendment* 1–2 (2013), and chief prosecutor in the impeachment trial of President Johnson after the President attempted to remove Stanton as Secretary of War in violation of the Tenure in Office Act, see *Proceedings in the Trial of Andrew Johnson, President of the United States, Before the United States Senate, on Articles of Impeachment* 3 (Washington, D.C., F. & J. Rives & Geo. A. Bailey 1868) (describing Bingham as “chairman of the managers”); *id.* at 786 (commencement of Bingham’s closing argument).

35. See Kauffman, *American Brutus*, supra note 11, at 340, 368–69; Leonard, *Lincoln’s Avengers*, supra note 15, at 71.

36. Leonard, *Lincoln’s Avengers*, supra note 15, at 79.



The military commission and prosecutors for the Lincoln assassination trial. Left to right: Lt. Col. David R. Clendenin, Col. C.H. Tompkins, Brig. Gen. Thomas M. Harris, Brig. Gen. Albion P. Howe, Brig. Gen. James Ekin, Maj. Gen. Lew Wallace, Maj. Gen. David Hunter (President of the Commission), Maj. Gen. August V. Kautz, Brig. Gen. Robert S. Foster, Rep. John A. Bingham, Brig. Gen. Henry L. Burnett, and Judge Advocate General Joseph Holt (Source: Library of Congress, Prints & Photographs Division, Civil War Photographs, LC-DIG-ppmsca-35257).

On June 30, after more than seven weeks of trial and testimony of more than 300 witnesses, the commission found all eight defendants guilty of at least some involvement in the events of April 14.<sup>37</sup> The commission recommended that three of the defendants—Arnold, O’Laughlen, and Mudd—be sentenced to life imprisonment at hard labor; that Spangler serve a term of six years at hard labor; and that the other four be executed.<sup>38</sup>

One week later, after President Johnson approved the verdicts, four of the defendants—Powell, Atzerodt, Herold, and Surratt—were hanged on a gallows built just outside the Arsenal courthouse.<sup>39</sup> Today, a desultory tennis court occupies the site of the hanging; a stock “places of interest” marker is the only reminder of the drama that occurred there.<sup>40</sup>

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37. See Pitman, *supra* note 18, at 247–49.

38. *Id.* at 248–49.

39. See Chamlee, *supra* note 16, at 470–74; Kauffman, *American Brutus*, *supra* note 11, at 373–74.

40. See The Historical Marker Database, Lincoln Assassination Trial, <http://www.hmdb.org/marker.asp?marker=29740> [<http://perma.cc/2DuM-Gk8k>] (last updated Jan, 11, 2017).

## INTRODUCTION

The Lincoln assassination has spawned a veritable library of writings over the past 150 years.<sup>41</sup> Indeed, an *actual* Lincoln assassination library, the James O. Hall Research Center, sits a few miles from the scene of the crime,<sup>42</sup> adjacent to the Surratt House Museum in Clinton, Maryland—what Sarah Vowell has aptly dubbed the “Vatican of the Lincoln assassination subculture.”<sup>43</sup> As with most great crimes, this one has engendered countless theses, controversies, and conspiracy theories, sustaining what one might fairly call “Lincoln assassination studies.” The majority of accounts have been written by amateur sleuths and obsessives who have devoted a remarkable part of their lives, and their energies, to the subject. Having spent some time poring over the materials at the museum and paid my nominal dues, I, too, am now a card-carrying member of the Surratt Society,<sup>44</sup> which collects much of its revenue by hosting regular, twelve-hour-long John Wilkes Booth Escape Route tours.<sup>45</sup> Every month, I receive “The Surratt Courier,” a newsletter chock-full of new discoveries, revelations, artifacts, and fighting words.<sup>46</sup>

Of course, just as the assassination literature itself is only a sliver of the much larger corpus of Lincoln scholarship, so, too, only a small percentage of the assassination literature concerns the trial of the conspirators. Even so, that relatively modest slice amounts to several heavily weighted shelves of books and other materials. Most of those sources offer detailed accounts (with varying degrees of accuracy) of the

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41. The most comprehensive modern accounts include Chamlee, *supra* note 16; Kauffman, *American Brutus*, *supra* note 11; Leonard, *Lincoln’s Avengers*, *supra* note 15, chs. 1–4; Steers, *Blood on the Moon*, *supra* note 11; Thomas Reed Turner, *Beware the People Weeping: Public Opinion and the Assassination of Abraham Lincoln* (1982); and John Fabian Witt, *Lincoln’s Code: The Laws of War in American History* 287–96 (2012). Older treatments include George S. Bryan, *The Great American Myth* (1940), and Osborn H. Oldroyd, *The Assassination of Abraham Lincoln* (1901). A popular account that first transfixed me, as a boy, on the Lincoln assassination was Jim Bishop, *The Day Lincoln Was Shot* (1955). Lincoln assassination writings have become so voluminous that a historiography of sorts has even sprouted up. See, e.g., Hanchett, *supra* note 2.

42. See James O. Hall Research Center, Surratt House Museum, <http://www.surrattmuseum.org/hall-research-center> [<http://perma.cc/X26E-83HQ>] (last visited Nov. 2, 2017).

43. Vowell, *supra* note 6, at 54. Mary Surratt, one of the commission defendants, owned a tavern in Clinton—then known as Surrattsville—and it was there that Booth and his accomplice, David Herold, first stopped for sustenance and munitions as they fled Washington on the night of April 14. See Rehnquist, *supra* note 22, at 162–66.

44. See Join the Surratt Society, Surratt House Museum, <http://www.surrattmuseum.org/surratt-society> [<http://perma.cc/ZHP5-ZFQ4>] (last visited Nov. 2, 2017).

45. See John Wilkes Booth Escape Route Tour, Surratt House Museum, <http://www.surrattmuseum.org/booth-escape-tour> [<http://perma.cc/JSU5-F28J>] (last visited Oct. 6, 2017).

46. See Surratt Courier, Surratt House Museum, <http://www.surrattmuseum.org/surratt-courier> [<http://perma.cc/Q7ES-X9R5>] (last visited Oct. 6, 2017).



trial itself. Many overflow with seemingly endless debates about the guilt or innocence of the defendants—especially of Samuel Mudd, the Charles County, Maryland, physician and slave owner who set Booth's broken leg and allowed Booth and Herold to sleep at his house several hours after the assassination, and of Mary Surratt, the owner of the boardinghouse where the conspirators plotted.<sup>47</sup>

Other accounts of the trial focus on the many significant shortcomings of the military proceedings, including:

- That the defendants were detained in horrifying conditions, first on the ironclad ships and then at the Arsenal—especially the requirements that most of them spend virtually all their waking hours, day after day, wearing heavy canvas hoods that made breathing and sight quite difficult, and that some of them be chained in excruciating iron ankle and wrist restraints.<sup>48</sup>
- That at the outset of trial the defendants were paraded before the commission “with black linen masks covering all their faces except tip of nose & mouth, heavily chained & each led staggering & clanking in, by his keeper. It was a horrid sight.”<sup>49</sup>
- That the charges against the defendants were of extraordinary breadth and vagueness—Chief Justice Rehnquist would later describe them as, “To put it mildly, . . . ambitious.”<sup>50</sup>
- That the accused were not offered counsel until after they were arraigned before the commission, and for some only the day before testimony began, with no time to prepare for

47. Chief Justice Rehnquist's chapter on the evidence against each of the defendants is about as fair and balanced a summary account as one could hope for. See Rehnquist, *supra* note 22, at 155–69. Rehnquist concluded that although all the defendants were likely guilty of something, such as conspiring to commit other offenses or being an accessory to Booth after the fact, few of them, other than Powell and Herold, had clearly conspired to murder the President or other officials, which was the principal basis for the charge before the commission. *Id.*

48. See, e.g., Kauffman, *American Brutus*, *supra* note 11, at 329–31.

49. Diary Entry of Cyrus B. Comstock (May 9, 1865), in *The Diary of Cyrus B. Comstock* 317, 317 (Merlin E. Sumner ed., 1987) [hereinafter *The Diary of Cyrus B. Comstock*]; see also Kauffman, *American Brutus*, *supra* note 11, at 354; 2 August V. Kautz, *Memoirs*, 1861–65, at 20, in *August V. Kautz Papers*, Library of Congress, box 4 [hereinafter *Kautz, Memoirs*] (“The mystery and apparent severity with which they were brought into the court room partook so much of what my imagination pictured the Inquisition to have been, that I was quite impressed with its impropriety in this age.”); Leonard, *Lincoln's Avengers*, *supra* note 15, at 69.

50. Rehnquist, *supra* note 22, at 147. The charge is described in further detail *infra* note 404.

trial or challenge the inclusion of the members of the commission (some of whom had possible conflicts).<sup>51</sup>

- That prosecutor Holt chose to convene the proceedings in secret (a decision he promptly reversed when it became a public embarrassment).<sup>52</sup>
- That at least one of the commission members, Thomas Harris, who would later write a volume accusing the Catholic Church of responsibility for the assassination,<sup>53</sup> tried (unsuccessfully) to deny Mary Surratt the services of the esteemed Maryland Senator Reverdy Johnson, a former Attorney General, as her counsel, by accusing Johnson of disloyalty to the Union.<sup>54</sup>
- That the prosecution unduly influenced the commission members, particularly on matters of law.<sup>55</sup>

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51. See Chamlee, *supra* note 16, at 219–23, 236–39; Kauffman, *American Brutus*, *supra* note 11, at 339–41.

52. See, e.g., Chamlee, *supra* note 16, at 234–36, 241; Kauffman, *American Brutus*, *supra* note 11, at 344; Leonard, *Lincoln's Avengers*, *supra* note 15, at 71.

53. Thomas Harris, *Rome's Responsibility for the Assassination of Abraham Lincoln* (Pittsburgh, Williams Publ'g Co. 1897).

54. Pitman, *supra* note 18, at 22; see also, e.g., Chamlee, *supra* note 16, at 247–52; Leonard, *Lincoln's Avengers*, *supra* note 15, at 77–79; Kautz, *Memoirs*, *supra* note 49, at 21 (noting the “absurdity” of Harris’s objection). Johnson was deeply offended by the accusation, see *id.*, and chose not to participate in the trial extensively thereafter, except for an important jurisdictional argument in June, see *infra* notes 417–424 and accompanying text.

55. See Leonard, *Lincoln's Avengers*, *supra* note 15, at 71, 79. Judge Advocate Holt and his Assistant Judge Advocates actually sat in on the commission’s deliberations concerning verdicts after the close of evidence. See Pitman, *supra* note 18, at 247. Many years later, William Doster, counsel to Paine and Atzerodt, summarized the disadvantages confronting the defendants:

There were minor circumstances against the defense. The prosecution had had a month assisted by the whole war power of the Government, its railroads, telegraphs, detectives, and military bureau to get its evidence into shape. The prisoners did not receive their charges until the day the trial opened and then they could only communicate sitting in chains, with a soldier on each side, a great crowd surrounding them, and whisper through the bars of the dock to their counsel[.] Had counsel been closeted with the prisoners for weeks, with the charges in their hands and the war power of the Government at their disposal, the odds might have been more even.

Counsel were not independent. In all military courts they are only tolerated. Here they were surrounded by bayonets and seated in a penitentiary. Every paper they read abused them. The judges could not be challenged. They were not peers, but high military officers. The names of witnesses were not given the prisoners. Tendencies, not facts, were admitted. The court, not knowing anything about the rules of evidence, ruled out practically everything the judge advocates objected to and admitted everything the counsel objected to.

- That a substantial portion of the trial was devoted to testimony about alleged plots against the President by Confederate agents in Canada—what one of the defense counsel called a “wild jungle of testimony.”<sup>56</sup>
- That the three principal witnesses who testified about supposed connections between the Canadian operation and Booth were revealed to be perjurers at best, if not outright charlatans.<sup>57</sup>
- That the prosecution produced almost no evidence that the eight accused themselves were even aware of any connection between Booth and the unindicted coconspirators in Canada.<sup>58</sup>
- That the prosecution failed to produce Booth’s diary—a document that (according to some) might have helped support the defense allegations that the conspiracy, if any, was merely to kidnap Lincoln and that Booth had decided to kill Lincoln only at the eleventh hour, without the knowledge of at least half of the defendants.<sup>59</sup>

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William E. Doster, *Lincoln and Episodes of the Civil War* 260 (1915).

56. Pitman, *supra* note 18, at 265 (argument of Thomas Ewing, Jr.); see also Joshua E. Kastenberg, *Law in War, War as Law: Brigadier General Joseph Holt and the Judge Advocate General’s Department in the Civil War and Early Reconstruction, 1861–1865*, at 364, 370 (2011) [hereinafter Kastenberg, *Law in War, War as Law*] (collecting other contemporary criticisms of the prosecution’s misbegotten efforts to prove a vast conspiracy); Kauffman, *American Brutus*, *supra* note 11, at 342–44 (describing how Holt became convinced the assassination was part of a Confederate plot); Leonard, *Lincoln’s Avengers*, *supra* note 15, at 82–86 (describing the prosecution’s strategy to present witnesses who would help prove a conspiracy); Rehnquist, *supra* note 22, at 148 (characterizing much of the testimony as “wide-ranging and quite immaterial”); Witt, *supra* note 41, at 294–95 (claiming that the military commission “placed virtually no constraints on the scope of the conspiracy theory” proposed by Holt and that a civilian court likely would have required Holt to “stick closer to the defendants in the dock”).

57. See Hanchett, *supra* note 2, at 71–81 (describing the testimony of Conover, Montgomery, and Merritt); Kastenberg, *Law in War, War as Law*, *supra* note 56, at 366–68 (same); Kauffman, *American Brutus*, *supra* note 11, at 363–64 (same); Leonard, *Lincoln’s Avengers*, *supra* note 15, at 83–86 (describing Conover’s controversial testimony); Witt, *supra* note 41, at 295 (same).

58. See Rehnquist, *supra* note 22, at 148–54; see also Kauffman, *American Brutus*, *supra* note 11, at 333 (concerning Atzerodt’s ignorance of any such plot).

59. See Hanchett, *supra* note 2, at 83–84; Kastenberg, *Law in War, War as Law*, *supra* note 56, at 368. When the diary came to light in the 1867 trial of John Surratt, Samuel Mudd concluded that it tended to exonerate him and was angered that Stanton had not disclosed it at the 1865 trial. See Letter from Samuel Mudd to Frances Mudd (June 3, 1867), *in* *The Life of Dr. Samuel A. Mudd* 238, 238–39 (Nettie Mudd ed., 1906).

- That the evidentiary rulings were, by most accounts, imbalanced in the prosecution's favor.<sup>60</sup>
- That—as in all military tribunals during the war—a finding of guilt required only a majority vote of the panel, and that the reviewing authority (in this case, the President, who convened the commission) retained the ultimate authority over the judgments and sentences, without the prospect of any review by a federal court<sup>61</sup> (other than perhaps on habeas—but, as we shall see in the case of Mary Surratt,<sup>62</sup> President Johnson cut off that prospect of review, too).
- That, after the trial, Holt might have deliberately failed to present President Johnson with a petition signed by five of the nine commission members, asking the President to commute Mary Surratt's sentence to life in prison.<sup>63</sup>

Many of these problems and irregularities were the direct result of Johnson's decision to convene a military commission. It is hard to imagine most of them occurring, at least not to the same degree, if the conspirators had been tried before a civilian jury in the D.C. Supreme Court, with an Article III judge presiding.

Nevertheless, this Article does not focus upon, or attempt to adjudicate disputes concerning, this familiar array of controversies attending the Lincoln commission, for several reasons. For one thing, there's not much more to add: Those issues have been dissected and debated, in sometimes excruciating detail, for several generations.<sup>64</sup> Moreover, there is a rough consensus about the inadequacies of the Lincoln commission itself. To be sure, many disputes among the self-appointed Lincoln assassination "experts" continue to fester on particular points of contention, especially with regard to the culpability of Mudd and Surratt. Yet even those who defend the verdicts typically

60. See Chamlee, *supra* note 16, at 305; Kauffman, *American Brutus*, *supra* note 11, at 355–56.

61. See, e.g., Stephen V. Benét, *A Treatise on Military Law and the Practice of Courts-Martial* 128, 159–60 (New York, D. Van Nostrand, 4th ed. 1864); William Winthrop, *Military Law and Precedents* 172, 377, 447 (2d ed. 1920) [hereinafter Winthrop, *Military Law and Precedents*].

62. See *infra* section II.B.5 (discussing Mary Surratt's habeas petition).

63. See *infra* notes 459–460 and accompanying text. This particular controversy lingered for decades and understandably became something of an obsession for Holt, who was determined to defend his reputation by demonstrating that he had, in fact, shared the recommendation for leniency with the President. See, e.g., Chamlee, *supra* note 16, at 548–53; Hanchett, *supra* note 2, at 94–100, 110–14.

64. Perhaps the most balanced—and certainly the most thorough and detailed—contemporary account is in Leonard, *Lincoln's Avengers*, *supra* note 15, at 67–135. Leonard's book has the additional virtue of situating the Lincoln trial in its broader contemporary context, including the ways in which it augured the coming struggles over how the Union would reconstruct, and reconcile with, the vanquished Southern states.

concede that the commission proceedings were shot through with structural, procedural, and evidentiary flaws. In the century and a half since it was convened, virtually no one, no matter how sympathetic to Johnson, Stanton, and Holt, has looked to the Lincoln assassination commission as a model of procedural justice. Few, if any, trials in American history better illustrate the quip often attributed to Clemenceau: “La justice militaire est a la justice ce que la musique militaire est à la musique.” (“Military Justice is to justice what military music is to music.”<sup>65</sup>) As Justice Robert Jackson would later write, reflecting the consensus view, “The performance of this Military Commission was hardly an edifying example of the judicial process.”<sup>66</sup>

More importantly, most of the particular, case-specific problems in the Lincoln assassination trial are unlikely to recur in the future, even in deeply contested military criminal tribunals such as the current military commissions at the Guantánamo Bay Naval Base. In recent decades, Congress has substantially reformed and “civilianized” the systems of military justice in order to conform them much more closely to the processes of civilian courts.<sup>67</sup> There is, of course, continuing debate about whether these reforms are sufficient; modern courts-martial and (especially) military commissions certainly remain deeply controversial. Not even their harshest critics, however, think it is likely we will ever again see anything resembling the Lincoln assassination commission.

This Article’s principal subject, then, is not the particular irregularities and flaws of the Lincoln assassination trial itself, troubling though they may have been. Instead, the Article is about the Lincoln trial, and related aspects of the assassination and the War Department’s system of military commissions, *as law*—the extent to which these singular historical events might, or might not, serve as legal precedents for subsequent generations or, in some cases, aberrant examples of constitutional error that might serve as object lessons for future actors in all three branches of the federal government.

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The fundamental constitutional question at the heart of the assassination trial was a constant source of contestation throughout the Civil War and into Reconstruction, has been the subject of debate and analysis

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65. See, e.g., Fred Gardner, *The Unlawful Concert* 111 (1970) (internal quotation marks omitted).

66. Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 *Buff. L. Rev.* 103, 111 (1951).

67. See Martin S. Lederman, *Of Spies, Saboteurs, and Enemy Accomplices: History’s Lessons for the Constitutionality of Wartime Military Tribunals*, 105 *Geo. L.J.* 1529, 1550 (2017) [hereinafter Lederman, *Wartime Military Tribunals*] (discussing Congress’s passage of the Military Justice Act of 1968 as an effort to “‘civilianize’ court-martial procedures”). Moreover, in the unlikely event Congress were to renege on these modern reforms, the Supreme Court would likely insist upon them as a matter of due process.

in many of the nation's other major wars, and has not yet been fully resolved: When, if ever, is it constitutional for the federal government to try persons other than members of the U.S. armed forces in a wartime military tribunal?

Article III of the Constitution provides two guarantees with respect to federal criminal trials: (1) A civilian jury will adjudicate guilt of "all crimes"<sup>68</sup> (a protection so important to the Framers that they repeated it in the Sixth Amendment<sup>69</sup>); and (2) an independent judge—someone not in any way subservient to the political branches—will oversee the proceedings and render rulings of law.<sup>70</sup> As Chief Justice Roberts has recently explained with respect to the latter feature of Article III:

By appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the "[c]lear heads . . . and honest hearts" deemed "essential to good judges."<sup>71</sup>

The concerns about disregarding these two Article III guarantees are especially acute when it comes to *military* tribunals, because even "conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have," nevertheless military tribunals "have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts."<sup>72</sup> Military judges, for instance, not only lack lifetime salary and tenure protections; they are also assigned to judicial duty by other executive officers, and commanding officers can remove or reassign them at will.<sup>73</sup> What is more, the future prospects for promotion and

68. U.S. Const. art. III, § 2, cl. 3.

69. See *id.* amend. VI; see also Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1545–46 (describing the "unconditional . . . constitutional language" requiring a civilian jury as "one of the most fundamental of constitutional guarantees").

70. See U.S. Const. art. III, § 1; see also Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1546–48 (discussing how the Supreme Court presumes the language of Article III requires a judge free from possible coercion or influence from other branches).

71. *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (quoting James Wilson, *Of Government*, in 1 *The Works of James Wilson* 343, 363 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896)); see also *The Federalist* No. 78, at 465–66 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The standard of good behavior for the continuance in office of the judicial magistracy . . . is the best expedient . . . to secure a steady, upright, and impartial administration of the laws . . . '[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers.'" (quoting 1 Montesquieu, *Spirit of Laws* 179 (Edinburgh, A. Donaldson 4th ed. 1768))).

72. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955).

73. See Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1550.

reassignment of both military judges *and* military panel “members” are in the hands of their superior officers; and, because promotion to a higher rank is appointment to a new office, which requires Senate consent, such officers have reason and incentive to avoid antagonizing or disappointing the legislative branch, as well.<sup>74</sup>

Despite these concerns, the Supreme Court has recognized three distinct contexts in which the Constitution permits criminal trials in military courts<sup>75</sup>: (i) for the court-martial of individuals within, or in some cases employed by, the United States armed forces themselves;<sup>76</sup> (ii) when the military is occupying a foreign territory and therefore no civilian courts are available;<sup>77</sup> and, most significantly, (iii) when the trial is for offenses against the international law of war.<sup>78</sup>

The question at issue in the Lincoln assassination trial—a question that was intensely debated throughout the Civil War and that has engendered significant confusion and disagreement in several other wars, as well—is whether there is, or ought to be, a fourth military exception, for the military adjudication of *domestic-law* offenses in wartime.

As I explain at greater length elsewhere, this Article III question has become increasingly important in the United States’ current armed conflicts against nonstate armed terrorist organizations, such as al-Qaeda and the Islamic State of Iraq and the Levant (ISIL).<sup>79</sup> Such nonstate enemies regularly engage in conduct—such as targeting U.S. forces, providing material assistance to terrorism, or conspiring to commit law-of-war offenses—that violates U.S. law but that international law neither prohibits nor privileges against prosecution.<sup>80</sup> And Congress has recently authorized military commissions to try alien enemy belligerents for many such domestic-law offenses, such as material support for terrorism and conspiracy.<sup>81</sup> Therefore, as a matter of statute, many terrorism-related

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74. See *id.* at 1550–53.

75. See generally *id.* at 1561–66, 1583–89; Stephen I. Vladeck, *Military Courts and Article III*, 103 *Geo. L.J.* 933 (2015).

76. See *Toth*, 350 U.S. at 14; *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 83–84 (1858); see also Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1561–65.

77. See Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1565–67; *infra* note 154.

78. See Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1583–89 (discussing *Ex parte Quirin*, 317 U.S. 1 (1942)).

79. See *id.* at 1534–35.

80. See *id.* at 1534–35 & n.11.

81. In the Military Commissions Act of 2009, 10 U.S.C. §§ 948–950 (2012), Congress authorized military commissions to try “alien unprivileged enemy belligerents,” *id.* § 948b, for an array of domestic-law offenses, including knowingly and intentionally aiding an enemy in breach of an allegiance or duty to the United States (which usually constitutes treason, as well), *id.* § 950t(26); soliciting or advising another to commit a substantive offense triable by military commission, *id.* § 950t(30); conspiring to commit an offense triable by military commission, *id.* § 950t(29); providing material support or resources

activities now constitute offenses that can be tried either by a military tribunal *or* in an Article III court. Moreover, as to some defendants—those detained at the Guantánamo Bay Naval Base—a military commission is currently the only possible venue, because Congress has precluded the President from trying them in ordinary Article III courts.<sup>82</sup>

Not surprisingly, then, the Article III question—whether military commissions may adjudicate domestic-law offenses in wartime—has recently been litigated, for the first time in many decades.<sup>83</sup> A military commission at Guantánamo convicted Ali Hamza Ahmad Suliman al Bahlul of several war-related offenses under the Military Commissions Act of 2006 that are not violations of the international law of war, such as providing material support to terrorism.<sup>84</sup> The United States Court of Appeals for the District of Columbia Circuit overturned all but one of those convictions on other constitutional grounds,<sup>85</sup> leaving only a single remaining conviction for an inchoate conspiracy.

The United States conceded that such a conspiracy is not a violation of the international law of war.<sup>86</sup> The government nevertheless argued that it was constitutional for Congress to authorize a military tribunal to try al Bahlul for such a domestic-law offense, even though the case could (if Congress allowed it) be tried in an Article III court.<sup>87</sup> And in the appellate court's recent en banc decision, four judges agreed.<sup>88</sup>

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intending that they be used in preparation for, or in carrying out, an act of terrorism, id. § 950t(25); and providing material support or resources to an international terrorist organization engaged in hostilities against the United States, id. This final “material support” provision is a potentially capacious offense the government has used to try numerous persons in Article III courts.

82. See, e.g., National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1031, 129 Stat. 726, 968 (2015) (“No amounts . . . may be used . . . to transfer, release, or assist in the transfer or release to or within the United States . . . any other detainee who . . . is or was held on or after January 20, 2009, at United States Naval Station, Guantanamo Bay, Cuba . . .”).

83. See *Al Bahlul v. United States*, 840 F.3d 757, 758 (D.C. Cir. 2016) (en banc) (per curiam), cert. denied, 138 S. Ct. 313 (2017).

84. See *Al Bahlul v. United States*, 767 F.3d 1, 5–8 (D.C. Cir. 2014) (en banc).

85. See id. at 18–31.

86. See Brief for the United States in Opposition at 26 n.6, *Al Bahlul*, 138 S. Ct. 313 (2017) (No. 16-1307), 2017 WL 3948468 (“[T]he government has for years acknowledged that standalone inchoate conspiracy has not attained international recognition at this time as an offense under customary international law.”).

87. See id. at 19–22.

88. See *Al Bahlul*, 840 F.3d at 759 (Henderson, J., concurring) (incorporating by reference her dissenting opinion in the panel proceeding, *Al Bahlul v. United States*, 792 F.3d 1, 27–72 (D.C. Cir. 2015) (Henderson, J., dissenting), rev'd en banc, 840 F.3d 757, cert. denied, 138 S. Ct. 313); id. at 759–74 (Kavanaugh, J., concurring, joined by Brown & Griffith, JJ.). Four other judges concluded that Article III bars such a prosecution. See id. at 800 (Wilkins, J., concurring) (stating that if he were to reach the merits, he “would be inclined to agree with the dissent”); id. at 809–26, 835–37 (Rogers, Tatel & Pillard, JJ.,



The Article III question has recently taken on even greater significance in light of the recent presidential election. During the 2016 presidential campaign, then–Republican candidate Donald Trump expressed disdain for Article III trials of terrorist suspects and signaled that he intends to try even more detainees, including even U.S. citizens, in military commissions.<sup>89</sup> Although the current version of the Military Commissions Act<sup>90</sup> does not authorize the trial of U.S. citizens by military commission,<sup>91</sup> now-President Trump and the Republican Congress might well seek to amend that statute. In any event, another longstanding provision of the Uniform Code of Military Justice already authorizes the trial in military tribunals—with a potential penalty of death—of U.S. persons who attempt to aid the enemy in certain ways or to correspond with the enemy.<sup>92</sup> As recently as 1943, the government convicted a U.S. citizen in a military tribunal for violation of an earlier iteration of that statutory offense.<sup>93</sup>

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dissenting). The remaining three judges on the court of appeals either did not reach the merits question or were recused. Judge Millett concluded that the conviction could be affirmed because it was not “plain error.” *Id.* at 788–95 (Millett, J., concurring). Chief Judge Garland and Judge Srinivasan did not participate in the decision. See *id.* at 757 n.\*, 758 n.\*\*.

89. See Donald Trump, Speech in Youngstown, Ohio (Aug. 15, 2016), in U.S. Presidential Candidates on ISIS, Extremism, Wilson Ctr. (Aug. 16, 2016), <http://www.wilsoncenter.org/article/us-presidential-candidates-isis-extremism> [<http://perma.cc/LE9M-L4K4>] (“Foreign combatants will be tried in military commissions.”); see also Patricia Mazzei, Trump: Americans Could Be Tried in Guantánamo, *Miami Herald* (Aug. 11, 2016), <http://www.miamiherald.com/news/politics-government/election/donald-trump/article95144337.html> [<http://perma.cc/TV88-W378>] (“I know that they want to try them in our regular court systems, and I don’t like that at all . . . I would say they could be tried [in military commissions], that would be fine.” (internal quotation marks omitted) (quoting Trump)).

90. Pub. L. No. 111-84, 123 Stat. 2574 (2009) (codified as amended at 10 U.S.C. §§ 948–950 (2012)).

91. See 10 U.S.C. § 948c (limiting the personal jurisdiction of military commissions to offenses committed by “alien unprivileged enemy belligerent[s]”).

92. Section 904 of Title 10 provides:

Any person who—

- (1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or
- (2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly;

shall suffer death or such other punishment as a court-martial or military commission may direct.

*Id.* § 904; see also Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1604–33, 1671–73.

93. See Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1673 (explaining that the Supreme Court in *Ex parte Quirin* declined to opine on whether the aiding-the-enemy convictions in that case were constitutional).

Such a military prosecution would appear to conflict directly with the terms of Article III (“all Crimes”)<sup>94</sup> and the Sixth Amendment (“all criminal prosecutions”).<sup>95</sup> As the Court stated in the landmark *Milligan* case, these are “provisions . . . too plain and direct, to leave room for misconstruction or doubt of their true meaning”<sup>96</sup>—they are “expressed in such plain English words, that it would seem the ingenuity of man could not evade them.”<sup>97</sup> Thus, as Judge Kavanaugh conceded in his recent opinion for three judges in *Al Bahlul*, “Based solely on the text of Article III, Bahlul might have a point.”<sup>98</sup> Nevertheless, the government has insisted—and, in *Al Bahlul*, Judge Kavanaugh and some of his colleagues agreed—that *history* resolves the constitutional question in favor of the authority to adjudicate such charges without the jury and jury guarantees of Article III.

The government and Judge Kavanaugh have relied on two distinct kinds of historical antecedents. First, the government invokes precedents from the Revolutionary War, in which the Continental Congress approved, and General George Washington implemented, military trials against spies and, in at least one case, a civilian charged with aiding the British army. Citing the Court’s understanding in *Ex parte Quirin* that “it was not the purpose or effect of § 2 of Article III . . . to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right,”<sup>99</sup> the government has argued that this preconstitutional history, or the “backdrop” against which the

94. U.S. Const. art. III, § 2, cl. 3.

95. *Id.* amend. VI.

96. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 119 (1866).

97. *Id.* at 120. Moreover, the government has opted not to invoke functional, pragmatic, or normative justifications for abandoning civilian judges and juries in such cases—the sorts of justifications that the Supreme Court has relied on to recognize most of the small handful of other exceptions to Article III’s criminal trial guarantees. The government apparently has concluded, with good reason, that no such functional or normative justifications would be compelling enough to warrant an atextual exception for military trials of domestic-law offenses, at least not in the context of our current armed conflicts. See Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1567–72. (In its brief in opposition to certiorari in the *Al Bahlul* case, the government made passing reference to Justice Brennan’s suggestion that “structural imperatives of the Constitution as a whole,” *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982) (plurality opinion), might be grounds for an Article III exception. Brief for the United States in Opposition, *supra* note 86, at 20. Notably, however, the government did not advert to any such “structural imperatives” in this context—it relied instead almost exclusively on “historical practice,” and on the Lincoln assassination trial in particular. *Id.* at 21–22.)

98. *Al Bahlul v. United States*, 840 F.3d 757, 768 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring), cert. denied, 138 S. Ct. 313 (2017).

99. 317 U.S. 1, 39 (1942) (citation omitted); see also *Miller v. United States*, 78 U.S. (11 Wall.) 268, 312 (1871) (reasoning that, with few exceptions, the Constitution was designed to give the government “the power of carrying on war as it had been carried on during the Revolution”).

Constitution was drafted and ratified,<sup>100</sup> demonstrates that the Constitution does not bar military trial of war-related domestic-law offenses.<sup>101</sup> Judge Kavanaugh has further contended that the early Congresses in effect ratified that constitutional understanding.<sup>102</sup> In a recent article, I explain why these Founding-era precedents offer meager support for the constitutionality of military trials for war-related domestic-law offenses.<sup>103</sup>

Second, heeding recent Supreme Court admonitions that “a regular course of practice” by the political branches—even one that “began after the founding era”—can, in Madison’s words, “liquidate & settle the meaning” of contested constitutional text,<sup>104</sup> the government argues that “longstanding practice of the government . . . can inform our determination of what the law is” on the Article III question.<sup>105</sup> This theory is at the heart of Judge Kavanaugh’s recent opinion in *Al Bahlul*. Kavanaugh emphasized that in two of the nation’s most important wars—the Civil War and the Second World War—the executive branch used military tribunals to try individuals for offenses (including conspiracy) that were not violations of the international law of war. Citing the Supreme Court’s recent decision in *NLRB v. Noel Canning*, Judge Kavanaugh concluded that “we must be ‘reluctant to upset this traditional practice where doing so would seriously shrink the authority that Presidents have believed existed and have exercised for so long.’”<sup>106</sup>

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100. See Stephen E. Sachs, *Constitutional Backdrops*, 80 *Geo. Wash. L. Rev.* 1813, 1816–18 (2012) (defining constitutional “backdrops” as “rules of law that aren’t derivable from the Constitution’s text, but instead are left unaltered by the text, and in fact are protected by the text from various kinds of legal change”).

101. See, e.g., Brief for the United States at 33–34, *Al Bahlul*, 840 F.3d 757 (No. 11-1324) [hereinafter U.S. 2015 *Al Bahlul* Brief], 2015 WL 6689466; see also Brief for the United States in Opposition, *supra* note 86, at 21.

102. See *Al Bahlul*, 840 F.3d at 765 (Kavanaugh, J., concurring) (“From the earliest days of the Republic, Congress has gone beyond international law in specifying the offenses that may be tried by military commission.”).

103. See generally Lederman, *Wartime Military Tribunals*, *supra* note 67.

104. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (quoting Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 *Writings of James Madison* 447, 450 (Gaillard Hunt ed., 1908)); see also *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015) (“In separation-of-powers cases this Court has often ‘put significant weight upon historical practice.’ Here, history is not all on one side, but on balance it provides strong support for the conclusion that the recognition power is the President’s alone.” (citation omitted) (quoting *Noel Canning*, 134 S. Ct. at 2559)).

105. U.S. 2015 *Al Bahlul* Brief, *supra* note 101, at 32 (internal quotation marks omitted) (quoting *Noel Canning*, 134 S. Ct. at 2560).

106. *Al Bahlul*, 840 F.3d at 768 (Kavanaugh, J., concurring) (quoting *Noel Canning*, 134 S. Ct. at 2573); see also *Al Bahlul v. United States*, 792 F.3d 1, 62 (D.C. Cir. 2015) (Henderson, J., dissenting) (relying on a “robust history” of wartime military trials of domestic-law offenses), *rev’d en banc*, 840 F.3d 757 (D.C. Cir. 2016), cert. denied, 138 S. Ct. 313 (2017).

On closer examination, this “traditional practice” is not especially extensive: The government, for instance, cites only a smattering of executive branch precedents—principally, five trials involving charges of “conspiracy” and other domestic-law offenses—during the Civil War and the Second World War.<sup>107</sup> And of those five, Judge Kavanaugh’s historical case rests upon only three. Two of those three were military trials of Nazi saboteurs in the Second World War, including in the *Quirin* case. As I explain later in this Article, however, those saboteur cases can hardly begin to describe a well-established practice that might be thought to “liquidate” an implied exception to Article III’s plain words, not least because the Supreme Court in *Quirin* expressly declined to sustain the convictions on the charges in that case—including a charge of aiding the enemy—that did not describe what the Court viewed as international law-of-war violations.<sup>108</sup>

That leaves just one other historical precedent, on which the “liquidation” argument crucially depends: the Lincoln assassination proceeding, which Judge Kavanaugh referred to as one of the two “most well-known and important U.S. military commissions in American history” (along with the *Quirin* saboteurs case).<sup>109</sup> His is not an idiosyncratic view of the Lincoln trial: Earlier in the *Al Bahlul* litigation, six judges of the court of appeals described that proceeding as “a particularly significant precedent” because it was “a matter of paramount national importance [that] attracted intense public scrutiny” and “the highest-level Executive Branch involvement.”<sup>110</sup>

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107. See U.S. 2015 *Al Bahlul* Brief, supra note 101, at 36–44. During the Civil War, to be sure, the military tried thousands of individuals for a wide variety of domestic-law offenses, see infra notes 137–148 and accompanying text, and Abraham Lincoln himself was deeply involved in that practice, even though he never did quite reconcile himself to the legality of the military commissions, nor was he able to offer an adequate answer to critics who complained that such commissions were unconstitutional, see infra notes 258–288 and accompanying text. The court of appeals, however, has already expressed a warranted “skepticism” that such trials could offer much constitutional guidance, because “[u]nlike the Lincoln conspirators’ and Nazi saboteurs’ cases, which attracted national attention and reflected the deliberations of highest-level Executive Branch officials, the field precedents are terse recordings of drumhead justice . . .” *Al Bahlul v. United States*, 767 F.3d 1, 27 (D.C. Cir. 2014) (en banc). The government, accordingly, has relied primarily on only three Civil War trials, the Lincoln proceeding foremost among them. See U.S. 2015 *Al Bahlul* Brief, supra note 101, at 40–44.

108. See infra section V.A.

109. *Al Bahlul*, 840 F.3d at 767 (Kavanaugh, J., concurring); accord Brief for the United States in Opposition, supra note 86, at 21 (invoking the same “two most important military commission precedents in U.S. history” (internal quotation marks omitted) (quoting *Al Bahlul*, 840 F.3d at 767 (Kavanaugh, J. concurring)), along with the longstanding statutes prohibiting spying and aiding the enemy, as the “historical practice” that purportedly justifies trials for conspiracies in military tribunals).

110. *Al Bahlul*, 767 F.3d at 25.

In certain respects, it is easy to see why the Lincoln assassination commission has come to play such a prominent part in the current debates about the constitutionality of using military commissions to try Guantánamo detainees for domestic-law offenses. After all, unlike the recent al-Qaeda defendants such as al Bahlul, the Lincoln defendants were not even members of an enemy armed force: They were U.S. citizens (most of whom resided in Union territory), captured and tried in the United States, for crimes that occurred in the nation's capital, and without the sort of congressional authorization of the military proceeding that the Military Commissions Act now provides. Thus, if the courts were ultimately to accept the Article III challenges to the recent Guantánamo trials, such a holding would almost certainly repudiate—in Judge Henderson's words, "retroactively undermine"—a landmark event in our national legal and political narrative.<sup>111</sup> Arguably, such a result should be disfavored or, at the very least, viewed with considerable skepticism.

Or so Judge Kavanaugh has suggested: In an earlier iteration of the *Al Bahlul* case, he expressed doubts about al Bahlul's constitutional argument precisely because it "would render the Lincoln conspirators and Nazi saboteur convictions for conspiracy illegitimate and unconstitutional."<sup>112</sup> And in his most recent opinion for three judges, Kavanaugh concluded that this is something courts should not do because the Lincoln trial (together with *Quirin*) is "at the core" of historical military practice, which "cannot be airbrushed out of the picture."<sup>113</sup>

As I demonstrate in this Article, however, such respect for the Lincoln assassination trial as an important constitutional precedent would itself be an historical anomaly. To be sure, that proceeding might, indeed, be the "highest-profile and most important" military trial in the nation's history.<sup>114</sup> Prominence does not necessarily correlate with precedent, however—not precedent worthy of respect, anyway. Until very recently it was folly—virtually unthinkable—for anyone to rely on the conspirators' proceeding as a venerated example that might *support*, rather than undermine, the argument that domestic-law offenses in wartime can be tried in military commissions rather than in Article III courts.

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111. See *Al Bahlul*, 792 F.3d at 60–61 (Henderson, J., dissenting).

112. *Al Bahlul*, 767 F.3d at 72 (Kavanaugh, J., concurring in the judgment in part and dissenting in part); see also *id.* at 52 (Brown, J., concurring in the judgment in part and dissenting in part) ("[A]s the Lincoln conspirators' cases, *Quirin*, *Colepaugh*, and the Korean War decisions demonstrate, domestic practice traditionally treated conspiracy as an offense triable by military commission.").

113. *Al Bahlul*, 840 F.3d at 768 (Kavanaugh, J., concurring).

114. *Al Bahlul*, 767 F.3d at 68 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

Indeed, even at the time of the trial, the constitutionality of the military court was deeply contested. Members of Lincoln's own cabinet,<sup>115</sup> and at least one member of the commission itself,<sup>116</sup> thought it was unconstitutional. Much of the pro-Union press inveighed against the constitutionality of the trial, as well.<sup>117</sup> And an esteemed New York judge, noting "grave" constitutional doubts, went so far as to invite a grand jury to issue a "presentment" concerning the unlawfulness of the Lincoln commission.<sup>118</sup> Shortly thereafter, the Supreme Court's 1866 decision in *Ex parte Milligan* was widely, and correctly, viewed as the death knell for the sorts of military courts that had become ubiquitous during the Civil War—including the Lincoln conspiracy tribunal itself—because all of the Justices in that case rejected the government's central arguments for bypassing the civilian courts.<sup>119</sup> Accordingly, when Booth's primary accomplice, John Surratt, was extradited to the United States several months after the *Milligan* decision, the government tried him in the local Article III court, where he was eventually freed after the jury was unable to reach a verdict.<sup>120</sup>

As far as the legal world was concerned, that was just about the last anyone heard of the constitutionality of the Lincoln assassination trial for well over a century, even though the constitutional question (whether Article III and the Sixth Amendment preclude such wartime military tribunals) was the subject of substantial debate in both World Wars. The Lincoln case disappeared from the leading treatises and academic accounts of military jurisdiction—so much so that the author of the most recent law review article devoted to the question of the trial's constitutionality, published in 1933, described the Lincoln commission precedent as having been "relegated to the museum of legal history."<sup>121</sup>

That was eighty-five years ago, and the constitutional questions raised by the Lincoln assassination trial have received virtually no scholarly attention since then.<sup>122</sup> As one of the nation's leading experts on military law wrote to Justice Frankfurter in 1942, the Lincoln assassi-

115. See *infra* note 359 and accompanying text (noting the preference of Secretaries Welles and McCulloch for a civilian trial).

116. See *infra* notes 393–397 and accompanying text (discussing Brevet Brigadier General Cyrus Comstock's doubts about the constitutionality of the military commission).

117. See *infra* notes 389–391 and accompanying text (recounting press criticism of the decision to use a military commission).

118. See *infra* note 424 and accompanying text (quoting Judge Rufus Peckham's charge to a grand jury on the use of a military commission to try the Lincoln conspirators).

119. See *infra* section III.D.

120. See *infra* section III.F.2.a.

121. John W. Curran, *Lincoln Conspiracy Trial and Military Jurisdiction over Civilians*, 9 *Notre Dame L. Rev.* 26, 46 (1933).

122. Professor John Fabian Witt's recent, brief account of how the jurisdictional question was considered at the trial itself is a rare and welcome exception. See Witt, *supra* note 41, at 289–94.

nation tribunal is an example of military jurisdiction that “no self-respecting military lawyer will look straight in the eye.”<sup>123</sup> The trial of the Lincoln conspirators had, in effect, become the Case That Must Not Be Named.

Until recently. Seemingly out of the blue, Justice Thomas cited the assassination trial as a relevant precedent (albeit for a statutory argument) in his dissenting opinion in *Hamdan v. Rumsfeld*<sup>124</sup>—thereby signaling that the Lincoln trial might, for the first time since 1865, serve as a possible source of legal authority. Shortly thereafter, the en banc federal court of appeals in the *Al Bahlul* case went further still, insisting that it is “a particularly significant precedent”;<sup>125</sup> and several judges on that court pointed to that proceeding as the principal basis for turning aside al Bahlul’s constitutional objections.<sup>126</sup> This completes an extraordinary about-face: All of a sudden, the Lincoln trial is no longer a dusty museum relic, let alone an antiprecedent—a case so palpably unconstitutional and unlawful that no one dare invoke it for over a century; instead, it “looms as an especially clear and significant precedent,”<sup>127</sup> one that “cannot be airbrushed out of the picture” because it lies “at the core” of our constitutional tradition.<sup>128</sup>

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This Article is a study of the Lincoln assassination trial and its place in our constitutional narrative. The most immediate reason for revisiting the 1865 commission is that a fair assessment of the constitutional arguments associated with that trial might bear heavily on the recent military commissions litigation testing the limits of Article III in wartime—an unresolved question that has bedeviled courts and commentators throughout the nation’s history. Indeed, the Lincoln precedent looms especially large now, given the new President’s professed

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123. Letter from Frederick Bernays Wiener to Justice Felix Frankfurter 9 (Nov. 5, 1942), in *Felix Frankfurter Papers*, Harvard Law School Library, Part III, Reel 43; accord *Felix Bernays Wiener, A Practical Manual of Martial Law* 138 (1940) [hereinafter *Wiener, Practical Manual*] (“[M]ilitary men generally have hesitated to regard the occasion as a sound precedent or, indeed, as anything more than an indication of the intensity of popular feeling at the moment.”).

124. 548 U.S. 557, 699 (2006) (Thomas, J., dissenting); see also *id.* at 693–94 (relying on Attorney General Speed’s after-the-fact legal opinion in support of the Lincoln trial’s constitutionality).

125. *Al Bahlul v. United States*, 767 F.3d 1, 25 (D.C. Cir. 2014) (en banc); accord *id.* at 52 (Brown, J., concurring).

126. See *supra* notes 109–113 and accompanying text (discussing Judge Kavanaugh’s opinion).

127. *Al Bahlul*, 767 F.3d at 69 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

128. *Al Bahlul v. United States*, 840 F.3d 757, 768 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring), cert. denied, 138 S. Ct. 313 (2017).

desire to do what President Johnson did then—namely, use military courts to try U.S. citizens alleged to have assisted the enemy.<sup>129</sup>

Moreover, and wholly apart from how modern courts might settle that particular constitutional controversy, the Lincoln assassination trial was a signal event in our constitutional history and the centerpiece of a fascinating constitutional debate about military justice that raged throughout the Civil War and into Reconstruction. There is a rich academic literature on many of the great constitutional questions raised during the Civil War, such as secession, habeas suspension, emancipation, and presidential prerogatives. Yet, until now, there has not been any comparable, comprehensive account of the ways in which all three branches engaged repeatedly with the difficult question of the permissible scope of military justice and whether certain wartime exigencies might justify circumvention of Article III's guarantees. As I will demonstrate, the question was so vexing throughout the war that even Lincoln himself—the greatest constitutional thinker of his time—appeared to be singularly uncertain how to resolve it.<sup>130</sup> Finally, at war's end, the President and many of his congressional allies appeared to be on the verge of repudiating the system of military tribunals that Lincoln himself had superintended.<sup>131</sup> His assassination, however, prompted the new President, Andrew Johnson, to convene the most controversial military trial of them all, in the name of avenging Lincoln's death. That unorthodox, landmark proceeding revived the heated debate over the constitutional question in acute form.<sup>132</sup> It also offered the occasion for the Article III courts themselves to resolve the question—only to have that opportunity stymied at the last moment, when Johnson dramatically suspended the habeas jurisdiction of the court hearing Mary Surratt's petition,<sup>133</sup> one of the only instances in the nation's history in which the Executive has disregarded a judicial order.

The story of this constitutional contestation during the Civil War is certainly worth recovering and conveying to new generations, if only as a cautionary tale, on the occasion of the trial's sesquicentennial. This Article is the first detailed academic treatment of the legal debates surrounding the system of Civil War military tribunals.

The Article also contributes to the current, robust academic interrogation of the use of custom, or practice, as an interpretive guide to questions involving the separation of powers.<sup>134</sup> In particular, the Article

129. See *supra* notes 89–91 and accompanying text.

130. See *infra* section I.B.2.

131. See *infra* section I.B.3.c.

132. See *infra* Part III.

133. See *infra* notes 471–485.

134. See, e.g., Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 *Sup. Ct. Rev.* 1; Curtis A.



explores the place of the Lincoln trial in constitutional discourse *after* 1868—the ways in which that proceeding, and other Civil War military trials, have been accorded authority, or dismissed as nonauthoritative, in subsequent generations. This historical exhumation might help inform current debates about whether and under what circumstances political branch practice, especially high-profile precedents, ought to establish, or “liquidate,” the meaning or proper application of the Constitution.<sup>135</sup> It might also provide insight into how particular precedents come to be established as canonical or as “anticanonical”<sup>136</sup>—and perhaps, as in this case, how they might toggle back and forth between the anticanon and the canon.

Part I of the Article sets the stage for the events of 1865. It recounts the sudden proliferation, during the Civil War, of military trials of persons who were not part of the Union armies and the considerable constitutional debates surrounding that practice in the military proceedings themselves and in both of the political branches. In Part II, the heart of the Article, I then examine the ways in which the constitutional question was contested and resolved in connection with the Lincoln assassination trial itself.

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Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 *Harv. L. Rev.* 411 (2012); Harlan Grant Cohen, “Undead” Wartime Cases: *Stare Decisis* and the Lessons of History, 84 *Tul. L. Rev.* 957, 1012–16 (2010); Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 *Notre Dame L. Rev.* 1753 (2015); Alison L. LaCroix, *Response, Historical Gloss: A Primer*, 126 *Harv. L. Rev. Forum* 75 (2013), [http://harvardlawreview.org/wp-content/uploads/pdfs/forvol126\\_lacroix.pdf](http://harvardlawreview.org/wp-content/uploads/pdfs/forvol126_lacroix.pdf) [<http://perma.cc/9NGK-437U>]; H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *Harv. L. Rev.* 885, 929–31 (1985); Shalev Roisman, *Constitutional Acquiescence*, 84 *Geo. Wash. L. Rev.* 668 (2016); Ernest A. Young, *Our Prescriptive Judicial Power: Constitutive and Entrenchment Effects of Historical Practice in Federal Courts Law*, 58 *Wm. & Mary L. Rev.* 535 (2016); William Baude, *Constitutional Liquidation*, 71 *Stan. L. Rev.* (forthcoming 2019) (on file with the *Columbia Law Review*).

135. See Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 *Writings of James Madison* 447, 450 (Gaillard Hunt ed., 1908) (“It . . . was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases . . . and that it might require a regular course of practice to liquidate & settle the meaning of some of them.”); see also *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015) (examining the weight of the historical evidence to assess whether Congress can regulate the President’s “recognition” power); *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559–60 (2014) (“[T]his Court has treated practice as an important interpretative factor even when the nature or longevity of that practice is subject to dispute.”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (“It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.”); Baude, *supra* note 134, at 7 (“The core idea [of liquidation] is that legal texts, including the Constitution, do not have a fully determined meaning and must have those indeterminacies settled through subsequent practice.”).

