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Legal History

Nobody's Perfect: Lincoln and Civil Liberties During the Civil War

By C. Evan Stewart

As Mark Neely so aptly put it in his Pulitzer Prize winning book, "The Fate of Liberty: Abraham Lincoln and Civil Liberties" (Oxford Univ. Press 1991): "War and its effect on civil liberties remain a frightening unknown." The presidency of Lincoln is, of course, justly famous for many things: e.g., saving the Union, emancipating the slaves, etc. Less well known (and certainly not well celebrated) is his administration's track record vis-a-vis constitutional rights during the prosecution of the Civil War. This article highlights two judicial decisions, one by the Chief Justice of the United States and another by an Associate Justice of the Supreme Court, which serve as bookends to help better understand Lincoln's record.

Ex Parte Merryman

Before the Civil War started in earnest, the most dangerous state in the Union was clearly Maryland. Lincoln, faced with numerous well-documented assassination plots awaiting him there on his 1861 trip from Illinois to Washington, had to take a secret train through Baltimore to ensure his safe arrival. Maryland, nearly a border state surrounding the capital, was also a slave state; Lincoln had received only 2,294 votes there in the 1860 election and many of its citizens were decidedly not in favor of the incoming administration (and, conversely, more sympathetic to the deep-South states that had already seceded).

After Fort Sumter was fired upon in Charleston Harbor and shortly thereafter had surrendered, Lincoln on April 15, 1861 called for the states to send 75,000 militiamen to Washington to help suppress the rebellion. Unfortunately, the only railroad access to the District of Columbia from the North came through Maryland.

On April 19, a Baltimore mob attacked the Sixth Massachusetts Regiment as it attempted to get to the capital; many deaths and injuries resulted. As a result, Maryland's governor and other state officials implored the president not to have any more troops sent through the state. Maryland citizens thereafter destroyed the railroad bridges in Baltimore and cut the city's telegraph lines linking it (and the District of Columbia) to the North.

On April 26, the Maryland legislature met to consider secession. The following day, Lincoln authorized the suspension of the writ of habeas corpus for the area between Philadelphia and Washington. The president's order was directed to military authorities only, giving them the right to arrest people aiding the rebels or threatening to overthrow the government (with any arrestee not eligible for release under a writ of habeas corpus).

On May 25, John Merryman was arrested under an order issued by Brigadier General William Hugh Klein. Merryman, a lieutenant in a secessionist drill company in Cockeysville, Maryland, was accused of destroying railroad bridges and planning to take his company south to join the Confederate army. Merryman was imprisoned in Fort McHenry, overlooking the Baltimore harbor.

Merryman's lawyers sought out Chief Justice Roger Taney (author of the odious *Dred Scott* decision; *see Federal Bar Council Quarterly*, "The Worst Supreme Court Decision, Ever!," (March/April/May 2016), *available at* https://www.federalbarcouncil.org/FBC/Publications/Quarterly/Federal_Bar_Council_Quarterly___March_April_May_2016.aspx), whose judicial circuit encompassed Maryland; they asked Taney to issue a writ of habeas corpus, which Taney did on May 26. Taney ordered General George Cadwalader, whose jurisdiction covered Fort McHenry, to produce Merryman before Taney in Maryland federal court on May 27. That day, Cadwalader instead sent an Army colonel with a written explanation stating that he

was acting under presidential authority, detailing the facts underlying Merryman's arrest, and asking for an extension to get more guidance from the president.

Taney, upset that there had been "no official notice" given to the courts or the public of the presidential claim of power, refused the request and held Cadwalader in contempt. On May 28, three things happened:

1. Cadwalader received express instructions from the U.S. Army ordering him, under the president's authority, to continue holding Merryman in custody;
2. A U.S. Marshal appeared at Fort McHenry, attempting (unsuccessfully) to execute on Taney's writ of attachment to seize Cadwalader for purposes of enforcing the contempt order; and
3. Taney issued an oral opinion, which ultimately became *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861).

As is clear from the citation, Taney's opinion – issued from his Supreme Court chambers – was filed in federal court in Maryland on June 1, 1861. Nonetheless, legal historians continue to debate its jurisdictional basis – some argue it was merely a circuit court decision, while some argue that Taney, as Chief Justice, was acting pursuant to Section 14 of the Judiciary Act of 1789, which grants certain authority to federal judges.

