Judge Perkins, the Indiana Supreme Court, and the Civil War

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A fundamental problem in a democracy is how to wage war effectively within the bounds set by the Constitution. Every war in United States history has been accompanied by protests on the part of the civilian population over alleged constitutional violations and infringements of personal liberties. This was notoriously true of Indiana during the Civil War. Recent scholarly works by Kenneth M. Stampp and Frank L. Klement have questioned the tradition that Indiana was honeycombed with treason and full of Southern sympathizers. Few states contributed as heavily to military victory for the Union cause as did Indiana. But if Klement's definition of Copperheads as "avid critics of the Lincoln administration" is accepted, then it must be admitted that Copperheads were numerous within the Democratic party.[1]

Most Indiana Democrats were willing to support a war to preserve the Union but insisted they were fighting to preserve "the Union as it was." They were conservatives alarmed over the revolutionary tendencies set in motion by the war. They frequently accused the Republicans, who were in power, of using the war for the purpose of carrying out a revolution and perpetuating themselves in power. As states' rights disciples of Jefferson and Jackson these Democrats were horrified at the increasing centralization of power in the hands of the federal government, and they were strongly opposed to such economic measures of the wartime Congress as the protective tariff, the national banking law, and the issuance of greenbacks. They were hostile to abolitionists and opposed to the Emancipation Proclamation and to the conversion of the war into a crusade against slavery. Finally they were bitter against both the Lincoln administration and the state administration of Governor Oliver P. Morton for

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[1] Kenneth M. Stampp, *Indiana Politics during the Civil War (Indiana Historical Collections*, Vol. XXXI; Indianapolis, 1949); Frank L. Klement, *The Copperheads in the Middle West* (Chicago, 1960).

"executive usurpations" and disregard of constitutional guarantees of personal liberties. They inveighed against military arrests and the suspension of the privilege of the writ of habeas corpus.

In several cases the Indiana Supreme Court, made up of Democrats for most of the Civil War, sought to curb the power of the military over civilians and declared certain wartime measures unconstitutional.[2] The principal spokesman for the court was Judge Samuel E. Perkins, a severe critic of both Lincoln and Morton. Perkins was a Democrat from Wayne County, Morton's home, where the governor himself had been an active Democrat until 1854. Perkins was older than Morton, but the two men knew each other well. Perkins' career was typical of those of many self-made men of his age who came to Indiana from the East. Born in Vermont in 1811, he was orphaned as a small child and was adopted by a man in Conway, Massachusetts, for whom he worked until he was twenty-one. He attended a three-months school in the winter for a few years but was largely self-educated. After he reached his majority he went to New York State, where he attended Yates County Academy for one year and read law in the town of Penn Yan.

Expecting to go to Indianapolis, he started out on foot from Buffalo in 1836. But in Richmond, Indiana, he was stopped by heavy storms and impassable roads and decided to stay. The following year he was admitted to the bar and began practice. He was soon active in the Democratic party, which was never strong in Wayne County, and for a time he edited the Richmond *Jeffersonian.* Governor James Whitcomb appointed him a prosecuting attorney and later a member of the state's supreme bench.[3] In 1852, the year after the adop-

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[2] In the elections of October, 1858, Democrats gained control of the Indiana Supreme Court. Samuel E. Perkins and Andrew Davison were re-elected at that time, while James L. Worden and James M. Hanna were elected for the first time. All four were Democrats. They served until January 3, 1865, when they were replaced by Republicans elected in October, 1864.

[3] For biographical sketches of Perkins see: "The Seventh Congressional District," *A Biographical History of Eminent and Self-Made Men of the State of Indiana* (2 vols., Cincinnati, 1880), II, 169; Leander J. Monks (ed.), *Courts and Lawyers of Indiana* (3 vols., Indianapolis, 1916), I, 206-07, 246, 252-53. There are some discrepancies in these accounts as to the exact date of Perkins' accession to the court. The facts appear to be as follows. On January 10, 1846, Governor James Whitcomb nominated Samuel E. Perkins and Thomas L. Smith to the

tion of the new state constitution, Perkins was elected to the Indiana Supreme Court. In 1858 he was re-elected. While serving on the court he also taught law at North Western Christian University (now Butler University) and prepared the *Indiana Digest* of 1858.