136. See Jamal Greene, *The Anticanon*, 125 *Harv. L. Rev.* 379, 380 (2011); see also Jack M. Balkin, *Constitutional Redemption* 119 (2011) (arguing that “attempting to move arguments from off-the-wall to on-the-wall is the process of constitutional development in America”).

In Part III, I turn to the effects of the postwar *Milligan* decision and how the generation immediately after the war came to view both the Lincoln trial, in particular, and the constitutionality of military criminal adjudication generally. In Part IV, I show how the Lincoln trial virtually disappeared as a constitutional precedent during wartime debates of the constitutional question in the two World Wars. Part V briefly examines the cases from World War II on which the government and Judge Kavanaugh have relied and the furtive revival of the Lincoln trial as legal authority since September 11, 2001. Finally, in Part VI, I offer some thoughts on what this history of the Lincoln trial might demonstrate, not only about the merits of the Article III question currently at issue in the courts but also, and more broadly, about the use of high-profile historical practices as a source of constitutional authority.

#### I. CONSIDERATION OF THE CONSTITUTIONAL QUESTION DURING THE CIVIL WAR

Long before the tragic events of April 14, 1865, criminal trials in military commissions had become commonplace in the Civil War. In the forty or so months that preceded Lincoln's assassination, the War Department instituted an elaborate system of such commissions (and some courts-martial) throughout the land—military courts that, in many places, virtually displaced ordinary civilian courts.<sup>137</sup> These military tribunals occasionally tried members of the Union and Confederate armed forces for violations of the law of war. Much more frequently, however, Judge Advocate General Joseph Holt and his august team of prosecutors<sup>138</sup> brought a wide range of charges against persons who were unconnected to military forces, in most cases for conduct that did not violate the international law of war.<sup>139</sup>

Commission proceedings began early in the war in the border states of Missouri and Kentucky, primarily against organized “guerrilla” groups and other marauders—persons sympathetic to, but not formally in league with, the Confederate cause, who endeavored to undermine the Union war effort by sabotage, including the destruction of railroads,

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137. The best, most thorough accounts of this practice include Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* chs. 2, 8 (1991); Witt, *supra* note 41, at 263–73; see also Kastenbergh, *Law in War, War as Law*, *supra* note 56, at 294–313; J.G. Randall, *Constitutional Problems Under Lincoln* ch. 8 (rev ed. 1951); Gideon M. Hart, *Military Commissions and the Lieber Code: Toward a New Understanding of the Jurisdictional Foundations of Military Commissions*, 203 *Mil. L. Rev.* 1 (2010).

138. See Witt, *supra* note 41, at 264–65 (describing how Holt pulled together a cadre of extraordinary, talented judge advocates, including Representative John Bingham, John Knox, John Chipman Gray, and William Winthrop).

139. See Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1643–44 (describing the types of conduct, ranging from ordinary crimes to activities viewed as harmful to the Union war effort, over which the commissions asserted jurisdiction).

bridges, and telegraph lines.<sup>140</sup> After President Lincoln appointed Holt as Judge Advocate General in September 1862, however, the cases quickly expanded to other jurisdictions, including the District of Columbia and some northern states, and to what Professor John Witt rightly characterizes as a “stunningly wide array of conduct.”<sup>141</sup> Some cases involved ordinary crimes—“often with only a very attenuated or nonexistent connection to the war—while others involved a wide array of activities that the military viewed as harmful to the Union war effort,” including expressions of sympathy for the Confederacy or criticizing the Union Army.<sup>142</sup> William Winthrop, a member of Holt’s team of judge advocates, later listed many of the charges tried in the commissions, roughly corresponding to these two categories of charges. Winthrop’s enumeration is, indeed, stunning in its breadth:

murder, manslaughter, robbery, larceny, burglary, rape, arson, assault and battery, attempts to commit the same; criminal conspiracies, riot, perjury, bribery, accepting bribes, forgery, fraud, embezzlement, misappropriation or other illegal disposition of public property, receiving stolen goods, obtaining money or property under false pretences, making or uttering counterfeit money, uttering false Treasury notes, breaches of the peace and disorderly conduct, keeping a disorderly house, selling obscene books, &c., malicious mischief or trespass, carrying concealed weapons, abuse of official authority by civil officials, resisting or evading the draft, discouraging enlistments, purchasing arms, clothing, &c., from soldiers, . . . aiding desertion, &c., . . . breaches of the law of non-intercourse with the enemy, such as running or attempting to run a blockade; unauthorized contracting, trading or dealing with, enemies, or furnishing them with money, arms, provisions, medicines, &c.; conveying to or from them dispatches, letters, or other communications, passing the lines for any purpose without a permit, or coming back after being sent through the lines and ordered not to return; aiding the enemy by harboring his spies, emissaries, &c., assisting his people or friends to cross the lines into his country, acting as guide to his troops, aiding the escape of his soldiers held as prisoners of war, secretly recruiting for his army, negotiating and circulating his currency or securities—as confederate notes or bonds . . . , hostile or disloyal acts, or publications or declarations calculated to excite opposition to the federal government or sympathy with the enemy, &c.; engaging in illegal warfare as a guerilla, or by the deliberate burning, or other destruction of boats, trains, bridges, buildings, &c.; acting as a spy, taking life or obtaining any advantage by means of treachery; abuse or violation of a flag of truce; violation

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140. See *id.* at 1643.

141. Witt, *supra* note 41, at 268.

142. See Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1643–44.

of a parole or of an oath of allegiance or amnesty, breach of bond given for loyal behaviour, good conduct, &c.; resistance to the constituted military authority, bribing or attempting to bribe officers or soldiers or the constituted civil officials; [and] kidnapping or returning persons to slavery.<sup>143</sup>

Winthrop added that even “treason,” as such, was “not infrequently charged.”<sup>144</sup> John Witt and Mark Neely also recount cases in which individuals were charged with traveling into the South without a pass; permitting rebels to lurk in a neighborhood without reporting them; corresponding with a child in the Confederate Army; stealing horses; and simply speaking aloud, “I am a Jeff Davis man.”<sup>145</sup> In addition to all this, courts-martial—which, unlike commissions, were statutorily authorized—also tried individuals for spying and for providing forms of aid to the enemy specified in the Articles of War, neither of which were offenses that violated the law of war.<sup>146</sup>

Even early in the war, this practice induced one shocked senator to remark that Secretary of War Stanton was “prone to bring every person and every act within military law and military courts.”<sup>147</sup> Similarly, Lincoln’s Attorney General Edward Bates lamented that “[t]here seems to be a general and growing disposition of the military, wherever stationed, to engross all power, and to treat the civil Government with contumely, as if the object were to bring it into contempt.”<sup>148</sup> By the time of the Lincoln assassination trial, such characterizations were not exaggerations.

#### A. *The War Department’s Justifications for the Constitutionality of Military Adjudication of Domestic-Law Offenses*

There was frequent public debate about the constitutionality of these tribunals, and occasionally the issue was litigated, mostly inside the military justice system itself. During the course of the war, the military

143. Winthrop, *Military Law and Precedents*, supra note 61, at 839–40 (footnotes omitted).

144. *Id.* at 839 (emphasis omitted).

145. See Neely, supra note 137, at 171–72; Witt, supra note 41, at 268–69.

146. I discuss this court-martial practice in Lederman, *Wartime Military Tribunals*, supra note 67, at 1634–35. For example, a court-martial in 1861 convicted a Missouri civilian, Isaac Wilcox, for “[t]reason against the Government of the United States,” by virtue of his enlisting in the rebel army and inducing others to do the same. See Headquarters, War Dep’t, *Case of Isaac Wilcox—Citizen, Missouri* (Sept. 20, 1861), National Archives Identifier 1813076, Local Identifier KK-817, in *Records of the Office of the Judge Advocate General (Army), 1792–2010* (National Archives Record Group 153), Court Martial Case Files, 12/1800–10/1894.

147. Cong. Globe, 37th Cong., 3d Sess. 957 (1863) (statement of Sen. Davis).

148. Letter from Attorney General Edward Bates to Judge J.G. Knapp (Sept. 16, 1863), in *Arbitrary Arrests in New-Mexico*; A Letter from Attorney-General Bates, N.Y. Times (Feb. 20, 1864), <http://www.nytimes.com/1864/02/20/news/arbitrary-arrests-in-new-mexico-a-letter-from-attorney-general-bates.html> (on file with the *Columbia Law Review*).

lawyers and officers who defended the legality of the tribunals did not settle upon a single rationale or justification. Instead, they invoked a smattering of different theories, in various combinations. Prior to the landmark Milligan and Lincoln assassination trials at the close of the war, the military relied primarily on three theories. One of them—an argument of “necessity” by virtue of the alleged inadequacy of civilian courts<sup>149</sup>—did not withstand the Supreme Court’s subsequent decision in *Milligan*.<sup>150</sup> The second argument, which fully flowered only after the Lincoln trial itself, rested on a rationale that the Supreme Court would later endorse in *Quirin*<sup>151</sup>—namely, that Congress may authorize military tribunals to adjudicate offenses against the international law of war.<sup>152</sup> The third rationale, which took various forms and was somewhat under-theorized, was that constitutional guarantees simply did not apply to certain forms of belligerent conduct, an argument that the courts never endorsed when it came to *trial* guarantees (including judge and jury) and that, more broadly, has not survived to the modern era.<sup>153</sup>

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149. See *infra* section I.A.1.

150. See *infra* section III.D. Moreover, that argument is inapposite in today’s armed conflicts (and the government therefore has not invoked it), because Article III courts obviously can be, and since 2001 have been, used to try many terrorism-related cases against the enemy and its supporters.

151. *Ex parte Quirin*, 317 U.S. 1 (1942).

152. See *infra* section I.A.2. This, too, is by definition not a ground for the military trial of domestic-law offenses in the United States’ current conflicts with nonstate terrorist organizations.

153. See *infra* section I.A.3. In addition to the three theories described in the text, Holt also sometimes proffered a quasi-textual argument for an Article III exception, predicated on an express exception in the Grand Jury Clause of the Fifth Amendment. See U.S. Const. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces . . .”). This argument had two constituent parts: First, Holt assumed that if a case “arises in” the land or naval forces, it is exempt not only from the grand jury guarantee but also from the petit jury guarantees of the Sixth Amendment and Article III and (implicitly) from the Article III guarantee of an independent, life-tenured judge. The second component of the argument was a capacious notion of how to identify those cases “arising in” the armed forces: According to Holt, that category included not only cases alleging offenses committed by persons in or accompanying the armed forces, and persons doing business with the armed forces, but also any case involving conduct that “directly connects itself with the operations and safety of th[e] forces, whose overthrow and destruction it seeks.” Judge Advocate Gen.’s Office, Case of William T. Smithson (Nov. 13, 1863) [hereinafter Case of William T. Smithson], in 5 Bureau of Military Justice Record Book 287, 293 (1863). On this view, any aid to the enemy that was likely to undermine the Union war effort would “arise in” the armed or naval forces and would, for that reason, permit military adjudication, even when the conduct could also be tried in an Article III court. This argument never took root in the courts, presumably because it was flawed in multiple respects, and the Supreme Court finally put it to rest in a series of cases in the middle of the twentieth century. See Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1563, 1584, 1642.

1. *The “Martial Law” Argument from Necessity.* — The most common and prominent explanation the War Department offered to justify its use of military commissions was one of exigency—namely, that military tribunals were necessary because the defendants could not be tried in ordinary civilian courts.<sup>154</sup> Early in the Civil War, for example, both the President and his generals, including, most importantly, General Henry Halleck, declared “martial law” in areas where the civil justice system was said to be unavailable or ineffective—and in such locales, the Army then used military commissions regularly, as a substitute for civilian justice.<sup>155</sup> Looking back upon the use of military commissions as the war was ending, Judge Advocate General Holt wrote that the commissions “originat[ed] in the necessities of the rebellion” and were employed “in regions where other courts had ceased to exist, and in cases of which the local criminal courts could not legally take cognizance, or which, by reason of intrinsic defects of machinery, they were incompetent to pass upon.”<sup>156</sup>

The difficulty with this justification, however, was that the civilian courts had not actually “ceased to exist” in those areas where President Lincoln and his generals declared martial law and began to regularly use military commissions in the Civil War; nor were the civil courts unable to “take cognizance” over most of the dangerous conduct that was adjudicated in military commissions. In fact, and not surprisingly, the true reason the War Department turned to military commissions was not out of necessity but because it was understandably eager to deliver justice that was much swifter and more unconstrained than in the ordinary course of trials in Article III (and state) courts—and, in some places, because the military officials feared that lay juries might refuse to convict, due to the presence of Confederate sympathizers within the jury pools.

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154. The Supreme Court would later endorse the use of military courts in certain other settings in which Article III courts are unavailable, such as foreign places of occupation, “where civilian government cannot and does not function.” *Duncan v. Kahanamoku*, 327 U.S. 304, 314 (1946); see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 595–96 (2006) (plurality opinion) (referring to the commission established “to apply the German Criminal Code, in occupied Germany following the end of World War II”). “The limitations on these occupied territory or military government commissions are tailored to the tribunals’ purpose and the exigencies that necessitate their use.” *Id.* at 596 n.26.

155. See, e.g., section I.A.1.a (discussing the assertion of martial law in Missouri). Martial law is often and aptly described as “the public law of necessity.” See, e.g., Wiener, *Practical Manual*, *supra* note 123, at 16. “Necessity calls it forth, necessity justifies its exercise, and necessity measures the extent and degree to which it may be employed.” *Id.* (citing *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866)).

156. Letter from J. Holt, Judge Advocate Gen., to E.M. Stanton, Sec’y of War (Nov. 13, 1865), in *United States Department of War, The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*, ser. III, vol. 5, at 490, 493 (1900) [hereinafter *Official Records*].

This can be seen by looking closely at the two most dramatic declarations of martial law early in the war: Major General Henry Halleck's declarations in Missouri in 1861 to 1862 and President Lincoln's own extraordinary nationwide declaration in September 1862 (which was, in turn, preceded by a similar declaration by Secretary of War Edwin Stanton).

a. *Halleck, December 1861.* — Henry Halleck was a lawyer and a scholar, as well as an Army officer. Just before the war, Halleck published one of the first comprehensive international law treatises in the United States that focused on the law of war.<sup>157</sup> Lincoln appointed him commander of the Department of the Missouri in November 1861<sup>158</sup> (and would later appoint him to be General-in-Chief of all the Union armies in July 1862<sup>159</sup>). In Missouri, Halleck confronted a state overrun by persons who were not part of the Confederate Army but who nonetheless worked assiduously to undermine the Union war effort. There were “numerous rebels and spies within our camps and in the territory occupied by our troops, who give information, aid, and assistance to the enemy,” he wrote.<sup>160</sup> “[R]ebels scattered through the country threaten and drive out loyal citizens and rob them of their property; . . . they furnish the enemy with arms, provisions, clothing, horses, and means of transportation; and . . . insurgents are banding together . . . to rob, to maraud, and to lay waste the country.”<sup>161</sup>

On November 20, 1861, his very first day in command, Halleck wrote to General McClellan, seeking the President's written authority to declare martial law within his department.<sup>162</sup> Receiving no response, Halleck wrote in greater detail five days later. He began by assuring McClellan and Lincoln it was not his intent to enforce martial law “in any place where there are civil tribunals which can be intrusted with the punishment of offenses and the regular administration of justice” and that he “intend[ed] to restrict [martial law] as much as possible.”<sup>163</sup> Halleck did *not* claim, however, that the state and federal courts in St. Louis were closed or unavailable. Instead, he obliquely suggested that there were “no civil authorities” to prosecute frauds against the government due to

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157. H.W. Halleck, *International Law; or, Rules Regulating the Intercourse of States in Peace and War* (San Francisco, H.H. Bancroft & Co. 1861) [hereinafter Halleck, *International Law*].

158. See Stephen E. Ambrose, *Halleck: Lincoln's Chief of Staff* 11 (1996).

159. *Id.* at 61; see also Witt, *supra* note 41, at 188 (describing Halleck).

160. Headquarters, Dep't of the Mo., General Orders, No. 13 (Dec. 4, 1861), *in* *Official Records*, *supra* note 156, ser. I, vol. 8, at 405, 405.

161. *Id.*

162. Telegram from Major Gen. H.W. Halleck to Gen. McClellan (Nov. 20, 1861), *in* *Official Records*, *supra* note 156, ser. I, vol. 8, at 817, 817.

163. Letter from Major Gen. H.W. Halleck to Brigadier Gen. Lorenzo Thomas (Nov. 25, 1861), *in* *Official Records*, *supra* note 156, ser. I, vol. 8, at 817, 817.

an “absence of the *proper* civil tribunals.”<sup>164</sup> Halleck did not specify what was “improper” about the existing courts or why they could not be “intrusted.” He probably did not need to spell out his thinking for his commanding officers.

The next day, still having received no answer, Halleck pleaded again for the presidential authority that was, he said, “absolutely necessary to enable me to procure evidence” of frauds against the government.<sup>165</sup> “If this authority be refused,” wrote Halleck, “I shall not exercise it, no matter how much the public service may suffer.”<sup>166</sup> In fact, unbeknownst to Halleck, McClellan had already sent a response to his previous request. (Presumably the missives crossed in the proverbial mail.) McClellan—perhaps reflecting some uncertainty in Washington about whether displacement of civilian courts in Missouri was truly necessary—requested Halleck to “give your views more fully as to the necessity of enforcing martial law in your department.”<sup>167</sup> On November 30, then, Halleck offered a more desperate—but still not very specific—plea, this time not focused on fraud in particular: Missouri, he wrote, was “in a state of insurrection,” but the threat was diffuse, such that there was no “large gathering in any one place so that we can strike them.”<sup>168</sup> Instead, Halleck needed to “punish these outrages” individually—something that was necessary because “there is no civil law or civil authority to reach them.”<sup>169</sup> Once again, he did not explain why the civil law and authority were inadequate to punish wrongdoers.

On December 2, Lincoln finally authorized Halleck not only to suspend the writ of habeas corpus in Missouri but also “to exercise martial law as you find it necessary in your discretion to secure the public

164. *Id.* (emphasis added).

165. Telegram from Major Gen. H.W. Halleck to Major Gen. George B. McClellan (Nov. 26, 1861), *in* Official Records, *supra* note 156, ser. I, vol. 8, at 818, 818.

166. *Id.*

167. Letter from Adjutant Gen. L. Thomas to Major Gen. H.W. Halleck (Nov. 25, 1861), *in* Official Records, *supra* note 156, ser. II, vol. 1, at 231, 231.

168. Telegram from Major Gen. H.W. Halleck to Major Gen. George B. McClellan (Nov. 30, 1861), *in* Official Records, *supra* note 156, ser. II, vol. 1, at 232, 232.

169. *Id.* As Halleck described it, he wished only to be given the authority to continue a form of martial law that his predecessor, John C. Frémont, had been exercising without authority for months. Halleck was a stickler for proper process—and he was wary of being blamed for either unlawful actions or a failure to deal with the problem of the disloyal violence if he acted unilaterally. “I mean to act strictly under authority and according to instructions and where authority will not be granted the Government must not hold me responsible for the result,” he wrote. *Id.* at 233. Accordingly, he added that if Lincoln was not willing to entrust him with the authority to enforce martial law, “he should relieve me from the command.” *Id.* at 232.



safety and the authority of the United States.”<sup>170</sup> Two days later, Halleck issued an order directing commanding officers within the Department of the Missouri not only to arrest and confine “all persons in arms against the lawful authorities of the United States, or who give aid, assistance, or encouragement to the enemy” but also to convene military commissions for the trial “of persons charged with aiding and assisting the enemy, the destruction of bridges, roads, and buildings, and the taking of public or private property for hostile purposes.”<sup>171</sup>

In a follow-on General Order four weeks later, Halleck prescribed how such commissions would work.<sup>172</sup> In that January 1, 1862, Order, he nominally guaranteed that “[c]ivil offenses cognizable by civil courts whenever such loyal courts exist will not be tried by a military commission.”<sup>173</sup> Halleck then proceeded, however, to render this an empty promise by adding that “many offenses which in time of peace are civil offenses become in time of war military offenses and are to be tried by a military tribunal even in places where civil tribunals exist.”<sup>174</sup> In other words, by *recharacterizing* conduct ordinarily condemned as a civil crime as a so-called “military” offense, the War Department could ensure that the offense was “not within the jurisdiction of any existing civil court”<sup>175</sup>—and in that case, the argument went, necessity *required* military adjudication. For example, although Halleck’s order acknowledged that treason, as such, was “a distinct offense . . . defined by the Constitution [that] must be tried by courts duly constituted by law,”<sup>176</sup> nevertheless “certain acts *of a treasonable character*,”<sup>177</sup> such as conveying information to the enemy, were “military offenses triable by military tribunals and punishable by military authority.”<sup>178</sup>

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170. Telegram from President Abraham Lincoln (sent by William Seward, Sec’y of State) to Major Gen. Henry W. Halleck (Dec. 2, 1861), *in* Official Records, *supra* note 156, ser. II, vol. 1, at 233, 233.

171. See Headquarters, Dep’t of the Mo., General Orders, No. 13, *supra* note 160, at 405. Halleck would later suggest that this order applied only in St. Louis, rather than across the state. Headquarters, Dep’t of the Miss., General Orders, No. 2 (Mar. 13, 1862) (signed by Assistant Adjutant Gen. N.H. McLean “[b]y command of Major-General Halleck”), *in* Official Records, *supra* note 156, ser. II, vol. 1, at 270, 270. The text of the December 4 order, however, was not so limited.

172. Headquarters, Dep’t of the Mo., General Orders, No. 1 (Jan. 1, 1862), *in* Official Records, *supra* note 156, ser. II, vol. 1, at 247, 247–49.

173. *Id.* at 248.

174. *Id.*

175. *Id.* at 247.

176. *Id.* at 248. Halleck would later disapprove of some treason convictions in military commissions. See, e.g., Headquarters, Dep’t of the Mo., General Orders, No. 20 (Jan. 14, 1862), *in* Official Records, *supra* note 156, ser. II, vol. 1, at 402, 405 (charges against George H. Cunningham).

177. Headquarters, Dep’t of the Mo., General Orders, No. 1, *supra* note 172, at 248.

178. *Id.*

This barely disguised sleight of hand did not include an explanation of why the criminal conduct could not simply be characterized in the traditional manner (e.g., as treason) and then be tried in a civilian court. The December 4 Order, however, was unusually candid in explaining why Halleck was so eager to use military commissions: not because Missouri courts were literally unavailable or without jurisdiction to punish the conduct in question—as Justice Samuel Miller would later note, “the process of the courts [in the state] had never been interrupted”<sup>179</sup>—but because they were insufficiently harsh. Their structures and procedures, Halleck explained, were not designed for the purpose of winning a war: “The mild and indulgent course heretofore pursued toward this class of men has utterly failed to restrain them from such unlawful conduct.”<sup>180</sup> A “more severe policy” therefore was necessary, according to Halleck—one in which the miscreants were not afforded “the rights of peace.”<sup>181</sup> Halleck wrote more along these lines in a letter to then-Chief Justice of the Kansas Supreme Court Thomas Ewing on January 1, 1862, explaining his resort to martial law in Missouri: Bridge-burners, wrote Halleck, are not “armed and open enemies but . . . pretended quiet citizens living on their farms,” who are back “quietly plowing or working in [the] field” a mere hour after the sabotage.<sup>182</sup> The civil courts, Halleck explained, “are very generally unreliable” in dealing with this problem; therefore he had “determined to put down these insurgents and bridge-burners with a strong hand.”<sup>183</sup> (It is probably not a coincidence that Ewing would later represent some of the accused in the Lincoln conspiracy trial and, in that capacity, offer an eloquent attack on the constitutional authority of the military court.<sup>184</sup>)

In fact, and contrary to Halleck’s suggestion, the Army did not need military tribunals to restrain the individuals who were committing such crimes: Many of them could have been convicted in civilian courts, and the military was arresting most of the others and asserting the authority to preventively detain them for the duration of the war. Accordingly, Halleck here was admitting, in effect, that the principal purpose of the

179. *In re Murphy*, 17 F. Cas. 1030, 1031 (C.C.D. Mo. 1867) (No. 9,947).

180. Headquarters, Dep’t of the Mo., General Orders, No. 13, *supra* note 160, at 405.

181. *Id.* In a related declaration that martial law would be enforced “in and about all railroads in this State,” Halleck likewise wrote that resort to civil courts would be the default rule where they adequately served the military’s purposes: “It is not intended by this declaration to interfere with the jurisdiction of any civil court which is loyal to the Government of the United States and which will aid the military authorities in enforcing order and punishing crimes.” Headquarters, Dep’t of the Mo., General Orders, No. 34 (Dec. 26, 1861), *in* Official Records, *supra* note 156, ser. II, vol. 1, at 155, 155.

182. Letter from Major Gen. H.W. Halleck to Hon. T. Ewing (Jan. 1, 1862), *in* Official Records, *supra* note 156, ser. II, vol. 1, at 247, 247.

183. *Id.*

184. See *infra* notes 425–427 and accompanying text (discussing Ewing’s oral argument attacking the jurisdiction of the military commission).

military tribunals was not so much to incapacitate the particular defendants who had been arrested but instead to deter others with the prospect of harsh and unrelenting military justice, unencumbered by due process or other constitutional protections. As Judge Advocate Holt would put the point in his argument for court-martial jurisdiction to try an alleged Confederate abettor in 1863, "Proceedings in the ordinary criminal courts, by indictment and jury trial, would have no terror for such traitors"; if offenses are not "promptly and unsparingly punished, there can be no successful prosecution of hostilities."<sup>185</sup> This sort of argument—that the use of severe military justice is necessary in order to terrorize citizens sympathetic to the enemy and to thereby deter them from misdeeds—is not one that the government ever could, or did, offer forthrightly to any reviewing, civilian court assessing the constitutionality of the tribunals (such as the Supreme Court in *Milligan* a few years later). It would not do to say, in such a setting, that the judge and jury protections of Article III—the "rights of peace" or, as Holt would later characterize them dismissively, the "intrinsic defects of machinery" of such courts<sup>186</sup>—were inadequate because they undermined the *in terrorem* impact that might be realized by the use, and threat, of summary and unforgiving military justice.

b. *Stanton and Lincoln, August and September 1862.* — In August 1862, Secretary of War Edwin Stanton issued an order entitled "Authorizing Arrests of Persons Discouraging Enlistments." Its authority to arrest was not limited, however, to conduct involving military enlistment, nor was it geographically cabined. It directed all U.S. marshals, and the superintendents or chiefs of police of "any town, city, or district," to "arrest and imprison any person or persons who may be engaged, by act, speech, or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or in any other disloyal practice against the United States."<sup>187</sup> Stanton's decree, like Lincoln's a few weeks later, is primarily remembered today for its authorization to arrest and detain those who urged resistance to the new conscription laws and other critics of the Union cause. Stanton's order, however, went further still: It ordered the civilian officials in question to report the arrested offenders "to [Major] L. C. Turner, judge-advocate, in order that such persons may be tried before a military commission."<sup>188</sup> Seven weeks later, President Lincoln himself followed suit, "order[ing]" that "all rebels and insurgents, their aiders and abettors," as well as any other persons throughout the United States "discouraging volunteer enlistments, resisting militia drafts" or

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185. Case of William T. Smithson, *supra* note 153, at 292.

186. Letter from J. Holt to E.M. Stanton, *supra* note 156, at 493.

187. War Dep't, Order Authorizing Arrests of Persons Discouraging Enlistments (Aug. 8, 1862), in *Official Records*, *supra* note 156, ser. III, vol. 2, at 321, 321 (emphasis added).

188. *Id.*

guilty “of any disloyal practice, affording aid and comfort to rebels against the authority of the United States” were to be “subject to martial law, and liable to trial and punishment by courts-martial or military commission.”<sup>189</sup>

Lincoln’s nationwide order on its face offered a purported justification for such an extraordinary assertion of military jurisdiction: “[D]isloyal persons are not adequately restrained by the ordinary processes of law from [calling volunteers and draftees into service] and from giving aid and comfort in various ways to the insurrection.”<sup>190</sup> This was, however, a gross overstatement (at least absent any further elaboration). As one state judge would shortly remark, the President’s order made little sense, at least in those states, such as Wisconsin, where the ordinary Article III and state courts were entirely adequate to the task of adjudicating cases involving aid to the enemy;<sup>191</sup> indeed, in July 1862, Congress had enacted a new treason law predicated on the assumption that such civilian trials were the proper means of dealing with the problem.<sup>192</sup> Apparently, then, Lincoln, like Halleck and Stanton, had turned to so-called “martial law,” and to military tribunals, not because civilian courts and other mechanisms (including military detention) were unavailable to incapacitate and punish wrongdoers but instead because such civil processes did not, in Lincoln’s words, adequately “restrain,” or deter, others. As I explain below, this reasoning, a very aggressive notion of the “necessity” that required circumvention of ordinary civilian courts, did not survive the Supreme Court’s decision in *Milligan*.<sup>193</sup>

2. *The Lieber Code’s Theory of Alleged Violations of the “Laws of War.”* — As John Fabian Witt has recently documented, as the Civil War progressed the War Department increasingly alleged that many of the accused on trial in commissions who were not members of either the Union or Confederate forces had violated the “laws of war.”<sup>194</sup> There were some such charges in Missouri, even before Lincoln’s martial-law declaration in September 1862.<sup>195</sup> The incidence of such “law of war”

189. War Dep’t, General Orders, No. 141 (Sept. 25, 1862), in *Official Records*, supra note 156, ser. III, vol. 2, at 587, 587.

190. *Id.*

191. See *In re Kemp*, 16 Wis. 382, 400 (1863) (“The civil authorities here maintain themselves. Justice is dispensed by the courts; the laws are administered without difficulty, and . . . no necessity can exist for subjecting the citizen to the control of military power.”). But cf. *Ex parte Field*, 9 F. Cas. 1, 8 (C.C.D. Vt. 1862) (No. 4,761) (“[I]t may be argued that Vermont is a loyal state, . . . that the enforcement of civil law has not been interfered with within her borders; and that, therefore, there is nothing to justify martial law. But . . . this is a question for the president, not for the court, to determine.”).

192. Act of July 17, 1862, ch. 195, § 1, 12 Stat. 589, 589–90.

193. See *infra* section III.D; see also *infra* notes 429–439 and accompanying text (explaining that Lincoln’s declaration of “martial law” was a misnomer).

194. Witt, *supra* note 41, at 267–71.

195. See Neely, *supra* note 137, at 42–43; Hart, *supra* note 137, at 16.

charges increased dramatically, however, late in 1862 and into 1863; by the end of the war, nearly 1,000 individuals had been so charged, by Witt's count.<sup>196</sup> Because the defendants in these cases were overwhelmingly civilians, the "law of war" charges were not usually what we have come to think of today as violations of the *jus in bello*—the rules that govern the conduct of armies—such as targeting civilians, torture, perfidy, or the use of prohibited weapons. Instead, as Witt describes, the so-called law-of-war charges in Civil War commissions covered a stunningly wide array of conduct, much of it involving private violence and disloyal conduct (including speech) that, directly or indirectly, was thought to undermine the Union war effort.<sup>197</sup>

As we will see, this became the primary basis that Attorney General James Speed offered, in mid-1865, to justify the constitutionality of the Lincoln assassination trial.<sup>198</sup> It is not clear, however, that the War Department ever placed much weight on this rationale to justify the constitutionality of commissions earlier in the war. The closest instance I have found is an offhand claim made by General Halleck in a memorandum he wrote in 1864, which was not published until many decades after his death. Because the offenses in question were "against the common laws of war," Halleck wrote, "the civil courts could impose no punishment."<sup>199</sup> This assertion would not have been very persuasive, even if the military had relied upon it openly. Although it is true that, during the Civil War, Congress had not enacted any laws making law-of-war violations subject to civilian prosecution, certainly Congress *could have* done so, as it has done in modern times,<sup>200</sup> pursuant to its power to define and punish offenses against the law of nations.<sup>201</sup>

There would have been a more fundamental problem with this argument, too, as Halleck well knew—namely, that most of the offenses tried in military commissions were *not* violations of the law of war, notwithstanding the characterizations of the War Department. This confusion about the source of law arose, in large measure, from the way in which the famous "Lieber Code" treated certain hostile conduct by persons who were not part of enemy forces.

In 1862, at Halleck's urging, Professor Francis Lieber completed a study of the problem that Halleck confronted in Missouri—how the law treated so-called "guerrilla" parties who engaged in actions to sabotage

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196. Witt, *supra* note 41, at 267.

197. See *id.* at 268–69.

198. See *infra* section II.B.6.

199. Henry Wager Halleck, *Military Tribunals and Their Jurisdiction*, 5 *Am. J. Int'l L.* 958, 965 (1911); see also *id.* at 958 n.1 (explaining, in an editor's note, that the memorandum was found among Halleck's papers at his death).

200. See, e.g., 18 U.S.C. § 2441 (2012) (making it a crime under federal law for a U.S. national or member of the armed services to "commit[] a war crime").

201. U.S. Const. art. I, § 8, cl. 10.

the nation's war effort even though they were not formally affiliated with the enemy.<sup>202</sup> The subject matter, Lieber noted in the first sentence of his paper, "has rarely been taken up by writers on the law of war" and was "substantially a new topic in the law of war."<sup>203</sup> The issue was not quite unprecedented, however: In fact, Halleck himself had dealt with the issue briefly the preceding year, in his international law treatise.<sup>204</sup> Halleck explained that, unlike the belligerent acts of members of a nation's armed forces, which are *privileged* by international law against prosecution (such fighters can, wrote Halleck, "plead the laws of war in their justification"—what today is known as the combatant's privilege), the hostile acts of bands of men who riot, plunder, and destroy *without* the sanction of their government, even in support of a war, "are not legitimate acts of war, and, therefore, are punishable according to the nature or character of the offense committed."<sup>205</sup> So, for example, if such persons take property by force in offensive hostilities it is not an act "authorized by the law of nations, but a *robbery*"; and the killing of the state's armed forces by such bands of private parties likewise is not a privileged act of war "but a *murder*."<sup>206</sup> Halleck explained that such persons, when captured, are treated not as prisoners of war but instead "as criminals, subject to the punishment due to their crimes."<sup>207</sup> Lieber's paper on guerrilla parties was to similar effect: Guerrillas, banditti, and the like, he reasoned, do not receive the *benefits* of the law of war; they are "answerable for the commission of those acts to which the law of war grants no protection."<sup>208</sup> Brigands, prowlers, bushwackers, and private assassins cannot "expect to be treated as a fair enemy of the regular war," entitled to the "privileges of regular warfare" that attach to authorized

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202. For a compelling account of Halleck, Lieber, and the problem of "guerrilla" warfare, see Witt, *supra* note 41, at 188–95.

203. Francis Lieber, *Guerrilla Parties Considered with Reference to the Laws and Usages of War* (1862) [hereinafter Lieber, *Guerrilla Parties*], in 2 Francis Lieber, *Contributions to Political Science, Including Lectures on the Constitution of the United States and Other Papers* 277, 277 (Philadelphia, J. B. Lippincott & Co. 1881) [hereinafter Lieber, *Contributions to Political Science*].

204. See Halleck, *International Law*, *supra* note 157, ch. XVI, § 8, at 386.

205. *Id.*

206. *Id.*

207. *Id.* A letter from Halleck on December 31, 1861, reporting the proceedings of an early Missouri military commission, included the same distinction: Whereas a soldier "duly enrolled" in an enemy's service by "proper authority" cannot be prosecuted for "taking life in battle or according to the rules of modern warfare," by contrast "it is a well-established principle that insurgents and marauding, predatory, and guerrilla bands are not entitled to this exemption" and "are, by the laws of war, regarded as no more nor less than murderers, robbers, and thieves," whose "military garb . . . cannot change the character of their offenses nor exempt them from punishment." Letter from Major Gen. H.W. Halleck to Brigadier Gen. John Pope (Dec. 31, 1861), in *Official Records*, *supra* note 156, ser. I, vol. 8, at 822, 822.

208. Lieber, *Guerrilla Parties*, *supra* note 203, at 289.

forces.<sup>209</sup> This, then, was Lieber's effort "to ascertain what may be considered the law of war, or fair rules of action toward so-called guerrilla parties"<sup>210</sup>: Their misdeeds will not go "unpunished," for the law of war does not protect them.<sup>211</sup> Importantly, however, Lieber did not argue that the law of war *proscribes* their unauthorized conduct or that it insists upon their punishment, in the way that a subset of the law of nations forbids certain practices of war (e.g., targeting civilians or torture).

This same, altogether accurate perspective is reflected in much of what came to be colloquially known as the "Lieber Code"—the regulations, written primarily by Lieber, that the Adjutant General's Office issued in April 1863 for use by the Union armies.<sup>212</sup> The Lieber Code addressed a "dazzling array of questions."<sup>213</sup> In light of Lieber's expertise in international law, much of the Code consists of descriptions of the "limitations and restrictions" that the customary laws of war impose on the conduct of war,<sup>214</sup> including, for instance, that parties may not engage in cruelty or break "stipulations solemnly contracted by the belligerents in time of peace,"<sup>215</sup> use poison in any manner,<sup>216</sup> harm prisoners "in order to extort the desired information or to punish them for having given false information,"<sup>217</sup> or punish a "successful spy" who returns to his own army.<sup>218</sup> Other parts of the Code, however, explain what belligerents *can* do without transgressing the law of war—including which law-of-war privileges they are not required to provide to those they capture. Most importantly for present purposes, Article 82 stated:

[Individuals] who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers . . . are not public enemies, and therefore, if captured, *are not entitled to the privileges of prisoners of war.*<sup>219</sup>

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209. *Id.* at 291.

210. *Id.*

211. *Id.* at 292.

212. See War Dep't, General Orders No. 100, Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863) [hereinafter Lieber Code], reprinted in Lieber, *Contributions to Political Science*, supra note 203, at 246, 246–74.

213. Witt, supra note 41, at 231.

214. Lieber Code, supra note 212, art. 30, at 253.

215. *Id.* art. 11, at 249.

216. *Id.* art. 70, at 260.

217. *Id.* art. 80, at 262.

218. *Id.* art. 104, at 266.

219. *Id.* art. 82, at 262–63 (emphasis added).

Likewise, Article 84 provided:

Armed prowlers, by whatever names they may be called, or persons of the enemy's territory, who steal within the lines of the hostile army, for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, *are not entitled to the privileges of the prisoner of war.*<sup>220</sup>

So far, so good: The vast majority of the Lieber Code distinguished between conduct that the law of war prohibited and conduct that it simply did not immunize. Unfortunately, a few stray remarks in the Code suggested the further, and misleading, idea that the laws of war not only fail to *privilege* the belligerent conduct of persons outside the armed forces (such as “banditti”)—so that those persons can be subjected to ordinary criminal prosecution—but that the law of nations affirmatively *prohibited* such conduct, or prescribed a penalty for it. Article 82, for example, stated not only that the individuals committing war-related violence without authorization “are not entitled to the privileges of prisoners of war” (which was correct) but also that such persons “shall be treated summarily as highway robbers or pirates.”<sup>221</sup> Similarly, Article 98 stated that “[a]ll unauthorized or secret communication with the enemy is considered *treasonable by the law of war.*”<sup>222</sup>

Here, Lieber erred. Secret communication with the enemy *could* be, and often is, “considered treasonable,” and states have severely punished it; but such treatment is a function of a state's *domestic* law, not the international law of war itself. Likewise, individuals unaffiliated with the enemy military *could* be “treated summarily” (at the time, anyway)—unlike members of enemy forces, they were not entitled to the combatant's privilege—but such treatment would be a function of municipal law, not “by the law of war.” Indeed, the law of war is generally indifferent as to how a state treats such unprivileged conduct and whether particular procedural protections will apply; those are matters for domestic law, which can vary from state to state. In the United States, such questions are determined by the corpus of federal statutes and by Article III and the Bill of Rights in the Constitution—bodies of law that the Lieber Code did not purport to describe (and concerning which Lieber himself was hardly an expert).

Unfortunately, this mistaken conflation between conduct that the law of war prohibits and conduct that it does not privilege, reflected in a few stray remarks in the Lieber Code, would later infect the Attorney

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220. Id. art. 84, at 263 (emphasis added).

221. Id. art. 82, at 262–63; see also id. art. 83, at 263 (“Scouts or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death.”).

222. Id. art. 98, at 265 (emphasis added).



General's analysis of the Lincoln assassination trial,<sup>223</sup> as well as the Supreme Court's reasoning in the important *Quirin* decision in 1942.<sup>224</sup>

3. "*The Power to Make War . . . Without Limitations.*" — The third, and most extreme, of the government's principal arguments in support of the constitutionality of military commissions was fully vetted for the first time in the most notorious and controversial commission case preceding the Lincoln assassination.

On March 16, 1863, the Secretary of War assigned General Ambrose Burnside to be Commanding General of the Department of the Ohio.<sup>225</sup> The next month, Burnside issued General Order No. 38, designed to address the increasingly prominent opposition to the war being voiced by Copperheads and other northern Democrats.<sup>226</sup> Burnside feared that such public attacks on the Union cause were grievously injuring the Army's efforts, such as by inspiring or even encouraging disregard of the compulsory enlistment laws.<sup>227</sup> His order not only announced that anyone committing acts "for the benefit of the enemies of our country" would be "tried as spies or traitors and if convicted will suffer death"; it also went much further, declaring that "[t]he habit of declaring sympathies for the enemy will not be allowed in this department" and that persons "committing such offences will be at once arrested with a view to being tried as above stated or sent beyond our lines into the lines of their friends."<sup>228</sup>

Burnside's decree incensed a prominent leader of the "Copperhead" faction of anti-war Democrats, Clement Vallandigham.<sup>229</sup> As a member of the House of Representatives from 1858 until March 3, 1863, Vallandigham had been a prominent opponent of the war.<sup>230</sup> His antagonism only increased once he left office. In an inflammatory speech in Mount Vernon, Ohio, on May 1, 1863,<sup>231</sup> Vallandigham described the war as "wicked, cruel, and unnecessary" and alleged that it was being prosecuted

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223. See *infra* section II.B.6 (discussing Attorney General Speed's legal opinion on the constitutionality of the Lincoln commission).

224. See *infra* section V.A (discussing the Supreme Court's decision in *Quirin*); see also Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1587–88.

225. See Letter from Major Gen. H.W. Halleck to Major Gen. Ambrose E. Burnside (Mar. 16, 1863), *in* *Official Records*, *supra* note 156, ser. I, vol. 23, at 147, 147.

226. See Headquarters, Dep't of the Ohio, General Orders, No. 38 (Apr. 13, 1863), *in* *Official Records*, *supra* note 156, ser. II, vol. 5, at 480, 480.

227. See Witt, *supra* note 41, at 271.

228. See Headquarters, Dep't of the Ohio, General Orders, No. 38, *supra* note 226, at 480.

229. See Frank L. Klement, *The Limits of Dissent: Clement L. Vallandigham and the Civil War 149–52* (1998).

230. *Id.* at 44–60, 74–75.

231. See *id.* at 152–55.

“for the purpose of crushing out liberty and to erect a despotism.”<sup>232</sup> He also decried General Order No. 38 as “a base usurpation of arbitrary authority,” adding that “the sooner the people inform the minions of usurped power that they will not submit to such restrictions upon their liberties, the better” and that he was “resolved to do what he could to defeat the attempts now being made to build up a monarchy upon the ruins of our free government.”<sup>233</sup> Predictably, this speech prompted Burnside to order Vallandigham’s arrest, on May 5; the Democrat was accused of making a public speech that “he well knew did aid, comfort, and encourage those in arms against the government, and could but induce in his hearers a distrust of their own government, sympathy for those in arms against it, and a disposition to resist the laws of the land.”<sup>234</sup>

The next day, Vallandigham was arraigned before a military commission, which proceeded to find him guilty of most of the specifications of the charge and sentenced him to close military confinement for the duration of the war.<sup>235</sup> Burnside confirmed the sentence on May 16, designating Fort Warren as the place of Vallandigham’s imprisonment.<sup>236</sup>

Even before the commission issued its sentence, Vallandigham petitioned a federal court for a writ of habeas corpus, arguing that the military lacked authority to detain him.<sup>237</sup> Judge Humphrey Leavitt denied the petition, reasoning that the question was controlled as a matter of *stare decisis* by an earlier decision of the court that he was powerless to second-guess.<sup>238</sup> The judge was careful to stress, however, that he was ruling on only the legality of Vallandigham’s arrest (i.e., his detention) and was *not* opining on whether the military trial was lawful: “Whether the military commission for the trial of the charges against Mr.

232. *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 244 (1864) (quoting from the military’s charge against Vallandigham).

233. *Id.* at 245. Regardless of the possible merits of Vallandigham’s attack on Burnside, and however questionable his later arrest and banishment might have been, he was anything but a sympathetic figure. One observer described him as “the incarnation of Copperheadism,” infected by a “pro-slavery virus that he had been collecting from his boyhood days.” Horace White, *The Life of Lyman Trumbull* 203 (1913) [hereinafter White, *Life of Lyman Trumbull*]. Horace White recounted:

As a public speaker [Vallandigham] had no attractions, but rather, as it seemed to me, the tone and front of a fallen angel defying the Almighty. There was neither humor nor persuasion nor conciliation in his make-up. He was cold as ice and hard as iron. Although born and bred in a free state, he avowed himself a pro-slavery man.

*Id.*

234. *Ex parte Vallandigham*, 28 F. Cas. 874, 875 (C.C.S.D. Ohio 1863) (No. 16,816).

235. See *Vallandigham*, 68 U.S. (1 Wall.) at 245–47 (statement of the case).

236. See *id.* at 247–48.

237. See *Vallandigham*, 28 F. Cas. at 874–76.

238. See *id.* at 920.

Vallandigham was legally constituted, and had jurisdiction of the case, is not a question before this court . . . . The sole question is whether the arrest was legal . . . .”<sup>239</sup>

Before Judge Leavitt ruled, however, counsel for the parties offered him their arguments on the constitutionality of the commission. Counsel for Vallandigham, for instance, contended that the military trial was precluded by an 1863 congressional enactment (on which more below) and that it violated Article III of the Constitution.<sup>240</sup> The government’s lead counsel was Aaron Fyfe Perry, a private lawyer who had declined President Lincoln’s 1861 offer for an appointment to the Supreme Court.<sup>241</sup> Perry’s argument was long and discursive, weaving together several different themes. For example, he somewhat melodramatically suggested that civilian juries were inappropriate for such cases because they were apt to be either too harsh or too lenient with such defendants in the heat of a war, when “the entrails of the volcano, covered for a while, have at length broken forth,” and “[s]moke and ashes obscure the sky.”<sup>242</sup> Perry also made some effort to argue the exigency defense of martial law<sup>243</sup>—a tough argument to sustain, given that the ordinary

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239. *Id.* at 923.

240. *Id.* at 878–79, 888–91.

241. See Witt, *supra* note 41, at 272.

242. *Vallandigham*, 28 F. Cas. at 894. It was a remarkable, florid argument:

If they should be put upon trial before a jury in such moments of overwhelming excitement, one of two results would follow. If the jury should not be so divided by the passions raging through the whole population as to disagree, and thus bring the law into contempt, their passions would take them to one side or the other. Men might be let loose, and certainly would be, whom the safety of the state required to be restrained, or more probably convicted and executed without sufficient evidence. When society is imperiled by intestine war, the passions rage which occasioned the war, the entrails of the volcano, covered for a while, have at length broken forth. Smoke and ashes obscure the sky. Fiery floods pour along the earth. No good man could be impartial. Who claims to be impartial impeaches himself. Believing his government to be in the right, interest, feeling, lawful duty, compelled him to uphold it with all his power. He has no decent pretext, certainly no lawful excuse, for throwing on others a duty to uphold the government which he shrinks from. It is each man’s duty as much as any other’s. Its enemies are, and in the nature of the case must be, his enemies; its friends his friends. The law allows him no other position. On the other hand, he who believes the government to be wrong has no choice but to sympathize with its enemies. He must assist them, and will assist them, either openly or by secret and suppressed sympathy. On one side or the other, men go to the jury box under the influence of deep feeling.

*Id.*

243. *Id.* at 903–06.

operations of law prevailed in Ohio, and Burnside had not specifically declared martial law there.<sup>244</sup>

At the heart of Perry's case, however, was a more fundamental argument—namely, that in the midst of an armed conflict, the laws of peacetime, including constitutional guarantees, are effectively displaced by the Executive's "rights of war," at least as applied to those actions taken in the service of defeating the enemy:

War is the last resort, but when properly appealed to, its processes are due and reasonable processes, and, like the rest, must be allowed to work out results exclusively by its own rules . . . . The power to make war is given without limitations. So far as war may be a means of preservation, or for warding off imminent danger, and keeping at a distance whatever is capable of causing its ruin, the nation is safe. The rights of war are as sacredly guaranteed as trial by jury, or personal liberty, or any other right whatever. The president cannot claim to have preserved, protected, and defended the constitution, to the best of his ability, until he shall have used all the ability given him by the utmost rights of war . . . . The constitution does not define the meaning of habeas corpus, or trial by jury, or liberty, or war. They were to be ascertained elsewhere . . . . By war was intended not a hollow pretext of war, but a lifting high of the red right hand of avenging justice. A thorough, condign, effectual laying hold of enemies, a summary breaking-up of their hiding places, and a terrifying deathly pursuit, until they shall cease to exist, or cease to be enemies. In Scott's *Military Dictionary*, a recent work, which, he says, was not prepared in view of existing disturbances, he states the following rule (page 273): "With regard to the requisition of military aid by the civil magistrate, the rule seems to be that when once the magistrate has charged the military officer with the duty of suppressing a riot, the execution of that duty is wholly confided to the judgment and skill of the military officer, who thenceforward acts independently of the magistrate until the service required is fully performed. The magistrate cannot dictate to the officer the mode of executing the duty; and an officer would desert his duty if he submitted to receive any such orders from the magistrate . . . ." <sup>245</sup>

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244. Professor Witt notes that Perry also invoked the laws of war. Witt, *supra* note 41, at 272. That is true, but Perry did not suggest that Vallandigham himself had violated any of the laws of war. Instead, he simply argued that the law of war, which on Perry's view governed the case, did not forbid Burnside from having Vallandigham arrested, *Vallandigham*, 28 F. Cas. at 894, and detained, *id.* at 895.

245. *Vallandigham*, 28 F. Cas. at 902–03 (quoting H.L. Scott, *Military Dictionary* 273–74 (New York, D. Van Nostrand 1861)).

This argument, too, would not survive the Supreme Court's decision, three years later, in *Milligan*.<sup>246</sup>

B. *Views from the Political Branches*

Before turning to the Lincoln assassination trial itself, it is important to understand how these arguments on behalf of the War Department—and the constitutionality of the military commissions practice—were treated throughout the rest of the federal government before the presidential assassination in April 1865. The Supreme Court itself did not opine on the substantive constitutional question, even in the *Vallandigham* case itself, in which it never reached the merits.<sup>247</sup> The President and his Attorney General, however, did consider the question, and it was a recurrent topic of debate in Congress, too.

1. *Attorney General Bates*. — Lincoln's first Attorney General, Edward Bates, was not shy about defending the President's more aggressive assertions of constitutional authority—including, most famously, the unilateral suspension of the privilege of the writ of habeas corpus.<sup>248</sup> He drew the line at the War Department's military commissions, however. Writing in his diary in March 1865, after civil law in Missouri was finally restored, Bates recounted that he had been an insistent opponent of the commissions, which he viewed as a “manifest wrong” aggravated by a “false pretense of lawful authority”:

I have, constantly and openly, held—Officially at Washington and personally, every where—that *martial law* was not established in Mo. That the military and *provotal* government, actually used here, was a bald usurpation of power—and every instance of its exercise, which concerned the civil rights of

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246. See *infra* section III.D.

