

CALL IT PEACE OR CALL IT TREASON:  
THE MILLIGAN CASE AND THE MEANING OF LOYALTY IN  
THE CIVIL WAR

by

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*I dedicate this thesis to my father, my first American History teacher, and still the best. And to my grandfather, who hated admitting he was glad the South lost the war—but was, nonetheless, as loyal as they come.*

WITH GRATITUDE...

First, to my advisor, Professor Dirk Hartog, for teaching me to ask the right kind of historical questions, for guiding me as my project took twists neither of us expected, and for always reassuring me that my thesis *says* something.

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## INTRODUCTION

Six months after the Civil War began, Federal troops disrupted a meeting of the Maryland state legislature by arresting sixteen of its leading members.<sup>1</sup> This episode, one of the most legally questionable of the entire war, exemplified two themes which carried through the length of the fighting. The first was the danger of opposition within states that did not secede, and the type of power the government could exercise to keep it from interfering with the war effort. The second was the mingling of military and political spheres, which the army's attack on a sitting legislature emblemized. Present at all times during the war, these two themes emerged in force again in another episode near the end of the conflict. In a case that would go down in history as *Ex parte Milligan*, the target of military force was not a political body but several individuals. A man named Milligan and four others, civilians who held anti-administration views, were arrested by the military in Indiana and brought to trial before a military court, on charges of treason and conspiracy against the government. Ultimately, their ordeal produced a decision, out of the United States Supreme Court, that addressed and gave some degree of closure to the issues first raised in Maryland in 1861.

This thesis will tell that story from its origins in the political culture of Indiana to its emergence onto the national scene, tracing the twin and intimately related themes of responses to opposition and loss of military/political boundaries. Much as Milligan's case rested upon and was an element of the wider national phenomenon of suspension of habeas corpus and military trials, the case was profoundly a product of the specific place

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<sup>1</sup> Marc Neely, *The Fate of Liberty: Abraham Lincoln and Civil Liberties*, (Oxford: Oxford University Press, 1991), 16.

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in which it occurred. The political climate in Indiana, the personalities and ideologies of key figures in that state, and the particular set of events that constituted Indiana's experience of the war made the story happen and unfold as it did. Certain aspects of antebellum Indiana history were crucial in creating the recipe that caused the state to birth the Milligan case.

American settlers began to flow into Indiana in the 1780s. The first wave of immigrants consisted mostly of small farmers from the Upper South, and many moved into the new territory to escape competition from Negro slave labor—a fact which bequeathed to the state a strong thread of anti-Negro sentiment. Later waves of immigration brought Northeasterners into the state, but in 1860, a significant portion of Indiana's population still felt close cultural and even familial ties to the South. Southern alienation and finally secession were personally painful and internally tumultuous events for many Hoosiers, who felt their loyalties strongly split. Further complicating the matter was the fact that Indiana's predominately agricultural economy relied on the Southern market, and, especially before the dominance of railroads, on the artery of the Mississippi River for bringing their produce to market. Formation of the Confederacy and the commencement of hostilities thus threatened both the livelihood and the identity of many in Indiana.<sup>2</sup>

Political sentiments largely correlated with Hoosiers' place of origin, so that the increasing strength of the Republican Party in the state and its success in the 1860 election corresponded to the eclipse of transplanted Southerners by transplanted Yankees in the population. Indiana Democrats were by and large old-style Jeffersonians,

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<sup>2</sup> Gilbert Tredway, *Democratic Opposition to the Lincoln Administration in Indiana* (Indianapolis: Indiana Historical Bureau, 1973), 1-2; Kenneth Stampp, *Indiana Politics During the Civil War* (Indianapolis: Indiana Historical Bureau, 1949), 1-2.

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committed to agrarian ideals and States' rights. Lambdin Milligan, the man at the center of this study, was a quintessential, albeit unusually fiery, example of an Indiana Democrat. Trained as a lawyer, Milligan had a steadfast understanding of the Constitution as a compact between the states, and viewed the war to force the South to remain in the Union as a constitutional travesty. Moreover, his criticism of the war and the administration's policies exhibited a deep distrust, bordering on paranoia, of Northeastern moneyed interests.<sup>3</sup> Considering the significant and substantive links Indiana Democrats felt to the South and the alienation many of them felt from the Northeast, it is not surprising that the concept of creating an independent Northwest Confederacy, an idea that predated the Civil War, was especially potent in Indiana.

Since the war's inception, many Southerners and portions of the opposition in the Northwest itself had harbored the dream of disconnecting the Old Northwest from New England and forming a separate republic, which would either ally itself or actually merge with the Southern Confederacy. The idea recurred in various circles throughout the war—for example, on March 13, 1863 the *Chattanooga Daily Rebel* published a letter spelling out its advantages to both regions. On the Southern side these included “a strong Ally in War and protection to slavery,” as well as revenue from imports to both Confederacies through her ports. The Northwest, meanwhile, “secures its former market in the South for its agricultural products” and “use of the great Mississippi river.”<sup>4</sup> In Indiana, the idea of the Northwest Confederacy was bandied about, notably in a January 1862 speech by Thomas Hendricks, a Democratic leader whom the state legislature proceeded to appoint

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<sup>3</sup> Allan Nevins, “The Case of the Copperhead Conspirator,” in *Quarrels That Have Shaped the Constitution*, ed. John A. Garraty, (New York: Harper & Row, Publishers, 1962), 91.

<sup>4</sup> Quoted in Samuel Klaus, *The Milligan Case*, (New York: Da Capo Press, 1970), 29.

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Senator over the vociferous protests of the Republican minority.<sup>5</sup>

The most important things to take away from the underlying demographic and political makeup of Indiana are the depth of the divisions that existed in the society, and the ideological commitments which characterized the Southern-sympathizing wing of the Democratic Party. In the ensuing chapters I deal far more with Republican ideological drives than with those of Democrats. Milligan and his cohorts often seem like passive figures, manipulated by the Republicans in power, a portrayal which is not accidental. The Republicans, stimulated by a messy conglomeration of partisanship, fear, and ideology, invented an image of the Democracy which had roots in reality, but was not reality. This image assumed that the genuine ambivalence of Democrats over fighting the South meant that they were all secretly hoping for and even working to aid the Union's demise. A number of studies of Indiana in the Civil War, most persuasively that of Gilbert Tredway, have demonstrated that the overwhelming bulk of Democrats in Indiana were loyal, in the sense that they desired that the Union be restored and wished for Northern victories on the battlefield.<sup>6</sup> Tredway ascribes much of the strife in Indiana to Republican inability to differentiate between disagreements over policy and genuine disloyalty, and to a large degree he is correct. It is important, however, to realize as well that the ambivalence of Indiana Democrats cut deep, so that the distinctions that Republicans obscured, the Democrats also blurred themselves. When Democratic politicians, for instance, publicly entertained notions of a Northwest Confederacy, they walked a fine line between dissent and disloyalty. In the Civil War, that line was often

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<sup>5</sup> Ibid.

<sup>6</sup> Tredway, *Democratic Opposition*. See also Stamp, *Indiana Politics*. A more extreme reading is that of Frank Klement, *The Copperheads in the Middle-West*, (Chicago: University of Chicago Press, 1960). Klement portrays Democratic loyalty as absolutely unqualified and strongly vilifies Republicans for shrewdly distorting reality.

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delicate and complex—a fact that is infinitely easier for historians to recognize with one hundred and fifty years of hindsight than it was for actors in those tense times.

My goal in this thesis is to retell the story of Milligan’s arrest, military trial, and hearing before the Supreme Court, with emphasis on the motivations of the actors whose decisions drove the case to unfold as it did. To the best of my ability, I want to strip away the reasoning of hindsight, and portray events as they *appeared to the people who lived them*. Tredway lists as goals of his project arriving at a judgment on the outcome of the Milligan military trial and evaluating the military commission as “a judicial instrumentality.” While I have addressed both of those issues, I want to nuance my judgments in a way that Tredway did not. While I agree with his evaluation that the cases against the defendants were objectively not strong enough to warrant convictions, I believe it is considerably more important and more interesting to examine why the trial was structured as it was, what its purpose was to the prosecutors, and why the commission decided as it did in spite of the scanty evidence. Tredway’s interest is in deconstructing the case and identifying objective truth, whereas mine is in analyzing the case, not as an entity unto itself, but in the context of a greater web of events.

Milligan’s was not a case about personal vendettas or irrational prejudice. The people responsible for the trial and conviction—the Governor, the generals, the Judge Advocate, and the members of the commission—believed the men on trial guilty of unpardonable crimes, and believed just as strongly that a solid case had been made for conviction. They were not delusional; they simply perceived the crimes and the nature of evidence needed to prove them differently than we do. While their actions may have been unwarranted, illegal, and even unethical, I believe that they were rational, and

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furthermore, that they were driven by principle.

Viewing the choices of these men through the lens of their own perceptions and belief system, the theme that emerges is that in war, some boundaries collapse, while others appear to sharpen. The separation between military instruments and goals and political ones blurred, while the distinctions between loyal people and traitors seemed to crystallize into stark lines, even as the reality was far hazier. During Milligan's trial the Judge Advocate captured the essence of this Republican worldview. "Each loyal man of the land is perfectly cognizant of what is loyalty and what is disloyalty," he proclaimed. "This is not a question of opinion, but one of fact."

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Before turning to the Milligan case itself, some background on the policies of the Lincoln Administration relating to civil liberties is necessary to explain how Lambdin Milligan wound up on trial for his life before a panel of Indiana Volunteer Corps officers. I opened with the arrests of the Maryland legislators because, in concrete as well as thematic ways, the groundwork for the Milligan case was laid in Maryland. It was in Maryland, on April 27, 1861, that President Lincoln first suspended the privilege of the writ of habeas corpus, authorizing the military to arrest civilians and confine them indefinitely.<sup>7</sup> Over the next eighteen months, Lincoln widened the scope of the suspension in a series of punctuated events, until finally martial law applied, to an element of the population, everywhere in the country. Although each extension was a response to a particular trigger, the President eventually wearied of piecemeal suspensions and swept "disloyal practice," broadly defined, under the specter of martial

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<sup>7</sup> Roy Basler, ed., *The Collected Works of Abraham Lincoln* (New Brunswick, N.J.: Rutgers University Press, 1953), IV: 347.

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law. With the gloves off, authorities in Indiana could send the military after Milligan simply because they perceived him as a threat.

When Lincoln suspended habeas corpus in Maryland, he was responding to a situation that explicitly threatened his ability to fight the war. There was enormous fear in the first months of fighting that Maryland, a slave state with close links to Virginia, would throw its lot with the South and secede. If that happened, Washington D.C. would be cut off from the rest of the North, an isolated and indefensible island in the heart of Confederate territory. On top of the fear that the state legislature would vote for secession, which eventually prompted its disruption by the military, in the first days of the war Marylanders actively interfered with military preparations for defense of the capital. Rioters in Baltimore blocked troops on their way to Washington, while local authorities burned railroad bridges in and out of the city.<sup>8</sup> With the dark predictions of General-in-Chief Winfield Scott that an attack on Washington might be imminent ringing in his ears, Lincoln issued orders authorizing the General to suspend the writ of habeas corpus in the event of “resistance which renders it necessary.” The suspension was geographically limited to the “vicinity of any military line” leading through Maryland to Washington.

Lincoln enacted this initial suspension of the writ reluctantly and under extreme provocation, and he limited it, geographically and substantively, to a place and situation of overt military necessity.<sup>9</sup> Constrained as it was, however, the first suspension broke the dam, and extending the policy entailed far less soul-searching by the President. The area

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<sup>8</sup> Neely, 4-5.

<sup>9</sup> Neely cites a communication of Lincoln’s to Scott prior to the suspension, in which the President offered that the general should consider bombarding Maryland’s cities to prevent her from leaving the Union before he suspended the writ. That measure was reversed for “the extremist necessity.” Lincoln also requested a report from his Attorney General assessing the legality of suspending the writ and of proclaiming martial law. The resulting document indicated that his authority to do either was highly questionable. Neely, 4-7.

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denied the privilege of the writ grew slowly at first, encompassing parts of Florida on May 10, 1861, on July 2 the “military line” between New York City and Washington, and on December 2, the guerilla-ridden state of Missouri.<sup>10</sup> For nearly a year the issue lay dormant, but on September 24, 1862, Lincoln issued a new proclamation which erased geographical limitations on the writ’s suspension and redefined its purpose. It was this proclamation that served as the premise for Milligan’s military arrest in Indiana two years later.

Lincoln’s 1862 extension of suspension of the writ was meant to serve a particular purpose, one which did not encompass the circumstances of Milligan’s arrest. Congress passed the first conscription law in American history in the summer of 1862, and its enforcement provoked violent resistance in some parts of the country.<sup>11</sup> The September decree suspending the writ was geared directly at subduing resistance to and enforcing the draft law. Lincoln made this connection explicit in the proclamation itself, referring in its opening line to the draft and the inadequacy of “the ordinary processes of law” in controlling resistance to it. While earlier suspensions had been defined primarily by geography, the 1862 decree applied throughout the country, but was ostensibly limited to a fixed set of offenses.

The President’s expansive definition of offenses that fell outside the realm of “the ordinary processes of law,” however, had a determinative effect on the relationship of his administration to civil liberties—and enabled Milligan’s arrest to occur. In orders issued by the War Department to field commanders six weeks before the President’s public

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<sup>10</sup> Basler, IV: 364-65, 419, and V: 35. Neely points out that whereas the initial suspension order had described a specific and well-defined military line, the proclamation of July 2, 1862, “referred to no particularly well-described ‘line’ between two places quite far apart on the map” Neely, 11.

<sup>11</sup> James McPherson, *Battle Cry of Freedom: The Civil War Era* (Oxford: Oxford University Press, 1988) 492-3.

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proclamation, conditions for the suspension of habeas corpus were nearly all directly related to draft resistance. The orders directed “all marshals, deputy marshals and military officers of the United States” to arrest persons who tried to evade the draft either by crossing out of the borders of the country or by leaving their state of residence, and then declared that “The writ of habeas corpus is hereby suspended in respect to all persons so arrested and detained, *and in respect to all persons arrested for disloyal practices.*”<sup>12</sup> Sounding almost like it was tacked on as an afterthought, the final line of Stanton’s orders presaged the far more expansive list of crimes which would shortly appear in the President’s proclamation. In Lincoln’s version the suspension applied to:

[A]ll Rebels and Insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to Rebels against the authority of the United States.<sup>13</sup>

When applied, the open-ended phrase, “guilty of any disloyal practice,” carried military arrests far beyond cases of draft resistance. Assessment of disloyalty fell into the hands of local officials, a fact which was crucial to the Milligan case.

Nor did the proclamation stop there. The September 24<sup>th</sup> decree paved a new avenue of military law enforcement by dictating not merely arrest and detainment of civilians, but making the class of people it delineated “subject to martial law and liable to trial and punishment by Courts Martial or Military Commission.” Although Mark Neely, an historian of civil liberties under Lincoln, claims that in both the geographical expansion and the formal introduction of military trials the proclamation merely ratified practices that were occurring on the ground, the administration’s official sanction made martial law part of government and army policy.

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<sup>12</sup> *O.R.*, II: 4, 358-59. Emphasis added.

<sup>13</sup> Basler, V: 436-7.

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From the beginning of the war through mid-1863, the suspension of habeas corpus and application of martial law developed entirely within the hands of the executive branch—Lincoln and his cabinet. This fact precipitated an enormous controversy, as conventional wisdom held that the Constitution’s provision for suspension of the writ bestowed the power on Congress, not the President.<sup>14</sup> Congress allowed this situation to continue for close to two full years, remaining completely silent about the President’s dubiously legal activities. Finally, on March 3, 1863, the legislature passed the Habeas Corpus Act, in which it authorized the President to suspend the writ.<sup>15</sup> While it gave unconditional approval to the President’s suspension of the writ and granted him full discretion in determining its necessity, Congress’ sensibilities regarding the issue of trials by military commission are far harder to discern. The bill that was passed never mentioned military commissions directly; moreover, they were never invoked in the lengthy Congressional debate over the bill. In the Senate, legislators expressed concern over arrests by unusual procedures and constituents sitting in “dungeons and bastilles,” but were silent about their subjection to trial and punishment by the military.

While the Congressmen never addressed the issue explicitly, portions of the

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<sup>14</sup> For a thorough treatment of the constitutional debate over which branch has the authority to suspend the writ of habeas corpus, see William F. Duker, *A Constitutional History of Habeas Corpus*, (Westport, C.T.: Greenwood Press, 1980), 141-44 and n.109-136. The traditional view that only Congress could suspend the writ was classically expressed by Chief Justice Taney in *Ex parte Merryman*, 17 F. Cas. 144 (1861), while the eminent legal scholar Horace Binney was a vocal proponent of the President’s interpretation of executive authority. Horace Binney, *The Privilege of the Writ of Habeas Corpus Under the Constitution*, (Philadelphia: T. B. Pugh, 1862).

<sup>15</sup> One notable feature of the legislation was its purposeful ambiguity—its drafters worded it in such a way that it was not clear whether Congress authorized the President to suspend the writ from the point of its passage on, or whether they retroactively approved his previous suspensions.

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Habeas Corpus Act had implications for the practice of military trials.<sup>16</sup> Its first section dealt straightforwardly with habeas corpus, authorizing the President to suspend the writ as he deemed necessary, “throughout the United States, or any part thereof.” From there the law took a surprising twist, directing that the Secretary of War furnish a list of all prisoners held by the authority of the President to the circuit and district courts. In convoluted language, the law then dictated that if a grand jury with jurisdiction in the area in which a prisoner was detained met and terminated its session without indicting that prisoner, the prisoner could apply to the judge of said court for discharge, which was guaranteed him as long as he took an oath of loyalty. Finally, the third section of the law dealt with technicalities of bail for prisoners who were indicted, and specified twenty days as the time allotted after an arrest for the Secretary of War to furnish a name to the courts.

The last two sections of the bill aimed to prevent men from languishing indefinitely in forts and military prisons, and its effect was, in the words of one Senator, “a modified suspension of the writ of habeas corpus.”<sup>17</sup> While preventing any court from issuing the writ, “it provides for what in effect amounts to the habeas corpus; it amounts to the discharge of the prisoner,”—after a certain length of time. The law’s wording left open the status of a person tried and convicted before a military court. If the trial and

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<sup>16</sup> Appendix to the *Congressional Globe*, Third Session of the Thirty-Seventh Congress, (Washington: Blair & Rives, 1863), 217. The last four sections dealt with the related issue of indemnity for officers involved in making arrests.

<sup>17</sup> One Senator did raise the point, which struck me when reading the law, that the latter sections stood in something of a contradiction to the concept of suspending the writ of habeas corpus, which presumably freed the Executive to detain people outside of judicial oversight. Senator Collamer of Vermont argued that “If [the Executive Departments] are to have the power of suspending the writ of habeas corpus, it should be to enable them to take and to hold persons...for the public security; and because a term has come the court should not be allowed to deliver a man from arrest...it should be left to the Executive, with whom we leave the suspension of the writ...otherwise it means very little or nothing at all.” *Congressional Globe*, Third Session of the Thirty-Seventh Congress, 1206.

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sentencing were completed before a grand jury session terminated, one could argue that the law did not bear on or interfere with such a military trial. The only clue in the debates to the intentions of the law regarding military trials was the statement of Senator Trumbull, the bill's author, that "if this bill is enacted into law, not a person can be held in prison except it be by virtue of judicial action."<sup>18</sup> Trumbull's words seem to preclude military trials as a means of attaining punishment, but if that was his intention, it did not find its way into the text of the law. The meaning of this law, and its intent regarding the use of military trials to deal with civilian political prisoners, would become a crucial issue in the final phase of Milligan's story, when the Supreme Court evaluated the case.

Whatever its intentions, however, the 1863 Act clearly did not prevent trials before military commissions. In fact it lacked teeth even in the areas it explicitly addressed, for while it stood on the books for the duration of the war, its provisions were seldom enforced. Military arrests and trials remained the province of the executive department, essentially unregulated by either of the other branches. Lincoln believed in delegating, and the Milligan case demonstrates the way the power of arbitrary arrest filtered down to the level of the state executive, where the governor's power was unbridled.<sup>19</sup> For the governor and military officials of Indiana, the broad swath of crimes the President had removed from the rubric of ordinary legal procedures provided a versatile weapon in their arsenal. In conflict-ridden Indiana, foes within nettled the authorities as much as foes without, and they viewed Lincoln's suspension of ordinary due process as an indispensable tool in their struggle to keep the state peaceful. The

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<sup>18</sup> *Ibid*, 1186.

<sup>19</sup> Unlike the Commander-in-Chief, the governor of Indiana had no place in the army chain of command, but he was granted discretion over the use of the armed forces in his state when it came to defending the state itself.

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Milligan case arose out of these enmeshed visions of executive authority and the danger of “fire from the rear.”

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The four chapters of this thesis divide Milligan’s story into chronological phases. The first traces the origins of the case, as far back as 1862, in Indiana’s turbulent politico-military scene. Concentrating on the Governor, Oliver Morton, and the two generals who commanded the District of Indiana, it seeks to explain the outlook of these men toward opposition and their response to it, culminating in Milligan’s arrest and the decision to try him and several others before a military tribunal. The second chapter turns to the military trial itself, exploring the way the two sides, prosecution and defense, conceived the cases they were arguing. In the third chapter, I briefly sketch the events which brought the case before the Supreme Court. Governor Morton is again a key figure, this time playing the role of savior rather than avenger, and his apparent one-eighty must be understood. Chapter three also introduces Supreme Court Justice David Davis, whose interest in and motives relating to the case are crucial to its final phase. The last chapter surveys the historiographical legacies of *Ex parte Milligan*, the Supreme Court’s decision in the matter, and finally reexamines that decision in light of the rest of Milligan’s story.

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## FEAR AND LOATHING IN INDIANA

### CHAPTER 1

Close to midnight on October 5, 1864, military officials arrested Lambdin P. Milligan at his home in Huntington, Indiana. As leg surgery the day before had left him unable to walk, the soldiers lifted up the incapacitated Democratic lawyer and would-be politician on his couch and loaded it, prisoner and all, onto the special train that awaited them. From Huntington the train traveled directly to Indianapolis, where Milligan was deposited into the less than homey Soldier's Home prison.<sup>1</sup>

Milligan's arrest was certainly not the first, nor the last, such event of the Civil War. Nor was it clear at the time that it was remarkable, that it stood apart significantly from the thousands of similar events that took place during Lincoln's administration. Yet Milligan's story was fated to be different, to become a landmark in American jurisprudence. A wholly self-made man, Milligan left his father's house at the age of seventeen and put himself through law school. He was admitted to the bar in 1835, and eventually settled in Huntington, Indiana, where he set up a successful legal practice, making a name for himself in railroad litigation. A staunch Democrat and devotee of State's Rights, Milligan began to dabble in politics in the 1850s, serving as chairman of his county's Democratic Party. It quickly became clear, however, that his fierce integrity, which prevented him from bending an inch on any of his radical principles, made him totally unelectable. After the war broke out, Milligan made periodic public speeches, in

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<sup>1</sup> Testimony of William Swasey, Milligan's attorney, quoted in Tredway, 238. *American Bastile*, a notorious anti-Administration polemic, describes the appalling conditions Milligan faced in the Soldier's Home at great length. Though its account is sensationalized, the place was no doubt unpleasant. John A. Marshall, *American Bastile*, (Philadelphia: T. W. Hartley & Co., 1881), 76-78.

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which he harped on themes of Republican culpability for the war and New England's exploitation of the agricultural sector. These speeches attracted the attention of Indiana Republicans—the Republican press denounced him, while an agent employed by the state provost marshal tracked his movements.<sup>2</sup>

In the fall of 1863 he provided hungry Republican partisans with real fodder by joining the Knights of the Golden Circle, a shadowy organization of radical peace Democrats, although his membership did not come to light until the following summer, shortly before he was arrested. Reminiscent of the Freemasons, the KGC was a secret society organized into local lodges, replete with secret signs and passwords for recognizing fellow members. The first in a series of similar secret societies, the KGC long predated the war and in its original incarnation was dedicated to the conquest of Mexico. It spread at first in the South, where it acquired a pro-Southern and pro-slavery bent. After the secession crisis and the outbreak of war, the KGC expanded into the North, now including in its mission aiding the rebellion.<sup>3</sup> Joining the organization was a costly decision for Milligan, as it was his association with the KGC that brought soldiers into his home that October night. Before his ordeal was over, that association would land Milligan on death row, sentenced by a military tribunal to hang, and would finally lead his attorneys to the Supreme Court bar, where they would win him vindication.

That Milligan's name is remembered now is due in large measure to his initiative and that of his friends, in pushing hard enough to get his case heard before the highest

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<sup>2</sup> For example, the *Columbia City Republican* on July 28, 1862, wrote: "Of all the infamous harangues ever delivered in any loyal State of the Union, since or before the inauguration of the present hell-born rebellion, none can compare to it in traitorous malignity and falsehood to the one hissed forth from the villainous lips of L.P. Milligan...on Saturday last." Clipping from John Hanna MSS. For the state agent, see Tredway, 236.

<sup>3</sup> Mayo Fesler, "Secret Political Societies in the North During the Civil War," *Indiana Magazine of History*, 14 (September 1918), 190-9.

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court in the land. The case's fame, however, is also due to its timing and location. Indiana in 1864 was a political pressure chamber, teetering on the edge of explosion. Scarcely beyond the State's borders raged a war far uglier than the nation had imagined possible. Within Indiana, obsessive fear that the war would engulf their state too rammed up against growing disaffection with the cause and exhaustion with the effort of fighting. Democrats and Republicans came to mistrust each other so deeply that ordinary citizens incessantly spied upon their neighbors, and both sides swelled the ranks of secret societies intended to consolidate and reinforce party affiliations.<sup>4</sup> Fear has a tendency to erase subtleties and gradations and so, especially on the Republican side, people came to view the state, and really the country as a whole, as starkly divided between loyal men and traitors. Loyal men were those who supported not only the Union but the administration wholeheartedly, and traitors represented everyone else. Democrats, meanwhile, vacillated between passionate defenses of their loyalty and the legitimacy of their opposition, and digging in behind positions on the outcome of the war that sounded to Republican ears like bald confirmations of their treachery.<sup>5</sup> It was against the backdrop of this volatile, polarized society that Union soldiers asserted authority over Lambdin Milligan's person.

A clear picture of the political atmosphere in Indiana, and especially a glimpse into the mindset of key authority figures in the state, is fundamental to understanding

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<sup>4</sup> On the pro-Union side, organizations called "Union Clubs" or "Loyalty Leagues" became popular beginning in the summer of 1862. Their purpose was predominately to spy on neighbors suspected of disloyalty, and on the activities of Democratic secret societies. Tredway, 122-23. Among Democrats, the Knights of the Golden Circle was the leader among a passel of such organizations.

<sup>5</sup> The recurring theme of the Northwest Confederacy is the best example of treacherous-sounding statements out of Democrats. On January 20, 1863, for example, the *Indiana Daily State Sentinel*, the Democratic Party organ, opined that the war was enriching New England at the expense of states like Indiana, and admitted the possibility that the Northwest could break away from the Union if her people became convinced that "a continued affiliation is detrimental to all her interests."

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how his case came about at all. For while in other times and other circumstances the mode of Milligan's arrest and trial would have been unthinkable, in the Indiana of late 1864 they were eminently predictable, even logical, outgrowths of a certain way of viewing the war and Indiana's place within it. Underlying that outlook was the erosion, over the course of the war, of a number of boundaries—the separations between legitimate political opposition and treachery, between military and civilian authorities, and between military and political objectives. With these distinctions utterly blurred, it became possible to consign Milligan, a man with no connection to the armed services, to the mercies of military justice.

By the fall of 1864, three and a half years of war had changed the face of the country and etched deeply into citizens' perceptions and expectations of authority and social organization. Soldiers were a fact of life to the people of Indiana, which had been organized in March of 1863 into a military District, a subset of the Department of the Ohio. This does not mean, however, that the people of Indiana universally accepted the military's authority in their state; on the contrary, many were deeply suspicious and resentful of the army's apparently ceaseless incursion into the administration of daily life. The Fort Wayne Sentinel typified the attitude of the Democratic press to the military's activities in Indiana when it wrote on September 27, 1862:

The Constitution has been set aside, freedom of speech and the press destroyed, our citizens subjected to arbitrary arrests, and the right of habeas corpus suspended. If the overthrow of the Constitution... is to be excused on the plea of military necessity, it must be obvious that the sooner the war is brought to an end the better.<sup>6</sup>

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<sup>6</sup> Quoted in Tredway, 24. He also cites a number of similar statements in Democratic newspapers across Indiana. Stamp, *Indiana Politics*, 141, makes this point as well, and notes the fact that Democrats were particularly outraged over military infringement on free speech and freedom of the press.

