Ex parte Milligan
History and Historians

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In *Ex parte Milligan* (1866), the U. S. Supreme Court rendered a landmark decision that civilians could not be tried by military commissions if the civil courts were open and operating. Justice David Davis authored the eloquent and powerful opinion: "The Constitution of the United States is a law for rulers and people, especially in war and peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances." Historians have characterized the decision as a "bulwark of American liberty" and praised its author: "Justice Davis paid the Bill of Rights such respects as had not sounded in the chamber since Taney's tribute to the Fifth Amendment in Dred Scott."[1]

Nearly 150 years after the decision, authors still cite and write about the Milligan case, although their vantage points range widely. Legal scholars have cited Milligan with regard to military commissions, arrests and detentions, habeas corpus, martial rule, the laws of war, and control of national emergencies in a changing world. Scholars of political science have utilized Milligan to consider the relationships among the branches of government

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[1]Samuel Klaus, ed., *The Milligan Case* (New York, 1929), 234; Charles Warren, *The Supreme Court in United States History* (Boston, 1922), 3:149; Harold M. Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835-1875* (New York, 1982), 382.

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during peace and war, and the balance between civil liberties and national security. Civil War-era historians have studied the connections between Milligan and the strategies of governmental leaders, including Abraham Lincoln; dissent on the home front; and the Supreme Court's role during the Civil War and Reconstruction.

This mixture of perspectives—from law, political science, and history—has resulted in diverse points of view that enrich our understanding of the case but may also obscure the authors' criteria for evaluation. This article reviews the historiography of the Milligan case and its influence on historians and other scholars, first by characterizing the case and its author, Justice David Davis, and then by considering the contributions of a select, yet diverse, group of scholars.

During the Civil War, the opposition of antiwar Democrats (Copperheads) fluctuated with Union losses and victories on the battlefield, and with the Lincoln administration's infringements on Northerners' civil liberties. By 1864, a group of leaders of the Sons of Liberty (a secret society of antiwar Democrats operating across the Old Northwest) were collaborating with Confederate agents in Canada to end the war and create a Northwest Confederacy. Their plans included sabotage, raiding arsenals, freeing and arming Confederate prisoners, and overthrowing state governments. An armed, militaristic organization emerged, albeit on paper, since these Copperheads had little or no military experience. In Indiana, plans progressed rapidly under the leadership of Harrison Dodd, William Bowles, John Walker, Lambdin Milligan, and others. However, Union infiltration and intelligence thwarted the plot and led to the arrests of the leaders, including Milligan. In the fall of 1864, a military commission in Indianapolis tried the men for treason. Dodd escaped to Canada and was convicted in abstentia; one defendant was acquitted, and the rest were convicted and sentenced to death.[2]

Milligan's appeal for habeas corpus and relief from his death sentence came before a federal district court. At this time, a Supreme Court justice also served as a co-judge in each federal district court; Justice David Davis

[2]Jennifer L. Weber, *Copperheads: The Rise and Fall of Lincoln's Opponents in the North* (New York, 2006); Oscar A. Kinchen, *Confederate Operations in Canada and the North: A Little-Known Phase of the American Civil War* (North Quincy, Mass., 1970); Thomas H. Hines, "The Northwestern Conspiracy," *The Southern Bivouac: A Monthly Literary and Historical Magazine*, series 2, vol. 2 (December 1886, January, February, April 1887), 437-44, 500-510, 567-74, 699-704; John B. Castleman, *Active Service* (Louisville, Ky., 1917).

served with Judge David McDonald in the Indiana district. Davis was a long-time circuit court lawyer and judge. A friend of Abraham Lincoln, he had served as a key floor manager of Lincoln's 1860 presidential nomination, and Lincoln appointed him to the U.S. Supreme Court in 1862.[3] Davis believed in the integrity of constitutional law and had pointedly advised Lincoln about legal processes under the Habeas Corpus Act of March 3, 1863. He had also conferred with Indiana governor Oliver Morton, who had advocated a timely military trial of Milligan and the other Copperheads, at least in part to further his own re-election. Davis, however, "thought it was clear that the commission had been illegal since the courts of Indiana had been open and martial law had not been declared." By the time of Milligan's appeal, Morton had begun to doubt the wisdom of contributing to the death of a potential martyr. Along with several others, Morton petitioned President Andrew Johnson for clemency for Milligan. Meanwhile, Davis and McDonald reasoned that while the military might ignore a federal district court ruling in Milligan's favor, they would not ignore a Supreme Court ruling. The two judges agreed to disagree on the Milligan case, thus taking it to the U.S. Supreme Court.[4]

Davis wrote the court's majority opinion, which found unconstitutional military trials of civilians when the civil courts were open and operating. Four justices agreed with Davis in the ruling and opinion. Four others, including Chief Justice Salmon Chase, agreed with the ruling but offered a concurring opinion that, whenever the writ of habeas corpus is suspended, "trial and punishment by military commission, in states where civil courts are open, may be authorized by Congress, as well as arrest and detention." Chase and the other three justices based their opinion on the constitutional powers of Congress to govern and protect the nation's

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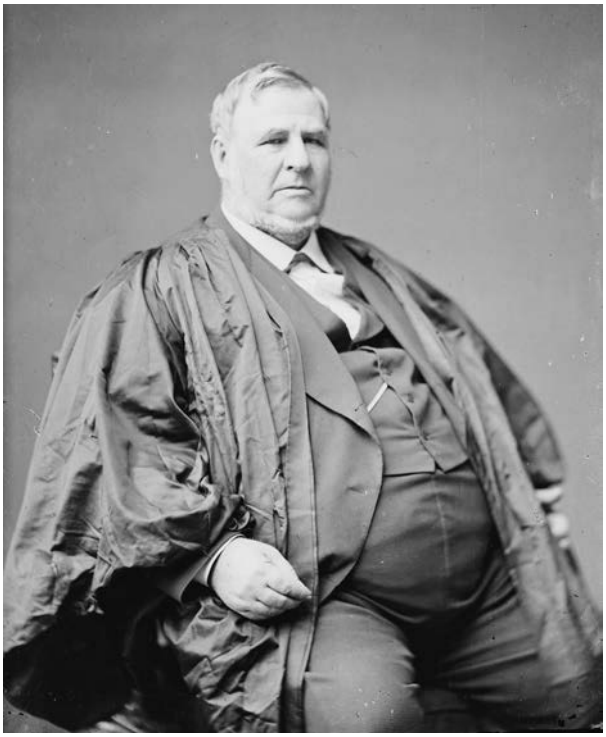
[3]David Davis was born in Maryland in 1815, graduated from Ohio's Kenyon College, and established a law practice in Illinois. Briefly considered a candidate for president in 1872, he resigned from the Supreme Court to serve as a United States senator from Illinois from 1872 to 1883. Willard L. King, *Lincoln's Manager: David Davis* (Cambridge, Mass., 1960).