247. Three days after Judge Leavitt's decision, Lincoln commuted the sentence, directing Burnside to exile Vallandigham to the South, beyond the Union lines, for the duration of the conflict. Order of the President (May 19, 1863), reprinted in *The Trial of Hon. Clement L. Vallandigham by a Military Commission 34* (Cincinnati, Rickey & Carroll 1863). This temporary banishment ended Vallandigham's detention and thus mooted his habeas case. Vallandigham's counsel then sought to challenge his military conviction directly in the Supreme Court, asking the Court to issue a writ of certiorari to the Judge Advocate General of the Army to bring before the Court the record of the trial and judgment. See 6 Charles Fairman, *History of the Supreme Court of the United States: Reconstruction and Reunion, 1864–1888, Part One* 193 n.49 (1971) [hereinafter Fairman, *History of the Supreme Court*]; Klement, *supra* note 229, at 258. The merits of the constitutional challenge, however, were never fully briefed, let alone decided, because the Court held that it lacked constitutional and statutory jurisdiction to review the judgment of the military tribunal. *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 251–53 (1864).

248. See *Suspension of the Privilege of the Writ of Habeas Corpus*, 10 Op. Att'y Gen. 74 (1861).

individuals and the jurisdiction of the Courts, was a manifest wrong, aggravated by the false pretense of lawful authority.<sup>249</sup>

According to Bates, he had “always contended that the Law, rightly administered, has ample [*sic*] power to protect itself, to vindicate the constitution, to uphold the Government and to subdue and punish the public enemy” and that therefore it was “not only a crime, but a gross folly, to *break the law*, in order to serve or save the country!”<sup>250</sup>

It is not clear how Bates conveyed his legal views to the President, or to the rest of the cabinet, in the preceding years, while the use of commissions became commonplace. There is no record of any official opinion by the Attorney General on the question; perhaps it is fair to assume that others assiduously avoided asking him for his formal views, for fear of what he would opine. He did make his views publicly known in at least one instance, however: In February 1864, the *New York Times* published a letter Bates had written five months earlier to a judge in New Mexico, Associate Justice Joseph G. Knapp, in which Bates insisted that certain “arbitrary” military proceedings “ought to be suppressed”—and that he had informed Lincoln of that view:

SIR: Your letter of the 4th August, complaining of military arrests, was slow in [r]eaching me, and then such was the urgent and continued occupation of the President in the great affairs of the Government, that I have not been able until now to fix his attention upon the particular outrage upon you, as your letter makes me believe it to be.

There seems to be a general and growing disposition of the military, wherever stationed, to engross all power, and to treat the civil Government with contumely, as if the object were to bring it into contempt.

I have delivered my opinion very plainly to the President, and I have reason to hope that he, in the main, concurs with me in believing that those arbitrary proceedings ought to be suppressed.<sup>251</sup>

2. *President Lincoln*. — As noted above, Lincoln’s September 1862 order expressly authorized the trial by military commission of anyone who was “guilty of any disloyal practice, affording aid and comfort to rebels against the authority of the United States.”<sup>252</sup> The commissions system therefore unquestionably enjoyed Lincoln’s formal imprimatur, at least at that high level of generality. There is reason to believe, however,

249. Diary Entry of Edward Bates (Mar. 9, 1865), in 4 *The Annual Report of the American Historical Association for the Year 1930*, at 457, 457 (1933) [hereinafter *The Diary of Edward Bates*].

250. *Id.* (alteration in original).

251. Letter from Edward Bates to J.G. Knapp, *supra* note 148.

252. See *supra* note 189 and accompanying text.

that Lincoln was never entirely comfortable with the constitutional basis for the way in which those commissions operated in many cases.

For one thing, in his 1863 letter to Judge Knapp,<sup>253</sup> Attorney General Bates stated that after meeting with the President he had “reason to hope” that Lincoln, “in the main,” shared Bates’s view that at least some “arbitrary” proceedings “ought to be suppressed.”<sup>254</sup> Less ambiguously, in September 1866, after Lincoln’s death, Supreme Court Justice David Davis, the author of the Court’s decision in *Milligan*, told a Lincoln biographer that he and others had advised Lincoln that the various military trials in the northern and border states, “where the courts were free and untrammelled, were unconstitutional and wrong,” and that the Supreme Court would not sustain them.<sup>255</sup> Davis further represented that he was “fully satisfied . . . that Lincoln was opposed to these military commissions, especially in the Northern States, where everything was open and free.”<sup>256</sup>

Such secondhand accounts must, of course, be treated with some caution; after all, even if they fairly represented Lincoln’s privately stated views, the President was not willing to express those positions publicly.<sup>257</sup> More telling, then, were Lincoln’s very public responses to the Democratic critics of Vallandigham’s detention and prosecution.

A group of prominent pro-Union New York Democrats wrote to Lincoln in May 1863, enclosing a series of resolutions adopted at one of the “most earnest [meetings] in support of the Union, ever held in [Albany].”<sup>258</sup> Those resolutions “denounce[d]” General Burnside’s treatment of Vallandigham and “demand[ed]” that the Administration “be true to the Constitution” and “exert all its powers to maintain the supremacy of the civil over military law” everywhere outside of the lines of “necessary military occupation and the scenes of insurrection.”<sup>259</sup> The Albany resolutions complained not only about the suspension of habeas corpus, “arbitrary arrests,” and the infringement of freedom of speech,

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253. See *supra* note 251 and accompanying text.

254. Letter from Edward Bates to J.G. Knapp, *supra* note 148.

255. 2 William H. Herndon & Jesse W. Weik, *Abraham Lincoln: The True Story of a Great Life* 266 n.\* (New York, D. Appleton & Co. 1893) (1888) [hereinafter Herndon & Weik, *Abraham Lincoln*].

256. *Id.*

257. Davis’s representation might well have been based on an incident in 1864, when Lincoln ordered prisoners released from military custody before trial after Davis had informed Lincoln of his view that military custody and trial were unlawful. See *infra* section III.A (discussing the case of Coles County rioters).

258. Letter from Erastus Corning, President, N.Y. Democrats, et al. to President Abraham Lincoln (May 19, 1863), in *The Political History of the United States of America, During the Great Rebellion* 163, 163 (Edward McPherson ed., Washington, D.C., Philp & Solomons 1864).

259. *Id.*

but also about the denial of the civilian *trial* guarantees of Article III and the Fifth and Sixth Amendments.<sup>260</sup>

Lincoln's response—the famous “Corning Letter” of June 12, 1863, published in many newspapers<sup>261</sup>—was, according to Horace Greeley, editor of the *New York Tribune*, “the most masterly document that ever came from his pen.”<sup>262</sup> The Corning Letter is perhaps best known for two things: First, Lincoln offered a subtle distinction between protected and unprotected speech. If, as the New York Democrats alleged, Vallandigham was seized and tried “for no other reason” than that he criticized the government and condemned Burnside's order, “then I concede that the arrest was wrong,” wrote Lincoln; in that case, “his arrest was made on mistake of fact, which I would be glad to correct, on reasonably satisfactory evidence.”<sup>263</sup> As Lincoln understood the case, however, Burnside arrested Vallandigham because he “was laboring, with some effect, to prevent the raising of troops, to encourage desertions from the army, and to leave the rebellion without an adequate military force to suppress it.”<sup>264</sup> If *that* was his aim, reasoned Lincoln, then “[h]e was warring upon the military; and this gave the military constitutional jurisdiction to lay hands upon him.”<sup>265</sup>

Second, Lincoln made an impassioned defense of the view, which he had been asserting from early in the war, that the constitutional power to suspend the writ of habeas corpus, when “in Cases of Rebellion or Invasion the public Safety may require it,”<sup>266</sup> also includes the ancillary power to *detain* those who may not lawfully petition the courts for relief from military detention.<sup>267</sup> “[S]uspension is allowed by the constitution on purpose that, men may be arrested and held, who can not be proved to be guilty of defined crime, ‘when, in cases of Rebellion or Invasion the public Safety may require it.’”<sup>268</sup> Moreover, according to Lincoln the

260. *Id.*

261. Letter from President Abraham Lincoln to Erastus Corning and Others (June 12, 1863) [hereinafter Corning Letter], in 6 *The Collected Works of Abraham Lincoln* 260 (Roy P. Basler ed., 1953).

262. Horace Greeley, *An Estimate of Abraham Lincoln*, in *Greeley on Lincoln* 11, 52 (Joel Benton ed., New York, Baker & Taylor Co. 1893).

263. Corning Letter, *supra* note 261, at 266.

264. *Id.*

265. *Id.*

266. U.S. Const. art. I, § 9, cl. 2.

267. Corning Letter, *supra* note 261, at 264.

268. *Id.* Three years later, in *Milligan*, the Justices divided on this question, in dicta. Compare *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 115 (1866) (“The suspension of the writ does not authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty.”), with *id.* at 137 (Chase, C.J., concurring) (“[W]hen the writ is suspended, the Executive is authorized to arrest as well as to detain . . .”). For further discussion of the Justices' disagreement in *Milligan*, see Trevor



Suspension Clause permits such arrests to be “made, not so much for what has been done, as for what probably would be done”—for “preventive” rather than “vindictive” purposes, and thus *before* the commission of any offense.<sup>269</sup> “Of how little value the constitutional provision I have quoted will be rendered, if arrests shall never be made until defined crimes shall have been committed . . . .”<sup>270</sup>

Whatever the merits of these arguments about free speech and the office of the suspension power, they were unresponsive to another aspect of the Democrats’ objections—the fact that Vallandigham not only was arrested and detained but also *subjected to a military trial*, sentenced for his delicts, and ultimately banished, on Lincoln’s order, to the South. In the Corning Letter, Lincoln acknowledged that the Albany resolutions had also complained about the circumvention of the Treason Clause and the denial of the jury protections of the Constitution.<sup>271</sup> The President proffered a modest, but hardly compelling, response to this argument: Civil courts, wrote Lincoln, were inadequate to adjudicate crimes in wartime cases involving enemy “sympathizers [who] pervaded all departments of the government, and nearly all communities of the people.”<sup>272</sup> “Nothing is better known to history,” he wrote, “than that courts of justice are utterly incompetent to such cases.”<sup>273</sup> Juries in such a heated environment, he complained, “too frequently have at least one member, more ready to hang the panel than to hang the traitor.”<sup>274</sup> Lincoln presumably recognized that this basic distrust in the jury system was hardly an adequate justification for a military criminal trial—especially if the arrested individuals could be detained in any event. Thus, he fell back on a remarkable, alternative argument—that the arrests were not made “to hold persons to answer for any capital, or otherwise infamous crimes” and that the military commission proceedings were not, “in any constitutional or legal sense, ‘criminal prosecutions’” at all!<sup>275</sup>

Lincoln left that thought hanging—in the Corning Letter he did not further elaborate on the purpose of the commission trial if, as he insinuated, it was not for criminal prosecution and punishment.

At this point, Democrats in Ohio, meeting in Columbus, actually nominated the exiled Vallandigham as their candidate for governor;

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W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 *Colum. L. Rev.* 1533, 1566–67 (2007).

269. Corning Letter, *supra* note 261, at 265.

270. *Id.*

271. *Id.* at 263–64.

272. *Id.* at 263.

273. *Id.* at 264.

274. *Id.* Justice Robert Jackson later pointed to this passage—with a mixture of criticism and sympathy—as “voic[ing] the impatience with the process of the civil courts that always develops in wartime.” Jackson, *supra* note 66, at 110.

275. Corning Letter, *supra* note 261, at 262.

moreover, like the New York Democrats, they passed resolves condemning his military trial and punishment, including his banishment. The Ohio Democrats took sharp issue with Lincoln's view, in the Corning Letter, that the authority to suspend habeas includes a power to arrest and detain: Even when there is a habeas suspension, they insisted, "the other guaranties of personal liberty . . . remain unchanged."<sup>276</sup> Lincoln agreed to meet with the Ohio Democrats when they visited Washington on June 25. On June 29, he wrote them a letter—commonly known as the "Birchard Letter"—responding to the points they had made at the meeting in Washington.<sup>277</sup>

It appears that the Ohio Democrats pressed Lincoln, at their meeting, on how he could justify a military trial, in addition to the arrest

276. Letter from M. Birchard, Chairman, 19th Dist., et al. to President Abraham Lincoln (June 26, 1863), in *The Political History of the United States of America, During the Great Rebellion*, supra note 258, at 167, 169. In a later letter to Lincoln, sent July 1, 1863, the Ohio Democrats elaborated:

[T]he denial of [the habeas petition] did not take away [Vallandigham's] right to a speedy public trial by an impartial jury, or deprive him of his other rights as an American citizen. Your assumption of the right to suspend all the constitutional guaranties of personal liberty, and even of the freedom of speech and of the press, because the summary remedy of *habeas corpus* may be suspended, is at once startling and alarming to all persons desirous of preserving free government in this country.

Letter from M. Birchard, Chairman, 19th Dist., et al. to President Abraham Lincoln (July 1, 1863), in *7 The Rebellion Record: A Diary of American Events* 376, 377 (F. Moore ed., New York, D. Van Nostrand 1864). This echoed the response the New York Democrats themselves made to Lincoln a day earlier:

[A] suspension of the writ of *habeas corpus* merely dispenses with a single and peculiar remedy against an unlawful imprisonment; but if that remedy had never existed, the right to liberty would be the same, and every invasion of that right would be condemned not only by the Constitution, but by principles of far greater antiquity than the writ itself . . .

. . . It seems to us, moreover, too plain for argument that the sacred right of trial by jury, and in courts where the law of the land is the rule of decision, is a right which is never dormant, never suspended, in peaceful and loyal communities and States. Will you, Mr. President, maintain, that because the writ of *habeas corpus* may be in suspense, you can substitute soldiers and bayonets for the peaceful operation of the laws, military commissions and inquisitorial modes of trial for the courts and juries prescribed by the Constitution itself? And if you cannot maintain this, then let us ask, where is the justification for the monstrous proceeding in the case of a citizen of Ohio, to which we have called your attention?

Reply from John V. L. Pruyn, Chairman of Comm., et al. to President Abraham Lincoln (June 30, 1863), in *Papers for the Society for the Diffusion of Political Knowledge*, No. 10, at 1, 5–6 (New York 1863).

277. Letter from President Abraham Lincoln to Matthew Birchard, Chairman, 19th Dist., et al. (June 29, 1863), in *6 The Collected Works of Abraham Lincoln*, supra note 261, at 300, 300–06.

and detention, of Vallandigham and similar military defendants, for Lincoln devoted a full paragraph of the Birchard Letter to the question. In that paragraph, Lincoln elaborated on what the Corning Letter had merely implied:

The earnestness with which you insist that persons can only, in times of rebellion, be lawfully dealt with, in accordance with the rules for criminal trials and punishments in times of peace, induces me to add a word to what I said on that point, in the Albany response. You claim that men may, if they choose, embarrass those whose duty it is, to combat a giant rebellion, and then be dealt with in turn, only as if there was no rebellion. The constitution itself rejects this view. The military arrests and detentions, which have been made, including those of Mr. V. which are not different in principle from the others, *have been for prevention, and not for punishment*—as injunctions to stay injury, as proceedings to keep the peace—and hence, like proceedings in such cases, and for like reasons, they have not been accompanied with indictments, or trials by juries, *nor, in a single case by any punishment whatever, beyond what is purely incidental to the prevention.* The original sentence of imprisonment in Mr. V.'s case, was to prevent injury to the Military service only, and the modification of it [i.e., Lincoln's banishment order] was made as a less disagreeable mode to him, of securing the same prevention.<sup>278</sup>

Lincoln argued, in other words, not only that “military arrests and detentions” were preventive rather than punitive, but that the *commission proceedings and sentences* were, too; he insisted that the function of such trials was merely to identify persons who, like prisoners of war, should be incapacitated for the duration of the war, so that they could no longer undermine the war effort.

There was at least a smidgen of truth in what Lincoln suggested: In many commissions cases, Vallandigham's included,<sup>279</sup> the sentences appeared to be tailored to the aim of wartime incapacitation, such as a term of confinement (or, here, exile) limited to the duration of the conflict. Even so, the idea that the military commission proceedings were not punitive in nature, designed to impose punishment for criminal wrongdoing, was untenable, as Lincoln must have known and as the Ohio Democrats pointedly noted in their response on July 1.<sup>280</sup> The War

278. *Id.* at 304 (emphasis added).

279. See *supra* note 235 and accompanying text.

280. They wrote:

You claim that the military arrests made by your Administration, are merely *preventive remedies* “as injunctions to stay injury, or proceedings to keep the peace, and *not for punishment.*” . . . If the proceeding be merely preventive, why not allow the prisoner the benefit of a bond to keep the peace? But if no offence had been committed, why was Mr.

Department regularly referred to the punitive nature of the proceedings, beginning in Halleck's very first order in December 1861, in which he wrote that those committing hostilities "will be held and punished as criminals,"<sup>281</sup> and continuing right through to Holt's final, extended defense of the commissions in November 1865, in which he explained that they were "indispensable for the punishment of public crimes" and had been a "powerful and efficacious instrumentality . . . for the bringing to justice of a large class of malefactors . . . who otherwise would have altogether escaped punishment."<sup>282</sup> More importantly, Lincoln's own actions betrayed his understanding that the commission trials were, indeed, punitive in character: Although Lincoln himself sometimes commuted death sentences to confinement for the duration of the war,<sup>283</sup> he also regularly approved death sentences, as well as fixed terms of confinement that might have easily extended beyond the conflict's end.<sup>284</sup> Recall, as well, that back in September 1862, when Lincoln

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Vallandigham tried, convicted, and sentenced by a court-martial? And why the actual punishment, by imprisonment or banishment, without the opportunity of obtaining his liberty in the mode usual in preventive remedies, and yet say, it is not for punishment?

Letter from M. Birchard et al. to Abraham Lincoln (July 1, 1863), *supra* note 276, at 378.

281. Headquarters, Dep't of the Mo., General Orders, No. 13, *supra* note 160, at 406.

282. Letter from J. Holt to E.M. Stanton, *supra* note 156, at 493. To similar effect, in the context of courts-martial, was a formal opinion of Lincoln's Attorney General, Edward Bates, in 1864, that a President's approval of a court-martial verdict establishes the "guilt" of the accused. See President's Approval of the Sentence of a Court Martial, 11 Op. Att'y Gen. 19, 22 (1864). Bates elaborated:

Undoubtedly the President, in passing upon the sentence of a court martial, and giving to it the approval without which it cannot be executed, acts judicially. The whole proceeding from its inception is judicial. The trial, finding, and sentence, are the solemn acts of a court organized and conducted under the authority and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor entitled to protection from the uncontrolled will of any man, but which must be adjudged *according to law*. And the act of the officer who reviews the proceedings of the court, whether he be the commander of the fleet or the President, and without whose approval the sentence cannot be executed, is as much a part of this judgment, according to law, as is the trial or the sentence. When the President, then, performs this duty of approving the sentence of a court martial dismissing an officer, his act has all the solemnity and significance of the judgment of a court of law. As it has to be performed under the same sanctions, so it draws with it the same consequences.

*Id.* at 21.

283. See Witt, *supra* note 41, at 196.

284. See generally Thomas P. Lowry, *Merciful Lincoln: The President and Military Justice* (2009). There is reason to be cautious about Lowry's scholarship: He later confessed to altering at least one date on a presidential pardon at the National Archives,

authorized military tribunals to deal with persons engaged in disloyal conduct throughout the United States,<sup>285</sup> he wrote that such persons were to be “liable to *trial and punishment* by courts-martial or military commission.”<sup>286</sup>

Lincoln, then, was undoubtedly aware that the military commissions proceedings were, at least in part, punitive in nature, designed to adjudicate whether the accused was guilty of an offense. That Lincoln had to deny, or obscure, such an obvious truth in order to offer even a superficially plausible account of why such military justice fell outside the guarantees of Article III and the Bill of Rights reveals his probable doubts about the commissions’ constitutionality. Lincoln was one of the greatest constitutional lawyers of his (or any) time. The fact that even he could not justify military courts except by denying their punitive nature—in the course of his otherwise robust and unapologetic public defenses of the military’s role in suppressing disloyal conduct in the North—suggests that perhaps Bates and Davis were correct: Maybe Lincoln *was* “opposed to these military commissions, especially in the Northern States, where everything was open and free,”<sup>287</sup> although he did not have the courage or wherewithal to say so while the war was in full flower. As Mark Neely has surmised, “He must have hoped [the military commission system’s] disappearance at war’s end would erase the military trials of civilians from national memory.”<sup>288</sup>

In any case, Lincoln’s sweeping 1862 authorization of military tribunals for civil offenses, and his own personal complicity thereafter in the machinery of such Article I courts, has hardly withstood the test of time as an executive precedent worthy of respect, even among those who generally admire Lincoln.<sup>289</sup>

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so as to make it look as though it was Lincoln’s last official pardon in 1865 (whereas in fact it occurred in 1864). See Press Release, Nat’l Archives, National Archives Discovers Date Change on Lincoln Record: Thomas Lowry Confesses to Altering Lincoln Pardon to April 14, 1865 (Jan. 24, 2011), <http://www.archives.gov/press/press-releases/2011/nr11-57.html> [<http://perma.cc/3BEF-S63S>]. Even if not all of Lowry’s assertions can necessarily be trusted, however, his 2009 book does reflect general patterns in Lincoln’s review of military tribunal verdicts.

285. See *supra* notes 189–193 and accompanying text.

286. War Dep’t, General Orders, No. 141, *supra* note 189, at 587 (emphasis added).

287. Herndon & Weik, Abraham Lincoln, *supra* note 255, at 266 n.\*.

288. Neely, *supra* note 137, at 175.

289. See, e.g., Daniel Farber, Lincoln’s Constitution 20 (2003) (“What authoritarian government could have asked for a broader charter?”); Neely, *supra* note 137, at 49 (explaining that the profligate use of commissions “dealt a blow to Lincoln’s reputation as a steward of the Constitution from which he never recovered in the constitutional history books”); Randall, *supra* note 137, at 152 (claiming that it “is of course evident” that the 1862 order was “arbitrary”); *id.* at 183 (“All this was out of keeping with the normal tenor of American law.”).

3. *Congress.* — On at least three occasions between March 1863 and March 1865, Congress confronted the question of the legality of the War Department’s system of military commissions. The legislature, not surprisingly, was not of a single mind about the constitutional question, and the results of its debates were decidedly ambiguous. At a minimum, however, it is fair to say that the Thirty-Seventh and Thirty-Eighth Congresses recognized, and agonized about, the seriousness of the constitutional concerns, even if they did not ultimately resolve them.<sup>290</sup>

a. *The Habeas Act of 1863.* — The Habeas Act of 1863 is best remembered for Congress’s ratification of President’s Lincoln’s authority

290. In addition to the three initiatives discussed in the text, Congress enacted two laws of possible relevance in 1862. First, on January 31, 1862, Congress authorized courts-martial to punish any persons who attempted to interfere with the government’s “unrestrained use” of telegraph and railroad lines. Act of Jan. 31, 1862, ch. 15, § 2, 12 Stat. 334, 334. That authority extended, however, only to states or districts in which federal law was “opposed” (i.e., the Confederate South) or in which federal law execution was obstructed by insurgents and rebels “too powerful to be suppressed by the ordinary course of judicial proceedings.” *Id.* In other words, the 1862 enactment expressly provided for military jurisdiction only in cases of necessity, where ordinary proceedings were obstructed. I have not found any instances in which courts either construed the scope of the “necessity” condition of this Act or had any occasion to opine on the circumstances in which it could be constitutionally applied.

Second, on July 17, 1862, Congress enacted a law authorizing courts-martial to impose punishment for fraud or willful neglect of duty by military contractors in their dealings with the Army and Navy. See Act of July 17, 1862, ch. 200, § 16, 12 Stat. 594, 596. That law contained within its very terms a recognition of the constitutional problem: It further provided that such contractors “shall be deemed and taken as a part of the land or naval forces of the United States, . . . and be subject to the rules and regulations for the government of the land and naval forces of the United States.” *Id.* In other words, Congress purported to “deem” military contractors as “part of” the land and naval forces, ostensibly so as to bring them within the reach of the Article III exception, recognized by the Supreme Court four years earlier, that allows the military trial of such forces. See *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1858); Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1562–63. The bill passed over sharp constitutional objections in the Senate. See, e.g., *Cong. Globe*, 37th Cong., 3d Sess. 954 (1863) (statement of Sen. Cowan) (characterizing the provision authorizing court-martial trial of civilian contractors to be a “monstrous proposition” and an “absurdity”). In 1866, a federal judge held that the provision was “clearly unconstitutional” under Article III, *Ex parte Henderson*, 11 F. Cas. 1067, 1075 (C.C.D. Ky. 1866 (reported 1878)) (No. 6,349), and that its constitutionality could not be salvaged by the “deeming” clause, which “no more places [the contractor] in the land or naval forces than he would be without such declaration.” *Id.* at 1078. Almost a century later, when the Supreme Court in *Reid v. Covert* rejected the constitutionality of subjecting spouses accompanying the armed forces to military trial, Justice Black’s governing plurality opinion noted with disapproval that “Congress once went to the extreme of subjecting persons who made contracts with the military to court-martial jurisdiction with respect to frauds related to such contracts,” and favorably cited *Henderson* as the “only judicial test” of the 1862 statute, in which “a Circuit Court held that the legislation was patently unconstitutional.” 354 U.S. 1, 20–21 (1957) (plurality opinion); see also Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 *Harv. L. Rev.* 266, 285 & n.460 (1958) (calling the 1862 provision “plainly unconstitutional”).

to suspend the privilege of the writ of habeas corpus “whenever, in his judgment, the public safety may require it, . . . in any case throughout the United States, or any part thereof.”<sup>291</sup> Less well known is that the Act was a compromise, of sorts, as a more comprehensive reading of the text reveals: On the one hand, it permitted the President to suspend habeas and thereby (at least) remove judicial supervision of the individuals who were being preventively detained by the military on a temporary basis. Its other provisions, however, were designed to guarantee that such detention would not be unregulated, unreviewable, or indefinite and to further guarantee the primacy of *civilian* courts for any criminal prosecutions. Section 2 of the Act directed the Secretaries of State and War to furnish federal courts a list of all persons within their jurisdictions who were “citizens of states in which the administration of the laws has continued unimpaired in the said Federal courts” and who were being held by the military “otherwise than as prisoners of war.”<sup>292</sup> If the grand jury in a particular federal district then terminated its session without indicting a person whose name appeared on one of those prisoner lists, the Act required a judge of that court to discharge the person, so long as the detainee first swore an oath of allegiance to the Union.<sup>293</sup> Section 3 of the Act further provided that if the Secretaries, for whatever reason, failed to supply the court with the list of prisoners’ names, a detainee could petition the court for the same relief, on the same grounds.<sup>294</sup>

Thus, the 1863 Act was (arguably) designed to afford the President an authority to secure temporary detention of dangerous persons, but only on the condition that “there should be this provision for the safety of the citizen”<sup>295</sup>—the President’s “great discretionary power over the liberty of the citizen” was not to be a “substitute for the administration of the criminal law.”<sup>296</sup> As Chief Justice Chase would later explain in the *Milligan* case, “[T]he 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.”<sup>297</sup> Chief Justice Chase’s supposition was correct. The chief Senate proponent of the bill, Lyman Trumbull of Illinois, was hardly opposed to the President’s exercise of the power to suspend habeas, but he considered it a significant error—harmful to the war effort—for the Union to subject detainees to military justice in places where the civil

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291. An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, ch. 81, § 1, 12 Stat. 755, 755 (1863).

292. *Id.* § 2, 12 Stat. at 755.

293. *Id.* at 755–56.

294. *Id.* § 3, 12 Stat. at 756.

295. Cong. Globe, 38th Cong., 2d Sess. 1047 (1865) (statement of Sen. Hendricks).

296. *Id.* at 318 (statement of Rep. Davis).

297. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 136 (1866) (Chase, C.J., concurring).

courts were open.<sup>298</sup> In a speech he delivered shortly after enactment of the 1863 Habeas Act, Trumbull insisted that the Constitution, and the laws adopted for the suppression of the rebellion, furnished ample means for dealing with traitors:

[T]he Administration and its friends were weakened by resort to measures of doubtful authority against rebel sympathizers where the law furnished adequate remedies; [and] while no one questioned the authority of military commanders in the field and within their lines where the civil authorities were overborne, to exercise supreme authority, the right to do this in the loyal portions of the country, where the judicial tribunals were in full operation, was very questionable.<sup>299</sup>

Trumbull warned that the use of military tribunals in such locations actually afforded the Union's enemies "a great advantage, by alleging that their constitutional rights and privileges were arbitrarily interfered with."<sup>300</sup>

The legislation Senator Trumbull sponsored, therefore, was indeed a significant congressional rebuke—or constitutional corrective, at a minimum—of the War Department's expanding practice of using military tribunals to try individuals for civil offenses. As James Randall would later recognize, "Had this law been complied with, the effect would have been to restore the supremacy of the civil power."<sup>301</sup>

Alarming, however, Holt and his colleagues in the War Department rarely complied with the law: They continued with impunity to initiate military adjudications, without providing the required lists of names to the courts for the consideration of grand juries.<sup>302</sup> What happened? The answer was simple, even if it was not widely appreciated at the time: Holt quietly determined that he would construe the provisions of the 1863 Act "strictly," so as not to cover "those cases which are clearly triable by court-martial or military commission and which are being every day thus tried and readily and summarily disposed of."<sup>303</sup> Making felicitous, double use of the passive voice, Holt wrote to Stanton that "[i]t is not believed that it was intended in the act to invite attention to cases of persons charged with purely military offenses or of persons suffering under sentences of military tribunals."<sup>304</sup>

In this way, the War Department was able to disregard the significant constraints Congress had imposed, and the reign of military commissions

298. White, *Life of Lyman Trumbull*, supra note 233, at 198–99.

299. See id. at 208 (quoting the *Chicago Evening Journal's* report of the speech).

300. Id.

301. Randall, supra note 137, at 164.

302. See id. at 166–67 & n.50.

303. Report from J. Holt, Judge Advocate Gen., to E.M. Stanton, Sec'y of War (June 9, 1863), in *Official Records*, supra note 156, ser. II, vol. 5, at 765, 765–66.

304. Id. at 766.



continued. Holt's tendentious statutory interpretation would not be challenged for another two years, and it was not corrected until the Court's decision (unanimous on this point) in *Milligan*, after the Lincoln assassination trial was long over.<sup>305</sup>

b. *The 1864 Guerrilla Sentencing Provision.* — In 1864, General William Tecumseh Sherman reportedly wrote to Holt, asking him to secure legislation that would permit execution of military commission sentences without presidential approval, so as to avoid undue delay of sentences against so-called "guerrillas." Holt prepared such legislation and offered it up to the House.<sup>306</sup> The House approved the bill without substantial debate,<sup>307</sup> but only after Representative James Garfield (who would later represent Lambdin Milligan in his Supreme Court challenge to military jurisdiction) assured fellow Ohio Representative Francis Le Blond that the bill would not provide for punishment of civilians and would "have no effect where civil courts are established"<sup>308</sup> (although neither of those limitations appeared on the face of the bill itself).

When the other chamber took up the legislation, two Senators from border states where such commissions were becoming increasingly common—Reverdy Johnson of Maryland and Garrett Davis of Kentucky—raised objections: Johnson argued that if the bill were construed to apply to civil parties in those states, as its plain language appeared to provide, it "would be a clear violation of the Constitution" by "substituting in Maryland military authority for the civil authority,"<sup>309</sup> and Davis called it a "strange and absurd" bill that was plainly unconstitutional.<sup>310</sup> Senator Lyman Trumbull of Illinois assured the objecting senators that although the constitutional objection to such jurisdiction "may or may not be a very good one," the legislation did not establish any such jurisdiction or "authoriz[e] the trial of anybody."<sup>311</sup> According to Trumbull, it left the tribunals' jurisdiction as it already was (wherever that was) and merely

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305. See *infra* notes 594–597 and accompanying text (discussing this holding in *Milligan*). The failure of the War Department to comply with the statute did not go entirely unremarked at the time. In their first letter to the President about the *Vallandigham* case, for example, the Ohio Democrats noted in passing that "the charge in the specifications upon which Mr. Vallandigham was tried entitled him to a trial before the civil tribunals, according to the express provisions of the late acts of Congress approved by yourself July 17, 1862, and March 3, 1863 . . ." Letter from M. Birchard et al. to Abraham Lincoln (June 26, 1863), *supra* note 276, at 169. In his response to Birchard's Letter, see *supra* note 277 and accompanying text, Lincoln did not address the statutory objection.

306. Cong. Globe, 38th Cong., 1st Sess. 3416 (1864) (statement of Sen. Wilson).

307. *Id.* at 2772.

308. *Id.* at 2771 (statements of Reps. Le Blond and Garfield).

309. *Id.* at 3003 (statement of Sen. Johnson).

310. *Id.* (statement of Sen. Davis); see also *id.* at 3029–30 (statement of Sen. Davis).

311. *Id.* at 3030 (statement of Sen. Trumbull).

authorized the execution of sentences without presidential approval<sup>312</sup>—an assurance he repeated just before the Senate approved its version of the legislation on June 30.<sup>313</sup>

As enacted, the legislation stated that the “commanding general in the field, or the commander of the department, as the case may be, shall have power to carry into execution all sentences” of military commissions and courts-martial “against guerilla marauders for robbery, arson, burglary, rape, assault with intent to commit rape, and for violation of the laws and customs of war, as well as sentences against spies, mutineers, deserters, and murderers.”<sup>314</sup> On its face, this provision did not authorize any military jurisdiction or establish any offense (as Senator Trumbull had assured); even so, unless the House was relying on Representative Garfield’s representation about implied limits, the legislation did appear to reflect—at a minimum—congressional awareness that such trials were continuing, and it was certainly vulnerable to the stronger reading that Congress had, at least implicitly, blessed such trials.

c. *The Eleventh-Hour Initiative in March 1865 to Prohibit Commission Trials in Places Where Civil Courts Were Open.* — At the outset of 1865, when Union victory was finally in sight, Representative Henry Winter Davis of Maryland took to the House floor to inquire about the apparent failure of the War Department to comply with the provisions of the 1863 Habeas Act.<sup>315</sup> Davis, a cousin of Supreme Court Associate Justice David Davis, had by this time become a Radical Republican, one who thought Lincoln’s plans for reconstruction were far too lenient.<sup>316</sup> Even so, Davis was very concerned that the forthcoming victory, and the Republicans’ legacy, would be tainted by the aggressive and constitutionally dubious practices of the War Department in northern states, especially the system of military commissions. He explained that the “great discretionary power” Congress had afforded Lincoln in 1863 “over the liberty of the citizen”—the power to suspend habeas—was not a “substitute for the administration of the criminal law” and that it was “a grave abuse to use

312. *Id.*

313. *Id.* at 3416–17 (statement of Sen. Trumbull).

314. An Act to Provide for the More Speedy Punishment of Guerilla Marauders, and for Other Purposes, ch. 215, § 1, 13 Stat. 356, 356 (1864).

315. See Cong. Globe, 38th Cong., 2d Sess. 318 (1865) (statement of Rep. Davis).

316. A year earlier, Davis sponsored legislation that would have given Congress more control over Reconstruction and that would have required the Confederate states to disenfranchise their officers and abolish slavery as conditions of reentry into the Union. Lincoln pocket-vetoed the legislation, which prompted Davis, together with Senator Benjamin Wade of Ohio, to issue a famous manifesto, strongly denouncing Lincoln for not being tough enough on the issue of slavery. See B.F. Wade & H. Winter Davis, *The War Upon the President; Manifesto of Ben. Wade and H. Winter Davis Against the President’s Proclamation*, N.Y. Times (Aug. 9, 1864), <http://www.nytimes.com/1864/08/09/news/war-upon-president-manifesto-ben-wade-h-winter-davis-against-president-s.html> (on file with the *Columbia Law Review*).

it for any such purpose.”<sup>317</sup> Davis accused the War Department of “continued, perpetual, and reiterated disobedience” of the 1863 law requiring the submission of detainees’ names to the civil process, and inveighed against the “illegal convictions by military commissions” for offenses “punishable by the laws of the United States upon indictment before the courts of the United States.”<sup>318</sup>

The House proceeded to vote 136 to 5 to authorize an inquiry into the War Department’s practices,<sup>319</sup> and the Senate followed suit on February 14, unanimously passing a resolution directing Secretary of War Stanton to inform the Senate whether he had been providing courts with the lists of prisoners, as the 1863 Act required.<sup>320</sup> Stanton responded on February 18 by providing the Senate with Joseph Holt’s report from 1863,<sup>321</sup> in which the Judge Advocate General had defanged the requirement of the 1863 Act by construing it not to apply to “cases which are clearly triable by court-martial or military commission.”<sup>322</sup> At this point it became clear to Congress—if it was not already—that “no attention whatever has been paid to this important provision of law”<sup>323</sup> and that the practice of using military tribunals to try civil law offenses was continuing unabated throughout the North, including in many places where civilian courts were open and available. The War Department, in other words, was effectively circumventing the protections of the 1863 Act.

Representative Davis then set out to put an end to what he saw as a constitutional black mark. Thursday, March 2, 1865, was the penultimate day of the Thirty-Eighth Congress, which would cease to exist at noon that Saturday. The legislature’s agenda was full, as one might expect; in particular, Congress had yet to approve a general appropriations bill, in order to keep the government running—the “grand omnibus on which everything rides, not otherwise provided for.”<sup>324</sup> Davis saw this as his opening. He rose to offer an amendment to the appropriations bill, one having nothing to do with funding:

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317. Cong. Globe, 38th Cong., 2d Sess. 318 (statement of Rep. Davis).

318. *Id.*

319. *Id.* at 320.

320. *Id.* at 784 (statement of Sen. Powell).

321. Letter from Edwin M. Stanton, Sec’y of War, to the President of the Senate (Feb. 18, 1865), in *Official Records*, supra note 156, ser. II, vol. 8, at 255, 255.

322. Report from J. Holt to E.M. Stanton, supra note 303, at 766; see also supra notes 303–304 and accompanying text (describing Holt’s restrictive reading of the 1863 Habeas Act).

323. Cong. Globe, 38th Cong., 2d Sess. 1047 (statement of Sen. Hendricks).

324. From Washington.; *The Closing Work of Congress*, N.Y. Times (Mar. 3, 1865), <http://www.nytimes.com/1865/03/03/news/washington-closing-work-congress-tax-bill-passed-senate-with-important.html> (on file with the *Columbia Law Review*).

*And be it further enacted,* That no person shall be tried by court-martial, or military commission, in any State or Territory where the courts of the United States are open, except persons actually mustered, or commissioned, or appointed in the military or naval service of the United States, or rebel enemies charged with being spies; and all proceedings heretofore had contrary to this provision are declared vacated; and all persons not subject to trial, under this act, by court-martial or military commission, now held under sentence thereof, shall be forthwith discharged or delivered to the civil authorities to be proceeded against before the courts of the United States according to law. And all acts inconsistent herewith are hereby repealed.<sup>325</sup>

Davis was quick to stress that his intent was not to indict Stanton, or the War Department, but instead to correct an “error” that had collectively been made by all the people and the Government as a whole, in the heat of war:

I do not think it is exclusively, perhaps not chiefly, the fault of those in authority that military commissions have tried, contrary to the Constitution and laws of the United States, many of its citizens. It began first in the rebel States, then spread to the border States, the theater of armed conflicts, then invaded Pennsylvania, Indiana, and New York, amid the general acclaim of the people; and now that it reaches as far north as Boston we hear the first murmur of its advocates or instigators. What [my] amendment contemplates is, not to cast imputation upon any administration or any officer, but recognizing the error which the people as well as the Government have in common committed against the foundation of their own safety, now, before the very idea of the supremacy of the law has faded from the country, to restore it to its power.<sup>326</sup>

Representative George Yeaman of Kentucky moved to amend Davis’s amendment to exclude (i.e., not to prohibit) the military trial of so-called violations of the law of war by “guerrillas,” invoking the military

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325. Cong. Globe, 38th Cong., 2d Sess. 1323 (statement of Rep. Davis).

326. Id. at 1324. Representative Francis Kernan of New York echoed this sentiment:

We owe it to the cause of constitutional liberty and to the preservation of republican government to enact a law that shall abrogate the system of arbitrary imprisonments and trials by military commissions which has been inaugurated, and which shall secure to every citizen the protection guaranteed by the Constitution against these weapons of despotism. If, during the excitement of this civil war, by reason of the real or supposed exigencies of the times, the practice of arbitrary arrests and trials of civilians by military tribunals has grown up, it is our right and our duty now, when it cannot truthfully be claimed that there is any need of proceedings of the kind, to enact a law which shall forbid them in the future, and which shall restore to the jurisdiction of the civil tribunals those who are now in prison.

Id. (statement of Rep. Kernan).

commission convictions of “vagabonds, cut-throats, and robbers, who have to-day become the greatest scourge to the States of Missouri, Tennessee, and Kentucky”<sup>327</sup> and who allegedly had themselves prevented the workings of the ordinary, civilian courts of justice: “[I]n three fourths of Kentucky we have no courts of justice, because from the acts of these men we cannot hold them,” said Yeaman.<sup>328</sup> “In eight counties of my own district they have burned our court-houses, and the officers of the law cannot go there, juries cannot be summoned, and witnesses cannot testify.”<sup>329</sup> Davis strongly opposed Yeaman’s amendment; his rebuke went to the heart of the underlying dispute that had been brewing for four years:

[I]f three fourths of the State of Kentucky are subject to incursions of guerrillas, the other fourth is not, and that will furnish jurors enough. If there is room to hold a military court there is room to hold a civil court. If men are not afraid to go to testify before a military court they will not be afraid to go before a civil court. If bayonets are needed to protect them before a military court, bayonets can protect them before a civil court. Sir, this hankering after military courts is not because they cannot be tried and convicted before the courts of the United State if guilty; but men mad with civil war want a sharper and easier way to deal with criminals as enemies. It is the cry for vengeance and not justice! That is what it is and nothing else.<sup>330</sup>

Davis ended his long oration with an impassioned plea:

“[I]f the House will now say that the liberty of the American citizen is of equal moment with the miscellaneous appropriation bill, . . . every man in the United States will breathe freer and bear himself more loftily, and look with assured joy to the day when armed rebellion shall be destroyed, to be followed not by armed despotism, but by the peaceful reign of liberty and law, by submission but not by servitude.”<sup>331</sup>

The *Congressional Globe* reports that “[a]ppause on the floor and in the galleries” broke out when Davis finished his oration.<sup>332</sup> According to the *New York Times*, Davis was congratulated “by both sides of the House” after his “powerful and very eloquent speech.”<sup>333</sup>

Later that evening, Davis himself successfully moved to strip out the retroactive part of his proposal, so that his amendment would only

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327. *Id.* at 1327 (statement of Rep. Yeaman).

328. *Id.*

329. *Id.*

330. *Id.* at 1327 (statement of Rep. Davis).

331. *Id.* at 1328.

332. *Id.*

333. From Washington.; *The Closing Work of Congress*, *supra* note 324.

preclude *future* military tribunals<sup>334</sup>—presumably a concession to some legislators who said they would support only a forward-looking provision.<sup>335</sup> The House then voted 79 to 64 to approve the Davis amendment.<sup>336</sup>

The next day, March 3—the second anniversary of the Habeas Corpus Act of 1863 and the final full day of the Thirty-Eighth Congress—the Senate was confronted with the Davis amendment to the appropriations bill. Senator Henry Lane of Indiana was incredulous that such a controversial substantive provision had been tacked on to an appropriations measure at the last minute:

[H]ere is a regular appropriation bill, every item of which is to carry out an express provision of law or is recommended by one of the Departments of the Government; and upon that bill in the last hours of the session is introduced this provision calculated to revolutionize and change the whole military jurisprudence of the country for the last four years. What business has this proposition upon such an appropriation bill? . . . I fail utterly to see that it has any connection with the bill before the Senate.<sup>337</sup>

Lane and Jacob Howard of Michigan both raised substantive objections, too. “[A]way with this mawkish, affected sensibility in regard to courts-martial,” exclaimed Howard. He continued:

If there be any fault connected with them, and connected with the Administration on account of them, it is that they have not been used with sufficient vigor and vigilance. That is my opinion. The rigors belonging to martial law are in a moment of war and public danger the only restraining power sufficient to compel obedience to law and order.<sup>338</sup>

Other senators, however—including Lyman Trumbull of Illinois, Reverdy Johnson of Maryland, Thomas Hendricks of Indiana, and Edgar Cowan of Pennsylvania—offered extended defenses of the Davis amendment.<sup>339</sup> Johnson stressed that the problem would not exist but for the fact that the 1863 Act had been “utterly disregarded,”<sup>340</sup> and Hendricks likewise pleaded with his fellow senators to “stand by this [1863] law” by approving the Davis amendment.<sup>341</sup>

334. See Cong. Globe, 38th Cong., 2d Sess. 1332.

335. See, e.g., *id.* at 1325 (statement of Rep. Schenck) (“I shall content myself with saying that if the resolution . . . were made prospective, . . . I could give it my most hearty support.”).

336. *Id.* at 1333.

337. *Id.* at 1369 (statement of Sen. Lane).

338. *Id.* at 1374 (statement of Sen. Howard).

339. See, e.g., *id.* at 1372 (statement of Sen. Johnson); *id.* at 1373, 1379–80 (statements of Sen. Trumbull); *id.* at 1374–75 (statement of Sen. Hendricks); *id.* at 1375–77 (statement of Sen. Cowan).

340. *Id.* at 1372 (statement of Sen. Johnson).

341. *Id.* at 1375 (statement of Sen. Hendricks).

At this point, the hour was getting *very* late—it was 1:30 in the morning of March 4—and the Senate still had several other important pieces of legislation to take up.<sup>342</sup> There was hardly time to debate such a contentious, substantive question. The Senate therefore voted 20 to 14 to strike the Davis amendment.<sup>343</sup> At 6:35 in the morning, the Senate finished its consideration of the omnibus appropriations bill, loading it up with new amendments that would make the conference committee's labors over the next few hours "herculean."<sup>344</sup> Just before 7:00 AM, the House and Senate each selected three representatives to a conference committee to iron out their differences. Henry Winter Davis was one of the House emissaries.<sup>345</sup> At 10:00 that morning, the Houses reconvened, the members having spent the interim, early morning hours "refresh[ing] themselves for the duties of the day."<sup>346</sup> In the Senate, the chamber was filling with dignitaries, including Supreme Court Justices, for the swearing in of the new Vice President. The Senate conferees on the omnibus bill reported that they had reached agreement on every one of their disputes . . . except one—the Davis amendment.<sup>347</sup> The Senate representatives told Davis that although a majority of Senators concurred "in the principle" of his amendment, they would not support it as an appropriations amendment—and it was too late in the day to initiate a stand-alone bill.<sup>348</sup> With the conferees still at stalemate, Senator Sherman predicted that the House would recede from its insistence on keeping the amendment, and so the Senate did not relent.<sup>349</sup> The ball was now in the House's court as the clock ran down.

Henry Winter Davis took the floor just minutes before noon. One of the three House conferees, DeWitt Littlejohn, thought that they should capitulate,<sup>350</sup> but the other two, Davis and James Rollins, were resolute: Faced with a choice between "the great result of losing an important appropriation bill," on the one hand, and permitting the military trial amendment to be struck, even after they had raised a "question of this magnitude touching so nearly the right of every citizen to his personal liberty and the very endurance of republican institutions," on the other, Davis and Rollins regretfully concluded that "their duty to their

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342. See *id.* at 1374 (statement of Sen. Grimes).

343. *Id.* at 1380.

344. Adjournment of Congress.; Both Houses in Session All Night, N.Y. Times (Mar. 5, 1865) [hereinafter Adjournment of Congress, N.Y. Times], <http://www.nytimes.com/1865/03/05/news/adjournment-congress-both-houses-session-all-night-army-appropriation-bill.html> (on file with the *Columbia Law Review*).

345. See Cong. Globe, 38th Cong., 2d Sess. 1389.

346. Adjournment of Congress, N.Y. Times, *supra* note 344.

347. See Cong. Globe, 38th Cong., 2d Sess. 1390 (statement of Sen. Sherman).

348. See *id.* at 1421 (statement of Rep. Davis).

349. See *id.*

350. See *id.* at 1422 (statement of Rep. Littlejohn).

constituents, to the House, and to themselves would not allow them to provide for any pecuniary appropriations at the expense of so grave a reflection upon the fundamental principles of the Government.”<sup>351</sup> Representative Kasson pleaded with his colleagues to at the very least pass a separate bill to pay for support of patients at an insane asylum, to provide for the deaf and dumb, and to furnish critical oil to illuminate lighthouses, but Davis—and the House more broadly—would not budge on what they considered sacred principle.<sup>352</sup>

The clock then struck twelve, and the Thirty-Eighth Congress (and Davis’s tenure in Congress) came to an end. Because of the struggle over Davis’s amendment to prohibit military commissions, the House failed to approve the funding for the following year of government operations.<sup>353</sup>

Meanwhile, over in the Senate, Andrew Johnson was sworn in as Vice President and proceeded to give a singularly embarrassing speech—slurred and melodramatic, virtually confessing that he was a simpleton not up to the job.<sup>354</sup> Minutes later, by contrast, on the East Portico of the Capitol, President Lincoln solemnly recited a succinct four paragraphs that were the greatest of his distinguished career<sup>355</sup>—what Frederick Douglass described to Lincoln, later that day, as a “sacred effort.”<sup>356</sup> The differences between the two officers could not have been more pronounced.

As Lincoln delivered his inaugural address, John Wilkes Booth stood watching on a Capitol balcony,<sup>357</sup> perched just several yards above the President as he implored the Union to bind up the wounds of the Nation, “[w]ith malice toward none, with charity for all . . .”<sup>358</sup>

351. *Id.* at 1421 (statement of Rep. Davis); see also *id.* at 1422 (conceding that the “situation is a grave one”).

352. See *id.* at 1423 (statements of Reps. Kasson, Davis, and Littlejohn).

353. It appears that at least some executive departments proceeded in the months thereafter to expend funds “on the faith” of both houses having passed an appropriations bill and the fact that they had been stymied “only . . . in consequence” of the failure to reach agreement on the Davis amendment. See *Cong. Globe*, 39th Cong., 1st Sess. 856 (1866) (statement of Rep. Stevens).

354. *Cong. Globe*, 38th Cong., 2d Sess. 1394–95. Johnson emphasized his “plebeian” roots several times, culminating in this passage: “I, though a plebeian boy, am authorized by the principles of the Government under which I live to feel proudly conscious that I am a man, and grave dignitaries are but men.” *Id.* at 1394.

355. *Cong. Globe*, 39th Cong., S. Spec. Sess. 1424–25 (1865) (President Lincoln’s Second Inaugural Address).

356. Frederick Douglass, *Life and Times of Frederick Douglass* 445 (1882).

357. See Dave Taylor, *Booth at Lincoln’s Second Inauguration*, *BoothieBarn* (May 31, 2012), <http://boothiebarn.com/2012/05/31/booth-at-lincolns-second-inauguration/> [<http://perma.cc/TP3Y-T3JQ>] (examining photographs of Lincoln delivering the inaugural address). Booth later boasted that he had “an excellent chance” to kill Lincoln on inauguration day. See Pitman, *supra* note 18, at 45 (testimony of Samuel Chester).

358. *Cong. Globe*, 39th Cong., S. Spec. Sess. 1425.