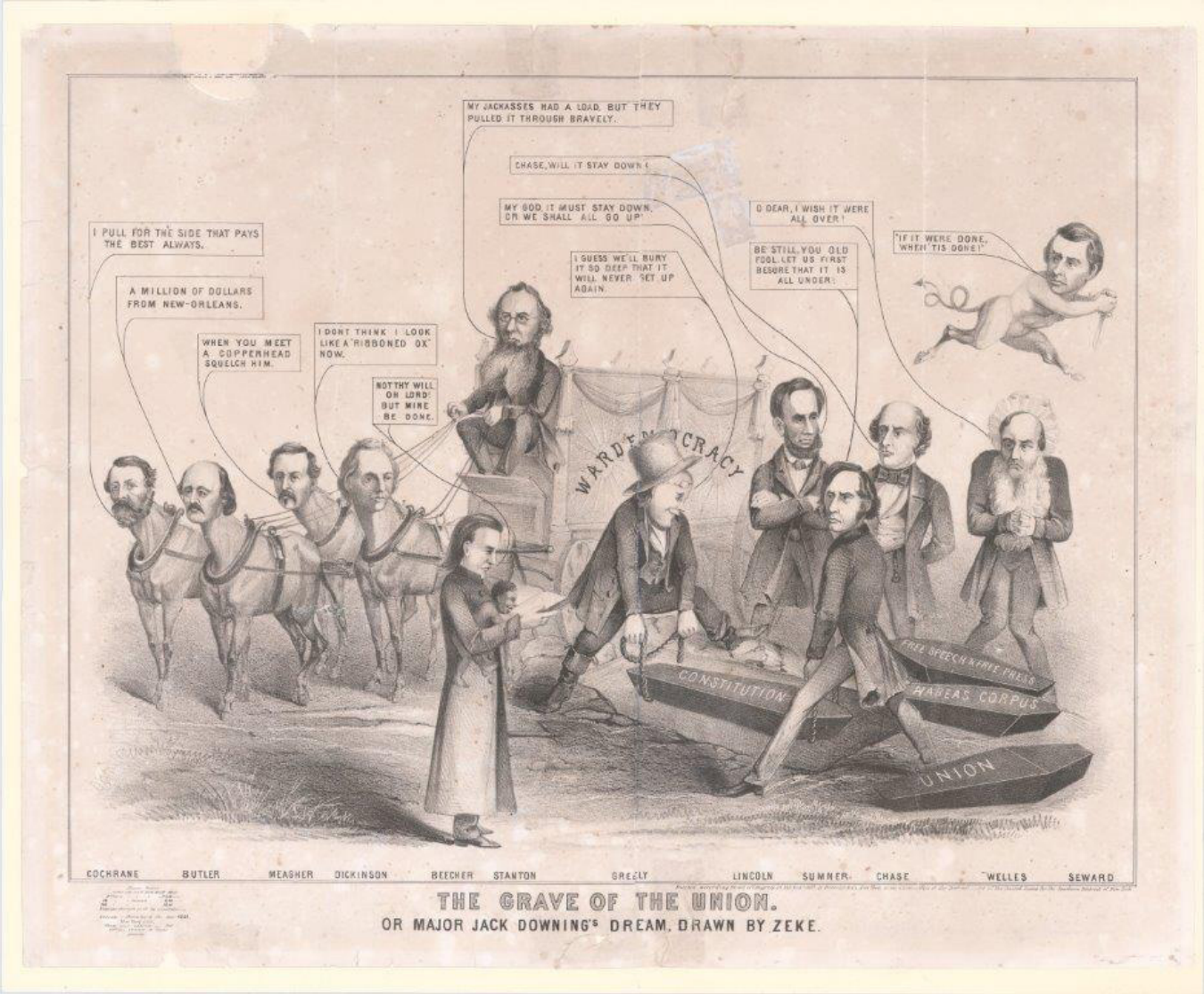
Following up on his oral ruling, Taney wrote that Lincoln had clearly violated the Constitution. More specifically, the problem was that only Congress had suspension authority, pursuant to Article I, Section 9, where the specific language about habeas corpus is located ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."): "This article is devoted to the Legislative Department of the United States, and has not the slightest reference to the Executive Department." Also citing English law (whereby the Parliament, not the King, has that power), Taney further cited Justice Story's "Commentaries," as well as Chief Justice Marshall's opinion in *Ex Parte Bellman*, 8 U.S. 75 (1807) ("If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the Legislature to say so.").