During the fifties he brought sharp criticism upon himself for two decisions. They reflected two characteristics of Perkins' philosophy which were to recur in his later decisions—an insistence upon strict construction of constitutional provisions and opposition to restraints upon personal liberty and the use of private property. The first decision concerned a law enacted in 1855 which absolutely prohibited the manufacture and sale of intoxicating liquors except for medicinal, mechanical, chemical, or sacramental purposes.[4] Perkins declared the law unconstitutional on several grounds but principally because it violated personal and property rights. Liquor distilleries were property, he declared, and the legislature could not by a general law "annihilate the entire property in liquors in the state." He cited the constitutional limitations against taking property without just compensation and asked: "What. . .is the right of property worth, stripped of the right of producing and using?"

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court to succeed Jeremiah Sullivan and Charles Dewey, whose terms were to expire at the end of that session of the general assembly. The senate rejected the nominations of both Perkins and Smith. At the next session of the legislature Whitcomb again submitted the name of Perkins, and the senate confirmed the nomination on December 30, 1846. At this same session Whitcomb twice submitted the name of Smith and the senate twice refused to confirm the appointment. In December, 1847, Whitcomb once again nominated Smith, and on January 21, 1848, his nomination was finally confirmed. Whitcomb was a Democrat as were Perkins and Smith, while the two judges whom they were replacing were Whigs. Indiana, *Senate Journal* (1845-1846), 488, 533-34; Indiana, *Senate Journal* (1846-1847), 219-20, 546-47, 620; Indiana, *Senate Journal* (1847-1848), 71, 216.

[4] *Beebe* v. *State*, 6 Indiana Reports 501 (1855). In the Beebe case Perkins spoke for the entire court. In an earlier and little known case he had released a man who had been arrested for breaking the 1855 prohibition law. The man sought release on a writ of habeas corpus. Perkins in granting the release declared the law unconstitutional. He admitted that the legislature could regulate the liquor business but denied that it could prohibit it completely. His reasoning foreshadowed his opinion in the Beebe case. "The right of liberty and pursuing happiness secured by the constitution," he said, "embraces the right, in each *compos mentis* individual, of selecting what he will eat and drink. . . ." The opinion in the case, *Hermann* v. *State*, which was decided October 30, 1855, is printed in the appendix of the eighth volume of the Indiana Reports.

In the second case Perkins invalidated the portion of the school law of 1855 which authorized incorporated cities and towns to levy taxes for the support of public schools within their borders.[5] He declared that the law violated the portion of the state constitution which made it the duty of the legislature to provide for a "general and uniform system of common schools wherein tuition shall be without charge and equally open to all." He insisted that in order to meet the requirement of uniformity the school system must operate equally in the city and the country. The provisions enabling municipal corporations to levy a special tax for school purposes made it possible, he said, for the legislature to shirk its duty of maintaining the schools and would lead, he maintained, to a system of schools which were not uniform. On a petition for a rehearing of the case he reiterated the same argument and also declared that the law violated the constitutional provision (Article IV, Section 22) prohibiting the legislature from passing any local or special law for the support of common schools. He held that the law was local because it operated on only a portion of the people and property of the state and permitted one scale of taxation for some school districts and another one for other districts.[6]

While on the bench Perkins continued to be an active Democrat, frequently writing letters to the press and making political speeches. He was strongly opposed to the antislavery tendencies of the Republican party. In a speech at Richmond during the 1860 campaign he declared the avowed objects of the Republicans to be aggressive and in violation of the Constitution of the United States. After the war began, like many other Democrats, he continued to insist that it could have been avoided by compromise. In a newspaper article in July, 1861, he expressed his fear that "in the prosecution of the war, we may build up a great consolidated military and enormously costly government, which will necessarily deprive us of many of the liberties we have enjoyed in the past." But he said that the South would receive no support from the "ever Union-loving Democracy of the North" and that it was the duty of Democrats "to aid the war so long as the Administration determines to prosecute it constitutionally

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[5] *City of Lafayette* v. *Jenners*, 10 Indiana Reports 70 (1857).
[6] *Ibid.*, 75-77.

and for a constitutional object." He was bitterly opposed to the Emancipation Proclamation, which he regarded as a flagrant violation of the Constitution. In January, 1863, Perkins declared the war, as it was being conducted, a failure and appeared to be favorable to an armistice. But a few months later he was calling for the "speedy conquest of the South, so that the war and the strife may cease. . ." and people "turn their attention to the question of reclaiming their lost liberties, and reestablishing the plain economical republican government which our fathers left us."[7]

