

INDIANAPOLIS JUDGES AND LAWYERS DRAMATIZE *EX PARTE MILLIGAN*, A HISTORICAL TRIAL OF CONTEMPORARY SIGNIFICANCE

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The two central Indiana American Inns of Court¹ joined forces this past fall in a dramatic portrayal of the saga of the famous 1866 United States Supreme Court decision, *Ex parte Milligan*.² Three judges and eleven Indianapolis lawyers from the Indianapolis American Inn of Court and the Sagamore American Inn of Court were cast in a production that was presented on October 18, 2003, as part of the Centennial Celebration of the United States Courthouse in Indianapolis. This short essay introduces the script of the production.

The play illustrates the story of a civilian in Indiana whose conviction for treason and death sentence imposed by a military tribunal was held by the Supreme Court to be unconstitutional because military tribunals could not try civilians. The case has received renewed attention in legal circles with the possible increased use of military tribunals since 9-11.³

I. THE 1866 *MILLIGAN* DECISION

Before the United States Supreme Court in *Ex parte Milligan* was the question of whether Southern sympathizers in Indiana could be tried before military tribunals (rather than civilian courts) on charges of conspiracy against the United States. In holding the trials unconstitutional, Justice David Davis famously wrote for the Court's majority:

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. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just

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1. American Inns of Court are local organizations consisting of judges, lawyers, law professors, and law students that regularly hold programs and discussions on matters of legal ethics, skills, and professionalism. American Inns of Court were inspired by the traditional English model of legal apprenticeship and modified it to fit the particular needs of the American legal system. There are approximately 340 Inns in the United States with more than 20,000 members.

2. 71 U.S. (4 Wall.) 2 (1866).

3. John Strauss, *Lawyers' Play Is a History Lesson Touching on Today's Events*, INDIANAPOLIS STAR, Oct. 17, 2003, at B1.

authority.⁴

In holding Southern sympathizers entitled to Constitutional protections, the Court's decision is even more notable for its author. Appointed to the Court by President Lincoln, Justice Davis was one of the founders of the Republican Party and Lincoln's floor manager at the 1860 Republican nominating convention.

Milligan is also a fascinating piece of Indiana history. Here is a very brief sketch of the litigation.

The story of Copperhead strength in Indiana during the Civil War is well known, especially the stalemate between Republican Governor Oliver P. Morton, elected in 1860, and the Democratic legislature elected in 1862. During the early 1860's, a number of Indiana citizens including Lambdin P. Milligan are alleged to have conspired to undermine the Union war effort in several ways. Among the allegations are conspiracies to establish a second confederacy of "Northwest States" in alliance with the South; free Southern prisoners of war; and even assassinate Morton.

Milligan and others were charged with treason and tried before a military tribunal beginning in October, 1864, in what history calls the "Indianapolis Treason Trials." Milligan and the others were convicted and sentenced to death in January, 1865. By now the war had turned in the North's favor and Milligan's lawyer, Joseph McDonald, secured an audience with President Lincoln and, he thought, a commutation of the death sentences. But before the paperwork was finalized, Lincoln was assassinated and President Johnson refused to commute the sentences. On the eve of the executions, however, Johnson reversed course, first postponing and then commuting the death sentences to life imprisonment at hard labor.

Meanwhile, Milligan and the others had filed a petition for habeas corpus in the Federal District Court in Indianapolis, contending that no sentence could properly be imposed on them by a military court because they were civilians and Indiana was not a theater of war. The case was heard by a two-judge panel consisting of Judge David McDonald, the federal district judge for Indiana, and Justice Davis, the Supreme Court justice assigned to the federal circuit that included Indiana. These two jurists disagreed as to the outcome. Under the jurisdictional rules in place at the time, this split created a case to be resolved by the Supreme Court.