## II. THE CONSTITUTIONAL DEBATES IN THE CONTEXT OF THE LINCOLN ASSASSINATION TRIAL

Less than two months later, in late April 1865, as the War Department was rounding up and interrogating the suspects in the assassination plot against Lincoln, the Johnson Cabinet debated the question of what sort of trial to convene. Secretary of the Navy Gideon Welles and Treasury Secretary Hugh McCulloch favored an ordinary trial in the local Article III court,<sup>359</sup> a tribunal that was open and operating normally and that Lincoln and the Congress had taken extraordinary steps to ensure would remain under the supervision of judges who were scrupulously loyal to the Union cause.<sup>360</sup>

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359. See Diary Entry of Gideon Welles (May 9, 1865), in 2 Diary of Gideon Welles 301, 303 (1911) (“I regret [the assassins] are not tried by the civil court, and so expressed myself, as did McCulloch; but Stanton, who says the proof is clear and positive, was emphatic, and Speed advised a military commission, though at first, I thought, otherwise inclined.”).

360. The creation of the new D.C. court in 1863—the culmination of an extraordinary rebuke to judicial independence by the political branches—raised a serious Article III question in its own right.

In 1861, parents of teenage soldiers in the Union Army began to petition for writs of habeas corpus to have their sons discharged, arguing that a federal law prohibited their enlistment without parental consent. See Howard C. Westwood, Questioned Loyalty in the District of Columbia Government, 75 Geo. L.J. 1455, 1459 (1987). One of the D.C. Circuit Court judges, William Matthew Merrick, began to grant some of these petitions. See *id.* at 1459–61; see also Jonathan W. White, “Sweltering with Treason”: The Civil War Trials of William Matthew Merrick, Prologue Mag., Summer 2007, at 27, 28–29 [hereinafter White, Sweltering with Treason]. Eventually, Merrick met with resistance from the executive branch. On October 19, 1861, he issued a writ of habeas corpus ordering the Army to release James Murphy, a seventeen-year-old boy. See *United States ex rel. Murphy v. Porter*, 27 F. Cas. 599, 600–01 (C.C.D.C. 1861) (No. 16,074a) (letter of Judge Merrick to the court). Murphy’s parents’ lawyer delivered the writ to Brigadier General Andrew Porter. *Id.* at 600. Porter did not produce Murphy to the court, however. *Id.* Instead, Porter not only disregarded the writ but went so far as to have the messenger (the petitioning lawyer) arrested, and—on the order of Secretary of State Seward—he also stationed a “strict military guard” outside Judge Merrick’s house. See *id.* at 600–01; Westwood, *supra*, at 1462–63; White, Sweltering with Treason, *supra*, at 29–30; Letter from William H. Seward, Sec’y of State, to Brigadier Gen. Andrew Porter (Oct. 21, 1861), in *Official Records*, *supra* note 156, ser. II, vol. 2, at 1021, 1021. (Although Seward privately informed Porter in a follow-up letter that it was “not expected” Judge Merrick would be confined to his house, Letter from William H. Seward, Sec’y of State, to Brigadier Gen. Andrew Porter (Oct. 21, 1861), in *Official Records*, *supra* note 156, ser. II, vol. 2, at 1022, 1022, Judge Merrick fully appreciated the *in terrorem* effect of the military guard: He did not attend court until the guard abandoned its watch on his house several weeks later. See White, Sweltering with Treason, *supra*, at 32.) Seward and Porter presumably acted at the direction of, or at least with the approval of, the President himself; indeed, Lincoln remarkably ordered Seward to direct the Comptroller of the Treasury to cease payment of Judge Merrick’s salary. See Letter from William Seward, Sec’y of State, to Elisha Whittlesey, First Comptroller of the Treasury (Oct. 21, 1861), in *Official Records*, *supra* note 156, ser. II, vol. 2, at 1022, 1022. (It is not clear what came of this patent violation of Article III:

According to one scholar, Merrick received his check on the next scheduled payday, in December 1861. See Westwood, *supra*, at 1465.) The other two judges on the court proceeded to issue a “rule” to General Porter, ordering him to show cause why he should not be held in contempt for ignoring the habeas writ. *Murphy*, 27 F. Cas. at 601. Porter never received the court’s order, however, because President Lincoln instructed the Deputy Marshal not to serve it. The Deputy Marshal also reported to the court that Lincoln had purported to suspend habeas “for the present . . . in regard to soldiers in the army of the United States within [the] [D]istrict . . . .” *Id.* The court was duly alarmed: It issued an opinion describing the executive actions as “without a parallel in the judicial history of the United States” and denied that Lincoln had the power to suspend habeas “retrospective[ly].” *Id.* at 602. The court concluded, however, that it was helpless to countermand Lincoln’s gambit, as “we have no physical power to enforce the lawful process of this court on [Lincoln’s] military subordinates against the president’s prohibition.” *Id.*

Within sixteen months of this episode, Lincoln’s Republican supporters in Congress concocted a more permanent method of disempowering Merrick, a jurist whose heart, in the words of one senator, was suspected to be “sweltering with treason.” Cong. Globe, 37th Cong., 3d Sess. 1139 (1863) (statement of Sen. Wilson). In February 1863, the Senate suddenly took up legislation that would disband the D.C. Circuit Court altogether and replace it with a new court, to which Lincoln could appoint new judges more amenable to the Union cause. *Id.* at 1135 (statement of Sen. Davis). Forty-nine District of Columbia attorneys—virtually all of the jurisdiction’s criminal bar—petitioned Congress to reject the legislation, which they insisted was unnecessary. *Id.* Opponents of the legislation alleged, with good reason, that “[t]here can be but one motive [for the bill], and that is to give to the present Executive of the United States the power to render the judiciary of this District subservient to his will, by such appointments as he shall choose to make.” *Id.* at 1138 (statement of Sen. Saulsbury); see also *id.* at 1538 (statement of Rep. Delano) (“I have received a letter from a very respectable source . . . informing me that the passage of this bill will have the very desirable effect of legislating out of office one judge very old, and another very disloyal.”); *id.* (statement of Rep. Pendleton) (“[I]t is nothing more than an attempt to legislate one set of judges out of office and another in.”); Westwood, *supra*, at 1471 (“There is little doubt that the dominant element in the federal government was motivated, not by an interest in reform of the court system, but by a hastily reached determination to be rid of judges it was unsure of, and to get on with the war.”). Senate opponents further insisted that if Lincoln and the Senate were to effectively displace any of the sitting judges (by not reappointing them to the new court), that would violate Article III’s guarantee of lifetime tenure and emoluments. See, e.g., Cong. Globe, 37th Cong., 3d Sess. 1136–37 (statement of Sen. Davis). Their objections were to no avail. The Senate narrowly approved the bill, *id.* at 1140, the House passed it in the waning hours of the congressional term, *id.* at 1538–39, and Lincoln signed it into law. See generally Westwood, *supra*, at 1468–71; White, *Sweltering with Treason*, *supra*, at 33–36. The new law replaced the Circuit Court, as well as the local criminal court (which had been established in 1838, with judges who were not tenured, see Act of July 7, 1838, ch. 192, § 1, 5 Stat. 306, 306–07), with the new Supreme Court for the District of Columbia, empowered to hear both civil and criminal cases. See An Act to Reorganize the Courts in the District of Columbia, ch. 91, § 3, 12 Stat. 762, 763 (1863).

Eight days after enactment, Lincoln appointed four judges to the new court. See Matthew F. McGuire, *An Anecdotal History of the United States District Court for the District of Columbia 1801–1976*, at 45 (1977). Two of those new judges had been members of the House of Representatives that voted, one week earlier, in favor of the court-switching legislation. See *id.* at 45–46; see also Cong. Globe, 37th Cong., 3d Sess. 1538 (recording the affirmative vote of Rep. George Fisher). The loyalty of all four new judges to the Union cause was “beyond the shadow of doubt.” Westwood, *supra*, at 1472. Not

Secretary of War Stanton, however, emphatically urged Johnson to authorize a military commission.<sup>361</sup> Within hours of the assassination, Stanton and Judge Advocate General Holt had aggressively taken charge of the investigation, to the virtual exclusion of civil authorities.<sup>362</sup> Not surprisingly, they lobbied to retain control as the case moved to the trial phase.<sup>363</sup> Stanton argued to Johnson that he and Holt had already developed evidence that the crimes of April 14 were part of a vast conspiracy to slaughter most of the Cabinet—the work of none other than Jefferson Davis himself, along with Alabama Senator Clement C. Clay and other Confederate officials scheming in Canada to effect a spree of sabotage and terror in Northern cities.<sup>364</sup> Stanton’s apparent argument for the military commission was that the plot was part of the South’s war effort and that therefore it was only appropriate that it should be met with a military response, and military justice, rather than the ordinary workings of a local criminal court. Indeed, on April 20, even before Johnson made his decision, Stanton took it upon himself to declare, in a widely distributed poster offering a reward for the capture of Booth, Herold, John Surratt, and accomplices, that persons aiding the conspirators “shall be subject to trial before a Military Commission and the punishment of DEATH.”<sup>365</sup>

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surprisingly, Judge Merrick was not among Lincoln’s appointees, and he therefore had to abandon his Article III office. See *id.* at 1472–73. In 1885, however, President Cleveland appointed Merrick to fill a vacancy on the D.C. Supreme Court, and Merrick served on that court for the final four years of his life. See *id.* at 1473–74.

This audacious displacement of disfavored Article III judges in 1863 echoed the more well-known actions of the Republican Congress in 1802, which eliminated circuit court judgeships that the lame-duck Federalist Congress had established the previous year, thereby effectively terminating the service of sixteen “midnight” Federalist judges. See Act of Mar. 8, 1802, ch. 8, §§ 1, 3, 2 Stat. 132, 132. The constitutionality of this effective “tenure-stripping” was challenged in *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 304–05 (1803) (argument of Mr. Lee); see also 3 Joseph Story, *Commentaries on the Constitution of the United States* 494–95 (Boston, Hilliard, Gray, & Co. and Cambridge, Brown, Shattuck, & Co. 1833) (arguing that the 1802 Act “prostrates in the dust the independence of all inferior judges, . . . and leaves the constitution a miserable and vain delusion”). The Supreme Court, however, did not say a word about the question in its opinion in *Stuart*. The constitutional question thus remained an open one when Lincoln and his cohorts acted in 1863.

361. See Diary Entry of Gideon Welles (May 9, 1865), *supra* note 359, at 303.

362. See Leonard, *Lincoln’s Avengers*, *supra* note 15, at 8–12, 33–65; see also Chamlee, *supra* note 16, chs. 18–23; Hanchett, *supra* note 2, at 60–65; Kauffman, *American Brutus*, *supra* note 11, at 42–46, 255–85, 324–25.

363. See Leonard, *Lincoln’s Avengers*, *supra* note 15, at 33–34.

364. Diary Entry of Gideon Welles (Apr. 23, 1865), *in* *Diary of Gideon Welles*, *supra* note 359, at 295, 296 n.1.

365. See *Broadside for the Capture of John Wilkes Booth, John Surratt, and David Herold*, Metro. Museum of Art, <http://www.metmuseum.org/art/collection/search/283200> [<http://perma.cc/4TTB-MZG5>] (last visited Nov. 3, 2017).

Stanton prevailed: On May 1, President Johnson signed an order authorizing the military commission and commanding Holt to prefer the charges and conduct the trial.<sup>366</sup>

A. *The Policy Arguments for a Military Tribunal in the Assassination Case*

There is no first-hand record of Johnson's policy reasons (nor Stanton's) for deviating from the constitutional norm by choosing the military option. Holt, however, did offer a defense of the assassination commission later in 1865; and from that and other sources, one can discern at least three principal incentives that likely influenced President Johnson's decision.

First, Stanton and Holt had become very familiar with, and deeply committed to, the elaborate system of military commissions the War Department had used throughout the war to try thousands of civilians, for all manner of offenses.<sup>367</sup> Holt, in particular, was prideful of this new institution, which he considered a critical complement to the nation's tools of war. "[T]he experience of three years," wrote Holt later that year, had "proved" the commissions to be "indispensable for the punishment of public crimes . . ." <sup>368</sup> "These tribunals had long been a most powerful and efficacious instrumentality in the hands of the Executive for the bringing to justice of a large class of malefactors in the service or interest of the rebellion, who otherwise would have altogether escaped punishment . . ." <sup>369</sup> As we have seen, however, by 1865 there was widespread concern about, and sharp criticism of, the commissions, including even by some staunchly pro-Union Republicans in Congress, who thought they had become a singular stain on the legacy that Lincoln and the Radical Republicans were establishing.<sup>370</sup> Holt and Stanton thus had reason to think that the Lincoln assassination might be a rebuke to such critics—the crown jewel in their innovative mode of wartime justice, which would confirm the legitimacy and necessity of their ambitious program.

Second, Stanton and Holt knew that Holt himself, rather than a federal judge, would effectively be in charge of the military proceedings, which meant that the prosecution would have far greater leeway to introduce whatever evidence it wished. In particular, they had in mind to use the trial not only to demonstrate the guilt of the eight defendants in the dock but, far more importantly, to spin out a much broader narrative

366. See Pitman, *supra* note 18, at 17.

367. See *supra* notes 137–148 and accompanying text (describing the practice during the war).

368. Letter from J. Holt to E.M. Stanton, *supra* note 156, at 493.

369. *Id.*

370. See *supra* section I.B.3.c (describing early-1865 legislative debate concerning Representative Davis's proposal).

about the plotting and crimes of Jefferson Davis and his Confederate “Secret Service” in Canada.<sup>371</sup> The efficacy of the commission in this case, explained Holt, was “chiefly illustrated” by the “extended reach which it could give to its investigation, and in the wide scope which it could cover by testimony”: The nefarious plot of the Confederate leaders would be “published to the community and to the world.”<sup>372</sup> Holt reasoned:

By no other species of tribunal and by no other known mode of judicial inquiry could this result have been so successfully attained; and it may truly be said that without the aid and agency of the military commission one of the most important chapters in the annals of the rebellion would have been lost to history, and the most complete and reliable disclosure of its inner and real life, alike treacherous and barbaric, would have failed to be developed.<sup>373</sup>

The proceedings, in other words, were designed to be a show trial, for purposes reaching far beyond a simple, dispassionate assessment of the defendants’ legal culpability.<sup>374</sup> For that purpose, Holt and his colleagues were in need of, and they did in fact exercise, “a latitude that no civil court would allow.”<sup>375</sup>

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371. According to witnesses, in 1864 the Confederate Congress appropriated \$5 million to support covert actions in the North, including against civilian targets, with operations to be coordinated by unindicted coconspirators Jacob Thompson (who had been President Buchanan’s Secretary of the Interior) and Clement Clay (a pre-secession senator from Alabama). See Pitman, *supra* note 18, at 373; see also James M. McPherson, *The Illustrated Battle Cry of Freedom: The Civil War Era 763* (2003). Witnesses testified of plots to burn down buildings and boats, to poison the New York water supply, and even, in the words of prosecutor John Bingham, “the infamous and fiendish project of importing pestilence” by distributing to Union soldiers clothing infected with yellow fever, smallpox, and other contagious diseases. Pitman, *supra* note 18, at 373. The same Confederate officials in Canada were said to have conspired with Booth on a plan to kill Lincoln and other U.S. government officials. *Id.*

372. Letter from J. Holt to E.M. Stanton, *supra* note 156, at 493.

373. *Id.*

374. See Witt, *supra* note 41, at 294 (“The military commission placed virtually no constraints on the scope of the conspiracy theory that Holt’s team proposed.”).

375. Pitman, *supra* note 18, at 259 (statement of Reverdy Johnson, counsel for Mary Surratt, toward the end of the trial). The *New York Times* identified the trial for what it was—a cross between a fishing expedition and a grand inquest:

The trial now in progress is not a trial for simple murder. Its object is not merely to punish one or more individuals for a specific act of crime. The government seeks to unravel a conspiracy—to follow every clue that may be offered for the detection and arraignment of every person in any way connected, directly or indirectly, with the extended and formidable conspiracy, in which the assassination of the President was only one of the objects sought.

Trial of the Assassins, *N.Y. Times* (May 15, 1865), <http://www.nytimes.com/1865/05/15/news/trial-of-the-assassins.html> (on file with the *Columbia Law Review*). It is noteworthy

Finally, and perhaps most importantly for present purposes, Stanton—and presumably Johnson, as well—had reason to fear what the outcome might be if the case were entrusted to a jury in the D.C. federal trial court, where unanimity was required for a guilty verdict. A significant percentage of adult men in the District were still off at war, and the remaining, winnowed jury pool included an unusually large number of Confederate sympathizers, any one of whom would have had the capacity to prevent a guilty verdict. More generally, as the acquittal-by-temporary-insanity verdict in a contemporaneous murder trial<sup>376</sup> and the hung jury in the John Surratt trial in 1867<sup>377</sup> would soon after confirm, the vagaries of high-profile trials before District of Columbia juries undoubtedly elicited great trepidation on the part of the prosecutors and Administration officials. By contrast, obtaining a mere majority vote of nine military officers, all of whom were devoted to the Union war effort and revered their fallen Commander in Chief, was a much safer bet. The commission was, in this respect, “unencumbered” by what Holt dismissively referred to as “the technicalities and inevitable embarrassments attending the administration of justice before civil tribunals.”<sup>378</sup>

#### B. *Addressing the Constitutional Question*

Whatever the policy reasons might have been for a military trial, however, there remained the formidable question whether it would be constitutional. Accordingly, before he made his final decision, Johnson turned to his Attorney General, James Speed, for an opinion on that question.<sup>379</sup> As Secretary Gideon Welles later recounted the internal dynamic, Speed was inclined against such a proceeding, but the new Attorney General was weak and prone to adopt and echo “the jealousies and wild vagaries of Stanton.”<sup>380</sup> Speed eventually came around to the

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that the *Times*, like Holt, considered this an admirable feature, not a (constitutional) flaw. See *infra* note 391 (describing the *Times*’s about-face regarding the legality of the military commission).

376. See *infra* note 467 (recounting the trial of Mary Harris).

377. See *infra* section III.F.2.a.

378. Letter from J. Holt to E.M. Stanton, *supra* note 156, at 493.

379. See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 (assigning the Attorney General the duty “to give his advice and opinion upon questions of law when required by the President of the United States”). As noted above, Lincoln apparently never asked for such a formal opinion on military commissions from Attorney General Bates, Speed’s predecessor, perhaps fearing he would not like the answer Bates was prepared to offer. See *supra* section I.B.1.

380. Diary Entry of Gideon Welles (Apr. 25, 1865), *in* Diary of Gideon Welles, *supra* note 359, at 296, 297.

War Secretary's view.<sup>381</sup> The Attorney General produced a formal opinion for the President on April 28. It reads in its entirety:

SIR:

I am of the opinion that the persons charged with the murder of the President of the United States can be rightfully tried by a military court.

I am, sir, very respectfully, Your obedient servant,

JAMES SPEED.<sup>382</sup>

Apparently that superficial work product was good enough for Johnson: In his order, the President expressly relied upon Speed's opinion that the alleged conspirators and abettors were "subject to the jurisdiction of, and lawfully triable before, a Military Commission."<sup>383</sup>

For obvious reasons, that conclusory Attorney General opinion did not quell anxieties about the legality of the military tribunal. Allies of the President expressed grave doubts about it. Henry Winter Davis, for instance, who three months earlier had come very close to persuading Congress to expressly prohibit such trials,<sup>384</sup> wrote Johnson that the tribunal was "in the very teeth of the express prohibition of the constitu-

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381. *Id.* Notably, Lincoln had initially asked Holt, in November 1864, to succeed Bates as Attorney General, but Holt declined "with extreme reluctance and regret," telling Lincoln that "[i]n view of all the circumstances, I am satisfied that I can serve you better in the position which I now hold at your hands, than in the more elevated one to which I have been invited." Letter from J. Holt, Judge Advocate Gen., to President Abraham Lincoln 2 (Nov. 30, 1864), *in* Abraham Lincoln Papers, Library of Congress, ser. 1. The next day, Holt recommended Speed for the post. See Letter from J. Holt, Judge Advocate Gen., to President Abraham Lincoln (Dec. 1, 1864), *in* Abraham Lincoln Papers, Library of Congress, ser. 1. Speed took office on December 2, 1864.

382. *Murder of the President*, 11 Op. Att'y Gen. 215, 215 (1865). Many years later, the Chief Justice of the United States would remark of this formal opinion: "The arguments for and against this position . . . were very much bruited about at the time, and Speed's failure to deal with them at all is . . . evidence of his lack of professional ability." Rehnquist, *supra* note 22, at 145. A few weeks after Speed opined, his predecessor, Edward Bates, wrote that Speed was in effect an empty suit, with "no strong confidence in his own opinions," who had been "caressed and courted by Stanton and [Secretary of State] Seward, and sank, under the weight of their blandishments, into a mere tool—to give such opinions as were wanted!," thereby corrupting and degrading Bates's beloved law department. Diary Entry of Edward Bates (Mar. 9, 1865), *supra* note 249, at 483. Although Speed "must know better," Bates surmised, he was "wheedled out of an *opinion*, to the effect that such a trial is lawful." *Id.* By contrast, Stanton's skills and energy impressed Secretary of the Navy Welles, who was nonetheless often at odds with the War Secretary and troubled by his "mercurial" and "impulsive" nature—never more so than in this instance. Diary Entry of Gideon Welles (May 19, 1865), *in* Diary of Gideon Welles, *supra* note 359, at 307, 309; see also Diary Entry of Gideon Welles (May 9, 1865), *supra* note 359, at 304 ("The rash, impulsive, and arbitrary measures of Stanton are exceedingly repugnant to my notions, and I am pained to witness the acquiescence they receive. He carries others with him, sometimes against their convictions as expressed to me.").

383. Pitman, *supra* note 18, at 17.

384. See *supra* section I.B.3.c.

tion; & not less in conflict with all our American usages & feelings respecting criminal proceedings.”<sup>385</sup> Davis assured the President that not a single one of his acquaintances thought otherwise and that the military proceeding would likely do damage to the Republic—and would surely be the ruin of his Administration.<sup>386</sup> Similarly, during the trial itself, David Dudley Field—a renowned Republican lawyer and brother of Supreme Court Justice Stephen Field—wrote Johnson that the trial was “a matter of great embarrassment to all of us who have been educated to dread encroachments upon the Constitution. We think a military trial is, to say the least, of questionable legality.”<sup>387</sup> To similar effect, on the day Johnson approved the verdicts, Republican Senator Orville Hickman Browning, Lincoln’s close ally and friend from Illinois, wrote in his diary that the commission “was without authority,” such that its proceedings were “void” and the imminent executions of Paine, Atzerodt, Herold, and Surratt “will be murder.”<sup>388</sup>

Many newspapers, including even some journals ordinarily sympathetic to the Union and to the Administration, also excoriated the decision to use a military tribunal.<sup>389</sup> The *New York Times*, for example, opined that the commission was “repugnant to the spirit of our institutions,” a tribunal “for which no precedent is to be found in the history of any free country, and one to which the worst European despotisms have rarely ventured, even in Poland or Hungary, to resort.”<sup>390</sup> Although the *Times* was quick to add, the next day, that it did not mean to impugn the motives of the relevant government officials, even so, “[i]t would have been far better every way if these trials could have been held before the ordinary civil tribunals of the land, and in presence of the public.”<sup>391</sup>

385. Letter from Henry Winter Davis to President Andrew Johnson (May 13, 1865), in 8 *The Papers of Andrew Johnson* 65, 65 (Paul H. Bergeron ed., 1989).

386. *Id.* at 65–66; see also Letter from Gen. Carl Schurz to President Andrew Johnson (May 13, 1865), in *The Papers of Andrew Johnson*, supra note 385, at 67, 67 (stating that submitting the case to a military commission was “perhaps the utmost stretch of power upon which the government could venture without laying itself open to an imputation of unfair play”).

387. Letter from David Dudley Field to President Andrew Johnson (June 8, 1865), in *The Papers of Andrew Johnson*, supra note 385, at 201, 201.

388. Diary Entry of Orville Hickman Browning (July 6, 1865), in 2 *The Diary of Orville Hickman Browning* 36, 37 (James G. Randall ed., 1933).

389. See Turner, supra note 41, at 140–41; see also Diary Entry of Edward Bates (May 25, 1865), in *The Diary of Edward Bates*, supra note 249, at 482, 483 (“The three leading *Republican* papers in New York,—the Post, the Tribune and the Times—come out boldly, against the trial of the assassins of the President and the Swards, by a *Military Commission*.”).

390. Secret Court.—The Trial of the Assassins, *N.Y. Times* (May 11, 1865), <http://www.nytimes.com/1865/05/11/news/secret-court-the-trial-of-the-assassins.html> (on file with the *Columbia Law Review*).

391. The Trial of the Assassins., *N.Y. Times* (May 12, 1865), <http://www.nytimes.com/1865/05/12/news/the-trial-of-the-assassins.html> (on file with the *Columbia Law Review*).



During the actual proceedings of the Lincoln assassination commission the constitutional question was raised five times, and then again, at much greater length, Attorney General Speed himself addressed the question in a formal opinion that he signed in July 1865,<sup>392</sup> after four of the accused had already faced the gallows.

1. *Comstock's Doubts*. — Before the trial even began, at least one of the nine original members of the commission itself—Brevet Brigadier General Cyrus Comstock—thought the accused “ought to be tried by . . . civil courts,”<sup>393</sup> and he raised the question of the commission’s jurisdiction with the President of the commission (General David Hunter) during proceedings the next day.<sup>394</sup> Holt interjected that Attorney General Speed had already decided the jurisdictional question,

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Other, more vociferous opponents of Stanton and Johnson were pleasantly surprised that the *Times* had joined in opposition to the military court. Interestingly, this prompted the *Times* to do an about-face; by May 13, it was apologizing for “the ill-judged language of an article accidentally inserted in these columns, a day or two since,” which had given the *New York World* “some color of justice in claiming the TIMES as among the journals which concur in its opinions on this subject.” *The Trial of the Assassins—Action of the Government; Prices of Things—Trade Combinations—Systematic Extortion*, N.Y. Times (May 13, 1865), <http://www.nytimes.com/1865/05/13/news/trial-assassins-action-government-prices-things-trade-combinations-systematic.html> (on file with the *Columbia Law Review*). In the span of just forty-eight hours, the *Times* had switched gears and become an unapologetic defender of the legality of the military commission proceedings:

The assassination of Mr. LINCOLN was the murder of a military officer, in actual command, during actual war, in a fortified camp, and for the purpose of aiding the enemy; what more was needed to give the military tribunals complete cognizance of the case? . . . [D]oes not every consideration of justice to the public welfare demand that they should be tried by the most summary, rigorous and inflexible tribunals provided by the constitution and laws of the land for such dread emergencies? Is it wise to give to such criminals, as a special favor, the chance of packing a jury or securing upon it one man who will screen them at all hazards? . . . It is well to remember that the purpose of the government is not simply, to punish a criminal, but to unravel a conspiracy; to detect the threads and connecting links of a vast and powerful organization, aiming at anarchy and the overthrow of the government by secret assassinations.

Id. After learning of this remarkable turnabout, former Attorney General Bates wrote in his diary that the *Times*, “scared, perhaps, at his own boldness, in daring to assert a principle contrary to the dictatorship of the war office,” was “easing off and backing down, into its normal condition of abject dependence upon power.” Diary Entry of Edward Bates (May 18, 1865), in *The Diary of Edward Bates*, supra note 249, at 481, 481. *Times* cofounder Henry J. Raymond, wrote Bates, “has capacity, and would rather be a statesman, and a good citizen than a sycophant”—but only when it was “convenient, and consistent with the pecuniary interest of his paper.” Id.

392. See *Military Commissions*, 11 Op. Att’y Gen. 297 (1865); see also infra section II.B.6.

393. Diary Entry of Cyrus B. Comstock (May 8, 1865), in *The Diary of Cyrus B. Comstock*, supra note 49, at 317, 317.

394. See Diary Entry of Cyrus B. Comstock (May 9, 1865), supra note 49, at 317.

implying that it was not Comstock's place to second-guess that decision, but Comstock continued to express his doubts (about that and other matters)—with no success.<sup>395</sup> The next day, May 10, Comstock and Brevet Colonel Horace Porter were relieved of duty on the commission;<sup>396</sup> the reason they were offered was that they were aides to General Grant, who was alleged to have been one of the targets of the conspiracy.<sup>397</sup>

2. *The Jurisdictional Pleas.* — On May 12, the first day on which they were represented by counsel, the accused each formally pled the absence of court jurisdiction, on grounds that they were not in military service and that “loyal civil courts, in which all the offenses charged are triable, exist, and are in full and free operation in all the places where the several offenses charged are alleged to have been committed,” including “in the City of Washington.”<sup>398</sup> Holt's entire response to this jurisdictional challenge was the following: “[T]his Commission has jurisdiction in the premises to try and determine the matters in the Charge and Specifications alleged and set forth against the said defendant[s].”<sup>399</sup> The court was cleared for the commission's deliberation of the jurisdictional objection, after which Holt “announced that the pleas of the accused had been overruled by the Commission.”<sup>400</sup>

3. *Ewing's Request for Specification of the Charge.* — The third challenge was more indirect, but it went to the important question of which *offenses* could be tried by a military commission. On June 14, 1865, well into the trial, Thomas Ewing, Jr., the former Chief Justice of the Kansas Supreme Court (and William Tecumseh Sherman's brother-in-law), serving as counsel for Mudd, Spangler, and Arnold, moved to require the prosecution to clarify the charge against the accused, so that Ewing and his fellow counsel would be able to offer a coherent defense.<sup>401</sup> Ewing complained that it was impossible to tell from the written charge exactly what offenses the defendants were accused of committing and, perhaps more importantly still, what the legal source of those offenses might be.<sup>402</sup>

Ewing was right: The charge itself was remarkably undifferentiated and indistinct. It appeared to accuse each defendant of having done two things: The first was an unlawful *agreement*—conspiring with Booth, John Surratt, Jefferson Davis, and other Confederate officials “maliciously,

395. Diary Entry of Cyrus B. Comstock (May 10, 1865), in *The Diary of Cyrus B. Comstock*, supra note 49, at 317, 317–18.

396. Pitman, supra note 18, at 18.

397. See Diary Entry of Cyrus B. Comstock (May 10, 1865), supra note 395, at 317–18.

398. Pitman, supra note 18, at 22–23.

399. *Id.* at 23.

400. *Id.* Holt later reported to President Johnson that the commission overruled the jurisdictional plea “after mature deliberations.” Report of Joseph Holt, Judge Advocate Gen., to President Andrew Johnson 2 (July 5, 1865) (on file with the *Columbia Law Review*).

401. Pitman, supra note 18, at 244.

402. *Id.* at 244–47.

unlawfully, and traitorously, and in aid of the existing armed rebellion,” to kill the President, the Vice President, the Secretary of State, and General Grant.<sup>403</sup> The second was the substantive offense corresponding to that alleged plot—acting, together with Booth and Surratt, to maliciously, unlawfully, and traitorously murder the President, assault the Secretary, and lie in wait with intent to murder Johnson and Grant.<sup>404</sup> As

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403. *Id.* at 18.

404. *Id.* at 18–21. The “Charge” paragraph, in its entirety, read as follows:

For maliciously, unlawfully, and traitorously, and in aid of the existing armed rebellion against the United States of America, on or before the 6th day of March, A.D. 1865, and on divers other days between that day and the 15th day of April, A.D. 1865, combining, confederating, and conspiring together with one John H. Surratt, John Wilkes Booth, Jefferson Davis, George N. Sanders, Beverly Tucker, Jacob Thompson, William C. Cleary, Clement C. Clay, George Harper, George Young, and others unknown, to kill and murder, within the Military Department of Washington, and within the fortified and intrenched lines thereof, Abraham Lincoln, late, and at the time of said combining, confederating, and conspiring, President of the United States of America, and Commander-in-Chief of the Army and Navy thereof; Andrew Johnson, now Vice-President of the United States aforesaid; William H. Seward, Secretary of State of the United States aforesaid; and Ulysses S. Grant, Lieutenant-General of the Army of the United States aforesaid, then in command of the Armies of the United States, under the direction of the said Abraham Lincoln; and in pursuance of and in prosecuting said malicious, unlawful, and traitorous conspiracy aforesaid, and in aid of the said rebellion, afterward, to wit, on the 14th day of April, A.D. 1865, within the Military Department of Washington aforesaid, and within the fortified and intrenched lines of said Military Department, together with said John Wilkes Booth and John H. Surratt, maliciously, unlawfully, and traitorously murdering the said Abraham Lincoln, then President of the United States and Commander-in-Chief of the Army and Navy of the United States, as aforesaid; and maliciously, unlawfully, and traitorously assaulting, with intent to kill and murder, the said William H. Seward, then Secretary of State of the United States, as aforesaid; and lying in wait with intent maliciously, unlawfully, and traitorously to kill and murder the said Andrew Johnson, then being Vice-President of the United States; and the said Ulysses S. Grant, then being Lieutenant-General, and in command of the Armies of the United States, as aforesaid.

*Id.* at 18–19. The charging document then proceeded to include ten more paragraphs, with further specifications for each of the defendants, many of which sounded in accessorial culpability. *Id.* at 19–21. The paragraph respecting Samuel Mudd, for instance, alleged that

[I]n further prosecution of said conspiracy, the said Samuel A. Mudd did, at Washington City, and within the military department and military lines aforesaid, on or before the 6th day of March, A.D. 1865, and on divers other days and times between that day and the 20th day of April, A.D. 1865, advise, encourage, receive, entertain, harbor, and conceal, aid and assist the said John Wilkes Booth, David E. Herold, Lewis Payne, John H. Surratt, Michael O’Laughlin, George A. Atzerodt, Mary E. Surratt, and Samuel Arnold, and their confederates, with knowledge of

Chief Justice Rehnquist would later write, it was, “[t]o put it mildly,” an “ambitious charge.”<sup>405</sup>

Ewing noted, for instance, that the defendants were each alleged to have “traitorously” murdered the President.<sup>406</sup> This raised at least two questions: First, how could any of these individuals be charged with the murder, since none of them was with Booth in Ford’s Theatre? And second, what was the offense, anyway? Murder *simpliciter* was defined by statutory and common law, explained Ewing, but what was this thing called “traitorous murder,” which sounded suspiciously similar to the crime of treason, which is specifically treated in Article III and conviction for which requires heightened proof?<sup>407</sup>

Judge Advocate Holt responded that the “general allegation” was a conspiracy—to murder Lincoln, in particular—but that the defendants were also charged with “the execution of that conspiracy as far as it went.”<sup>408</sup> As for the law, Holt conceded that “[w]e have no special statute to which we can point,” but “[w]e have the great principles of jurisprudence, which regulate this trial.”<sup>409</sup> The adverb “traitorously” was included in the charge, said Holt, to specify that the conduct was “in aid of the rebellion”—without explaining why that objective might be legally significant or why it was permissible to avoid the constitutional requirements for a treason trial.<sup>410</sup> Assistant Judge Advocate Bingham interjected that each of the defendants was alleged to have committed the assaults themselves because “the act of any one of the participants to a conspiracy in its execution, is the act of every party to that conspiracy,” such that when the President was slain by the “hand of Booth,” he was “murdered by every one of the parties to this conspiracy.”<sup>411</sup> Even so, Bingham added, although there were charges of both making *and* executing the conspiracy, “it is all one transaction.”<sup>412</sup>

Ewing, by now even more exasperated—“I get no answer intelligible to me”—probed once more for the “code or system of laws” that

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the murderous and traitorous conspiracy aforesaid, and with the intent to aid, abet, and assist them in the execution thereof, and in escaping from justice after the murder of the said Abraham Lincoln, in pursuance of said conspiracy in manner aforesaid.

Id. at 20–21.

405. Rehnquist, *supra* note 22, at 147.

406. Pitman, *supra* note 18, at 244.

407. Id. at 245; see also U.S. Const. art. III, § 3; *infra* note 420 (discussing the Treason Clause of Article III).

408. Pitman, *supra* note 18, at 245–46.

409. Id. at 246.

410. Id. at 245–46.

411. Id. at 246.

412. Id. at 247.

condemns “traitorously” murdering, assaulting and lying in wait.<sup>413</sup> Holt’s cryptic response: “I think the common law of war will reach that case.”<sup>414</sup>

4. *The Oral Arguments on Jurisdiction.* — The fourth and most extensive attack on the jurisdiction of the commission came in the form of two long disquisitions on the subject: the first on June 16 by Mary Surratt’s attorney, former Attorney General Reverdy Johnson,<sup>415</sup> and the second on June 23 by Thomas Ewing.<sup>416</sup>

Surratt had retained Johnson, a Democratic senator from Maryland who had both defended the slave owner in *Dred Scott v. Sandford*<sup>417</sup> and served as one of President Lincoln’s pallbearers,<sup>418</sup> especially for the purpose of the jurisdictional challenge to the military proceeding.<sup>419</sup> Johnson proffered several arguments, including that no statute or constitutional power afforded the Executive affirmative authority to unilaterally establish the commission; that the commission could not be defended on the theory that martial law had been declared; and that the charges appeared to be allegations of treason in the guise of other “traitorous” offenses and therefore had to be tried in an Article III court.<sup>420</sup> Most pointedly, Johnson argued that whereas military judges “are absolutely dependent” on executive power, Article III guaranteed Surratt a trial before a judge who was independent of the executive power.<sup>421</sup> Johnson stressed that this view of constitutional limits on military jurisdiction was “the almost unanimous opinion of the profession, and certainly is of every judge or court who has expressed

413. *Id.*

414. *Id.*

415. *Id.* at 251–62.

416. *Id.* at 264–67.

417. 60 U.S. (19 How.) 393 (1857).

418. John Woolley & Gerhard Peters, Official Arrangements for the Funeral of President Lincoln, The Am. Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=69747> [<http://perma.cc/X6HW-4KS5>] (last visited Oct. 12, 2017).

419. See Pitman, *supra* note 18, at 251.

420. See *id.* at 251–63. Section 3 of Article III provides that “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.” U.S. Const. art. III, § 3. The defendants before the commission certainly appeared to be charged with adhering, and giving aid and comfort, to the enemy. Section 3 does not say in so many words that treason charges must be adjudicated in Article III courts; however, Attorney General Speed himself opined several months later, with respect to a potential treason trial of Jefferson Davis, that “I have ever thought trials for high treason cannot be had before a military court. The civil courts have alone jurisdiction of that crime.” Case of Jefferson Davis, 11 Op. Att’y Gen. 411, 411 (1866); accord *Ex parte Quirin*, 317 U.S. 1, 38–39 (1942) (intimating that the crime of treason is not a violation of the law of war that can be tried before a military commission).

421. Pitman, *supra* note 18, at 261.

any.”<sup>422</sup> Johnson then quoted at length from a remarkable contemporary charge to a grand jury by New York Judge Rufus Peckham (a former congressman and father of the future Supreme Court Justice), inveighing against the misuse of military commissions: The constitutional protections in question, instructed Peckham, “were made for occasions of great excitement, no matter from what cause, when passion, rather than reason, might prevail.”<sup>423</sup> Judge Peckham then took aim at the Lincoln conspirators’ commission itself:

A great crime has lately been committed that has shocked the civilized world. Every right-minded man desires the punishment of the criminals, but he desires that punishment to be administered according to law, and through the judicial tribunals of the country. No star-chamber court, no secret inquisition, in this nineteenth century, can ever be made acceptable to the American mind.

....

Grave doubts, to say the least, exist in the minds of intelligent men as to the constitutional right of the recent military commissions at Washington to sit in judgment upon the persons now on trial for their lives before that tribunal. Thoughtful men feel aggrieved that such a commission should be established in this free country when the war is over, and when the common-law courts are open and accessible to administer justice, according to law, without fear or favor.

....

The unanimity with which the leading press of our land has condemned this mode of trial ought to be gratifying to every Patriot.

Every citizen is interested in the preservation, in their purity, of the institutions of his country; and you, gentlemen, may make such presentment on this subject, if any, as your judgment may dictate.<sup>424</sup>

One week later, Ewing homed in on the specific protections of Article III, including not only the right to a trial by jury but also the

422. *Id.*

423. *Id.* at 262 (argument of Reverdy Johnson) (internal quotation marks omitted) (quoting Judge Peckham’s charge to the grand jury). Judge Peckham gave this charge to the grand jury in the May term of the New York Supreme Court and Court of Oyer and Terminer, in Albany, and it was reported in local papers, see, e.g., Judge Peckham’s Charge to the Grand Jury, *Albany Argus*, May 16, 1865.

424. Pitman, *supra* note 18, at 262. Judge Peckham apparently understood that the Albany grand jury’s “presentment” would be merely hortatory: He conceded that no “remedy” for the unlawful military proceeding was available “except through the power of public sentiment” and thus implored the grand jury “in all courtesy and kindness, and with all proper respect, [to] express our disapprobation of this course in our rulers in Washington.” *Id.* I have not uncovered any record indicating that the grand jury responded to Peckham’s plea.

importance of an independent Article III judge, who would be much more adept at keeping the trial within proper legal bounds, a function beyond the commission's ken:

Inexperienced as most of you are in judicial investigations, you can admit evidence which the courts would reject, and reject what they would admit, and you may convict and sentence on evidence which those courts would hold to be wholly insufficient. Means, too, may be resorted to by detectives, acting under promise or hope of reward, and operating on the fears or the cupidity of witnesses, to obtain and introduce evidence, which can not be detected and exposed in this military trial, but could be readily in the free, but guarded, course of investigation before our regular judicial tribunals.<sup>425</sup>

Ewing repeated Johnson's claim that "a large proportion of the legal profession think now, that your jurisdiction in these cases is an unwarranted assumption."<sup>426</sup> He prophesied that if and when the established judicial tribunals would find, as they likely would, that this sort of military proceeding was invalid through and through, history would not look kindly on the assassins' commission, no matter the outcome of the trial:

In that event, however fully the recorded evidence may sustain your findings, however moderate may seem your sentences, however favorable to the accused your rulings on the evidence, your sentence will be held *in law* no better than the rulings of Judge Lynch's courts in the administration of lynch law.<sup>427</sup>

The duty of responding to Johnson and Ewing on the jurisdictional questions fell to Special Judge Advocate John Bingham, then a member of the House of Representatives and best known today as the principal author of Section 1 of the Fourteenth Amendment. Bingham's lengthy jurisdictional presentation, part of his closing argument, included several different strands of justification, most of which had become familiar during the war, as military officials such as Holt and Halleck had endeavored to afford legal support to their expansion of military jurisdiction.<sup>428</sup>

Bingham contended, for example, that because President Lincoln had, in September 1862, supposedly declared martial law "within the United States,"<sup>429</sup> the ordinary rules of civilian life were simply inapposite and were displaced by "military law";<sup>430</sup> indeed, Bingham argued, the

425. *Id.* at 266 (argument of Thomas Ewing). Ewing acknowledged that Judge Advocate Holt was "learned in the law," but that was cold comfort because "from his position he can not be an impartial judge, unless he be more than a man." *Id.*

426. *Id.*

427. *Id.*

428. See *id.* at 351-72 (argument of John A. Bingham).

429. See *supra* notes 189-190 and accompanying text (quoting Lincoln's September 1862 Order).

430. Pitman, *supra* note 18, at 359.

provisions of the Constitution invoked by counsel for the accused are “silent and inoperative in time of war when the public safety requires it.”<sup>431</sup> To be sure, Lincoln’s 1862 proclamation decreed, somewhat imprecisely, that a certain class of persons who harmed the Union cause—“all rebels and insurgents, their agents and abettors, within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to rebels against the authority of the United States”—would be “subject to martial law and liable to trial and punishment by courts-martial or military commissions.”<sup>432</sup> Because the term “martial law” does not have any precise or uncontroverted meaning,<sup>433</sup> it is not clear what, if any, legal effect Lincoln intended by such declaration, other than purporting to lay a predicate for military “trial and punishment.” What is certain, however, is that the 1862 proclamation did not establish what the Supreme Court would shortly refer to as “martial rule,” a situation in which there is “no power . . . left but the military, [which] is allowed to govern . . . until the laws can have their free course.”<sup>434</sup> The system of civil law remained in place throughout much of the Union—it had not been suspended and displaced by “the omnipotence of military power.”<sup>435</sup>

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431. *Id.* at 361. Bingham reasoned that if it was permissible for the Army to have chased down and killed Booth himself, without “civil process,” it stood to reason that the military could try his coconspirators. *Id.* at 352. At one point, Bingham invoked a well-known argument offered by then-Representative John Quincy Adams in 1836, to the effect that when the Executive exercises war powers, municipal laws are displaced by the law of war—that there is a sharp distinction between the laws that govern “war power” and “peace power.” *Id.* at 365. This argument had some traction with the Supreme Court in the nineteenth century in the context of constitutional property rights, but it was never successfully applied to displace the rights the Constitution guarantees with respect to criminal trials. See Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1579–82.

432. War Dep’t, General Orders, No. 141, *supra* note 189, at 587; see also *supra* notes 189–190 and accompanying text (discussing Lincoln’s September 1862 Order).

433. See *Duncan v. Kahanamoku*, 327 U.S. 304, 315 (1946) (“[T]he term ‘martial law’ carries no precise meaning. The Constitution does not refer to ‘martial law’ at all and no Act of Congress has defined the term. It has been employed in various ways by different people and at different times.”); *Martial Law*, 8 Op. Att’y Gen. 365, 368 (1857) (“Martial law is a thing not mentioned by name, and scarcely as much as hinted at, in the Constitution and statutes of the United States. And our law books, whether civil or military, do not afford any correct or useful information on the subject.”).

434. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866).

435. *Martial Law*, 8 Op. Att’y Gen. at 374. In that opinion, Attorney General Caleb Cushing explained:

When martial law is proclaimed under circumstances of assumed necessity, the proclamation must be regarded as the statement of an existing fact, rather than the legal creation of that fact. In a beleaguered city, for instance, the state of siege lawfully exists, because the city is beleaguered; and the proclamation of martial law, in such case, is but notice and authentication of a fact,—that civil authority has become



Somewhat more narrowly, the prosecution tried to exploit the notion that “martial law” prevailed at the very least in the District of Columbia, where Booth committed his crime. To establish this point, early in the trial Holt called to the stand Lieutenant General Ulysses S. Grant, who testified that “[m]artial law, I believe, extends to all the territory south of the railroad that runs across from Annapolis, running south to the Potomac and the Chesapeake.”<sup>436</sup> This idea—that “[m]artial law had been declared in the District of Columbia”<sup>437</sup>—has persisted through the years, to the point that some observers appear to have taken it for granted.<sup>438</sup> Neither Lincoln nor Johnson, however, ever specifically declared martial law in the District, a point Ewing effectively exploited in his cross-examination of Grant at the trial:

Q. By virtue of what order does martial law extend south of Annapolis?

A. I never saw the order. It is just simply an understanding.

Q. It is just an understanding?

A. Yes, sir; just an understanding that it does exist.

Q. You have never seen any order?

A. No, sir.

Q. And do not know that such an order exists?

A. No, sir: I have never seen the order.<sup>439</sup>

Even if there had been a formal declaration of martial law in the District, however—or to the extent Lincoln’s 1862 proclamation

suspended, of itself, by the force of circumstances, and that by the same force of circumstances the military power has had devolved upon it, without having authoritatively assumed, the supreme control of affairs, in the care of the public safety and conservation.

Id.

436. 1 *The Conspiracy Trial for the Murder of the President, and the Attempt to Overthrow the Government by the Assassination of Its Principal Officers* 39 (Ben: Perley Poore ed., Boston, J.E. Tilton & Co. 1865) [hereinafter Poore, *The Conspiracy Trial*].

437. *Military Commissions*, 11 Op. Att’y Gen. 297, 297 (1865).

438. In his classic work on constitutional questions during the Civil War, for example, James Randall wrote that “[b]eginning with September, 1863, the District of Columbia was subjected to martial law.” Randall, *supra* note 137, at 170; see also, e.g., Steers, *Blood on the Moon*, *supra* note 11, at 211, 324 n.7. In support of this statement, Randall cited only an 1874 House Report, see Randall, *supra* note 137, at 170 n.4; that House Report, in turn, cited a letter from the Chief Clerk of the State Department, which claimed that “[t]he date of the President’s proclamation declaring martial law in the District of Columbia is September 15, 1863.” H.R. Rep. No. 43-262, at 6 n.20 (1874) (quoting Letter from Sevellon A. Brown, Chief Clerk, Dep’t of State (Feb. 6, 1874)). Lincoln’s September 1863 proclamation, however—principally a suspension of habeas—does not mention martial law at all, let alone declare martial law in the District. See Proclamation 104—Suspending the Writ of Habeas Corpus Throughout the United States (Sept. 15, 1863), in 4 *A Compilation of the Messages and Papers of the Presidents* 3371, 3371–72 (James D. Richardson ed., New York, Bureau of Nat’l Literature, Inc. 1897).

439. Poore, *The Conspiracy Trial*, *supra* note 436, at 39.

established that certain classes of persons were “subject to” martial law<sup>440</sup>—it was not obvious why that formal legal assertion, in and of itself, would have been an adequate constitutional justification for subjecting the accused to a military trial. After all, as defense counsel stressed in their jurisdictional arguments, the civilian courts in the District of Columbia were open and available for trial of precisely the sort of wrongdoing alleged in the case.<sup>441</sup> Bingham conceded as much, but he added that, even after Lee’s surrender at Appomattox Court House, the civilian courts were open in the District “only . . . by force of the bayonet.”<sup>442</sup> This retort, although true, was nonresponsive to the legal point defendants’ counsel were pressing. To be sure, at the time of the assassination, the District was heavily guarded by military forces.<sup>443</sup> Such a military role, however, did not establish a state of martial law, “which, in the proper acceptation of the term, was not at any time fully established over the District.”<sup>444</sup> Indeed, the very military protection that Bingham identified (the “force of the bayonet”), by guaranteeing that the civilian courts would remain open and running, made it *unnecessary* to impose martial law. As one esteemed military treatise writer would later summarize:

The civil magistracy of the District exercised their vocations as usual. Civil officers were chosen, they entered upon or surrendered their duties as in times of peace. *To this extent the military, instead of supplanting the civil authorities, rendered it possible for the latter to exercise their functions.* Without the former the latter would have been powerless to protect and render secure either life or property. Yet in doing this the military did not act in subordination to the civil power. It strengthened the latter, but in its own way.<sup>445</sup>

Bingham offered other arguments, as well.<sup>446</sup> Some of them sounded textual or structural themes. He insisted, for instance, that because the

440. War Dep’t, General Orders, No. 141, supra note 189, at 587.

441. See, e.g., Pitman, supra note 18, at 271 (argument of Frederick Stone) (arguing that Lincoln’s 1862 proclamation left “untouched and undisturbed” the authority and ability of civil courts in D.C. to try cases alleging murder, conspiracy to murder, and aiding and abetting murder).

442. *Id.* at 352.

443. See Military Commissions, 11 Op. Att’y Gen. 297, 297 (1865) (“Washington was defended by fortifications regularly and constantly manned, the principal police of the city was by federal soldiers, the public offices and property in the city were all guarded by soldiers, and the President’s house and person were, or should have been, under the guard of soldiers.”).

444. William E. Birkhimer, *Military Government and Martial Law* 480 (Franklin Hudson Publ’g Co. 3d rev. ed. 1914) (1892).

445. *Id.* (emphasis added).