Perkins became involved in a direct clash with Governor Morton in a decision of the state supreme court which attempted to thwart the governor's plans to take the state's financial affairs into his own hands. The acrimonious 1863 session of the General Assembly, in which the Democrats had a majority, had come to an end without passing an appropriation bill. Towards the end of the session the Republican members had halted the enactment of all legislation by bolting and going as a group to Madison ostensibly to block the passage of a militia bill they regarded as unconstitutional. Instead of calling a special session of the legislature to appropriate the money necessary to run the government for the next two years Morton resorted to a number of extraordinary measures, some of them of doubtful legality. He insisted that he dare not call a special session because the Democratic members were bent on "revolution."[8]

Morton ran into a snag when he attempted to compel the state auditor, Joseph Ristine, a Democrat, to authorize the expenditure of money in the treasury to pay the interest on the state debt due New York bankers. Attorneys for the Board of Commissioners of the Sinking Fund sought a mandamus in the Marion County Circuit Court to compel

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[7] *Speech of Judge Perkins at Mass Meeting Held at Richmond, Indiana, September 25, 1860* (pamphlet, n.p., n.d.); Indianapolis *Daily State Sentinel*, July 11, 1861, January 16, 1863; letter of Samuel E. Perkins to J. E. McDonald, Joseph Ristine, and others, *ibid.*, November 10, 1863. See also Perkins' letter to the Democratic Club of Lawrenceburg, *ibid.*, May 12, 1864.

[8] See Stampp, *Indiana Politics during the Civil War*, 176-85, for an account of the legislative session and Morton's one-man rule. See also Morton's defense of his conduct in his speech before the Union state convention, February 23, 1864, in William M. French (ed.), *Life, Speeches, State Papers and Public Services of Governor Oliver P. Morton* (Indianapolis, n.d.), 393-415.

Ristine to issue a warrant for the payment of the money. This led to two opinions of the Indiana Supreme Court dealing with the same question. Perkins wrote the opinion in one case, Judge James M. Hanna in the other.[9] The same briefs were filed in each case. Oscar B. Hord, the state attorney general, another Democrat (and Judge Perkins' son-in-law), represented the auditor. Hord argued that since no specific appropriation had been made for the payment of the interest the funds could not be paid out. He said that under the state constitution the legislature alone had control over the disposition of public money and warned against the dangers to the state if this principle was violated.[10]

In support of the right to withdraw the money from the treasury without a specific legislative enactment Morton wrote a letter to James Winslow of the New York banking firm of Winslow, Lanier and Company. The letter was filed as a brief.[11] The essence of Morton's argument was that laws already in force authorized payment and that failure to pay the interest would constitute the impairment by the state of an obligation of a contract thereby violating the United States Constitution. And the commissioners' counsel declared:

> Then the case stands thus: there is a general appropriation in the original contract for the payment of the interest; the money is in the treasury; it is the plain duty of the Auditor to draw the warrant upon the Treasurer for the interest. . . .
>
> We contend further, that the laws in force and made at the time of the State's arrangement with the bondholders are to be taken together as forming a contract. . . .

Any subsequent legislation which interfered with the payment was in conflict with the Constitution of the United States, and "so far as it affects that contract detrimentally it is null and void."[12]

Perkins and Hanna sustained the position of the attorney general. Perkins held that there was no provision in Indiana

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[9] *Ristine* v. *State* ex rel. *Board of Commissioners*, 20 Indiana Reports 328 (1863) and *State* ex rel. *Board of Commissioners* v. *Ristine*, *ibid.*, 345. Perkins wrote the opinion in the first case; Hanna in the second.

[10] *Ibid.*, 358-72.

[11] "The Governor in his argument entitled a Letter to James Winslow Esq., and filed herein as part of the brief of the counsel for the Commissioners," *ibid.*, 372-79.