[4]King, *Lincoln's Manager*; Peter J. Barry, "'I'll Keep them in prison awhile . . .': Abraham Lincoln and David Davis on Civil Liberties in Wartime," *Journal of the Abraham Lincoln Association*, 28 (Winter 2007), 20-29; David Davis to Abraham Lincoln, July 4, 1864, Letters Received by the Office of the Adjutant General, 1861-1870, M619, roll 285, 199-799, National Archives and Records Administration, Washington, D.C. Davis's letter to Lincoln addressed the detention of fifteen citizens following a riot in Charleston, Illinois, on March 28, 1864. Both the civil and military courts were vying for control of the prisoners. Lincoln followed Davis's advice to transfer the prisoners to the civil court, but then had to suspend the release while the judge advocate general's office further investigated the case. Klaus, *The Milligan Case*, 40.



Supreme Court Justice David Davis, c. 1870. Davis's opinion for the court in the *Ex parte Milligan* case would be cited by future generations for his defense of the Constitution in the face of wartime threat.
Library of Congress, Prints and Photographs Division, Brady-Handy Collection

military forces during times of war "for crimes against the security and safety of the national forces . . . or against the public safety."[5]

Davis recognized that cases like *Ex parte Milligan* should be addressed in calmer postwar times, when high emotions had passed and martial law was no longer in force:

> During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary

[5]Klaus, *The Milligan Case*, 246, 248, 250.

> to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment. We approach the investigation of this case, fully sensible of the magnitude of the inquiry and the necessity of full and cautious deliberation.[6]

Davis based his conclusions on the U. S. Constitution, writing that "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." He utilized the applicable constitutional provisions—including those governing martial rule, arrest, habeas corpus, jury trial, and due process—and clearly stated his reasoning:

> By that Constitution and the laws authorized by it this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct, to leave room for misconstruction or doubt of their true meaning. Those applicable to this case are found in that clause of the original Constitution which says, "That the trial of all crimes, except in the case of impeachment, shall be by jury;" and in the fourth, fifth, and sixth articles of the amendments. . . . Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of habeas corpus.

Davis was also firm on the justification for imposition of martial rule: "Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectively closes the courts and deposes the civil administration." Milligan was not a prisoner of war, nor were the laws of war applicable to his case: "They can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."[7]

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[6]Ibid., 226.

[7]Ibid., 233-35, 237-38.

Justice Davis had long opposed wartime infringements on civil liberties, and he had advised Lincoln to follow the law. In 1863, he had asked a grand jury how the Rebels could be compelled to follow the law "if we do not ourselves render a willing obedience." In 1866, he told Lincoln biographer William Herndon that "Mr. Lincoln was advised as Presdt that the various military trials in the Northern states . . . where the Courts were open and untrammeled and free, were unconstitutional and wrong." He went on, "I am satisfied that Lincoln was thoroughly opposed to these military commissions especially in the free states where the courts were open and free." Davis was sensitive to criticism of the court's opinion in Milligan, but the justices were doing their duty and his opinion was consistent with his beliefs. Historian Stanley Kutler, writing a century later, interpreted Davis's opinion "as a determined effort to re-affirm traditional values over an expedient wartime policy which he regarded at best as an aberration."[8]

Still, the Milligan decision yielded a storm of controversy, as historians of the case have documented. In the 1920s, when Charles W. Warren was writing his comprehensive history of the Supreme Court, he devoted an entire chapter to the turbulent public reaction: "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."[9]

To Reconstructionists, the decision "came as a staggering blow." Congress was forming legislation which would enable the military, through the use of military commissions and the power to invoke martial law, to assist Southern freedmen in a hostile postwar environment. According to Warren, President Johnson saw the *Ex parte Milligan* decision "as an indorsement of his policy to put an end to military government in the South as soon as possible." Warren surveyed notable editorials and quoted

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[8]Davis quoted in *Huntington Democrat*, May 14, 1863, in Darwin Kelley, *Milligan's Fight against Lincoln* (New York, 1973), 96; Douglas L. Wilson and Rodney O. Davis, *Herndon's Informants* (Urbana, Ill., 1998), 349; William H. Herndon and Jesse W. Weik, *Herndon's Life of Lincoln: The History and Personal Recollections of Abraham Lincoln* (Cleveland, Ohio, 1943); Stanley L. Kutler, *Judicial Power and Reconstruction Politics* (Chicago, 1968), 92.

[9]Warren, *The Supreme Court in United States History*, 3:149-50. Despite the Milligan ruling, the use of military commissions continued during Reconstruction. In part, the practice reflected the continuation of martial law, racial tensions, and the unstable state of government affairs, as Congress and President Johnson vied to control the process. The first Reconstruction Act (March 2, 1867) passed over the president's veto and stipulated that the commanding generals of the five military districts into which the South was divided were authorized to use military commissions "in their judgment," in place of local civil tribunals.

from the more virulent ones. *The Independent* pronounced Davis's work "the most dangerous opinion ever produced" by the court. The *Cleveland Herald* called the decision "judicial tyranny . . . not a judicial opinion; it is a political act." The Milligan decision, wrote the editors of the *Washington Chronicle*, "has amazed jurists and statesmen by the poverty of its learning and the feebleness of its logic." The *New York Herald* wrote about the "constitutional twaddle of Mr. Justice Davis," while the *Indianapolis Journal* stated that "the decision carries no moral force." In conclusion, Warren observed that "while these criticisms of the *Milligan Case* decision vastly outweighed the applause, the more conservative Republicans and the Democrats hailed it as a triumph of the rule of law over lawlessness."[10]

In 1867, Davis laid out his reasoning in a private letter to his brother-in-law, Judge Julius Rockwell of the Supreme Court of Massachusetts. He explained the scope of the majority opinion and insisted that it was silent regarding Southern Reconstruction.