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A headline in the Indiana State *Sentinel* two years later could not have been more forthright in its anger over the burgeoning military authority. It proclaimed, “Another Excitement in the City—The Civil Authority usurped by the Military.” Eloquent protests from Democrats in the state were ubiquitous, but did nothing to diminish the military’s presence.

In truth, however, the situation in Indiana was more complicated than most people realized, in a way that made cries that the military was usurping civilian authority less than fully credible. Oliver Morton, the State’s staunchly Republican governor, was no shrinking violet, and was far from inclined to allow anyone, no matter how many stars he wore on his lapel, to take control of his state out of his hands. Rather than wage a power struggle, Morton’s savvy approach was to establish close contact and cooperation with the armed forces. For the bulk of the war, Morton’s closest ally in the military was Colonel Henry B. Carrington—after April 1863, at Morton’s urging, Brigadier General Carrington.<sup>7</sup> Together, these two men were primarily responsible for running Indiana’s military operations, and for defining the role of the military in Indiana life. The decision to use the military to track and attack perceived disloyalty, which set the stage for Milligan’s case, was theirs, and so it is their perceptions of circumstances in Indiana that is of greatest import. Carrington served in a variety of posts throughout the war, but no matter what his title, he always worked closely with Morton, reporting to the Governor as much or more than to his military superiors.<sup>8</sup> Morton was Carrington’s patron and

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<sup>7</sup> Carrington credited Indiana Senator Henry Lane and Representative Schuyler Colfax with advocating on his behalf as well, but Morton was certainly the most influential of the three. “Indiana in the Civil War: Major General H.W. Halleck’s Interference with the Plans of Governor Morton, criticized, and his prejudiced statements confronted by actual Facts that are of Record,” Carrington Papers.

<sup>8</sup> The order reassigning Carrington to Indiana after his brief removal in 1863 (see the next note) instructed “Brigadier General Henry B. Carrington, having been ordered by the Secretary of War, in the present emergency to report to the Governor of Indiana for special service” Ibid. Describing his investigation later

protector, at one point pitting himself against Ambrose Burnside, commander of the Department of the Ohio, and Henry Halleck, Lincoln's Chief of Staff, to keep Carrington from being transferred out of Indiana.<sup>9</sup> Having cultivated Carrington as his primary executor, his bridge to the Indiana military command structure, it was crucial to Morton to keep the General in the District, in as high a position as possible.

In a retrospective he wrote in 1908, Carrington commented on his unique working relationship with Morton, and also noted the governor's extraordinary level of control over the armed forces in his state. He wrote:

In no other State of the Union was the U.S. Officer in charge of the State Recruiting Service, placed under similar relations with the Governor of the State. Indiana was so responsible for the safety of the Federal Western Base of the Ohio River, that the Governor was accepted as the legitimate adviser as to the use of its own troops, and its state militia for the common defense.<sup>10</sup>

While Carrington ascribed Governor Morton's unusual role in the state's military affairs to Indiana's strategic importance, Morton's force of will and political skill were much

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in the war of Democratic secret societies, Carrington claimed that he sent all his reports to Morton, and "most" were "successively furnished to Generals Wright, and Heintzelman," his commanding officers. "Indiana War Documents Cleared of Error," Carrington Papers.

<sup>9</sup> Halleck was a severe critic of Carrington, though his intense objection to the General is bizarre considering that his impressions of Carrington's incompetence were, by his own account, second hand, and in fact seem to be of his own invention. On March 30, 1863, he sent Burnside an unofficial dispatch in which he wrote,

"It is reported in the newspapers that you have formed Indiana into a separate military district, placing General Carrington in command. The Secretary of War is of opinion that General Carrington is entirely unfitted for such a command. From my conversations with Governors Tod and Morton, I think the Secretary is right. I do not know General Carrington personally, but, from the best information I can get of him, he has not sufficient judgment or brains to qualify him for the position. . . . He owes his promotion entirely to political influence." *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* (4 series, 70 vols., Washington, D.C., 1880-1901), I: 23, 193-194. Hereafter cited as *O.R.*

There is no evidence at all that the Secretary of War had any problem with Carrington. When Burnside consulted with him about removing the General, Stanton responded that "The Department has no disposition to remove General Carrington or interfere with his command, unless you should find it necessary." *O.R.*, I: 23, 217. Burnside nonetheless removed Carrington from command of the Division of Indiana, but a back-and-forth with Morton resulted in Carrington's speedy return to Indianapolis, now as a Recruiting Officer under Morton's direct authority. Burnside, Special Order No. 165, May 5, 1863; Order of O.P. Morton, July 9, 1863, Carrington Papers.

<sup>10</sup> Carrington to Governor J. Frank Hanly, March 9, 1907. Carrington Papers. The letter was written as an introduction to the collection, which Carrington himself assembled.

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larger factors. Other states in the Union, especially slave states across the Mason-Dixon line like Missouri and Kentucky, were more critical to military operations than Indiana; yet their governors did not exert the kind of control that Morton did. Moreover, on top of the actual power he wielded, by war's end Morton had cultivated a *perception* of virtual omnipotence in State affairs. Early in 1865 one David Kilgore, a friend of Milligan's, wrote to Morton pleading that the Governor obtain commutations of the death sentences delivered to Milligan and his co-defendants. Kilgore insisted that "a word from you may save their lives, do the country no harm, and reflect infinite credit upon the grandness of your heart." While this was an exaggerated vision of Morton's reach, the reality was not so far behind the image. Well-connected, persuasive, and forceful, Morton maintained the upper hand within the civilian/military partnership, so that in fact it may have been more accurate to say in Indiana that his civilian leadership subverted the authority of the military! This meant that Milligan's arrest, like many of the army's activities, was done with Morton's blessing at the least, and possibly at his direction.

Carefully timed and orchestrated, the midnight raid into Lambdin Milligan's home was far from an isolated event. Part of a larger operation to root out disloyal "secret societies" in Indiana, the arrests of Milligan and his peers initiated the climactic phase of a project several years in the making.<sup>11</sup> The issue of secret societies had begun to fester as early as 1861, when they were brought to Morton's attention by ordinary citizens.<sup>12</sup>

Letters from loyal "Union men" poured in to the Governor, many through District

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<sup>11</sup> While secret societies were a fixture on both sides of the political divide, this paper is concerned with Democratic organizations. The generic term "secret society" will be used to encompass only organizations which the Administration viewed antagonistically, and not those it sponsored.

<sup>12</sup> By the end of 1861 the idea of secret societies was part of the public consciousness, with the leading Republican newspaper in Indiana reporting the existence of secret societies opposed to the war. Indianapolis *Daily Journal*, Dec. 30, 1861.

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Attorney John Hanna's office, reporting the existence of lodges and meetings of treasonous intent and ratting out names of the neighbors who played leading roles. In one especially detailed letter, a citizen of Shelby County who identified himself only as "A Friend of the Union," wrote that the Knights of the Golden Circle had existed in his community for some time. After listing its "prominent members," he reported that, at a secret meeting two weeks prior to his writing, the leaders had "urg[ed] the faithful to Contribute money for the purpose of Procuring Arms" and elected delegates to a statewide convention at Indianapolis. The "Friend" ended by recommending the arrests of "some of the persons named" and suggesting that "their examination before the Grand Jury or United States Court now in session might lead to important developments and produce timely intimidation."<sup>13</sup>

To what degree letters like that of the "Friend" reflected reality has been the source of considerable historical debate. Older sources tended to give credence to Republican accounts of the extent and nature of secret Democratic organizations, but beginning in the late 1940s, historians began to question the accepted line, noting that evidence of the societies' existence overwhelmingly came from Republican sources.<sup>14</sup> The most radical revisionist history is that of Frank Klement, who maintains that the societies never existed at all except on paper, and were purposefully created by the Republican press and politicians in order to lambaste their Democratic opponents as traitors.<sup>15</sup> As Gilbert Tredway demonstrates, Klement's position ignores the fact that

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<sup>13</sup> Anonymous to Morton, February 23, 1863, John Hanna MSS.

<sup>14</sup> The most thoroughly researched of the early phase of scholarship is Mayo Fesler's 1918 article. While Fesler concludes that the societies were widespread and uses evidence primarily from Republican sources to do so, he is careful to distinguish the Orders from the Democratic party, emphasizing that the majority of Democrats and Democratic leaders had nothing to do with secret organizations. Fesler, 183-286. See also Samuel Klaus' introduction in *The Milligan Case*.

<sup>15</sup> Klement, *The Copperheads in the Middle-West*.

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there is solid evidence that a certain kind of society *did* exist among Democrats, and these probably served as the base for Republican suspicions. Called “mutual protection” (MP) groups, they were organized to provide collective defense from the violence that ardent Unionists often perpetrated against those whose support for the war and the administration did not satisfy them. Many Democrats also worried about intimidation at the polls, and MPs were intended to protect against this as well.<sup>16</sup> While in reality the MPs were almost certainly innocuous, their clandestine meetings led Republicans to suspect the worst.

The history of genuinely traitorous organizations is far harder to pin down, but Tredway shows that, at least from mid-1862 onward, references to more elaborate societies than MPs appear in Democratic as well as Republican sources. Although their numbers were doubtless far smaller than Republican reports claimed, and their precise agendas are unknown, Tredway’s evidence is fairly conclusive in establishing that secret societies of Democratic orientation, with shadowy, suspicious motives, did exist in Indiana.<sup>17</sup> They went by a number of different names, and the distinctness of each is especially difficult to pin down, but there seems to have been a primary organization which evolved through a number of stages. First known as the Knights of the Golden Circle, it gave way to an organization called the Order of American Knights, and finally came to be called the Order of the Sons of Liberty. By the time of Milligan’s arrest, the Sons of Liberty was the prominent group.

While the question of whether and to what extent the secret societies actually functioned has enormous implications for studies like Klement’s, which seeks to

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<sup>16</sup> Tredway 113-14.

<sup>17</sup> *Ibid*, 129-30.

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characterize the nature of Democratic opposition to the Lincoln Administration, it is largely irrelevant to my interest. Because my concern is the motivations and thought processes of the actors in the Milligan story, what is important is the fact that Republicans all over Indiana believed that treacherous organizations were widespread. The volume and content of their letters to the Governor make it clear that, however ill-founded it may have been, their fear was real.

Initially Morton's government made little or no official response to these unsolicited reports, but in the late summer and fall of 1862 and then the spring of 1863, two separate events—one political and one military—vaulted the secret organizations onto Morton and Carrington's radar screens. From that point on, Governor Morton in particular embraced the potential of attacking the societies as an intimidation device. While he vilified members of the societies in public speeches, General Carrington pursued the suggestion of bringing some of the leaders before Federal courts. This first wave of official reaction to the secret societies petered out rather inexplicably, with no major action taken. It was, however, an important stage in the gathering momentum against secret organizations that eventually led to Milligan's arrest.

October 1862 was election time in Indiana, and trepidation about the poll results was the first of the circumstances that drew Republican fire to the secret societies. The Democrats were running strong on an unbroken string of bad news from the front, and Republicans feared that the "peace men" would take control of the state. Campaigning on behalf of the "Union" convention, a joint movement of the Republicans and War Democrats, (he himself was not up for election) Morton became fixated on the secret societies, making them a staple of his stump speeches. In the words of William Foulke,

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Morton's extremely sympathetic biographer, Morton "warned the men of Indiana to beware of all factions, of all secret organizations designed to embarrass the government." He went further, issuing an unsubtle threat to members of the secret orders. "The administration, which had been so patient and forbearing," Foulke paraphrases, "would not always overlook these things, but, if need be, would make short work in suppressing them." Because their intent was treason, Morton asserted, the secret societies violated the laws of the United States and Indiana. Associating with them was criminal and would be treated as such.<sup>18</sup>

While Morton issued verbal attacks on the secret societies, his faithful ally General Carrington complemented the Governor's efforts with more concrete actions. As the target was secret societies, Carrington chose subterfuge as his preferred method of combat, supplementing the information that continued to flow in unsolicited from concerned citizens with paid informers.<sup>19</sup> His spies infiltrated the secret organizations, attended their meetings, and supplied Carrington with detailed reports on their activities and individual members. When Lincoln issued his September 1862 proclamation extending the suspension of habeas corpus throughout the nation and making all persons charged with disloyalty subject to martial law, Carrington seized the opportunity and had the army arrest a number of citizens for disloyal practices.<sup>20</sup>

Alongside Carrington's covert activities, Morton recruited the courts to

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<sup>18</sup> William Dudley Foulke, *Life of Oliver P. Morton*, (Indianapolis: The Bowen-Merrill Company, 1899), 206.

<sup>19</sup> The origins of Carrington's spy network are not well documented. In a letter to Senator Henry Lane dated January 12, 1863, he claims to "have been ferreting out the 'Secret Order' existing in this State," presumably a reference to his espionage activities. Henry Lane MSS. A reference to S. Coffin, one of the leading secret agents, in a communication of March 30, 1863, shows that by that point the infiltration was underway. Carrington to Colonel Charles Chase, Carrington Papers.

<sup>20</sup> Stamp, *Indiana Politics*, 141. Men rounded up in this period were fortunate enough to be freed two months later by Stanton's general release of political prisoners upon taking office as Secretary of War.

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investigate as well. In August of 1862, a grand jury of the United States circuit court released the findings of its investigation of the Knights of the Golden Circle, based upon interviews of witnesses and its own spies, and estimated its numbers at 15,000. The grand jury indicted sixteen men for treason, but more importantly, the publication of its report provided Governor Morton with firm grounding for his attacks.<sup>21</sup>

Neither Morton's fire-breathing nor the spate of arrests, however, prevented the Democrats from taking control of the Indiana state legislature in the 1862 election. Pessimism over the dismal performance of the Union army and fury over the draft trumped whatever concern about Democratic treason Morton was able to inspire in voters' minds.<sup>22</sup> The Democrats' empowerment brought to the fore another one of Morton's polemic fixations—the Northwest Confederacy—which eventually, in the run-up to the Milligan case, would blend together with the secret societies into one massive anti-governmental threat.<sup>23</sup> One county Democratic Party meeting actually passed a resolution declaring that if the South succeeded in establishing its independence, Indiana's interest would lie with the Confederacy, and rumors circulated that the state legislature intended to pass an even stronger resolution.<sup>24</sup> Morton was sufficiently perturbed by the rumblings to write a letter to Lincoln alerting him to the danger and suggesting strategies to combat the threat. Describing the prevalence of the secessionist impulse in his state, he wrote that “During the recent campaign it was the staple of every Democratic speech,” and offered the view that if the army failed to bring the Southern

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<sup>21</sup> Fesler, 202-3.

<sup>22</sup> Foulke, 223; Fesler, 204.

<sup>23</sup> According to the government's case, the conspiracy in which Milligan was accused of participating involved a plot to use the OSL as a nascent army to fight for Northwestern independence.

<sup>24</sup> Morton reported to Stanton on January 3, 1863, that the legislature was poised to pass a joint resolution “acknowledging the Confederacy and urging the Northwest to dissolve all relations with New England.” Quoted in Foulke, 213.

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states back into the Union, the nation would certainly be faced with the choice of watching Indiana, Ohio, and Illinois break away as well, or fighting a new civil war to hold onto them.<sup>25</sup> In Morton's eyes, the advocates for a Northwest Confederacy posed nearly as great a threat to the Union cause as the rebel soldiers on the battlefield.

At the same time, rebel soldiers were causing a great deal of anxiety in Indiana. The second catalyst of the heightened attention to secret societies in Indiana was Confederate guerilla commander John Morgan's raid through Kentucky and into Indiana. Morgan's campaign brought actual fighting to Indiana for the first time, but more disturbing than the external threat were the rumblings of danger from within the State. As fear of invasion mounted in early 1863, Carrington predicted that upon entering the state, Morgan would be able to assemble an army twenty thousand strong out of traitorous Indiana citizens.<sup>26</sup> The secret societies seemed to represent a ready pool of recruits for the Confederate invaders, organized, in some places armed, and waiting to be called out to serve the Rebel cause. Looking back on the events of 1863, Morton went so far as to claim that it was actually the clamorings of the secret societies that induced Morgan to invade the state, assured that a general uprising would greet him.<sup>27</sup>

In the last half century, historians of Indiana Civil War politics have uniformly portrayed Governor Morton's fixation with secret societies as pure partisanship, a strategy to discredit his political opponents in order to achieve political hegemony. While this interpretation is not entirely wrong—Morton's tendency to equate the Democratic

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<sup>25</sup> Morton's suggestion for action was to make securing the Mississippi River a priority. In his opinion, the motive force behind the drive to unite the Northwest and the South was the centrality of the river to the economy of the Northwest, and fears that access to it would be blocked if the South were a separate, hostile nation. Morton to Lincoln, in Foulke, 210-11.

<sup>26</sup> *O.R.*, II:5, 366.

<sup>27</sup> Testimony before the Senate, May 4, 1876. Quoted in Foulke, 374.

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Party as a whole with the alleged traitorous elements belies his partisan sensibilities—it is an oversimplification. In the context of a potential invasion, what had begun during the previous fall’s campaign as primarily a convenient partisan tool took on a different tinge.

Recalling the events of that summer of 1863, Carrington wrote eloquently about Morton’s sincerity in castigating disloyal secret organizations. Although Carrington is by no means an objective source—he was a personal friend of Morton’s, and moreover, the governor’s motives heavily colored the justice of his own actions—his comments on this matter are too vivid and insightful to dismiss readily. Describing a particular speech of Morton’s during the Morgan raid, Carrington recalled, “His [Morton’s] words, though few, were simply terrific in the denunciation of traitors, especially traitors at home.” The power of the governor’s rhetoric, like all great persuasive speech, Carrington insisted, derived from the fact that Morton believed his own words wholeheartedly.

I never before so fully separated in my mind, Governor Morton’s hatred of treason from all possible personal or merely political considerations. Once, when in my boyhood, while riding from New York to New Haven, on a steamboat, I watched Daniel Webster as he talked with Sherlock Andrews, of Cleveland, Ohio, as to what was then called ‘Clay’s American System’ and in the depth of his cavernous eye socket, there seemed to be some divine power; but in Governor Morton’s face, that morning there was the type of the real ‘Nemesis.’ The Political opponents of Governor Morton, never fully gauged this element of his influence among the people.

Carrington makes the intriguing claim about politics, that only the passion of true conviction can inspire people in the way that Morton did. If we accept this premise, as I am inclined to do, we must conclude that however staunch a partisan or ruthless a politician the governor was, when it came to defending his state, he was propelled by an almost prophetic sense of duty. This by no means implies that a significant portion of the Democrats of Indiana were actually disloyal, or that the secret societies objectively posed

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a real threat to peace and order. Historical evidence indicating the innocuous motives and limited capabilities of the societies, however, is irrelevant to consideration of the official response to them. Whether or not they *should* have feared conspiracy, the fact is that Carrington and Morton probably *did* fear it, and that fear drove their behavior.

Acting on the premise that internal disloyalty posed a grave threat to Indiana's security, Carrington made dismantling secret societies a major part of his preparation to defend the State. On March 1, 1863, he made good on Morton's threats from the previous fall to treat members of the secret societies as criminals, and appeared poised to take drastic action, sending the President the following telegram:

The jury of the United States Court, have convicted four conspirators, arrested by me. We shall be able to expose the secret treasonable associations fully.<sup>28</sup>

In the wake of these convictions, however, something caused Carrington to pull back, and the promised exposure of the secret societies did not come in 1863. Carrington never explained or even acknowledged his retreat in 1863 from the edge of the precipice, so historians are left hypothesizing about the reasons for it with little evidence.

Describing the timing of the final strike against the secret societies, which did not come until the following summer, Foulke ascribes brutally pragmatic motives to the Governor. Morton, Foulke claims, "played with [the secret societies] as a cat with a mouse...he even permitted them to grow and develop that he might fasten conviction more securely upon them and overthrow them utterly when the time should be ripe for their destruction."<sup>29</sup> While Tredway reads this as the governor waiting for the most politically advantageous moment to spring the trap, Foulke's language actually indicates that Morton's main concern in waiting was making certain that the case against the

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<sup>28</sup> Carrington Papers, vol. 1.

<sup>29</sup> Foulke, 374.

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societies was rock solid.<sup>30</sup> Although Carrington apparently managed to secure several convictions before the U.S. Court, in 1863 he still lacked sufficient evidence to make a strong case that the societies were plotting severe acts of treason against the government. In all likelihood, the reason he lacked evidence was that at the time, no revolutionary plots yet existed.<sup>31</sup> Had he gone ahead with full exposure in 1863, he would have been hard pressed to convince either the public or any kind of judicial body that a treasonous conspiracy was at work. Morton and Carrington intuited, however, that there were elements within the secret societies whose ambitions extended beyond mutual protection and dabbling in signs and rites. They chose to sit in ambush, waiting until they could capture the societies engaging in real treason.

When Morgan's invasion finally came in July, no outpouring of support from Indiana Butternuts greeted him, and within eight days Federal cavalry had driven him out of the state into Ohio.<sup>32</sup> Rather than viewing this turn of events as proof that the secret societies were innocuous and Indiana Democrats loyal, as Tredway adamantly maintains was the case, Carrington chose to view Indiana's passivity as a triumph of his own efforts. Carrington had contradictory interests regarding Indiana's reaction to Morgan's threat, and his comments on the event reflect that ambivalence. On the one hand, he desired to win praise for the state by playing up the loyalty, dedication, and unity of purpose of Indiana citizens to leaders in the rest of the nation. Hence Carrington remarked in one retrospective account:

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<sup>30</sup> Tredway, 218.

<sup>31</sup> According to testimony from government witnesses before the military commission, the plot in which Milligan was accused of participating was not contemplated until the last months of 1863.

<sup>32</sup> "Butternuts" was a term applied to Southern-sympathizing residents of southern Indiana, Illinois, and Ohio, derived from the fact that they wore homespun clothing dyed a light brown with nut extracts. McPherson, 31.

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Indiana certainly deserves great credit in the crisis. None of her citizens proved false to their country; although Morgan had bragged that thousands would join him. On the contrary, the citizens rose as one man to oppose the invaders.<sup>33</sup>

Yet if it was really the case that not one of Indiana's citizens "proved false," Carrington was left in a bit of a pickle. For months he had sent alarming reports of the danger treacherous secret societies posed to the state, and if he did not continue to portray a significant portion of the State as treasonous rattlesnakes, his previous claims would appear paranoid and overblown. His effort to walk the fine line between these two positions was not terribly graceful, but to the extent that he did reconcile them, it was in the vein of the following statement, part of a different post-war account of the Morgan episode. "It was also apparent," he wrote, "that Morgan had not only failed to find allies among disaffected people, along the Border Counties, but that the force retained at Indianapolis, and the loyalty of sterling men, of all parties, would prevent any sympathetic overt-outbreak in Morgan's behalf."<sup>34</sup> Traitors did exist in Indiana, Carrington implied, but they were prevented from causing trouble by the presence of the Indiana Legion (which Carrington had been personally instrumental in mustering) and the undefined efforts of "sterling men."

For Morton, on top of the generalized climate of fear and his intense commitment to maintaining Indiana as a contributor to the Union cause, there was a personal component to the war against the secret societies. The Order at various times proposed plans to assassinate the Governor, and in 1863 he received a letter of warning, complete with floor plans of his house, from the wife of a conspirator. Shortly thereafter, according

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<sup>33</sup> "Indiana in the Civil War: Major General H.W. Halleck's Interference with the Plans of Governor Morton, Criticized, and his Prejudiced Statements Confronted by Actual Facts that are of Record," Carrington Papers.

<sup>34</sup> "Morgan's Raid of 1863," Carrington Papers.

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to Foulke, an attempt was actually made on Morton's life, albeit an ill-planned, amateurish one. A single shooter fired once at the Governor as he left the state-house late one night, narrowly missing his head.<sup>35</sup>

From late 1862 onward, denunciations of treasonous secret societies increasingly became a mainstay of Morton's stump speeches, despite the twin facts that the issue had failed to aid the Republican cause in the 1862 election, and that the Morgan invasion had illustrated that the societies did not constitute an enemy army waiting in the wings. Perhaps because of the threats to his person, the phantom organizations became something of a white whale for the Governor. While Morton railed against the associations from the podium, General Carrington continued and expanded his surveillance activities, until he could credibly claim that in the summer of 1864 he knew every morning what had gone on the night before in the lodges of the Order of the Sons of Liberty, the new incarnation of the defunct KGC.<sup>36</sup> After the immediate danger of Morgan's raid passed, the heat under the secret societies by no means faded away, but merely lowered from a boil to a hearty simmer. In the summer of 1864, the same combination of factors—an impending election and the threat of invasion—would reignite the issue and bring it to eruption.

Morgan's cavalry, the vanquished threat of 1863, returned to the neighborhood of Indiana the following summer.<sup>37</sup> In June of 1864, Morgan besieged Frankfort, Kentucky,

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<sup>35</sup> Foulke, 383-84.

<sup>36</sup> *Indianapolis Daily Sentinel*, May 25, 1871, quoted in Tredway, 216. It is important to keep perspective on Carrington's pursuit of the societies within his role as mustering officer and then commander of the District. Reading Tredway one is left with the impression that playing cat-and-mouse with the Order was Carrington's primary occupation, but in fact it was a subsidiary part of his duties. It is clear from his correspondence that the bulk of his time was devoted to raising troops and dealing with their logistics. "Telegrams, 1864," Carrington Papers.

<sup>37</sup> The Confederate commander had been captured in 1863, after his forces were routed in Ohio. He managed to escape from prison in Ohio, and made his way back to the South where he was hailed a

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and Carrington once more prepared Indiana for a potential invasion. Again, the General feared collusion with the rebels from within the state, and linked the treason to secret societies. On June 12 he telegraphed Morton,

Reporting armed Scouts of Morgan [in Lebanon, Indiana] in full sympathy with rebel citizens. A Michigan man this day arrested with first degree of KGC, of 1863, in his pocket. Gives no account of himself. Shall examine him tomorrow and report.<sup>38</sup>

Espionage activities, it should be noted, were only one component of Carrington's response to the Morgan threat. The series of telegrams from that summer deal mostly with the flurry of calls to the militia and troop deployments that Carrington orchestrated, documenting the fact that fear of Morgan translated into real military action, not just spying. Surveillance of the secret societies and suspected rebel sympathizers and military preparation were seen as two prongs of defense from the same threat.

Meanwhile, as war again menaced Indiana's borders, the summer of 1864 also saw morale throughout the North dip lower than it had been since the dark days before Gettysburg and Vicksburg. Preparing for the fall elections, the peace faction of the Democratic Party was infused with a new burst of energy, as "a forest fire of peace resolutions in Democratic district conventions" swept through the North."<sup>39</sup> Indiana, where a strong anti-war strain had always existed, was no exception.<sup>40</sup> All factions recognized that the upcoming election was momentous—that the stakes were no less than the fate of the war and of the Union cause—and Republicans from the President on down viewed their chances with pessimism. Lincoln famously expressed the view on August 23,

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conquering hero. Morgan and one of his subordinates who participated in the jailbreak, T.H. Hines, were largely responsible for convincing the Confederate government to sponsor revolutionary plots in the North. McPherson, 763.

<sup>38</sup> "Telegrams, 1864," Carrington Papers.

<sup>39</sup> McPherson, 762.

<sup>40</sup> Tredway, 51 n.70, cites a number of expressions of peace sentiment in the mainstream Indiana Democratic press.

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1864, that he would likely lose the election, leaving him with the duty “to so co-operate with the President elect, as to save the Union between the election and the inauguration, as he will have secured his election on such grounds that he cannot possibly save it afterward.”<sup>41</sup> In the minds of Republicans, the idea of losing the election was totally catastrophic, practically synonymous with losing the war. Ten weeks before the state elections, Carrington went public with the abundant material he had collected on the OSL.