[12] *Ibid.*, 383.

law authorizing state officers to pay the interest on the state debt without a specific appropriation, and he declared that there was no existing law making such an appropriation.[13] Hanna's opinion also held that neither the state constitution nor the laws of the state authorized any state officer to pay interest on the state debt without a specific appropriation, and, like Perkins, Hanna denied that any law already passed made such an appropriation.[14]

After the decision the Indianapolis *Daily State Sentinel,* the leading Democratic newspaper, insisted that if Morton failed to call a special session "he would be without excuse, and such will be the popular verdict." The Republican Indianapolis *Daily Journal,* on the other hand, assailed the "contemptible quibbles, and the hocus pocus of a sham lawsuit" which prevented the payment of the money from the treasury. This newspaper insisted it was futile to call a special session because the Democratic majority *"would never pass an appropriation, never!"* Morton, ignoring assertions by Democrats that if a session were called they would promise to pass an appropriation bill, made arrangements with the New York bankers to advance the money necessary to pay the interest. During the 1864 political campaign Judge Perkins called Morton's financial course a usurpation of powers belonging to the legislature and compared the governor to Caesar and Cromwell. But Democrats could only fume and utter cries of outrage at the audacious Morton. They were powerless to stop him from establishing a one-man government which ignored not only the state legislature but the other state officers as well.[15]

Threats to personal liberty from actions of military officers aroused even more bitter condemnation than did Morton's financial policies. Military arrests were felt to strike at the very roots of constitutional government. Such authority as there was for these arrests rested on a proclamation by President Lincoln issued September 24, 1862, and on various orders by military authorities which were supposedly derived from it. There were also examples of arrests in which officers

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[13] *Ibid.,* 339-42.

[14] *Ibid.,* 348, 357-58.

[15] Indianapolis *Daily State Sentinel,* June 6, 1863, June 29, 1864; Indianapolis *Daily Journal,* June 13, 1863; Stampp, *Indiana Politics during the Civil War,* 182-84.

clearly acted on their own initiative. Lincoln's proclamation declared that, so long as the insurrection lasted, all rebels or persons discouraging enlistment or resisting the draft or persons guilty of any disloyal action were subject to martial law and liable to be tried by military authorities. Such persons were denied the privilege of the writ of habeas corpus. By an act of March 3, 1863, Congress authorized the President to suspend the writ of habeas corpus whenever in his judgment the public safety required it and relieved military officers from the obligation of answering the writ. The act also gave immunity and the protection of the federal courts to officers who might be sued for arrests or imprisonments.[16]

Democratic members of the 1863 Indiana legislature vehemently protested military arrests and introduced several bills designed to curb them. In the lower house a resolution was passed which condemned military arrests as "acts of tyranny, a flagrant violation of the rights of the people, as unwarranted by the laws of the Constitution," and demanded that "all such arrests shall hereafter cease." A committee created by the house held hearings and examined witnesses in forty-three cases of military arrests. The report of the Democratic majority of the committee found that persons had been "taken into custody upon frivolous pretexts," and that persons had been arrested whose only offense had been the expressions of opinions derogatory to emancipation. "Those who spoke boldly, as freemen ought to do," the majority asserted, "were seized, deprived of liberty, and refused a trial, under the pretext that they had been guilty of disloyal practices. . . ."[17]

The dissenting report of the Republican minority refused to recognize "for one moment that the arrests complained of in this State were arbitrary, unjust, and illegal, or that they were subversive of the Constitution of the United States, or of this State or dangerous to the liberties of the people. . . ."

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[16] James D. Richardson (comp.), *A Compilation of the Messages and Papers of the Presidents* (10 vols., Washington, 1922), VI, 98; James G. Randall, *Constitutional Problems under Lincoln* (rev. ed., Urbana, Ill., 1951), 152, 163-66; *United States Statutes at Large*, XII, 755.

[17] Indiana, *House Journal* (1863), 26; *Report and Evidence of the Committee on Arbitrary Arrests in the State of Indiana, Authorized by Resolution of the House of Representatives, January 9, 1863* (Indianapolis, 1863), 6, 8.

On the contrary, these arrests were held to be necessary measures in suppressing the rebellion and restoring the Union. "All such as would, in time of war, make the civil authority supreme and above the military power," the minority said, "were begotten and brought forth by either *ignorance* or *treason.*" Those people "who are constantly talking of the *habeas corpus,* and are very much alarmed for fear its great liberty features will be violated—they need more patriotism. . . ."[18]

A few months later the state supreme court, speaking through Perkins, entered a powerful dissent to such views and denied the authority of the military to arrest and imprison civilians. The first case involving military arrests grew out of an order issued by Brigadier General Orlando B. Willcox, the commander of the District of Indiana and Michigan.[19] It called for the arrest of any persons "engaged in stealing, concealing, or preventing the delivery of any Government property, or any property to which the *United States* have just claim." Acting under the authority of this order Jeremiah D. Skeen, the deputy provost marshal for Ripley County, arrested Dederick Monkheimer, whom he accused of stealing a horse which was the property of the United States. But the local jailer refused to confine the man. Thereupon Skeen ordered the jailer to surrender his keys and personally locked up Monkheimer. The next day the victim obtained a writ of habeas corpus from the Ripley County judge, who ordered Monkheimer's release on the ground that "no verified charge of any offence whatever" had been brought against him. Arguing that as deputy provost marshal of the United States he was not liable to answer to a state judge and that the county judge had no jurisdiction in the case, Skeen appealed to the state supreme court.