Having found the president in violation of the Constitution, however, Taney did not order Merryman's release; rather, he directed that a copy of his opinion be transmitted to the president, where it would "remain for that high officer, in fulfillment of his constitutional obligation, to 'take care that the laws be faithfully executed,' to determine what response he will take to cause the civil process of the United States to be respected and enforced."

Lincoln, faced with this direct judicial rebuke to his authority and actions, did nothing, at least initially. On May 30, with Merryman remaining in Fort McHenry, Lincoln privately asked Attorney General Edward Bates to prepare "the argument for the suspension of the Habeas Corpus." At the same time, he broadened the suspension to cover the area between New York City and Washington, and placed Secretary of State William Henry Seward in overall charge of the process (under whom it would remain until February 1862, when its oversight shifted to the War Department).

On July 4, with Congress now in session, Lincoln sent on a formal message defending his actions in Congress's absence. Its reasoning was not air-tight and its words and tone were defensive (to say the least). He wrote that "extraordinary measures" had been undertaken post-Sumter, but trusted the Congress would ratify them. Acknowledging that some acts might not have been "strictly legal," Lincoln first assured Congress that while the suspension of habeas corpus "might [be] deem[ed] dangerous to the public safety…[it had] purposely been exercised but very sparingly." (That was not quite true – besides Merryman, among those also arrested and imprisoned at Fort McHenry included the mayor of Baltimore, the entire city council, the police commissioner, and the entire police board.) Responding to Taney's taunt that one charged to "faithfully execute" the laws "should not himself violate them," Lincoln offered the following rhetorical question:

> [A]re all the laws, *but one,* to go unexecuted, and the gov-



Cartoon from the political history collection of the author.

> ernment itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?

Then, having posed that question "directly," Lincoln added (in the passive voice): "But it was not believed that this question was presented. It was not believed that any law was violated." Why not? Because there was obviously a case of rebellion, Congress was absent, the Constitution was silent as to whether Congress or the president could exercise the power, and "it cannot be believed that the framers of the [Constitution] intended that in every case the danger should run its course until Congress could be called together, the very assembling of which might be prevented, as was intended in this case by the rebellion."

In 1861, Congress did not pass legislation ratifying Lincoln's past suppressions or authorizing future ones. Nonetheless, and notwithstanding Lincoln's less than confident arguments for his authority and actions, that did not dissuade him from issuing an-

other order to the military on October 14, 1861. By that order, the area in which the suspension covered now spanned Washington to Bangor, Maine.

On August 8, 1862, the suspension was expanded to cover the entire country. That order (issued by the Secretary of War, pursuant to presidential authority) also added a new provision: those arrested would be "tried before a military commission." Subsequently, on September 24, Lincoln issued a proclamation, publicly announcing the nationwide scope of the suspension.

Congress ultimately got in on the matter with the Habeas Corpus Act of March 3, 1863. That statute gave prospective legal cover, but did not clear up whether the presidential actions prior thereto had always been legal, or were legal now only because of Congressional approval. Later that year came another presidential proclamation, this one issued on September 15. Now the suspension would "continue throughout the duration of the said rebellion."

With that "legal" chapter on civil liberties seemingly closed, attention would now turn to the issue of military commission trials.

First *Vallandigham*

The first prominent military trial of a civilian was that of leading Copperhead politician Clement Vallandigham. Since that episode has already been covered by a prior article (*see Federal Bar Council Quarterly*, "The Trials of Clement Vallandigham" (March/April/May 2015), *available at* https://www.federalbarcouncil.org/FBC/Publications/Quarterly/Federal_Bar_Council_Quarterly_-_March_April_May_2015.aspx?WebsiteKey=da1567e8-b8f4-4228-8b17-e42df31006c8,) it will not be re-covered here. One thing the Vallandigham imbroglio did do was to give Lincoln a chance to present a far more effective public defense of his administration.