The report Carrington leaked to the Indianapolis *Daily Journal*, the state’s leading Republican Party organ, was based mostly upon the espionage of Felix Stidger, the General’s most successful spy. A Kentucky native who had served briefly in the Union army and been released on a fraudulent medical discharge, Stidger was something of a shady character.<sup>42</sup> He offered his services to Carrington in May of 1864 and quickly gained the confidence of top OSL leaders in Kentucky and Indiana. From them he secured copies of the Order’s constitution and its rites and rituals, which, reproduced in their entirety, made up the bulk of the *Journal*’s July 30, 1864 exposé.<sup>43</sup> In the month that followed, army officials obtained more incriminating documentation, and passed it all directly along to the *Journal*.

Acting on a tip that the Order was expecting a shipment of weapons, on August 20<sup>th</sup> soldiers raided the print-shop of Harrison H. Dodd, known from Stidger’s reports to be the “Grand Commander” of the Order in Indiana.<sup>44</sup> The raid was an enormous boon; in addition to several hundred revolvers and thousands of rounds of ammunition, the army

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<sup>41</sup> John G. Nicolay and John Hay, *Abraham Lincoln: A History*, (New York: The Century Co., 1890), IX: 221.

<sup>42</sup> Tredway, 217.

<sup>43</sup> Kenneth Stamp, “The Milligan Case and the Election of 1864 in Indiana,” *The Mississippi Valley Historical Review*, 31.1 (June 1944), 47.

<sup>44</sup> The *Journal* published an unsigned letter sent, to Morton “from an eastern city,” which informed the Governor that the arms had been shipped. *Indianapolis Journal*, August 23, 1863.

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captured a trove of incriminating material in the form of Dodd's papers. In the text of one speech, Dodd wrote, "Who shall dispute 1,000,000 of able-bodied men, planting themselves upon the organic law of their own creation, the right to remove their perjured hirelings, when their safety, liberty and government demand it? ...Let us right our sect, or secede."<sup>45</sup> Dodd did not specify means by which his million patriots should remove the governing officials, and may well have been referring to the election—but the cases of revolvers sitting nearby gave his words a sinister tinge. The papers also included correspondence with Clement Vallandigham, the country's most notorious Copperhead, who in 1863 was convicted of treason before a military commission and exiled from the North. After a stint in Canada Vallandigham illegally returned to his native Ohio, and was the nationwide leader of the OSL, the "Supreme Commander." Most satisfying to the Republicans, several of the letters bore the names of important Democratic politicians, linking them to the traitorous Order. One letter to Vallandigham was signed by Indiana Secretary of State James Athon, Joseph Ristine, the State Auditor, Attorney General O.B. Hord, and Joseph McDonald, the Democratic nominee for governor, as well as by Lambdin Milligan and three other men who were eventually tried alongside him. For Morton, Carrington, and the editors of the *Journal*, this was a precious gift, evidence they could (and did, repeatedly) invoke to prove that the state Democratic organization was practically a synonym for the Order of the Sons of Liberty.

With the election so close at hand, the linkage between Democrats and disloyalty to the government and the Union cause stretched beyond Indiana's borders. On the election trail, Governor Morton railed that Peace Democrats "were responsible for prolonging the war" by giving the Confederacy hope that, if it held on long enough to see

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<sup>45</sup> *Indianapolis Journal*, August 23, 1863.

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a Democratic victory in the election, it would see its independence recognized. From the floor of Congress to Hendricks County, Indiana, Democratic speeches conveyed to the South that “We are your friends, and when we come into power we will end the war.”<sup>46</sup> During a debate with McDonald, Morton ripped apart the distinction his opponent, and many other moderate Democrats, made between objecting to the war as Lincoln was fighting it, and wishing to see the Union dissolve. “To say that he is in favor of preservation of the Union, but opposed to the subjugation of the rebel states,” Morton stated, “is equivalent to saying that he desires to preserve the Union, but is opposed to the use of any means for its preservation.” Democratic candidates’ lack of commitment to the fight, Morton realized, was even more crucial on the national level. “If we elect a candidate for the Presidency, who is in favor of withdrawing our armies from the field, and recognizing the independence of the Southern Confederates,” he avowed at a Republican mass meeting, “they will gain their object just as effectually as if they had annihilated the last Union army.”<sup>47</sup> Like Lincoln and most Republicans, Morton believed wholeheartedly that a Republican victory at the polls was necessary for the continued existence of the nation.

General Carrington shared Morton’s outlook, and acted on the premise that preserving the Union was paramount. Looking back, in an 1867 letter to military authorities, Carrington wrote that his actions against the OSL in 1864 were motivated by the fact that “I felt that the success of the Republicans was vital ... [to] the general good.”<sup>48</sup> At the time, too, Carrington was totally outspoken about the connection he perceived between quashing the OSL and victory at the polls. On October 8, three days

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<sup>46</sup> Foulke, 299.

<sup>47</sup> Ibid, 411.

<sup>48</sup> “Civil War Miscellany,” December 23, 1867, Morton Correspondence.

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before the election, Carrington published an appeal “To the People of Indiana” in the *Journal*, in which he adamantly upheld the truth of all the accusations against the Order.

He then proceeded to exhort the readership:

Citizens! every day shows that you were on the threshold of revolution! You can rebuke this treason. The traitors intended to bring war to your homes. Meet them at the ballot box, while Grant and Sherman meet them in the field... Believe me, or not, I say to all men of all parties, that the election in Indiana has become a matter of National interest. Defeat treason at home and our armies will rejoice, the rebellion will wither, and you shall have a Union restored, with perpetual peace .

To Carrington the syllogism was crystal clear. The leaders of the Order were explicitly plotting to subvert the government and defeat the Union. The Order was made up of Democrats, and all Democrats sympathized with its goals at least, if not with its means. Therefore, a vote for the Democratic ticket was a vote for a Southern triumph. On the flip side, a vote for the Republican ticket was a counterattack against traitors at home and rebels in the bloody fields of Virginia, as potent an action as picking up a rifle and heading out to fight.

Carrington was by no means alone in espousing this viewpoint. In an appeal of their own two days later, the editors of the *Journal* expressed a virtually identical sentiment. Referring to the secret order, the paper wrote, “You have been threatened by a home enemy as bold and wicked as that of Jeff Davis! That enemy meant civil war, to waste your homes, to rupture this Union, to bring the rebel armies to Indiana.” Luckily, the article continued, “Your Governor and the military authorities were advised in time. The scheme will be foiled, if you rebuke it at the polls.” Even more explicit about the link between treason and political affiliation was a snippet from General Alvin P. Hovey, who

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replaced Carrington as commander of the District on August 29, 1864.<sup>49</sup> He warned that

Every traitor, rebel sympathizer and member of the “Sons of Liberty” in Indiana, will cast his vote and use all of his influence to secure the election of the entire Democratic State Ticket to-morrow. Beware of such men.<sup>50</sup>

Republican orthodoxy in Indiana united behind and drove home, at every opportunity, the message that the Democracy equaled treason, and that the exposed Order of the Sons of Liberty was the most compelling proof possible of that fact.

Gilbert Tredway depicts the Republicans’ flogging of the Democracy-equals-treason message as evidence of their ruthless partisanship, a calculating and immensely successful means of demolishing their political opponents. On one level he is absolutely correct—the sources are in fact explicit that their goal was to persuade voters that the Democratic Party was unelectable to all men of conscience. Tredway’s account, however, fails to understand the passions of 1864—it relates to politics as they are in normal, rational times. To men like Morton, who, for all his shrewd political acumen was without a doubt thoroughly and genuinely devoted to the Union cause in its full Lincolnian articulation, the politics of 1864 were of a different dimension than regular partisan bickering. Personal ambition had to fall into perspective when the entire political system in which one built a career stood in jeopardy. Tredway depicts Republican “electioneering claptrap” as purposefully exaggerated, emphasizing the fact the “peace men” were a minority in the Democratic Party while the mainstream was committed to prosecuting the war.<sup>51</sup> Yet while it is true that McClellan, the eventual Democratic nominee, claimed to be dedicated to completing the war to save the Union, Republicans

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<sup>49</sup> “Report of Alvin P. Hovey,” in *Indiana in the War of the Rebellion: Official Report of W.H.H. Terrell, Adjutant General*, (Indianapolis: Douglass & Conner, 1869) Appendix, 282. Carrington’s removal will be discussed later in the chapter.

<sup>50</sup> *Indianapolis Daily Journal*, October 10, 1864.

<sup>51</sup> Tredway, 47.

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at the time were deeply skeptical.<sup>52</sup> To deny that in the summer and early fall of 1864 Union men seriously feared for the survival of their cause, not because of conditions on the battlefield but because of defeatism at home, requires ignoring considerable historical evidence.<sup>53</sup>

In view of the mindset of men like Morton, the whole notion of partisanship as it relates to secret societies and the Indiana election campaign must be reinterpreted. Certainly the goal was victory of the Republican ticket, on state and national levels, at any cost. Certainly the tactic was to undermine the opposition with sensational and highly exaggerated accusations of widespread disloyalty among Democratic leaders. For better or worse, however, in the 1864 election personal advancement could not hold a candle to the holy crusade of saving the Union, and that cause, the Republicans believed, was to be decided at the ballot box. It is especially telling that a recurring trope in the Republican election rhetoric is analogizing the citizen's act of voting to the general's prosecution of war on the battlefield. Carrington probably said it best, when he urged Hoosiers to "Meet them at the ballot box, while Grant and Sherman meet them in the field." The 1864 campaign was truly a campaign in both senses of the word—the political contest was also a crucial element of the struggle against enemy arms.

With the Order laid bare, Indiana authorities had to decide on their next move in that home theater of the war to save the Union. This was a pivotal moment for the story of Milligan's case, determining whether or not the path to his arrest and trial would be walked. Up to this point, Carrington had published private correspondence obtained by

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<sup>52</sup> As just one of many examples, the *Indianapolis Journal* on September 5, 1864 described McClellan as "the tool of scheming, conniving demagogues," and referred to his ticket as the "'peace' candidates."

<sup>53</sup> McPherson discusses the dismal state of Northern morale in the summer of 1864, noting that the season's most popular song was called "When this Cruel War is Over." McPherson, 760-71.

the military's scouring of private property with no warrant—already an assertion of military prerogative that infuriated Democratic partisans.<sup>54</sup> How much further he and his superiors, or the administration, thought it wise to press was now the key question. Their calculation, however, was burdened, for whether or not they believed it strategically necessary to take the pursuit any further, the sensational reports in the papers had created a demand for blood, leaving little choice but to follow through with some kind of crackdown.<sup>55</sup> Since the exposure had been done in a way that implicated a small group, who constituted the top echelon of both the Order and the Democratic Party, the logical course was to indict the organization's leadership. Through what means their punishment should be wrought, however—by normal process of law or by the strong arm of the military—was a matter of debate.

The Republican Party organ addressed this question outright, and the opinion it expressed reveals a great deal about the way Union sympathizers related to the use of military justice. The *Journal* wrote:

But how shall they be punished? By military arrests and military imprisonment? We say, no: not when the offense is such that the civil courts of the United States have jurisdiction and retain the power to inflict punishment. We believe that the imprisonment of one conspirator... by the verdict of a jury and the judgment of a civil Court, would have a more wholesome effect than one hundred military arrests. It is well that the military should act, where the emergency of the case or the probable escape of the criminal render prompt measures necessary, but let the District Court of the United States take jurisdiction of the case, as soon as it can

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<sup>54</sup> In addition to Dodd's office, Carrington searched an office that had been used at one point by Daniel Voorhees, formerly a member of the House of Representative and a staunch Democrat. The raid found copies of the OSL constitution among his other papers, and the *Journal* lambasted Voorhees as a traitor. The Indianapolis *Daily Sentinel*, August 9, 1864, rhapsodized on the "ungentlemanly" conduct of the Republicans in searching a private office. "When a party is forced to such measures to excite prejudice against a political opponent it stoops to a depth of infamy which best demonstrates the cause it represents."

<sup>55</sup> On August 23, 1864, the *Journal* demanded to know whether members of the "sworn conspiracy against the Government... were to go unpunished until they become strong enough to grapple with the power of the Government? At each new development of rascality people inquire 'What is to be done with the guilty men? Will they be arrested and punished?' We hope the necessity for the frequent repetition of these inquiries will cease."

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be done, except where the offense is purely military.<sup>56</sup>

While on the surface the *Journal's* view seems surprisingly measured, speaking out volubly against military arrests and trials, in fact the paper was quite ruthless. True, it advocated granting the alleged conspirators the benefit of a trial by jury, but it did so out of calculations of expediency, not justice. The *Journal* believed that the impact of the affair, its “wholesome effect” on people, would be far greater if it were carried out through the civil channels, unencumbered by cries of “arbitrary arrests” or “military despotism.” There could not exist a more crushing censure of the secret Order and, by association, the Democratic Party, than the return of a guilty verdict by a jury of Indiana citizens. The article was careful to affirm that action by the military had its appropriate place, and it impugned only the wisdom, never the right, of trying civilians accused of treason in military courts. Although they preferred to see trials in the civilian courts, if they “should prove ineffectual, we must then fall back on the universal principle that ‘the public safety is the supreme law’ and protect the state and her people by any and all means in our power,” i.e. punishment by the military. To Indiana’s official Republican mouthpiece, the right of the military to commandeer the bodily freedom of civilians and remove them from the processes of law which in normal times were sacrosanct was unambiguous. In the desperation of civil war, granting such latitude to the armed forces was imperative for protecting the state and her loyal citizens.

The *Journal's* view, that military action against the secret societies was unnecessary and ill-advised, was shared, surprisingly enough, by the head of the Indiana armed forces—General Carrington himself. As his investigation closed in around the Order in the summer of 1864, Carrington understood his goal as constructing a case to

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<sup>56</sup> Indianapolis *Daily Journal*, August 23, 1864.

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indict the leaders of the organization in civil court. He articulated this intention to Captain Potter, Heintzelman's Adjutant General, writing:

Whenever a grand jury of the Federal court meets I shall be able to make a clear case against Colonel Bowles of enlisting men for the rebel army, secreting rebel officers, and plotting war against the Government. He has full confidence in my chief detective...and I am almost daily finding confirmation of their movements.<sup>57</sup>

Carrington did not seem to even consider pursuing the Order with military might as an option. There was no need, since the evidence he could muster was so strong that, in his view, conviction before a jury was absolutely assured. That evidence, he told Potter, included letters from a deserter in Canada, (presumably involved in the meetings there between Southern emissaries and Order leaders) and the testimony of his detectives. Moreover, and this is crucial, Carrington was confident that the Order would not succeed in any of its goals, and therefore did not view it as a serious threat to the peace. "It is my opinion," he wrote, "that timely knowledge of their plans and the general patriotism of the people will thwart them...." Carrington did not completely discount the Order as a danger, cautioning that "their leaders are surely endeavoring to educate their people to the contingency of actual war." Taken in total, his statements paint the picture that the organization was not strong enough to cause serious trouble, but that its leaders had ambitious and terrible intents, and their ideas needed to be checked to ensure that they never became a threat to public safety.

Using military arrests to accomplish that check was, in Carrington's mind, not merely unnecessary but positively dangerous. Though he only expressed this point in writings after the war, Carrington purported to have been deeply concerned about the volatility of the state, fearing that a round of military arrests, imbued as they were with

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<sup>57</sup> June 5, 1864, *O.R.*, II:7, 339-40.

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political discord, would catapult Indiana into chaos.<sup>58</sup> While the intention in airing the details of the Order's secret rituals and plots and in punishing its leaders was to influence public opinion against the Democratic Party, Carrington feared that the process of punishing the traitors could be a double-edged sword. If the army and administration were too heavy-handed, the backlash against "military despotism" might lead to violence, or worse, to the very thing they had set out to prevent—a strong Democratic showing at the polls. This calculation was a major factor in Carrington's assessment of how to proceed. Carrington had singled out only Dr. Bowles as a target for prosecution—it seems that the General considered the trial of just one major figure to be a significant, and possibly sufficient, counteraction to the Order's plot.<sup>59</sup> He wished to create just enough spectacle to thoroughly humiliate everyone remotely associated with the Order, but to do so in a manner that was unimpugnable and tempered enough to avoid backlash.

Although Carrington had been the primary figure responsible for uncovering the Order, by the time of its exposure the issue had taken on momentum that he could not control. Overwhelming success in discovering and documenting the Order's treachery left Carrington feeling vindicated and triumphant, and inclined to follow up his victory with moderation. His impulse toward restraint, however, was radically out of step with the sentiments of other Republicans in the hotly charged summer of 1864, including those of his close associate Governor Morton. Carrington recounted the clash in comments on "Original War Telegrams of August 1864." "Governor Morton," he wrote, "urged the immediate arrest of citizens named in my Official Report to him, as members of said

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<sup>58</sup> "Complications During the Draft," Carrington Papers.

<sup>59</sup> In a second transmission to Potter on June 6, Carrington mentioned that Kentucky's Governor Bramlette was in favor of more arrests, but expresses no opinion of his own on their wisdom. Despite the fact that this second message names a number of individuals in connection with the Order, Carrington does not propose trying or arresting anyone besides Dr. Bowles. *O.R.*, II: 7, 341-42.

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Sons of Liberty, and their trial by a Military Commission,” insisting that their detention was “essential to the national cause in the coming elections.”<sup>60</sup> For the first time on record, Carrington refused an appeal from the Governor, choosing to trust his own belief that “the Federal Courts, then open, backed by Military Authority could more wisely adjudicate the cases, and with less political excitement,” than the Military Commission for which Morton clamored. Carrington supported his refusal to act by claiming that General Samuel Heintzelman, who had replaced Burnside as commander of the Department of the Ohio, had forbidden him to make arrests without orders from above.<sup>61</sup> While he makes this attempt to deflect the conflict onto his superior, it remains clear that he “declined to make such arrests” because of his own views on the situation.

A fundamental disagreement thus existed, with powerful figures on either side, over how to deal with the alleged conspirators. Resolving it would require intervention from higher authorities—ultimately from the President himself. At the end of the day, the dispute was settled by removing those who objected to military arrests from the picture. According to Carrington’s account, the initiative came from a man by the name of James Hughes, a Major General who had once served under him. Hughes wrote to Lincoln and urged that the District of Indiana be turned over to General Alvin Hovey (insert previous position), a man with a reputation for firm action who petitioned Washington in favor of military arrests.<sup>62</sup> He further proposed that Hovey’s command be “entirely independent of General Heintzelman’s control.”<sup>63</sup> Hughes’ communication to Lincoln does not actually

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<sup>60</sup> Carrington Papers.

<sup>61</sup> “Indiana War Documents, Cleared of Error,” Carrington Papers.

<sup>62</sup> “Indiana War Documents Cleared of Error,” Carrington Papers.

<sup>63</sup> *Ibid.*

mention the issue of arrests or trials at all, purporting to be about border defenses.<sup>64</sup>

Considering that he both recommends Hovey and mentions detaching the District from Heintzelman, however, Carrington's conclusion that the issue of dealing with the Sons of Liberty motivated his suggestions to Lincoln is probably correct. Like Carrington, Heintzelman was considered soft on the issue of military arrests, and ascribed his own removal from command to his reluctance to exert military force over the civilian population. "I have not been radical enough," Heintzelman wrote in a September 30, 1864 journal entry "—won't arrest people without orders—would not take the responsibility of doing what Mr. Stanton would not do without Mr. Lincoln's orders."<sup>65</sup> On August 29, 1864, Carrington received notice that he was relieved of command of the District of Indiana and reassigned to "special, and confidential duty under Governor Morton."<sup>66</sup>

Morton's role in Carrington's removal from command is a tricky historical question. There is no documentation directly linking the Governor to the command shakeup, yet historians of Indiana politics and of the Milligan case tend to ascribe the decision to his action.<sup>67</sup> On the one hand, Morton was outspoken in his advocacy of

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<sup>64</sup> *O.R.*, I: 39.2, 324.

<sup>65</sup> Heintzelman's reluctance to use the military to silence dissent was not limited to the OSL case, and was a source of concern to the Secretary of War. At nearly the same time that Carrington sent his report on the Order to the War Department, Stanton received a telegram from the Governor John Brough of Ohio reporting that Vallandigham was about to speak at Dayton and requesting instructions for how to deal with the nation's leading Copperhead. Stanton's replied that "My own opinion is that it was the duty of Major-General Heintzelman...to have arrested Vallandigham at all hazards...but he is proving unequal to his station." While Governor Brough defended Heintzelman, positing that he would "probably take action on the matter" as soon as he returned to Ohio, Heintzelman clearly had a reputation for weakness when it came to military arrests. *O.R.* II:7, 371-372.

<sup>66</sup> "Original War Telegrams of August 1864," Carrington Papers.

<sup>67</sup> In an article on the Milligan case, Klement writes that "Governor Morton worked backstage to bring in more 'cooperative' commanders." Frank Klement, "The Indianapolis Treason Trials and *Ex parte Milligan*," in *American Political Trials*, ed. Michal Belknap, (Westport, C.T.: Greenwood Press, 1994), 103. Tredway asserts that after demanding immediate arrest of the OSL leadership, "The governor then went to the President, who had no inhibitions," and promptly replaced Carrington and Heintzelman with Hovey and

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bringing the conspirators before a military tribunal. At the same time, the governor had a longstanding relationship with and deep appreciation for General Carrington. As late as August 7, 1864, Morton telegraphed Stanton requesting that Carrington remain in his post.<sup>68</sup> Yet when Stanton wired two weeks later with the question, “How would you like to have General Hovey assigned to command the Military district of Indiana?” the governor responded that “General Hovey will be satisfactory” and instructed Stanton to “Order him here at once.” It is entirely possible that between August 8 and August 22, Morton determined that Carrington had fulfilled his utility as District Commander, having brought the investigation of the Order to a successful conclusion and turned over all the important information and documentation to the Judge Advocate General.<sup>69</sup> The governor did not abandon his friend to the winds of fortune (or the risk of field assignment), but made sure that Carrington remained in Indiana and under his authority.<sup>70</sup> And while Carrington later on expressed a good deal of bitterness over his removal from command of the District, he never said an ill word about Governor Morton. If Morton was indeed the primary player in replacing Carrington, the governor was careful to keep his fingerprints out of the process, ensuring that his good relations with Carrington were not damaged.

General Hovey, Carrington’s replacement, was a completely different breed of officer from his predecessor. A “fighting general,” Hovey saw battles during the time that

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Hooker. Tredway, 222. Stampf states that “the Governor secured the appointment of Gen. Alvin P. Hovey...who was thoroughly in sympathy with his course Stampf, *Indiana Politics*, 247. None of these authors, however, provide sources for their assertions of Morton’s involvement beyond quoting Carrington on Morton’s advocacy of military arrests.

<sup>68</sup> “Telegrams, 1864,” Carrington Papers.

<sup>69</sup> Holt submitted his report to the War Department on October 8, 1864. Near the end he acknowledged Carrington’s pivotal role in collecting information on the OSL contained in the report. *O.R.*, II: 7, 930-53.

<sup>70</sup> Carrington’s new official post was “Commanding the Draft Rendezvous,” a position he filled until March 27, 1865, at which point the war was nearly over. “Indiana War Documents, Cleared of Error,” Carrington Papers.

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Carrington had spent mustering troops and spying on secret societies from the safety of his desk in Indianapolis. Before the war Hovey had been a prominent lawyer and an active Democrat, following up two years on the bench of the Indiana Supreme Court with a stint as District Attorney for the state of Indiana. When the Democratic Party began to fracture he identified himself as a “Douglas Democrat,” and, distanced from President Buchanan, he resigned his post. In 1861 after Fort Sumter, Hovey appealed to Governor Morton for a commission, and was made a colonel.<sup>71</sup>

By late 1864, three years in the field left Hovey’s visions of Indiana’s population and of the measures needed to deal with disloyalty more starkly drawn even than Morton’s. In a September 17, 1864 speech that was printed in the *Journal*, he articulated his understanding of the situation in the state, delivering a shuddering warning to his audience. Comparing Indianapolis’ tranquil streets to flowers growing around the mouth of Vesuvius, Hovey declared that the good, loyal people of the state “little know at what moment the awful crater of the burning mountain [of treason] may burst forth and deluge your homes in bloodshed and ruin.” Ascribing his extreme views to his experiences marching “day after day where your brave soldier boys have fallen and perished by the wayside,” Hovey proclaimed that disloyalty must not be tolerated. If the decision were in his hands, “I would not let any man woman or child, preach, speak, write or publish, one single word of treason. That is my creed. I am ultra.” As far as the OSL was concerned, Hovey had not a speck of doubt about its character. The “disloyal and treasonable society, caucusing at midnight, armed with pistols” purchased with Confederate money, had very nearly caused “a fearful and bloody revolution” within Indiana’s borders.<sup>72</sup> That Hovey’s

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<sup>71</sup> Biographical timeline, Alvin P. Hovey MSS.

<sup>72</sup> Indianapolis *Daily Journal*, September 19, 1864.

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conviction of the danger the state faced was genuine is clear from a private letter he sent his daughter Essie, explaining his continued absence from home. "I can only say to you," he penned, "that we are in great danger and that I feel it to be my duty to serve."<sup>73</sup>

How to handle the situation was no less clear in Hovey's mind. True danger to the safety and security of the state and the Union cause did not come from Confederate armies, who were all but conquered. "You need not dread the results of a battle in the front," he told the people, "but you have much to fear from your Vallandighams, and men of that character, in the rear of your armies." The election was a major means of attack for these enemies in the rear, and therefore its favorable results had to be ensured. Hovey's bald statement on the matter sounded awfully like a threat. "This peace party," he declared, "never can or shall triumph in Indiana, at the polls or anywhere else, while I have the power to prevent it." Elsewhere, the *Journal* had insisted that the army would never interfere with free elections—and while Hovey did not send soldiers to control the polls on election day, judging from his comment I doubt he would have hesitated to do so if he had thought the election results were in question.<sup>74</sup>

In any event, force at the polls was not the only means of manipulating the election available to Hovey. Writing retrospectively, Hovey explained his "unusual exercise of military power...during this exciting period" of the election.

I deemed it necessary, for the purpose of bringing the great criminals of this State to justice *and opening the eyes of the honest*, to arrest Harrison H. Dodd, L.P. Milligan, Andy Humphreys, Horace Heffren, James Wilson, William A. Bowles, Stephen Horsey, and others, as officers of the army of conspirators, and Joseph J. Bingham and others as aiders and abettors of the treason.<sup>75</sup>

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<sup>73</sup> August 26, 1864, Alvin P. Hovey MSS.

<sup>74</sup> "A Free Election or a Free Fight," *Indianapolis Daily Journal*, September 6, 1864.

<sup>75</sup> "Report of General Alvin P. Hovey," in *Indiana in the War of the Rebellion: Official Report of W.H.H. Terrell, Adjutant General*, Appendix, 282-84. Emphasis added.

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Arresting the alleged conspirators was not merely an act of justice, it was a move calculated to influence the public. Moreover, Hovey regarded his actions commanding the District of Indiana as analogous to any of his activities in the field. Setting the scene for his report, Hovey explained that just as “every movement in an active campaign—marches, battles, sieges” demands reports, so was he compelled to “show the facts which impelled my action.” Wielding his power to arrest civilian traitors, as part of a campaign to win over the public on the eve of the election, was Hovey’s way of doing his duty to his nation, his uniform, and his cause.

However it came about, the replacement of Carrington with General Hovey was the decisive moment in the struggle over the fate of the OSL conspirators. The behind-the-scenes politicking that surrounded it illustrates a critical element in the drama leading up to the Treason Trials.<sup>76</sup> Difference of opinion over military arrests in Indiana did not, as one might have expected, pit the military against the civilian authorities. Rather, individuals from within each sphere gelled into camps that crossed the army/civilian divide. To some extent, the decision to move ahead with military arrests occurred through civil authorities overruling and pulling rank on military figures—because ironically, on the whole civilian leaders were less restrained about bypassing the procedures of civil law than the army commanders. This distinction was by no means universal. General Hovey was one of the strongest proponents of military arrests, and was, of course, the man responsible for actually carrying them out. Meanwhile, the civilians who edited the *Indianapolis Journal* advised against resort to military justice. The way the debate fell out, as a shifting and realignment of alliances between state and Federal officials and

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<sup>76</sup> The trials of Harrison H. Dodd, Grand Commander of the OSL, and of Milligan and four other alleged conspirators are referred to collectively by historians as the Indianapolis Treason Trials.