> I had to prove that military trials were illegal. . . . The right to try by a military tribunal was claimed as an Executive power. We held that the provisions of the Constitution were irrepealable and could not be suspended. Did it not logically follow, that Congress could not repeal. . . . wd it not have been unmanly, & unworthy a court, to have confirmed the denial to the Executive, and wd it not at once have been claimed, that we admitted Congress could do it. How can a provision be irrepealable, & yet Congress repeal it, disregard it, or suspend it. The whole argument, such as it is, is to show the irrepealable character of the amendments—nothing else. I used the words "Congress could grant no such power" in the wrong place, but in the subsequent part of the opinion, I think I proved it, and we could only deny the military right to try Milligan through the provisions of the Constitution. These we had, therefore, to interpret, & we interpreted them, as binding on all, for ever. The opinion wd have been worth nothing for future time, if we had cowardly toadied to the prevalent idea, that the legislative dept of the govt can override everything. Cowardice of all sorts is mean, but judicial cowardice is the meanest of all. Not a word said in the opinion is conceded about reconstruction & the power is conceded in insurrectionary States, & yet the Republican

[10]Ibid., 3:151-56.

> press every where has denounced the opinion as a second Dred Scott opinion, when the Dred Scott opinion was in the interest of Slavery, & the Milligan opinion in the interest of liberty. . . . I abide the judgment of *time*. The people are mad now, and, if they dont recover soon, civil liberty will be entirely gone. During the war I was afraid it wd be all gone.[11]

Following the initial outcry, legal discussion and citation of the Milligan case entered a lengthy quiet period. Situations were few in which domestic military commissions could arise. Workers' strikes and other emergencies did elicit proclamations of martial law and heighten public discussions regarding civil liberties, but the judicial system was not threatened. At the same time, however, historians and political scientists were beginning to apply a scholarly lens to the post-Civil War era.[12]

In the last years of the nineteenth century, three well-known historians wrote about the Milligan case. John Burgess (1891) gave a gloomy prognosis of the case's future legal application: "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." William A. Dunning (1888), whose critical view of Reconstruction would influence a subsequent generation of historians, saw Milligan as evidence of a "judicial hostility to Congress." Sydney Fisher (1891) gave the most insightful perspective on the relationship between Milligan and the "balance" between civil liberties and national security. He recognized the vulnerability of the court system in times of war and observed that, except for potential suspension of habeas corpus,

> it is generally admitted that when a government is attacked by a rebellion it is impossible for it to protect itself from conspirators and assassins if every one of them has to be taken before a court of law and proved guilty beyond a reasonable doubt. In such a crisis some arbitrary power must be given… to preserve the balance

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[11]David Davis to Julius Rockwell, February 27, 1867, in Charles Fairman, "The Milligan and Test Oath Cases," in the Oliver Wendell Holmes Devise *History of the Supreme Court of the United States*, Vol. 6, *Reconstruction and Reunion 1864-88* Part One A (New York, 1971), 182-252, quotes 232-33.

[12]Klaus, *The Milligan Case*, 60.

> between the liberty of the citizen and the safety of the government is one of the great problems of political science.

Fisher also recognized the significance of the Milligan opinion being rendered in peacetime:

> When the war was over the Supreme Court decided in Milligan's case, after the most solemn argument and deep consideration, that the President could not declare martial law in any district not invaded by the enemy and where the judges were on the bench and the courts of law in operation… The decision in Milligan's case has played havoc with the theories that prevailed during the war.

Every subsequent attempt "to weaken the authority of Milligan's case," Fisher concluded, had been "of little avail."[13]

The arrival of World War I sorely tested civil liberties, as Congress amended the Articles of War to ensure that military commissions would retain their authority in the appropriate situations. President Woodrow Wilson, however, relied on the courts and on "explicit legislative authority for almost every unusual step he found it necessary to take." In the pages of the *Minnesota Law Review*, Henry J. Fletcher offered a wartime perspective on constitutional flexibility under duress. In his article "The Civilian and the War Power," he wrote:

> In providing for the suspension of the privilege of habeas corpus the constitution does not decree its own abolition; and when it provides for the temporary suspension of the individual rights which the habeas corpus was designed to protect until the ship of state emerges from the danger zone, the constitution merely shifts the responsibility for safeguarding the interests of the state and its citizens from one set of officers to another.

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[13]John W. Burgess, *Political Science and Comparative Constitutional Law* (Boston, 1891), 1:251; William A. Dunning, "The Constitution of the United States in Reconstruction," *Political Science Quarterly* 2 (December 1887), 558-602; Sydney G. Fisher, "The Suspension of Habeas Corpus During the War of the Rebellion," *Political Science Quarterly* 3 (September 1888), 454-88, quotes 454-55, 478. Fisher also realistically observed that "the man who saved the union in the war of the Rebellion, and the man who shall hereafter save it in some other war, will never be held to a very strict account for violations of the Constitution."

Fletcher extensively discussed *Ex parte Milligan*, expressing views similar to those of Justice Oliver Wendell Holmes regarding constitutional responses to emergencies: "Public danger warrants the substitution of executive process for judicial process."[14]

On occasion, early twentieth-century scholars cited the Milligan case as a beacon for civil liberties. American judicial scholar and civil libertarian Zechariah Chafee Jr., an expert on the First Amendment, served on the Harvard Law faculty from 1916 to 1956. In his classic 1920 book, *Freedom of Speech*, Chafee wrote that the Constitution must be considered as an integrated whole to fully appreciate its mutual constraints, and that the Bill of Rights should hold under both war and peace. He cited Milligan as a part of the holistic role of the Constitution:

> The truth is that all provisions of the Constitution must be construed together so as to limit each other. In a war as in peace, this process of mutual adjustment must include the Bill of Rights. There are those who believe that the Bill of Rights can be set aside in war time at the uncontrolled will of the government. The first ten amendments were drafted by men who had just been through a war. The Third and Fifth Amendments expressly apply in war. A majority of the Supreme Court declared the war power of Congress to be restricted by the Bill of Rights in *Ex Parte* Milligan, which cannot be lightly brushed aside, whether or not the majority went too far in thinking that the Fifth Amendment would have prevented Congress from exercising the war power under the particular circumstances of that case.