As noted above, the Supreme Court in 1866 held that the military tribunal did not have jurisdiction to try Milligan. Justice Davis spoke for a majority of five justices in holding that the trials were unconstitutional. A minority of four led by Chief Justice Salmon P. Chase concurred that the military tribunal did not have jurisdiction to try Milligan. But these justices were of the view that when the nation is at war, it would not violate the Constitution for Congress to provide for trials by military tribunals of persons accused of conspiracy like Milligan. The reason, they said, that Milligan's trial was improper was not because it was

4. *Milligan*, 71 U.S. at 120-21.

unconstitutional but because such trials were not authorized by Congress.⁵

This aspect of *Milligan*—its holding that it was beyond the power of Congress to authorize the use of military tribunals in times of rebellion where, for example, the civilian courts might be allied with the rebels—sparked sharp criticism of the *Milligan* holding by many who believed that military courts were essential to protect former slaves from violence in the South. Indeed, President Andrew Johnson used *Milligan* as justification for reducing military authority in the occupied states of the former Confederacy.⁶

II. *MILLIGAN*'S CONTEMPORARY SIGNIFICANCE

The *Milligan* decision figured prominently in a World War II case, *Ex parte Quirin*.⁷ During the war, eight men in German military uniforms, carrying explosives and other supplies, landed from German submarines at night on the East Coast. They buried the uniforms and supplies, and proceeded, in civilian dress, to various places in the United States under instructions from the German High Command to destroy war industries and war facilities in the United States. They appealed their convictions by a military tribunal, invoking *Milligan*'s pronouncement that the law of war “can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.”⁸ The Supreme Court rejected this contention, concluding that *Milligan* was limited to its facts: “*Milligan*, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present, and not involved here—martial law might be constitutionally established.”⁹ Because the appellants in *Quirin* were belligerents, they were subject to the authority of military tribunals.

Milligan (and the gloss placed upon it by *Quirin*) resonates—perhaps reverberates is a better verb—today with military tribunals being considered for use in the fight against terrorism. Two such cases, both of which invoke *Milligan*, have just reached the Supreme Court.¹⁰

*Hamdi v. Rumsfeld*¹¹ is the case of Yaser Esam Hamdi, a man apparently born in Louisiana but who left for Saudi Arabia when he was a small child. During United States military operations in Afghanistan, thousands of alleged enemy combatants were captured, including Hamdi. Although initially detained in Afghanistan and then Guantanamo Bay, Hamdi was transferred to the Norfolk

5. *Id.* at 140-41.

6. Donald G. Nieman, *Ex parte Milligan*, in *THE OXFORD COMPANION TO THE SUPREME COURT* 548 (Kermit L. Hall ed., 1992).

7. 317 U.S. 1 (1942).

8. *Id.* at 45 (quoting *Milligan*, 71 U.S. at 121).

9. *Id.*

10. *Hamdi v. Rumsfeld*, 124 S. Ct. 981 (2004) (granting cert.); *Rumsfeld v. Padilla*, No. 03-1027, 2004 U.S. LEXIS 1011 (Feb. 20, 2004) (granting cert.).

11. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004).

Naval Station Brig after it was discovered that he may not have renounced his American citizenship.

Hamdi petitioned for a writ of habeas corpus, seeking release. His case has raised a number of issues. The one that has reached the Supreme Court arises from the federal district court's order requiring the government to justify his detention. The district court held a Defense Department official's declaration insufficient but the federal court of appeals reversed. It held that

[b]ecause it [was] undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict, . . . the submitted declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution. No further factual inquiry [was] necessary or proper.¹²

The Supreme Court granted certiorari on January 9, 2004.

*Padilla v. Rumsfeld*¹³ is the case of Jose Padilla, an American citizen. On May 8, 2002, Padilla flew on his American passport from Pakistan, via Switzerland, to Chicago's O'Hare International Airport. There he was arrested by FBI agents pursuant to a material witness warrant in connection with the terrorist attacks of September 11. On June 8, the President issued an order designating Padilla as an enemy combatant. Padilla was taken into custody by the Defense Department and transported to the high-security Consolidated Naval Brig in Charleston, South Carolina, where he was held for ongoing questioning regarding the al Qaeda network and its terrorist activities in an effort to obtain intelligence.

After analysis of the applicability of *Milligan* (and *Quirin*), the federal court of appeals concluded that Padilla's detention was not authorized by Congress, and absent such authorization, the President did not have the power under the Constitution to detain as an enemy combatant an American citizen seized on American soil outside a zone of combat.¹⁴ In reaching this conclusion, the court expressly distinguished the *Hamdi* case as involving the detention of an American citizen seized within a zone of combat in Afghanistan.¹⁵ The Supreme Court granted certiorari on February 20, 2004.