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particular army officers, exemplifies how jumbled military and civilian authority had become. Politicians joined up with sympathetic officers to push through their goals, which involved using the force of the army to go after civilians.

To a man like Morton, the conclusion to enforce loyalty by military arrest was an obvious extension. For over three years he had enjoyed a radical degree of authority over all military activity in the state of Indiana; moreover, he saw the task of the army—to preserve the Union—as indistinguishable from the task of the political system. Why would he hesitate to turn loose the provost marshals on Indiana’s citizenry, if doing so would help the cause? Those who, like Carrington, wished to pursue justice through civilian channels, did so because they thought restraint was the best way to achieve both the military goal of keeping peace and the political goal of winning the election. While they reached different conclusions, both men saw civilian and military power as elements in a toolbox, reaching for the instrument that best served the overriding, all encompassing objective of keeping up the fight until the Union was reunited.

Morton’s vision of the military as the enforcer to control recalcitrant elements of his constituent population prevailed, and General Hovey set about convening a military tribunal to try the accused. The trial itself was a stage in the drama in which Milligan and his fellow defendants would have a voice, and so it serves as a window to study the way both sides perceived the unusual situation they were playing out. In the next chapter, I will use the record of the military trial to flesh out the way the Republican prosecutors perceived disloyal elements, the way the Democratic defendants viewed their own opposition, and the way both sides related to suppression of opposition.

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## GUILTY BY ASSOCIATION

### CHAPTER 2

Unlike many prisoners arrested by the military during the Civil War, Milligan did not linger in confinement before his case was heard. General Hovey initiated his trial, before a military commission, on October 21, 1864, less than three weeks after the arrest. Four other men stood on trial alongside him—William A. Bowles, Horace Heffren, Andrew Humphreys, and Stephen Horsey. The five men brought before Hovey's commission on October 21 were the unlucky remnants of those jailed in the roundup of the Order of the Sons of Liberty.<sup>1</sup> Most of the prisoners were inconsequential figures and were eventually released. Of those whose names made it into the literature, three were released without indictment in exchange for testimony against the rest, while the ringleader, Indiana Grand Commander Harrison H. Dodd, faced a separate trial which commenced on September 22.<sup>2</sup> The remaining five, who were tried together, held a variety of leadership positions in the Order. They were a strange conglomeration, covering a range of professions, social statuses, and levels of influence within and without the Order.<sup>3</sup> Bowles was certainly the most prominent in the OS�, the only one

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<sup>1</sup> There are no reliable records of how many men were arrested, but Major Henry Burnett, the Judge Advocate who tried the case, placed the civilian inhabitants of the Soldiers' Home prison in November 1864, after the OS� arrests were complete, at three to four hundred. Tredway, 219.

<sup>2</sup> Dodd's trial would have dominated the army and the public's interest with the other a mere sideshow, had it not been thrown into turmoil on October 7, when the prisoner vanished in the middle of the night from his place of confinement. The authorities had grudgingly agreed to Dodd's request to be moved out of the Soldier's Home prison, and placed him in a room on the third floor of the Post Office building. He escaped by climbing down a rope, which speculators theorized he had pulled up from an accessory on the ground by means of a string lowered from the window. *Indianapolis Journal*, October 8, 1864. However he accomplished the feat, he must have had help from the outside. Dodd fled to Canada, and in his absence the commission finished his trial, convicted him, and sentenced him to hang. With the leading conspirator out of the picture, all the bloodlust was diverted onto the secondary figures of Milligan et al.

<sup>3</sup> Born in Maryland in 1799, Bowles was both a doctor by training and a wealthy landowner. He married a lady from New Orleans and fancied himself a Southern gentleman, making no secret of his sympathies and

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against whom there was solid evidence that he knew of and supported Dodd's schemes for violence, even though technically Heffren, as Deputy Grand Commander, was the highest ranking. Bowles, Milligan, and Humphreys had been given "commissions" as Major Generals in the Order's pseudo-military organization, though Humphreys and Milligan denied accepting their appointments and even claimed not to know that they had been cast in that role. Horsey was a leader only on the local level, responsible for recruiting and conducting meetings in his county lodge, but with no position in the statewide organization.

Despite the variance in their positions in the OSL, the five defendants were all

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going so far as to bring some of his wife's slaves from Louisiana into Indiana, where he kept them until a lawsuit forced him to send them below the Mason-Dixon line. Although before the war he had generally enjoyed a good reputation, especially as a uniquely talented physician, Bowles did carry a few stains on his name. He had been convicted of grave-robbing as a young man, and later, serving as a Colonel in the Mexican War, he mishandled his regiment and watched them routed as a result. The stigma of that event stuck with him for the rest of his life. Although he was an old man by the time of the Civil War, Bowles participated in the Sons of Liberty with energy and enthusiasm, claiming to have attended every one of its meetings, and also contributed considerable sums from his personal fortune to the Order's coffers. Tredway, 136-144

Like Milligan, Horace Heffren was a farmer's son, a lawyer, and a former schoolteacher. He was a native New Yorker who moved to Indiana in 1850 at the age of nineteen, where he joined his uncle's law practice. During the 1860-61 secession crisis, Heffren expressed extreme sympathy with the South, using his position as editor of the Salem, Indiana *Washington Democrat* to advocate compromise and oppose the use of force to sustain the Union. He went so far as to declare that if war did come, he would enlist in the Confederate army. When the fighting actually came, however, he suddenly changed his tune and sought a commission in the Union army. As Lieutenant Colonel of the 13<sup>th</sup> Indiana, he developed a reputation for brutality, and then abruptly resigned his commission after only fifteen months of service—according to rumor in order to avoid court-martial for incompetence and cowardice. Rashness, temper, and inconsistency generally characterized Heffren's behavior, and after his short stint in the army he returned to loud criticism of the Administration and the war. Tredway, 147-52.

Yet another immigrant to Indiana, Andrew Humphreys was born in Tennessee and moved to the state as a child. He set up house in Green County, where he worked as a blacksmith. In 1849 he entered politics as a state legislator, and from 1857 to 1860 he served by appointment from President Buchanan as Indian agent and United States Marshal in Utah Territory. After he returned to Indiana he became active in local Democratic politics, and was identified by Green County Republicans as a leader of the area's KGC with hundreds of armed men ready to answer his call. Republican Rhetoric aside, while Humphreys' speeches were highly partisan, he regularly chided his followers to obey the laws, and on one occasion dispersed a mob and prevented a serious riot. Testimony of Edward Price, in Klaus, 430; Tredway, 152-54.

Stephen Horsey was a businessman from Martin County, who before the war had shipped goods from Indiana down the Mississippi to market at New Orleans. When the war broke out in 1860, Horsey was a wealthy man, but more than any of the other defendants, the ordeal of the trial ruined him and left his family destitute. Horsey joined the secret societies in the spring of 1863, according to local lore at the behest of his physician, Dr. William A. Bowles.

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arraigned on the same list of charges. They were:

1. Conspiracy against the government of the United States
2. Affording aid and comfort to the rebels against the authority of the United States
3. Inciting insurrection
4. Disloyal practices
5. Violation of the laws of war.<sup>4</sup>

The charges stemmed from the OSL plot against the government, Dodd's pet project, which witnesses described in great detail over the course of the trial. Essentially the plot entailed assembling masses of OSL members who would, in concert with a rebel invasion of Indiana, storm Federal installations and free Confederate prisoners of war. Freed prisoners would join the mob to create an informal army, which would advance on the capital, dispose in some way with Governor Morton, and take over the state government.

From the outset, the trial took place on two planes. It was, on the one hand, about the defendants' guilt or innocence, but for both sides, there were also more global matters at stake. Milligan and his fellows' trial was a microcosm, a small stage upon which to play out the large drama of loyalty and opposition that permeated Indiana. From the government's standpoint, the trial was an opportunity to trumpet the premise that people who opposed administration policies were tantamount to rebels, every bit as eager to fell the Republic as the gray-uniformed men on the battlefield. To the defense, the trial was an illustration of how morally bankrupt the authorities had become. Over the course of the proceedings, the defense counsel increasingly came to portray the case as an offense to the very notion of civil liberties, imbued with universal significance that reached beyond the individuals it affected. Both sides viewed Milligan, Bowles, Heffren, Humphries, and Horsey as paradigms—as either archetypal villains or martyrs.

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<sup>4</sup> The charges and specifications are recorded in *O.R.*, II: 8, 543-47.

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As I examine the trial record in this chapter, my goal is to tease out the thought processes that lay behind the prosecution and defense strategies, and the way that each side worked within the unusual forum of the military commission to advance their particular goals and agendas. Because of the way the military commission was structured, the prosecutors very much had the upper hand, and used the setup of the trial to limit the defense's range of expression. Defense counsel fought back as hard as they could but also responded by readjusting their attitude to the proceedings, honing their depiction of the defendants as martyrs railroaded by an abusive system, and targeting their argument beyond the walls of the courtroom itself, to judgments of public opinion and of history.

The prosecution, meanwhile, made the most of the trial as a means of continuing the onslaught against the Democratic Party that had begun during the exposure of the Order. Yet it is important to remember that while it is a useful way of deconstructing the trial record, the distinction I draw, between the case against the defendants themselves and the politically charged campaign against a wide bloc of perceived disloyalty, was not so delineated in the minds of the prosecutors. While the evidence that the defendants committed the serious crimes of which they were accused was meager, the Judge Advocate and members of the commission nonetheless believed that they were guilty, and that the case mounted against them merited conviction.

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Despite the fact that trying civilians before military commissions had become common during the war, there was no special procedure established for conducting such trials. The commission that tried Milligan and his peers had the same makeup and followed the same rules as an ordinary commission assembled for court-martials of

soldiers. Even those rules were new and fairly loose, as the Civil War marked the beginning of the standardization and codification of U.S. military law.<sup>5</sup> Military commissions derived their authority from the commanding general in the region; the act of convening one was considered a delegation of his power to judge and discipline his men.<sup>6</sup> Practically, this meant that the general had sole power to select the members of the commission, appointing them from among his subordinate officers. The defense was able to challenge members and show cause of their lack of objectivity, but had no veto power.<sup>7</sup> Military law required that the commission consist of at least five officers, and it was they who decided the outcome of the case, the sentence, and ruled on procedural matters, performing some of the functions of the judge in a civil trial in addition to those of the jury.<sup>8</sup> A Judge Advocate presided over the court and delivered opinions on legal questions, though the final ruling was the commission's purview.<sup>9</sup>

The role of the Judge Advocate is one of the most troubling elements of military tribunals, a way in which they deviate significantly from civil procedures. He is prosecutor and judge rolled into one, meaning that there is no totally objective legal voice

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<sup>5</sup> In the middle of the war, the political theorist Francis Lieber produced the first code of military law in American history. Popularly known as the "Lieber Code," it was circulated as "Instructions for the Government of Armies of the United States in the Field, General Orders No. 100." Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, (New York: D. Van Nostrand, 1863). The novelty of Lieber's code is evident from his comments General Halleck regarding the project. He wrote, "...nothing of the kind exists in any language. I had no guide, no groundwork, no textbook." Francis Lieber, *The Life and Letters of Francis Lieber*, (Boston: James R. Osgood and Company, 1882), 331.

<sup>6</sup> This theory is articulated by Attorney General A.G. Speed and Benjamin Butler in their arguments before the Supreme Court in *Ex parte Milligan*. As representatives of the administration and the army, I take their view to represent the standard understanding within those institutions of the authority of military commissions. *Ex parte Milligan*, 4 Wall. 2; 1866 U.S. LEXIS 861, 11-12. (Pagination is from Lexis-Nexis edition.)

<sup>7</sup> Joseph W. Bishop, *Justice Under Fire: A Study of Military Law*, (New York: Charterhouse, 1974), 27.

<sup>8</sup> *Ibid.*

<sup>9</sup> The Act of Congress establishing the Judge Advocate General's Corps required that "there be appointed...for each army in the field, a Judge Advocate...who shall perform the duties of Judge Advocate for the army to which they respectively belong, under the direction of the Judge Advocate General." In the Civil War military organization, every military Department had a Judge Advocate attached to it.

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in the trial. The website Globalsecurity.org, describing the responsibilities of a Judge Advocate, attempts to delineate two separate functions, that of “judge” and of “advocate.” As a judge, the Judge Advocate is “routinely called upon for opinions or rulings on whether a law is applicable, a legal obligation exists, or a legal right must be respected,” while as an advocate, he must use persuasion to “prosecute or defend a particular client’s interests.”<sup>10</sup> The problem with this distinction is that the Judge Advocate acts in both capacities at the same time, within a single trial. During the Milligan case, Judge Advocate Burnett at one point felt compelled to clarify his role, stating the following:

I desire to correct a misapprehension, frequently entertained, and which appears to exist here, that the Judge Advocate is counsel for the accused as well as for the Government. His position is exactly defined by the Articles of War, which say that he ‘shall so far consider himself as counsel for the prisoner, after the said prisoner shall have made his plea, as to object to any leading question to any of the witnesses, or any question to the prisoner, the answer to which may tend to incriminate himself.’

According to the Articles of War, the Judge Advocate’s responsibilities to the defendant were limited to a strictly defined set of legal questions, and Burnett went on to constrict his role respecting the prisoners even further. He continued,

When the accused come into Court ably represented by counsel, I feel that the defense of the accused rests upon their shoulders, rather than on mine. I do not act as counsel for the accused in this case. On all questions of law I put them on an equal footing with the Government, but in questions of fact, I act only for the Government, and leave the accused in the hands of their counsel.<sup>11</sup>

Since the defendants had counsel present to watch out for their interests, Burnett felt that

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<sup>10</sup> Global Security.org, “The Role of the Judge Advocate,” <http://www.globalsecurity.org/military/library/policy/army/fm/27-100/chap1.htm#1.2.5>.

<sup>11</sup> Klaus, *The Milligan Case*, 436. Klaus’ work is a compilation of official documents relating to *Ex parte Milligan*—the lawyers’ briefs and Supreme Court opinions—and includes a transcript of the military commission as an appendix. Klaus’ edition is taken from that of Benn Pitman, the official court reporter, and I used it as my source for the all of the testimony in the trial.

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he was relieved of any responsibility to advocate on their behalf, and was free to act solely as opposing counsel in regard to all matters of fact.

The problem with this attitude was that the Judge Advocate's position in the court was not equivalent to that of the defense counsel; the two sides were by no means on equal footing. While technically the commission, and not the Judge Advocate, was invested with authority to make rulings on all matters, from objections to testimony, to admissibility of evidence, to objections to members of the commission itself, the Milligan trial demonstrates that in fact the Judge Advocate's voice was supreme. There is not a single instance, in the entire two hundred page trial record, of the commission ruling against the advice of the Judge Advocate.<sup>12</sup> Furthermore, while he claimed to represent both sides equally on questions of law, Burnett was by no means evenhanded. Though he certainly bore personal responsibility for allowing his bias to color his opinions, the structure of the court, which placed him in such a strange, hybrid role, made his behavior practically inevitable. It is a tall order to ask a human being to vigilantly advocate one side of an argument and view that argument with impartial detachment at the same time. The result in the Milligan case, and undoubtedly in most if not all cases tried under similar circumstances, was that the defense was forced to wage its case in a hostile environment, without recourse to a neutral arbitrator.

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For the defense, the trial was a grueling and frustrating experience devoid of justice from start to finish. To deal with the unsympathetic circumstances of the military commission, the defense attorneys turned the trial into a constant scrimmage over legal

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<sup>12</sup> Tredway, 243, makes this observation, and from my own reading I judge it to be true.

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particulars, which served as stand-ins for their underlying issue—whether or not the trial of civilians in that setting was legal at all. Since the Judge Advocate had dismissed objections to the military court’s jurisdiction in the Dodd trial, the defense counsel had no choice but to accept the reality of the situation, and resorted to doggedly challenging nearly every legal ruling. They did so to serve both concrete and abstract purposes. In an immediate sense, they were trying to protect their clients from abuses and secure them the best outcome possible under the circumstances. But policing the judicial decisions was also a strategy intended to highlight as frequently as possible the discrepancies between a civil court proceeding and the trial in which they were engaged, bringing home the point that the trial by military commission was robbing their clients of their rights as citizens. On several occasions the defense pointedly noted the difference between the dictates of the common law and the procedures the Judge Advocate was following.<sup>13</sup> As much as the Judge Advocate tried to silence them, and he did, the trial, which was open to the public, was the best opportunity the defendants and those who sympathized with them got to air their views.

Copious defense objections were effective as expressions of discontent with the legality of the trial, but since the Judge Advocate invariably rejected them, that was the only thing they accomplished. Furthermore, acting as prosecuting attorney, the Judge Advocate effectively shut down much of the defense’s case during testimony. He did so primarily by objecting to defense questions during cross-examination, especially those which dealt with the credibility of prosecution witnesses. A few examples of the skirmishes the defense attorneys waged and lost make it easy to understand why they

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<sup>13</sup> For example, during a mundane objection on procedures for admitting documents as evidence, defense counsel remarked that “In all courts of justice, before a document can be offered in evidence, all these distinct facts as to its identity are gone into and proved.” Klaus 264.

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ended the trial feeling so frustrated, self-righteous, and vindicated in their belief that military tribunals were antithetical to justice.

One of the most important legal battles the defense pressed occurred, not in the evidentiary phase of the trial, but at the very outset, before testimony began. The defendants and their attorneys perceived the government's decision to try all five prisoners jointly as yet another illegal abuse, heaped upon the overriding injustice of trying civilians before a military commission in the first place. Because the commission had closed the door on jurisdictional arguments weeks before in Dodd's trial, Milligan and his peers latched onto the communal trial issue to launch a major attack on the legality of the proceedings. They opened the trial with three separate motions, two by defense attorneys and one by Milligan on his own behalf, to hold separate trials for the five defendants rather than the single, communal trial the army had planned. For the first time but by no means the last, J.W. Gordon, counsel for Bowles, Heffren, and Humphreys, cited Indiana civil law, which assured separate trials to defendants jointly charged with criminal offenses. He clarified, however, that he understood that the civil law was inadequate grounds for making his request before the commission. Rather, he based his real appeal on a "plea to the discretion of the court," claiming that, as the only way his clients could hope for fair treatment, individual trials were "a matter of justice to the accused."<sup>14</sup> Cyrus L. Dunham, who represented Stephen Horsey, added that a joint trial was "entirely without precedent in Military Courts," and spelled out the problem more explicitly than Gordon had. Dunham explained that trying all the accused together would inevitably cause evidence implicating only one defendant to be held against the rest. Finally, Milligan requested a separate trial on the grounds that his health could not

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<sup>14</sup> Ibid, 253-54.

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withstand attendance at a prolonged communal trial, and went so far as to offer to waive all technical objections throughout the rest of the case if the commission would only honor his request. The Judge Advocate responded to the defendants' appeals for separate trials with a lengthy legal justification, which hinged on the joint nature of the offenses charged against them. His argument set out a crucial precondition for the way he approached the case, which I will discuss at length when I turn to the prosecution's perspective on the trial.

A quintessential example of the Judge Advocate's efforts to silence the defense occurred during the cross-examination of Felix Stidger, Carrington's star detective who was now one of the government's star witnesses. When the defense asked Stidger what his intentions were when he actively recruited new members to the Order, Burnett objected. The Judge Advocate declared that "the counsel for the accused were at liberty to show what were the feelings and purposes of the witness, by inquiring as to his *acts*, but they could not inquire as to his purposes and feelings."<sup>15</sup> Since the defense insisted on the question, the commission retired to an anteroom as per procedure to deliberate, the outcome being, as always, a ruling in favor of the Judge Advocate.<sup>16</sup> In this particular case, sustaining the objection prevented the defense from addressing the troubling fact that, while on the government's payroll as a spy, Stidger was instrumental in building up the Order in Kentucky.<sup>17</sup> Amongst ordinary Democratic-leaning citizens, he encouraged

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<sup>15</sup> *Ibid*, 319 (Emphasis added).

<sup>16</sup> Since the military commission did not have an individual acting as judge on the model of civil courts, if the defense did not contest an objection by the Judge Advocate it was automatically sustained. In this instance, all the defendants except Milligan were prepared to drop the question and forego appeal to the commission, but Milligan, as always unyieldingly principled, insisted that the commission address the dispute.

<sup>17</sup> Stamp states that Stidger should be credited as one of the founders of the OSL in Kentucky, since the Order barely existed in that state before he began heavily recruiting and establishing lodges. Stamp, "The Milligan Case," 46-47.

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the very treachery that the government deemed perilous, goading along people who might otherwise have remained silent objectors. His methods, moreover, would certainly have been considered entrapment by any civil court. Yet the defense was not permitted to bring to light this disturbing aspect of government practice in investigating the Order.

While he repeatedly prevented the defense from pursuing lines of cross-examination, the Judge Advocate denied similar objections by the defense to his probing of witnesses. Questioning W.S. Bush, a reporter for the *Cincinnati Gazette*, about a speech of Milligan's that he had covered for his paper, Burnett asked the witness "this general question, whether his speech at that time was loyal, and in favor of the Government, or whether it was disloyal, and against it?"<sup>18</sup> Defense counsel objected, on the grounds that the Judge Advocate was asking the witness to go beyond relaying the content of Milligan's statements and offer an interpretation of the intent behind them. Burnett had prevented the defense from asking Stidger what intentions motivated his own actions, and then turned around and asked this witness to define the sentiments that lay behind another man's speech. On this point the defense felt its argument so sound that it waged an especially tenacious fight, going back and forth with the Judge Advocate a number of times before he finally cleared the court for deliberation. The defense argument cited both legal precedents from a civil case, and the section from a legal text on evidence in courts-martial.<sup>19</sup> Simon Greenleaf's *Treatise on the Laws of Evidence* stated that "courts-martial are bound, in general, to observe the rules of the law of

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<sup>18</sup> Klaus, 380.

<sup>19</sup> The civil precedent was actually first invoked by the Judge Advocate in his initial response to the defense objection, and the defense then criticized the conclusions he drew from it. There are several other instances of the Judge Advocate backing his opinions with civil law precedents. Burnett was clearly interested in buoying his decisions with the legitimacy conveyed by civil law.

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evidence by which the courts of criminal jurisdiction are governed.”<sup>20</sup> So, according to the leading authority on evidence law, defendants in military trials were entitled to the same treatment they would have received in a civil court. Noting that most of the members of the commission were lawyers, defense counsel pleaded that they uphold what they knew to be the correct interpretation of the law.

When the Judge Advocate delivered the commission’s decision, the defendants were, once again, disappointed. Its ruling accepted Burnett’s shaky counterclaim that in conspiracy trials anything the accused said or did was admissible as evidence, which sidestepped the defense’s actual objection—Burnett had asked the witness to characterize the sentiment of Milligan’s speech, not to relay his words. All the legal acumen the defense attorneys could muster was futile; the Judge Advocate’s version of the law was the only one with any sway, and the notion that the trial was governed by a body allegedly rendering decisions based on law seemed more and more a farce. There was no recourse from the arbitrary decisions, and they could not even register an official protest as one could in a civil trial, since the Judge Advocate had announced earlier in the trial that “There can be no protest in this court. If objections are made by the counsel for the accused, they come before the Court to be sustained or overruled.” Once overruled, the defense had no choice but to sit down and shut up.

In their closing arguments, the defense attorneys gave full expression to the frustration that had been palpable throughout the trial. They vented their discontent in appeals to the verdicts of history and future public opinion, which, they insisted, would

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<sup>20</sup> Klaus, 381-84. It should be noted that Greenleaf’s general approach to Court Martials is that while they “are not bound by all the technical formalities” that prevail in civil courts, they must preserve basic rights of prisoners, such the right to be informed of the specific crimes with which they are charged, and the right to be convicted only on the basis of legal evidence. Simon Greenleaf, *A Treatise on the Laws of Legal Evidence*, (Boston: Little, Brown and Company, 1853), 470-74.

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bequeath them the justice and respect they were being denied in the present. John

Coffroth, Milligan's attorney, declared that

...the tribunal before which the accused are immediately held to answer is not the only one that sits in judgment...[The case] is continued, for the sober second thought, before that other self-correcting tribunal—public opinion—whose decree frequently reverses the first hasty decision, and whose final judgment is most generally right.<sup>21</sup>

Coffroth appealed to public opinion in spite of the fact that, at least in Indiana, there was reason to believe that a majority of the public believed the defendants traitorous and supported the administration's punishing them in military court.<sup>22</sup> In looking for recourse outside the court that had already made its judgment of his client painfully obvious, Coffroth expressed a remarkable faith in the populace. Claiming that pendulum swings in the public mood tend to even out eventually, he professed that at the end of the day the people usually settle on what is right. They do not always do so immediately, so Coffroth conceded that "that final judgment may come too late for Mr. Milligan," such that only "his children will reap its rewards." We cannot know whether Coffroth genuinely believed in the wisdom of the people and was grasping, on behalf of himself and his client, for a way to come to terms with their helplessness, or if his righteous rhetoric was intended to pave the way for the next round in the legal battle. In either case, Coffroth recognized that any salvation his client might find would come from another body's censure of the current trial, and, he believed, would represent a restoration of fundamental principles of justice.

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<sup>21</sup> John Coffroth, "Argument of John R. Coffroth in Defense of L.P. Milligan," in Benn Pitman, ed., *The Trials for Treason at Indianapolis*, (Cincinnati: Moore, Wilstach & Baldwin, 1865), 288.

<sup>22</sup> By the time Coffroth delivered his closing argument both the state and national elections had returned overwhelming victories to the Republicans. While there were many factors, predominately the state of the armies, that contributed to the Republican victory, in Indiana executive and military authority had been a fairly significant campaign issue, and so in some measure the election proved that a public mandate supported the extreme actions of Morton and Hovey.

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The fact that the defense continued to fight back throughout the trial, in spite of the apparent futility of their efforts and their growing frustration, was explicitly intended in large measure to ensure that their protests were set down in the record. M.M. Ray, who represented Bowles and Humphreys, referred to the record overtly in his closing statements, begging the court for the sake of “that scrutiny of history which your record will invite...to make this, your judicial record, as illustrious for its probity, learning, impartiality and justice, as your military record can be.”<sup>23</sup> Keeping accurate records of the proceedings was one of the few explicit rules governing military commissions, specified in the same Congressional Act of 1862 that established the Judge Advocate General’s Corps, so the defense knew that its motions and objections would be preserved for posterity.<sup>24</sup> This preoccupation with history’s judgment was an important element in the shift of emphasis in the trial from the limited circumstances of the defendants’ cases to issues of fundamental principle. The shift was in large part a product of frustration and anger—their side was denied a fair fight in the battle, so they turned their focus to winning the much larger war of constitutional interpretation.

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In the eyes of the Judge Advocate, the trial itself was a powerful weapon in a different larger war, the fight against internal opposition. It was an opportunity to vindicate the premises that disloyalty abounded in the state of Indiana, that anyone who spoke against the administration was a traitor, and that this treachery, regardless of the impracticality of its schemes, was insidiously dangerous and had to be stopped at any

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<sup>23</sup>M.M. Ray, “Argument of M.M. Ray,” in *The Treason Trials at Indianapolis*, 230.

<sup>24</sup> *The Army Lawyer: A History of the Judge Advocate General’s Corps, 1775-1975*, (Washington: Government Printing Office, 1975), 49-50.

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cost. The case the Judge Advocate presented was much more interested in proving those beliefs than in establishing the guilt of the individuals accused. Reading the trial record, it is astonishing how little the defendants are mentioned; sometimes their names are literally absent for pages, as witnesses went on and on about the composition, organization, and strength of the Order of the Sons of Liberty. Guilty or innocent, Milligan and the rest were pawns in a production much larger than themselves. The government was explicit in its belief that treachery extended far beyond the defendants, who, while guilty enough to deserve severe punishment, were really no more guilty than many others. What mattered was the end—revealing and uprooting the rot of treason—and trying these particular men was a means to that end, one which had the advantage of being just and right, since the men happened also to be guilty.