Perkins upheld the action of the county judge in an opinion which was a stinging rebuke to the claims of military authority. He pointed out that no legal charges had been brought against Monkheimer and that an admission that arrests could be made "at the mere pleasure of these military policemen" made state governments subservient to the military

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[18] *Report and Evidence of the Committee on Arbitrary Arrests,* 123, 127.

[19] *Skeen* v. *Monkheimer,* 21 Indiana Reports 1 (1863).

and paved the way for despotism. "And it is not improper to add here the remark," he declared, "that Indiana has never been in a condition to justify, according to any established principle of law, the superseding of the judicial by the military power, in the prosecution and punishment of crime. . . ."[20] There had been no time when both state and federal courts were not ready and able to arrest anyone charged with a crime.

A second and much more widely publicized case[21] arose when the chief provost marshal of the District of Indiana and Michigan directed the provost marshal of Indianapolis, Captain Frank Wilcox, to issue an order prohibiting anyone from selling liquor to enlisted men. "This order must be rigidly enforced," he informed Wilcox. "Anyone violating it will be severely punished. I have noticed with surprise, many intoxicated soldiers in our streets. This evil should and must be stopped." Wilcox thereupon issued an order which prohibited all persons engaged in the sale of liquor from making sales to enlisted men and warned that violation would lead to severe punishment. Joseph Griffin, a saloonkeeper, was arrested and imprisoned by Wilcox for disobeying the order. He did not apply for a writ of habeas corpus, but after he was released he brought suit against the captain for false imprisonment. He secured as his counsel John L. Ketcham, one of the ablest attorneys in Indianapolis, who argued that Griffin was not subject to military jurisdiction because at the time of his arrest there were no organized rebel forces in Indiana and no rebellion in the state. Wilcox' defense was that he was acting under military orders of the provost marshal, who possessed "summary police powers" to deal with all matters affecting the good order and behavior of enlisted men and with "all persons interfering therewith, whether connected with the military service or not."[22] Griffin lost his case in the Marion County court and appealed to the state supreme court, where Perkins reversed the lower court's decision.

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[20] *Ibid.*, 3.

[21] *Griffin* v. *Wilcox*, 21 Indiana Reports 370 (1864).

[22] *Griffin* v. *Wilcox*, Transcript of Record from the Court of Common Pleas of Marion County, Case No. 3554, Indiana Supreme Court Papers (Archives Division, Indiana State Library, Indianapolis).

The act of Congress of March 3, 1863, granting immunity to military officers did not bar the present suit, said Perkins, because Congress did not have the power to enact legislation denying citizens redress through damage suits for violations of rights secured by the Fourth and Fifth amendments. He then went into a long discourse on the war powers of the President and the extent of military jurisdiction. He admitted that men in military service were subject to military orders and that military officers might prohibit soldiers under their command from drinking intoxicating liquor. But Griffin was not connected with the military service in any way. Nor had he been charged with violating any law of Indiana or of the United States. Perkins admitted that the President had the power to govern through military officers and martial law when the civil power of the United States was suspended by force. "But in all parts of the country, where the Courts are open, and the civil power is not expelled by force," he declared, "the Constitution and laws rule, the President is but President, and no citizen not connected with the army, can be punished by the military power of the *United States,* nor is he amenable to military orders." If men committed crimes defined by law they should be punished according to the laws and the Constitution in civil courts. But if they were not guilty of crimes recognized by law and if the civil power was operative in the region in which they resided, "their arrest, trial, and punishment by, military courts, is but a mode of applying lynch law; is, in short, mob violence."[23] So far as the present case was concerned, he pointed out: "The Courts have at all times been open, and there are a sufficiency of them here, including those of the city, State, and *United States,* to meet the public necessities."[24] Therefore the arrest and imprisonment of Griffin on the pretext of military authority was held to be without justification.