In response to what has come to be known as the Corning letter (a June 12, 1863 public letter by a group of Albany Democrats, led by Erastus Corning, head of the New York Central Railroad, condemning the Vallandigham arrest and trial as being "against the spirit of our laws and Constitution…the liberty of speech and of the press, the right of trial by jury, the law of evidence, and the privilege of habeas corpus."), Lincoln published a reply. Because the legislative-executive issue was no longer in play, Lincoln started on stronger footing: obviously the Constitution provided for a suspension of the writ in "cases of Rebellion or Invasion, [when] the public Safety may require it." That the United States faced a rebellion was "clear, flagrant, and gigantic." Then, addressing what had led to Vallandigham's arrest (a vitriolic speech, denouncing the war as an effort to liberate African-Americans and enslave whites), Lincoln – worried about the effect such inflammatory speeches would have on the military draft – wrote that the speaker was arrested "because he was damaging the army, upon the existence, and vigor of which, the life of the nation depends."

Lincoln then posed a rhetorical question that long resonated with the public: "Must I shoot a simple-minded soldier who deserts, while I must not touch a hair of the wily agitator who induces him to desert?" (Thereafter, Vallandigham's well-accepted nickname was the "wily agitator"!)

Milligan

Lambdin P. Milligan, a Huntington, Indiana, lawyer and disappointed office seeker, joined an organization named Sons of Liberty; its avowed purpose was to open Northern prison camps and foment an insurrection in the Midwest. In October 1864, he (and four co-conspirators) were arrested by the U.S. Army. A military trial followed and, on December 10, 1864, Milligan was found guilty and sentenced to death by hanging.

On May 10, 1865, nine days before Milligan's scheduled execution, his lawyer petitioned the federal court in Indianapolis for a writ of habeas corpus. Importantly, part of that petition included the facts that a federal grand jury had met in January 1865 and had refused to indict Milligan.

Two different judges reviewed the Milligan petition: Associate Supreme Court Justice David Davis (whose circuit court jurisdiction included Indiana), and Judge David McDonald, a federal district judge in Indianapolis. Because they reached differ-

ent conclusions – McDonald was against granting the writ and Davis was in favor, the case was certified to be reviewed by the U.S. Supreme Court, with three specific questions to be addressed:

1. Should the writ be issued;
2. Should Milligan be released from custody; and
3. Whether the military commission that conducted Milligan's trial had jurisdiction to do so.

Lengthy arguments before the Court concluded on March 13, 1866. On April 3, Chief Justice Salmon Chase orally ruled that the military commission did not have jurisdiction over Milligan and ordered that a writ be issued for his release. But it was not until December 17, 1866 that the Court issued a written decision(s). *Ex Parte Milligan*, 71 U.S. 109 (1866).

Justice Davis, an old friend and political ally of Lincoln (he had been his campaign manager at the 1860 Republican convention), wrote the majority opinion. It began by emphasizing that "the importance of the main question presented…cannot be overstated; for it involves the very framework of the government and the fundamental principles of American liberty." At issue were "the rights of the whole people; for it is the birthright of every American citizen when charged with a crime, to be tried and punished according to the law."

Drawing upon the Fourth, Fifth, and Sixth Amendments, Davis used the Bill of Rights for the first time to expand civil liberty, ruling that the Constitution prohibited the trial of citizens by a military commission when civil courts were open and available (as they were in Indiana).

Chief Justice Chase issued a concurring opinion, joined in by two other Justices. Chase agreed that Milligan was entitled to an Article III civil court trial, but disagreed with respect to the relevance of Congress' 1863 legislation. Davis' opinion took the view that the habeas corpus statute overstepped Congress' reach by authorizing trials by military commission. In Chase's view, Congress did have that authority, but the 1863 law had not, in fact, authorized such trials.

Immediate reaction to the Court's decision – a direct repudiation of Lincoln's war-time stewardship – was decidedly mixed.

In the North, especially among those seeking post-war retribution against the South (enforced by the military), there was great consternation, with a number of critics calling Davis's decision "the new Dred Scott."

On the other hand, Southern editorial writers, hoping for a quick end to military trials in their jurisdictions (President Andrew Johnson had ordered them to cease in 1866; in fact, the last one took place in 1869), took a different tack – they viewed the opinions far more favorably ("the Democracy of the nation has now been vindicated.").

While many legal scholars and historians have hailed *Milligan* as "a great triumph for civil liberties in time of war," Neely dismissed the opinion as "irrelevant" and having had "little effect on history."