From the very beginning, with the ruling against separate trials, Judge Advocate Burnett set out to inextricably link the guilt of the defendants to the guilt of the Order. The communal nature of the trial was essential to creating that link, and that is what made it a foundational element of the government's agenda. Only by trying all five men at once could the Judge Advocate turn the proceedings into a trial of the Order of the Sons of Liberty as a body, with the roles of the individual defendants marginalized. No one involved with the government's case was terribly interested in the specific men on trial; convicting them was necessary as a means of attacking bigger game. Milligan and the rest were merely representatives of the rampant, organized treachery that he, along with Governor Morton, General Carrington, General Hovey, and the Indianapolis Journal, believed pervaded the Indiana Democratic Party.

Burnett grounded his argument against holding separate trials in a particular

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definition of the charge of conspiracy, which he claimed was at the core of all the charges brought against the defendants. “The offenses charged against these defendants are joint,” he wrote. “They are in the nature of a conspiracy. Conspiracy is the gist of the charges, and the other offenses grew out of this.” Because the defendants were accused of participating in a single conspiracy, their crimes were communal; sins were aggregate and belonged, not to a single actor, but to the group as a whole. Thus, a joint trial was the logical course of action, since “having established the conspiracy, the acts of any one of the conspirators are liable to be brought in proof as evidence against any other member of the conspiracy.” In their petitions, the defense had pointed precisely to this phenomenon—evidence of treachery on the part of one defendant inevitably implicating the rest—and proclaimed it an injustice to their clients. Responding squarely to their claim, the Judge Advocate agreed with the assumption that evidence against one would be held against the rest, but argued that that was exactly as it should be.

Burnett added a final twist to his argument, claiming that, “When [a person] takes upon himself the responsibility of joining an unlawful body, he takes upon himself the responsibility for every unlawful act of that body.”<sup>25</sup> According to the Judge Advocate, if the Order was engaged in illegal activities, membership alone made one a criminal, guilty of the worst offenses contemplated by the organization’s leaders. This formulation of the charges provided a legal and logical rationale for devoting the bulk of the testimony to the nature of the Order and its plots, without reference to the defendants. More importantly, it established a theoretical framework for the case that fit the prosecution’s beliefs and aims, the idea that even a mild association with Indiana’s treacherous underbelly cast one as a traitor. Finally, it meant that, from a practical standpoint, in order

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<sup>25</sup> Klaus, 255.

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to win the case against all five defendants he needed to prove two sets of facts. First, he had to show that the Order of the Sons of Liberty constituted an illegal conspiracy, and second, he had to establish that each of the men was a member of the organization.

Logically, the government's witnesses generally broke down into two categories—minor witnesses whose function was to incriminate a particular defendant (or defendants), and major witnesses who provided information on the wider conspiracy. Categories were not entirely rigid, as major witnesses often furnished incidental evidence against the defendants and vice versa, but for the most part the function of a given witness was well defined. The crux of the government's case rested on the testimony of five men, who provided the fact base on the Order and its plots, and, at least according to the government's reading, linked the treacherous Order to the Indiana Democratic Party. The latter was a critical element of the government's conceptual theory that the treason was widespread, and of its motive to use the trial to influence the public political outlook. Of the five pillars of the prosecution's case, two were leaders of the Order who had been arrested by Hovey and released without being charged in exchange for their testimony. One was a government detective, and one was a leader of the Indiana Democratic Party with only a passing association with the Order. The fifth was a surprise.<sup>26</sup> My examination of the government's case will focus on these five witnesses, as it was through their testimony that the government made the trial fulfill the role of public spectacle, conveying sensational images of a vast and ingenious conspiracy.

On the afternoon of October 21<sup>st</sup>, Major Burnett inaugurated the trial by jumping right to the heart of his case, calling William M. Harrison, one of the major witnesses.

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<sup>26</sup> My treatment of these five witnesses is not chronological, but rather orders them in a way that I believe makes sense of their respective roles in the case. As a result, when I refer to them as the "second" or "third" witness, this should not be understood as a reference to their place in the timeline of the case.

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Harrison was the Grand Secretary of the Order of the Sons of Liberty in Indiana, and was one of Hovey's arrestees who had cut a deal with the government to testify against his fellows. If the Judge Advocate's response to the defense petitions for separate trials had left any doubt about his strategy for the case, his questioning of Harrison put it to rest. The paucity of information Harrison provided in his three days on the stand directly relating to, much less implicating, the men on trial, is remarkable. Bowles, Heffren, Humphreys, and Milligan entered his narrative only in relation to their appointed positions in the Order (which, by his admission, Milligan and Humphreys never demonstrably accepted) and their attendance or absence at various meetings. Horsey was not mentioned at all. Harrison more than compensated for the thinness of information on the defendants, however, by sharing a great deal about the structure, ritual, and activities of the Order, which alone qualified him to be one of Burnett's key witnesses. The Judge Advocate did press on the point of the defendants' attendance at meetings, but beyond that, he did not even ask about them. Having set forth the proposition that the defendants could be proven guilty by association, proof of the acute and dangerous treachery of the Order of the Sons of Liberty as an organization was more valuable to Burnett than evidence against the defendants.

Towards the goal of vilifying the Order, Harrison's testimony was richly productive, providing three substantial pieces of information on the Order's military preparations. First, he testified to the organization of the Order in Indiana into four military districts, each to be headed by a Major General with a hierarchy of lower ranking officers serving under him. Milligan, Humphreys, and Bowles were elected to these posts at the annual meeting of the Order on February 16 or 17, 1864, along with John C.

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Walker, a member of the conspiracy's inner circle who was a close confidant of Dodd and Bowles.<sup>27</sup> Of the three Major Generals on trial, Harrison knew only of Bowles accepting his appointment. He wavered over whether Milligan was even present at the February meeting where the appointment was made, concluding that "he was absent from one meeting, and I think it was that one."<sup>28</sup> While it did little to pin down any of the defendants except Bowles, this portion of Harrison's testimony served to establish that the Order (at least among its upper echelon) conceived of itself as a military body, consciously mimicking army organization.

Harrison went on to corroborate the fact that the Order had purchased thirty-two boxes of munitions early in the summer of 1864 with which to arm its quasi-militia, the same arms that Carrington's men had discovered in their raid of Dodd's printing office. On the subject of arms Harrison did not really contribute anything to the government's case, since he adamantly insisted that he knew of no other attempts to arm the Order's membership aside from the one the government had uncovered, and for that they had the testimony of the officer who conducted the raid. The final element of his testimony, however, advanced the case against the conspiracy significantly. Harrison delineated one of the most odious components of the Northwest Conspiracy plot, the plan for the Order to storm Federal installations at Chicago and at Rock Island, Illinois, and liberate the Confederate prisoners held there. All of Harrison's information on this score came directly from Dodd, who divulged it not in a meeting but in informal conversation, and to Harrison's knowledge, none of the accused had any knowledge of the plot. Dodd's rather vague and improvisational vision entailed calling out the Order's membership to an

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<sup>27</sup> Walker escaped the fate of the others by fleeing to Canada when the arrests of OSL leaders began. Tredway, 219.

<sup>28</sup> Klaus, 260

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armed meeting, which, if successfully assembled, would mold into a general uprising. In Harrison's description, the plot came across both as blatant, unabashed treachery, and as completely fantastical and inexecutable. In addition to being shoddily conceived, the plan existed only in the minds of Dodd and a handful of other men—though the Judge Advocate saw this fact as little challenge to his case. Since even the lowliest initiate to the Order swore allegiance and unquestioning obedience to Dodd as Grand Commander, and his scheme entailed calling upon the entire membership, every neophyte was a party to the conspiracy.<sup>29</sup>

In terms of its fear factor, Harrison's testimony was a mere sideshow next to that of Wilson, the second OSL leader-turned-informer. Wilson's testimony was detailed, and sensational—far too sensational, in fact, to be believable.<sup>30</sup> Reports of the extent of the Order's strength, and of the diffusion of knowledge about the military plots among the membership, were especially overblown. Relaying, for example, second-hand knowledge of the condition of the Order in Illinois, Wilson asserted that in a certain county “almost the entire Democratic party” was involved with the organization, and that throughout the state, men “had arms in their hands, generally, and were ready to for any emergency that the order might contemplate, or wish to carry out.”<sup>31</sup> In his own county in Indiana, Wilson claimed that the military plot was made known to the entire membership of the Order. This assertion is his most radical departure from all the other testimony in the trial; only Stidger implied any kind of awareness by the lay membership of the existence of a military wing, and even he conceded that a hierarchy of knowledge existed. The

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<sup>29</sup> Harrison's testimony appears in Klaus, 257-280.

<sup>30</sup> One of the most extraordinary details unique to Wilson's account was the claim that Vallandigham had gathered a force in Canada which was poised to invade Ohio.

<sup>31</sup> Klaus, 366.

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egalitarian organization Wilson described, in which the whole common class was informed and consciously complicit seems, from all the evidence available to us, to be his own invention.

In terms of the plot itself, Wilson gave the most detailed account on record, but since he clearly had a flair for embellished storytelling, I consider him useless in terms of gleaning actual facts. As a player in the government's public drama, however, he was priceless. Complete with rendezvous spots and a specific sequence of events for how the plot would unfold, Wilson's story *sounded* plausible enough—at least to ears trained to jump at the slightest sound of treachery. All elements of the plot meshed in his description: the general membership of the Order would meet at its rendezvous spots and drill. When the Confederate troops made their appearance, some signal would be spread through the various assemblies, and individuals would then grab their weapons and advance on Camp Morton, one of the Federal installations where Confederate prisoners were held.<sup>32</sup> Once released the prisoners would “participate in the affair,” and as the rebel troops converged on the place, “the Federal soldiers, finding themselves surrounded, would be easily overcome.”<sup>33</sup> The combined forces would also seize the arsenals at Camp Morton and equip themselves from those stores; newly outfitted, they would move on to reproduce the sequence of events at several other locations. Simultaneous with the move on Camp Morton, a special detail would go “take care of the Governor,” rounding out the military operations with a takeover of the state's political apparatus. While elements of

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<sup>32</sup> “Camp Morton” was the honorific name given to the Fair Grounds of the Indiana State Board of Agriculture, located on the outskirts of Indianapolis, when they were converted at the beginning of the war into a rendezvous spot for troops. Later on, the camp was used to house prisoners of war. W.H.H. Terrell, *Indiana in the War of the Rebellion: Official Report of the Adjutant General*, (Indianapolis: Douglass & Conner, Journal Office, Printers, 1869), 5.

<sup>33</sup> Klaus, 373.

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the plot remained hazy even in Wilson's blow-by-blow account (what sort of signal, for instance, could "some one at the camp" "throw up" that would be visible to groups scattered around a vast area?), he demonstrated the degree to which a serious uprising had been contemplated.

A crucial feature of Wilson's account was the high level of communication and cooperation he described with the Confederacy. The appearance of Confederate guerillas or regular troops was to be the signal for the start of the general uprising, so that the entire plot was a concerted action between Northern peaceniks and Southern forces. Wilson also claimed that the Confederacy was bankrolling the project to the tune of two million dollars, and testified to a number of liaisons with Confederate agents, both in Canada and with guerilla commanders in Kentucky and Missouri. More explicit treason than this is hard to fathom—the Order was allegedly operating as a wing of the Confederate army, not only aiding and abetting enemies of the government, but essentially joining the enemy armed force. Were it not for the minor detail that most of it was probably not true, Wilson's testimony would have provided the government with a rock-solid case. But putting the story out into the public imagination was more important than finding truth, and much of the Republican population of Indiana, from the leadership on down, was probably excited enough to believe Wilson's story. Like Harrison, Wilson made brief reference to the defendants, with Bowles playing a fairly prominent role in his tale. Guided by the Judge Advocate, however, the entire thrust of his testimony was aimed at vilifying the Order, creating the impression that out-and-out treachery tainted a significant portion of the Democratic population in Indiana and its surrounding

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Northwestern states.<sup>34</sup>

To augment the stories of Harrison and Wilson, the government provided many of the same facts from a different perspective, in the person of Felix Stidger. Stidger was a government spy, one of the Union men who had infiltrated the Order, and was the primary source of the information General Carrington had forwarded to Joseph Holt, the Judge Advocate General. Holt's widely publicized report on the organization to the War Department was based almost entirely on Stidger's information.<sup>35</sup> As a spy on the government payroll, Stidger had a stake in pleasing his employers, who wanted to hear that the Order was a nest of traitors, and this fact naturally made him tend toward exaggeration and occasionally, according to some historians, outright fabrication—though even so he was not as outlandish as Wilson.<sup>36</sup> Within the context of the trial, however, his account of events was accepted as fact, with cross-examination barely making a dent in his credibility. The Indianapolis *Journal*, admittedly not the most balanced of sources but correct on this score, claimed after Stidger's appearance in the Dodd trial that "The cross-examination by the defense... failed to disturb the proof that the secret Order of the Sons of Liberty... was converted in the ripeness of time into a military organization."<sup>37</sup> Nor did the defense debunk other key aspects of Stidger's testimony, in spite of the fact that Gordon and Ray, who had also represented Dodd, pushed Stidger much harder in that trial than they did in the second. At the time, the defense, as was discussed earlier, was intensely concerned with Stidger's double-dealings

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<sup>34</sup> Wilson's testimony appears in Klaus, 364-76.

<sup>35</sup> Joseph Holt, *Report of the Judge Advocate General on the "Order of American Knights," or "Sons of Liberty": A Western Conspiracy in Aid of the Southern Rebellion*, (Washington: Government Printing Office, 1864).

<sup>36</sup> Klement, "The Indianapolis Treason Trials," 106. Klement claims that Stidger's references to communications with Richmond are falsehoods. Wilson made similar references in his testimony.

<sup>37</sup> Indianapolis *Daily Journal*, October 11, 1864.

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as a government agent and an active member of the Order, but they barely impugned his facts at all.<sup>38</sup>

Like Wilson, Stidger alleged a great deal of communication between the OSL leadership and representatives of the Confederacy. According to Stidger, who in turn credited his information to Bowles, the Order was in contact with Confederate guerilla forces in Kentucky, and planned to time its uprising to a move by the guerillas against Louisville. The detective also spoke vaguely, this time quoting Heffren as his source, of a mysterious character named Dickerson, who “went to Richmond at his pleasure,” presumably communicating there with CSA authorities.<sup>39</sup> He asserted that a man named Hines, who had served as a Captain in the Confederate army, was a member of Vallandigham’s staff, and testified that a number of other men who were or had been part of the rebel army had been initiated into the Order in Kentucky. These final claims were a unique contribution of Stidger’s, and even further bolstered the government’s narration of collusion between the Order and the Confederacy.<sup>40</sup>

Joseph J. Bingham, the fourth major government witness, was of a totally different stripe from any of the other three, and he played a different role in the

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<sup>38</sup> There were a few minor exceptions. The defense questioned an assertion that Humphreys was present at the June 14<sup>th</sup> meeting of the Grand Council, and elicited the concession from Stidger that he may have confused the defendant with another man bearing the same surname. More substantively, the defense pressed Stidger on the details of his story that Bowles and several other high-ranking members had agreed to “put out of the way” another spy, one Samuel Coffin, whom they had discovered to be a U.S. detective. Stidger seems to contradict himself under cross-examination, stating that the murder was discussed “in open meeting” rather than in a private discussion, as he had originally claimed. He also added, under pressure from the defense for allowing the murder to be contemplated, that he had gone on to warn Coffin—a fact he neglected to mention in his original account. Klaus 307-8, 322. Remarkably, however, the defense let Stidger’s inconsistencies get past without notice.

<sup>39</sup> Klaus, 304. This is the element of Stidger’s testimony that Klement singled out as false. The trial transcript doesn’t record the cross-examination relating to the conversation with Heffren—Pitman, the court reporter, abridged it writing only that “no additional facts were elucidated”—so we have no way of knowing how the defense reacted to this shadowy information. This editorial decision by Pitman is one of the points that led Tredway to allege that the reporter abridged the trial record to make it more sympathetic to the government. Tredway, 246.

<sup>40</sup> Stidger’s testimony appears in Klaus, 301-326.

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government's case. The decision to put Bingham on the stand is one of the most compelling pieces of evidence within the trial record itself to the political motives of the Judge Advocate and commission. In terms of content relevant to the case, even under the Judge Advocate's broad conception of relevance, Bingham had precious little to contribute. Bingham was a leader of the Indiana Democratic Party, and, more importantly, was the editor of the *Indiana State Sentinel*, Indiana's leading Democratic newspaper. Like Harrison and Wilson, Bingham was among those the army had arrested in its early-October mop-up. However, unlike them he had never held, or been accused of holding, any office in the Order. As a result, Bingham knew comparatively little about the Order and its plots. Kenneth Stampp asserts that arresting Bingham, who represented the voice of the Democratic Party, was done purely for political effect, citing as proof the fact that he was released almost immediately without ever being charged.<sup>41</sup> The Judge Advocate clearly considered Bingham more valuable as a witness than a defendant, for the government viewed the journalist as a means to sprinkle the Democratic Party as an institution with a liberal dusting of guilt.

In reality, Bingham's testimony arguably weakened, rather than contributed to, the government's case. He did admit that he belonged to the Order, providing the commission with a superficial piece of the kind of political ammunition it doubtlessly sought. Otherwise, however, the content of his testimony actually railed against the notion that the Democratic Party apparatus was in cahoots with the Order of American Knights. Bingham testified to his own and other Democratic leaders' shock and dismay at Dodd's scheme to assemble a mob and release Confederate prisoners from facilities all over the Northwest. Dodd confided his plan to Bingham seeking aid—he wanted

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<sup>41</sup> Stampp, *Indiana Politics During the Civil War*, 249.

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Bingham to use his authority as Chairman of the Democratic State Central Committee to call a mass meeting from which he could fashion the armed mob that would serve as his army. Instead of support, Dodd encountered total resistance from Bingham and from the other prominent Democrat he approached, Michael Kerr, a candidate for Congress. When Bingham and Kerr promptly relayed Dodd's plan to Joseph McDonald, the Democratic gubernatorial candidate, McDonald insisted that none of the Party elite knew anything about it. He deprecatingly remarked that "It's all gas; such a scheme cannot be entertained by sensible men."<sup>42</sup> The three men proceeded to call a meeting of the state's leading Democrats, with Dodd and John C. Walker present, wherein Kerr laid out the details of the plot and exhorted that it be stopped. Bingham claimed that by the end of the meeting he was sufficiently satisfied that Dodd had been persuaded to call off the uprising that he took no further preventative action.

Of course, this account is Bingham's, and the journalist-politician had plenty of incentive to keep his personal reputation clean. Other government witnesses corroborated the claim that intervention by Democratic leaders was a factor in preventing the planned uprising, however, and even if Bingham overstated his righteous indignation at Dodd's fantastic plotting, there is no evidence whatsoever that Democratic leaders offered Dodd the slightest encouragement in preparing his "uprising." Though it is improbable that, in late 1864, with Union troops finally succeeding on the battlefield, a rebellion like the one Dodd envisioned could have succeeded under any circumstances, the fact is that the plot was pushed off again and again, and ultimately never came close to even being attempted. Bingham ascribes this in large part to the refusal by Democratic leaders, like himself, to whom Dodd appealed for aid in rallying his motley troops, to assist. His avowal that the

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<sup>42</sup> Bingham's testimony, Klaus, 295.

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Democratic establishment saw the plot as hopelessly self-destructive, and desired to quash it before it leaked out and became political fodder for the authorities, rings true. It is precisely because of the motives Bingham professed for his opposition to Dodd that he is so believable. Before a hostile commission, he expressed not moral outrage at the concept of revolt, but rather distress over the consequences of Dodd's recklessness for his beloved Party. Bingham thus provided credible testimony that the Democratic Party organization had actively *prevented* the Order from carrying out its planned revolt.

A self-described "party man," Bingham was not the least bit shy about the fervor of his loyalty to the Democracy or the extent to which that loyalty motivated his actions. This feature of his testimony was the only thing that salvaged it from the government's standpoint. Claiming that his interest in the Order stemmed entirely from his concerns over the health of the Democratic Party, Bingham had, according to his version of events, been extremely skeptical of and reluctant to join the organization. Eventually he did so in order to keep track of its activities and try to shield his Party from the "seeds of discord" he saw brewing within the secret society.<sup>43</sup> Furthermore, he adamantly maintained, under pressure from the Judge Advocate, that he knew of the Order only as a political organization, a society intended to rally and consolidate the Democratic vote, until long after he had joined it. Yet even as he disassociated himself and the rest of the Democratic elite from the militant segment of the Order, in a sense, Bingham still played into the government's hands. The reaction he described to Dodd's scheme, rooted in calculations of Democratic political strategy and devoid of any apparent concern for the health of the Union, implied that his loyalty to the Democratic organization came before his loyalty to the nation. While the government was itself driven by partisan political calculations, in

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<sup>43</sup> Klaus, 290.

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the opposition such thinking was highly suspect. Though Bingham had worked to prevent *this* rebellion, his testimony did not preclude the possibility that he would support a different rebellion under more favorable circumstances, where the chance of success was greater. Since he represented the moderate wing of his Party, the implication that Bingham placed party before country cast suspicion on the loyalty of the entire Indiana Democracy.<sup>44</sup>

In one of the trial's most dramatic moments, on November 4, 1864, the government introduced its fifth major witness—Horace Heffren who, just the day before, had sat among the accused. Without warning even Heffren's attorney—let alone the other defendants and their counsel—the government abruptly dropped all charges against Heffren, and immediately put him on the stand to testify against the remaining defendants. According to Heffren's sworn statements, no lesser figures than Governor Morton and General Hovey approached him on the morning of the 4<sup>th</sup> to feel out his inclination to turn witness.<sup>45</sup> Heffren admitted in cross-examination that he had written to General Hovey in an effort “to get out of the scrape,” but maintained that he had not proposed any particular method of doing so, and certainly had not offered to bare his soul. Why the general, or the governor, paid attention to Heffren's advance and desired to negotiate with him for his testimony, is hard to discern.

Bearing the title of “Deputy Grand Commander” of the OSL, Heffren was officially second in command of the Order in Indiana; he would be called upon to lead if

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<sup>44</sup> Bingham's testimony appears in Klaus, 288-301.

<sup>45</sup> This bit of testimony is probably the best direct evidence of the Governor's intimate involvement with the case. While every historian to treat the case takes it for granted that Morton played a major role, he was discreet and kept his fingerprints out of the record, which makes this allusion to him noteworthy.

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anything happened to Dodd.<sup>46</sup> Therefore it was strange that the government should choose to drop prosecution against him while maintaining a case against Stephen Horsey, for example, who was a mere county chief. Stamppp believes that the authorities were willing to offer immunity to anyone who was willing to testify; Heffren simply indicated willingness.<sup>47</sup> With the exception of Bowles, against whom the case was far too devastating to relinquish, Klement is probably right. The government was invested in the spectacle they were producing, not in the defendants. Justice of a certain kind was the goal, but a justice that was best served by exposing treachery as thoroughly and conclusively as possible, not by punishing particular individuals. At the end of the day there needed to be someone left to hang as a symbol, but it mattered little who that was. Besides, Hovey and Morton must have felt that Heffren, precisely because of his high rank, had more useful knowledge about the plot than any of the other defendants except Bowles. Yet his turn on the stand added little new information, mostly just corroborating parts of Stidger and Wilson's accounts. In fact, much of Heffren's testimony was simply a parroting of Wilson's, since Wilson was his primary source of information of the OSL's plans, and would have qualified as hearsay in a civil court. Considering his mediocre quality as a witness, the decision to free Heffren in exchange for another dose of juicy material about the Order's treachery stands as one more indication of the government's disinterest with the defendants and preoccupation with pounding the theme of widespread treason into the ground.

A pattern that emerges in Heffren's testimony is discrepancies between statements

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<sup>46</sup> In fact, when Dodd was arrested, Heffren did step in and take responsibility for communicating with Supreme Commander Vallandigham and the Major Generals, in spite of the fact that, according to his testimony, he had previously renounced all ties to the Order.

<sup>47</sup> Stamppp, "The Milligan Case and the Election of 1864 in Indiana," 56.

that he volunteered, and those that the prosecution was able to extract from him with leading questions. More than any other witness, Heffren seemed manipulated, a pliant attester who would agree to most anything placed before him. Some incriminating pieces had to be pried out of him—for instance, when asked about the Order’s purpose in arming its members, Heffren responded that arms “were to be used either to defend themselves from oppression and wrong, or to fight any thing that came to fight them.” Only with significant prodding from the Judge Advocate did he concede that the Order was arming itself not merely for self-defense but in order to perpetrate the Northwest conspiracy plot.<sup>48</sup> In defiance of the government’s case that the Order was essentially a military group, with all its members pledged to use force against the government, Heffren staunchly maintained that the OSL consisted of two nearly separate organizations, a civil/political group and a military order. He claimed that the vast majority of members, including, for a long time, his high-ranking self, were completely unaware that the military wing even existed. On the other hand, while only a tiny group of leaders knew of the military organization and its intentions, Heffren claimed that the command structure placed the “civil subordinate to the military.”<sup>49</sup> This admission acted as a hook on which the prosecution could hang its thesis that the entire membership was ultimately

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<sup>48</sup> The Judge Advocate’s questioning went like this: After Heffren responded to the initial question that the arms were meant for self-defense, the Judge Advocate asked, “Were or were not these arms to be used in carrying out the purposes of the order that you have detailed?” Still equivocating, Heffren responded vaguely that “they were to be used for carrying out the purposed of the organization of American Knights.” Finally, after two diversionary questions, Burnett closed in. He restated Heffren’s testimony about the goal of creating a Northwest Confederacy, and asked if that was not “the object of the military part of the order,” and when Heffren was compelled to agree, asked, “Then were or were not those arms meant to be used in carrying out these objects of the military organization?” Heffren at last delivered the line Burnett had been fishing for, agreeing that “That was my understanding.” The entire theory was articulated for him by the Judge Advocate; Heffren merely eventually acquiesced to the story Burnett presented. Klaus, 336-337.

<sup>49</sup> This admission, too, was obtained by leading questions. The phrase “Then the civil was subordinate to the military?” was the Judge Advocate’s question; Heffren responded “Yes, sir,” and even qualified his statement again with the fact that the civil membership “knew nothing except the few who were in the confidence of the military.” Klaus, 335.

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answerable to the demands of the military schemers, despite the rest of Heffren's testimony to the contrary.

Heffren's elasticity as a witness was apparent in his testimony relating to one of the prosecution's major themes in the trial—the linkage of the Democratic Party to the Order. Several statements he made freely, without leading by the Judge Advocate, indicated distance between the state Democratic organization and the Order. Asked if leading Democrats in the state were informed of the scheme to deactivate Governor Morton and replace him with Athon, Heffren replied that the information “was given only to members of the order; I never knew of its being communicated to any Democrat unless he was a member of the order.” Strangely the Judge Advocate did not press him on whether leading Democrats were members, so Heffren's statement stood as originally articulated, apparently distinguishing between Democratic leaders and OSL members. Heffren also listed interference by the Democratic elite of Kerr, Athon, Ristine, and McDonald as the first factor in the failure of the August 16<sup>th</sup> iteration of the scheme. The failure of the Confederates to come through the Cumberland Gap, as anticipated, he cited as secondary.

Yet while his own story portrayed the Democratic establishment as a force separate from and even opposed to the Order, when faced with the question, “Of what political faith were the majority of the men comprising that organization,” Heffren responded that “They were all Democrats.” Burnett pushed even further, demanding whether “any class of men were admitted, or was it a *sine qua non* that a man must be a Democrat?” and Heffren cooperatively stated that “I do not think any one would have got in unless he professed to be a Democrat.” Of course, the profession that the membership

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was exclusively Democratic did not directly contradict the proposition that the Party leadership disapproved of the Order's activities. However, it must be noted that the attitude linking the Party to the Order emerged from extremely leading questions by the prosecution, while the statements about the Party leadership's noncompliance were Heffren's own. Inconsistencies like this one strongly indicate that in his desperation to save his own skin Heffren was willing to say practically anything he believed the prosecution wanted to hear. He didn't lie *per se*, sticking to his understanding of facts on specific issues like Party leader's knowledge of the Order's schemes, but willingly made generalizations that suited the prosecution's theories.