III. THE 2003 *MILLIGAN* PRODUCTION

The United States Courthouse in Indianapolis celebrated its centennial in 2003 with a flourish.¹⁶ The United States District Court for the Southern District

12. *Id.* at 459.

13. 352 F.3d 695 (2d Cir. 2003), *cert. granted*, No. 03-1027, 2004 U.S. LEXIS 1011 (Feb. 20, 2004).

14. *Id.* at 698.

15. *Id.* at 699.

16. By Act of Congress signed into law by President George W. Bush on June 23, 2003, the Courthouse was renamed the Birch Bayh Federal Building and United States Courthouse. Birch

of Indiana, the Court's Historical Society, and the General Services Administration (the building manager) collaborated on a series of ceremonies, programs, and social events to commemorate the beautiful building's century of service to city, state, and country. Among the activities was an open house to which the entire community was invited to visit the magnificent beaux-arts structure.

The two American Inns of Court in Indianapolis were invited to be a part of the open house and quickly landed on the idea of making a presentation relating to the *Milligan* case. Though decided well before construction of the Courthouse, the case remains the most significant ever decided by the court now headquartered there.

A joint planning committee was established and its members soon concluded that some type of theatrical presentation would likely be of much greater interest than a series of lectures and papers. A sub-committee, headed by Elizabeth G. Russell and including Suzanne M. Buchko, James A. Geiger, Debra McVicker Lynch, Marsh C. Massey, and Karen Butler Reisinger, set to the task of capturing a proceeding that spanned two years and three forums in a script for a forty-five-minute production. They did so extremely well.

A virtually complete transcript of the trial before the military tribunal exists and the record is also extensive of the proceedings before the Supreme Court. On the other hand, there is little record of the habeas proceeding itself. The script committee relied on the record but also used creative license when it found it to be necessary: the production is a dramatization, not a re-enactment. For example, the script presents Major General Alvin P. Hovey, the military commander of Indiana, as the presiding member of the tribunal's jury. This is not historically accurate—Hovey was not a member of the jury—but it served to illustrate Hovey's central role in the brief time available. Hovey had ordered Milligan arrested, had convened the tribunal, and was responsible for carrying out the sentence.

The production took place in the high-ceilinged, marble William E. Steckler Ceremonial Courtroom,¹⁷ with its mosaics, beautiful painted friezes, and massive stained glass windows providing a most impressive setting.

United States District Judge Sarah Evans Barker played Indianapolis federal Judge David McDonald and U.S. District Judge David F. Hamilton played United States Supreme Court Justice David Davis who wrote the Supreme Court's opinion in *Milligan*. This author played General Hovey.

Lawyers in leading parts included Russell, the narrator; Hugh E. Reynolds,

Bayh represented Indiana in the United States Senate from 1959-1981, during which time he was a member of its Judiciary Committee and, as chairman of the Constitutional Amendments Subcommittee, authored two amendments to the United States Constitution: the Twenty-fifth Amendment which specifies procedures for presidential disability and vice presidential succession; and the Twenty-sixth Amendment which lowered the voting age to 18.

17. William E. Steckler served as a member of the U.S. District Court, Southern District of Indiana, from April 7, 1950 until his death on March 8, 1995. He served as chief judge from 1954 until 1982 and assumed senior status on December 31, 1986.

Jr., as Milligan's lawyer, Joseph E. McDonald; Massey, as the prosecutor before the military tribunal; and Thomas A. John, as Milligan.

Other Indianapolis lawyers in the cast included Geiger, Lynch, Reisinger, Ricardo A. Rivera, Michael Rosiello, and Kevin S. Smith. Buchko most ably directed the production.

CONCLUSION

The script that follows represents the efforts of 21st century Hoosier judges and lawyers to dramatize what is at once a major event in Indiana history, an important case in American Constitutional history, and a legal precedent of great contemporary significance. Those involved in its preparation and production believe *Ex parte Milligan's* remarkable story, nearly seven score years after its writing, warrants the sober reflection of all citizens and hope that this presentation makes a contribution to that end.