Perhaps encouraged by the Vallandigham case,[25] then pending before the United States Supreme Court, Perkins

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[23] *Griffin* v. *Wilcox*, 21 Indiana Reports 386.

[24] *Ibid.*, 391-92.

[25] Clement L. Vallandigham, a former Democratic congressman from Ohio, had been arrested for violating an order of Major General Ambrose Burnside which stated that persons declaring sympathy with the enemy would be arrested and tried by military procedure. Vallandigham was tried before a military commission in Cincinnati for a speech in which he charged the Lincoln administration with needlessly prolonging the war. The United States Supreme Court refused to review the case.

attacked military arrests made for the purpose of suppressing criticism of the war, although this issue was not actually involved in the Griffin case. "Resistance to illegal arrests and mob violence," he declared, "is not necessarily resistance to the Government." He defended the right of citizens to oppose the administration in power and asked whether "peaceful conflict of opinion and argument justify the administration in subjecting those who differ with it to military power?"[26]

The Indianapolis *Daily Journal,* which usually expressed Morton's views, assailed the "brilliantly copper plated sentiments" in Perkins' opinion, which it characterized as "a monstrosity, a skeleton of treason clothed in judicial arguments." The *Journal* was especially outraged by the suggestion that arrests had been made for the purpose of suppressing legimate criticism. "No cross roads spouter with an audience of two men and a dog, in an abandoned hog pen, ever uttered a more shameless slander than this Judge," it shrieked. After the United States Supreme Court refused to review the decision of the military court which tried Clement L. Vallandigham, the *Journal* predicted the same court would reverse Perkins' decision in the Griffin case.[27]

Perkins also outraged Republicans by denying the constitutionality of some of the financial measures enacted by the wartime Congress. In fact, Indiana had its own version of the Legal Tender cases, including an abrupt reversal of an earlier opinion, before these celebrated cases were decided by the United States Supreme Court. The first case involving the power of Congress to make treasury notes legal tender came before the Indiana Supreme Court early in the war, in

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[26] *Griffin* v. *Wilcox,* 21 Indiana Reports 389. In the course of his opinion Perkins denied that the President had the right to suspend the privilege of the writ of habeas corpus. This was the same position taken by Chief Justice Roger B. Taney in the case of *Ex parte Merryman* (17 Fed. Cas. 144). Perkins also declared that neither the President nor Congress had the power to suspend the issuance of the writ of habeas corpus by a state court. 21 Indiana Reports 383.

[27] Indianapolis *Daily Journal,* February 3, 1864. In another editorial on February 4, 1864, the *Journal* declared that "after wriggling first to treason, then to loyalty, the snake [Perkins] has at last got back to treason again." After the *Journal* had published a series of virulent editorials against Perkins, the Indianapolis *Daily State Sentinel,* February 9, 1864, said that the rival newspaper was evidently "affected with Perkins on the brain."

1862.[28] The charter of the Bank of the State of Indiana prohibited the bank from refusing to redeem its notes in gold or silver, but, after Congress declared the treasury notes legal tender, the South Bend branch of the bank refused to redeem a note in gold but offered instead to redeem it in treasury notes. When the question as to the right of the bank to refuse payment in gold reached the highest state court, it obviously created a dilemna for Judge Perkins, who wrote the majority opinion. It is clear from his language, that, as a loyal Jacksonian and strict constructionist, he viewed the legal tender notes with extreme distaste and thought the act of Congress unconstitutional but feared the results if he rendered an opinion to that effect. He asserted that Congress could exercise only such powers as were granted expressly or incidentally by the Constitution and added "that if the proposition just stated is not true in every particular, then is our government practically one of unlimited powers, and the constitution a delusive bauble."[29] Nevertheless Congress had issued treasury notes and declared them legal tender and thereby had clearly exceeded its powers in Perkins' view. The judge revealed his dilemma when he admitted that "the disastrous consequences to the country that must follow a denial of the validity" of the legislation, "press hard upon the judiciary to sustain the violation of the constitution, if it be such. . . ." But, on the other hand, to sustain it would "create a precedent for further usurpations." He got himself out of the difficulty by declaring that if the Indiana court were the court of last resort, "the preservation of the constitution, in its letter and spirit, should be an object outweighing. . .all considerations of temporary inconvenience." The final determination of this question, however, did not lie with the state court but with the United States Supreme Court. Therefore, with obvious reluctance, Perkins upheld the act of Congress making the treasury notes legal tender. "Such will be the ruling of this Court," he declared, "till the Federal Court shall determine the question otherwise."[30]

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[28] *Reynolds* v. *Bank of the State of Indiana*, 18 Indiana Reports 467 (1862).