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When the Judge Advocate suddenly changed Heffren's status from defendant to witness, the shocked defense naturally objected. Among other things, Heffren had been privy in the month the defendants had spent together in confinement to his fellow's prison confidences.<sup>50</sup> They formulated their objection on the grounds that, "when the accused were jointly indicted, as in this instance, it was not competent for an accused to testify either for the defense or prosecution, till a verdict of "not guilty" has been entered." Trying the men together had been the prosecution's decision, and the defense vainly strove to claim that the decision bore consequences. Surely once their fates were linked together in the joint trial, one defendant could not be separated from the group and called to witness against the others. Either the five were a unit or they were not; the

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<sup>50</sup> While the defense did not mention this as part of their objection, it became clear during Heffren's testimony that it was no small issue, and the defense must have been aware of this danger. Heffren claimed to decline from sharing information he acquired from the other defendants in prison, but considering his decision to sell his fellows down the river to save his own skin, his discretion was not incredibly trustworthy.

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prosecution should not be allowed to have it both ways.

Burnett, of course, sidestepped this logic, and his rejection of the defense position was especially notable for its self-reference, falling back on the “very nature and constitution of a military court” to justify his claims. The Judge Advocate was not terribly clear in explaining what it was about the military court that made the defense “rule” impossible. Since in the paragraph before he cycled through the command structure governing military trials and their review, I presume that by invoking the “nature and constitution of a military court,” Burnett was referring to the fact that the court derived its authority from the commanding general, whose powers were practically limitless. As a result, principles like the one the defense tried to formulate, limiting the government’s actions in conducting the trial, were meaningless. As an extension of the arm of the commanding general, the military tribunal was essentially all-powerful, limited only by its own discretion. Since its functioning mimicked that of a civilian court in most ways, that fact was often obscured and could be forgotten, at least for a little while. The abrupt change of Heffren’s status represented the keenest reminder in the trial of the fact of the commission’s omnipotence, and brought home to the defense its sheer powerlessness. As a result it marked a turning point in the trial, the moment at which the defense’s bitterness crystallized and the Indianapolis trial fully ripened into a drama of martyrdom, seeking restitution from the wisdom of the “Long View.”<sup>51</sup>

Heffren’s appearance as a witness epitomized the trial for both sides. From the prosecution standpoint, it drove home with special force the fundamental fact that the

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<sup>51</sup> The term the “Long View” is borrowed from Professor James McPherson’s 2004 Baccalaureate address of that title at Princeton University. Professor McPherson considered the “Long View” perspective to be the gift of historians, who look back on events with detachment and after the passage of time, so that they can see a full context of events without the coloring of present passions. The text of McPherson’s speech can be found online at <http://www.princeton.edu/pr/news/04/q2/0530-mcpherson.htm>.

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government had no interest in the cases against the men they were actually trying. For the remaining defendants, the day Heffren took the stand may have represented a turning point in their saga. If they perceived, like Stamp, that the government would have agreed to cut similar deals with them, then Heffren's defection must have changed their senses of their situation. No longer were they passive figures, tossed about with no control over their own destiny. As soon as Heffren made it clear that groveling on the stand as a ticket to freedom was a live possibility, the remaining defendants were empowered, and burdened, with choice.<sup>52</sup> At that moment they became full-fledged martyrs, men who chose to sacrifice themselves—for surely they had little doubt what the outcome of the trial would be—on the alter of principle. For Milligan at least, there is no doubt that conviction at the inherent wrongness of the affair made plea bargaining unthinkable. He was no longer merely a small man engaged in a deeply unbalanced sparring match with Oliver Morton, he was the representative of the uncorrupted United States Constitution, the Constitution that he prayed the nation would one day rediscover. By nature a man devoted to principle, Milligan had certainly seen his as a constitutional battle before Heffren took the stand. But I believe it is fair to imagine that overt evidence that he could escape the entire nightmare by compromising gave Milligan a fresh sense of resolve.

Though his victory was by no means assured on that November afternoon in Indianapolis, Milligan's battle-lines were drawn. Before he could have his day in a court he considered legitimate, however, Milligan would need every scrap of resolve he could muster. On December 6, 1864, the commission found him, Bowles, and Horsey guilty on

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<sup>52</sup> Again, this reasoning does not apply to Bowles, since I maintain that the government would never have dropped the charges against him. There had to be at least one man to take the fall, and Bowles would have been that man.

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all counts and sentenced them “To be hanged by the neck until dead.”<sup>53</sup> Now a condemned man, Milligan had to fight for his life at the same time that he fought for his principles. In the next chapter, I will follow the twists of Indiana political and judicial machinations that secured Milligan a chance at legal vindication.

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<sup>53</sup> Klaus, 457. The commission found Humphreys guilty as well, but because the evidence against him was especially weak, they gave him a lighter sentence of imprisonment at hard labor for the duration of the war. Tredway, 249.

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## REPRIEVE

### CHAPTER 3

For a story tied up in the judiciary, an institution not noted for its speedy action, the Milligan case moved with surprising rapidity. Almost exactly one year after his sentencing by the military commission, the transcript of the record of that trial was filed before the Supreme Court, which heard arguments between March 5<sup>th</sup> and 13<sup>th</sup> 1866, and delivered its decision on April 3<sup>rd</sup>.<sup>1</sup> The intervening year was an eventful one, both for Milligan and for the nation. 1865, of course, witnessed Lee's surrender at Appomattox and the end of the Civil War. Meanwhile, from the Ohio cell to which he had been transferred after the trial, Milligan labored to save his own life. Aided by his attorneys, friends, and other concerned individuals, his efforts took two forms—judicial and extrajudicial. Milligan and his supporters flooded Washington with appeals for clemency and Governor Morton with pleas to intercede on his behalf, while his attorneys filed a request for a writ of habeas corpus before the Circuit Court at Indianapolis.<sup>2</sup> As it turned out, both efforts were instrumental in saving Milligan. It was the courts that eventually liberated him, but without mercy from the President his original execution date of May 19, 1865, would have left only a corpse for the courts to set free.

The story of the intervening year once again brings into sharp relief the interweaving of Indiana politics with Milligan's experience. The same Indiana Republican establishment that had condemned Milligan in the first place experienced an

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<sup>1</sup> Milligan was sentenced on December 10, 1864; the record of the military trial was filed with the Supreme Court on December 27, 1865. Supreme Court Docket and Minutes, cited in Charles Fairman, *History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-1888*, (New York: Macmillan, 1971), 200.

<sup>2</sup> David Kilgore to Morton, January 5, 1865; J.D. Lutz to Morton, January 7, 1865, Morton Correspondence.

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apparent change of heart, and a number of Republican leaders devoted their efforts to saving him. Governor Morton played a critical role in these events, just as he had in bringing about the military tribunal, though this time around Morton revealed his whole hand, acknowledging his involvement publicly rather than concealing it as he had done the previous fall.<sup>3</sup> The Republicans' apparent about-face did not mean that the basic mindset that had motivated them to arrest and try Milligan the year before had changed. Morton and other Republicans who participated in the events—the Speaker of the Indiana House of Representatives, the Circuit Court judge—were concerned to preserve the political stability and good reputation of the State of Indiana. These factors had driven Morton's and Carrington's actions throughout the war as well, but during the fighting, stability and reputation were tied up in threats of invasion, insurrection, and the potential of surrender if Democrats came to power. With the war done, the measures they deemed necessary to achieve those ends leaned toward leniency and pacification rather than iron-fisted discipline. Still, the priorities that spurred their actions were little changed.

The first and, fleetingly, one of the most successful extrajudicial appeals to higher authority, was made not by a Republican, but by Joseph E. McDonald, Milligan's former rival for the Democratic gubernatorial nomination. Engaged by the remaining defendants to work to secure their liberty, McDonald headed for Washington, armed with a copy of the court record from the military trial.<sup>4</sup> In the capital he met up with Indiana Senator Thomas Hendricks, another Democrat, who, despite having "little faith in the prospect of executive clemency," accompanied McDonald to call on the President. The two Hoosiers

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<sup>3</sup> In 1869 Morton delivered a speech in Richmond, Indiana, justifying his actions and taking full credit for saving the prisoners' lives. Foulke, 430.

<sup>4</sup> Hovey pardoned Humphreys on January 10, 1865, leaving only Milligan, Bowles, and Horsey fighting in the courts. Hovey to Hooker, Basler, VIII: 211.

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apparently caught Lincoln on a good day. McDonald described to Lincoln's biographer, Jesse W. Weik, his surprise at finding the President "in a singularly cheerful and reminiscent mood." Lincoln perused the documents McDonald provided and "suggested certain errors and imperfections in the record," which would require a lengthy review process. The condemned men would not face execution until that review was complete, and, in the meantime, Lincoln hopefully predicted, the war would end. With peace, he suggested, "we shall none of us want any more killing done."<sup>5</sup> While Lincoln did not offer an official statement of clemency or commutation of the defendants' sentences, the President's response to this appeal was positive enough that McDonald left the interview satisfied that his clients would be spared. Justice Davis' account of the meeting between Lincoln and McDonald, recorded in the same source, summed up the President's attitude as desiring to keep the men in jail a while longer "to keep them from killing the government," but with an assurance that he would not allow them to hang.

If these accounts are accurate, then Lincoln had been persuaded to release Milligan and his fellows once the war was over and they no longer presented a threat. The case might then have faded away into obscurity, memorable only to chroniclers of anti-administration movements in the Northwest. An assassin's bullet changed that, however, for by the time the final decision had to be made Lincoln was dead, and Milligan's fate lay in the hands of another President. Caught up in the fervor that followed Lincoln's assassination, President Johnson vowed to "make treason odious," and approved the death sentences. He ordered General Hovey, still commanding the District of Indiana, to set a date for the speedy execution of the three death sentences.

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<sup>5</sup> Statement of Joseph McDonald, in William H. Herndon and Jesse W. Weik, *Herndon's Lincoln: The True Story of a Great Life*, (Springfield, I.L.: The Herndon's Lincoln Publishing Company, 1888), 556-7.

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Hovey chose Friday, the 19<sup>th</sup> of May, 1865.<sup>6</sup>

Where two months earlier their prospects had appeared sunny, as May 1865 dawned the prisoners' situation looked exceedingly grim. At this point, with the noose practically dangling before Milligan's nose, Governor Morton intervened. According to Foulke, Morton was persuaded to intercede by Justice David Davis who, calling upon the Governor, instilled enough doubt in his mind about the legality of the military-imposed sentences that he preferred not to "have the blood of these men on his hands."

Even if Foulke's account of Morton's newfound moral ambivalence is correct, the Governor's statements regarding the affair indicate that he was also motivated by political pragmatism. After sending several written entreaties to Washington, Morton enlisted John U. Pettit, the speaker of the Indiana House of Representatives, to go to the President in person as his emissary.<sup>7</sup> Their discussion, as recorded by Foulke, expressed an interest in justice overlaid with anxiety about the reputation of Indiana. When Morton demanded his opinion on the impending executions, Pettit replied that he doubted the military commission's authority in light of the fact that the civil courts were always open. He did not stop there, however, but went on to assert, "Now at the beginning of peace the President ought not to pick out this, as the first of all the states, and have a military execution in our midst, as if we did not know how to administer our law." The crux of Pettit's feelings on the matter seemed to be state pride and fear that Indiana would suffer humiliation if she had to go through with the execution. Apparently forgetting that his maneuverings, and not the President's, had led to the now odious executions, Morton

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<sup>6</sup> Emphasizing the connection between the assassination and Johnson's hard-line stance toward the alleged Indiana traitors, Fairman notes that Johnson approved the trial of the Lincoln conspirators before a military tribunal on May 1, just one day before he issued the order regarding Milligan's sentence. Fairman, 197.

<sup>7</sup> Ever the savvy politician, Morton sent one letter in the hands of Milligan's wife in an attempt to play on the President's emotions. Foulke, 428.

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emphatically agreed that Pettit's "were exactly his sentiments." Urging Pettit to fulfill his duty and accept the mission to Washington, Morton echoed the Speaker's Indiana-centric attitude, stating that they must prevent the executions because "These men are our citizens and entitled to the care of our laws." The governor had shown no concern for the prisoner's entitlement to any sort of law when he had insisted upon trying them in military court. Although it is possible that after soul-searching Morton recognized the error of his former ways, he never expressed a note of remorse, nor did he ever acknowledge a contradiction between his earlier stance and his subsequent impassioned advocacy on the prisoners' behalf. His choice of words to Pettit—they are *our* citizens entitled to *our* laws—underscores the fact that Morton's preoccupation continued to be with what he perceived as best for Indiana's good name, to which, of course, his personal reputation was inextricably tied.

At the same time that he looked to Washington for clemency, Milligan also sought salvation in the law. Though denied a hearing in the civil courts on the first go-round, Milligan clung to the hope that he could work his case back into the legal system. Having devoted his professional life to the law, obtaining vindication *through the law* was essential to Milligan personally. Stubborn, uncompromising, and deeply devoted to principle, Milligan refused suggestions that he beg the President to commute his sentence and peacefully accept a punishment of imprisonment till the end of the war. Maintaining that he had violated no law, he would not consider, even in the face of a death sentence, any solution that entailed an admission of guilt. A grant of mercy from the President was to Milligan only a reprieve, an allowance of time to pursue his day in court.<sup>8</sup>

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<sup>8</sup> John A. Marshall, *American Bastille*, (Philadelphia: T. W. Hartley & Co., 1881), 82-83. See also Tredway, 252.

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In pursuit of the legal vindication Milligan so prized, on May 10, 1865, his counsel petitioned the Circuit Court at Indianapolis for a writ of habeas corpus. The two-judge panel consisted of David McDonald, the newly appointed District Judge for the Indiana circuit, and Supreme Court Justice David Davis, on circuit in Indiana.<sup>9</sup> Milligan was lucky; in Judges McDonald and Davis he encountered not only sympathetic but politically astute figures, who happened also to be committed to securing judicial review of military tribunals for civilian offenders.

With the execution date looming, the twin channels of political and court appeals interlaced. One of the pleas sent to Johnson was from Judges Davis and McDonald, who urged the President to postpone Milligan et al's sentences until the legality of the convictions could be decided by the Supreme Court.<sup>10</sup> The judges' letter alone did not sway Johnson, but when Governor Morton's string of well-staged appeals followed on its heels, the President backed down. On the 16<sup>th</sup>, just three days before the men were scheduled to hang, he pushed back the execution date for Milligan and Bowles to June 1 and commuted Horsey's sentence to life imprisonment with hard labor. By month's end Johnson commuted the other two sentences as well.<sup>11</sup>

The judges wrote to Johnson on May 11, 1865, the same day they sent a certification of division of opinion in the case to the Supreme Court. For Justice Davis in particular, Milligan's case presented a long-awaited opportunity to confront an issue that had troubled him for years. Davis' biographer, Willard King, claims that Davis had been

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<sup>9</sup> During the Civil War era each Supreme Court Justice was assigned a circuit, and spent a portion of the year traveling through his circuit to hear cases alongside the district judge.

<sup>10</sup> The content of the judges' argument is noteworthy. They knew their audience, and predicated their plea almost entirely on pragmatic, political considerations. "[A]side from the legal question," they remarked, "we doubt the policy of the proposed execution," and went on to posit that executions would probably inflame an otherwise peaceful Indiana and would soil the Administration's reputation. Fairman, 198-9.

<sup>11</sup> *Ibid*, 199.

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opposed to the arbitrary arrest policy since its initiation in Lincoln's September 1862 habeas corpus proclamation.<sup>12</sup> Encountering the case initially on circuit, Davis would become the crucial figure in *Ex parte Milligan*, the case's national incarnation. Authoring the Supreme Court's majority opinion, he had the opportunity at last to voice the serious reservations about the use of military tribunals that he had nursed quietly throughout the war. Davis was not merely a Lincoln appointee, he was an old and dear friend of the President's from his time practicing in the Eighth Judicial Circuit, a dedicated Illinois Republican who had been instrumental in helping Lincoln to secure the Presidential nomination in 1860.<sup>13</sup> Respect for Lincoln and apprehension about hampering the war effort had kept Davis from speaking out publicly against administration policy during the war, although he had expressed his views privately.<sup>14</sup> When, in the afterglow of war, the Milligan case was placed before him, he could no longer avoid confronting the issue. Lincoln was dead, the armies were returning from the fields, and for Davis, the time had come to right constitutional wrongs.

Like Davis, McDonald was a Republican of unswerving party loyalty, and, also like Davis, he harbored misgivings about the application of military justice to civilians. McDonald kept a journal, and on May 9, 1865, he expressed in it his chagrin at learning that Bowles, Milligan, and Horsey were set to be executed in ten days. He was sorry, he wrote, not because "they are not traitors, but that there is too much doubt of their having been convicted by a Court of competent jurisdiction." While McDonald himself claimed

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<sup>12</sup> Willard King, *Lincoln's Manager: David Davis*, (Cambridge, Massachusetts: Harvard University Press, 1960), 247.

<sup>13</sup> Neely, 176.

<sup>14</sup> King documents Davis' expressions of objection to the policy in his diary and private communications. Although he never made public statements on the matter, King claims that by the time *Ex parte Milligan* reached the Supreme Court bench, Davis' position was well known to legal insiders. King, 251.

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that he and Justice Davis shared “the same fears...on this topic,” it strikes me that there is some difference between the two judges’ perspectives on the issue. While Davis had long, albeit quietly, opposed the practice of trying civilians before military commissions as a matter of principle, McDonald’s journal entries at the time when the Indianapolis trials were taking place express no ambivalence at all about their legality. McDonald mentioned Dodd’s trial, but expressed no disapproval and commented only that “The disclosures in this case make the ‘Sons of Liberty’ a most treasonable association.”<sup>15</sup>

In his entries during and immediately after Milligan’s hearing before his court, McDonald worried about public reaction to an execution more than the constitutionality of the military trial. Writing that the executions “would be impolitic if not illegal,” he gave greater weight to the inadvisability of following through with the military punishment than to its constitutionality. Though he acknowledged a split in public opinion, noting that any decision to release the prisoners would also be met with rage, McDonald feared massive and potentially violent backlash if the government shed blood under dubious legal circumstances. His journal also supports the contention that Morton was impelled by concerns about the stability of the state, writing that “The truth, I learn, is that Gov. Morton has become alarmed, justly fears the consequence of the execution of these bad men,” and therefore “last night telegraphed President Johnson earnestly begging a delay of the execution.” While the Judge clearly did have reservations about the constitutionality of military tribunals, this fear seems to have been the main impetus motivating him to act on the prisoners’ behalf.

Even with their somewhat different angles on the problem, neither Davis nor

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<sup>15</sup> Donald O. Dewey, ed., “Hoosier Justice: The Journal of David McDonald, 1864-1868,” *Indiana Magazine of History*, 62 (September 1966),190.

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McDonald harbored any doubts about the proper outcome of Milligan's appeal. How to address the situation judicially, however, presented a problem. If they simply honored the petitioner's request and issued the writ, they knew that the military would disregard it, as it had consistently throughout the war; in fact, General Hovey had orders from Washington to ignore any writ issued by the civil courts.<sup>16</sup> Their clever solution was to issue a split decision, feigning disagreement, because the law demanded that when a circuit court split, the Supreme Court had to settle the case.<sup>17</sup> This device forced the case into the hands of the highest tribunal, whose constitutional ruling military authorities would find much harder to ignore.

The split decision emanating from a Circuit Court successfully overcame a potential obstacle standing between Milligan's case and the Supreme Court docket. Two years earlier, in a similar case, the Court had refused to rule on the legality of military tribunals trying civilians for treachery.<sup>18</sup> In *Ex parte Vallandigham*, the Court responded to the Copperhead leader's appeal by claiming that neither the Constitution nor any statute gave it jurisdiction over appeals from military courts. The Supreme Court's authority extended only to appellate matters arising in the lower Federal courts. Although their legal reasoning was sound, at the time the reliance on jurisdictional claims was

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<sup>16</sup> King, 250

<sup>17</sup> The law, passed in 1802, dictated that "whenever any question should occur before a Circuit Court, upon which the judges were divided, the point upon which they disagreed might be certified to the Supreme Court. Fairman, 139.

<sup>18</sup> On April 13, 1863, General Ambrose Burnside, then commanding the Department of the Ohio, issued General Orders No. 38, which declared that "The habit of declaring sympathy for the enemy will not be allowed in this department. Persons committing such offenses will be at once arrested." *O.R.* I, 23, 1: 237. The Orders were likely aimed directly at Clement L. Vallandigham, former Ohio Congressman and the informal leader of the Copperheads, as peace Democrats were disparagingly called. Vallandigham promptly defied the Orders by making a speech decrying the Administration, and was promptly arrested by the military on Burnside's orders and brought to trial before a military commission. The commission found him guilty and sentenced him to "close confinement in some fortress of the United States." *O.R.* II, 5: 646. Lincoln, wishing to avoid creating a heroic martyr, altered his sentence and exiled him from the North. Frank Klement, *The Limits of Dissent*, (Lexington, KY: The University Press of Kentucky, 1970), 177.

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widely seen as an excuse to avoid passing judgment on administration policy.<sup>19</sup> Of course, in the interim between Vallandigham and Milligan the war ended, which fundamentally changed the political equation. Both Milligan's lawyers and Justice Davis must have believed that there was at least a good chance that the Court was prepared in May of 1865 to confront the issue it had ducked at the war's apogee. Nonetheless, Milligan's attorney's were careful to bring their appeal through the proper channels so that the Justices would have no easy way out of passing judgment on the case, and by issuing a split decision, Davis and McDonald gave the case an additional nudge onto the docket.

A humdrum case filed before the High Court in the 1860s would typically sit in the docket about two years, waiting to come up in turn for argument.<sup>20</sup> Here, though, oral arguments began on March 5, 1866—merely two months after the case was petitioned. The speed with which the Supreme Court moved on Milligan's case, taking it up out of turn, was one indication of the fact that the case had, notwithstanding the President's commutation of all three sentences, been identified as a potential constitutional landmark.

Another indication of the case's perceived import was the men who appeared to argue before the tribunal. On the side of the defense, Jeremiah S. Black, former Attorney General under President Buchanan, judge of the Pennsylvania Supreme Court, and one of the most highly regarded lawyers in the country, volunteered to play lead counsel. Assisting him were David Dudley Field, brother of newly appointed Justice Stephen J. Field, Joseph E. McDonald, who had futilely wrangled for clemency from Lincoln, and James A. Garfield, then an up-and-coming moderate Republican Congressman, whose speeches on the House floor denouncing the use of military commissions had attracted

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<sup>19</sup> James G. Randall, *Constitutional Problems Under Lincoln*, (Urbana, I.L.: University of Illinois Press, 1951), 176-79.

<sup>20</sup> Fairman, 2.

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Black's attention.<sup>21</sup> The government's lineup was also well-credentialed, though they turned out to be no match for Black and his team. Attorney General James Speed argued the case, along with Henry Stanbery, who soon took Speed's place as Attorney General, and General Benjamin F. Butler. Butler was intimately familiar with the issue in the case, having, during his highly controversial governance of New Orleans, declared martial law and tried scores of civilians in military tribunals.<sup>22</sup> For Butler, then, arguing the Milligan case was indirectly a defense of his own actions and reputation.

When it reached the Supreme Court, Indiana forever lost custody of the Milligan case. As landmark constitutional decisions always do, *Milligan* became national property, its wisdom and repercussions debated on the floor of Congress, in newspapers across the nation, and in legal journals. General Butler became just one of hundreds of men who found a place for their own agendas in the case's far-flung implications. Governor Morton, who had navigated the direction of the case from its inception to its day before the Supreme Court, and all the other Hoosiers who had played parts great and small in determining its course, stepped back into the shadows. Indiana's particular blend of panic, ideological conviction, suspicion, partisanship, pride, had first condemned Milligan and then pulled his feet out of the fire just before he was burnt. That story, however, gave way in April of 1866, with the announcement of the Court's decision, to a whole new hullabaloo. The next chapter will examine the way that *Ex parte Milligan* has been described and understood, by historians, political scientists, and legal scholars, over the hundred-and-fifty-odd years since it first captured the nation's attention.

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<sup>21</sup> William Norwood Brigance, *Jeremiah Sullivan Black: A Defender of the Constitution and the Ten Commandments*, (Philadelphia: University of Pennsylvania Press, 1934), 147.

<sup>22</sup> Hans L. Trefousse, *Ben Butler: The South Called Him BEAST!*, (New York: Twayne Publishers, 1957), 114-18.

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## THE CASE HAS TWO FACES

### CHAPTER 4

“*Ex parte Milligan* wears several faces,” Charles Fairman observed in 1971. Generations of commentators have made the case a virtual chameleon, acquiring new meanings to suit the needs and interests of wide-ranging scholars, politicians, and judges. War, its definitions and rules of conduct, lay at the heart of the case, and war is an inherently charged and volatile subject. Moreover, the high-minded language of Justice Davis’ opinion for the majority, and Chief Justice Chase’s division of the Court on Constitutional principle through his concurrence, lent themselves to interpretation and reinterpretation. I will give a brief sketch of the contents of those opinions, and then examine a number of specific uses of *Milligan*, which are emblematic of the broad categories of thinkers who have contemplated the case. Historians of the Supreme Court, the first category I study, situate the case in the scheme of judicial power, and for those who focus on the Reconstruction period, *Milligan* has a particular set of implications. From judicial historians I turn to a legal scholar, whose interest in applicable law contrasts with the theoretical musings of Court historians. Historians of civil liberties under Lincoln then provide another contrast, since they view *Milligan* as part of the narrative of the Civil War itself rather than its aftermath. Finally, I look at the work of an historian of Midwestern Civil War politics, whose local focus causes him to reinterpret *Ex parte Milligan* outside of its true context. Finally, I will offer my own theory of how the decision should be understood, as a final chapter to *Milligan*’s ordeal, but also as an independent entity impelled by its own set of motivations and goals.

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According to most interpreters, Justice Davis went beyond the scope of the case itself when he passed judgment on Congress' ability under the Constitution to institute military tribunals for the trial of civilians. Justice Davis proclaimed that reading exceptions into the Constitution's guarantees of liberty so that they could be suspended in times of emergency, was a pernicious doctrine leading "directly to anarchy and despotism."<sup>1</sup> In ringing prose, he declared instead that "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." Even as he laid out this sweeping principle, he included caveats, describing the "occasions when martial rule can be properly applied."<sup>2</sup> Practically speaking, Davis established two conditions which tested whether martial law could stand in a place: the presence of actual fighting, and the absence of open, functioning civil courts. Neither condition was met in Milligan's case, and therefore the military commission that tried him had defied the Constitution.

Chief Justice Chase's concurring opinion agreed with the majority's decision on how to dispose of the case, but took issue with Davis' reasoning. A veteran of Lincoln's cabinet, Chase was far more sympathetic than Davis to the concept of "military necessity," the backbone of the government's argument. Chase was concerned about damaging the nation's ability to prosecute future wars, to the point that he and the three Justices who joined him were "unwilling to give our assent by silence to expressions of opinion which seem to us calculated, though not intended, to cripple the constitutional powers of the government, and to augment the public dangers in times of invasion and

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<sup>1</sup> *Ex parte Milligan*, 4 Wall. 2; 1866 U.S. LEXIS 861, 89.

<sup>2</sup> *Ibid*, 93.

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rebellion.”<sup>3</sup> While Davis had espoused a “continuous Constitution” which no branch of government could abrogate, Chase maintained that Congress’ war powers granted it the power to set aside normal constitutional procedure and to legalize military tribunals in wartime, if it deemed them necessary to public safety.<sup>4</sup> Conditions in war were not always so black and white, Chase argued. “In Indiana,” he posited,

the judges and officers of the courts were loyal to the government. But it might have been otherwise. In times of rebellion and civil war it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels, and courts their most efficient allies.<sup>5</sup>

Because situations in war could be so variable, Chase believed that Congress must retain discretion over what measures the public safety required. Addressing Milligan’s case, the Chief Justice claimed that while Congress *could* have authorized his tribunal, it did not, and therefore the military commission had lacked jurisdiction. Rather, the Act of March 3, 1863 authorizing suspension of habeas corpus had also provided a procedure for bringing military detainees to trial, if the civil courts were functioning, before those normal organs of justice. The conditions of that law were in place in Indiana, and therefore the law required that Milligan either be brought before a Grand Jury or released. Milligan’s case could and should have been settled, the Chief Justice argued, on the basis of statute alone, without recourse to the Constitution.

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The many faces of *Ex parte Milligan* are due in large measure to the fact that the case spans eras and disciplines. While Milligan’s alleged crimes and his military trial

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<sup>3</sup> Ibid, 104.