Chafee advocated judicious rebalancing of civil liberties and national security during times of peace and times of war—preserving freedom of speech above all other constitutional rights. He gained the respect of Supreme Court Justices Oliver Wendell Holmes Jr. and Louis Brandeis,

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[14]A. S. Klieman, "Preparing for the Hour of Need: Emergency Powers in the United States," *The Review of Politics* 41 (April 1979), 240; M. R. Belknap, "Alarm Bells from the Past: The Troubling History of American Military Commissions," *Journal of Supreme Court History* 28 (November 2003), 300-322; Henry J. Fletcher, "The Civilian and the War Power," *Minnesota Law Review* 2 (1917-1918), 130-31; William A. Dunning, "The Constitution of the United States in Civil War," *Political Science Quarterly* 1 (June 1886), 163-98.

although his advocacy of free speech would later make him vulnerable to the McCarthy witch-hunts of the 1950s.[15]

In 1926, prominent Lincoln historian James Randall authored *Constitutional Problems under Lincoln*, the first comprehensive treatise on the subject. In the chapter "Martial Law and Military Commissions," he compared the Supreme Court outcomes in the cases of Copperhead Clement Vallandigham (1864) and Milligan (1866), noting: "A comparison of these important cases reveals in a striking manner the effect of the war upon judicial decisions; for the court which upheld the authority of a military commission in 1864 declared such a commission to be illegal in an analogous case two years later."[16]

Randall characterized the split between Davis and Chase in the Milligan opinion as leaving "the impression of a court about to swing from one opinion to another." He cited earlier observations on Milligan by John Innis Clark Hare, professor of constitutional law at the University of Pennsylvania, who held that "the wavering balance fortunately inclined to the side of freedom, although with a tendency to oscillate which leaves the ultimate result in doubt." Randall concluded the chapter on a similarly ambiguous note:

> Finally, after a close study of the subject, the author feels that the arbitrary arrests were unfortunate, that Lincoln's conception of the executive power was too expansive, and that a clearer distinction between military and civil control would have been desirable. If, however, the Government under Lincoln erred in these respects, it erred under great provocation with the best of motives; and its policy may not be justly criticized without a full understanding of the alarming situation which confronted the nation.

Randall did not specify how Lincoln "erred," nor did he explicitly address, in the chapter, the shifting balance of civil liberties and national security during peace versus war. He did, however, acknowledge that

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[15]Zechariah Chafee Jr., *Freedom of Speech* (New York, 1920), 33; Peter H. Irons, "'Fighting Fair': Zechariah Chafee, Jr., the Department of Justice, and the 'Trial at the Harvard Club,'" *Harvard Law Review* 94 (April 1981), 1205-1236.

[16]James G. Randall, *Constitutional Problems under Lincoln* (New York, 1926), 176.

the Milligan decision had enunciated "one of the great doctrines of the Supreme Court . . . that the Constitution is not suspended during war."[17]

In 1929, legal expert Samuel Klaus published *The Milligan Case*, which included the proceedings of the military commission and the civil courts and remains a comprehensive resource on the case. Klaus, in his lengthy introduction, minimized the pragmatic significance of the case, citing a sixty–year history marked by "no occasion for either the suspension of habeas corpus, whether by the president or Congress, or the trial of civilians by military courts." He observed that, instead, "civil conflict today is for the most part industrial. It is in essence a struggle between economic groups." Yet Klaus also perceived that "cases such as these must of necessity be infrequent. . . . It is precisely for this rare and crucial situation that Ex Parte Milligan purports to assert a rule of judicial decision." Ending with a reference to the opinion in the Dred Scott case, Klaus noted somberly: "If Taney's fate pursues it, what is Ex Parte Milligan but a despairing gesture."[18]

The outbreak of a second global war provided occasion for new scholarly reflections on civil liberties in wartime. Charles Fairman, a distinguished legal scholar who served in the judge advocate general's office of the Army during World War II, published "The Law of Martial Rule and the National Emergency" in the June 1942 issue of the *Harvard Law Review*. He criticized the excessive scope of the Milligan decision and questioned its applicability to modern war conditions, characterized by "mobility on land, surprise from the air, sabotage, and the preparation of fifth columns."

> In the three-quarters of a century since then the *Milligan* case has remained seemingly untouched; indeed there has been no occasion either to affirm or question it. It is currently cited with approval, and at times distinguished, but never under circumstances implying a prophecy as to what the Court would do in a like case today.

Fairman also found fault with Davis:

> Justice Davis, for a bare majority, went on to announce quite gratuitously that Congress could not constitutionally have autho-

[17]Ibid., 182, 184-85, 513.

[18]Klaus, *The Milligan Case*, 59-62.

> rized trial by military commission at any place outside the theatre of active military operations. . . . [Davis] would import into the Constitution a mechanical test derived from English constitutional history of a period when rigid lines had seemed the only means of controlling the prerogative.

And he concluded that "a court which takes a fair view of the relation between judicial power and the effective discharge of other governmental functions will not allow itself to be controlled by the dictum in Ex parte *Milligan*."[19]

The publication of Fairman's article coincided with the arrival on U. S. soil of eight German saboteurs, who were quickly apprehended and found guilty by a military commission. In *Ex Parte Quirin*, the Supreme Court validated the commission's jurisdiction. The court carefully studied the Milligan case and found grounds for distinguishing it from *Quirin*—Milligan, they wrote, "was a non-belligerent, not subject to the law of war," while the actions of the saboteurs convicted in the Quirin case placed them well within "the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war."[20]

Three decades later, Fairman authored a volume of the Oliver Wendell Holmes Devise *History of the Supreme Court of the United States*. He devoted most of a chapter to the Milligan case, and his views, while more tempered, still largely paralleled his judgments recorded in the 1940s. He cited the opinion as a "landmark of constitutional liberty," but cautioned that "the very words of the Milligan opinion should not be taken as precise tests for all future emergencies." Regarding Reconstruction, he concluded that, with the Milligan opinion, "the court had impaired its own standing as authentic expositor of the Constitution."[21]

John P. Frank, distinguished attorney and civil libertarian, offered a different interpretation of the Milligan case in his 1944 article "Ex Parte Milligan v. The Five Companies: Martial Law in Hawaii," published in the *Columbia Law Review*. Frank stated at the outset that the Milligan opinion

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[19]Charles Fairman, "The Law of Martial Rule and the National Emergency," *Harvard Law Review* 55 (June 1942), 1285-87.