446. In addition to the substantive arguments described in the text, he argued that the commission lacked the power to declare that it lacked jurisdiction: “[T]his Court has no power, as a Court, to declare the authority by which it was constituted null and void, and

power to create the court emanated from an Article I authority (even though Congress did not create it!), the commission's trial of military offenses was not part of the "judicial power" of Article III<sup>447</sup>—an argument that begged the question at issue, which was if and when the political branches could create Article I courts to perform criminal trial functions ordinarily entrusted, within the federal government, to Article III courts. Bingham also suggested that just as Congress has the power to subject service members to courts-martial—based on its authority to make rules for the government and regulation of the land and naval forces, together with the exception to the Fifth Amendment Grand Jury Clause for cases "arising in the land or naval forces"—so, too, should those same constitutional provisions empower the federal government to use military tribunals to try persons outside the armed forces who, in a time of war, commit offenses "in the interests of, or in concert with, the enemy."<sup>448</sup> It would be deeply unfair, reasoned Bingham, to provide constitutional protections to those who would conspire with the enemy to commit murder but to deny those same protections to the lowly soldier who falls asleep at his post.<sup>449</sup>

Although none of these arguments has withstood the test of time,<sup>450</sup> Bingham offered one other rationale, as well—an argument rooted firmly in practice and understandings at the Founding. Bingham explained that, notwithstanding provisions in virtually all of the state constitutions shortly after independence guaranteeing jury trials for all crimes, the Continental Congress had passed resolutions during the war prescribing military tribunals for persons who had aided the British enemy.<sup>451</sup> In particular, Bingham pointed to the following resolution that the Continental Congress adopted on February 27, 1778:

*Resolved*, That whatever inhabitant of these states shall kill or seize, or take any loyal citizen or citizens thereof and convey him, her, or them to any place within the power of the enemy, or shall enter into any combination for such purpose, or attempt to carry the same into execution, or hath assisted or shall assist therein; or shall, by giving intelligence, acting as a

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the act of the President a mere nullity, a usurpation . . . How can it be possible that a judicial tribunal can decide the question that it does not exist . . . ?" Pitman, *supra* note 18, at 353–54.

447. *Id.* at 354.

448. *Id.* at 358–59; see also *supra* note 153 (discussing a similar argument Holt had made in 1863).

449. Pitman, *supra* note 18, at 360–61; see also Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1574 (addressing this equitable argument).

450. Indeed, a year later, in *Ex parte Milligan*, the Supreme Court vigorously rejected Bingham's arguments premised on the alleged existence of martial law and displacement of civil law. See 71 U.S. (4 Wall.) 2, 124–27 (1866); see also *infra* section III.D (describing the Supreme Court's holding in *Milligan*).

451. Pitman, *supra* note 18, at 361–62.

guide, or in any manner whatever, aid the enemy in the perpetration thereof, he shall suffer death by the judgment of a court martial as a traitor, assassin, and spy, if the offence be committed within seventy miles of the headquarters of the grand or other armies of these states where a general officer commands.<sup>452</sup>

What is more, added Bingham, none other than General George Washington himself, “the peerless, the stainless, and the just, with whom God walked through the night of that great trial,” attempted to *enforce* that resolution in 1780 against a civilian attorney, Joshua Hett Smith.<sup>453</sup> Smith was, on Washington’s orders, arraigned by court-martial for having allegedly abetted Benedict Arnold in his traitorous scheme to surrender the army garrison at West Point to the British army.<sup>454</sup> How could the jurisdictional arguments of Ewing and Johnson be correct, asked Bingham, if the Continental Congress had passed such a resolution, and Washington had enforced it, “when the constitutions of the several States at that day as fully guaranteed trial by jury to every person held to answer for a crime, as does the Constitution of the United States at this hour?”<sup>455</sup>

This was probably Bingham’s most effective response to the accused’s jurisdictional challenges, but it did not garner much attention during the trial itself. It appears that Johnson and Ewing did not anticipate or countermand this quasi-originalist line of argument, and it was not mentioned further.<sup>456</sup>

It is not reported whether the Lincoln commission members deliberated any further on the question of the tribunal’s jurisdiction or whether, instead, they merely deferred to Holt’s and Bingham’s insistence that the proceedings were constitutional, as Attorney General Speed had already determined. Obviously, Johnson and Ewing did not persuade the panel, which proceeded to render its verdicts later that month.<sup>457</sup>

452. 10 Journals of the Continental Congress, 1774–1789, at 204–05 (Gov’t Printing Office 1908) (1778).

453. Pitman, *supra* note 18, at 362.

454. I discuss the Smith case and the 1778 resolution in greater detail in Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1615–27.

455. Pitman, *supra* note 18, at 362.

456. This argument, based upon Revolutionary War precedents and the authority of General Washington, is the principal subject of Lederman, *Wartime Military Tribunals*, *supra* note 67.

457. Defense counsel William Doster later wrote that Johnson’s argument on behalf of Mary Surratt, although nominally addressed to the commission, was in fact “meant for the President and the people.” Doster, *supra* note 55, at 263. “From what members of the court have since told me,” wrote Doster, “it had no effect on them whatever. They had Stanton’s orders, and that was enough for them who were in the service of the United States.” *Id.* Reflecting upon the experience after the fact, one of the commission members, August Kautz, conceded that although the “slight statutory authority” for military commissions might have been subject to “abuse,” he doubted the assassination

5. *Mary Surratt's Habeas Petition and Johnson's Suspension of the Writ.* — The final, and most dramatic, constitutional challenge to the tribunal's jurisdiction occurred after the panel rendered its verdicts. The case finally did reach the Supreme Court of the District of Columbia, at 5th and E Streets . . . only to have the President himself refuse to recognize the authority of the first Article III judge who had an opportunity to consider the constitutional question.

On June 30, the commission sentenced Mary Surratt to death by hanging.<sup>458</sup> Five of the nine members wrote a petition to Andrew Johnson, asking the President to reduce her sentence to life imprisonment “in consideration of [her] sex and age.”<sup>459</sup> If the President saw that plea for clemency (which is not certain), he ignored it.<sup>460</sup> On Wednesday, July 5, the President ordered Surratt, together with Atzerodt, Herold, and Powell, to be put to death two days hence, between the hours of 10:00 AM and 2:00 PM on Friday, July 7, twelve weeks to the day after the tragic events of Good Friday.<sup>461</sup>

At 2:00 AM that Friday morning, Surratt's principal attorneys, Frederick Aiken and John W. Clampitt, acting on the advice of Reverdy Johnson, appeared at the home of one of the judges on the D.C. Supreme Court, Andrew Wylie.<sup>462</sup> Judge Wylie was a deeply loyal Unionist: Of the 1,670 persons who voted for President in the city of Alexandria, Virginia, in 1860, Wylie was one of only two who cast a ballot for Lincoln.<sup>463</sup> His supplicants on that July night carried with them a petition for a writ of habeas corpus.<sup>464</sup> Roused from his sleep and still in his dressing gown, the bearded, stately Judge Wylie received the petition and studied it carefully.<sup>465</sup> It challenged the jurisdiction of the commission to try a

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commission would be “styled [as] such by posterity,” for it was “the only way for [a] speedy result which the loyal spirit of the country seemed to demand at the time.” Kautz, *Memoirs*, supra note 49, at 27.

458. Pitman, supra note 18, at 248.

459. Joseph Holt, *Vindication of Hon. Joseph Holt, Judge Advocate General of the United States Army 13* (Washington, D.C., Chronicle Publ'g. Co. 1873).

460. Johnson later claimed that he had never seen the clemency request. Holt insisted that he presented it to the President; he informed Surratt's lawyers and daughter that the President was “immovable” and that they “might as well attempt to overthrow this building as to alter his decision.” John W. Clampitt, *The Trial of Mrs. Surratt*, 131 *N. Am. Rev.* 223, 235 (1880). It has never been definitively resolved whether Holt presented Johnson the panel majority's clemency request for Surratt. See generally Hanchett, supra note 2, at 94–100, 110–14. In 1873, Holt published a short volume, in which he desperately tried to show that he had faithfully presented the petition to Johnson. See generally Holt, supra note 459.

461. Pitman, supra note 18, at 249.

462. Clampitt, supra note 460, at 236.

463. See Ted Pulliam, *Historic Alexandria: An Illustrated History* 37 (2011).

464. Clampitt, supra note 460, at 236.

465. *Id.*

private citizen such as Surratt for what the petition described as a simple “offense against the peace of the United States,” triable in Judge Wylie’s own civilian court, which “was and now is open for the trial of such crimes and offenses.”<sup>466</sup> (Indeed, that very morning, Judge Wylie would preside over the opening arguments of one of the most notorious murder cases of the era, involving another woman named Mary, accused of killing in cold blood—in the corridors of the Treasury Department, no less—the man who had long courted her before marrying another.<sup>467</sup>) Aiken and Clappitt’s petition argued that the Constitution afforded Surratt the right of public trial by jury in that Article III court and thus that her trial by commission and execution of her impending sentence were unconstitutional.<sup>468</sup> The petition accordingly prayed for the court to order her jailer, General W.S. Hancock, to bring Surratt to the federal court that very morning, so that an Article III judge might, finally, consider the merits of the jurisdictional challenge before the hangman’s noose would render it forever moot sometime before 2:00 PM.<sup>469</sup>

Judge Wylie retired to his bedchamber. A few minutes later he reemerged and is said to have addressed Aiken and Clappitt as follows:

Gentlemen, my mind is made up. I have always endeavored to perform my duty fearlessly, as I understand it. I am constrained to decide the points in your petition well taken. I am about to perform an act which before to-morrow’s sun goes down may consign me to the old Capitol Prison. I believe it to be my duty, as a judge, to order this writ to issue . . . .<sup>470</sup>

Judge Wylie’s signature affixed, Aiken and Clappitt promptly had the writ served upon General Hancock.

At half-past-eleven that morning, General Hancock did, indeed, appear in Judge Wylie’s packed courtroom, as ordered. He was accompanied, however, not by Mary Surratt, but instead by none other than the

466. Pitman, *supra* note 18, at 250.

467. See J.O. Clephane, *Official Report of the Trial of Mary Harris, Indicted for the Murder of Adoniram J. Burroughs 6–18 (1865)*. On the very day the Lincoln conspirators were to be executed, the trial of Mary Harris for the murder of Adoniram Burroughs generated widespread public interest and morbid curiosity: Judge Wylie’s courtroom was “crowded to excess; nearly all the legal fraternity of Washington occupying the bar, the space without being filled by citizens generally.” *Id.* at 6. Harris’s lawyer, Joseph Bradley (who would, two years later, defend Mary Surratt’s son John in his trial for the murder of President Lincoln, see *infra* section III.F.2.a), proffered a defense of “paroxysmal insanity from moral causes,” Clephane, *supra*, at 17, on the theory that Burroughs’s abandonment of Harris caused her dysmenorrhea, which in turn led to bouts of temporary insanity, see, e.g., *id.* at 51–52, 73–74, 78–79, during one of which Harris traveled across the country and shot Burroughs. After only five minutes’ deliberation, the jury accepted Harris’s defense and acquitted her, just days after Mary Surratt was hanged. *Id.* at 181.

468. Pitman, *supra* note 18, at 250.

469. *Id.*

470. Clappitt, *supra* note 460, at 236.

Attorney General of the United States, James Speed.<sup>471</sup> Speed came bearing an “Indorsement” signed by President Johnson. In that document, Johnson “declar[ed] that the writ of *habeas corpus* has been heretofore suspended in such cases as this.”<sup>472</sup> Presumably Johnson was referring to Lincoln’s own declaration from September 1863, in which he declared that the public safety required suspension of the privilege of the writ “throughout the United States” in all cases involving *military* detention of prisoners of war and other persons “amenable to military law or the rules and articles of war.”<sup>473</sup> The whole point of Surratt’s habeas petition,

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471. Pitman, *supra* note 18, at 250.

472. *Id.*

473. Lincoln issued his 1863 suspension pursuant to section 1 of the Habeas Act of 1863, see *supra* section I.B.3.a, in which Congress authorized the President to suspend habeas “whenever, in *his* judgment, the public safety may require it . . . in any case throughout the United States, or any part thereof.” An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, ch. 81, § 1, 12 Stat. 755, 755 (1863) (emphasis added). (It is an interesting question, beyond the scope of this Article, whether Congress may delegate to the President the authority to make the “public safety” determination that Article I, Section 9 of the Constitution requires as a predicate for a habeas suspension. See generally Amy Coney Barrett, Suspension and Delegation, 99 *Cornell L. Rev.* 251 (2014).) The operative paragraphs of Lincoln’s September 15, 1863 proclamation read in full:

Whereas, in the judgment of the President, the public safety does require that the privilege of the said writ shall now be suspended throughout the United States in the cases where, by the authority of the President of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy, or officers, soldiers, or seamen enrolled or drafted or mustered or enlisted in or belonging to the land or naval forces of the United States, or as deserters therefrom, 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 of the United States, or for resisting a draft, or for any other offense against the military or naval service:

Now, therefore, I, Abraham Lincoln, President of the United States, do hereby proclaim and make known to all whom it may concern that the privilege of the writ of *habeas corpus* is suspended throughout the United States in the several cases before mentioned, and that this suspension will continue throughout the duration of the said rebellion or until this proclamation shall, by a subsequent one to be issued by the President of the United States, be modified or revoked. And I do hereby require all magistrates, attorneys, and other civil officers within the United States and all officers and others in the military and naval services of the United States to take distinct notice of this suspension and to give it full effect, and all citizens of the United States to conduct and govern themselves accordingly and in conformity with the Constitution of the United States and the laws of Congress in such case made and provided.

Proclamation 104—Suspending the Writ of Habeas Corpus Throughout the United States, *supra* note 438, at 3372.

however, was her counsel's assertion that she was *not* "amenable to military law"—in which case not only would her trial by military commission have been unlawful, but she also would not have been subject to Lincoln's suspension proclamation. No doubt realizing that it was question-begging to rely on the 1863 suspension, Johnson therefore added, in his "Indorsement," that "I do hereby *especially* suspend *this* writ"—that is, the particular writ Judge Wylie had just issued in Mary Surratt's case.<sup>474</sup> Johnson's order further directed Hancock to carry out the sentence upon Surratt as scheduled and to proffer the President's order to Judge Wylie in lieu of the detainee herself.<sup>475</sup>

In retrospect, there were serious reasons to question the validity of Johnson's order. For one thing, and as discussed above,<sup>476</sup> sections 2 and 3 of the 1863 Habeas Act provided that, notwithstanding any suspension order by the President, the military was required to notify federal courts of its detentions, and the courts, in turn, were required to order the *release* of prisoners, under specified conditions, if and when the grand jury failed to indict them. As far as the 1863 decree of *Congress* was concerned, then, Surratt and her fellow defendants probably ought to have been transferred over to the civilian justice system and tried there. As in many other cases, however, the War Department disregarded those provisions of the Habeas Act with respect to the Lincoln trial defendants, based on Joseph Holt's disingenuous construction of the Act to be inapposite to such military prisoners<sup>477</sup>—a reading the Supreme Court unanimously rejected one year later, in *Milligan*.<sup>478</sup>

With respect to the substance of his habeas suspension, Johnson failed to make any finding, as the 1863 Act (and the Constitution) demanded, that public safety "required" suspension of the writ in Surratt's case.<sup>479</sup>

474. Pitman, *supra* note 18, at 250 (emphasis added).

475. See *id.*

476. See *supra* section I.B.3.a (discussing the 1863 Habeas Act).

477. See *supra* notes 302–305 (discussing Holt's narrow interpretation of the 1863 Habeas Act).

478. See *infra* section III.D (discussing the Supreme Court's decision in *Milligan*).

479. In an impromptu address to Judge Wylie in court that morning, Attorney General Speed struggled to offer a hamfisted defense of necessity that amounted to nothing much more than a trite variation on "*inter arma enim silent leges*":

It may not be out of order for me to say here that this whole subject has of course had the most earnest and anxious considerations of the Executive, and of the war-making power of the government. Everyman, upon reflection, and particularly every lawyer knows that war cannot be fought by due process of law, and armies cannot be maintained by the process of law: there must be armies, there must be battles of war; of war comes the law of war, and usage permits battles to be fought, permits human life to be taken without the judgment of the court, and without the process of the court it permits prisoners to be taken and prisoners to be held; and your Honor will not undertake to discharge them although



This crucial lacuna is hardly surprisingly, because Johnson would have been hard-pressed to defend such a finding. Surratt, after all, was hardly a danger to the Republic and, in any event, she likely would have remained in one form of custody or another as higher courts reviewed Wylie's writ. (Even in the worst-case scenario, from the government's perspective, Surratt might eventually have been tried in—and possibly sentenced by—a civilian court.) The effect of Johnson's suspension, then, was merely to expedite her execution—a dubious justification for invoking the suspension power at all.<sup>480</sup>

Judge Wylie, however, did not consider these possible objections—or, in any event, he felt powerless, as a practical matter, to countermand Johnson's order, owing to the simple fact that the War Department was refusing to comply with his command and the hour of execution was at hand.<sup>481</sup> Judge Wylie's response to the stunning turn of events was terse and to the point: He ruled that the court had no choice but to “yield[] to the suspension of the writ of *habeas corpus* from the President of the United States.”<sup>482</sup> “[T]he *posse comitatus* of his court,” he regretfully informed Surratt's attorneys, “was not able to overcome the armies of the United States under the command of the President.”<sup>483</sup>

Less than two hours later, beneath a scorching July sun, Mary Surratt ascended the steps of the hastily built gallows at the Old Arsenal and was hanged from the neck, alongside Lewis Powell, George Atzerodt, and David Herold.

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the constitution says that human life shall not be taken, or man be deprived of his liberty or property without due process of law . . . This country is now in the midst of a great war, and the Commander-in-Chief of the armies of the United States was slain in the discharge of his duties, and if the armies of the United States cannot, under the laws of war, protect its Commander-in-Chief from assassination, and if the laws and usages of war cannot protect by military law, its Commander-in-Chief from assassination and destruction[,] [w]hat has the government come to?

End of the Assassins, N.Y. Times (July 8, 1865) [hereinafter End of the Assassins, N.Y. Times], <http://www.nytimes.com/1865/07/08/news/end-assassins-execution-mrs-surratt-payne-herold-atzerodt-their-demeanor.html> (on file with the *Columbia Law Review*).

480. See Amanda L. Tyler, *Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay* 180 (2017).

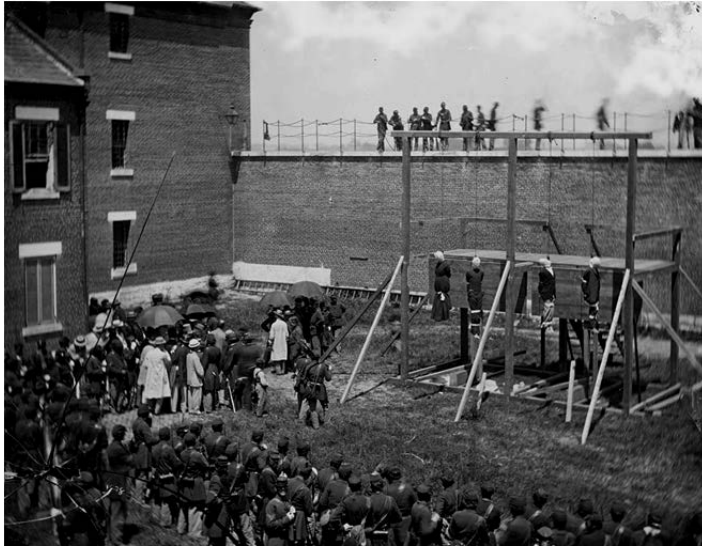
481. In his address to the court, Attorney General Speed put the point in somewhat grotesque terms, albeit effectively:

If the government desires to carry out its purpose in regard to the petitioner, the Court cannot prevent it, and I do not know that it would be possible ever hereafter to bring the case up for argument on this court, for if the petitioner be executed as designed, the body cannot be brought into court, and, therefore, there is an end of the case.

End of the Assassins, N.Y. Times, *supra* note 479.

482. *Id.*

483. Clappitt, *supra* note 460, at 238.



Aftermath of the execution of (left to right) Mary Surratt, Lewis Powell, David Herold, and George Atzerodt, outside the Washington Arsenal, July 7, 1865 (Alexander Gardner) (Source: Library of Congress, Prints & Photographs Division, Civil War Photographs, LC-DIG-cwpb-04230).

This extraordinary assertion of executive resistance in the teeth of a judicial order was significant not merely because it determined the fate of an unusual, celebrated defendant. If Johnson had not “especially” suspended habeas in Surratt’s case, and if Judge Wylie’s order had eventually found favor with the Supreme Court, Surratt’s writ would have cast a legal shadow over the entire Lincoln assassination trial and the sentences of all the defendants, including the three who were hanged with her that afternoon.<sup>484</sup> More broadly still, it also would have called into question most of the hundreds or thousands of military tribunals and sentences over the preceding four years, something the Supreme Court did not do until the following year, in its decision in *Milligan*.<sup>485</sup>

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484. Indeed, William Doster, counsel for Paine and Atzerodt, reportedly followed on the heels of Surratt’s counsel and petitioned for writs on his clients’ behalf that same day, “but as the writ in the case of Mrs. Surratt had been of no avail, Judge Wylie declined to issue the writ” on their behalf, as well. President Johnson on Habeas Corpus, in *The Political History of the United States of America During the Period of Reconstruction* 260, 260 (Edward McPherson ed., Washington, D.C., Philp & Solomons 1871); see also William E. Doster, *Lincoln and Episodes of the Civil War* 256 (1915) (reporting that Surratt “and other prisoners” applied to Judge Wylie for writs that day).

485. See *infra* section III.D.

6. *Attorney General Speed's Legal Opinion*. — Recall that back on May 1, 1865, before President Johnson had decided whether to authorize a military commission, Attorney General Speed issued the shortest formal opinion in the history of his office, the substance consuming only a single sentence: "I am of the opinion that the persons charged with the murder of the President of the United States can be rightfully tried by a military court."<sup>486</sup> Thereafter, Speed was well aware that the constitutionality of the commission engendered deep skepticism and withering critique, both inside the courtroom and without. Accordingly, now that the trial was over and the sentences had been executed, and "[h]aving given the question propounded the patient and earnest consideration its magnitude and importance require,"<sup>487</sup> he set out to write a more elaborate defense of the institution he had blessed back in May. His finished opinion bears the imprecise date "July, 1865."<sup>488</sup>

Speed's opinion began by describing the question presented as whether the individuals charged "with the offence of having assassinated the President" could be tried before a military tribunal, "or must they be tried before a civil court."<sup>489</sup> Of course, the accused before the commission had not themselves "assassinated" the President; the prosecution claimed that their culpability for that crime was based on vicarious liability, owing to the grand conspiracy they were alleged to have joined.<sup>490</sup> In its twenty pages, Speed's opinion never mentioned the defendants themselves, their conduct, or, with the exception of one glancing reference,<sup>491</sup> the fact that they were convicted of a conspiracy.

One of the most noteworthy things about Speed's opinion is that he did *not* rely upon some of the more prominent arguments that Holt and others—including Bingham, during the trial just the month before—had set forth in defense of military jurisdiction. For example, although Speed mentioned on the first page of his opinion that "[m]artial law had been

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486. *Murder of the President*, 11 Op. Att'y Gen. 215, 215 (1865); see also *supra* note 382 and accompanying text.

487. *Military Commissions*, 11 Op. Att'y Gen. 297, 298 (1865).

488. *Id.* at 297. (On July 5, Speed wrote Francis Lieber that he was preparing his opinion on the jurisdiction of the assassins' military commission and hoping to obtain Lieber's "full and free criticism upon it." Letter from James Speed to Dr. Francis Lieber 1–2 (July 5, 1865), in *Francis Lieber Papers, 1815–1888*, The Huntington Library, box 62. Presumably, then, Speed issued the opinion sometime later in July.)

Once again, Speed's predecessor, Edward Bates, was unsparing in his criticism of Speed's work product. See *Diary Entry of Edward Bates* (Aug. 21, 1865), in *The Diary of Edward Bates*, *supra* note 249, at 498, 498–503.

489. *Military Commissions*, 11 Op. Att'y Gen. at 297.

490. See *supra* note 404 (quoting the charge against the conspirators).

491. *Military Commissions*, 11 Op. Att'y Gen. at 298 ("[T]he conspirators not only may but ought to be tried by a military tribunal.").

declared in the District of Columbia,”<sup>492</sup> he immediately added that the civil courts nevertheless were open, held regular sessions, and transacted business “as in times of peace”;<sup>493</sup> accordingly, Speed did not rely upon martial law, or necessity, as a justification for the military trial.<sup>494</sup> Nor did Speed invoke the formalist, textual argument that Congress’s power to “make rules for the government of the land and naval forces”<sup>495</sup> includes the power to create military commissions to try persons who are not part of such forces. To the contrary, he expressly repudiated that argument: “I do not think that Congress can, in time of war or peace, under this clause of the Constitution, create military tribunals for the adjudication of offences committed by persons not engaged in, or belonging to, such forces. This is a proposition too plain for argument.”<sup>496</sup>

Speed even went out of his way to express reverence for the constitutional protections of Article III and the Fifth and Sixth Amendments, without so much as hinting at the argument, often heard in that era, that such constitutional guarantees are inapplicable in wartime:

These provisions of the Constitution are intended to fling around the life, liberty, and property of a citizen all the guarantees of a jury trial. These constitutional guarantees cannot be estimated too highly, or protected too sacredly. The reader of history knows that for many weary ages the people suffered for the want of them; it would not only be stupidity but madness in us not to preserve them. No man has a deeper conviction of their value or a more sincere desire to preserve and perpetuate them than I have.<sup>497</sup>

Accordingly, he wrote, “It must be constantly borne in mind” that military tribunals “cannot exist except in time of war.” Furthermore, reasoned Speed, even in times of war such tribunals are impermissible “where the civil courts are open” . . . with one important exception: to try “offenders and offences *against the laws of war.*”<sup>498</sup>

Speed thereby made a move that the Supreme Court would endorse many decades later, at least in part, in *Ex parte Quirin*—concluding that although military courts are constitutionally dubious, they are permissible in wartime when convened for prosecution of “offences against the

492. *Id.* at 297. As noted *supra* notes 429–439 and accompanying text, this assertion was misleading, at best: There had not been any such declaration of martial law in the District.

493. Military Commissions, 11 Op. Att’y Gen. at 297.

494. In retrospect, this omission is surprising, because Speed and his fellow government attorneys relied almost exclusively on the martial law rationale in defending the constitutionality of commissions before the Supreme Court several months later in *Milligan*. See *infra* section III.D.

495. U.S. Const. art. I, § 8, cl. 14.

496. Military Commissions, 11 Op. Att’y Gen. at 298.

497. *Id.* at 311.

498. *Id.* at 309 (emphasis added).

laws of war.”<sup>499</sup> Speed offered many examples of such law-of-war offenses, such as the rule of distinction, which prohibits the targeting of non-combatants; the injunction against harsh or cruel treatment of prisoners and the wounded; the requirement to honor flags of surrender; and the prohibition on breaching terms of surrender.<sup>500</sup> Speed was also crystal clear about the source of the “laws of war” to which he referred—they are a subset of the *international* law of nations; indeed, they constituted (at least at the time) “much the greater part of the law of nations.”<sup>501</sup>

This left at least two major questions that Speed still had to answer: What was the source of this constitutional exception for military trials of offenses against the laws of war? And how, exactly, had Booth’s coconspirators *violated* that body of international law?

As to the former question, Speed argued that by using the terms “offenses” rather than “crimes” to describe violations of the law of nations, the “Define and Punish” Clause of Article I of the Constitution suggests that such international law violations are not among the “crimes” to which Article III and the Fifth and Sixth Amendments refer.<sup>502</sup> He further suggested that it is the laws of war themselves—international sources, to be sure, but laws “constitut[ing] a part of the laws of the land” nevertheless<sup>503</sup>—that provide the affirmative authority for the jurisdiction of military tribunals to try violations of the laws of war, a development that Speed described as “in the interest of justice and mercy,” to *save* lives and to prevent cruelty.<sup>504</sup>

Speed’s argument in this respect was not especially convincing.<sup>505</sup> Even assuming Speed was correct concerning a constitutionally permissible

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499. See Lederman, *Wartime Military Tribunals*, supra note 67, at 1583–89 (discussing this aspect of *Quirin*).

500. *Military Commissions*, 11 Op. Att’y Gen. at 302–04.

501. *Id.* at 299; see also *id.* at 300 (“[W]ar is required by the framework of our Government to be prosecuted according to the known usages of war amongst the civilized nations of the earth . . .”); *id.* at 310 (referring to “the laws and usages of war as understood and practiced by the civilized nations of the world”); *id.* at 316 (referencing the “law of nations”). Speed invoked international historical examples when canvassing many of the restrictions of the law of war. *Id.* at 302–04.

502. *Id.* at 312.

503. *Id.* at 299.

504. *Id.* at 305, 308.

505. Speed repeatedly reasoned that the laws of war encourage or even require military trials of such offenses because the alternative is savage butchery—punishment in the form of slaughter. *Id.* at 307–08. Military tribunals therefore “exert a kindly and benign influence in time of war.” *Id.* at 309; see also *id.* at 315–16 (“The object of such tribunals is obviously intended to save life, and when their jurisdiction is confined to offences against the laws of war, that is their effect. They prevent indiscriminate slaughter; they prevent men from being punished or killed upon mere suspicion.”). Speed may have been correct that the laws of war often insist upon trial rather than summary execution of detained individuals who have breached those laws. But the alternative to military trials is not simple butchery of those within the commander’s custody: Such persons can, after all,

law-of-war jurisdiction of military war tribunals, however, his opinion was much more opaque on the ultimate question about the Lincoln case itself: In what way did Booth—or, more to the point, Booth’s alleged compatriots—*violate* the international law of war by (allegedly) plotting to kill Lincoln?

It is tempting to assume, as some often do, that the premeditated killing of a particular, known individual is, by definition, an “assassination” that the law of war presumptively forbids, even when the person in question is a member or leader of enemy forces in an armed conflict.<sup>506</sup> Such an assumption is mistaken, however, as President Barack Obama explained in a landmark speech he delivered in 2013 at the National Defense University,<sup>507</sup> just across a parking lot from the spot at Fort McNair where Powell, Atzerodt, Herold, and Surratt were executed for their involvement in the killing of the Commander in Chief of U.S. forces. In that speech, Obama explained that targeting an operational leader of enemy forces with lethal force does not, without more, violate international

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be detained during hostilities and can be tried in civilian courts for any crimes they committed. (Indeed, the general rule under the law of war is that prisoners, like other persons who are *hors de combat*, may not be harmed.) Nor, contrary to Speed’s suggestion, does the law of war affirmatively authorize the use of military, rather than civilian, tribunals in a particular state’s legal system. The law of nations is generally indifferent as to the civilian or military nature of the tribunal a state may choose to use. At one point in his opinion, Speed claimed that “it would be . . . palpably wrong for the military to hand [law-of-war offenders] over to the civil courts.” *Id.* at 317. He did not defend that proposition, however, and the “wrongness” of civilian trials of law-of-war violations is certainly not “palpable,” at least not today. See, e.g., 18 U.S.C. § 2441 (2012) (providing that certain war crimes committed by U.S. nationals are criminal offenses, which are triable in Article III courts).

506. See, e.g., Stephen Carter, *The Violence of Peace: America’s Wars in the Age of Obama* 74 (2011). “[T]he [Obama] Administration does not like this word,” writes Carter, “but, to paraphrase one of my wisest professors, you can call it Thucydides or you can call it bananas, but it’s assassination all the same.” *Id.* at 80. Carter thus assumes that such a targeted killing by the United States of a leader of enemy forces not only violates customary law, *id.* at 74, and the so-called “plain language” of Article 23(b) of the 1907 Hague Convention (which Carter misquotes as prohibiting “assassination,” although that term does not appear in Article 23), *id.*, but that it also must violate section 2.11 of Executive Order 12,333, entitled “United States Intelligence Activities,” 46 Fed. Reg. 59,941, 59,952 (Dec. 4, 1981), which provides that “[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.” Carter is simply mistaken, however: Such a targeted killing might be colloquially referred to as an “assassination,” but it is not an “assassination” as that term is understood in international law or in Executive Order 12,333. See Marty Lederman, *The U.S. Perspective on the Legal Basis for the Bin Laden Operation*, *Opinio Juris* (May 24, 2011), <http://opiniojuris.org/2011/05/24/the-us-perspective-on-the-legal-basis-for-the-bin-laden-operation/> [<http://perma.cc/2D5E-QZPH>].

507. See Barack Obama, *Remarks by the President at the National Defense University* (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> [<http://perma.cc/M7RA-RSR4>].

law.<sup>508</sup> Indeed, the law of war would in the ordinary course *privilege* such a killing of the leader of enemy forces, in the sense of immunizing members of state armed forces from culpability for what would otherwise be murder under the victim state's domestic law.<sup>509</sup>

If that is right, then why did Attorney General Speed conclude that the individuals who were tried and executed just a couple of hundred yards from where Obama spoke had committed a law-of-war offense?

One possible theory might have been premised, not on the fact that Booth targeted the Union Army's Commander in Chief, a legitimate military target, but instead on virtually the converse concern—namely, that the targets of the plot described in the charge included two *civilian* officers, Vice President Johnson and Secretary of State Seward.<sup>510</sup> Today, it would likely violate the law-of-war principle of distinction for a member of a state army to deliberately target such civilians (at least to the extent they were not directly participating in the armed conflict),<sup>511</sup> and such conduct almost certainly would have been considered a violation in 1865, as well.<sup>512</sup> Indeed, just one year before Lincoln's killing, a rumored Union plot to destroy Richmond and to kill the entire Confederate cabinet engendered great controversy because of the widespread understanding that such a scheme would have violated settled norms of civilized warfare.<sup>513</sup>

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508. See *id.*

509. See Military Commissions, 11 Op. Att'y Gen. at 305–06 (referring to the combatant's privilege); see also, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 43(2), June 8, 1977, 1125 U.N.T.S. 4 [hereinafter API] (“Members of the armed forces of a Party to a conflict . . . are combatants, that is to say, they have the right to participate directly in hostilities.”); Lieber Code, *supra* note 212, art. 57, at 258 (“So soon as a man is armed by a sovereign government, and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts, are no individual crimes or offences.”); Jens David Ohlin, The Combatant's Privilege in Asymmetric and Covert Conflicts, 40 *Yale J. Int'l L.* 337, 342–43 (2015) (challenging the view that the combatant's privilege does not apply to noninternational armed conflicts).

510. See *supra* note 404 (quoting from the charge).

511. See, e.g., API, *supra* note 509, art. 51(2) (“The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”).

512. See Military Commissions, 11 Op. Att'y Gen. at 302 (“Non-combatants are not to be disturbed or interfered with by the armies of either party except in extreme cases.”).

513. In March 1864, Confederate soldiers claimed to have found on the body of a slain Union officer, Colonel Ulric Dahlgren, papers directing forces under his command to burn Richmond to the ground and to slaughter President Jefferson Davis and his entire cabinet “on the spot.” See Duane Schultz, *The Dahlgren Affair: Terror and Conspiracy in the Civil War* 144–45, 152–57 (1998); see also Letter from Gen. R.E. Lee to Major Gen. George G. Meade (Apr. 1, 1864), in *Official Records*, *supra* note 156, ser. I, vol. 33, at 178, 178–79 (enclosing documents allegedly found on Dahlgren's body). This naturally caused great consternation in the South, because such a plot would, at the very least, have violated well-established chivalric norms. Union Army General George Meade assured Robert E. Lee, however, that “neither the United States Government, myself, nor General Kilpatrick

Speed did not, however, invoke this theory, either, presumably because Booth and his cohorts were not part of the Confederate forces and therefore could not have violated the law-of-war norm that prohibits combatants from deliberately targeting civilians. To the contrary, Speed's opinion might be read to suggest, at least implicitly, that the accused violated the law of war precisely because they were *not* members of the Confederate forces at the time of their conduct.<sup>514</sup> At several places, Speed asserted that certain *unprivileged* forms of belligerency in wartime—such as killing without a commission from the state;<sup>515</sup> “unit[ing] with banditti, jayhawkers, guerillas, or any other unauthorized marauders”,<sup>516</sup> spying;<sup>517</sup> and even communicating with the enemy<sup>518</sup>—are themselves offenses against the law of nations. In this respect Speed fundamentally misunderstood the law of war—in particular, the critical distinction between belligerency that *violates* that law (such as targeting civilians or torture), and belligerent acts that international law does not prohibit but that the law of war also *does not privilege* (i.e., belligerent conduct that can be punished pursuant to a state's *domestic* law).<sup>519</sup> As we have seen with

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[Dahlgren's commander] authorized, sanctioned, or approved the burning of the city of Richmond and the killing of Mr. Davis and cabinet, nor any other act not required by military necessity and in accordance with the usages of war.” Letter from Major Gen. George G. Meade to Gen. R. E. Lee (Apr. 17, 1864), *in* Official Records, *supra* note 156, ser. I, vol. 33, at 180, 180.

514. Lewis Powell had previously been in the Confederate Army, and spent some time as a Union prisoner, but he deserted from the army in January 1865 and had taken an oath of allegiance to the United States. During the trial, his counsel argued that his conduct—the attack on Secretary of State Seward—was morally indistinguishable from that of “the best rebel soldiers,” who had themselves “picked off high officers of the government.” Pitman, *supra* note 18, at 310. Whatever the moral merits of that somewhat desperate plea might have been, Powell's conduct differed from that of the rebel soldiers in question in at least two important legal respects: Most fundamentally, Powell was no longer a member of the Confederate Army, acting within the chain of command; thus the combatant's privilege no longer protected him from an attempted murder prosecution under U.S. law. Second, he attacked not “the chief of the enemy,” *id.* at 311, but instead a civilian officer (Seward)—conduct that is presumptively a violation of the law of war when committed by enemy forces. (Powell's counsel tried to justify the attack on Seward by describing the Secretary as “an adviser in oppression, and a slippery advocate of an irrepressible conflict.” *Id.* It is unclear, even today, whether such a military advice function, performed by a civilian official, would make that official a permissible target of a state's armed forces.)

515. Military Commissions, 11 Op. Att'y Gen. at 301.

516. *Id.* at 312.

517. *Id.* at 312–13.

518. *Id.* at 312.

519. See, e.g., Richard R. Baxter, So-called ‘Unprivileged Belligerency’: Spies, Guerrillas, and Saboteurs, 28 Brit. Y.B. Int'l L. 323, 339–40 (1951); Marty Lederman, Unprivileged Does Not Mean Prohibited, Just Security (Sept. 26, 2013), <http://www.justsecurity.org/1153/unprivilegedunlawful/> [<http://perma.cc/A4RY-C3X8>].



respect to a similar conflation in the Lieber Code,<sup>520</sup> this was and is a common mistake—indeed, one the Supreme Court itself later committed in *Quirin*.<sup>521</sup>

This error probably was not of great consequence for Speed's opinion itself, however, because the Attorney General never did quite come out and argue that the Lincoln conspirators violated any of those alleged law-of-war prohibitions on unprivileged belligerency. Instead, at the very end of his opinion, Speed suggested a different theory for why Booth "and his associates" had violated the law of war: by virtue of the fact that they were "*secret* active public enemies."<sup>522</sup> Citing the great law-of-war theorist Emer de Vattel, Speed intimated that what made Booth's killing of Lincoln an "assassination" that violated the law of nations rather than an ordinary domestic-law murder was a combination of two things: (i) that Booth acted as a "public foe"—that is, with the objective of harming the state as such (rather than, e.g., for private gain); and (ii) that the killing of Lincoln was "treacherous."<sup>523</sup>

The first factor—Booth's motive to harm the state—does not establish a law-of-war offense: After all, that is what enemy soldiers try to do every day, and it does not violate the law of war. But what about the alleged "treacherous" nature of the killing? Treachery is, indeed, a violation of the law of war. The most familiar variant of the offense of treachery is what we know today as perfidy. Not all secret attacks in war are perfidious, however, and Booth's was not. Perfidy requires a particular form of *deceit* (not simply stealth)—namely, the feigning of a protected status under the law of war in order to induce the deceived party to forebear its own use of force, and thereby to gain an advantage that empowers the deceiving party to attack the deceived party. The modern formulation of the offense is described in Article 37(1) of Protocol I to the Geneva Conventions:

It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy.<sup>524</sup>

Article 37(1) offers examples of perfidious conduct, including, of most pertinence, "the feigning of civilian . . . status."<sup>525</sup> Importantly, however,

520. See *supra* section I.A.2 (discussing the Lieber Code's theory of alleged violations of the "laws of war").

521. See *infra* section V.A.

522. Military Commissions, 11 Op. Att'y Gen. at 316 (emphasis added).

523. *Id.* at 316 (quoting 3 Emer de Vattel, *The Law of Nations* ch. 8, § 155, at 559 (Béla Kapossy & R. Whatmore eds., 2008)).

524. API, *supra* note 509, art. 37(1).

525. *Id.*

a feigned civilian status is not sufficient, standing alone, to establish an unlawful perfidious killing—at least not under modern formulations of the prohibition. What is required, in addition, is proof that the victim target *exercised forbearance* because of the killer’s feigned civilian—that is, protected—status, thereby enabling the fatal attack to occur.<sup>526</sup>

There is no reason to believe—and neither Speed nor the prosecution argued—that Booth’s killing of Lincoln was perfidious. There was no evidence, for instance, that Booth was able to enter the President’s box in Ford’s Theatre by deceiving Army officers into thinking that he was an ordinary civilian rather than a part of enemy forces.<sup>527</sup> Indeed, Booth *was* a civilian, not a member of the Confederate Army. He didn’t feign any status at all, let alone induce reliance by the Union Army on any such feigned status.

It appears, then, that Speed must instead have been referring to another, less familiar variant of “treachery,” distinct from perfidy. The Attorney General’s citation to Vattel is telling. Vattel opined, in the passage of his treatise Speed cited, that it would be an impermissible “treacherous murder,” “contrary to the law of nature,” for one belligerent party to “hir[e] a traitor to assassinate our enemy,” including, in particular, a “subject[] of the party whom we cause to be assassinated.”<sup>528</sup>

This particular ancient corner of the customary law of treachery—a prohibition on inducing or soliciting an enemy’s subject to kill his leader—does not appear often, if at all, in modern codes. Yet perhaps it was understandable for Speed to refer to it. Vattel, after all, did describe it, as did one of the leading international law treatises of the day, written by the esteemed international law scholar Henry Halleck, who was also General in Chief of the Union Armies during the war.<sup>529</sup> This obscure

526. See generally Sean Watts, *Law-of-War Perfidy*, 219 *Mil. L. Rev.* 106 (2014). As Professor Watts explains, the law of perfidy was more indistinct, and less well-settled, in the nineteenth century and typically was focused on the idea that it was impermissible to breach “good faith” in a way that was inconsistent with chivalric norms of honor. *Id.* at 125–34. Nevertheless, the modern idea of the prohibition was present, at least in nascent form. See, e.g., Lieber Code, *supra* note 212, art. 117, at 268 (“It is justly considered an act of bad faith, of infamy or fiendishness, to deceive the enemy by flags of protection.”).

527. Lincoln was not protected by a military guard on the evening of April 14. See Kauffman, *American Brutus*, *supra* note 11, at 393 (“Mr. Lincoln had never been guarded in the theater before, and if anyone had suggested he be accompanied by guards on Good Friday, he undoubtedly would have rejected the idea.”). Of course, others in Ford’s Theatre that evening, including off-duty officers, paid Booth no mind precisely because he was a well-known actor who did not appear to be doing anything out of the ordinary. Presumably someone in the vicinity, even if not Army personnel, might have tried to interdict Booth had he revealed his true intentions—what Speed called his role as a “public foe”—upon entering the theater. But that fact does not establish that the killing was in violation of the law of war.

528. Vattel, *supra* note 523, ch. 8, § 155, at 559.

529. Halleck, *International Law*, *supra* note 157, ch. XVI, § 20, at 400.

subset of the law of treachery described the conduct implied in the first part of the charge against the Lincoln defendants: Recall that they were accused of “traitorously” “combining, confederating, and conspiring” with not only Booth and John Surratt, but also with Jefferson Davis and other Confederate officers and agents, “to kill and murder” Lincoln, Johnson, Seward, and Grant.<sup>530</sup>

That charge, to be sure, might have suggested a violation of the law-of-war prohibition on treachery, as described by Vattel, committed *by Davis and the other Confederate officers*. Even on this theory, however, it is difficult to see how the actual defendants before the military commission might have committed a law-of-war violation (nor did Speed even try to establish the case against them). After all, they were the disloyal subjects who allegedly agreed to betray Lincoln, rather than the enemies who induced such subjects to betray.<sup>531</sup> Moreover, the prosecution introduced very little evidence—as to some of the defendants, none at all—that the accused themselves (as opposed to Booth and John Surratt) were induced to act by Confederate officers and agents. Speed was, therefore, almost certainly wrong in his assumption that the defendants had violated the international law of war.

Most importantly for present purposes, however, even if Speed were correct that some or all of the alleged conspirators *were* charged with law-of-war violations of an attempted “treacherous killing” by virtue of the alleged Confederate inducement, it would only mean—per the Court’s later decision in *Quirin*—that the military commission had constitutional jurisdiction to try the defendants *for those law-of-war violations*. But to the extent the defendants were also charged with *domestic-law* offenses, such as a “traitorous” killing and a conspiracy, Speed’s opinion did not establish the commission’s proper jurisdiction—indeed, he did not endeavor to do so. To the contrary, Speed opined that where civil courts are open, military tribunals “cannot exist except in time of war” to try “offenders and offences *against the [international] laws of war.*”<sup>532</sup>

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530. See *supra* note 404 (quoting from the charge).

531. Vattel wrote that the attempted killing by the induced subject would be “infamous and execrable, both in him who executes and in him who commands it.” Vattel, *supra* note 523, ch. 8, § 155, at 559. But Vattel did not say directly whether the disloyal subject (as opposed to the enemy inducer) would thereby violate the law of war. Halleck, to similar effect, characterized famous cases of killings by disloyal subjects as “infamous and execrable” and added that the “detestation of the civilized world is not confined to the perpetrators of such acts; those who command, encourage, countenance, or reward them, are equally execrated.” Halleck, *International Law*, *supra* note 157, ch. XVI, § 20, at 400. Like Vattel, however, Halleck did not specify whether the subjects who were induced to kill their leader would thereby violate international law.

532. *Military Commissions*, 11 Op. Att’y Gen. 297, 309 (1865).

In sum, Attorney General Speed's post hoc opinion, whatever its flaws, actually undermined rather than supported the notion that military commissions can be used to try wartime defendants for offenses other than violations of the international law of war. Moreover, almost all of the arguments offered by the prosecution during the assassins' trial itself do not withstand scrutiny, and the Supreme Court expressly rejected the principal such argument shortly thereafter, in *Milligan*.

### III. AFTER THE WAR: *MILLIGAN* AND ITS AFTERMATH

The end of the war did not mean that the question of the constitutionality of military adjudication dissipated—to the contrary, in the first few years after the Lincoln assassination trial, all three branches of the federal government had repeated opportunities to consider the question afresh, without the exigencies of war pressing upon them and in circumstances in which emotions were not nearly so charged as in the weeks after the killing of the President. Both the executive branch and the judiciary took significant steps to repudiate the wartime practices of Stanton and Holt's War Department. Congress, by contrast, which had pushed back on military jurisdiction during the war itself, now took steps to empower the military, not so much due to a change of heart about the past but instead in order to facilitate Reconstruction. Remarkably, throughout these years of intense attention to the constitutional question, the trial of the assassination conspirators, so fresh in everyone's mind, played virtually no role—from all that appears, it had already come to be viewed as an idiosyncratic outlier or aberration, rather than a signal event that might shed light on the pressing constitutional question.

#### A. *Precursor to Milligan: The Coles County Riot and Justice Davis's Advice to Lincoln*

The most significant postwar assessment of the constitutional question was, of course, the Supreme Court's 1866 decision in *Milligan*.<sup>533</sup> That decision, however, was presaged by a less well-known case—one that, like *Vallandigham* and *Milligan* itself, also involved Northern resistance to the Union war effort.

After Clement Vallandigham's exile, factions of the so-called "Peace Democrats," or "Copperheads," began to form secret societies across the Midwest, some of which became, in effect, military arms of the Northern antiwar movement, which engaged in sporadic violent interventions designed to weaken the Union Army.<sup>534</sup> By early 1864, they called themselves

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533. Ex parte *Milligan*, 71 U.S. (4 Wall.) 2 (1866).

534. See Charles H. Coleman & Paul H. Spence, The Charleston Riot, March 28, 1864, 33 J. Ill. St. Hist. Soc'y 7, 10–11 (1940).

the Sons of Liberty; Vallandigham was (nominally) their Supreme Commander.<sup>535</sup>

On March 28, 1864, a riot between Union soldiers on leave and a band of Peace Democrats broke out at a courthouse in Charleston, Illinois.<sup>536</sup> Six soldiers and three civilians were killed.<sup>537</sup> A grand jury in Coles County returned indictments for murder and riot against several of those alleged to have targeted Union soldiers in the fight.<sup>538</sup> It was military, rather than civilian, authorities, however, who rounded up and arrested sixteen individuals (only some of whom had been indicted by the grand jury).<sup>539</sup> In his report to Washington on the riot and the arrests, Lieutenant Colonel James Oakes wrote that “I fear it would be useless to turn [the detainees] over for trial by the civil tribunals, whether State or Federal, to whose jurisdiction they would belong”; instead, “[p]rompt and vigorous dealing by military law could not fail to be of salutary and lasting effect.”<sup>540</sup> A military commission for the case was presently appointed, which was to sit in Cincinnati.<sup>541</sup>

Counsel for the prisoners filed a request for a writ of habeas corpus in the Fourth Circuit federal court in Illinois, seeking to be discharged from military custody.<sup>542</sup> A pair of jurists—Judge Samuel Treat and Supreme Court Justice David Davis—granted the writ.<sup>543</sup> Davis was a longtime friend of the President—he effectively managed Lincoln’s campaign in 1860—and they had both practiced in the Coles County courthouse where the riot occurred.<sup>544</sup> In 1862, Lincoln appointed Davis to serve on the Supreme Court.<sup>545</sup> In 1864, however, the President suspended the privilege of the writ of habeas corpus for the alleged Charleston rioters—in other words, he authorized the military to disregard Justice Davis’s discharge order—and the judges therefore had

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535. *Id.*

536. See generally Peter J. Barry, *The Charleston Riot and Its Aftermath: Civil, Military, and Presidential Responses*, 7 *J. Ill. Hist.* 82 (2004) [hereinafter Barry, *The Charleston Riot*]; Coleman & Spence, *supra* note 534, at 22–30.

537. Coleman & Spence, *supra* note 534, at 29.

538. *Id.* at 43.

539. *Id.* at 37–39.

540. Report from Lieutenant Colonel James Oakes to Colonel James B. Fry (Apr. 18, 1864), *in* *Official Records*, *supra* note 156, ser. I, vol. 32, pt. 1, at 630, 633.

541. Barry, *The Charleston Riot*, *supra* note 536, at 91.

542. *Id.*

543. *Id.* at 92.

544. See Peter J. Barry, “I’ll Keep Them in Prison Awhile . . .”: Abraham Lincoln and David Davis on Civil Liberties in Wartime, *J. Abraham Lincoln Ass’n*, Winter 2007, at 20, 20–21 & n.1 (2007) [hereinafter Barry, *Civil Liberties in Wartime*]; see also Barry, *The Charleston Riot*, *supra* note 536, at 93 (discussing Lincoln and Davis’s friendship and correspondence).