[29] *Ibid.*, 470.

[30] *Ibid.*, 474-75.

In a brief dissenting opinion Judge James M. Hanna met the issue more forthrightly and held unconstitutional the act of Congress making treasury notes legal tender. "Professing to be guided by the plain teaching of the constitution, and knowing in judicial decisions no higher law," he declared, "I can not accord with the conclusion of the Court." He found "that by the constitution the right is not vested in Congress to make a paper named a legal tender in payment of private debts."[31]

Two years later, when another case involving legal tender came before the court, Perkins cast aside the restraint he had shown in 1862 and flatly declared that Congress had no power to pass such legislation, but at the same time he again avoided overruling the lower court, which had upheld the validity of the legal tender act.[32] The case arose out of the question of whether a promissory note, made after Congress had declared the treasury notes legal tender, could be paid in them. The holder of the note refused to accept greenbacks and demanded payment in gold or in treasury notes of a value equivalent to the market value of the gold, because the notes had depreciated. In the Boone County court, where the case was first heard, counsel for the plaintiff argued that if the debtor had agreed to pay a horse, "the measure of the plaintiff's recovery would have been the value of the horse." He asked: "Has this act [of Congress] so far changed the law of contracts as to make a tender on such a contract good when the paper is 47 per cent below par?"[33] The county court upheld the plaintiff's demand for the amount of the note but charged him for court costs since a legally valid repayment in greenbacks had been offered by the defendant.

In a long rambling opinion, which reviewed the history of money in the United States and much of the history of federal-state relations as well, Perkins found the legal tender provisions invalid when the case came before the state court. He declared that the act of Congress, by making an article of no intrinsic value legal tender, impaired the obligation of

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[31] *Ibid.*

[32] *Thayer* v. *Hedges*, 22 Indiana Reports 282 (1864).

[33] *Thayer* v. *Hedges*, Case No. 336, Box 609, Indiana Supreme Court Papers.

contracts by compelling creditors to receive in discharge of contracts less than half of the stipulated value. Furthermore, the act operated "as a fraud on the public creditors and a hardship upon the honest public servants, by depreciating and debasing the currency." Moreover the legislation had the effect of enabling the government to take forced loans "without interest, against the will of the lender," and with repayment of but part of the principal in depreciated currency.[34] Perkins denied that the power to make paper money legal tender was incidental to any other power of Congress. It was not incidental to the power to borrow money because the power to borrow does not imply the power "to make forced loans, to take the citizens [*sic*] property without his consent, and without just compensation."[35] It was the intention of the framers of the Constitution, he contended, "to withhold this power of supplanting natural money from the general government, and to strip the States of it, and thus extinguish it, and to insure to the people and nation a sound currency forever."[36]

Having thus impugned the validity of the act of Congress, Perkins still did not take the logical next step and reverse the order of the lower court, which had held that the offer to pay in treasury notes fulfilled the requirements of the note. Instead he said:

> Having fully presented the views of the court on the constitutional question, in which we unanimously hold the legal tender provisions void, we shall as we did in the case of *Reynolds* v. *The Bank of the State*, 18 Ind. 467, and for the reason there given. . .affirm the judgment below. We are advised that the question is before the Supreme Court of the *United States*, the ultimate tribunal to settle it, and a petition for rehearing may, if the party desires, keep open the question and save all rights as they may be finally settled by that tribunal.[37]

Perkins' opinion was delivered October 31, 1864, just after the Republicans had swept the state in the October elections and he himself had been defeated for re-election. His opinion had left the way open for a rehearing. Soon after

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[34] *Thayer* v. *Hedges*, 22 Indiana Reports 286.
[35] *Ibid.*, 303.
[36] *Ibid.*, 306.
[37] *Ibid.*, 310.