<sup>4</sup> In a public lecture, Kathleen Sullivan used the term “continuous Constitution” to describe the theory that except where it contains specific emergency provisions, like the provision for suspending habeas corpus, the Constitution remains in force at all times, regardless of war. Kathleen Sullivan, “The Constitution and Emergencies,” Address delivered at Princeton University, February 9, 2005.

<sup>5</sup> *Ex parte Milligan*, 103.

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took place during the Civil War, the Supreme Court ruled upon the case during Reconstruction. Thus the case has bearing for historians of the Civil War, especially those concerned with the war's impact on constitutional questions and civil liberties, and also for historians of the post-war. In addition to its embrace of two distinct (although certainly related) historical epochs, *Ex parte Milligan*, like all important Supreme Court decisions, sets constitutional precedent and is therefore of interest to legal/constitutional interpreters. There is a striking difference, which I will try to highlight, between the conclusions of those whose interest is primarily historical and those, acting judges and legal theorists alike, whose main interest lies in the law.

In the context of Reconstruction, *Milligan* takes on a whole new aspect and significance that was in no way part of the story when the case began in Indiana in 1864. Reconstruction, as envisioned by Radical Republicans, entailed military rule over the subdued states until they were readmitted under whatever conditions Congress set; under this plan the military would be responsible, indefinitely, for judicial functions in the Southern territories. Though the language of *Milligan* did *not* address this scenario, the potential applicability of its doctrine to the proposed Reconstruction Acts was lost on no one. It would be an easy step from the *Milligan* doctrine for the Court to decide that the Southern states were no longer military zones, and that martial law could not be applied to them indefinitely just because they had been conquered territories.

A brief look at the contemporary reactions makes it clear that *Milligan's* effect on Reconstruction pressed upon the minds of people on either side of the political spectrum. In Congress, the Radical Republican Thaddeus Stevens asserted that "this most injurious and iniquitous decision" was more dangerous than *Dred Scott*. He urged the House to

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pass the first 1867 Reconstruction Act immediately, warning that by banning military trials the decision “has taken away every protection...from every loyal man, black or white,” residing in the Southern states. Echoing Stevens, the *Chicago Tribune* also invoked Dred Scott, accusing the majority of overstepping its boundaries. “Such a stepping aside from the case at hand was, we think, unnecessary, uncalled for, and unwise, and will do much to revive the unfavorable impression of the tribunal, which rested upon the public mind after the Dred Scott decision.” Directly addressing the issue of Reconstruction, the Alton (Illinois) *Telegraph* worried that the Court would deny the Federal Government the right to enforce military jurisdiction in the conquered South, and claimed that if it tried to do so, “neither the President nor the Supreme Court will long be permitted to stand in the way.”<sup>6</sup> At the other end, the Democratic press was no less attuned to the implications of the case. The more moderate New York *World* saw the decision primarily as vindication for Democrats during the war, representing “the final judgment of the law, as it will be the verdict of history, that the obloquy heaped upon Democrats for their opposition to the arbitrary exertions of authority, was undeserved.” But in Jackson, Mississippi, the *Clarion* gloated that the decision “destroys Radical hopes of carrying into effect the various revolutionary schemes projected for our humiliation.”<sup>7</sup> Scholars of the Reconstruction era tend to both analyze the meaning and significance of these contemporary reactions to the decision, and pose their own interpretations of the implications of Davis’ opinion on Reconstruction policy.

Historians of the Supreme Court tend to concentrate on the courageousness of the Court’s decision and what it says about the Court’s level of institutional confidence at the

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<sup>6</sup> Quoted in Fairman, 218.

<sup>7</sup> Quoted in Fairman, 220.

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time it was delivered. Published in 1922, Charles Warren's two volume history of the Supreme Court is arguably the classic work on the Third Branch. Its rather bland title, *The Supreme Court in United States History*, was carefully chosen, and tips off an attentive reader to Warren's approach. He sets out in the preface that his essential concern is the correlation between the Court's decisions and "the political events in the Nation's history." That is, Warren views the Court not in a vacuum, but as both an object of and an actor in the national political scene.<sup>8</sup> Contemporary views of major Court cases are crucial to understanding the tribunal's place in the political structure, and so Warren's book is packed with extensive quotations from newspapers, politicians, and legal journals. These are intended to provide a comprehensive view of the way decisions were received, for Warren believes that the reception often bears more heavily on the historical impact of a case than the decision itself.

In accordance with this philosophy, Warren's chapter on *Milligan* seeks to convey the fervor of the public and political reactions to the case. In *Milligan* sensitivity to the way people viewed the case at the time is particularly important, Warren maintains, because such a disconnect had grown between the way the opinion had come to be perceived by the 1920s and the way it was seen in its own time. "This famous decision has been so long recognized as one of the bulwarks of American liberty," Warren writes, "that it is difficult to realize now the storm of invective and opprobrium which burst upon the Court at the time when it was first made public."<sup>9</sup> Anger was not the only emotion the decision aroused at the time; there was also a large segment of the political spectrum which ardently praised the Court's action.

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<sup>8</sup> Charles Warren, *The Supreme Court in United States History*, (Boston: Little, Brown, and Company, 1926), vi.

<sup>9</sup> *Ibid*, 428-9.

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Of course, in order to understand why the reaction to *Milligan* was so vehement and so divided, it is necessary to look to the other half of Warren's project, the political context in which rulings were made. An overriding theme in Warren's work is the idea that the judiciary's most consistent and lasting impact on American political development has been in solidifying national supremacy over the authority of the States. Warren thus contextualizes the uproar against *Milligan*, which came from the Radical Republicans, in terms of national power. With its limitation on the powers of Congress, the decision was a step outside the Court's typical attitude at the time. Warren claims that throughout the 1860's "the Court had consistently upheld the authority of the National Government... and had strictly limited the sovereignty of the States whenever they appeared to trespass on the National domain."<sup>10</sup> Despite this fact, after the war the Court endured a "serious and determined attack" from the Radical Republicans, "the very political party which favored such extension of National power." Stemming from speculation that the Court would disallow their proposals for governing the conquered South under military rule, the Radical's attack was preemptive, initiated before the Court took any action that bore on Reconstruction.<sup>11</sup> When the *Milligan* decision was delivered, it reinforced and seemed to justify the Radicals' fears. It was the decision's affront to national power, and particularly the implications of that affront to Reconstruction, that provoked a firestorm. Likewise, political elements opposed to Reconstruction, who believed Congress was stepping far outside the bounds of its power, saw *Milligan* as a heroic move by the judiciary.

The most thorough treatment I have found of the *Milligan* case—the only one that

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<sup>10</sup> *Ibid.*, 418.

<sup>11</sup> Warren ascribes the Radicals' apprehension partially to the lingering legacy of *Dred Scott*, and to the more recent refusal of the Justices to sit in circuit in the conquered South until civil government was restored.

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covers, on some level, everything from the events leading up to the Indianapolis military commission through the aftermath and legacies of the Supreme Court decision—is that of Charles Fairman. Part of the Oliver Wendell Holmes Devise, a multi-author series covering the history of the Supreme Court from its inception to the New Deal, Fairman’s two volumes on the Supreme Court during Reconstruction are a sprawling narrative, viewing the Court’s activities from many angles. Because his work is so eclectic, it is harder to identify a guiding theme or program in Fairman’s study, but he does clearly aim, like Warren, at describing the court and its activities within the greater political narrative of its times. His project also expressly involves judging the Court’s decisions through his own lens, a fact he makes clear at the end of his preface. “It must be patent,” Fairman writes, “that when one individual undertakes to appraise the work of the Bench over a period of years—and an exceedingly controversial one at that—it is beyond belief that all of his judgments will command universal assent.” Thus, on top of abundant background on both the origins of the case and the political debate into which it entered, and extensive discussion of the reaction to the Supreme Court decision, Fairman’s analysis of *Milligan* includes his own determination of its merits as a legal document.

In Fairman’s assessment, *Milligan* deserves its reputation as a “landmark of constitutional liberty.” The Government’s contention that war nullified constitutional protections and granted the executive unlimited powers was “utterly at variance with the national inheritance and traditions,” and the extremity of its wrongness necessitated an extreme reaction. As a much-needed reassertion of America’s commitment to the rights of the individual, Davis’ forceful opinion served the nation well. However, because the opinion went so far in its condemnation of war powers, Fairman judges that fears that the

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*Milligan* precedent would cripple the nation in future wars or rebellions were warranted. During the First World War, for instance, *Milligan* threatened to prevent punishment of Germans who infiltrated the country in civilian dress. The Court, however, deemed the precedent inapplicable to that situation. Ultimately, Fairman concludes that “the very words of the *Milligan* opinion should not be taken as precise tests for all future emergencies.”<sup>12</sup> Its spirit, however, which asserted the sacredness of civil liberties and subordination of the executive to the Constitution even in times of war, is a timeless contribution to American liberty.

Contrast Fairman’s assessment of the case with that of John W. Burgess, a professor of political science and constitutional law. Here we highlight the difference between an historian’s perspective and that of a lawyer. Burgess wrote in 1902, before World War I had put *Milligan* to the test, but he theorizes that in the event of another war, the President would probably emulate Lincoln in spite of the *Milligan* dicta. Burgess is a pragmatist, and judges that because *Milligan* is ineffectual, “The practices of the Administration are...to be considered as the precedents of the Constitution in civil war rather than the opinion of the Court.”<sup>13</sup> That is, in formulating legal precedent, which is his concern, Burgess preemptively writes off *Milligan* altogether, before it is even tested. *Milligan* dooms itself to irrelevance by challenging the executive power in precisely those times when the Executive, backed by the strength of the military, is unchallengeable. Where Fairman distinguishes the case’s dubious usefulness as a precedent from its value as a public, written affirmation of national values, Burgess sees the purpose of a Supreme Court opinion to be establishing law and nothing else. *Milligan*

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<sup>12</sup> Fairman, 214.

<sup>13</sup> John W. Burgess, *The Civil War and the Constitution 1859-1865* (New York: Charles Scribner’s Sons, 1901), 218.

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failed to create effective law and is therefore valueless.

Burgess followed up his work on the Constitution in the Civil War with a tome on Reconstruction.<sup>14</sup> His only discussion of Milligan is in the first book; he mentions the case nowhere in the Reconstruction volume. Considering his attitude this is logical, in spite of the fact that the case is technically Reconstruction era and is usually treated as such. Though press and politicians at the time produced a lot of hot air surrounding the case's relationship to the Reconstruction acts, it is pretty indisputable that Milligan did not have any practical effect on the course of Reconstruction policy or law. Historians of the period have posited different explanations for this, but whatever the reasons, from Burgess' practical standpoint, *Milligan's* lack of impact on Reconstruction in practice makes it totally irrelevant to the discussion of that phenomenon.

An historian of American legal and political institutions, Stanley Kutler's revisionist history is devoted heavily to explaining Milligan's apparent lack of effect on Reconstruction. Entitled *Judicial Power and Reconstruction Politics*, Kutler's work, like that of Warren and Fairman, examines the relationship of the Court to the other branches of government, especially Congress, and the way it was perceived in the public eye. As his title indicates, Kutler is particularly interested in the power of the court, often relative to the other branches, in shaping American public discourse. Writing in 1968, Kutler aims at debunking the traditional interpretation of the Reconstruction era Court that Warren pioneered. He summarizes the older model as follows: The Supreme Court in the 1860s was still dragged down by the stinking weight of Dred Scott, and therefore disdained by Radical Republicans. As they prepared to launch their Reconstruction

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<sup>14</sup> John W. Burgess, *Reconstruction and the Constitution, 1866-1876*, (New York: Charles Scribner's Sons, 1902).

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program, the Radicals were preemptively hostile toward the Court, wary that it might try to interfere. *Milligan* confirmed the Radicals' worst suspicions and prompted them to launch a full-scale attack on the Tribunal, even contemplating abolishing it altogether.<sup>15</sup> Such extreme measures did not get through, but Congress did reduce the Court's size and limit its jurisdiction, as means of curbing its power. In response to Congress' threatening stance, the Court retreated from the boldness of *Milligan* and became "intimidated and impotent." For the rest of the Reconstruction period, Congress plowed ahead and the Court toddled passively behind.<sup>16</sup>

Kutler's reinterpretation of the Court's perception and behavior during Reconstruction regards *Milligan* as "central to contemporary and historical interpretations of how the Supreme Court really felt about the Republican [Reconstruction] program."<sup>17</sup> A key feature of his argument that the Court capitulated on its principles is the claim that the Reconstruction Acts, which provided for trials of civilians by military commissions in the former-combatant Southern states, violated the *Milligan* precedent. Kutler, however, denies that there was any conflict between Davis' decision and the Congressional bills on ruling the South. While many people, both contemporaries and historians, saw the

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<sup>15</sup> The editor of the Republican Newark *Evening News* wrote on January 2, 1867, that "Every member of Congress with whom I have conferred on the subject is out and out for abolishing the Supreme Court at once." Quoted in Fairman, 222.

<sup>16</sup> The cases of *Mississippi v. Johnson*, *Georgia v. Stanton*, and especially *Ex parte McCardle*, are typically cited as evidence of the Court's evasions of confronting Reconstruction legislation. In the first two cases, the Court denied requests for injunctions preventing executive enforcement of the Reconstruction Acts, declaring the issue a political rather than a judicial question. In *McCardle*, the Court acceded to Congress' removal, through repeal of part of the Court's appellate powers, of the case from its jurisdiction. Kutler argues that in each case, the Supreme Court followed the proper legal course and did so out of respect for the law, not in cowardly appeasement of the Congressional Radicals. It should be noted, that in each decision the Court opted not to pass judgment on the substance of the Reconstruction Acts. While the classic view passed this off as a reliance on "legal technicalities" to evade the issue, Kutler's reading of the practice as the Court preserving the traditional separation of powers and division between judicial and political questions is convincing. Had the Court truly wanted to kow-tow to the Radicals, it could have delivered a decision expressly sanctioning the Acts as constitutional.

<sup>17</sup> Stanley Kutler, *Judicial Power and Reconstruction Politics*, (Chicago: University of Chicago Press, 1968), 67.

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opinion's sweeping declarations against martial law as paving the way for a ban on military commissions in the South, Kutler shows that Justice Davis never intended his opinion to be read that way. As the Justice wrote to his brother-in-law, Julius Rockwell, "not a word is said in the opinion about reconstruction, & the power [to try by military commission] is conceded in the insurrectionary States."<sup>18</sup> The Court, Kutler claims, made a conscious decision to stop short of challenging Reconstruction, but that choice did not involve ignoring or tacitly overruling *Milligan*. Its self-restraint following the bold stance of *Milligan* was not a retreat, but a move calculated at preserving the power of each branch of government over its proper sphere.

Both Kutler and the older historians with whom he argues use *Milligan* to chart the court's aggressiveness and its willingness to stand up in the face of popular pressure. Each derives different implications from the decision, however, and those implications determine whether the Court's courage in *Milligan* was an aberration or, as Kutler argues, part of a continuous practice of judicious use of power, which demanded extreme decisions at some times and moderation at others. What is important to Kutler about *Milligan*'s case is the way that it epitomizes the Court's courage and its restraint. Although it went much further than most people thought necessary, Davis' decision did not go as far as it could have; it did not prohibit military commissions in the Southern states. More broadly, Kutler's challenge to the standard interpretation of the post-bellum Supreme Court is helpful in pinpointing the way that scholars of Reconstruction view *Milligan*. They are interested in the picture it paints of the Supreme Court's role in the political upheaval of those times.

The approach of James Randall, one of the classic writers on civil liberties under

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<sup>18</sup> Quoted in Kutler, 95.

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Lincoln, has an entirely different focus than that of the Reconstruction-era Supreme Court historians or of Burgess, the constitutional lawyer. Randall reads the Milligan case as one element in the corpus of military trials of civilians carried out under the administration. Evaluating Milligan's trial in light of other Civil War military commissions, Randall concludes that government conduct in the case was both illegal and exceptional. For the most part, the administration and its generals used the powers of martial law sparingly, so that the military authority actually interfered relatively little with the civil. Even when applied to civilians, military trials were typically used "in military areas for military crimes," meaning in places like Kentucky, where fighting was constant, for offenses like bridge-burning or cutting telegraph lines. *Milligan* was different; it exemplified "a twofold extension of military justice beyond its normal sphere." First, it involved an offense that was not part of the military code, and second, it took place in a location "remote from military operations."<sup>19</sup>

Randall's assessment of the Milligan case fits in with his overall theory on the constitutionality of Lincoln's behavior. While he does not shy away from the problematic elements of Lincoln's policy, frankly admitting that "Lincoln's conception of the executive power was too expansive," Randall's view is ultimately sympathetic to the Civil War President. Lincoln's assumptions of authority on many occasions crossed the line of constitutionality, but those occurrences remained exceptions and not the rule, and even the grossest excesses, of which Milligan's trial is an example, are comprehensible in the face of the extraordinary circumstances that characterized Lincoln's Presidency. Commenting specifically on the practices of arbitrary arrests and military trials, Randall

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<sup>19</sup> James G. Randall, *Constitutional Problems Under Lincoln*, (Urbana, I.L.: University of Illinois Press, 1951), 176.

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concludes that the administration “erred in these respects,” but did so “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.”<sup>20</sup> Thus *Milligan*, which Randall accepts as an unjustified exertion of brute force, instructs primarily as a contrast that highlights the restraint that more commonly typified the administration and its subordinates.

While he attributes a considerable self-restraint to Lincoln and his underlings in both the executive and the military, Randall contends that the other branches of government, Congress and the judiciary, failed during the war to fulfill their role as checks on executive power when it did wander outside acceptable bounds.<sup>21</sup> He essentially indicts Congress and the courts for the executive’s missteps, implying that the President could not be expected to maintain a perfect level of wartime authority when internal restraint was the only brake on executive power. The Supreme Court’s behavior in *Ex parte Milligan* becomes noteworthy within the context of this argument. The decision was undeniably an act of censure by the Court, a declaration that the executive had gone too far. Though he recognizes it as such, Randall also downplays the forcefulness of the decision as an exercise of judicial power to restrain the executive. For one thing, *Milligan* was decided after the war ended, a fact which Randall considers integral to understanding the case’s legacy. Moreover, Randall maintains that Chase’s separate opinion, which left the Court divided over the principle at the heart of the case—

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<sup>20</sup> Ibid, 185. In a footnote to this passage, Randall cites examples of Lincoln’s tendency against harshness and toward leniency—his sympathy for conscientious objectors and favorable treatment of political prisoners.

<sup>21</sup> The application of martial law is a particular area in which Randall portrays restraint as the guiding principle of the Administration and its generals. He cites, for example, the commanding General in Maryland who proclaimed upon declaration of martial law, “that this suspension of the civil government...should not extend beyond the necessities of the occasion,” and argues that this general’s attitude derived from the tone of restraint set in Washington. Randall, 171-4.

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whether constitutional liberties can ever legally fall prey to war—weakened the decision’s punch.

Milligan’s limitations emerge most clearly, Randall proposes, when it is viewed alongside *Ex parte Vallandigham*, the Supreme Court’s other Civil War encounter with the issue of civilians tried by the military. Although he recognizes that “from the standpoint of the lawyer there were technical differences” between the two cases, Randall believes that in essence they involved the same question, “namely, the right of civil courts to set aside the sentence of a military commission, and the illegality of such a commission when used for the trial of citizens in a non-military area.” Thus while the Court did not acknowledge it as such, *Milligan* was in fact a reversal of *Vallandigham*. *Vallandigham*, of course, came before the court while the war was still on, and Justice Davis was frank, in his opinion on *Milligan*, about the relationship between the war’s end and the Court’s change of heart. “During the late wicked Rebellion,” he wrote, “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.” With threats to public safety dissipated, the Court could return to the role it abdicated during the war of adjudicating the lawfulness of governmental actions.

Even in the safety of the post-war, however, the court did not completely abandon the timidity it had showed in *Vallandigham*. Instead of a united front setting forth the limits of executive action, Randall claims that Chase’s “dissent has produced the impression of a court about to swing from one opinion to another.” Borrowing the words of J.I.C. Hare, a scholar of Constitutional Law, “in *Ex parte Milligan*, . . . the wavering balance fortunately inclined to the side of freedom, although with a tendency to oscillate

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which leaves the ultimate result in doubt.”<sup>22</sup> Rather than a truly bold assertion of judicial authority, Milligan was, according to Randall, only a partial step away from the deference to executive actions that characterized the entire judiciary throughout the war.<sup>23</sup>

To Randall, the significance of Milligan is twofold. Firstly, the facts of the original military trial are important. Particular aspects of the circumstances in which it arose—distance from the front and charges beyond the strictures of the military code—defined the trial as an audacious exercise of military/executive power, but also as a rarity. Its departure from the restraint that was the norm is the key feature of the trial.<sup>24</sup> Randall is also interested in the Court’s decision, as it sheds light on the relationship between the judiciary and the President, who is the focus of his study. Somewhat counterintuitively, the decision illustrates his premise that the judiciary tended to shy away from challenging Lincoln when his policies came into conflict with the Constitution. Milligan is thus, in Randall’s reading, a paradigm of ambivalence on multiple levels—the ambivalence of executive self-restraint, and of the Court’s reaction to executive excesses.

Marc Neely departs from Randall’s model of writing about civil liberties under Lincoln in two important ways. While Randall surveys constitutional problems under Lincoln generally, including, but not limited to, the rights of civilians during the war, Neely restricts his focus to the issues of military detainment and trial of civilians. This

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<sup>22</sup> Quoted in Randall, 182-3.

<sup>23</sup> There is a serious flaw with Randall and Hare’s characterization of the two *Milligan* opinions, namely, that Chase’s dissent affirms the power of the *legislature* to create military tribunals for trials of civilians, not of the executive. Nowhere in his opinion does Chase question the propriety of the President, or of the military citing executive authority, enacting such tribunals of his own accord, without legislative sanction. Considering that the Court was actually united on the issue of executive authority, Milligan should perhaps get credit for drawing a real line in the sand with respect to executive usurpations. However, the fact that Congress during the war often deferred to the President, stamping approval on his actions, may have undergirded Randall’s view. He may have missed the distinction between granting authority to Congress and granting it to the executive branch because he viewed the two as indistinguishable in practice.

<sup>24</sup> I find it striking that the two features Randall draws attention to in the military trial are the same ones Davis singled out in his opinion. Randall’s reading of the trial was clearly colored by the opinion.

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difference in scope is related to a difference in methodology. Whereas Randall strives to identify a coherent constitutional theory that binds all of Lincoln's actions, Neely describes his endeavor as "constitutional history from the bottom up."<sup>25</sup> His interest is in the actual impact of administration policy, the way executive decrees played out on the ground and were felt by citizens. Concretely, Neely sets out in *The Fate of Liberty* to answer the questions of how common military arrests and trials really were, who were the targets, and of what crime they were accused. Because his interest is in the practical, when he turns to *Ex parte Milligan* he evaluates it in terms of its real-world impact on the practice of arbitrary arrests and military trial.

After thoroughly examining the abundant available prison and trial records, he concludes that arrests by the military truly were ubiquitous, with the generally accepted figure of 13,535 political arrests by the War Department actually an underestimate.<sup>26</sup> Neely claims, however, that the identity of the prisoners and nature of their crimes are more important to understanding the arbitrary arrest policy's implementation and impact than a hard number. A majority of the non-military persons imprisoned by the Union army were Confederate citizens, and the remainder overwhelmingly came from Border States, particularly Kentucky and Missouri, which experienced constant guerrilla warfare. As to the nature of their crimes, the most common charges were pseudo-military offenses, like bridge-burning and cutting of telegraph lines. While arrests for offensive speech and disloyal sentiments existed, they were relatively rare. To Neely, these discoveries explain

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<sup>25</sup> Neely, xi.

<sup>26</sup> Colonel F.C. Ainsworth, then head of the War Department's Record and Pension Office, posited this number in 1897. At the request of James Ford Rhodes, that era's premier Civil War historian, Ainsworth sifted through all the records his Office held, but he warned at the time that the records were fragmentary and no count could be precise. Nonetheless, until Neely, his was the only attempt to use the extant records to pin down the number of arrests, and so it has been quoted whenever anyone wants a figure. Neely, 115.

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a crucial question surrounding the administration's policy: why arbitrary arrests never caused public outrage on the level that conscription did. Despite the volume of rhetoric from Democratic politicians and press charging a massive military assault on free speech, in their actual experience, arrests were mostly limited to people for whom loyal Northern citizens had no sympathy. Moreover, the neat categories of political prisoner as opposed to combatant, of martial law versus civil law, were regularly breached by the realities of the war.

Regarding Milligan, Neely provides empirical justification for Randall's claim that his case was extraordinary. Along with Vallandigham's it was a favorite object of rhetoric, used in polemical, anti-administration tomes like John A. Marshall's *American Bastille* to present a general picture of military arrests that actually represented only a fringe of the truth. In his chapter on the *Milligan* decision, however, Neely hones in on a different aspect of the case, one that is quite similar to Burgess' outlook. The noteworthy feature of *Ex parte Milligan*, he believes, is the fact that from a practical standpoint, it was irrelevant. Trials by military commission continued unabated in the decision's immediate aftermath, despite the Court's ruling against them. In a brief survey of historiography on the case, Neely points out a similar dichotomy to the one I noted previously, between the scholarly treatment of the Milligan decision by historians, and its role in formulating actual law. He cites the treatment of the case, not by legal scholars like Burgess, but by judges who make law in practice. While praised in theoretical discussions as a landmark case for liberty, Milligan has been ignored, Neely asserts, by subsequent courts and politicians. The reason for this split, Neely claims, is that the distinctions Court drew—between military commissions and military arrests, between all-

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out martial law and the mere suspension of habeas corpus—were not so clear to Lincoln or to the people who conducted the trial. Nor would they be clear, Neely opines, to future generations entangled in messy wartime situations. “Historians,” he writes, “not realizing how muddled the law was before 1866, have repeatedly misinterpreted the constitutional history of the Civil War mainly by making the choices seem clearer than they appeared to the protagonists at the time.”<sup>27</sup> The Court’s neat categories created a fine doctrine that could not be applied. *Milligan* exemplifies the obscurity, the fuzziness, the lack of clear boundaries that Neely holds responsible for much of the imprecision and overly ideologically motivated readings of the whole arbitrary arrest issue. The way historians have treated the case, in spite of its lack of value as a legal precedent, indicates this tendency to wax poetic on Civil War civil liberties without a great deal of grounding.<sup>28</sup>

Frank Klement is the leading example of a final type of scholar with an interest in *Milligan*. These are historians whose focus is the political history of Indiana or of the Northwestern region. Clearly, they approach the case from a different angle, concentrating on its early history and its local aspects more than its national impact.

Klement’s specialty is in resistance movements to Lincoln in the Northwest. He has dedicated his career to proving that Democrats in that region, even members of the

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<sup>27</sup> Neely, 184.

<sup>28</sup> A serious flaw in Neely’s claim that *Milligan* had no impact is the fact that the military commissions that took place after the case was decided were almost all in the South, which did not fall under *Milligan*’s holding. Those commissions that were in Northern territory seem, from Neely’s citations, to have been trials that are very dubiously categorized as civilian or political, such as a trial of men accused of being active guerrillas in Kentucky. As far as genuinely political cases in the North were concerned, anecdotal evidence at least indicates that *Milligan* did have an impact. In response to the decision, President Johnson released one Dr. James L. Watson, a Virginian who shot and killed a black man for accidentally driving into his wife’s carriage. Watson was tried before a military commission after a civil court dropped the charges against him. Fairman, 214. In his diary, Secretary of the Navy Gideon Welles recounted that he secured the release of Raphael Semmes, a naval officer accused of treason, on the same day *Milligan* was delivered. Gideon Welles, *Diary of Gideon Welles*, (Boston: Houghton Mifflin Company, 1911), 476-77. Of course, Neely believes that cases of sketchy definition make up the bulk of the arbitrary arrests, but I think he may fall prey to overstating definitional ambiguity. He may be grouping a large number of trials and arrests in the civilian category which are fairly clearly military in nature.