545. Barry, *Civil Liberties in Wartime*, *supra* note 544, at 20.

no choice but to dismiss the case, paving the way for a military adjudication.<sup>546</sup>

Even though he had undermined the court's jurisdiction, apparently Lincoln was concerned about the case, because on July 2 he wrote to Justice Davis, asking for his views on it.<sup>547</sup> Justice Davis promptly wrote back that he would "very cheerfully give you my impression of the case," which was, quite simply, that the government "ought not to have taken these men out of the hands of the law."<sup>548</sup> Presaging what the Court would later do in *Milligan* (in an opinion that he himself would write), Justice Davis focused mainly on section 2 of the 1863 Habeas Act<sup>549</sup>. Because the Secretary of War had failed to furnish a list of the detainees to the court, they were entitled to be discharged from military custody once the local grand jury had adjourned (which it had done after issuing indictments in the case).<sup>550</sup> For the military to continue to hold them, explained Justice Davis, was not only "oppression" but also a violation of the "purpose and intention of the act of Congress."<sup>551</sup> In addition to the statutory problem, Davis also noted that although the prisoners might have committed horrible crimes, they had not violated any federal law, and certainly could not be "tried by military law" because they had "violated no military law."<sup>552</sup>

Davis apparently persuaded Lincoln. The President decided that the prisoners should not be subject to military jurisdiction. Although he delayed issuing his order until November 4,<sup>553</sup> some of the prisoners were eventually transferred to the civilian justice system and the others were released before any military trial could take place.<sup>554</sup>

#### B. *Meanwhile, in Indiana (Early Developments in the Milligan Case)*

Contemporaneous with Davis's exchange with Lincoln in July 1864, a number of leaders of the Sons of Liberty hatched a plan to release Confederate prisoners from Army camps throughout the Midwest and

546. See Report from Major Addison A. Hosmer to President Abraham Lincoln (July 26, 1864), in *Official Records*, supra note 156, ser. I, vol. 32, pt. 1, at 635, 643 (referring to the "express order" of the President that the writ be disregarded and the prisoners retained by the military).

547. Barry, *Civil Liberties in Wartime*, supra note 544, at 23.

548. Letter from Justice David Davis to President Abraham Lincoln (July 4, 1864), reprinted in Barry, *Civil Liberties in Wartime*, supra note 544, at 27, 28.

549. See supra notes 292–293 and accompanying text (quoting section 2 of the 1863 Habeas Act).

550. Letter from David Davis to Abraham Lincoln, supra note 548, at 29.

551. *Id.*

552. *Id.* at 28.

553. Order of President Lincoln (Nov. 4, 1864), in *Official Records*, supra note 156, ser. I, vol. 32, pt. 1, at 643, 643.

554. See Barry, *The Charleston Riot*, supra note 536, at 98–103.

arm them with weapons seized from government arsenals.<sup>555</sup> The government, however, had a source on the inside and interdicted the plan before it became operational, arresting several of the participants, including Lambdin Milligan, a prominent Indiana lawyer. The detainees were charged with five vaguely identified offenses before a military commission: conspiracy against the government; affording aid to rebels; inciting insurrection; disloyal practices; and an alleged “violation of the laws of war,” namely, endeavoring to aid the enemy “while pretending to be peaceable loyal citizens of the United States.”<sup>556</sup> The commission found four of the defendants guilty and sentenced three of them (Milligan, William Bowles, and Steven Horsey) to hang.<sup>557</sup>

One of the condemned’s counsel, who knew Lincoln well, met with the President and asked him to review the case. Reportedly, at their meeting the President identified “errors and imperfections” in the record that required correction—a process, Lincoln noted with a “pleased expression,” that would take a considerable amount of time, by which point the war might well be over, thus mooted out the case.<sup>558</sup> This is yet further evidence that the President was uncomfortable with the legality of the commissions<sup>559</sup>—or, at a minimum, that Lincoln was not eager to press the point or to tee up the question to the Supreme Court, especially given Justice Davis’s warnings that the Court would likely declare the tribunals to be unlawful.

After Lincoln was killed, however, his successor had no such qualms. Johnson approved the verdicts against Milligan, Bowles, and Horsey on May 2, the day after he established the Lincoln assassination commission, and execution was set for May 19, in the midst of the assassination trial.<sup>560</sup> On May 10, just as the assassination trial was getting underway, Milligan’s counsel filed a habeas petition in a circuit court in Indianapolis.<sup>561</sup>

As in the 1864 Coles County case, Justice Davis was one of the two judges who considered the petition; and, once again, Justice Davis (joined by the other judge, District Judge David McDonald) wrote an extraordinary letter to the President.<sup>562</sup> The judges explained to Johnson that it was their “duty as your friends, as judicial officers, and as citizens,

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555. See *The Milligan Case*, supra note 34, at 68–69 (reporting the third and fourth specifications of the first charge in the military commission proceeding).

556. See *id.* at 67–73.

557. See *id.* at 81–82.

558. Herndon & Weik, *Abraham Lincoln*, supra note 255, at 267 n.\* (recounting the statement of Joseph E. McDonald to Herndon on August 28, 1888).

559. See supra section I.B.2.

560. See *The Milligan Case*, supra note 34, at 39.

561. See *id.* at 40.

562. Letter from Justice David Davis and Judge David McDonald to President Andrew Johnson (May 11, 1865), in Fairman, *History of the Supreme Court*, supra note 247, at 197, 197–99.

in all good faith and good will to lay [these] suggestions before you.”<sup>563</sup> It would be a “safe and wise policy,” they explained, not to execute the prisoners until the judicial challenges were completed: “We would most respectfully but earnestly urge the wisdom and justice of giving [the prisoners] time to be heard before [the Supreme Court],” because if they were executed and then the Court were to hold that the tribunal was without jurisdiction, it would be a “stain on the national character,” and “the government would be justly chargeable with lawless oppression.”<sup>564</sup> Although purporting not to express an opinion on the merits, the judges pointedly added that the military commission “is a new tribunal unknown to the Common Law” and that “[t]here is no denying the fact that many learned lawyers doubt its jurisdiction over citizens unconnected with the military, as these men were”—a fairly audacious suggestion, in light of the fact that Johnson had recently authorized the Lincoln assassination trial that was just then commencing.<sup>565</sup>

Just as before, the judges’ letter had its intended effect: Later that month, Johnson commuted the sentences to life at hard labor.<sup>566</sup> Meanwhile, the two judges certified that they were split on the merits of the habeas petition, a result that arguably permitted a form of certification of the merits questions to the Supreme Court.<sup>567</sup> The Court did not hear argument in *Milligan*, however, until March of 1866, long after the Lincoln assassination trial ended.<sup>568</sup>

### C. *What to Do with Jefferson Davis?*

May 10, 1865, was an auspicious day, owing to a confluence of three distinct, watershed events related to military justice at the end of the Civil War. The accused in the Lincoln assassination proceeding were arraigned before the new military commission. Lambdin Milligan filed his petition for a writ of habeas corpus, challenging the jurisdiction of the military commission that had convicted him. And, perhaps most important of all, Union Army forces captured Confederate President Jefferson Davis in Irwin County, Georgia.

A few days earlier, President Johnson had publicly offered a \$100,000 reward for Davis’s capture, so that he could “be brought to trial . . . to the end that justice may be done.”<sup>569</sup> In his call for capture, Johnson alleged:

563. *Id.* at 198.

564. *Id.*

565. *Id.*

566. *Id.* at 199.

567. *Id.* at 199–200.

568. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 4 (1866).

569. President Andrew Johnson, Proclamation 131—Rewards for the Arrest of Jefferson Davis and Others (May 2, 1865), <http://www.presidency.ucsb.edu/ws/index.php?pid=72356> [<http://perma.cc/9BJP-GQEH>].



[E]vidence [exists] in the Bureau of Military Justice, that the atrocious murder of the late President, Abraham Lincoln, and the attempted assassination of the Hon. William H. Seward, Secretary of State, were incited, concerted, and procured by and between Jefferson Davis, . . . and other rebels and traitors against the Government of the United States, harbored in Canada.<sup>570</sup>

Indeed, the charges in the pending Lincoln conspirators' military commission even alleged that the eight accused individuals had conspired with Davis and other Confederate officials to kill the President.<sup>571</sup> In theory, therefore, Davis might have been joined to the pending trial proceedings in the Old Arsenal. Instead, the military held Davis as a prisoner of war, so that Johnson could decide how to deal with him after the Lincoln trial ended.<sup>572</sup>

In the conspirators' trial, the prosecution's case for Davis's involvement with the assassination turned out to be far more uncertain than Holt and Stanton had promised; and in the months that followed, the case became flimsier still, as one witness after another was revealed to be duplicitous.<sup>573</sup> The prospect of trying Davis for Lincoln's murder—or some law-of-war offense related to the killing<sup>574</sup>—therefore rapidly dissipated. In any event, Johnson was inclined to try Davis for treason, in order to demonstrate to the nation that the secession itself was an inexcusable criminal act. Johnson's Cabinet, however, was deeply split on the question of whether to try Davis and, if so, whether the trial should be in a civilian or a military tribunal.<sup>575</sup>

570. *Id.*

571. See *supra* note 404 (quoting from the charge).

572. See *Case of Jefferson Davis*, 11 Op. Att'y Gen. 411, 413 (1866).

573. See, e.g., Leonard, *Lincoln's Avengers*, *supra* note 15, at 217–18. Secretary Stanton even asked Francis Lieber to scour the Confederate archives to find evidence of Davis's complicity in the Lincoln killing or in other violations of the laws of war. That effort came to naught. See Witt, *supra* note 41, at 319–20.

574. See *supra* notes 528–532 and accompanying text (discussing Speed's theory of treachery-by-inducement).

575. The cabinet debates are detailed in *Diary of Gideon Welles*, *supra* note 359, at 335–39, and nicely summarized in Cynthia Nicoletti, *Secession on Trial: The Treason Prosecution of Jefferson Davis* 33–36 (2017); see also Witt, *supra* note 41, at 318. Francis Lieber himself concluded—and probably advised cabinet officials with whom he was meeting in Washington that July—that a military trial was inadvisable, in part because the people had become “jealous” of military trials (perhaps owing to the taint of the Lincoln assassination proceeding), in part because Davis had “committed plain, broad and wide treason, and trying him for any special military crime (or rather for a crime at the common law of war,) would [be] avoiding the main question,” and also because such a choice would “look like a positive distrust in our law as it stands.” Memorandum from Francis Lieber to James Speed 1–2 (July 15, 1865), in *Francis Lieber Papers*, Johns Hopkins Univ., Sheridan Libraries, Special Collections, MS71, box 2, folder 33; see also

Finally, on January 6, 1866—just six months after his opinion on the assassination commission and in the shadow of the upcoming arguments in *Milligan*—Attorney General Speed formally advised that it would be unconstitutional to try Davis in a military court for “high treason”<sup>576</sup> and thus that the military was obliged to transfer him to civil custody.<sup>577</sup> Speed’s opinion appeared to presage the Court’s decision several months later in *Milligan*: He did not so much as entertain the notion that “martial law” or “necessity” might justify a military trial of Davis for a domestic-law crime (treason), even though he found that a “state of war still exist[ed].”<sup>578</sup> After Speed’s decision, a grand jury returned a treason indictment against Davis.<sup>579</sup> A “series of maddening obstacles” precluded the case from going forward, however.<sup>580</sup> Eventually, Davis was released on bail,<sup>581</sup> was indicated a second time,<sup>582</sup> and then, in December 1868, was subject to Johnson’s blanket pardon and amnesty for the offense of treason for all those who participated in the insurrection or rebellion.<sup>583</sup> The President of the Confederacy never stood trial.<sup>584</sup>

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Frank Freidel, Francis Lieber: Nineteenth Century Liberal 369–70 (1971) (describing Lieber’s involvement with cabinet officials that July).

576. Case of Jefferson Davis, 11 Op. Att’y Gen. at 411–12.

577. *Id.* at 413.

578. *Id.* at 411. Speed mentioned in passing that if Davis had been tried and convicted for offenses against the laws of war, as Speed’s opinion of the previous July suggested he might have been, he could remain in military custody. *Id.* at 413. But Speed’s opinion appeared to assume that no law-of-war offense could be proved, and therefore a civilian treason trial was the only prosecutorial option. Speed’s reasoning in this January 1866 opinion—that Davis could in theory be tried for law-of-war offenses in a military court but not for the domestic-law offense of treason—was consistent with his Lincoln trial opinion from the preceding July, yet it contradicted what Speed himself would write several weeks later in the government’s brief in *Milligan*, see *infra* notes 615–616 and accompanying text (quoting the government’s brief in *Milligan*), namely, that military jurisdiction could be predicated only on martial law and that such tribunals could not try law-of-war offenses.

Even after Speed’s opinion, Joseph Holt continued to advocate for a military trial, see Letter from J. Holt, Judge Advocate Gen., to E.M. Stanton, Sec’y of War (Mar. 20, 1866), in *Official Records*, supra note 156, ser. II, vol. 8, at 890, 891; but by this point his pleas were to no avail.

579. See Nicoletti, supra note 575, at 164–66.

580. Witt, supra note 41, at 321.

581. See Nicoletti, supra note 575, at 187–89.

582. See *id.* at 266–68.

583. *Id.* at 300; see also President Andrew Johnson, Proclamation No. 179—Granting Full Pardon and Amnesty for the Offense of Treason Against the United States During the Late Civil War (Dec. 25, 1868), <http://www.presidency.ucsb.edu/ws/?pid=72360> [<http://perma.cc/4WMV-CE7J>].

584. See Witt, supra note 41, at 319–24.

D. *The Supreme Court Finally Weighs In—The Milligan Case*

The transcripts of the records in the *Milligan* case were not all filed in the Supreme Court until early 1866.<sup>585</sup> The Court allotted three hours apiece for oral argument to seven lawyers in the case and heard argument over the course of six days in March 1866.<sup>586</sup>

On April 2, 1866, President Johnson declared the insurrection—the Civil War—to be at an end in all of the Confederate states other than Texas.<sup>587</sup> That declaration suggested that the justification for military tribunals therefore had expired.<sup>588</sup> The very next day, the Court issued its preliminary, summary decision in *Milligan*, sustaining the prisoners' petition for a writ of habeas corpus. The Court briefly stated that Milligan and his codefendants "ought to be discharged from custody" pursuant to the Habeas Act of March 1863<sup>589</sup> and that the military commission "had no jurisdiction legally to try and sentence [them]."<sup>590</sup> The Court promised to issue its opinions in due course, which it finally did at the start of its next term, on December 17, 1866.<sup>591</sup> The author of the majority opinion was none other than David Davis. Not surprisingly, his opinion reflected the advice he had offered to Lincoln, regarding both the 1863 Habeas Act and the Constitution, in relation to the Coles County prisoners two years earlier.<sup>592</sup>

585. See Fairman, *History of the Supreme Court*, supra note 247, at 200.

586. *Id.*

587. President Andrew Johnson, Proclamation No. 153—Declaring the Insurrection in Certain Southern States to Be at an End (Apr. 2, 1866), <http://www.presidency.ucsb.edu/ws/index.php?pid=71987> [<http://perma.cc/H4XC-EA86>].

588. See *id.* ("[M]ilitary tribunals . . . are in time of peace dangerous to public liberty, incompatible with the individual rights of the citizen, contrary to the genius and spirit of our free institutions, and exhaustive of the national resources, and ought not, therefore, to be sanctioned . . . except in cases of actual necessity . . ."). Four weeks later, after the Supreme Court issued its judgment in *Milligan*, the War Department issued a follow-up order clarifying that "hereafter, whenever offenses committed by civilians are to be tried where civil tribunals are in existence which can try them, their cases are not authorized to be, and will not be, brought before military courts-martial or commissions, but will be committed to the proper civil authorities." Executive Order—General Orders: 26—Order in Relation to Trials by Military Courts and Commissions (May 1, 1866), <http://www.presidency.ucsb.edu/ws/index.php?pid=71996> [<http://perma.cc/7ZXQ-L84C>].

589. See supra section I.B.3.a (discussing the Act).

590. *The Milligan Case*, supra note 34, at 224.

591. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). The opinions were not published in full until two weeks later, on January 1, 1867. See *The Milligan Case*, supra note 34, at 47.

592. See supra notes 548–552 and accompanying text (discussing the correspondence between Lincoln and Davis regarding the legality of subjecting the Coles County prisoners to military jurisdiction).

Details of the *Milligan* briefs, the fascinating oral arguments, and the Court's resolution are well recounted elsewhere.<sup>593</sup> For present purposes, three aspects of the case are most salient.

First, the petitioners argued not only that the military commission violated Article III and the Sixth Amendment but also that Milligan was entitled to his freedom by virtue of section 2 of the 1863 Habeas Act.<sup>594</sup> The government's response to this statutory argument was simply to repeat Joseph Holt's unconvincing construction of the Act—that is, that it did not cover the case of prisoners subject to military trial.<sup>595</sup> The Court unanimously rejected that construction; it held that Milligan and the others were entitled to release under the 1863 Act.<sup>596</sup> As Chief Justice Chase explained, the statutory question wasn't even close:

[T]he 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 . . . . [Its] 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.<sup>597</sup>

Second, the government did not so much as mention the Lincoln assassination commission, let alone rely upon it as relevant precedent, although it must have been evident to all concerned that the Court's decision respecting the *Milligan* commission would likely be seen as a judgment upon the legitimacy of the Lincoln tribunal, as well. The government's avoidance of the Lincoln case presumably reflected the fact that David Dudley Field was right: Although that proceeding had ended less than one year earlier and had gripped the nation, it had already become something of an embarrassment, at least in legal circles—a trial that was widely thought to be “of questionable legality.”<sup>598</sup>

593. See, e.g., David J. Barron, *Waging War: The Clash Between Presidents and Congress, 1776 to ISIS* 161–69 (2016); Fairman, *History of the Supreme Court*, supra note 247, at 200–14; Curtis A. Bradley, *The Story of Ex parte Milligan: Military Trials, Enemy Combatants, and Congressional Authorization*, in *Presidential Power Stories* 93, 93–132 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

594. See *Milligan*, 71 U.S. (4 Wall.) at 59 (argument of James Garfield on behalf of the petitioner); Brief for Petitioner at 8, *Milligan*, 71 U.S. (4 Wall.) 2 (No. 350).

595. See *Milligan*, 71 U.S. (4 Wall.) at 21 (argument for the United States); Brief for the United States at 14, *Milligan*, 71 U.S. (4 Wall.) 2 (No. 350) [hereinafter Brief for the United States, *Ex parte Milligan*]; see also supra notes 302–305 (describing Holt's construction).

596. *Milligan*, 71 U.S. (4 Wall.) at 131 (majority opinion); id. at 133–36 (Chase, C.J., concurring).

597. Id. at 136 (Chase, C.J., concurring).

598. Letter from David Dudley Field to Andrew Johnson, supra note 387, at 201.

Tellingly, at oral argument in *Milligan*, only former Attorney General Jeremiah Black, representing Milligan, alluded to the case of the assassination conspirators—and then only to viciously excoriate the formal opinion that Attorney General Speed had issued in July 1865<sup>599</sup> defending the constitutionality of the Lincoln tribunal.<sup>600</sup> Black reserved special contempt for Speed's idea that the use of military commissions was merciful, in comparison to the alternative<sup>601</sup>:

The Attorney General thinks that a proceeding which takes away the lives of citizens without a constitutional trial is a most merciful dispensation. His idea of humanity as well as law is embodied in the bureau of military justice, with all its dark and bloody machinery. For that strange opinion he gives this curious reason: That the duty of the Commander in Chief is to kill, and unless he has this bureau and these commissions he must "butcher" indiscriminately, without mercy or justice. I admit that if the Commander in Chief or any other officer of the Government has the power of an Asiatic king, to butcher the people at pleasure, he ought to have somebody to aid him in selecting his victims, as well as to do the rough work of strangling and shooting. But if my learned friend will only condescend to cast an eye upon the Constitution, he will see at once that all the executive and military officers are completely

599. See *supra* section II.B.6 (discussing Speed's opinion).

600. See *The Milligan Case*, *supra* note 34, at 124. Black argued:

The truth is that no authority exists anywhere in the world for the doctrine of the Attorney General. No judge or jurist, no statesman or parliamentary orator, on this or the other side of the water, sustains him. Every elementary writer from Coke to Wharton is against him. All military authors who profess to know the duties of their profession admit themselves to be under, not above, the laws. No book can be found in any library to justify the assertion that military tribunals may try a citizen at a place where the courts are open.

*Id.* at 132. Later, he continued:

You assert the right of the Executive Government, without the intervention of the judiciary, to capture, imprison, and kill any person to whom that Government or its paid dependents may choose to impute an offence. This, in its very essence, is despotic and lawless. It is never claimed or tolerated except by those governments which deny the restraints of all law. It has been exercised by the great and small oppressors of mankind ever since the days of Nimrod. It operates in different ways; the tools it uses are not always the same; it hides its hideous features under many disguises; it assumes every variety of form;

"It can change shapes with Proteus for advantages,

And set the murderous Machiavel to school."

*Id.* at 143 (quoting William Shakespeare, *The Third Part of King Henry the Sixth*, act 3, sc. 2).

601. See *supra* notes 503–505 and accompanying text.

relieved by the provision that the life of a citizen shall not be taken at all until after legal conviction by a court and jury.<sup>602</sup>

Presumably, Black would not have been so bold as to call out, and to so sharply condemn, the rationale supporting the Lincoln case—written by the Attorney General sitting right there in the courtroom—were he not fairly confident that the Justices themselves would be more inclined to condemn that proceeding than to ratify it.

The *Milligan* Court proceeded to hold not only that the continued detention of the accused violated the 1863 statute but also that the military trial of Milligan and his codefendants violated both the Article III guarantee of a trial superintended by independent judges “appointed during good behavior” and the right, found in both Article III and the Sixth Amendment, to be tried by a jury.<sup>603</sup> This alternative holding, which has become *Milligan*’s principal legacy (much more so than its statutory holding), meant that such tribunals could not be used even if Congress authorized them.<sup>604</sup>

The third noteworthy aspect of *Milligan*, for present purposes, was the nature of the government’s arguments on this constitutional question. Counsel for the United States relied predominantly on two contentions, *neither* of which was Attorney General Speed’s argument that military courts can try offenses against the law of war.<sup>605</sup> Attorney General Speed and Benjamin Butler first argued that the vast majority of the guarantees of the Constitution (all but the Third Amendment, which expressly applies to wartime), as well as “all other conventional and legislative laws and enactments,” are simply “silent amidst arms” and that therefore there are *no* constitutional limitations (other than the Third Amendment) on the “war-making and war-conducting powers of Congress and the

602. The *Milligan* Case, *supra* note 34, at 146.

603. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 122–23 (1866); see also *id.* at 119 (stating that the Article III jury guarantee for the “trial of all crimes” is “too plain and direct, to leave room for misconstruction or doubt of [its] true meaning”).

604. This constitutional conclusion technically was *dicta*, in the sense that the statutory holding was sufficient to resolve the case. See generally Fairman, *History of the Supreme Court*, *supra* note 247, at 224–29; Bradley, *supra* note 593, at 115 (“[T]he majority’s unnecessary resolution of a constitutional issue . . . seems questionable by contemporary standards.”). Nevertheless, the constitutional questions were fully briefed, and there is little question that the Court’s constitutional analysis was a well-considered and deliberate effort by a majority of Justices to condemn even some military trials that Congress had arguably authorized during the late war.

605. Benjamin Butler, arguing for the United States on rebuttal, also relied upon history, namely, an account of the military trials approved by General George Washington during the Revolutionary War—especially the court-martial of Joshua Hett Smith for his involvement in the treasonous plot of Benedict Arnold to sacrifice West Point to the British. *Milligan*, 71 U.S. (4 Wall.) at 99–101 (Butler’s argument for the United States). I discuss this argument in greater detail in Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1647–48. The Court in *Milligan* did not refer to this argument, or to Washington’s practice during the Revolutionary War, in its opinions.

President.”<sup>606</sup> As Charles Fairman would later write, a “competent Attorney General would never have permitted such an outlandish argument to be made.”<sup>607</sup> Not surprisingly, the Court disdainfully and summarily turned aside this argument:

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.<sup>608</sup>

The government’s second principal *constitutional* defense of the military commission was the “martial law” argument of “necessity” that the War Department had so prominently advanced throughout the war.<sup>609</sup> The Court majority actually agreed with the government that necessity might, in extreme circumstances, justify military justice:

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.<sup>610</sup>

The necessity, however, “must be actual and present; the invasion real, such as effectively closes the courts and deposes the civil administration.”<sup>611</sup> Remarkably, in *Milligan* the government made no effort to

606. *Milligan*, 71 U.S. (4 Wall.) at 20–21 (argument for the United States).

607. Fairman, *History of the Supreme Court*, *supra* note 247, at 201.

608. *Milligan*, 71 U.S. (4 Wall.) at 121. In his rebuttal argument for the United States, Benjamin Butler offered the somewhat more sophisticated argument (which had famously been propounded by John Quincy Adams) that when the political branches are exercising their war powers, municipal constraints, including the Constitution, are displaced by the distinct limitations of the law and usages of nations. *Id.* at 104 (reply for the United States). The Court did not accept that argument, either, because it assumed that the law of war did not apply to the Peace Democrats, who were not part of an armed force. *Id.* at 121–22 (majority opinion). For a discussion of this common nineteenth-century argument, see Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1579–82.

609. See *supra* section I.A.1.

610. *Milligan*, 71 U.S. (4 Wall.) at 127.

611. *Id.* Chief Justice Chase’s concurrence agreed that the political branches’ power to authorize military trials against such civilians was limited by necessity, although he would have allowed Congress more leeway to authorize military trials if and when the legislature determined that the civil courts were “wholly incompetent to avert threatened danger, or

explain why the condition of necessity was satisfied in Indiana—why Milligan and the other defendants could not have been tried in civilian courts there. The Court, therefore, firmly rejected this argument, too:

It is difficult to see how the *safety* of 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 established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law.<sup>612</sup>

What the government did *not* argue was, in some respects, more interesting than the arguments it made. As noted above, the final charge against the *Milligan* defendants in the commission proceedings alleged a (vaguely described) “violation of the laws of war.”<sup>613</sup> One thus would have expected the government to argue that the military commission had jurisdiction at least to adjudicate *that* charge, based upon Attorney General Speed’s opinion eight months earlier respecting the Lincoln trial, which, as I have explained, was predicated crucially upon the notion that military courts may adjudicate offenses against the law of war.<sup>614</sup> Yet not only did the government fail to rely upon the law-of-war charge; Speed’s own brief actually abandoned—expressly repudiated—his earlier argument: “Infractions of the Laws of War,” Speed wrote for

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to punish, with adequate promptitude and certainty.” *Id.* at 140–41 (Chase, C.J., concurring). The Court more recently addressed this question in *Duncan v. Kahanamoku*:

There must be some overpowering factor that makes a recognition of [the jury right and other constitutional trial rights] incompatible with the public safety before we should consent to their temporary suspension . . . . In other words, the civil courts must be utterly incapable of trying criminals or of dispensing justice in their usual manner before the Bill of Rights may be temporarily suspended.

327 U.S. 304, 330 (1946).

612. *Milligan*, 71 U.S. (4 Wall.) at 127. The Court explained that civilian courts were fully operational at the time of Milligan’s trial:

[S]oon after this military tribunal was ended, the Circuit Court met, peacefully transacted its business, and adjourned. 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.

*Id.* at 122.

613. See *supra* text accompanying note 556.

614. See *supra* section II.B.6.



the United States, “can only be punished or remedied by retaliation, negotiation, or an appeal to the opinion of nations,”<sup>615</sup> and thus military commissions are appropriate to adjudicate *only* acts that are the proper subject of martial-law restraint, “not breaches of the common laws of war by belligerents.”<sup>616</sup>

As far as I have been able to determine, there is no extant record of *why* Speed thus waived off “what was probably [the government’s] strongest argument for the use of the commission in this case.”<sup>617</sup> Perhaps he thought it would be difficult to persuade the Court that these defendants had actually done anything to violate the laws of war, notwithstanding his (mistaken) assumption, in the assassination trial opinion, that uniting with “banditti, jayhawkers, guerillas, or any other unauthorized marauders is a high offense against the law of nations.”<sup>618</sup> Or, perhaps, by the time of the *Milligan* argument, the government’s principal concern was not so much to sustain sentences issued by Civil War military tribunals as it was to preserve the prospect of using military courts in the South during the coming Reconstruction. A government victory in *Milligan* on Speed’s “law of war offense” theory would hardly have justified those anticipated trials in the South, because the charges in those Reconstruction tribunals—especially for crimes of violence against free blacks—would rarely, if ever, allege offenses against the law of nations.<sup>619</sup> Instead, the government apparently hoped that the Court would pay great deference to executive assessments of the inadequacies of civil courts and of the necessity of using military courts in lieu of civil proceedings—because that was the only theory that might possibly justify the coming military justice system throughout the former Confederacy.<sup>620</sup>

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615. Brief for the United States, *Ex parte Milligan*, supra note 595, at 5; see also *Milligan*, 71 U.S. (4 Wall.) at 14 (argument for the United States).

616. Brief for the United States, *Ex parte Milligan*, supra note 595, at 6; see also *Milligan*, 71 U.S. (4 Wall.) at 15 (argument for the United States).

617. Bradley, supra note 593, at 110.

618. Military Commissions, 11 Op. Att’y Gen. 297, 312 (1865).

619. Even so, this would not fully explain why the government went so far as to affirmatively disclaim the fount of jurisdiction of military commissions that Speed had recognized the previous July—namely, to adjudicate alleged violations of the law of war.

620. See Witt, supra note 41, at 311. As Charles Fairman explained, the differences between Justices Davis and Chase in *Milligan*, concerning Congress’s power to make determinations of the inadequacy of civil courts, can perhaps best be understood—and were widely understood—to be animated by a debate not about the completed wartime commissions (which were not legislatively authorized) but instead about whether and how Congress could authorize the use of military tribunals in the South if and when civil courts there were deemed ineffective to quell violence outside the context of an ongoing war. See Fairman, History of the Supreme Court, supra note 247, at 214–22. Davis, however, insisted that his opinion did not resolve that question. See *infra* note 626.

E. Congress's Reaction to *Milligan* in Anticipation of Reconstruction

Today, *Milligan* is commonly considered “one of the great landmarks in th[e] Court’s history,”<sup>621</sup> primarily by virtue of Justice Davis’s rousing confirmation that the Constitution does not go silent during a time of war. When it was issued, however, the majority’s opinion in *Milligan* was deeply controversial. As Charles Warren wrote, “This famous decision has been so long recognized as one of the bulwarks of American liberty that it is difficult to realize now the storm of invective and opprobrium which burst upon the Court at the time when it was first made public.”<sup>622</sup> The critics of the decision were predominantly Radical Republicans who saw Justice Davis’s paean to civilian courts as a profound threat to the future prospects, and legality, of using military courts in Reconstruction, where and when local courts were deemed inadequate to quell violence, especially against freed blacks.<sup>623</sup> On January 3, 1867, for example, Representative Thaddeus Stevens excoriated *Milligan* on the House floor; the decision, he warned sternly, “rendered immediate action by Congress upon the question of the establishment of governments in the rebel States absolutely indispensable.”<sup>624</sup> The reasoning of the majority opinion, said Stevens, was “far more dangerous” than even the *Dred Scott* decision “upon the lives and liberties of the loyal men of this country.”<sup>625</sup> “That decision,” warned Stevens,

has unsheathed the dagger of the assassin, and places the knife of the rebel at the throat of every man who dares proclaim himself to be now, or to have been heretofore, a loyal Union man. If the doctrine enunciated in that decision be true, never were the people of any country anywhere, or at any time, in such a terrible peril as are our loyal brethren at the South, whether they be black or white, whether they go there from the North or are natives of the rebel States.<sup>626</sup>

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621. *Reid v. Covert*, 354 U.S. 1, 30 (1957) (plurality opinion); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 567 n.1 (2004) (Scalia, J., dissenting) (citing *Covert*, 354 U.S. at 30).

622. 3 Charles Warren, *The Supreme Court in United States History 149–50* (1922) [hereinafter Warren, *The Supreme Court in United States History*].

623. See, e.g., *id.* at 150–56 (collecting many of the contemporaneous attacks on the majority opinion).

624. *Cong. Globe*, 39th Cong., 2d Sess. 251 (1867) (statement of Rep. Stevens).

625. *Id.*

626. *Id.* Justice Davis was stung by these characterizations of his handiwork. Writing to his brother-in-law, Massachusetts Judge Julius Rockwell, in February 1867, he insisted that “[n]ot a word said in the opinion about reconstruction . . . & yet the Republican press every where has denounced the opinion as a second *Dred Scott*, when the *Dred Scott* opinion was in the interest of Slavery, & the *Milligan* opinion in the interest of liberty.” Letter from David Davis to Julius Rockwell 3 (Feb. 24, 1867), in *David Davis Papers, 1815–1964*, Chicago History Museum, Research Center, ser. I, box 15. Notwithstanding Davis’s good intentions, echoes of the contemporary criticisms of *Milligan* are still heard today.

On the penultimate day of its term, the Thirty-Ninth Congress enacted two measures in response to *Milligan*, both of which involved the authorization of military tribunals outside the context of an active war.

First, early in 1867 Stevens introduced an aggressive Reconstruction Act, which both houses of Congress approved in late February. Among other things, the Act directed Army officers who were detailed to military districts in the South to “protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals,” and authorized such officers “to this end” both to “allow local civil tribunals to take jurisdiction of and to try offenders” and “to organize military commissions or tribunals for that purpose” when, in the officer’s judgment, “it may be necessary for the trial of offenders.”<sup>627</sup> In his veto statement, President Johnson—relying upon the Court’s recent decision in *Milligan*—wrote that this section of the Reconstruction Act, if implemented, would “deny a trial by the lawful courts and juries to 9,000,000 American citizens and to their posterity for an indefinite period.” “It seems to be scarcely possible,” Johnson argued, “that anyone should seriously believe this consistent with a Constitution which declares in simple, plain, and unambiguous language that all persons shall have that right and that no person shall ever in any case be deprived of it.”<sup>628</sup> Congress overrode the veto, however, and the provision became law on March 2.<sup>629</sup>

At the same time Congress was considering the Reconstruction Act, which authorized military commissions prospectively, it was also consumed with debate over how to deal with the impact of *Milligan* on *past* wartime military proceedings. Members perceived at least two potential problems. First, hundreds or thousands of private and public actions had been brought against Union officers for false imprisonment, and *Milligan* had the potential to be a very powerful tool in the hands of the plaintiffs and prosecutors bringing such cases: The Court had, after all, essentially declared that many military tribunal convictions and sentences were

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Aziz Rana, for example, observes that the great civil libertarian passages in his opinion masked a profoundly reactionary impact: “[T]he *Milligan* decision embodies a moment in which the language of a shared constitutional tradition and the commitment to legal continuity were employed to stymie a redemptive agenda.” Aziz Rana, *Freedom Struggles and the Limits of Constitutional Continuity*, 71 Md. L. Rev. 1015, 1039 (2012).

627. As enacted, this provision appeared as section 3 of An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, § 3, 14 Stat. 428, 428 (1867).

628. Andrew Johnson, Veto Message to the House of Representatives (Mar. 2, 1867), in 6 A Compilation of the Messages and Papers of the Presidents 1789–1897, at 498, 506 (James D. Richardson ed., 1900).

629. See Cong. Globe, 39th Cong., 2d Sess. 1976. It is an irony, of sorts, that Reverdy Johnson, Mary Surratt’s attorney who had offered such a strong objection to the jurisdiction of the Lincoln commission, see *supra* notes 415–424 and accompanying text, was the lone Democratic Senator to vote for the Act.

unlawful—and the majority found that they were unconstitutional, too.<sup>630</sup> Republicans in Congress wanted to protect the Union officers who had tried and jailed the detainees—actions usually undertaken pursuant to what, at the time, they understood to be lawful orders.<sup>631</sup> Second, some members of Congress were outraged that the Supreme Court would have the gall to conclude that President Lincoln’s handiwork—and later, as in the Lincoln assassination tribunal, President Johnson’s, too—was unlawful and invalid.<sup>632</sup>

Congress’s response to these concerns was a so-called “Indemnity Act,” introduced by none other than Lincoln trial prosecutor John Bingham on December 10, 1866—after the Court announced its judgment in *Milligan* but shortly before it released the opinions.<sup>633</sup> Once the Supreme Court revealed its reasoning, Congress was eager to enact Bingham’s proposal—“to show its disapprobation to the decision of the Supreme Court which has rendered this bill a necessity.”<sup>634</sup> Some members expressly acknowledged that they supported the legislation as both a rebuke of, and a corrective to, the Court’s decision. Representative James F. Wilson, for example, excoriated Davis’s majority opinion “holding” regarding Congress’s constitutional power as dicta and “a piece of judicial impertinence which we are not bound to respect.”<sup>635</sup> The indemnity bill, he happily conceded, “proposes to bring the legislative department of the Government in conflict with the views of [the Supreme Court in the *Milligan* case].”<sup>636</sup>

Congress overwhelmingly enacted the “indemnity” bill on March 2, 1867,<sup>637</sup> the same day it approved the Reconstruction Act. In contrast to the other bill, however, President Johnson did not veto this legislation

630. See Randall, *supra* note 137, at 194.

631. See, e.g., Cong. Globe, 39th Cong., 2d Sess. 1484 (statement of Rep. Wilson); *id.* at 1961 (statement of Sen. Trumbull) (“[W]e should go to the very extent of our power in protecting parties for acts done in the suppression of the rebellion.”).

632. See, e.g., *id.* at 1484 (statement of Rep. Wilson). The Washington correspondent for the *Boston Daily Advertiser* reported: “Good lawyers here give it as their opinion that the [*Milligan*] decision renders the Secretary of War, the Judge Advocate General and all the members of the Court which tried the assassins, liable to prosecution.” Warren, *The Supreme Court in United States History*, *supra* note 622, at 165 n.2 (quoting the *Boston Daily Advertiser*, Dec. 27, 1866); see also, e.g., White, *Life of Lyman Trumbull*, *supra* note 233, at 289 (“[I]t follow[ed] logically [from *Milligan*] that the trial and execution of Booth’s fellow conspirators, Payne, Atzerodt, Herold, and Mrs. Surratt, were, in contemplation of law, no better than lynching . . .”).

633. Cong. Globe, 39th Cong., 2d Sess. 47.

634. Cong. Globe, 39th Cong., 2d Sess. 646 (1867) (statement of Rep. Delano).

635. *Id.* at 1484 (statement of Rep. Wilson).

636. *Id.* at 646.

637. An Act to Declare Valid and Conclusive Certain Proclamations of the President, and Acts Done in Pursuance Thereof, or of His Orders, in the Suppression of the Late Rebellion Against the United States, ch. 155, 14 Stat. 432 (1867).

(perhaps because it ratified his own earlier orders), and so no override was necessary. The Act's principal function was, indeed, to establish a form of de facto indemnity, or immunity, for officers involved in wartime detention and prosecutions undertaken pursuant to presidential proclamation between March 4, 1861, and July 1, 1866. The law purported to accomplish this objective in two ways: First, it starkly declared that, notwithstanding the 1863 Habeas Act and the *Milligan* decision, all such actions undertaken pursuant to presidential proclamation or order, or with his authority or approval, between March 4, 1861, and July 1, 1866, were

*approved in all respects, legalized and made valid, to the same extent and with the same effect as if said orders and proclamations had been issued and made, and said arrests, imprisonments, proceedings, and acts had been done under the previous express authority and direction of the Congress of the United States, and in pursuance of a law thereof previously enacted and expressly authorizing and directing the same to be done.*<sup>638</sup>

For good measure, it also directly provided that no person could be "held to answer in . . . courts for any act done or omitted to be done in pursuance or in aid of any of said proclamations or orders, or by authority or with the approval of the President within the period aforesaid."<sup>639</sup>

This was, then, in effect the mirror image of the Henry Winter Davis proposal that the House had overwhelmingly approved at the very end of the preceding Congress, in March 1865.<sup>640</sup> Instead of trying to correct the excesses of the war by magnanimously acknowledging the Executive's overreach, this was an effort to ratify the legality of that legacy wholesale—to whitewash, in effect, the excessive actions that appeared to be necessary for victory during that fierce conflict, or at the very least to absolve well-intentioned chief executives and officers of any transgressions they might have made in good faith to vanquish a stubborn enemy. Senator Lyman Trumbull went so far as to worry, on the Senate floor, about what the decision in *Milligan* meant for the Lincoln assassination proceedings: "Would you try and execute as a murderer a man who sat upon the military commission here that tried the assassins of the President?"<sup>641</sup> And thus Trumbull—who had been the chief Senate sponsor of the limitations in the 1863 Habeas Act and one of the

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638. *Id.* at 432–33 (emphasis added).

639. *Id.* at 433. The Act went further still: It purported to establish a legal presumption that the acts of all officers and other persons in the service of the United States, or who acted in aid of the United States, "shall be held prima facie to have been authorized by the President" and thus indemnified. *Id.*

640. See *supra* section I.B.3.c.

641. Cong. Globe, 39th Cong., 2d Sess. 1962 (statement of Sen. Trumbull); see also *supra* note 632.

strongest advocates of the Henry Winter Davis proposal condemning military tribunals in 1865<sup>642</sup>—appeared to speak for many when he pleaded on behalf of the expiating feature of the “indemnity” bill: “Let the waters of oblivion wash over and bury out of sight and out of remembrance, if it were possible, all the acts connected with this terrible war.”<sup>643</sup>

The 1867 Act, however, went further still, in a way that is even more pertinent for present purposes: It not only purported to declare the presidentially approved wartime commissions lawful, and to foreclose officer liability, but also included a clause that would strip the courts, federal and state alike, of all jurisdiction to adjudicate the legality of those commissions and detentions:

And no civil court of the United States, or of any State, or of the District of Columbia, or of any district or territory of the United States, shall have or take jurisdiction of, or in any manner reverse any of the proceedings had or acts done as aforesaid . . . .<sup>644</sup>

The effect of this clause, read literally, would have been not only to foreclose actions to hold Union officers liable (or criminally culpable) but also to prevent courts—even state courts—from declaring continuing detentions to be unlawful and ordering the release of prisoners wrongfully held, including perhaps the Lincoln assassination defendants who remained in custody. That is to say, it would have cut off all habeas actions such as the one in *Milligan* itself. Some members of Congress,

642. See *supra* section I.B.3.a (describing the 1863 Habeas Act); *supra* note 339 and accompanying text.

643. Cong. Globe, 39th Cong., 2d Sess. 1961 (statement of Sen. Trumbull). Interestingly, Thaddeus Stevens, one of the more vociferous proponents of the legislation, candidly acknowledged that it might cover cases of dubious legality. *Id.* at 1487 (statement of Rep. Stevens). Stevens’s remarks reflected an admirable candor about his doubts whether Holt had extended commission jurisdiction too far, and might even be read as sympathetic to Davis’s opinion in *Milligan*, at least as applied to certain sorts of domestic-law offenses:

The law with regard to the power of military tribunals is one about which there is not very great harmony among the legal fraternity. While I feel disposed to support them all as far as possible, and while I believe that nothing has been done by them which was not requisite for the country, yet I am not quite prepared to believe that a mere civilian can commit an offense except it be as a spy, which can be tried by a military tribunal. Take, for instance, the case of Mr. Harris, of Maryland, who was tried by a military tribunal, he never having been in the Army or Navy, or in any way participating in military operations, but being simply charged with giving a dollar to a confederate soldier to buy a night’s lodging. I have not made up my mind yet, but I can hardly believe that an offense of that kind is triable by a military tribunal.

*Id.*

644. 14 Stat. at 433.

sympathetic to the indemnification aspects of the bill, could hardly believe that the proponents meant to preclude any prospect of relief for wrongfully held prisoners.<sup>645</sup> The proponents, however, confirmed that that was, indeed, precisely the intended effect of the clause: “to provide against just such action as we had in the Milligan case.”<sup>646</sup> Republican Senator Daniel Norton of Minnesota proposed an amendment that would have preserved such habeas actions—“to relieve the bill from any doubt as to the jurisdiction of the courts to test the regularity of the sentences as judgments of military commissions”<sup>647</sup>—but the Senate rejected it by a vote of 29 to 9.<sup>648</sup> Even so, the bill’s sponsors appeared to realize that the jurisdiction-stripping clause raised a serious constitutional question of its own, one that would be left for the courts themselves to resolve.<sup>649</sup>

#### F. Milligan’s *Impact in the Executive Branch and the Courts*

By contrast with Congress, the Court’s decision in *Milligan* had a dramatic effect on the way in which the other two branches dealt with the question of military adjudication relating to the late war—as illustrated most dramatically after the government captured Booth’s primary coconspirator, John Surratt, in late 1866.

1. *The Fate of the March 2, 1867, Congressional Enactments.* — In June 1867, the new Attorney General, Henry Stanbery (who had argued a jurisdictional point for the government in *Milligan*), issued an opinion expressing doubt about the constitutionality of section 3 of the March 2, 1867, Reconstruction Act, authorizing military commissions in the former Confederate states.<sup>650</sup> Even under the concurring rationale of Chief Justice Chase in *Milligan*, Stanbery explained, the law’s constitutionality was dubious because it allowed military officers, rather than Congress, to assess the requisite “necessity” and to do so “in a time of peace, when all the courts, State and federal, are in the undisturbed exercise of their jurisdiction,” thereby giving such an officer discretion to try, condemn,

645. See, e.g., Cong. Globe, 39th Cong., 2d Sess. 1959 (statement of Sen. Reverdy Johnson) (proposing that the clause be removed in whole because, under the proposed act, a wrongfully held individual “can in no possible way bring his case for redress before the courts of the United States”).

646. *Id.* at 1535 (statement of Rep. Wilson) (responding to Rep. Cooper); see also, e.g., *id.* at 1487 (statement of Rep. Wilson) (responding to Rep. Eldridge); *id.* at 1962 (statement of Sen. Trumbull) (responding to Sen. Norton, although conceding that a court might find such jurisdiction-stripping to be unconstitutional).

647. *Id.* at 1963 (statement of Sen. Norton).

648. *Id.* (recording vote).

649. See, e.g., *id.* at 1962 (statement of Sen. Trumbull) (“I do not suppose that this bill would prevent a court from acting if the court believed that the law forbidding it to act was unconstitutional. That would be a question for the court to decide . . .”).

650. See *The Reconstruction Acts*, 12 Op. Att’y Gen. 182, 182, 198–99 (1867).

and even execute a citizen.<sup>651</sup> Stanbery reasoned that, at best, the provision should be very narrowly construed, such that “nothing short of an absolute or controlling necessity would give any color of authority for arraigning a citizen before a military commission.”<sup>652</sup> Despite Stanbery’s opinion, pursuant to the authority conferred by section 3 of the Reconstruction Act the Army proceeded to initiate approximately 1,400 military commissions throughout the South from 1867 to 1869.<sup>653</sup>

The constitutionality of such courts, in light of *Milligan*, was challenged in *Ex parte McCardle*, which involved a newspaper publisher convicted by military commission for publishing articles challenging the legitimacy of Reconstruction and of black suffrage and urging Mississippi residents to boycott an election to authorize a state constitutional convention.<sup>654</sup> A district judge denied McCardle’s habeas petition, distinguishing *Milligan* on the ground that Mississippi lacked a “practical state government” because Congress had refused to recognize the state government.<sup>655</sup> On appeal to the Supreme Court, Attorney General Stanbery refused to represent the United States because he had already called into question the constitutionality of the commissions in his June 1867 opinion; two Northern senators therefore stepped in to defend the legislation.<sup>656</sup> The case was briefed and argued, but then in April 1868 Congress repealed the Supreme Court’s statutory jurisdiction to hear the case, after which the Court concluded that it had no choice but to dismiss the appeal.<sup>657</sup> There is no way to know for certain, of course, how the Court would have resolved the merits of the constitutional challenge. Chief Justice Chase later privately wrote, however, that “had the merits of the McCardle case been decided the court would doubtless have held that his imprisonment for trial before a military commission was illegal.”<sup>658</sup>

651. *Id.* at 198–99.

652. *Id.* at 199.

653. See Detlev F. Vagts, *Military Commissions: The Forgotten Reconstruction Chapter*, 23 *Am. U. Int’l L. Rev.* 231, 257–69 (2008).

654. See 74 U.S. (7 Wall.) 506 (1869). Much of the account in this paragraph is derived from the rich description of the case in Daniel J. Meltzer, *The Story of Ex parte McCardle: The Power of Congress to Limit the Supreme Court’s Appellate Jurisdiction*, in *Federal Courts Stories* 57, 57–86 (Vicki C. Jackson & Judith Resnik eds., 2010); see also Witt, *supra* note 41, at 314–16; David P. Currie, *The Constitution in the Supreme Court: Civil War and Reconstruction, 1865–1873*, 51 *U. Chi. L. Rev.* 131, 154–58 (1984).

655. Meltzer, *supra* note 654, at 65.

656. *Id.* at 68.

657. *McCardle*, 74 U.S. (7 Wall.) at 515.

658. Letter from Chief Justice Salmon P. Chase to Judge Robert A. Hill (May 1, 1869), in 5 *The Salmon P. Chase Papers* 302, 302 (John Niven ed., 1998); see also Meltzer, *supra* note 654, at 73–74.



As for the backward-looking “Indemnity Act,” also enacted on March 2, 1867,<sup>659</sup> the Supreme Court never definitively resolved whether the Constitution permitted Congress to “declare” in 1867 that the Civil War detentions and commissions were lawful and/or to absolve Union officers of liability. At least three members of the Court, however, opined that those legislative efforts were unconstitutional. The courts appear to have disregarded the clause of the Act that purported to strip them of jurisdiction to hear habeas actions challenging ongoing detentions and sentences decreed by commissions.

For example, Justice Miller, riding circuit, granted habeas relief to William Murphy, who had been convicted by a military commission of burning a steamboat and sentenced to confinement at hard labor for ten years—a sentence that President Johnson approved just three days before he declared the end of the war.<sup>660</sup> Miller’s judgment was a bit reluctant—he had joined Chief Justice Chase’s concurrence in *Milligan*—but he conceded that Justice Davis’s majority opinion “must be binding upon every member of that court, whatever be his individual opinion.”<sup>661</sup> Thus, reasoned Miller, the military commission that tried Murphy in St. Louis, “where the process of the courts had never been interrupted,” was invalid, especially as Murphy “was arrested at New Orleans in 1865, [and] charged with offences committed at Memphis in 1864”—both places in which “the courts of the United States were open, and perfectly competent to the trial of any offences within their jurisdiction.”<sup>662</sup> Miller acknowledged, and quoted in full, the 1867 Indemnity Act, including its jurisdiction-stripping clause,<sup>663</sup> yet he ruled that Congress’s purported after-the-fact authorization of the commission was unconstitutional,<sup>664</sup> and he did not even address Congress’s command that he not take jurisdiction over the case.<sup>665</sup>

2. *Cases Involving the Alleged Lincoln Conspirators Themselves.* — Whatever *Milligan* might have portended for the constitutionality of the legislatively approved Reconstruction Act military trials, there appeared to be little question that the decision condemned the military trials and

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659. See *supra* notes 633–649 and accompanying text (describing the enactment and purpose of the 1867 Indemnity Act).

660. See *In re Murphy*, 17 F. Cas. 1030, 1032 (C.C.D. Mo. 1867) (No. 9,947).

661. *Id.* at 1031.

662. *Id.*

663. *Id.* at 1031–32.

664. *Id.* at 1032.