[20]*Ex Parte Quirin*, U.S. Supreme Court, 317, U.S. 1 (1942); Louis Fisher, *Nazi Saboteurs on Trial: A Military Tribunal and American Law* (2nd ed., Lawrence, Kan., 2005).

[21]Fairman, *History of the Supreme Court of the United States*, 6:232-33.

The military commission trial of eight Nazi saboteurs, July 1942. Upon reviewing the commission's convictions, the Supreme Court found in *Ex parte Quirin* that the Milligan case did not apply to foreign enemy combatants on U.S. soil.
Library of Congress, Prints and Photographs Division, FSA/OWI Collection

was "one of the truly great documents of the American Constitution, a bulwark for the protection of the civil liberties of every American citizen." Addressing the recent proclamation of martial law in Hawaii, Frank rejected contemporary criticism that Milligan was obsolete, outmoded, and filled with "irrelevant dictum." He concluded that the U.S. Constitution applied to Hawaii; that the civil courts should have had jurisdiction; and that military trials for the two cases he addressed were "utterly and completely illegal." He observed: "Nothing of weight in American legal history supports the view that the Supreme Court has any intention of abandoning one iota of the rule of *Ex Parte Milligan*."[22]

[22]John P. Frank, "Ex Parte Milligan v. The Five Companies: Martial Law in Hawaii," *Columbia Law Review* 44 (September 1944), 639-68, quotes 639, 666, 667.

Although the events of the Second World War did not overturn the principles of the Milligan decision, the Quirin case and others resulted in the application of more distinct legal categories to individuals subject to detention and/or trial in the U. S. and its territories. A recent report by the Congressional Research Service, written after courts began to deal with the legal implications of post-9/11 prisoners classified by the U.S. government as terrorists, examined several such categories—including prisoner of war, civilian, lawful combatant, and belligerent—and summarized *Ex parte Milligan* within that context:

> The Court made repeated reference to the fact that its inquiry into whether the military tribunal had jurisdiction to try and punish Milligan turned in large part on the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there.

The author of that report commented in another essay:

> Milligan was indeed alleged to have engaged in hostile and warlike acts, but these were not legal acts of hostility because Milligan was not a lawful combatant … Milligan's membership in the Sons of Liberty did not secure his legitimacy as a belligerent, but neither did it give the government the right to detain him as a POW.[23]

In the 1960s, a new generation of historians shed the conservative legacy of Warren, Dunning, and other earlier scholars of the Civil War and Reconstruction. Based on the consensus liberalism typical of the period, they began to offer their own analyses of the Milligan case and the court's opinion. Allan Nevins addressed the historic precedents of the Milligan decision. He saw it as an official statement about the dominance of civil authority over that of the military, during peace or war. To Nevins, Milligan "was merely a disturbing zealot, a rider of the wave of sectional passion." The individual did not deserve historical attention, he contended, but rather "the terribly

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[23]Jennifer K. Elsea, *Detention of American Citizens as Enemy Combatants* (Washington, D.C., 2005), 21; Elsea, "Detention of American Citizens as Enemy Combatants," in *The Treatment of Prisoners: Legal, Moral or Criminal?* ed. Ralph D. McPhee (New York, 2006), 1-52; Fisher, *Nazi Saboteurs on Trial*, 105; *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

perilous situation which, in the midst of the Civil War, created the dramatic case of which he was the center." Nevins observed further:

> The Milligan decision nevertheless represented a great triumph for the civil liberties of Americans in times of war or internal dissension. . . . Although Lincoln was the last man in the world to make himself such a [military] despot, he might conceivably have a successor some day who, unless a clear line were drawn, would permit the erection of a martial autocracy. The line was now emphatically delineated. . . . The heart of this decision is the heart of the difference between the United States of America and Nazi Germany or Communist Russia.[24]

In his 1968 book, *Judicial Power and Reconstruction Politics*, historian Stanley Kutler continued to set forth major revisions in the historic view of the Supreme Court during Reconstruction. Challenging the view of the so-called Dunning school that the court had been intimidated by and impotent under the radical Republicans, Kutler maintained that "the Congressional threat to the federal judiciary during the Reconstruction era has been grossly exaggerated." Rather, the court was characterized by "forcefulness and not timidity, by judicious and self-imposed restraint rather than retreat, by boldness and defiance instead of cowardice and impotence, and by a creative and determinative role with no abdication of its rightful power." These characteristics were exemplified by the rulings in the Milligan and test oath cases—such as *Cummings v. Missouri* (1867)—that reaffirmed traditional constitutional rights over wartime policy.[25]

Kutler buttressed his arguments with a chronology of events and issues affecting the relationship between the court and Congress. Republican responses to the Milligan opinion, except for that of Senator Thaddeus Stevens, were tempered and restrained: "In short the Republican Party did not spend its waking hours scheming of ways to destroy the Court." Moreover, in the years just after the war, Kutler wrote, Republicans "had as yet no clearly defined, coherent southern policy." With the exception of the *Ex parte McArdle* case in 1869, Congress took no explicit, antagonistic

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[24]Allan Nevins, "The Case of the Copperhead Conspirator," in *Quarrels That Have Shaped the Constitution*, ed. John A. Garraty (New York, 1964), 90-108, quote p. 108.