Perkins' retirement the new Republican judges, declaring that since the earlier opinion "other judges have come upon the bench of this court, whose duty it is to act upon the case," proceeded to deal with the case as if it had never before been considered. They announced that they were "unanimous in holding an opinion entirely different from that heretofore given by the learned judge [Perkins]. . . ." They agreed with Perkins that only the United States Supreme Court could make a final settlement of the question, but they expressed the opinion that the legal tender act could be upheld under the power of Congress to borrow money and to make all laws "necessary and proper" for carrying out the express powers of Congress.[38]

While Perkins apparently lacked the temerity to declare the legal tender law inoperative, he did invalidate a portion of the wartime internal revenue act on the grounds that it had the effect of encroaching upon the freedom of state courts. The law required the payment of a stamp tax on legal documents and declared invalid those documents to which the stamp was not affixed. In a case appealed from Elkhart County Perkins ruled that Congress had no power to require the stamp on documents used in state court proceedings.[39] The purported tax, he declared, did not fall within the power of Congress to levy direct taxes, duties or imposts, and excises; instead, it was "a tax on the right to justice."[40] It was manifestly the intention of the Constitution, said Perkins, that state courts should exist, and this being so, Congress had no power to encroach upon or control them. Developing the *argumentum ad horrendum,* he said that if Congress could levy this tax it might require state legislatures to stamp their bills, journals, and laws in order to make them valid. It

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[38] *Thayer* v. *Hedges,* 23 Indiana Reports 141 (1865).

[39] *Warren* v. *Paul,* 22 Indiana Reports 276 (1864). The Internal Revenue Act of June 30, 1864 (*United States Statutes at Large,* XIII, 223), required a stamp tax on any writ or other original process by which any suit was commenced in any court of law or equity. This case involved the recovery of personal property. The lower court dismissed the suit because the papers had not been stamped as required by the act of Congress. In the official report of the Warren case, the date of the national law is given incorrectly as July 4, 1864, which was the date of the joint resolution imposing an income tax (*United States Statutes at Large,* XIII, 417).

[40] *Warren* v. *Paul,* 22 Indiana Reports 278.

might even require the executive of the state to stamp all commissions. Perkins denied that Congress could "thus subjugate a State by legislation." The federal government might, he thought, take most of the property in a state by taxation if exigencies required it, but it did not have the right, "by direct or indirect means, to annihilate the functions of the State government."[41]

Perkins and the other Democratic justices were defeated in the 1864 election, which marked the beginning of several years of Republican ascendancy in Indiana. But Perkins enjoyed a kind of vindication—by both the voters of Indiana and the United States Supreme Court. In 1876 he was elected once more to the Indiana Supreme Court and was serving on that bench when he died in 1879. More significantly, some of the constitutional doctrines he had expounded during the war were affirmed by the United States Supreme Court in the postwar period. The same arguments which Perkins had used in the Indiana legal tender cases were used by Chief Justice Salmon P. Chase in *Hepburn* v. *Griswold,* which declared the legal tender legislation of 1862 unconstitutional.[42] As is well known, this decision was reversed the following year after two new justices were appointed to the court.[43] Ironically, Perkins himself reversed his position on paper money in the postwar years. Like most western Democrats he abandoned his earlier hard money views and became an advocate of currency expansion.[44]

But the principles which he set forth in the cases involving military arrests of civilians received a lasting vindication in the Milligan case.[45] During the war years the United States Supreme Court had refused to review the cases of any of the civilians who were tried in military courts. In 1866, however, they accepted the appeal of Lambdin P. Milligan, who had been convicted of treason by a military court in Indiana in 1864. In considering the question of the extent of military

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[41] *Ibid.,* 280-281.

[42] *Hepburn* v. *Griswold,* 8 Wallace 603 (1869).

[43] Legal Tender cases *(Knox* v. *Lee* and *Parker* v. *Davis),* 12 Wallace 457 (1870).

[44] See, for example, his speech at Shelbyville, Indiana, September 4, 1867, as reported in the Indianapolis *Herald,* September 27, 1867.

[45] *Ex parte Milligan,* 4 Wallace 2 (1866).

jurisdiction during wartime, Judge David Davis admitted: "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." But now that the war was over and the public danger was past, he said, the question could be decided "without passion or the admixture of any element not required to form a legal judgement."[46] In language reminiscent of that which Perkins had used in the Griffin case the court ruled that the military tribunal had not had jurisdiction to try Milligan since the civil courts had been open and functioning and since Indiana had not been invaded. "Martial rule," said Davis, "can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction."[47]

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[46] *Ibid.*, 109.
[47] *Ibid.*, 127.