He has a point.

It was of no moment in stopping President Wilson from engineering thousands of domestic arrests and subsequent trials during World War I (under the Espionage Act of 1917, the Sedition Act of 1918, *and* the Alien Enemies Act of 1798).

It did not stop President Roosevelt's imprisoning 120,000 American citizens of Japanese descent in World War II, with the Supreme Court's subsequent approval of that terrible act – the *Korematsu* decision (*see Federal Bar Council Quarterly*, "Yet Another Awful Decision by the Supreme Court" (Sept./Oct./Nov. 2016), *available at* https://www.federalbarcouncil.org/FBC/Publications/Quarterly/Federal_Bar_Council_Quarterly_-_Sept_Oct_Nov_2016.aspx.)

During that same period, the Court also decided *Ex Parte Quirin*, 317 U.S. 1 (1942) (a military trial of eight Nazi saboteurs arrested in the United States – two of whom were U.S. citizens – was upheld; *Milligan* was ruled not applicable because the German spies were considered unlawful enemy combatants). And in more recent times, with respect to individuals "detained" during the never-ending war against terrorism that began after 9/11, *Milligan* has not seemed to have had much relevance. *See Rasul*

v. Bush, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdon v. Rumsfeld*, 548 U.S. 557 (2006); *Boumodiene v. Bush*, 553 U.S. 723 (2008).

Postscripts

- No one knows with certainty just how many civilians were arrested, held without habeas corpus, and ultimately subjected to military trials during the Civil War. Neely, who has done extensive work in the historical archives, puts the number well north of 10,000.
- During the period that this process was under the jurisdiction of Secretary Seward, he is reputed to have told the British ambassador: "I can touch a bell on my right hand, and order the arrest of a citizen of Ohio; I can touch a bell again, and order the imprisonment of a citizen of New York; and no power on earth, except that of the President, can release them. Can the Queen of England do so much?" This quote (which was widely referred to as "Seward's Little Bell") first appeared in anti-administration newspapers in 1863, but there is little evidence that Seward in fact said these words to anyone, let alone to the British ambassador. Notwithstanding, as one historian has written, "Seward had more arbitrary power over the freedom of individual American citizens all over the country than any other man has ever had, before or since."
- For those wanting to read more on these subjects, besides Neely's excellent book, there is a wonderful compendium of essays in "Ex Parte Milligan Reconsidered: Race and Civil Liberties from the Lincoln Administration to the War on Terror" (edited by Stewart Winger & Jonathan White) (Kansas Press 2020). The best one volume biography on Lincoln is David Donald's 1995 book "Lincoln" (Simon & Schuster); the best multi-volume biography on Lincoln is Michael Burlingame's magisterial "Abraham Lincoln: A Life" (Johns Hopkins Press 2008).

Lawyers Who Made a Difference

Grenville Clark and the Emergence of "The American Century"

By Steven Flanders and Travis J. Mock

Here are a couple of challenges for readers of the *Federal Bar Council Quarterly*: What private citizen contributed more to Allied victory in World War I *and* World War II than Grenville Clark? And what lawyer in private practice today even comes close to Clark's essential role addressing the great problems of public and international affairs of the day? A modest man, Grenville Clark never sought public office, or for that matter, the limelight in any form: "There is no limit to the good a man can do if he doesn't care who gets credit."

Grenville Clark, 1882-1967, was born to unmatched privilege but rose above it, so to speak. Having emerged from what his partner Emory Buckner and then-Professor Felix Frankfurter called the "Gold Coast set," he speedily made his mark first as a first-class lawyer and then also as a counselor of remarkable persuasive power and invention to the top office-holders of the day, even though he never held high office himself.

A ninth-generation New Yorker, Clark was born and raised on Fifth Avenue, son of Louis Crawford Clark, who worked his entire life at his father's Wall Street banking firm, Clark, Dodge & Co. Of at least as much consequence to less-privileged colleagues like Buckner and Frankfurter, he grew up in the mansion his mother's grandfather Colonel LeGrand Bouton Cannon, also a banker, had built for the family. Cannon was a Civil War veteran, friend of Abraham Lincoln, staunch abolitionist, vice president of the Delaware & Hudson Railroad, commercial banker, and a founding Republi-