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so-called “Copperhead” wing of the party, were loyal to the government and never tried to undermine the war effort.<sup>29</sup> When he takes on *Milligan*, he does so with this framework already established. The first part of his essay, “The Indianapolis Treason Trials and *Ex parte Milligan*,” is devoted to the context in which the military tribunal took place. In Klement’s account of the background of the trial, the Order of the Sons of Liberty was a fantasy of Dodd’s and existed as a “paper organization” only, while the Republican press twisted the sketchy facts it picked up into visions of a vast conspiracy. He emphasizes repeatedly that the arrests and trials of OSL leaders were carried out at Governor Morton’s urging, and were one hundred percent an election-season political ploy. The commission convicted Milligan and company in spite of the fact that, in his estimation, the government failed to prove either of the essential points of its case—that the OSL was actually a conspiracy, or that the planned treachery was translated into actions—a constitutional requirement for a treason conviction.

When he turns to *Ex parte Milligan*, Klement reads the Supreme Court decision into his story about partisanship in Indiana. Justice Davis’ decision, he claims, “in effect, repudiated Governor Morton’s practice of using military commissions to achieve political ends.” Klement goes on to present Davis’ assertion of the principle that “A citizen, not connected with the military service, and resident in a State where the Courts are all open...cannot...be tried, convicted or sentenced otherwise than by the ordinary courts of law” as a reprimand to the men who set up such trials—i.e., Morton and Hovey. After reaffirming the classical view that the case represented a “notable victory for human rights,” he closes his essay with the assertion that the case “has stood the test of time.” The truth of this claim is demonstrated by a quote from Professor Louis Smith, who noted

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<sup>29</sup> He elaborates this thesis in his most famous work, *The Copperheads of the Middle West*.

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that “The Supreme Court has never specifically disavowed the restrictive principle contained in the Milligan decision.”

Setting aside the fact that his portrayal of the situation in Indiana, specifically the notion that the OSL did not really exist, flies in the face of considerable evidence, Klement’s use of *Ex parte Milligan* takes the decision grossly out of context.<sup>30</sup> He is attentive to the background of the case, which I think is important and is vastly overlooked in most treatments of the Supreme Court decision, but he reads his own agenda into Justice Davis’ opinion. Davis was not speaking to Governor Morton, nor was he interested in Indiana politics. It is actually striking, considering the heavily political nature of the Indianapolis trial that spawned the case (on that score Klement is correct), that neither of the Court’s opinions makes any mention of the danger of military tribunals being used for political ends. Davis could have seized the opportunity to decry actions like Morton’s, but his purpose was to use lofty constitutionalism to curb executive war powers, not to censure the wartime behavior of mid-Western party squabblers. Gilbert Tredway is on target when he notes that “Perhaps to minimize political damage to the Republican Party, the decision did not deal with the fairness of the trial. In fact, it implied strongly that the prisoners deserved the fate that nearly overtook them.”<sup>31</sup> This is an accurate reading of the decision, and points to exactly the opposite from what Klement tries to claim. Davis’ decision was *not* a censure of Morton or Hovey. If military tribunals were ever appropriate for civilians, Davis conveyed the impression that Milligan and Bowles and Horsey would be prime material. The Supreme Court deemed that they were never acceptable, but at the time that Hovey installed his commission he was acting in

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<sup>30</sup> Tredway, 280-81, gives a thorough accounting of the evidence that contradicts Klement’s claims.

<sup>31</sup> Tredway, 253.

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accordance with, albeit not at the express behest of, the President's orders. It was the executive policy that Davis excoriated, not the practitioners in Milligan's particular case. Klement is guilty of projecting his historical agenda relating to the Indianapolis treason trials onto *Ex parte Milligan*

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*Ex parte Milligan* must be read on its own terms, the way Justice Davis and his brother justices intended it to be read. That said, I contend that knowing the story that brought the case before the Supreme Court enables a far more critical reading of the decision. Davis had a preexisting agenda when he crossed paths with Milligan—he wanted to declare military commissions an unconstitutional means of trying civilians in wartime. In a private letter written while the case was being argued before the Court, he wrote that “The Military Commission is on trial,” and expressed anxiety that the arguments were “not presented in such a way as to bring the question squarely before the court for decision.”<sup>32</sup> When it came before him on circuit, Davis had grasped *Milligan* as a test case, and as he listened to the case play out before the Supreme Court, he was concerned that it conform to his goal of passing judgment on the principle of military trials. Striving in his opinion to lay out a lofty principle for all time, Davis obscured anything that was nuanced or questionable in circumstances of the case, defining it in terms of strict categories. Details on the origin of the case blur the boundaries of these black-and-white distinctions, making Justice Davis' priorities in his decision far clearer. He also ignored particularities of the case—since he wanted to make an unequivocal statement about the unjustness of military tribunals per se, he completely steered away

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<sup>32</sup> Davis to William Orme, quoted in King, 253.

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from questioning the procedures of or impetuses behind Milligan's particular commission. That Davis had his agenda in place from the outset is really only clear when his famous opinion is viewed as the end of a longer story.

Reading Justice Davis' opinion with the tumult of Civil War era Indiana in mind, I realize how problematic the starkly defined tests that Davis set out for the applicability of martial law really were. In a strict sense, it was true that during Milligan's arrest and trial Indiana was not a battleground, and that her courts were open and capable of administering justice. Yet as they sent out the militia to defend the state's borders in the summer of 1862 Governor Morton and General Carrington certainly felt that their state was the site of actual fighting. In the summer of '64, the fact that the raid they anticipated never materialized did not diminish their sense, during those long, tense months, that bloodshed was at their doorstep. It was easy for Justice Davis to assert that "Martial law cannot arise from a threatened invasion" but only from "actual and present" necessity, but for army officers concerned about keeping peace in their command, the distinction between threat and reality was practically meaningless.

Meanwhile, at various times during the war, Morton and Carrington both had reason to doubt the loyalty of the Indiana courts. In the spring of 1863, while fears of Morgan's invasion were nearing their peak, a Federal judge in neighboring Illinois refused to release two of Carrington's officers who were arrested for kidnapping while rounding up deserters. Carrington regarded this act as a flagrant attempt by a disloyal judge to interfere with the army's operation, and nearly hauled the Judge, Charles Constable, before a military commission.<sup>33</sup> Meanwhile, the number one OSL man in the state of Kentucky was a Federal judge by the name of Bullitt, and within Indiana herself,

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<sup>33</sup> "The Constable Case," Carrington Papers.

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the Chief Justice of the state Supreme Court, Samuel Perkins, was perceived by the Republican establishment as openly hostile to administration policy and was regularly excoriated in the Republican press.<sup>34</sup> Thus Chief Justice's assurance that "in Indiana the judges and officers of the courts were loyal to the government" masked a reality that was far more complicated. When he ordered Milligan's arrest, General Hovey would almost certainly have claimed that there was at least some chance that in Indiana the judges and marshals *were* "in active sympathy with the rebels, and courts their most efficient allies."<sup>35</sup> An objective observer, trying to decide where Burnett's military commission in Indianapolis fell within Davis' framework, could reasonably reach either conclusion. Considering that even in the very context they ostensibly described, Davis' guidelines were uncertain, the difficulty that Fairman, Neely, and Burgess recognized in applying the tests to future situations was eminently predictable.

In addition to simplifying the overall situation in Indiana, Davis also glossed over problems surrounding the trial itself. Because of his involvement at the circuit level, he was in a position, more than the other justices, to know that the defendants' guilt was very much in question. Yet for the sake of his argument, he took it as a given that Milligan was guilty of horrible crimes and deserved his sentence. Questioning Milligan's guilt would have diluted the Justice's purposes, since the constitutional principle he wanted to establish was far more powerful when it stated that military tribunals were invalid even for the most heinous of criminals. Likewise, in contrast to Klement's interpretation, Davis actually turned a blind eye to the way the military trial had been used as a political spectacle, a tool for partisan attacks. He could have pointed to the

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<sup>34</sup> Tredway, 76-77. Stamp, *Indiana Politics*, 240.

<sup>35</sup> Ex parte Milligan, 103.

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exploitation of military justice for political ends as support for his contention that military commissions were unjust, but Davis did not want his opinion to be about the missteps of individuals in Indiana. He wanted it to be about constitutional guarantees, unsullied by messy, local issues of partisanship and abuse of power.

Davis did not intend or envision his opinion as a censure of Governor Morton and General Hovey in particular. Nor was it received as such in Indiana, and this fact lies at the heart of understanding how the Supreme Court decision functioned in the end of a story that belonged to that state. What strikes me as remarkable is how little effect *Ex parte Milligan* had in Indiana. Far from reprimanding Governor Morton, to the extent that the decision affected him at all, it was a vindication, since his efforts on the defendants' behalf in 1865 had been much more visible than his role in their arrests. But it is not only Morton whom the decision left unscathed. The strongly worded condemnation by the Supreme Court of the policy they had executed created absolutely no backlash for any of the Treason Trials' major players. Governor Morton served out his term and was then elected to the Senate, where he served until his death. Upon retirement from the army in 1865, General Hovey secured an ambassadorship to Peru. Long after the war, he followed in Morton's footsteps and served part of a term as Governor of Indiana, until he died in office in 1891.<sup>36</sup> Major Burnett, the Judge Advocate, was brevetted a Brigadier General in 1865, and after the war spent many successful years as a U.S. Attorney in New York.<sup>37</sup> Of all the people who played leading roles in the drama of dismantling the OSL, only Carrington's career was less than sterling, and he was the one who had tried to prevent

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<sup>36</sup> Biographical timeline in Alvin P. Hovey MSS, Lilly Library.

<sup>37</sup> *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975*.

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use of a military commission!<sup>38</sup>

In his account of the backdrop to *Milligan*, Fairman called Morton's push for the military trial "a capital mistake," because eight months later the Governor implored Johnson to commute the sentences that commission had rendered. To call Morton's original decision a mistake, however, misses a crucial point. By the time the execution date neared, Morton and Hovey had accomplished all the goals they had envisioned for the military trial. The election was won, the Democrats were shamed, and the authorities had frightened every last impulse to plot against the government out of even the most fanatical opponents of the war. Neither the commutation of the prisoners' sentences nor the Supreme Court's condemnation of the military tribunal in any way diminished those victories. *Milligan's* lack of repercussions brings home the fact that the Supreme Court decision was in a certain sense a totally separate entity from the story I told in the first three chapters.

What *Ex parte Milligan* did do in Indiana was quietly shut the door on the tide of paranoia and vengeance, which had started to recede almost as soon as the military trial ended. Viewed as a whole, *Milligan's* story portrays an arc, which pushes at the bounds of power authorities can exert in chaotic times. Without fanfare, the Supreme Court ruling officially ended the unusual exercises of power that the war had brought on, but practically, the era of military muscling was already over. *Milligan's* saga in Indiana shows that a key to successfully harnessing power is to keep an ear finely tuned to the mood of the people, and to make sure not to push too hard. If they had executed *Milligan*

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<sup>38</sup> Carrington remained in the army after the war, and was assigned to remote Fort Phil Kearny, deep in Indian country. His service there was marred when Indians massacred eighty men under the command of one of his subordinates. Whether or not Carrington was directly responsible was not clear, but the incident ruined his career—shortly after he resigned from the army and spent the next twenty years trying to rehabilitate his reputation. Tredway, 256-57.

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and the others, Morton, Hovey, and Burnett would no doubt have ended up the objects of public wrath and revulsion. But because they avoided crossing that threshold, in Indiana the case ended with passions subsiding and the entire affair melting away, leaving *Ex parte Milligan* to live its own life as an American icon.

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## EPILOGUE

Nine days after the Court handed down its decision, Lambdin Milligan was back in Huntington. The city received him like a conquering hero—one local newspaper compared the event to “the ovation of welcome which greeted the immortal Demosthenes upon his return to Piraeus, from his exile at Megara.”<sup>1</sup> Though the classical analogy was perhaps slightly overenthusiastic, the day-long celebration did include cannon blasts, marching bands, and a fawning address from the mayor. Never a hearty man and especially feeble after his long incarceration, Milligan delivered a short speech, in which, after thanking the city for its generous welcome, he made sure to interpret the celebration as an affirmation of his innocence and of his enemies’ malignity. His neighbors’ outpouring, he proclaimed, was “the untutored expression of your conviction that I never wronged my country or my fellow-man,” and that, more importantly, “nor did those who clamored loudest for my oppression ever suspect me of any wrong.”<sup>2</sup> On that self-righteous note, Milligan retired to his home.

After the fuss died down and Milligan regained his strength, he returned to his legal practice. As a formality, an Indianapolis grand jury indicted him on the same charges as had the military commission, but the case was quickly dismissed, marking the end of his formal ordeal.<sup>3</sup> The saga closed the door on Milligan’s political aspirations, but it did not make him quiet, and it certainly did not dull his scathing and intractable moral convictions. Nor did vindication by the Supreme Court soften his bitterness. Shortly after his release Milligan publicly condemned the slain President Lincoln, stricken Governor

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<sup>1</sup> Unattributed newspaper account, recorded in *American Bastille*, 87.

<sup>2</sup> *Ibid.*, 90.

<sup>3</sup> Florence Grayston, “Lambdin P. Milligan—A Knight of the Golden Circle,” *Indiana Magazine of History*, 43 (December 1947), 391.

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Morton (he had suffered a paralytic stroke in the summer of 1865), and deceased Governor Brough of Ohio, proclaiming that their fates were retribution for their iniquitous acts in his and similar cases. Regarding Morton he declared, “There yet remains one of the Godless trio, but the plague is on its westward march, his limbs are smote with the blight of crime and tremble under their load of corruption, but I PRAY that he may live long enough to realize... THAT GOD IS JUST.”<sup>4</sup> Notwithstanding this consuming passion for divine retribution, Milligan managed to move on with his life sufficiently to rebuild his estate, so that in 1893 he was able to retire to a “comfortable fortune.”<sup>5</sup>

In an attempt to secure retribution through human channels, Milligan brought suit in 1868 against a raft of men involved in his arrest, including General Hovey and the twelve members of the military commission. By the time the suit made it to trial three years had passed, but that did not stop Thomas Hendricks, the former Indiana Senator who now represented Milligan, from rehashing every detail of the original trial. Before the civil court, he exposed the weakness of the government’s case, and for good measure, added a character assassination of Carrington, whom he accused of staying in the rear throughout the war because of cowardice. The Indianapolis jury found in Milligan’s favor and awarded him the maximum damages allowed under the law—five dollars.<sup>6</sup>

With a legal, if not a pecuniary, victory under his belt, Lambdin Milligan died in Huntington on December 21, 1899.<sup>7</sup>

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<sup>4</sup> Huntington *Democrat*, May 26, 1866, quoted in Tredway, 254.

<sup>5</sup> Tredway, 254.

<sup>6</sup> A state Indemnity Act had enacted a statute of limitations which capped the damages in cases like Milligan’s. Tredway, 261.

<sup>7</sup> Grayston, 391.

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## CONCLUSION

Beginning all the way back in August, when I settled on a thesis topic, whenever I told anyone that I was writing about civilians tried in military courts during the Civil War, I invariably got the same reaction. “That’s timely,” people would remark, and go on to express some sort of opinion about the current administration’s post-September 11<sup>th</sup> policies on detainment of civilian prisoners without trial. I would smile politely and reply that current events were really not my interest, that no two sets of events are the same, and as tactfully as I could assert the dangers of applying historical analogies to public policy. If anything, the process of researching and writing this thesis has reinforced my stance that the “lessons of history” are too particular, too tied to a specific time and place and set of circumstances, to serve as instructions in matters of the present. And yet, as I reflect after all these months about the role of the Milligan case in the society of its time and place, I find myself drawn to the very comparison I eschewed for so long.

What has lodged itself in my mind is not an analogy between Milligan’s case and Bush Administration policies, but a key contrast between the history I have laid out in the previous chapters and the events unfolding today, which I believe provides insight into both situations. In my mind, the crucial difference between the two episodes is *transparency*. Infringements of civil liberties during the Civil War were extreme, ubiquitous—and overt. When Lincoln issued a general proclamation declaring the writ of habeas corpus suspended and martial law in force, there was no sugar-coating or mistaking the fact that extraordinary forces were in play. In the years since 9/11, President Bush’s administration, on the other hand, has been guarded about its deviations from normal processes of law, maintaining a shroud of secrecy whenever possible.

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In the months immediately following the attack on the Twin Towers, the Justice Department rounded up large numbers of people, almost all of them Arab men, and held them, without charge, as material witnesses. Because the arrestees were aliens, the government investigated them through the Immigration and Naturalization department, and controversially interpreted the law to enable the INS to hold its hearings in secret, with no press access, a practice forbidden in normal criminal hearings. The administration removed other suspected terrorists from the regular criminal justice system by defining them as “enemy combatants” and then placing enemy combatants under the same rubric as spies. Spies do not receive the same due process or range of protections in investigations as do other criminals, and are tried by the Foreign Intelligence Surveillance Court, whose proceedings are, once again, secret.

My appreciation of the contrast between the Bush Administration’s methods of dealing with internal threats to the government and the steps taken in the Milligan case to counter disloyalty grew out of points Kathleen Sullivan, Dean of the Stanford Law School, made in a lecture she delivered at Princeton. In her talk on “The Constitution and Emergency,” Professor Sullivan identified secret proceedings as one of the most disturbing elements of the Bush Administration’s domestic war on terror. Unlike Lincoln’s Civil War policies, what we face today is “not the danger of a candidly discontinuous constitution in which we know that bets are off.” Rather, “it’s the danger of an insidiously, quietly, incrementally discontinuous Constitution, the erosion through small steps, a thousand cuts, rather than wholesale departures.” Secretive pseudo-suspension of the Constitution, Sullivan suggested, is especially dangerous “because it’s hard to get worked up about obscure provisions in the U.S. Patriot Act...the invisibility

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of the procedures makes it hard for political opposition develop. They're less visible and therefore less incendiary."<sup>1</sup> As it inhibits public scrutiny, secrecy also accompanies a tendency to smuggle extraordinary practices into discretionary areas of the existing judicial system in such a way that they can become entrenched. This is especially true, Sullivan noted, in an emergency like the war on terror which is not clearly bounded. It is unlikely that we will see a VT day along the lines of VE or VJ days—and so there is no obvious cutoff point for the suspensions of normal procedure.

Constitutional suspension in the Civil War did have a clean shutoff, a “toggle switch” in Sullivan’s words, and that, of course, was *Ex parte Milligan*. From beginning to end, the Milligan case epitomized the opposite of today’s secretive maneuverings. Far from the authorities trying to keep its proceedings under wraps, publicity was a defining feature of the entire case. The military trial in Indianapolis was open to the public, so ordinary residents of the city could and did see the commission in action. Meanwhile, the courtroom audience was but a tiny fraction of the people who followed the case, since transcripts of the trial were printed almost daily in the Indianapolis *Journal*.<sup>2</sup> This high level of exposure was not incidental; it was essential to the trial’s ability to fulfill the heavily politicized goals of its instigators and executors. Once the channel was open, it presented the defense with the opportunity to get its message out as well.

While it was intended to and did influence public opinion, the Milligan story was also driven throughout by the voice of the people. In the early phase, Morton and Carrington’s dispute over the best means of trying Milligan hinged on their predictions of the public’s reaction to a show of force. Once the trial commenced, Morton, Hovey and

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<sup>1</sup> Kathleen Sullivan, “The Constitution and Emergencies,” Address delivered at Princeton University, February 9, 2005.

<sup>2</sup> Indianapolis *Daily Journal*, October 22, 1864-December 1, 1864.

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Burnett pursued Milligan's execution as long as they thought the people of Indiana lusted for blood—but when he sensed that the general mood had changed, Morton helped steer the case toward clemency. Milligan's odyssey served as a barometer of the public's toleration and support for extraordinary executive and military power. Inherent in the aspect of the story that is the most unsettling—the Indiana authorities' forceful exploitation of a few individuals' lives to score political points—is an ingredient that helped to restore the regular legal system, and to save Milligan's life in the process. Only by unfolding under blazing lights could the case work as a political wedge. Yet that very openness made possible the public outcry that signaled that the time of military free reign needed to end.

If Milligan holds any lesson for today it is this: that public opinion is the bottom line when it comes to emergency suspension of civil liberties no less than in any issue that arises in our democracy. Secrecy and obfuscation are the most dangerous qualities of Bush's policies, far more problematic than any specific measures the administration and or Congress may take, because they interfere with the public's ability to assess its government. Extralegal detention of "enemy combatants" and other incursions on civil liberties may be warranted as part of the war on terror, or they may not be. What is essential, however, is that the American people not forego their role as overseers and final arbiters of the kind of treatment of the Constitution that they will tolerate. Certainly the courts play a major role in establishing limits, as *Ex parte Milligan* demonstrates. But the Constitution belongs to the people, and we are ultimately only as safe as we make ourselves.

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## BIBLIOGRAPHY

### PRIMARY SOURCES

#### Indiana State Government Records, Unpublished

Carrington Papers, microfilm, Indiana State Archives.

Correspondence of Governor Oliver P. Morton and Aides, microfilm, Indiana State Archives.

#### Manuscripts

John Hanna MSS, Lilly Library, Indiana University.

Alvin P. Hovey MSS, Lilly Library, Indiana University.

Henry Lane MSS, Lilly Library, Indiana University.

#### Government Records, Published

*Congressional Globe*. Washington: Blair & Rives, 1834-1873.

*Indiana in the War of the Rebellion: Official Report of W.H.H. Terrell, Adjutant General*. 8 vols. Indianapolis: Douglass & Conner, 1869.

*The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*. 4 series, 70 vols. Washington, D.C.: Government Printing Office, 1880-1901.

#### Newspapers

Indianapolis *Daily Journal*, 1861-1864, Indiana State Library.

Indianapolis *Daily Sentinel* 1861-1864, Indiana State Library.

#### Books and Pamphlets

Basler, Roy, ed. *The Collected Works of Abraham Lincoln*. 11 vols. New Brunswick, N.J.: Rutgers University Press, 1953.

Bates, Edward. *The Diary of Edward Bates, 1859-1866*. Edited by Howard K. Beale. Washington: Government Printing Office, 1930.

Binney, Horace. *The Privilege of the Writ of Habeas Corpus Under the Constitution*. Philadelphia: T. B. Pugh, 1862.

Dewey, Donald O., ed. "Hoosier Justice: The Journal of David McDonald, 1864-1868." *Indiana Magazine of History* 62 (September, 1966), 175-232.

Greenleaf, Simon. *A Treatise on the Laws of Legal Evidence*. 3 vols. Boston: Little, Brown and Company, 1853.

Klaus, Samuel. *The Milligan Case*. New York: Da Capo Press, 1970.

Herndon, William H., and Jesse W. Weik. *Herndon's Lincoln: The True Story of a Great Life*. Springfield, I.L.: The Herndon's Lincoln Publishing Company, 1888.

Holt, Joseph. *Report of the Judge Advocate General on the "Order of American Knights," or "Sons of Liberty": A Western Conspiracy in Aid of the Southern Rebellion*. Washington: Government Printing Office, 1864.

Lieber, Francis. *Instructions for the Government of Armies of the United States in the Field*. New York: D. Van Nostrand, 1863.

Lieber, Francis. *The Life and Letters of Francis Lieber*. Boston: James R. Osgood and Company,

1882.

Nicolay, John G., and John Hay. *Abraham Lincoln: A History*. 10 vols. New York: The Century Co., 1890.

Pitman, Benn, ed. *The Trials for Treason at Indianapolis*. Cincinnati: Moore, Wilstach & Baldwin, 1865.

Stidger, Felix G. *Treason History of the Order of the Sons of Liberty, Formerly Circle of Honor, Succeeded by Knights of the Golden Circle, Afterward Order of American Knights*. Published by the Author, 1903.

Welles, Gideon. *Diary of Gideon Welles*. Boston: Houghton Mifflin Company, 1911.

### Legal Cases

*Ex parte Merryman*. 17 F. Cas. 144, (1861).

*Ex parte Milligan*, 4 Wall. 2, (1866).

## SECONDARY SOURCES

### Books

*The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975*. Washington: Government Printing Office, 1975.

Bishop, Joseph W. *Justice Under Fire: A Study of Military Law*. New York: Charterhouse, 1974.

Brigance, William Norwood. *Jeremiah Sullivan Black: A Defender of the Constitution and the Ten Commandments*. Philadelphia: University of Pennsylvania Press, 1934.

Burgess, John W. *The Civil War and the Constitution 1859-1865*. New York: Charles Scribner's Sons, 1901.

Burgess, John W. *Reconstruction and the Constitution, 1866-1876*. New York: Charles Scribner's Sons, 1902.

Duker, William F. *A Constitutional History of Habeas Corpus*. Westport, C.T.: Greenwood Press, 1980.

Fairman, Charles. *History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-1888*. New York: Macmillan, 1971.

Farber, Daniel. *Lincoln's Constitution*. Chicago: University of Chicago Press, 2003.

Fisher, Sidney George. *The Trial of the Constitution*. New York: Da Capo Press, 1972.

Foulke, William Dudley. *Life of Oliver P. Morton*. Indianapolis: The Bowen-Merrill Company, 1899.

Harley, Lewis R. *Francis Lieber: His Life and Political Philosophy*. New York: The Columbia University Press, 1899.

Hyman, Harold M., and William M. Wiecek. *Equal Justice Under Law: Constitutional Development, 1835-1875*. New York: Harper and Row, 1982.

King, Willard. *Lincoln's Manager: David Davis*. Cambridge, Massachusetts: Harvard University Press, 1960.

Keller, Morton. *Affairs of State: Public Life in Late Nineteenth Century America*. Cambridge, M.A.: The Belknap Press of Harvard University, 1977.

Kelley, Darwin. *Milligan's Fight Against Lincoln*. New York: Exposition Press, 1973.

Klement, Frank. *The Copperheads in the Middle-West*. Chicago: University of Chicago Press, 1960.

Klement, Frank. "The Indianapolis Treason Trials and *Ex parte Milligan*." In *American Political*

- Trials*, edited by Michal Belknap. Westport, C.T.: Greenwood Press, 1994.
- Klement, Frank. *The Limits of Dissent*. Lexington, KY: The University Press of Kentucky, 1970.
- Kutler, Stanley. *Judicial Power and Reconstruction Politics*. Chicago: University of Chicago Press, 1968.
- Lurie, Jonathan. *Arming Military Justice: The Origins of the United States Court of Military Appeals*. Princeton: Princeton University Press, 1992.
- Marshall, John A. *American Bastille*. Philadelphia: T. W. Hartley & Co., 1881.
- McPherson, James. *Battle Cry of Freedom: The Civil War Era*. Oxford: Oxford University Press, 1988.
- Neely, Marc. *The Fate of Liberty: Abraham Lincoln and Civil Liberties*. Oxford: Oxford University Press, 1991.
- Nevins, Alan. "The Case of the Copperhead Conspirator." In *Quarrels That Have Shaped the Constitution*, edited by John A. Garraty. New York: Harper & Row, Publishers, 1962.
- Randall, James G. *Constitutional Problems Under Lincoln*. Urbana, I.L.: University of Illinois Press, 1951.
- Stampp, Kenneth. *Indiana Politics During the Civil War*. Indianapolis: Indiana Historical Bureau, 1949.
- Tredway, Gilbert. *Democratic Opposition to the Lincoln Administration in Indiana*. Indianapolis: Indiana Historical Bureau, 1973.
- Trefousse, Hans L. *Ben Butler: The South Called Him BEAST!* New York: Twayne Publishers, 1957.
- Warren, Charles. *The Supreme Court in United States History*. Boston: Little, Brown, and Company, 1926.

#### Articles

- Fesler, Mayo. "Secret Political Societies in the North During the Civil War." *Indiana Magazine of History* 14 (September 1918), 183-286.
- Grayston, Florence. "Lambdin P. Milligan—A Knight of the Golden Circle." *Indiana Magazine of History* 43 (December 1947), 379-91.
- Stampp, Kenneth. "The Milligan Case and the Election of 1864 in Indiana." *The Mississippi Valley Historical Review* 31.1 (June 1944), 41-58.

#### Electronic Resources

- Global Security.org. "The Role of the Judge Advocate."  
<http://www.globalsecurity.org/military/library/policy/army/fm/27-100/chap1.htm#1.2.5>

#### Public Addresses

- McPherson, James. "2004 Baccalaureate Address." Delivered at Princeton University, May 30, 2004.
- Sullivan, Kathleen. "The Constitution and Emergencies." Delivered at Princeton University, February 9, 2005.