665. Moreover, in *Beckwith v. Bean*, Justice Field, joined by Justice Clifford, concluded that Congress did not have the constitutional authority to authorize or approve the conduct after the fact or to shield the perpetrators from responsibility. 98 U.S. 266, 292–98 (1879) (Field, J., dissenting). Field and Clifford had both joined Justice Davis’s majority opinion in *Milligan*. See *The Milligan Case*, *supra* note 34, at 52. The majority in *Beckwith* did not reach the question. See *Beckwith*, 98 U.S. at 284.

judgments of conduct occurring during the Civil War itself—at least in those cases that did not involve actual offenses against the international law of war (which is one reason why Congress, in March 1867, tried retroactively to secure the legality of those proceedings).<sup>666</sup> So, for example, Attorney General Stanbery opined that there could “be no doubt,” in light of *Milligan*, that a military commission that had tried a New York citizen (John Devlin) for forging enlistment papers and selling them to draft evaders “had no jurisdiction of the subject-matter or of the party.”<sup>667</sup>

a. *John Surratt*. — Perhaps most tellingly, not only did the Johnson Administration choose, before *Milligan*, not to try Jefferson Davis in a military tribunal; it also declined, *after Milligan*, to use a commission to try John Surratt, Mary’s son, who was alleged to have been Booth’s most trusted confidant in the Lincoln assassination plot. Surratt had been in Elmira, New York, on April 14, 1865; after the assassination, he fled to Canada, and from there to Liverpool, London, and Rome, where he served with the papal Zouaves, which is why he was not tried along with his alleged coconspirators in the 1865 military commission.<sup>668</sup> U.S. forces finally apprehended Surratt in Alexandria, Egypt, in late 1866 and brought him to the United States to face justice.<sup>669</sup> Upon Surratt’s arrival in Washington in February 1867, a federal judge issued a warrant to remand him to the civilian authorities in the District, to be tried on an indictment recently returned by a grand jury. That indictment alleged that Surratt, “being moved and seduced by the instigation of the devil,” had plotted with Booth and others to violate ordinary criminal statutes proscribing murder and conspiracy.<sup>670</sup>

The Surratt trial lasted over two months.<sup>671</sup> At the close of evidence, Judge George Fisher instructed the jury that if they were convinced Surratt was not guilty, their verdict would provide a “lesson of assurance that a court of justice is the asylum of innocence.”<sup>672</sup> On the other hand, the judge explained, if the jury concluded that he was guilty, its verdict

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666. See *supra* notes 633–649 and accompanying text (describing the 1867 Indemnity Act).

667. Devlin’s Claim, 12 Op. Att’y Gen. 128, 128 (1867); see also Leonard, Lincoln’s Avengers, *supra* note 15, at 213–14 (recounting that shortly after *Milligan*, President Johnson began to release military prisoners awaiting military commission trials).

668. On Surratt’s apprehension and trial, see the thorough account in Leonard, Lincoln’s Avengers, *supra* note 15, at 235–43, 252–63.

669. See *id.* at 237.

670. 2 Trial of John H. Surratt in the Criminal Court for the District of Columbia 1380–83 (Washington, D.C., French & Richardson 1867) [hereinafter Trial of John H. Surratt].

671. See generally *id.* (recording the proceedings of the trial); see also David Miller DeWitt, *The Assassination of Abraham Lincoln and Its Expiation* ch. VIII (1909).

672. Trial of John H. Surratt, *supra* note 670, at 1378.

would be a “testimonial to the country and the world that the District of Columbia . . . gives the judicial guarantees essential to the protection of the persons of the public servants commissioned by the people of the nation to do their work, safe and sacred from the presence of unpunished assassins within its borders.”<sup>673</sup> The jury chose to offer the nation neither of those lessons: It was “nearly equally divided” throughout its more than seventy hours of deliberations and failed to reach a verdict.<sup>674</sup> Surratt was eventually released on bail and was never retried.

b. *Mudd, Arnold, and Spangler*. — In his instruction to the jury in the John Surratt trial, Judge Fisher asked a rhetorical question: If, as many argued (including Surratt’s lawyers), the Court’s decision in *Milligan* condemned the constitutionality of the 1865 Lincoln military commission, why hadn’t the military released the four prisoners from that trial—Samuel Arnold, Michael O’Laughlen, Samuel Mudd, and Edman Spangler—who were then serving terms of incarceration in the Dry Tortugas, at the far western end of the Florida Keys?<sup>675</sup>

It was a good question—indeed, one that Mudd himself wondered about. He wrote from prison to his wife that “[i]t is vexatious to see how partial the laws are . . . administered . . . . If the trial of *Milligan* was wrong, certainly ours was more so, and no necessity can be pleaded in palliation.”<sup>676</sup> Accordingly, just two days after the Court issued its decision, Andrew Sterett Ridgely—Reverdy Johnson’s son-in-law—submitted a petition for a writ of habeas corpus to Chief Justice Chase, seeking Mudd’s release.<sup>677</sup> The Chief Justice denied the Mudd petition without reaching the jurisdictional or merits questions, on the ground that it had been filed in the wrong court. He advised Ridgely “that the

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673. *Id.* Fisher was a close ally of Secretary of War Stanton and hardly a shining exemplar of an Article III judge. His instruction to the jury was a fiery sermon inveighing against the “most foul and wicked conspiracy the record of which has ever stained the pages of history,” *id.* at 1369, in which he actually defended both the legitimacy and the constitutionality of the military commission two years earlier, arguing that it was not called into question by *Milligan*, *id.* at 1370–71. By the end of the trial, Surratt’s lawyer, Joseph H. Bradley, Sr., had become so enraged by Judge Fisher’s conduct that he allegedly “threatened the judge with personal chastisement.” *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 344 (1872). Fisher responded by striking Bradley’s name from the roll of attorneys authorized to practice in the court, which prompted Bradley to sue Fisher for damages. See *id.* at 337–38. The Supreme Court eventually held that Fisher was entitled to judicial immunity. See *id.* at 356–57.

674. Trial of John H. Surratt, *supra* note 670, at 1366, 1379.

675. *Id.* at 1370.

676. Letter from Samuel Mudd to Sarah Frances (“Frank”) Mudd (Jan. 15, 1867), *in* The Life of Dr. Samuel A. Mudd, *supra* note 59, at 219, 219.

677. See Fairman, *History of the Supreme Court*, *supra* note 247, at 238–39.

petition should be addressed to a Court or Judge of the United States in the District within which the prisoner is held.”<sup>678</sup>

More than a year later, in mid-1868, Mudd finally took up the Chief Justice on his suggestion: Along with his codefendants Samuel Arnold and Edman Spangler, he filed a habeas petition with Judge Thomas Boynton of the Southern District of Florida, seeking release from the prison in the Dry Tortugas.<sup>679</sup> In September 1868, Judge Boynton denied the petition.<sup>680</sup> Boynton reasoned that in killing Lincoln, Booth had been motivated not by “private animosity” but instead by a design to “impair the effectiveness of military operations, and enable the rebellion to establish itself into a government.”<sup>681</sup> Because the offense was in this sense (i.e., based upon its alleged motive) a “military one,” Judge Boynton concluded that it was proper to try it in a military forum, notwithstanding *Milligan*.<sup>682</sup>

Boynton’s opinion was unconvincing in virtually every respect: For one thing, the military trial did not establish that Booth killed Lincoln in order to “impair the effectiveness of military operations, and enable the rebellion to establish itself into a government.”<sup>683</sup> The assassination was almost certainly far too late in the day to have any such expected effect. More fundamentally, *Milligan* did not turn on any such test of whether the offenders had a civil or a “military” motive; indeed, if that *had* been the ground of decision, *Milligan* itself would have come out the other way, because Milligan and his cohorts, unlike Booth, *did* plot to “impair the effectiveness of [Union] military operations.” More broadly, the Court in *Milligan* did not identify any vaguely defined category of so-called “military cases” that could be tried in military courts.

678. Letter from Chief Justice Chase to Andrew Sterrett Ridgely (Jan. 3, 1867), in 6 Salmon P. Chase Papers, Historical Society of Pennsylvania, Manuscript Letterpress Copies, Oct. 1865–1867, Doc. 467; see also Cong. Globe, 39th Cong., 2d Sess. 730 (1867) (statement of Sen. Johnson) (reporting Chase’s disposition).

679. The fourth prisoner from the Lincoln trial, Michael O’Laughlen, died of yellow fever in the Fort Jefferson prison in the Dry Tortugas in September 1867. See Kat Long, How Samuel Mudd Went from Lincoln Conspirator to Medical Savior, *Smithsonian Mag.* (Apr. 14, 2015), <http://www.smithsonianmag.com/history/how-samuel-mudd-went-lincoln-conspirator-medical-savior-180954980/> [<http://perma.cc/PA2X-734P>].

680. Ex parte Mudd, 17 F. Cas. 954 (S.D. Fla. 1868) (No. 9,899). The text of Judge Boynton’s opinion is not included in Federal Cases. It was published in full, however, in Habeas Corpus: The Application in Behalf of Dr. Mudd, Arnold and Spangler—Opinion of Judge Boynton, *N.Y. Times*, Oct. 1, 1868, at 2 [hereinafter Judge Boynton’s Habeas Corpus Opinion].

681. *Id.*

682. *Id.* Notably, Judge Boynton did not mention, let alone rely upon, the March 1867 congressional enactment that purported to strip all courts of jurisdiction over military commission proceedings, or acts undertaken pursuant to such proceedings, initiated on the President’s authority. See *supra* notes 633–649 and accompanying text (describing the 1867 Indemnity Act).

683. Judge Boynton’s Habeas Corpus Opinion, *supra* note 680, at 2.

Having failed to persuade Judge Boynton, counsel for the three prisoners in the Dry Tortugas, Philip Phillips, then prepared habeas petitions to be filed directly in the Supreme Court, asking the Court to hold that the military commission lacked jurisdiction.<sup>684</sup> On February 8, 1869, however, just before Phillips was to file the petitions, President Johnson pardoned Mudd, citing both some “room for uncertainty as to the true measure and nature of [his] complicity” with Booth and also the fact that Mudd had “devoted himself to the care and cure” of those who were ill with yellow fever at the Dry Tortugas and “saved many valuable lives and earned the admiration and the gratitude of all who observed or experienced his generous and faithful service to humanity.”<sup>685</sup> The pardon effectively mooted Mudd’s case in the Supreme Court.<sup>686</sup> The Court heard oral argument on Arnold and Spangler’s petitions on February 26.<sup>687</sup> The Court never had an opportunity to opine in these cases, however: On March 1, 1869, one of his last days in office, President Johnson pardoned Arnold and Spangler, too, and the Court therefore dismissed their petitions.<sup>688</sup>

3. *Military Trials for Violations of the Law of War.* — As noted above, in *Milligan* the government surprisingly chose not to argue that the commission had jurisdiction, at a minimum, to try the one charge alleging that the Indiana defendants had violated the law of war. Indeed, the government appeared to disclaim any such possible fount of military jurisdiction.<sup>689</sup> The *Milligan* Court therefore did not have occasion to

684. See Fairman, *History of the Supreme Court*, supra note 247, at 488–89. Under governing Supreme Court precedent, they could not appeal directly from Judge Boynton’s denial of their petitions, which he had issued at chambers. See *id.* at 490 (citing *In re Metzger*, 46 U.S. (5 How.) 176 (1847)). In light of the Court’s holding in *Milligan*, the petitions for Arnold and Spangler apparently, and unsurprisingly, emphasized the commission’s absence of jurisdiction under the 1863 Habeas Act rather than the Constitution. See *The Assassination Conspirators. Petitions for Habeas Corpus in the Cases of Spangler and Arnold*, N.Y. Trib., Feb. 10, 1869 (byline of Feb. 9).

685. *The Lincoln Assassination: The Evidence* 752 (William C. Edwards & Edward Steers eds., 2009).

686. Charles Fairman reported that Mudd’s petition was filed as No. 12, Original. See Fairman, *History of the Supreme Court*, supra note 247, at 489 n.193. However, an account in the *New York Tribune* from February 9—the day after the pardon—reported that Phillips had prepared Mudd’s petition but did not present it to the Court in light of the pardon. *The Assassination Conspirators. Petitions for Habeas Corpus in the Cases of Spangler and Arnold*, supra note 684.

687. See *Supreme Court Argument Calendar* (Feb. 26, 1869) (reporting the arguments on Nos. 13 and 14, Original); *United States Supreme Court*, N.Y. Times, Mar. 1, 1869, at 2. The oral arguments focused upon complex jurisdictional issues. See *United States Supreme Court*, supra; see also Fairman, *History of the Supreme Court*, supra note 247, at 489–91.

688. See *Supreme Court Argument Calendar* (Mar. 19, 1869) (reporting the pardons and the Court’s dismissal).

689. See supra notes 613–620 and accompanying text.

opine on whether Attorney General Speed had been right when he wrote in his July 1865 opinion that military courts can try allegations of offenses against the law of war committed by members of belligerent forces.<sup>690</sup>

The most famous case of this sort in the Civil War was a trial that occurred just after the conclusion of the Lincoln assassination trial—the military commission proceedings against Confederate Army Captain Henry Wirz, who was commander of the Confederate camp for prisoners of war in Andersonville, Georgia, where horrifying conditions of confinement resulted in the deaths of over 12,000 Union soldiers.<sup>691</sup> Like the Lincoln conspirators, Wirz was charged with both a substantive count—namely, murder of prisoners “in violation of the laws and customs of war”—and a conspiracy “to injure the health and destroy the lives of soldiers in the military service of the United States, then held and being prisoners of war within the lines of the so-called Confederate States and in the military prisons thereof.”<sup>692</sup> The substantive charge certainly alleged a violation of the law of war, which prohibits the abuse of, and violence against, prisoners rendered *hors de combat*.<sup>693</sup> Likewise, the second charge, although characterized in terms of “conspiracy,” was in effect an allegation that Wirz had failed to exercise his command to prevent the prisoner abuse at Andersonville, a breach of duty that the Supreme Court would later determine is itself a violation of the law of war.<sup>694</sup> Wirz was found guilty of the substantive offense and of most of the

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690. In his opinion for the Court, Justice Davis did state, somewhat cryptically, that the “laws and usages of war . . . 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.” *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866). It appears, however, that Davis was simply responding to the government’s argument that the laws and usages of war permitted the use of military tribunals where martial law applied; he was not addressing any argument that law-of-war offenses could be subject to military adjudication. In the much later *Quirin* case, however, Chief Justice Stone read the Court in *Milligan* to have held that the law of war itself does not regulate the conduct of persons in Milligan’s situation, who act independently of any direction or control of an organized belligerent force. *Ex parte Quirin*, 317 U.S. 1, 45 (1942).

691. See generally Trial of Henry Wirz, H.R. Exec. Doc. No. 40-23 (1867).

692. *Id.* at 3–8.

693. This customary norm is today reflected in API, supra note 509, art. 41.

694. See *In re Yamashita*, 327 U.S. 1, 13–18 (1946). In the recent *Al Bahlul* litigation, the government cited the Wirz trial as a relevant precedent, see U.S. 2015 *Al Bahlul* Brief, supra note 101, at 40–42, because the charge in that case described the alleged conspiracy as being “in violation of the laws and customs of war.” H.R. Exec. Doc. No. 40-23, at 3. It is not clear why the government views that characterization as important. If the conspiracy count in the Wirz case did allege conduct in violation of the law of war, as *Yamashita* suggests would have been appropriate, then the Wirz trial simply stands as an example of the use of a military court to try law-of-war violations—something the Supreme Court later approved in *Quirin*. And if, on the other hand, the evidence of agreement in the Wirz case did not establish a violation of the law of war, that would simply mean that Wirz’s counsel should have objected that the charge did not describe such an offense. His counsel did, indeed, raise several objections to the legality of the commission, see H.R. Exec. Doc. No.

specifications of the conspiracy charge<sup>695</sup> and was hanged on November 10, 1865; his body was interred in the Old Arsenal grounds next to that of George Atzerodt, who had suffered the same fate that July.<sup>696</sup> The *Milligan* decision neither confirmed nor called into question the constitutionality of the Wirz commission, which did involve genuine law-of-war offenses.

An 1873 opinion of Attorney General George Williams concerning a conflict between the Army and the Modoc Indian tribe is to similar effect.<sup>697</sup> After extended hostilities between United States troops and the Modoc Indians, the parties arranged for peace negotiations under a so-called “flag of truce.” At the place designated for negotiations, the tribe ambushed the U.S. forces and killed an Army general and two others in the U.S. delegation.<sup>698</sup> This violation of the flag of truce violated the customary law of war.<sup>699</sup> President Grant asked Attorney General Williams whether a military tribunal could try the malefactors. Williams answered

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40-23, at 10–11, but none of them was predicated on the notion that the court could not adjudicate law-of-war violations or that the conspiracy charge did not describe such an offense.

Similarly, the government has relied upon the conspiracy charges in the Civil War commission trial of George St. Leger Grenfel and others, see U.S. 2015 *Al Bahlul* Brief, *supra* note 101, at 40–42, which likewise characterized the unlawful agreements at issue there as “in violation of the laws of war.” George St. Leger Grenfel, H.R. Exec. Doc. No. 39-50, at 21–22 (1867). The allegations in the Grenfel commission were that the defendants—who, like Milligan, were not part of, or acting at the direction of, the Confederate Army—had plotted to spring free some Rebel prisoners of war in Camp Douglas, near Chicago, and then set fire to Chicago. *Id.* That plan, although certainly unlawful, did not describe a violation of the law of war, notwithstanding that the charge said otherwise. The accused raised jurisdictional objections, similar to those in the *Milligan* case; but again, those objections were not predicated on the idea that the commission could not adjudicate law-of-war violations or that the conspiracy charge did not describe such an offense. More importantly, Judge Advocate Henry Burnett (who would assist Joseph Holt the next year in prosecuting the Lincoln conspirators) did not defend the commission’s jurisdiction there on the ground that the conduct described an offense against the law of war. Instead, he made an argument based upon martial law and “necessity” virtually identical to the government’s unsuccessful arguments in *Milligan*, see *id.* at 576–79, and even cited the military commission’s jurisdictional decision in the *Milligan* case (which was not yet before the Supreme Court) as precedential authority that bound the commission on the jurisdictional question in the Grenfel case, see *id.* at 580. In other words, Grenfel’s case appeared to be virtually on all fours with Milligan’s, and therefore when the Court decided *Milligan* in 1866, it appeared to Grenfel and his counsel as though he, too—like Milligan—was entitled to be released. See Stephen Z. Starr, Colonel Grenfell’s Wars 288–90 (1971). “[F]or reasons which the surviving documents do not reveal,” however, his counsel never filed a habeas petition, preferring instead to try to persuade the War Department to release Grenfel. *Id.* at 291.

695. H.R. Exec. Doc. No. 40-23, at 807–08.

696. *Id.* at 815; see also Kauffman, Fort Lesley McNair, *supra* note 11, at 181.

697. The Modoc Indian Prisoners, 14 Op. Att’y Gen. 249 (1873).

698. *Id.* at 250.

699. *Id.* at 250–51.

in the affirmative; he prominently cited the Wirz precedent and liberally quoted from Speed's 1865 opinion.<sup>700</sup> The Modocs responsible for the ambush were tried, and four of them were hanged.<sup>701</sup>

Military commission jurisdiction to try actual offenses against the international law of war thus arguably survived *Milligan*—or, in any event, the question remained open. Even so, there were few if any such trials after the Modoc trial of 1873;<sup>702</sup> the question was not renewed again until the Second World War, in the case of the military trial of eight Nazi saboteurs.<sup>703</sup>

#### IV. THE LINCOLN ASSASSINATION COMMISSION LEGACY (OR LACK THEREOF), 1886–1940

In 1886, Lieutenant Colonel William Winthrop, later known as the “Blackstone of Military Law,”<sup>704</sup> published the first edition of his comprehensive treatise on military law.<sup>705</sup> That landmark work—both the first edition and the now-canonical second edition (published in 1920)<sup>706</sup>—cited the Lincoln assassination trial on a handful of occasions, but almost always for a discrete, uncontroversial procedural proposition or a point about the role of various military officers in trials.<sup>707</sup> Winthrop never once cited the Lincoln trial as affirmative authority for the jurisdiction of wartime military tribunals or even as among the sources

700. *Id.* at 251–52. The only issue that gave Williams any pause was whether the Modoc Indians were bound by the customary laws of war. He concluded that they were. *Id.* at 253. Williams distinguished *Milligan* primarily on the ground that civilian courts lacked any jurisdiction to adjudicate violations of the law of war. *Id.* at 252. Indeed, Williams, following Speed, see *supra* note 505, assumed that civilian courts could not try such offenses. He might have been wrong about that, but he was certainly correct that *Milligan* had not decided whether law-of-war offenses can be tried in military commissions.

701. Witt, *supra* note 41, at 334–35. Professor Witt notes that the military commission in this case was actually a humanitarian improvement; previously, it was common to summarily execute Indian captives. Indeed, Witt suggests that the reason President Grant put the question to Attorney General Williams was in order to stave off the summary justice the Army was otherwise prepared to enforce. See *id.* at 329–35.

702. In the 1920 edition of his comprehensive treatise on military justice, William Winthrop did not cite any cases after the Civil War in his litany of examples of military tribunals being used to try offenses against the laws of war. See Winthrop, *Military Law and Precedents*, *supra* note 61, at 839–40 & nn.7–17.

703. See *infra* section V.A.

704. *Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006) (plurality opinion) (quoting Reid v. Covert, 354 U.S. 1, 19 n.38 (1957) (plurality opinion)).

705. See 1 W. Winthrop, *Military Law* (1886) [hereinafter 1 Winthrop, *Military Law*]; 2 W. Winthrop, *Military Law* (1886) [hereinafter 2 Winthrop, *Military Law*].

706. See Winthrop, *Military Law and Precedents*, *supra* note 61.

707. See, e.g., 1 Winthrop, *Military Law*, *supra* note 705, at 225, 249 n.1, 473 n.3 (discussing various procedural matters from the Lincoln trial, including the attendance of a “special provost-marshal,” use of two additional officers to assist the judge advocate, and admission of testimony by Confederate Army officers).



supporting the treatise's proposition that it is against the law of war to employ assassins.<sup>708</sup> Indeed, on at least two occasions Winthrop appeared to go out of his way to suggest that the Lincoln trial is *not* a valid or accepted precedent for any jurisdictional authority. First, in a footnote Winthrop *contrasted* John Bingham's jurisdictional argument during the trial<sup>709</sup> with what he referred to in the text as the holding of the "leading case" of *Milligan* that a commission may not assume jurisdiction over offenses committed in a locality "not involved in war nor subject to any form of military dominion."<sup>710</sup> Second, Winthrop listed the Lincoln trial as among those held during the Civil War to adjudicate ordinary crimes or statutory offenses, cognizable in civilian courts, "which would properly be tried by such courts if open and acting."<sup>711</sup>

Winthrop was a trusted protégé of Judge Advocate General Holt.<sup>712</sup> His treatise liberally cites Holt precedents from the war as honored authority. Winthrop's failure, therefore, to "say a single word about the legality" of the Lincoln assassination commission (apart from his implied critique of Bingham's arguments) is, in the words of Frederick Bernays Wiener (one of the premier judge advocates of the past century), "positively deafening."<sup>713</sup> "The only inference possible," concluded Wiener in 1995, "is that Colonel Winthrop, like all contemporary military lawyers a century later, deemed utterly illegal the trial of the Assassination Conspirators by military commission."<sup>714</sup>

Nor was Winthrop alone in this regard. Other leading treatises on military law either disregarded the Lincoln trial altogether<sup>715</sup> or cited it

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708. See 2 Winthrop, *Military Law*, supra note 705, at 13 n.1; Winthrop, *Military Law and Precedents*, supra note 61, at 785 & n.67 (explaining that a "resort to the employment of assassins . . . is interdicted by civilized usage").

709. See supra notes 428–431 and accompanying text.

710. 2 Winthrop, *Military Law*, supra note 705, at 66 & n.3 ("Compare, in this connection, the argument of Hon. J.A. Bingham, on the Trial of the Assassins of President Lincoln."); Winthrop, *Military Law and Precedents*, supra note 61, at 836 & n.90 (same).

711. 2 Winthrop, *Military Law*, supra note 705, at 70 & n.5 (providing examples of such offenses); Winthrop, *Military Law and Precedents*, supra note 61, 839 & n.5 (same).

712. Winthrop was unswervingly loyal to Holt when, years after the trial, a controversy arose concerning whether Holt had failed to present President Johnson with the commission's recommendation to spare Mary Surratt from execution. See Joshua E. Kastenberg, *The Blackstone of Military Law: Colonel William Winthrop* 205 n.41 (Martin Gordon ed., 2009); Leonard, *Lincoln's Avengers*, supra note 15, at 272–73; Elizabeth D. Leonard, *Lincoln's Forgotten Ally: Judge Advocate General Joseph Holt of Kentucky* 277 (2011).

713. Frederick Bernays Wiener, *His Name Was Mudd*, in *Dr. Mudd and the Lincoln Assassination: The Case Reopened* 117, 162 (John Paul Jones ed., 1995) [hereinafter Wiener, *His Name Was Mudd*].

714. *Id.*

715. See, e.g., Birkhimer, supra note 444.

only for discrete procedural points unrelated to military jurisdiction.<sup>716</sup> The esteemed Judge Advocate General G. Norman Lieber, Francis's son, did not cite it in his pamphlet on martial law.<sup>717</sup> Even the constitutional law treatise that adopted the broadest view of the wartime jurisdiction of military courts failed to cite the 1865 trial as authority.<sup>718</sup> These authors all knew, of course, that "the Lincoln conspirators' trial was a matter of paramount national importance and attracted intense public scrutiny."<sup>719</sup> Some of them had lived through it. Yet they chose not to rely upon it or, in most cases, not to mention it at all.

During the First World War, there was an important, contentious debate within the political branches about proposed legislation that would have authorized military trials of "any person, whether citizen or subject of the enemy country or otherwise," who engaged in any conduct or speech (including any publication opposing the U.S. war cause), anywhere in the United States, that would "endanger or interfere with[] the good discipline order, movements, health, safety, or successful operations of the land or naval forces of the United States."<sup>720</sup> Notably, the ghostwriter and intellectual progenitor of this legislation, Assistant Attorney General Charles Warren—acting in his personal capacity, without Department of Justice approval—aggressively invoked alleged historical analogies in support of the legislation.<sup>721</sup> Yet Warren said not a word about the Lincoln tribunal. Nor did the congressional proponents of the legislation, such as Senators Chamberlain, Lodge, and Overman. Moreover, both President Wilson and Attorney General Thomas Gregory concluded that such legislation would be unconstitutional; and Gregory formally opined that even a member of enemy forces, captured in an effort to commit sabotage in the United States, could not constitutionally be tried by a military court for a domestic-law spying offense unless his conduct fell within a very circumscribed historical exception for certain

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716. See, e.g., George B. Davis, *A Treatise on the Military Law of the United States* 33 & n.3 (New York, John Wiley & Sons 1898) (citing the Lincoln trial as one of the last occasions in which a civilian (Bingham) was appointed as a prosecuting judge advocate); *id.* at 130–31 n.1 (identifying another procedural point).

717. See G. Norman Lieber, *The Justification of Martial Law* (Washington, Gov't Printing Office 1898) (1896).

718. See John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* § 714, at 597–98 (Boston & New York, Houghton, Mifflin & Co. 10th ed., rev. 1888).

719. *Al Bahlul v. United States*, 767 F.3d 1, 25 (D.C. Cir. 2014) (en banc).

720. See *Extending Jurisdiction of Military Tribunals: Hearings on S. 4364 Before the S. Comm. on Military Affairs*, 65th Cong. 3 (1918) (quoting legislation); see also 56 Cong. Rec. 5,120 (1918) (noting Senator Chamberlain's introduction of S. 4364); Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1657–66 (discussing the proposed legislation).

721. See Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1664–65.

forms of spying that are not privileged by the international law of war.<sup>722</sup> Nowhere in these important debates did anyone mention the Lincoln assassination commission, as far as I have been able to determine.

The questions raised in the First World War also precipitated a (relative) outpouring of scholarship on the constitutional parameters of military jurisdiction, in addition to the Second Edition of Winthrop, during and shortly after the war.<sup>723</sup> That corpus of work did not even bother to contend with the well-known Lincoln trial, let alone cite it as relevant authority.<sup>724</sup> Finally, in 1933, John W. Curran wrote a short article devoted specifically to the constitutionality of the Lincoln proceedings. His stark conclusion, however, was hardly that the Lincoln commission was an important legal precedent: "As the trials of the Lincoln conspirators have been relegated to the museum of legal history," Curran wrote, "the most charitable view is to consider them the result of the hysteria of war."<sup>725</sup>

The view within the military justice system itself, by all that appears, was even more damning. For example, Frederick Bernays Wiener recalled that in the very first training session he attended as a judge advocate, in 1936, Lieutenant Colonel Henry A. Auer instructed the class "that no one currently regarded the military tribunal of the Assassination Conspirators as a precedent that would or should be followed."<sup>726</sup> In his own manual on martial law, which he published in 1940, Wiener wrote that "military men generally have hesitated to regard the occasion as a sound precedent or, indeed, as anything more than an indication of the intensity of popular feeling at the moment."<sup>727</sup> And Wiener even went so

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722. See *id.* at 1663–64 (discussing the Wilson Administration's constitutional objections to the legislation); *id.* at 1666–68 (discussing Trial of Spies by Military Tribunals, 31 Op. Att'y Gen. 356 (1918)).

723. See, e.g., Charles Fairman, *The Law of Martial Rule* (1930) [hereinafter Fairman, *Law of Martial Rule*]; Henry J. Fletcher, *The Civilian and the War Power*, 2 Minn. L. Rev. 110 (1918); Hayes McKinney, *Spies and Traitors*, 12 Ill. L. Rev. 591 (1918); Edmund M. Morgan, *Court-Martial Jurisdiction over Non-Military Persons Under the Articles of War*, 4 Minn. L. Rev. 79 (1920); L.K. Underhill, *Jurisdiction of Military Tribunals in the United States over Civilians*, 12 Calif. L. Rev. 75 (1924); Charles Warren, *Spies, and the Power of Congress to Subject Certain Classes of Civilians to Trial by Military Tribunal*, 53 Am. L. Rev. 195 (1919).

724. A minor exception is that Charles Fairman made passing reference to Attorney General Speed's opinion in his 1930 volume on martial law. That citation, however, was hardly favorable. Fairman himself wrote that "[c]ertainly in time of war a commander may seize those who engage in operation against his forces." Fairman, *Law of Martial Rule*, *supra* note 723, at 166. In a footnote, Fairman then added that Speed "carried the principle to the point of sustaining the trial by military commission of persons charged with the assassination of President Lincoln." *Id.* at 166 n.12.

725. Curran, *supra* note 121, at 46.

726. Wiener, *His Name Was Mudd*, *supra* note 713, at 179 n.273.

727. Wiener, *Practical Manual*, *supra* note 123, at 138; see also *id.* ("[T]he assassination of the President was murder, pure and simple . . .").

far as to tell Justice Frankfurter, in private correspondence following the *Quirin* case in 1942, that the Lincoln commission was a precedent that “no self-respecting military lawyer will look straight in the eye.”<sup>728</sup>

## V. MODERN DEVELOPMENTS

The relevant historical narrative is much sparser in the past century, if only because there were very few wartime military trials of persons unconnected with the U.S. armed services between 1873 and 2002. There were, however, at least three such trials during or just after World War II, including the landmark trial of eight Nazi saboteurs. The Lincoln assassination tribunal was barely mentioned in those proceedings, either. In the early 1990s, however, the constitutionality of the Lincoln trial itself actually became a live issue again, in a very unusual proceeding initiated by a descendant of Samuel Mudd. And finally, after the attacks of September 11, 2001, the Lincoln commission, and Attorney General Speed’s opinion about its constitutionality, began to be cited—for the first time ever—as pertinent legal authority, within both the executive branch and the federal judiciary.

### A. *The Nazi Saboteurs Case* (*Quirin*)

In the summer of 1942, the Federal Bureau of Investigation apprehended eight individuals who had been paid and directed by the German Army to commit acts of sabotage against war industries and facilities in the United States.<sup>729</sup> Two of them claimed to be American citizens, and the Court assumed for purposes of argument that at least one of them was.<sup>730</sup> The federal courts in the District of Columbia were available for a trial of these men, presumably for conspiring to commit sabotage against federal facilities. Attorney General Francis Biddle, however, recommended to President Roosevelt that the detainees be tried in a military commission, principally because it would be difficult to prove attempted sabotage in an Article III court (as the prisoners had not gotten very far in their activities—they were under instructions not to

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728. Letter from Frederick Bernays Wiener to Felix Frankfurter, *supra* note 123, at 9. Indeed, the Lincoln trial was such a legal anathema that Wiener suggested it should not even be cited as authority for the modest proposition that the Judge Advocate General could be employed as prosecutor of a commission case. *Id.*

729. See *Ex parte Quirin*, 317 U.S. 1, 20–21 (1942).

730. See *id.* at 20; David J. Danelski, *The Saboteurs’ Case*, 1 J. Sup. Ct. Hist. 61, 62 (1996). There is now a rich and growing literature on the case of the saboteurs. See, e.g., Carlos M. Vázquez, “Not a Happy Precedent”: The Story of *Ex parte Quirin*, in *Federal Courts Stories*, *supra* note 654, at 219, 219 n.1 (citing sources). The best accounts of the legal proceedings and decision include Charles F. Barber, *Trial of Unlawful Enemy Belligerents*, 29 Cornell L.Q. 53 (1943); Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 Mil. L. Rev. 59 (1980); Danelski, *supra*; Vázquez, *supra*.

commit any acts of sabotage for ninety days after their arrival). Although it might have been easier to prove a *conspiracy* to commit sabotage, the penalty for such an offense was modest—as little as three years.<sup>731</sup> Biddle thus assumed that the law of war offered a better opportunity for “swifter” and “severer” penalties.<sup>732</sup> He advised Roosevelt that the defendants had committed a “major violation of the law of war [by] crossing behind the lines of a belligerent to commit hostile acts without being in uniform”—an alleged offense that could be prosecuted by a military commission and for which death was the penalty.<sup>733</sup> Biddle further advised the President that because enemy forces (allegedly) lacked any constitutional rights of access to courts in wartime, Roosevelt should issue an order precluding state and federal courts from hearing any claims by the prisoners.<sup>734</sup>

The President took Biddle’s advice, even though he recognized that the two U.S. citizens were “guilty of high treason,” which would ordinarily be tried in a federal civilian court.<sup>735</sup> “This being wartime,” Roosevelt wrote to Biddle, “it is my inclination to try them by court martial.”<sup>736</sup> On July 2, 1942, the President issued two documents. The first was a proclamation establishing both the primacy of military tribunals and the denial of access to civil courts for a defined group of offenders:

[A]ll persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals; and that such persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of

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731. See Francis Biddle, In Brief Authority 328 (1962) [hereinafter Biddle, In Brief Authority].

732. See Memorandum from Attorney Gen. Biddle to President Franklin Roosevelt on German Saboteurs 1 (June 30, 1942), in Franklin D. Roosevelt Papers, Franklin D. Roosevelt Presidential Library and Museum, Official File 5036 [hereinafter Biddle Memorandum to the President].

733. *Id.* In fact, the saboteurs had been in uniform when they stealthily “crossed” the relevant military lines—the beach patrols along the coasts in Long Island and Florida. See *Quirin*, 317 U.S. at 22 n.1 (describing military patrols). It was only after they had evaded the military patrols at night that they shed their uniforms and went off into the interior of the country in civilian dress.

734. Biddle Memorandum to the President, *supra* note 732, at 2.

735. Biddle, In Brief Authority, *supra* note 731, at 330 (quoting Memorandum from President Franklin Roosevelt to Attorney Gen. Francis Biddle (June 30, 1942)).

736. *Id.*

the United States, or of its States, territories, and possessions, except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe.<sup>737</sup>

The second of Roosevelt's directives was denominated an order of the "Commander in Chief of the Army and Navy."<sup>738</sup> In that order, the President appointed an eight-member military commission to try the eight prisoners "for offenses against the law of war and the Articles of War."<sup>739</sup> Roosevelt authorized the commission to admit evidence if the President of the commission deemed that it would "have probative value to a reasonable man," and he specified that "[t]he concurrence of at least two-thirds of the members of the Commission present shall be necessary for a conviction or sentence."<sup>740</sup>

Note that the President's Proclamation and Order authorized trial not only for violations of (or "offenses against") the law of war but *also* for offenses under the (statutory) Articles of War and for "committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts."<sup>741</sup> Roosevelt therefore specifically contemplated that the saboteurs might be tried for some *domestic-law* offenses. And that is what happened. The Department of the Judge Advocate General presented four charges to the commission. Charge I purported to allege a "violation of the law of war," described as secretly passing, and appearing behind, military and naval lines and defenses, in civilian dress, for the purpose of committing acts of sabotage and espionage on behalf of the German Reich—in particular, the destruction of certain war industries, utilities, and materials within the United States.<sup>742</sup> The other three charges did not purport to describe violations of the law of war. Charge II alleged a violation of Article 81 of the Articles of War, in that the saboteurs allegedly "relieved or attempted to relieve" the enemy with arms, ammunition, supplies, money and other things and allegedly "gave intelligence to the enemies."<sup>743</sup> Charge III alleged a violation of Article

737. President Franklin D. Roosevelt, Proclamation 2561, Denying Certain Enemies Access to the Courts of the United States (July 2, 1942), 7 Fed. Reg. 5,101, 5,101 (July 7, 1942).

738. President Franklin D. Roosevelt, Appointment of a Military Commission (July 2, 1942), 7 Fed. Reg. 5,103, 5,103 (July 7, 1942).

739. *Id.*

740. *Id.*

741. Denying Certain Enemies Access to the Courts of the United States, 7 Fed. Reg. at 5,101.

742. Brief in Support of Writs of Habeas Corpus at 5–6, *Ex parte Quirin*, 317 U.S. 1 (Nos. 1-7), reprinted in 39 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 306, 310–11* (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter *Landmark Briefs*].

743. *Id.* at 6. The theory underlying this charge was a stretch of Article 81—it was not so much that the eight prisoners were conveying goods or information back to Germany

82, the age-old prohibition on wartime spying under certain circumstances.<sup>744</sup> Finally, Charge IV alleged that the accused conspired with one another and with the German Reich to commit the first three offenses.<sup>745</sup>

In the midst of the commission proceedings, the defendants filed both a habeas petition and a petition for certiorari with the Supreme Court. The Court entertained extensive briefing and argument on the case in a special session at the end of July. On July 31, the Court granted the petition for certiorari and, in a brief per curiam opinion, held that the petitioners were not entitled to release and, in particular, that the “charges preferred against petitioners on which they are being tried by military commission appointed by the order of the President of July 2, 1942, allege *an offense or offenses* which the President is authorized to order tried before a military commission.”<sup>746</sup> A few days later, the military commission convicted the individuals of all four charges; six of the saboteurs were executed, the other two sentenced to prison terms of thirty years and life, respectively.<sup>747</sup>

In the Supreme Court briefing, the Lincoln trial did not get very much attention; Attorney General Biddle, however, did cite it or Attorney General Speed’s opinion three times in his brief. First, he cited the 1865 Attorney General opinion, among other authorities, for the modest proposition that military commissions (as opposed to courts-martial) had historically been recognized by the political branches.<sup>748</sup> Next, in an Appendix, Biddle’s brief referred to the assassination trial itself, along with the Milligan, Vallandigham, Grenfel, and other trials, as examples of Civil War military commissions.<sup>749</sup> Finally, and most notably, in another Appendix the brief cited the Lincoln conspirators’ trial as a “cf.” authority for the proposition that Charge IV against the saboteurs, the charge of a *conspiracy* to commit the other three charges, was itself “contrary to the law of war.”<sup>750</sup> Biddle’s brief did not make any effort, however, to demonstrate that such a conspiracy (especially with respect to the two non-law-of-war charges) was in fact a violation of the law of

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but that they planned to supply one another with such supplies and information in the service of their sabotage plan. *Id.*

744. *Id.* at 7.

745. *Id.* at 7–8.

746. *Quirin*, 317 U.S. at 18 n. (emphasis added).

747. See Statement from the White House on the Sentences of Eight Nazi Saboteurs Landed by Submarine on the Long Island and Florida Shores on June 13 and 17, 1942 (Aug. 8, 1942), <http://www.ibiblio.org/pha/policy/1942/1942-08-08a.html> [<http://perma.cc/S7W9-3QH5>]; see also Eugene Rachlis, *They Came to Kill: The Story of Eight Nazi Saboteurs in America* 281–90 (1961).

748. Brief for the Respondent at 35, *Quirin*, 317 U.S. 1 (Nos. 1-7), reprinted in *Landmark Briefs*, *supra* note 742, at 402, 436.

749. *Id.* app. II at 73–76.

750. *Id.* app. III at 83.

war, except to assert, without elaboration or citation of authority, that the “principle” that a conspiracy to commit an offense is itself an offense “is a part of the laws of war.”<sup>751</sup>



Military trial of the eight alleged Nazi "saboteurs," July 1942, in a room on the Fifth Floor of the Department of Justice that, as reconfigured, was the author's office when he served as a DOJ officer from 2009 to 2010 (U.S. Army Signal Corps) (Source: Library of Congress, Prints & Photographs Division, FSA/OWI Collection, LC-USE623-D-OA-000144).

In an opinion filed several months after the executions, the Court effectively rejected Roosevelt's effort to deny the saboteurs' right of access to courts. "[N]either the [President's] Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission."<sup>752</sup> On the merits, however, the Court held that it was constitutional for Congress to have authorized such use of a military commission, even where civilian courts were "open and functioning normally,"<sup>753</sup> to try persons who were part of, or directed by, enemy armed forces, for at least *some* offenses against the international law of war.<sup>754</sup> In other words, the

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751. *Id.*

752. *Quirin*, 317 U.S. at 25; accord *In re Yamashita*, 327 U.S. 1, 9 (1945).

753. *Quirin*, 317 U.S. at 24.

754. See *id.* at 40. The Court explained:



Court affirmed Attorney General Speed's basic theory of military jurisdiction, from his July 1865 opinion, distinct from the theories of "necessity" and martial law that the *Milligan* Court had rejected.<sup>755</sup>

As I have explained elsewhere, Chief Justice Stone could have offered a functional argument in support of this new Article III exception—namely, that there would be good reason for Congress to prefer that military officers, rather than civilian juries, adjudicate questions involving the customary international law of war by which all forces, including U.S. forces, must abide.<sup>756</sup> Instead, Stone rested his case on an argument from historical authority. Notably, however, Stone did *not* rely upon the Lincoln trial, or on any other Civil War trials, even

[W]e must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.

Id; see also id. at 29. The Court indicated that this law-of-war-offense exception is not absolute: Some violations of the laws of war, wrote the Chief Justice, might be in a "class of offenses constitutionally triable only by a jury." Id. Chief Justice Stone included this caveat at the insistence of Justice Black, who had written Stone an internal note declaring his reluctance to issue a categorical judgment:

I seriously question whether Congress could constitutionally confer jurisdiction to try all such violations before military tribunals . . . [T]o subject every person in the United States to trial by military tribunals for every violation of every rule of war which has been or may hereafter be adopted between nations among themselves, might go far to destroy the protections declared by the *Milligan* case.

Memorandum from Justice Hugo L. Black to Chief Justice Harlan Stone (Oct. 2, 1942), in Papers of Hugo L. Black, Library of Congress, box 269. The Court did not offer any hint in its opinion about which law-of-war offenses must be tried in an Article III court.

755. The Court reaffirmed its holding that military courts could try charges of international law-of-war violations in *Yamashita*, 327 U.S. at 7–8, 11, 14, and in *Duncan v. Kahanamoku*, 327 U.S. 304, 313–14 n.8 (1946) (citing *Quirin* and *Yamashita* for the proposition that the military has jurisdiction to try "enemy belligerents, prisoners of war, or others charged with violating the laws of war").

756. See Lederman, *Wartime Military Tribunals*, supra note 67, at 1584–85. Alexander Hamilton argued in *The Federalist* that perhaps juries should not try *any* cases that turn on international law:

[T]here are many cases in which the trial by jury is an ineligible one. I think it so particularly in cases which concern the public peace with foreign nations—that is, in most cases where the question turns wholly on the laws of nations . . . Juries cannot be supposed competent to investigations that require a thorough knowledge of the laws and usages of nations; and they will sometimes be under the influence of impressions which will not suffer them to pay sufficient regard to those considerations of public policy which ought to guide their inquiries. There would of course be always danger that the rights of other nations might be infringed by their decisions so as to afford occasions of reprisal and war.

The *Federalist* No. 83, at 504 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

though Speed's opinion would have been the most obvious, and famous, citation of authority for an "offenses against the law of war" theory of military jurisdiction. Instead, Stone relied exclusively on Revolutionary War precedents that he thought demonstrated an early practice of trying law-of-war offenses in military tribunals,<sup>757</sup> together with an assumption that the Framers did not intend "to bring within the sweep of the [Article III and Sixth Amendment] guarant[ees] those cases in which it was [at the Founding] well understood that a jury trial could not be demanded as of right."<sup>758</sup>

Stone then proceeded to apply his holding to affirm the commission's jurisdiction over a single specification of *one* of the four charges at hand: Specification 1 of Charge I, which nominally alleged a violation of the law of war. Stone assumed that "unprivileged" belligerency of the sort described in that specification—crossing enemy lines in civilian dress with aims to attack military targets—violated the law of war.<sup>759</sup>

In the recent *Al Bahlul* litigation, Judge Kavanaugh opined that the Nazi saboteurs' *conspiracy* conviction in Charge IV (together with the conspiracy charge in the Lincoln case) is an historical example that supports military jurisdiction over domestic-law conspiracy charges under the Military Commissions Act, not only because it was personally prosecuted by the Attorney General (Francis Biddle) and approved by President Franklin Roosevelt but also because "[t]he Supreme Court

757. *Quirin*, 317 U.S. at 41–44 n.14.

758. *Id.* at 39. I argue in my earlier article that Stone misunderstood the Founding-era history. See Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1587–88. Nevertheless, whether he described that history accurately is not germane to the questions at issue in this Article.

759. *Quirin*, 317 U.S. at 36–37. As he was writing the opinion, Stone was chagrined to discover that international law authorities did not support this assumption; as he wrote to his law clerks, he had drafted the opinion to include the law "as I think it ought to be," hoping that he would find authority for it. Letter from Chief Justice Harlan Stone to Bennett Boskey and James L. Morrison, Law Clerks, 1 (Aug. 14, 1942), *in* Papers of Harlan Fiske Stone, Library of Congress, box 69, folder marked "July Special Term 1942 Ex Parte Quirin et al."; see also Danelski, *supra* note 730, at 72–73. As I explain elsewhere, Stone could not locate such authorities because his assumption about the law of war was mistaken. See Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1587–88. Like some of the stray remarks in the Lieber Code, see *supra* notes 221–224 and accompanying text, it reflected "a fundamental confusion between acts punishable under international law and acts with respect to which international law affords no protection." Baxter, *supra* note 519, at 340. Stone was therefore wrong to assume that the conduct alleged against the saboteurs in Charge I—going behind enemy lines in civilian dress with aims to attack military targets—violated the law of war. Such conduct might not be privileged—i.e., international law may permit states to punish it under their domestic law—but international law does not itself prohibit the conduct. For present purposes, however, what is important is simply the nature of the Court's holding—and its refusal to decide whether the commission had jurisdiction over the other three charges, which plainly did not allege offenses against the law of war—rather than whether the application of that holding to Specification 1 of Charge I was correct.

affirmed the legality of the trial, and in doing so, did not disturb the conspiracy charge.”<sup>760</sup>

Contrary to Judge Kavanaugh’s account, however, the Court in *Quirin* actually cast doubt on the constitutionality of using military tribunals to try individuals unaffiliated with the armed forces for war-related offenses (such as conspiracy) that are *not* violations of the law of war. For one thing, Chief Justice Stone distinguished *Milligan* on precisely that ground: He assumed that the law of war was “inapplicab[le]” to Milligan’s conduct because he was not “part of or associated with the armed forces of the enemy.”<sup>761</sup> Of perhaps even greater significance, Stone also stressed that the Court was not deciding whether the Roosevelt-approved commission had constitutional jurisdiction to adjudicate any of the *other* charges in the case, apart from Specification 1 of Charge I.<sup>762</sup> Stone apparently settled upon this odd quasi-disposition in *Quirin* because he recognized constitutional “difficulties” with military adjudication of claims that did not clearly allege law-of-war offenses.<sup>763</sup> Stone was not alone in failing to identify any legal authority for treating the alleged conspiracy as a law-of-war offense: Just as Attorney General Speed did not discuss whether the conspiracy charge in the Lincoln case was constitutional in his comprehensive 1865 opinion defending that military commission,<sup>764</sup> likewise Attorney General Biddle made no effort to argue that the conspiracy charge in *Quirin* was constitutional—apart from his unconvincing, undefended statement in passing, in an appendix to his brief, that such conspiracy *was*, in fact, a violation of the law of

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760. *Al Bahlul v. United States*, 840 F.3d 757, 766–67 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring), cert. denied, 138 S. Ct. 313 (2017).

761. *Quirin*, 317 U.S. at 45. Otherwise, of course, the charge against Milligan that expressly alleged a violation of the law of war would have been constitutional, per *Quirin*.

762. *Id.* at 46; see also Lederman, *Wartime Military Tribunals*, supra note 67, at 1674.

763. Letter from Chief Justice Harlan Stone to Bennett Boskey, Law Clerk, 1 (Aug. 20, 1942), in *Papers of Harlan Fiske Stone*, Library of Congress, box 69, folder marked “July Special Term 1942 Ex Parte *Quirin et al.*” Stone was referring to the second and third charges, for relieving the enemy and spying, which as alleged by the government did not clearly make out law-of-war offenses. Stone did not specifically mention the conspiracy charge at all, in his memo to his clerk or in his ultimate description, in his opinion, of what the Court was and was not deciding. Presumably, if Stone had agreed with the government that the conspiracy charge alleged a law-of-war offense, the Court would have confirmed the constitutionality of that count, too, on the basis of Stone’s rationale for upholding Specification 1 of Charge I. The fact that the Court did not do so suggests that Stone was uncertain about the legal source of the conspiracy charge, as well as of Charges II and III.

764. See supra notes 489–491 and accompanying text (highlighting Speed’s characterization of the issue as whether persons charged “with the offence of having assassinated the President” could be tried before a military tribunal (quoting *Military Commissions*, 11 Op. Att’y Gen. 297, 297 (1865))).

war<sup>765</sup> (that is to say, his effort to bring that charge *within* the Court's ultimate holding—an implied invitation that the Court carefully rebuffed).

### B. *The Surprising Revival of the Case of Samuel Mudd*

In the 1970s, Samuel Mudd's grandson, Richard Mudd, began a campaign to clear his grandfather's name. When he petitioned President Jimmy Carter to set aside the conviction, Carter responded that, in his "personal opinion," Andrew Johnson's declarations in his formal pardon of Mudd "substantially discredit the validity of the military commission's judgment," and he hoped that this conclusion would "clear the Mudd family name of any negative connotation or implied lack of honor."<sup>766</sup> Nevertheless, Carter informed Richard Mudd that he lacked any power to set aside the conviction.<sup>767</sup> Eight years later, Ronald Reagan likewise informed Richard Mudd that although he had come to believe "that Dr. Samuel Mudd was indeed innocent of any wrongdoing," the power to pardon "is all that is within a President's prerogatives and that, of course, was done by President Andrew Johnson."<sup>768</sup>

Richard Mudd then tried another tactic: He applied to the Army Board for Correction of Military Records (ABCMR), seeking to correct his grandfather's military records by striking the 1865 military commission conviction.<sup>769</sup> (The ABCMR is a civilian board that can recommend correction of Army records to the Secretary of the Army.) Richard Mudd cited two reasons for the requested correction: that his grandfather was not guilty of the offense (primarily because there wasn't sufficient evidence that Mudd knew of Lincoln's killing when he assisted Booth) and that the military commission lacked jurisdiction to try Dr. Mudd.<sup>770</sup> As to the jurisdictional claim, Mudd's representatives stressed at an ABCMR hearing that Mudd was *not* charged with violating the law of war and that therefore he should have been afforded a civilian trial,<sup>771</sup> just as John Surratt received in 1867<sup>772</sup> and just as the government had prosecuted those accused of assisting German agents (including the *Quirin* saboteurs) in World War II.<sup>773</sup>

765. See *supra* note 751 and accompanying text.

766. Letter from President Jimmy Carter to Dr. Richard Mudd (July 24, 1979) (on file with the *Columbia Law Review*).

767. *Id.*

768. Letter from President Ronald Reagan to Dr. Richard Mudd (Dec. 8, 1987) (on file with the *Columbia Law Review*).

769. See Proceedings at 2–3, *In re Mudd*, No. AC91-05511 (Army Bd. for Corr. of Military Records Jan. 22, 1992).

770. Transcript of Hearing at 7–8, *Mudd*, No. AC91-05511 (Index No. 101.01).

771. See *id.* at 46.

772. See *supra* section III.F.2.a.

773. See, e.g., *Cramer v. United States*, 325 U.S. 1, 36 (1945); *United States v. Haupt*, 136 F.2d 661, 663 (7th Cir. 1943).