[25]Kutler, *Judicial Power and Reconstruction Politics*, 92.

actions against the court. In more than one dozen reviews of Kutler's book in professional journals, scholars presented two types of responses: one group largely accepted Kutler's revised perception of the Reconstruction-era court; the other reviewers believed that Kutler had overstated the court's boldness and defiance. Reviewer Joseph Burke suggested moderation: "Surely it is possible to lift the 'Chase Court' from the well of weakness without raising it to a tower of strength."[26]

Archivist Joseph P. Gambone reinforced Kutler's contribution with his 1970 article "Ex Parte Milligan: The Restoration of Judicial Prestige." Writing in the journal *Civil War History,* Gambone highlighted the postwar re-emergence of the Supreme Court. The Milligan decision, he believed, gave rise to the court's vitality: "By virtue of the Milligan decision, the Supreme Court restored itself to a position of greater prestige, and reaffirmed its position as the 'final arbiter of the Constitution.'"[27]

In addition to this body of scholarship debating the Milligan decision and what it revealed about the Supreme Court, a second collection of works related to *Ex parte Milligan* has focused on the extent and severity of dissent in response to the Lincoln administration's war policies. Did wartime dissent such as Milligan's reflect primarily loyal opposition or treasonous action aimed at undermining the war effort, aiding the rebellion, and diverting significant Union resources to enemy control? During the first half of the twentieth century, several writers—including Mayo Fesler (1918), Wood Gray (1942), and George Fort Milton (1942)—studied the Copperhead movement but tended to sensationalize the connections of Copperheads to treacherous conspiracies.[28]

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[26]Ibid.; Joseph C. Burke, review of *Judicial Power and Reconstruction Politics* by Stanley Kutler, *Pennsylvania Magazine of History and Biography* 93 (July 1969), 434-44. Other reviews considered here include those by Herman Belz, *Wisconsin Magazine of History* 52 (Summer 1969), 361-62; Maurice G. Baxter, *Indiana Magazine of History* 65 (March 1969), 71-72; William C. Wooldridge, *Virginia Law Review* 55 (April 1969), 569-78; R. Kent Newmyer, *Journal of Southern History* 35 (August 1969), 426-27; Leonard W. Levy, *Journal of American History* 56 (March 1970), 919-21; Alfred H. Kelly, *Journal of the Illinois State Historical Society* 62 (Winter 1969), 433-36; Michael Perman, *Journal of American Studies* 4 (July 1970), 133-35; John G. Sproat, *Pacific Northwest Quarterly* 61 (April 1970), 117; Don E. Fehrenbacher, *Political Science Quarterly* 86 (September 1971), 488-90.

[27]Joseph G. Gambone, "Ex Parte Milligan: The Restoration of Judicial Prestige?" *Civil War History* 16 (September 1970), 246-59.

[28]Mayo Fesler, "Secret Political Societies in the North during the Civil War," *Indiana Magazine of History* 14 (September 1918), 183-286; Wood Gray, *The Hidden Civil War: The Story of the Copperheads* (New York, 1942); George F. Milton, *Abraham Lincoln and the Fifth Column* (New York, 1942).

In the 1950s, historian Frank L. Klement began what would become a lifetime career devoted to uncovering the truth about Copperheadism. In four books and numerous articles written over several decades, he reported a wealth of information about Copperheads, secret societies, and opposition to Lincoln's war policies. Along the way, he developed a robust skepticism about the legitimacy, threat, and even the existence of such opposition. He concluded that Copperhead conspiracies were simply a "fairytale"—Copperheads had been a vocal source of loyal opposition to the war, and charges of treason, while politically useful, were mythical and irrelevant. Nonetheless, he cited historical opinion that the Milligan case had been "one of the basic defenses of American civil liberty" and remarked that the court's opinion had "stood the test of time."[29]

Klement's conclusions about the myths of Copperheadism have been challenged by a number of historians whose work has validated the serious threats posed by the movement. In 1973, G. R. Tredway claimed that Klement was "in error on several points" about the capabilities of the Sons of Liberty and the Indiana conspirators: "If they are all spurious, there was indeed a conspiracy, but one to perpetrate one of the most monumental historical hoaxes of all time!" In 1995, David E. Long voiced strong disagreement with Klement's conclusions, citing an abundance of evidence to the contrary. In her 2006 book, *Copperheads: The Rise and Fall of Lincoln's Opponents in the North*, Jennifer Weber concluded that opposition to the Civil War, while localized, was widespread, hostile, and harmful to the Union' s military effectiveness. In response to Klement's claim "that the Copperheads were mostly a fiction," she wrote: "My research finds to the contrary: that the peace movement was broad, and so influential by August 1864 that it very nearly took over the Democratic Party." Stephen E. Towne concluded from his own research that "Klement and other historians got the facts wrong and omitted reference to key records in a variety of archives that point to different conclusions."[30]

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[29]Frank L. Klement, "The Indianapolis Treason Trials and *Ex Parte Milligan*," in *American Political Trials*, ed. Michal Belknap (Westport, Conn., 1981), 101-127, quote 120. Klement was citing James Morton Smith and Paul Murphy, eds., *Liberty and Justice: A Historical Record of American Constitutional Development* (New York, 1958), 227.

[30]G. R. Tredway, *Democratic Opposition to the Lincoln Administration in Indiana* (Indianapolis, Ind., 1973), 280; David E. Long, "Frank Klement Revisited: Disloyalty & Treason in the American Civil War," *Lincoln Herald* 97(Fall 1995), 99-115; Weber, *Copperheads*, 10; Stephen E. Towne, "Scorched Earth or Fertile Ground? Indiana in the Civil War, 1861-1865," in *The State of Indiana History 2000*, ed. Robert M. Taylor Jr. (Indianapolis, Ind., 2001), 397-416; Towne, "Such Conduct Must Be Put Down: The Military Arrest of Judge Charles H. Constable during the Civil War," *Journal of Illinois History* 9 (Spring 2006), 43-62.

The most compelling response to Klement's thesis has come from James M. McPherson in his Pulitzer Prize-winning *Battle Cry of Freedom*:

> The leading historian of the midwestern copperheads brands "the great Civil War myth of conspiracies and subversive secret societies" as a "fairy tale," a "figment of Republican imagination" compounded of "lies, conjecture and political malignancy."
>
> This carries revisionism a bit too far. There was some real fire under that smokescreen of Republican propaganda.[31]

The "real fire" was evidenced by Civil War-era newspapers and their extensive coverage of the Indianapolis and Cincinnati treason trials of 1864 and 1865, when Milligan was implicated, convicted, and sentenced to death. Thus, the direction of scholarship on civil liberties and dissent during the Civil War, post-Klement, supports the wartime Republican view of Copperheads as a credible threat in the North. This redirection also suggests that the North's internal security processes kept the federal and state authorities abreast of the "fire in the rear" without excessive numbers of arbitrary arrests.

Historian Mark Neely Jr. has offered the most significant contrast to this now-widely accepted view of Civil War secret societies and the significance of Milligan—both the individual and the case based upon his legal conviction. In the 1980s, Neely began his prodigious work on civil liberties during the Civil War. In his 1991 Pulitzer Prize-winning book, *The Fate of Liberty: Abraham Lincoln and Civil Liberties*, he accepted Klement's principal findings: "The shrewd and painstaking work of historian Frank L. Klement over the last thirty years has proved, beyond any reasonable doubt, that no systematic, organized, disloyal opposition to the war existed in the North." If Klement's conclusions were accurate, Neely reasoned, then they called into question Lincoln's relatively tough policies on civil liberties during the war. Who, then, was being arbitrarily arrested and why? How extensive were these civilian arrests and military trials? Using arrest and trial records from the U. S. National Archives, Neely estimated

[31]James M. McPherson, *Battle Cry of Freedom: The Civil War Era* (New York, 1988), 783.

that there had been at least 13,535 wartime civilian arrests, although many more might be unaccounted for. Most of those arrested were citizens of the Confederacy or border states; only 624 cases of citizen arrests occurred above the border states and the District of Columbia, and the vast majority of these were criminal in nature. Most of the arrests "had nothing to do with dissent or political opposition in the loyal states above the Border States." In a similar manner, of the 4,271 trials by military commission during the Civil War, 55.5 percent were concentrated in the border states of Maryland, Kentucky, and Missouri, with 31.9 percent in the occupied Confederate states, and 6.4 percent in Washington, D.C.[32]

Neely also addressed what he termed the "Irrelevance of the Milligan Decision." Reviewing the origins of *Ex parte Milligan* and its rising reputation among scholars during the 1920s, he contended that the case would be inapplicable during wartime, since it had been decided post-Civil War. In support of his opinion, Neely quoted Klaus's 1929 comment that "between Sumter and Appomattox, one is apt to infer, the opinion would simply have been irrelevant." He conceded that the Milligan decision clarified a muddied pre-1866 legal situation, but maintained that "the real legacy of *Ex Parte Milligan* is confined between the covers of the constitutional history books. The decision itself had little effect on history."[33]

The publication in 1996 of Chief Justice William Rehnquist's book, *All the Laws but One*, brought a refined focus to the relation of *Ex parte Milligan* and civil liberties during war and peace. Rehnquist's interest in history added a rich perspective to his legal analysis. He devoted several chapters to David Davis, the arguments in the Milligan case, the decision, and his own perspective on the issues. Rehnquist did not question the Milligan ruling, but he agreed with others that the broad scope of the opinion addressed some unasked questions.

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

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[32]Mark Neely Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York, 1991), xii, 137-38.

[33]Ibid., 184.

Citing the old Latin maxim *Inter Arma Enim Silent Leges* ("In time of war the laws are silent"), Rehnquist agreed that "without question the government's authority to engage in conduct that infringes civil liberties is greatest in time of declared war" and that "there is also the reluctance of courts to decide a case against the government on an issue of national security during a war." He concluded that "the laws will not be silent in the time of war, but they will speak with a somewhat different voice." In this opinion, he echoed Lincoln's famous dictum in a letter to Erastus Corning: "The Constitution is not in its application in all respects the same, in cases of rebellion or invasion, involving the public safety, as it is in times of profound peace and public security. The Constitution itself makes the distinction."[34]

In the twenty-first century, scholars of the law and of American history have written in the shadow of the attacks of September 11, 2001. Historian Eric Foner, whose career has focused on the quest for civil liberties by various social groups, has written numerous public opinion articles that adroitly combine historical and international perspectives to broaden understanding of contemporary American freedoms. Much of his recent work has been motivated by the terrorist attacks on New York City and Washington, D.C.; however, his study of much earlier terrorist activity on American soil, and its adverse implications for civil liberties, adds a temporal dimension to the pressing issues of the day.[35] On more than one occasion, Foner has invoked Milligan's legacy to elucidate current policy issues. Writing for *The Nation* in 2003, he reflected on the vulnerabilities of civil liberties:

> In the aftermath of the Civil War, a far greater crisis than the war on Iraq, the Supreme Court in the Milligan case invalidated the use of military tribunals to try civilians. The Court proclaimed that the Constitution is not suspended in wartime: "It is a law for rulers and people, especially in war and peace." Alas we have not always lived up to this ideal. The history of civil liberties in the

[34]William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (New York, 1998) 137, 218, 221, 225; Abraham Lincoln to Erastus Corning and Others, June 12, 1863, in *Collected Works of Abraham Lincoln*, ed. Roy Basler (New Brunswick, N. J., 1953) 6:260-69.

[35]See, for example, Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York, 1988); and Foner, *The Fiery Trial: Abraham Lincoln and Slavery* (New York, 2010).

> United States is not always a straight-line trajectory toward ever greater freedom. It is a complex story in which victories can prove temporary and regression can follow progress.[36]

In the decade following the 9/11 attacks, books, articles, reports, and other publications have addressed the aggressive responses of President George W. Bush's administration, as well as the actions of the U. S. Supreme Court and Congress to redirect and/or legalize those executive actions. Two of the most divisive constitutional issues have proved to be the detention of captured terrorists and the use of military tribunals. On both of these issues, President Bush's advisers referenced history, including the Milligan and Quirin cases, for their inspiration, as well as precedent for their actions.[37]

The work of legal scholars and historians who have published on civil liberties in the post-9/11 period reveals how thoroughly the Milligan case has become woven into the historical fabric. Curtis Bradley, a professor of law at Duke University, devoted a chapter to the case in *Presidential Power Stories* (2009), co-edited with Christopher Schroeder. Although Bradley largely addresses legal issues, he concludes with a historical perspective: "Perhaps the greatest significance of *Milligan* is symbolic rather than doctrinal. . . . [It] provides a precedential counterweight to claims of unlimited government authority in wartime."[38]

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[36]Eric Foner, "Dare Call It Treason," *The Nation*, June 2, 2003.