The Army Board concluded that Mudd's case was "analogous" to Milligan's and that Attorney General Speed's opinion thus did not offer a justification for military jurisdiction.<sup>774</sup> It concluded that the commission did not have jurisdiction to try Mudd and that the trial was "such a gross infringement of his constitutionally protected rights, that his conviction should be set aside."<sup>775</sup> Six months later, however, the Acting Assistant Secretary of the Army, William D. Clark, denied the Board's recommendation and Richard Mudd's request, because he concluded it was "inappropriate" for a nonjudicial body such as the ABCMR to second-guess the decisions of Attorney General Speed and Judge Boynton in the 1860s.<sup>776</sup> Mudd's grandson asked for reconsideration of the decision.<sup>777</sup> Four years later, a new Assistant Secretary, Sara Lister, again denied the request to vacate the conviction, on the ground, earlier decreed by Speed, that the "assassination was an offense against the law of war."<sup>778</sup> Lister wrote that "[a]ny further Army action would be an ill-advised attempt to alter legal history by nonjudicial means."<sup>779</sup>

Richard Mudd then filed an action in federal district court, challenging the Army's refusal to expunge his grandfather's record of conviction.<sup>780</sup> Judge Paul Friedman concluded that Lister's action was arbitrary and capricious because she had simply deferred to Attorney General Speed's and Judge Boynton's judgments and had not independently addressed whether Mudd's offense was, in fact, a violation of the law of war.<sup>781</sup> On remand to the Army, yet a third Assistant Secretary, Patrick Henry, also rejected the petition. Henry concluded that the commission had jurisdiction over Mudd because he was, in effect, charged with aiding and abetting Booth, who had violated the law of war.<sup>782</sup> Henry did not explain, however, why Booth's actions violated international law. Nor did he examine whether aiding and abetting another's law-of-war offense is itself a law-of-war offense.<sup>783</sup> The case then

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774. Proceedings at 12, *Mudd*, No. AC91-05511.

775. *Id.*

776. Memorandum from William D. Clark, Acting Assistant Sec'y of the Army, to the Exec. Sec'y, Army Bd. for Corr. of Military Records 2 (July 22, 1992) (on file with the *Columbia Law Review*).

777. See Letter from Sara E. Lister, Assistant Sec'y of the Army, to [redacted recipient] 1 (Feb. 2, 1996) (on file with the *Columbia Law Review*).

778. *Id.* at 2.

779. *Id.* at 3.

780. *Mudd v. Caldera*, 26 F. Supp. 2d 113, 118 (D.D.C. 1998).

781. *Id.* at 123.

782. Decision at 2, *In re Mudd*, Patrick Henry, Assistant Sec'y of the Army for Manpower and Reserve Affairs (Mar. 6, 2000).

783. Notably, even in the case of the Nazi saboteurs, when U.S. persons—including the father of one of the accused—were alleged to have given aid and comfort to two of the saboteurs, the government tried them for treason in Article III courts, rather than for a

went back up to Judge Friedman. The judge did not decide whether Mudd had committed an offense against the law of war, but he concluded that he “[could not] say that [Assistant] Secretary Henry’s decision was arbitrary, capricious or not in accordance with law.”<sup>784</sup>

Richard Mudd then appealed to the U.S. Court of Appeals for the District of Columbia Circuit.<sup>785</sup> Defending the Army’s decision, the federal government’s entire explanation for why Mudd had committed a law-of-war offense was to repeat Judge Boynton’s 1869 “reasoning” that Lincoln was killed not in his capacity as President but as Commander in Chief.<sup>786</sup> Once again, however—as in 1869—Dr. Mudd’s case was dismissed without an ultimate resolution of the merits: The court of appeals concluded that Richard Mudd was not an heir of the sort of “claimant” contemplated by the military record corrections statute because Samuel Mudd had not been a member of the armed forces.<sup>787</sup> Accordingly, the court held, Richard Mudd was not within the “zone of interests” protected by the statute and thus lacked so-called “prudential” standing.<sup>788</sup>

Mudd’s grandson’s belated effort to formally repudiate any constitutional legacy of the assassination trial thus ended with a whimper.

### C. After 2001: Resuscitating the Lincoln Case as Precedent

While Richard Mudd’s federal case was on appeal, the Department of Justice’s Office of Legal Counsel (OLC) dusted off Attorney General Speed’s opinion in the Lincoln case, citing it as authority for the proposition that President George W. Bush had the power to establish military commissions in wartime without statutory authorization.<sup>789</sup> That particular question is, of course, distinct from the question of Article III’s limits, and it is unlikely to be relevant anytime in the near future because such unilateral Presidential action is unlikely: In the wake of *Hamdan v. Rumsfeld*<sup>790</sup> and the enactment of the Military Commissions Act of 2009, it is almost certain that, going forward, military commissions will be convened pursuant to a statutory regime, not as a matter of unilateral executive command. Even so, the 2001 OLC opinion brought the Speed

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law-of-war offense in a military court. See *Cramer v. United States*, 325 U.S. 1, 36 (1945); *United States v. Haupt*, 136 F.2d 661, 663 (7th Cir. 1943).

784. *Mudd v. Caldera*, 134 F. Supp. 2d 138, 147 (D.D.C. 2001).

785. *Mudd v. White*, 309 F.3d 819, 820–21 (D.C. Cir. 2002).

786. Brief for Appellees at 20, *Mudd*, 309 F.3d 819 (No. 01-5103).

787. See *Mudd*, 309 F.3d at 824.

788. *Id.*

789. Legality of the Use of Military Commissions to Try Terrorists, 25 Op. O.L.C. 238, 248–49 (2001).

790. 548 U.S. 557 (2006).

opinion out of the mothballs—it was the first time in well over a century that a published Department of Justice opinion had cited it.

The Lincoln assassination commission then became an unexpected flash point in the Supreme Court's decision in *Hamdan*. The Court in that case assumed, based upon *Quirin*, that congressionally authorized military commissions could be used to adjudicate at least some offenses against the international law of war.<sup>791</sup> In dissent, Justice Thomas cited the Lincoln commission, and the Speed opinion, as authority for the proposition that *conspiracy* to commit a law-of-war offense is itself a violation of the law of war: “[I]n the highest profile case to be tried before a military commission relating to [the Civil War], namely, the trial of the men [sic] involved in the assassination of President Lincoln, the charge provided that those men had ‘combin[ed], confederat[ed], and conspir[ed] . . . to kill and murder’ President Lincoln.”<sup>792</sup> Further, Justice Thomas argued that, even apart from conspiracy, the petitioner, Salim Hamdan, could be tried in a military commission for merely having cast his lot with al-Qaeda.<sup>793</sup> In support of this notion, Thomas relied upon the Speed opinion as having *established* such a proposition as a matter of international law:

For well over a century it has been established that “to unite with banditti, jayhawkers, guerillas, or any other unauthorized marauders is a high offence against the laws of war; the offence is complete when the band is organized or joined. The atrocities committed by such a band do not constitute the offence, but make the reasons, and sufficient reasons they are, why such banditti are denounced by the laws of war.”<sup>794</sup>

Both of these citations were problematic, even on their own terms.<sup>795</sup> Be that as it may, however, they served to revive the notion that the

791. See *id.* at 602 (plurality opinion).

792. *Id.* at 699 (Thomas, J., dissenting) (quoting General Court-Martial Orders, No. 356 (July 5, 1865), in *Official Records*, supra note 156, ser. II, vol. 8, at 696, 696).

793. *Id.* at 692–93.

794. *Id.* at 693–94 (emphasis omitted) (quoting Military Commissions, 11 Op. Att’y Gen. 297, 312 (1865)). Thomas elaborated: “In other words, unlawful combatants, such as Hamdan, violate the law of war merely by joining an organization, such as al-Qaeda, whose principal purpose is the ‘killing [and] disabling . . . of peaceable citizens or soldiers.’” *Id.* at 694 (citing, *inter alia*, Military Commissions, 11 Op. Att’y Gen. at 314 (“A bushwhacker, a jayhawker, a bandit, a rebel, an assassin, being public enemies, may be tried, condemned, and executed as offenders against the laws of war.”)).

795. As the United States has recently acknowledged, a stand-alone conspiracy to violate the law of war is not itself a law-of-war violation. See Brief for the United States in Opposition, supra note 86, at 26 n.6. Moreover, the Lincoln case was not litigated on the theory that conspiracy—let alone an inchoate, unrealized conspiracy, which was not at issue there—is a violation of the international law of war. Nor did Attorney General Speed opine on that question. Speed did opine that joining certain sorts of unprivileged belligerent groups violates the law of war. See supra notes 514–518 and accompanying

Speed opinion, and the Lincoln assassination trial, might serve as possible sources of legal authority for the first time since 1865. And if the Lincoln case could be cited as authority for propositions about the content of international law, it stood to figure that it was only a matter of time before it would also be cited as authority with respect to the more fundamental constitutional question, too.

That time has now come. As I discussed at the outset,<sup>796</sup> in his recent opinion for three judges in *Al Bahlul*, Judge Kavanaugh relied heavily on the Lincoln trial as a basis for rejecting the defendant's Article III objection to his conviction by military commission, reasoning that that 1865 trial (along with the *Quirin* case) allegedly lies "at the core" of historical military practice, which "cannot be airbrushed out of the picture."<sup>797</sup>

#### VI. THE USE OF LANDMARK MILITARY TRIALS AS A SOURCE OF CONSTITUTIONAL AUTHORITY

"Arguments based on historical practice are a mainstay of debates about the constitutional separation of powers."<sup>798</sup> In two recent landmark cases, the Supreme Court has confirmed that adage by resolving long-standing interbranch disputes primarily on the basis of the Court's reading of historical settlement within the political branches.<sup>799</sup> Political-branch practice, the Court insists, can be "an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era."<sup>800</sup>

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text. But he was mistaken about that, see *supra* notes 519–521 and accompanying text, and, in any event, the prosecution in the Lincoln commission did not allege that theory, either.

796. See *supra* notes 109–113 and accompanying text.

797. *Al Bahlul v. United States*, 840 F.3d 757, 768 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring), cert. denied, 138 S. Ct. 313 (2017).

798. *Bradley & Morrison*, *supra* note 134, at 412.

799. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091–94 (2015); *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559–64 (2014).

800. *Noel Canning*, 134 S. Ct. at 2560. *Noel Canning* was not, of course, the first such case in which the Court had relied heavily on such political-branch practice. For example, in *The Pocket Veto Case*, the Court affirmed that a bill becomes law when it is submitted to the President fewer than ten days before a congressional adjournment at the end of a session and the President neither signs nor returns it before that adjournment. See 279 U.S. 655, 692 (1929). Pointing to 119 such examples over the course of about seventy years, the Court explained:

The views which we have expressed as to the construction and effect of the constitutional provision here in question are confirmed by the practical construction that has been given to it by the Presidents through a long course of years, in which Congress has acquiesced. Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character.



Not surprisingly, then, in the wake of *Noel Canning* and *Zivotofsky*, the government contends—and at least three judges of the D.C. Circuit agree—that such deference to established practice is the key to unlocking the question of whether there is, or should be, an Article III exception for the military adjudication of domestic-law crimes that are in some way related to the nation’s prosecution of war.

A. *The Problems with Reliance on Political-Branch Practice in This Context*

It is noteworthy, however, that in its long series of cases dealing with possible exceptions to Article III’s guarantees, in both the civil and criminal contexts, the Supreme Court has rarely, if ever, looked to the practices of the political branches for guidance.<sup>801</sup> Indeed, on at least one such occasion it brushed aside Civil War statutory precedents as worthy of no more than summary dismissal in a footnote.<sup>802</sup>

There are at least two reasons why the Court might be reluctant to defer to political-branch practice in this context. First, the Court typically has credited such practice when the constitutional text is vague or ambiguous—to “give meaning to the words of a text,” such as by treating practice “as a gloss” on the undefined term “executive Power” in Article II,<sup>803</sup> or to effectively “supply” words when the Constitution is silent on a question of one branch’s power.<sup>804</sup> Here, however, the words of Article

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Id. at 688–89. Likewise, in *Ex parte Grossman*, the Court reasoned that a “long practice” of presidential pardons of convictions for criminal contempt of court—twenty-seven instances over the course of eighty-five years—with virtually no congressional pushback, “sustain[ed]” a construction of the Pardon Clause to encompass such offenses. 267 U.S. 87, 118–19 (1925); see also, e.g., *The Laura*, 114 U.S. 411, 416 (1885) (holding that a statute giving the Secretary of Treasury, rather than the President, the power to remit penalties relating to steam vessels was constitutional in light of a long tradition of such remissions by the Secretary pursuant to such statutes).

801. But cf. *Stern v. Marshall*, 564 U.S. 462, 504–05 (2011) (Scalia, J., concurring) (“[I]n my view an Article III judge is required in all federal adjudications, unless there is a firmly established historical practice to the contrary.”). It is unclear whether Justice Scalia here was referring to a preconstitutional “historical practice” or to a practice that might have crystallized after the Constitution was ratified.

802. See *Toth v. Quarles*, 350 U.S. 11, 14 n.8 (1955). In at least one case—*Quirin*—the Court’s decision did rest upon a very different sort of historical argument, namely, that the Constitution was not designed to eliminate a practice that (allegedly) was commonly employed during the Revolutionary War, and that the early Congresses confirmed the legitimacy of that practice. See Lederman, *Wartime Military Tribunals*, supra note 67, at 1585–87. That decision did not, however, invoke postconstitutional wartime practices as precedent.

803. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

804. Id. at 610; see also Letter from James Madison to Spencer Roane, supra note 135, at 450 (“It . . . was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily

III and the Sixth Amendment arguably are “too plain and direct, to leave room for misconstruction or doubt of their true meaning.”<sup>805</sup> Exceptions to that plain text, at least in theory, should thus be recognized only reluctantly, and only for fairly compelling reasons.<sup>806</sup>

Second, the Article III question at issue here is not—as in *Noel Canning*, *Zivotofsky*, and similar cases—simply about the powers of the Executive and the relationship of authorities between the two political branches. In cases such as those, it arguably makes some sense to inquire whether there has been “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution.”<sup>807</sup> If the two political branches have, in effect, settled upon an equilibrium in allocating authority between themselves, perhaps there is good reason to credit that settlement. Here, however, the guarantees in question, especially the jury right, are widely understood to be fundamental protections of individual liberty.<sup>808</sup> Moreover, insofar as Article III is also seen as a *structural* protection to “safeguard[] the role of the Judicial Branch in our tripartite system by barring congressional attempts ‘to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating’ constitutional courts,”<sup>809</sup> then the military’s exercise of Article I adjudicatory power diminishes the authority of the very branch to which the Constitution assigns the “judicial power” of the United States. Accordingly, the fact that the two political branches might have “settled” upon a practice that weakens the otherwise exclusive authority of the judiciary should not be accepted as a reasonable gloss on

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used in such a charter . . . and that it might require a regular course of practice to liquidate & settle the meaning of some of them.”).

805. Ex parte Milligan, 71 U.S. (4 Wall.) 2, 119–20 (1866); see also Transcript in En Banc Oral Argument at 21–22, *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (No. 11-1324) (Kavanaugh, J.) [hereinafter *Al Bahlul* Transcript] (“[B]ecause Article III . . . does not have an exception for Military Commissions . . . under the plain language of Article III you [al Bahlul’s counsel] have a great case.”).

806. See *Al Bahlul* Transcript at 66 (Kavanaugh, J.) (“The baseline, arguably, should be the text of Article III which contains no exception for Military Commissions, and then the argument would go [that] *Quirin* carved out an atextual exception to Article III, but we should narrowly construe it because it is an atextual exception.”); see also *INS v. Chadha*, 462 U.S. 919, 944–52 (1983) (rejecting the authority of a frequent practice of the political branches that the Court thought was flatly inconsistent with the textual commands of bicameralism and presentment in Article I, Section 7, Clauses 2 and 3).

807. *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring).

808. To be sure, the Court has often understood the balance of powers between the President and Congress also to be a guarantee of individual liberty, in the sense that checks on the exercise of unilateral power help to prevent tyranny. The jury right, however, is a more direct protection of individual rights.

809. *CFTC v. Schor*, 478 U.S. 833, 850 (1986) (quoting *Nat’l Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 664 (1949) (Vinson, C.J., dissenting)); accord *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1944 (2015).

“the judicial power of the United States” unless the judiciary itself has also acquiesced in its own “emasculati[on].”<sup>810</sup>

### B. *Views from the Three Branches on the Article III Question*

It is, therefore, necessary—at a minimum—to consider carefully the historical perspectives of all three branches in order to discern whether there has been the sort of “systematic, unbroken, executive practice”<sup>811</sup> that might at least inform the question of whether to now recognize yet another Article III criminal trial exception. And when we look to whether and how the three branches have historically treated military trials of domestic-law offenses, it turns out there is not much ratification to be found there, even accounting for “the two most well-known U.S. military commission precedents, the landmark Lincoln assassin and Nazi saboteur cases.”<sup>812</sup>

1. *The Executive.* — Perhaps the single most revealing historical fact bearing on the Article III question is how infrequently the military has actually tried individuals for domestic-law offenses in the wars fought since Article III was ratified in 1789. Almost all such cases occurred during the Civil War, as part of an aggressive undertaking by Edwin

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810. *Schor*, 478 U.S. at 850. In this respect, the juxtaposition of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803), is instructive. In *Marbury*, the Court paid no deference at all to Congress’s—and George Washington’s—(purported) judgment, reflected in section 13 of the Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80, that Article III empowered Congress to afford the Court original jurisdiction to issue writs of mandamus to federal officers. See *Marbury*, 5 U.S. (1 Cranch) at 176. Six days later, however, in *Stuart*, the Court held that Article III did not prohibit Congress from requiring the Justices to ride circuit, reasoning that the “practice and acquiescence” by the Justices themselves “for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.” *Stuart*, 5 U.S. (1 Cranch) at 309. To similar effect, in *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816), the Court affirmed its authority to entertain appeals from state court decisions on questions of federal law, in part because of the historical practice:

[T]he supreme court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important states in the union, and . . . no state tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the supreme court, until the present occasion.”

*Id.* at 352. “[T]hese judicial decisions of the supreme court through so long a period,” wrote Justice Story, together with “contemporaneous exposition by all parties [at the time of ratification], [and] acquiescence of enlightened state courts, . . . place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts.” *Id.*

811. *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring).

812. *Al Bahlul v. United States*, 767 F.3d 1, 71 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

Stanton's War Department.<sup>813</sup> And the War Department defended the constitutionality of those trials predominantly on two grounds—martial law “necessity” and the inapplicability of the Constitution in war—that did not survive the *Milligan* decision and that, in any event, would not be viable arguments today with respect to trials pursuant to the Military Commissions Act. Not surprisingly, then, since the Civil War the executive branch has increasingly turned to civilian court trials to prosecute war-related, domestic-law offenses such as “support” for the enemy, especially during the current armed conflict against al-Qaeda, in which Article III trials have become ubiquitous.<sup>814</sup>

The two major exceptions to this historical norm are those on which the government and Judge Kavanaugh would place so much reliance: the 1865 Lincoln assassination commission and the 1942 Nazi saboteur trial. Indeed, those trials stand out not only due to the notoriety of the defendants and their offenses but precisely *because* those military proceedings are such anomalies in our constitutional history.<sup>815</sup> They are aberrant cases, noteworthy in large measure because they deviated so dramatically from the norm. Just as significantly, both cases have also been viewed with deep suspicion over time. Various aspects of the Court's decision (and process) in *Quirin* have been regularly, and sharply, criticized. Justice Scalia, for example, referred to it as “not this Court's finest hour.”<sup>816</sup> As for the Lincoln assassination trial, its constitutionality was a deeply contested question even as it was being

813. See *supra* notes 137–148 and accompanying text.

814. See Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1567–68.

815. Three other less famous cases do not materially affect the basic thrust of the historical narrative. First, in the War of 1812, General Andrew Jackson convened a court-martial to try a Louisiana state senator for having written a letter to the editor of a newspaper. See *id.* at 1632 n.557. That court-martial resulted in a quick acquittal; it was not authorized by President Madison (to the contrary, Madison indicated doubts about the legitimacy of such trials, see *id.* at 1632), and it was predicated on a very aggressive understanding of martial law, of the sort the Court in *Milligan* rejected. See *id.* Second, in the First World War, the military tried a German agent, Lieutenant Lothar Witzke, who was apprehended after crossing the Mexican border in disguise with plans to conduct acts of sabotage in the United States. See *id.* at 1666–68. The government defended that prosecution on the ground that it came within the traditional exception for spying within enemy encampments, unprivileged by the laws of war. See *id.* Notably, however, Attorney General Gregory concluded that that trial would not be constitutional if the facts did not bring the case within that traditional, very circumscribed exception. See *id.* at 1667. Third, in the *Colepaugh* case—one that closely resembled the *Quirin* saboteurs case—a military commission tried two German agents for both a law-of-war offense and domestic-law offenses. See *id.* at 1674–75. In asking the Supreme Court not to review the convictions, however, the government specifically argued that the (alleged) law-of-war offense was sufficient to sustain the judgment and that the Court did not need to consider the other counts. See *id.*

816. *Hamdi v. Rumsfeld*, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting, joined by Stevens, J.).

conducted. Members of Congress questioned it,<sup>817</sup> as did officers in Lincoln's own cabinet,<sup>818</sup> at least one member of the military commission itself,<sup>819</sup> and much of the press sympathetic to the Union.<sup>820</sup> An esteemed New York judge, noting "grave" constitutional doubts, went so far as to invite a grand jury to issue a "presentment" expressing the unlawfulness of the Lincoln commission.<sup>821</sup> By 1867, that trial was under such a dark constitutional shadow that when Booth's primary accomplice, John Surratt, was extradited to the United States several months after the *Milligan* decision, the government did not use a military commission but instead tried him in the local Article III court.<sup>822</sup> Thus, even taken together, these two very unusual military trials hardly establish the sort of "systematic" and "unbroken" practice that is ordinarily thought adequate to "liquidate" the meaning or proper application of a constitutional provision by virtue of a longstanding consensus regarding their legitimacy.<sup>823</sup>

Nor is there a robust, pre-2001 history of Presidents or Attorneys General approving of the constitutionality of such military tribunals. To be sure, Franklin Roosevelt and Francis Biddle approved of the trial of the Nazi saboteurs, and Roosevelt even expressed an interest (in internal correspondence) in having a military tribunal try the U.S. citizens among them for *treason*.<sup>824</sup> But FDR was the exception, not the rule. President Madison hinted at doubts in the War of 1812.<sup>825</sup> President Wilson and his

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817. See, e.g., *supra* notes 385–386 and accompanying text (describing Representative Davis's letter to President Johnson arguing against trying the conspirators in a military commission).

818. See *supra* note 359 and accompanying text (noting Secretaries Welles's and McCulloch's preference for a trial in the local Article III court).

819. See *supra* notes 393–397 and accompanying text (discussing Brevet Brigadier-General Cyrus Comstock's doubts about the constitutionality of the military commission).

820. See, e.g., *supra* notes 389–391 and accompanying text (recounting criticism of the decision to use a military commission in the *New York Times*).

821. See *supra* notes 423–424 and accompanying text (quoting Judge Rufus Peckham's charge to a grand jury on the use of a military commission to try the Lincoln conspirators).

822. See *supra* section III.F.2.a.

823. See, e.g., *Powell v. McCormack*, 395 U.S. 486, 546–47 (1969) ("That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."); Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. Rev. 109, 130–31 (1984) (explaining that the Court has usually credited political-branch custom only when it has been exercised repeatedly, not merely on occasion).

824. See *supra* note 735–747 and accompanying text (quoting Roosevelt's memorandum to Biddle).

825. See Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1632. Although the constitutional question there was not directly at issue, by virtue of an absence of statutory authority Madison overturned the military conviction of a U.S. citizen who had spied upon U.S. Army camps on behalf of the British, directing that the spy be tried instead in state court or released. See *id.*

Attorney General, Thomas Gregory, flatly rejected the constitutionality of proposed legislation (drafted by Assistant Attorney General Charles Warren) that would have authorized military courts to adjudicate a wide swath of conduct because of its impact on military objectives.<sup>826</sup> And, of greatest importance here, Attorney General Speed eventually defended the Lincoln conspirators' prosecutions *only* on the theory that they had been convicted of offenses against the international law of war—a view that the Court eventually ratified in *Quirin*, but one that does not begin to justify the use of such military courts for the trial of domestic-law offenses.<sup>827</sup>

That leaves the fascinating, complicated, and perhaps inscrutable example of Abraham Lincoln himself. It is true, of course, that Lincoln formally authorized, and participated in, his War Department's elaborate system of military trials, including many cases that did not allege violations of the law of war. Lincoln apparently expressed doubts about the constitutionality of at least some such trials when speaking to trusted colleagues, however, and in at least one case—involving the Coles County rioters—Lincoln appeared to heed the advice of Justice David Davis, who had advised him that a military trial would be unconstitutional and unlikely to survive judicial scrutiny: Lincoln directed that the prisoners be released or turned over to civilian authorities before the military trial commenced.<sup>828</sup> Perhaps most revealingly, when a group of Ohio Democrats called out Lincoln specifically on the question of the tribunals' constitutionality, in the context of the *Vallandigham* case, Lincoln was unable to offer any response other than to mischaracterize the military commissions as only a means of wartime incapacitation rather than as criminal tribunals designed to assess guilt and impose punishment, which they plainly were.<sup>829</sup> The paucity of Lincoln's legal response is especially revealing about whether he had resolved that the military

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826. See *id.* at 1659–64; see also *id.* at 1666–68 (discussing Gregory's "repudiation of the Warren view" in a spying case involving a captured German agent).

827. See *supra* section II.B.6. As I have explained, Speed was probably wrong about whether the accused did, in fact, violate the law of war and in suggesting that they were convicted of any such offense; but the important point is that Speed's opinion hinged, critically, on the idea that they had, in fact, violated the law of war. It is true, as Judge Kavanaugh noted in *Al Bahlul*, that President Johnson personally approved military adjudication of the case of the Lincoln assassination defendants. See *Al Bahlul v. United States*, 840 F.3d 757, 766 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring), cert. denied, 138 S. Ct. 313 (2017). Johnson did so, however, based upon a conclusory, one-sentence opinion of Attorney General Speed, see *supra* note 382 and accompanying text (quoting Speed's one-sentence opinion); and there is no way of knowing whether Johnson, like Speed, thought the military trial was permissible only because the charges (allegedly) described offenses against the international law of war.

828. See *supra* section III.A (discussing the Coles County Riot).

829. See *supra* notes 276–286 (discussing Lincoln's response in the Birchard Letter to criticism from Ohio Democrats).

commissions were constitutionally defensible: He obscured the issue in order to avoid it.<sup>830</sup> Lincoln was famously willing and eager to offer robust, albeit contested, justifications of the constitutionality of many of his most controversial wartime actions, including the suspension of habeas, detention of dissidents, and emancipation.<sup>831</sup> There were, however, rare cases in which Lincoln acted with full knowledge that what he was doing was unlawful, or at least dubious—cases in which he conspicuously declined to offer his usual legal defenses.<sup>832</sup> By all that appears, his involvement in, and approval of, certain military tribunal trials was one such instance.

It is tempting to speculate how Lincoln would have treated the legacy, and continued operation, of military trials, had he lived to superintend the cessation of the war and the subsequent Reconstruction. There is, for example, no evidence that he attempted to disclaim, or hamper, Henry Winter Davis's efforts, in the hours just before the Second Inaugural, to have Congress effectively repudiate the system of commissions and bring it to a halt.<sup>833</sup> Perhaps he would have welcomed such an erasure of the constitutional slate. (But then again, there is no evidence that Lincoln encouraged that legislative initiative, either.) It is difficult to imagine he would have countenanced the dramatic and highly irregular proceedings that occurred in the Old Arsenal in May and June of 1865, or his successor's use of habeas suspension to prevent the judiciary from adjudicating the constitutional question in the case of Mary Surratt just hours before she went to the gallows. There is, however, no way to know for certain: Booth's bullet ensured that the nation would never learn how Lincoln would have negotiated questions such as these in his second term, just as we are left to speculate precisely whether and how he would have made good on the conciliatory path he began to carve in his inaugural address less than six weeks before his untimely death.

2. *Congress.* — The Civil War Congress was, at best, deeply ambivalent about the War Department's military commissions. The legislature never expressly authorized them and, in the 1863 Habeas Act,

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830. See *supra* notes 280–288 and accompanying text (offering contextual evidence to show Lincoln's awareness that military commissions were, at least in part, punitive in nature).

831. See generally Farber, *supra* note 289; Randall, *supra* note 137.

832. See, e.g., Cong. Globe, 37th Cong., 2d Sess. 2383 (1862) (confessing in a message to the Senate and House that he had in one instance expended funds for the raising of troops "without any authority of law" in order to ensure that "the Government was saved from overthrow"). For discussion of this extraordinary episode, see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 Harv. L. Rev. 941, 1001–03 (2008) [hereinafter Barron & Lederman, *Lowest Ebb—A Constitutional History*].

833. See *supra* section I.B.3.c.

Congress took steps to effectively prevent such commissions except in cases in which civil courts were genuinely unavailable.<sup>834</sup> On the other hand, Congress did little to ensure enforcement of the 1863 Act for two years, as Holt and the War Department circumvented it via an interpretive sleight-of-hand;<sup>835</sup> and in 1864 Congress passed a statute drafted by Holt that expressly assumed the commissions' continued operation (albeit only after a chief sponsor reassured skeptical members that it would not authorize any such trials).<sup>836</sup> In 1865, many members of Congress inveighed against the War Department's trials and complained about the Executive's noncompliance with the 1863 Act. Indeed, only minutes before Lincoln's second term began, the legislature—led by staunch supporters of the President, who thought that the blight of commissions would tarnish his legacy—came within a hair's breadth of proscribing military commissions altogether, with the House even refusing to approve a government-wide appropriations bill because the anticommission provision was not included in the version the Senate approved. On the other hand, however, the Senate would not accede to that legislation, at least not as an appropriations rider mere hours before Congress's adjournment.<sup>837</sup> Like President Lincoln, then, the Civil War Congress appeared to be deeply concerned about the constitutionality of the military commissions, but not concerned enough (or perhaps too concerned about practical or political ramifications) to take the steps necessary to bring them to a halt. To be sure, in 1867 Congress enacted a law that purported to retroactively authorize most of the Civil War military trials and, in effect, to statutorily rebuke *Milligan*. That enactment was primarily motivated, however, by a desire to foreclose liability against Union officers for their conduct during the war and did not accomplish its apparent objective: The judiciary continued to adjudicate the legality of Civil War commission sentences, notwithstanding a provision of the 1867 law that purported to strip the courts of jurisdiction.

From Reconstruction until 2006, Congress did not authorize the use of military tribunals for domestic-law offenses by persons who were not a part of, or employed by, the armed forces, with one possible, minor exception—a statute the Executive virtually never used except in the case of the 1942 saboteurs.<sup>838</sup> Senator George Chamberlain's initiative in

834. See *supra* section I.B.3.a.

835. See *supra* notes 302–305 and accompanying text (discussing Holt's strict interpretation of the 1863 Habeas Act).

836. See *supra* notes 306–314 and accompanying text (discussing the 1864 guerrilla-sentencing provision).

837. See *supra* section I.B.3.c (recounting Representative Davis's eleventh-hour initiative in March 1865 to prohibit commission trials in places where civil courts were open).

838. As I explain in Lederman, *Wartime Military Tribunals*, *supra* note 67, in its reorganization of the Articles of War in 1916, Congress reenacted a provision of the Articles of War (redesignated as Article 81) that had long authorized military trials of



World War I, which would have given military tribunals much broader authority to try war-related offenses, was stopped in its tracks as soon as the President and Attorney General opined that it was unconstitutional.<sup>839</sup>

3. *The Court.* — Finally, we come to the branch of the federal government whose authority would be usurped by the claimed military jurisdiction. That department certainly has not acquiesced in its own disempowerment. The Supreme Court in *Milligan* turned aside most, if not quite all, of the constitutional justifications offered for wartime military trials.<sup>840</sup> Earlier, there were at least two contemporary opportunities for the courts to opine on the constitutionality of the Lincoln conspirators' trial itself, but President Johnson foreclosed those possibilities on both occasions—first with his remarkable habeas suspension on the morning of Mary Surratt's execution<sup>841</sup> and then again when he pardoned Mudd, Arnold, and Spangler just before the Supreme Court might rule on their habeas petitions early in 1869.<sup>842</sup>

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persons who provided particular sorts of aid to the enemy. *Id.* at 1654–57. Although the better reading of that law, before the 1916 reenactment, was that it did not cover persons who were not within or connected with the armed forces, the Judge Advocate General at the time characterized it as covering other persons, as well, and thus it might be fair to attribute that broader understanding to the 1916 Congress. *Id.*

In that same 1916 reenactment, Article 15 provided:

The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals.

Act of Aug. 29, 1916, ch. 418, § 3, 39 Stat. 619, 653. In the *Al Bahlul* litigation, Judge Kavanaugh suggested that the enactment of Article 15 amounted to a legislative ratification of the Lincoln assassination trial, because Congress “was aware of” that “significant precedent[,]” and “[b]y stating that [Article 15] did not ‘deprive’ military commissions of their traditional authority, Congress necessarily incorporated the Lincoln assassins precedent for conspiracy.” *Al Bahlul v. United States*, 767 F.3d 1, 70 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring in the judgment in part and dissenting in part). Judge Kavanaugh is undoubtedly right that the 1916 Congress was “aware of” the Lincoln case—who wasn’t? It was probably “aware of” the *Milligan* trial, too, and perhaps even the military trial of a state senator for having sent a letter to a newspaper editor in the War of 1812, see *supra* note 815, and plenty of other legally dubious military trials throughout history, as well. But surely the 1916 Congress, in clarifying that its conferral of courts-martial jurisdiction did not “deprive” other military tribunals of “jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such [tribunals],” § 3, 39 Stat. at 653, did not mean to ratify, let alone express a view on the constitutionality of, every single military trial that had ever occurred in the nation’s history.

839. See Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1659–64.

840. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 118–31 (1866).

841. See *supra* notes 472–485 and accompanying text.

842. See *supra* notes 685, 688 and accompanying text.

To be sure, the Court in *Quirin* did finally ratify Speed's argument that military courts can adjudicate at least some offenses against the international law of war.<sup>843</sup> That Court thus affirmed the judgment of a single specification of a single charge in the saboteurs' case—one that Chief Justice Stone thought clearly described a law-of-war violation. The *Quirin* Court specifically declined, however, to address the constitutionality of the other counts in the case—for alleged spying, aiding the enemy, and conspiracy, all of which were not, in fact, offenses against the law of war—in part, apparently, because Stone recognized constitutional “difficulties” with military adjudication of claims that did not clearly allege law-of-war offenses.<sup>844</sup> Therefore, the Supreme Court has never resolved the question at hand. Nor, until the recent *Al Bahlul* case, had any other Article III court, either.

### C. *An Alternative Lesson?*

This summary survey of the three branches' historical treatment of military tribunals appears to point decisively against using them to try wartime domestic-law offenses—or, at the very least, to belie any argument that the three branches have acquiesced in, or ratified, the purported constitutionality of such a practice. As for the Lincoln assassination trial, in particular, Justice Jackson's conclusion in 1951 that Thomas Ewing and Reverdy Johnson's jurisdictional objection during the trial “was certainly one of substance” in light of “later decisions” (presumably including, most significantly, *Milligan*)<sup>845</sup> undoubtedly reflects the dominant view over the past century and a half.

It is not difficult, however, to imagine some observers reading this same body of evidence, particularly in the Civil War, to illustrate a very different, commonly heard account of war powers—namely, that during the pendency of the war itself, not only is it appropriate for the President to aggressively construe executive powers, but the other two branches should also generally defer to such aggressive constructions, lest they risk unduly hamstringing the military's efforts to shape the Constitution to a felt need to effectively address enemy threats. According to Professors Eric Posner and Adrian Vermeule, for example, “When national emergencies strike, the executive acts, Congress acquiesces, and courts defer. When emergencies decay, judges become bolder, and soul searching begins.”<sup>846</sup> This “traditional practice of judicial and legislative deference” during wartime, they argue, “has served Americans well, and

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843. See *supra* notes 753–758 and accompanying text.

844. See *supra* notes 760–763 and accompanying text.

845. Jackson, *supra* note 66, at 111.

846. Eric A. Posner & Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* 3 (2007).

there is no reason to change it.”<sup>847</sup> Indeed, in light of the American “tradition” of judicial deference in times of emergency, “we think the burden of factual uncertainty should be on those who urge courts to abandon this historical posture and assume strict scrutiny.”<sup>848</sup>

So, for example, the self-described “realist” might emphasize that even when the Civil War Congress suspected the War Department was disregarding the tempering provisions of the 1863 Act, it turned a blind eye to the problem until peace was virtually at hand. Lincoln, too, confronted with constitutional challenges that he knew to be formidable, took many ameliorative steps to keep the doubts at bay, but declined to order a clean halt to Stanton’s and Holt’s excesses. Likewise, one might see the judiciary’s approach during the war to be a form of capitulation, such as when the Supreme Court rejected Vallandigham’s appeal on jurisdictional grounds, and when Judge Wylie felt powerless to resist President Johnson when the latter purported to suspend habeas in Mary Surratt’s case, recognizing to his chagrin that Johnson and his Army would likely hang Surratt, anyway, in disregard of any judicial decree. To be sure, the Court eventually condemned the War Department’s system of military trials—in *Milligan*—but only after the rifles had gone (almost) silent. And even then, Mudd and his cohorts languished for another two years in prison, freed only by the stroke of Johnson’s pen rather than by the expected precedential effect of the *Milligan* ruling.<sup>849</sup>

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847. *Id.* at 5.

848. *Id.* at 122; *id.* at 12 (“[J]udges deciding constitutional claims during times of emergency should defer to government action so long as there is any rational basis for the government’s position, which in effect means that the judges should almost always defer, as in fact they have when emergencies are in full flower.”); see also Stephen Breyer, *The Court and the World* 78–79 (2015) (noting, without approval, the oft-heard view that “the Court should restore constitutionality only after, perhaps long after, the war is over”); William Rehnquist, *Civil Liberty and the Civil War: The Indianapolis Treason Trials*, 72 *Ind. L.J.* 927, 927 (1997) (“Perhaps it may be best that the courts reserve their serious consideration of questions of civil liberties which arise during wartime until after the war is over. . . . Peacetime offers an opportunity for detached reflection on these important governmental questions which are not so calmly discussed in the midst of a war.”).

849. For many years after *Milligan*, the majority’s constitutional holding was condemned in some circles as an example of empty judicial grandstanding—a precedent that would (or should) be honored only in the breach when tested in the crucible of an actual trial of dangerous enemies in future wars. Political scientist John Burgess’s assessment in 1891 was typical: “It is devoutly to be hoped that the decision of the court may never be subject to the strain of actual war. If, however, it should be, we may safely predict that it will be necessarily disregarded.” 1 John W. Burgess, *Political Science and Comparative Constitutional Law* 251 (Boston & London, Ginn & Co. 1891); see also, e.g., *The Milligan Case*, *supra* note 34, at 3 (“[B]etween Sumter and Appomattox, one is apt to infer, the opinion would simply have been irrelevant.”); Neely, *supra* note 137, at 184 (“[T]he real legacy of *Ex parte Milligan* is confined between the covers of the constitutional history books. The decision itself had little effect on history.”).

A fair assessment of *Milligan*’s actual impact in subsequent wars is complicated and uncertain. On the one hand, the Court in *Quirin* appeared to rely upon some fairly hazy

A more tempered version of this skeptical perspective, commonly associated with Justice Jackson's dissent in *Korematsu*, is that whether or not such judicial cowering is desirable or warranted in wartime, it is virtually inevitable. On this view, courts will be inclined, "whether consciously or not," to "distort the Constitution to approve all that the military may deem expedient."<sup>850</sup> Therefore, thought Jackson, the judiciary should, when possible, avoid any pronouncements until after the fighting has ceased—such as by invoking jurisdictional barriers to review—so as not to establish any dubious precedents that might persist as a "loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."<sup>851</sup> The unhappy result of such a course is that military officers will be effectively free to issue decrees that "may have a certain authority as military commands, although they may be very bad as constitutional law,"<sup>852</sup> although the courts will then have an opportunity for a course correction once the emergency ebbs.<sup>853</sup>

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and tenuous distinctions in affirming the conviction of the Nazi saboteurs (including at least one U.S. citizen). See Lederman, *Wartime Military Tribunals*, supra note 67, at 1588–89. On the other hand, *Milligan's* shadow limited the scope of the Court's rationale in *Quirin*, so much so that Chief Justice Stone declined to opine on the legality of most of the charges in that case. See *id.* at 1673–75. And the *Milligan* precedent played a prominent role in the First World War, as a basis for President Wilson's and Attorney General Gregory's repudiation of a rogue official's effort to have Congress codify a vastly expanded military commission jurisdiction and Gregory's subsequent rejection of a proposal to use a military tribunal for trial of a German saboteur captured just after entering the United States. See *id.* at 1657–68.

850. *Korematsu v. United States*, 323 U.S. 214, 244–45 (1944) (Jackson, J., dissenting).

851. Jackson famously wrote:

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.

*Id.* at 245–46.

852. *Id.* at 244.

853. Jackson was unwilling to countenance this posture of deference when, as in *Korematsu* itself, the Executive had compelled the Article III courts to be complicit in the constitutionally dubious endeavor, such as by securing a criminal conviction in a civilian court for violation of the internment order. See *id.* at 247 ("I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and

The judiciary's failure to limit military adjudications during and (in part) after the Civil War might be viewed as an important example of Jackson's prescription. Indeed, the Court in *Milligan* itself candidly conceded that such a dynamic described the Court's posture there:

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.<sup>854</sup>

There are several reasons to be dubious about these alternative accounts and, especially, concerning their relevance to the development of contemporary constitutional understandings of possible wartime exceptions to Article III's guarantees.

First, both of these variants of wartime constitutional skepticism or "realism" depend upon the assumption that the war emergency—and thus the undisturbed military discretion at the heart of it—is only a temporary, aberrant state of affairs, and that constitutional correction will be forthcoming (as in *Milligan*) after a short period, when the exigency that justifies military deference has passed. The current armed conflict, however, is now almost two decades old and is unlikely to end anytime soon. We are, for better or worse, on a perpetual, somewhat indefinite war footing; therefore any "wartime" resolution of a constitutional question, if only by way of deference to the Executive, becomes, in effect, an establishment of the new normal state of affairs.<sup>855</sup> Not surprisingly, then, in this long-running conflict the current Supreme Court arguably has been more willing than in some past conflicts to impose

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become instruments of military policy."). That is not an issue, however, when the Executive uses a military tribunal.

854. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 109 (1866).

855. See, e.g., Aharon Barak, *The Supreme Court, 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 *Harv. L. Rev.* 16, 149 (2002) (remarking that where "[t]he line between war and peace is thin," he must not, as a Justice of the Israeli Supreme Court, "make do with the mistaken belief that, at the end of the conflict, I can turn back the clock"); Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 *Wis. L. Rev.* 273, 279 ("To say that law is silent during a more-or-less permanent condition is quite different from saying that law is silent during wartime."). Such a consideration was one of the principal reasons Justice Jackson himself was unwilling to extend the Court's deference in *Hirabayashi v. United States*, 320 U.S. 81 (1943), involving a race-based, temporary curfew, to the context of indefinite detention. See *Korematsu*, 323 U.S. at 247 (Jackson, J. dissenting) ("[In *Hirabayashi*] we did validate a discrimination of the basis of ancestry for mild and temporary deprivation of liberty. Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones.").

constitutional limits on the decisions of the political branches about how to treat the enemy.<sup>856</sup> In any event, the Executive does not invoke any exigency or emergency for military commission trials at Guantánamo—because there isn't any.<sup>857</sup> Practice has demonstrated that Article III trials are much more efficient and timely for the prosecution of enemy forces and those who afford them support.<sup>858</sup>

Second, the constitutional question at issue here not only implicates civil liberties but also whether and to what extent the political branches may transfer authority away from the Article III courts themselves: The choice is not, for example, between detaining dangerous individuals and setting them free; it is, instead, merely about *which* tribunal will host a criminal trial. Unless and until the Supreme Court itself has reason to question the adequacy of federal trial courts and lay juries—a prospect that is currently hard to imagine—there is no particular normative reason to defer to the decision of the political branches to strip the judiciary of its constitutional role in hosting trials of federal domestic offenses.

Finally, Justice Jackson's posture in *Koramatsu* appears to have been predicated on the notion that “as long as the judiciary withholds its formal approval of [military] excesses, the Constitution will remain intact.”<sup>859</sup> The question at hand, however, is precisely whether the historical practice of the political branches, standing alone—particularly Executive practice in high-profile trials such as the Lincoln assassination commission—should serve to “liquidate” the meaning and scope of Article III, in cases where the text of the Constitution and judicial precedents are insufficient to justify exceptions to the Article III norm (indeed, where the text cuts plainly in the other direction). Where *that* is

856. See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion) (“If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, th[e] understanding [that Congress’ grant of authority for the President to use ‘necessary and appropriate force’ includes the authority to detain enemy forces ‘for the duration of the relevant conflict’] may unravel.”); see also Breyer, *supra* note 848, at 81 (noting that it is no coincidence that the Court issued the *Steel Seizure* and *Boumediene* decisions in times when the threats, and thus the challenged state conduct, “seemed likely to persist indefinitely”). This might not be a new phenomenon, however. Assertive judicial superintendence of the Executive’s conduct of war is not as historically anomalous as many often assume. See David J. Barron & Martin S. Lederman, *The Commander-in-Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 *Harv. L. Rev.* 689, 718–19 (2008).

857. See Lederman, *Wartime Military Tribunals*, *supra* note 67, at 1567–70.

858. See *id.* at 1568 & nn. 204–205; see also Robert Chesney, *Military Commissions Compared to Civilian Prosecution in Federal Court: A Revealing Snapshot*, *Lawfare* (Feb. 26, 2018), <http://lawfareblog.com/military-commissions-compared-civilian-prosecution-federal-court-revealing-snapshot> [<http://perma.cc/5K7U-4WAJ>].

859. Dennis J. Hutchinson, “The Achilles Heel” of the Constitution: Justice Jackson and the Japanese Exclusion Cases, 2002 *Sup. Ct. Rev.* 455, 493.

the question, “judicial abstention may popularly and even formally be understood as tacit approval,”<sup>860</sup> or, at the very least, as a deliberate failure to staunch the generative legal force of the executive practice itself.

### CONCLUSION

There are compelling reasons to think that history can, and should, significantly inform our understandings of how constitutional authority may be distributed in wartime.<sup>861</sup> Even so, the historical treatment of any constitutional question worth asking is likely to be messy, ambiguous, and multivalent. History does not often yield easy-to-identify or pellucid answers to the hardest questions: “[N]o simple, algorithmic formula dictates how pertinent kinds of history fit together to yield determinate conclusions in many cases that provoke constitutional controversy.”<sup>862</sup> Professor Alison LaCroix is thus surely right to caution against assuming “an artificial degree of unity and coherence within institutions, and from one action to another. Whose historical practice matters, and which moment encompasses the relevant distillation of that practice, are complex questions. Messiness, unspoken accommodation, and explicit disagreement abound.”<sup>863</sup>

That is especially true when it comes to practices developed in the proverbial fog—and intense pressures and anxieties—of war. And it is true, in particular, with respect to the use of wartime military courts: The history I have recounted here does not run in a straight line, nor has there been a firm and unbroken consensus of constitutional limits within or among the branches. Although the narrative certainly tends to point in a particular direction—a direction quite different from the one described by the government and its judicial defenders—there are undoubtedly anomalies and thus plenty of room for continued contestation.

The Lincoln assassination commission is the most striking, and the most famous, of those historical anomalies: It is, indeed, “the highest-profile and most important U.S. military commission precedent in American history.”<sup>864</sup> Its prominence in our national narrative, however, is hardly reason to accord it a special pride of place in establishing the

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860. *Id.*

861. See Barron & Lederman, *Lowest Ebb—A Constitutional History*, *supra* note 832, at 1099–101. But see *id.* at 1100 (“[W]e do not mean to suggest that history is dispositive . . . . Past practice does not, in our view, freeze constitutional meaning. Even (and perhaps especially) as to the separation of powers, our constitutional tradition has always been much more tolerant of dynamism.”).

862. Fallon, *supra* note 134, at 1758.

863. LaCroix, *supra* note 134, at 78.

864. *Al Bahlut v. United States*, 767 F.3d 1, 68 (D.C. Cir. 2014) (*en banc*) (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

constitutional breadth of military jurisdiction, as some judges and the Executive would have it. To the contrary, the fact that Johnson, Stanton, and Holt convened the tribunal at a moment of heightened public passions and anxiety, and for the conceded purpose of putting on a show trial of sorts, designed to smoke out the alleged nefarious schemes of the leaders of a just-vanquished foe, makes it an especially poor place to look for measured constitutional judgment or evidence of a constitutional settlement of a more lasting, and more generally applicable, kind. The assassination trial, in other words, might be a singular example of how landmark cases can make bad law.

It is no accident that “military men generally have hesitated to regard the occasion as a sound precedent or, indeed, as anything more than an indication of the intensity of popular feeling at the moment.”<sup>865</sup> For that is exactly what it was. And thus, until very recently, not only for “military men” but for lawyers and historians, too, to cite the Lincoln tribunal as constitutional authority would have been akin to invoking *Korematsu*, *Dred Scott*, or *Buck v. Bell* as authoritative precedent: Like those cases, the Lincoln assassination tribunal has long been firmly ensconced in the constitutional “anticanon.”<sup>866</sup>

Of course, there is nothing inherently illegitimate about an effort to transform once discredited constitutional ideas or examples into tomorrow’s orthodoxy.<sup>867</sup> The burden, however, is on those who would resuscitate the Lincoln assassination trial—and use it to justify a deviation from Article III norms in a very different historical context and in a starkly different armed conflict—to offer compelling reasons why that singular proceeding should, all of a sudden, emerge from its century and a half of constitutional exile.

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865. Wiener, *Practical Manual*, *supra* note 123, at 138.

866. See generally Greene, *supra* note 136.

867. See Balkin, *supra* note 136, at 12 (“Through acts of persuasion, norm contestation, and social movement activism, people can eventually move ideas and positions from off-the-wall to on-the-wall.”); see also *id.* at 68–70, 177–83.