[37]One deputy to President George W. Bush downplayed the importance of the Milligan decision, referring to it as one of the "landmarks of constitutional law that never were." John Yoo, "*Merryman* and *Milligan* (and *McArdle*)," *Journal of Supreme Court History* 34 (November 2009), 243-60, quote 245.

[38]Curtis A. Bradley, "The Story of *Ex parte Milligan*: Military Trials, Enemy Combatants, and Congressional Authorization," in *Presidential Power Stories*, eds. Christopher H. Schroeder and Curtis A. Bradley (New York, 2009), 93-132. Other recent publications include Daniel Farber, ed., *Security versus Liberty* (New York, 2008); Barry Friedman, *The Will of the People: How Public Opinion Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York, 2009); Marouf Hasian, *In the Name of Necessity: Military Tribunals and the Loss of American Civil Liberties* (Tuscaloosa, Al., 2005), chapter 4; Lucas A. Powe Jr., *The Supreme Court and the American Elite, 1789-2008* (Cambridge, Mass., 2009); William O. Walker III, *National Security and Core Values in American History* (New York, 2009). For the perspective of a European scholar on the balance of liberty and domestic security in the U.S. versus Europe, see Stefan Sottiaux, *Terrorism and the Limitation of Rights: The ECHR and the U.S. Constitution* (Oxford, U.K., 2008).

As this review of the century-and-a-half of literature related to the Milligan decision suggests, historians and legal scholars have made three primary criticisms of the case. First, the timing of the opinion has led some observers to characterize it as opportunistic postwar hindsight. Davis did attempt, early in his opinion, to account for the "then versus now" aspect of the case. Moreover, in subsequent eras, the Supreme Court has shown a capability to address related issues during a crisis, rather than after the exigency has passed—cases involving World War II and the responses to post-9/11 terrorism are examples. Questions persist, however, because the domestic risks of the Civil War remain unique in U.S. history. The court deferred then to the conflict, and might again if the U. S. faced a similar dire emergency.

A second critique of the Milligan case holds that it has become irrelevant as a legal precedent. "Irrelevant" seems too strong a term, however, as historians have shown that the Copperhead movement constituted a credible threat. The legal precedent and the value of the case have not been extinguished, overlooked, or disregarded. Rather, the case has been *distinguished* because Milligan was a "non-belligerent, not subject to the law of war," as the Supreme Court emphasized in its consideration of Milligan during World War II.

The greatest controversy over Milligan has arisen from the broad scope of the opinion, in which the court seemed to answer questions that were not asked. The court did not need to facilely define the conditions of martial rule or congressional authority for military commissions to reach its ruling. However, Davis resorted to the Constitution to judge the status of military commissions when the federal courts were open and operating. He considered the joint relationships among martial rule, arrest and detention, habeas corpus, and trial by jury as safeguards of civil liberties. He viewed these Constitutional safeguards as "irrepealable"—insulated from congressional, executive, and judicial interference. His approach, similar to that of Zechariah Chafee fifty years later, treated the Constitution as an integrated whole, sustainable under war or peace conditions. By inference, the Milligan opinion would allow military commissions under martial rule if one or more federal courts were not open and operating—were not in the "proper and unobstructed exercise of their jurisdiction." In their concurring opinion, Chief Justice Chase and his three colleagues went beyond this rationale, allowing Congress to authorize military commissions under its military powers: "Those courts might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert

threatened danger or to punish with adequate promptitude and certainty the guilty conspirators." Chase and the other justices might have argued that Congress could appoint a special federal court to address these conditions, but they did not.[39]

Historians from several disciplines have served important roles in establishing the longevity, significance, and key attributes of the Milligan case. Sydney Fisher placed Milligan squarely within the framework of balancing between civil liberties and national security, while Henry Fletcher regarded Milligan as a key example of how the responsibility for safeguarding citizens under emergencies may shift among government units. Charles Warren documented Milligan's potentially adverse effect on the Supreme Court's standing during Reconstruction, while still calling the opinion a "bulwark of American liberty." In response, Stanley Kutler proposed a profound revision in the view of the court's performance during Reconstruction, with its renaissance led by the Milligan case. Samuel Klaus compiled a comprehensive resource on the case, and recognized that Milligan was most valuable in "rare and crucial" situations. Charles Fairman echoed other scholars' concerns about the applicability of the Milligan opinion and chastised Justice Davis for the rigidity of his positions. Allan Nevins saw Milligan as an official statement about the dominance of civil over military authorities during peace or war. Mark Neely Jr. undertook the most thorough accounting of arbitrary arrests and military trials during the Civil War, and concluded that relatively few were motivated by disloyalty. Louis Fisher, Eric Foner, Curtis Bradley, and others bridged eras by citing Milligan as a historical precedent in addressing modern policy issues. William Rehnquist wrote that, in war time, laws "will speak with a somewhat different voice." Together, these individuals reflect the variety of disciplinary perspectives that scholars have brought to bear on *Ex parte Milligan*.

Justice Davis struck a resonant chord in his opinion. He clearly understood the trade-offs between civil liberties and national security, and knew that the Civil War had pushed the nation to the brink of collapse. He wrote for the ages, and tolerated the controversies about Reconstruction as best he could, stating privately that he would "abide the judgment of time."

The stature of the *Ex parte Milligan* case has persisted through periods of great institutional, technological, and cultural change. The United States has continued to endure war and conflict, and there is little reason

[39]Klaus, *The Milligan Case*, 249.

to expect the future to differ. The establishment of a historically based, definitive understanding of the boundaries between civil governance and the military is vital for the preservation of a free, democratic society. The Milligan case continues to speak unequivocally to these constitutional values. On this point, Justice David Davis will have the last word:

> When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty… but if society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws.[40]

[40]Ibid., 236.