

## ***EX PARTE MILLIGAN***

A joint project of the Indianapolis and Sagamore Inns of Court  
Indianapolis, Indiana

Milligan Project Committee Chair—Indiana Supreme Court Justice  
Frank Sullivan Jr.

Script Committee—Suzanne Buchko, Jamie Gieger, Debra Lynch,  
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adapted from the transcripts of the military trial of Lambdin Milligan,  
the proceedings on the writ of habeas corpus before the Circuit Court  
of the United States for the District of Indiana, the personal journals  
of Judge David McDonald, and the opinions of the Circuit Court  
and the Supreme Court of the United States

Citation to the relevant case:

*Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)

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Southern District of Indiana  
46 East Ohio Street  
Indianapolis, Indiana 46204

*Cast of Characters*

Newsboy—*young man dressed in knickers, sweater and cap.*

Narrator—*woman dressed in an 1860s traveling outfit complete with bonnet and fan.*

Bailiff—*middle-aged man dressed in broadcloth frock coat.*

Prosecutor—*government attorney, Union officer.*

General Alvin Peterson Hovey—*40-year-old General of the Union Army.*

Five Member Military Tribunal—*Union officers.*

Lambdin Milligan—*middle-aged man, attorney and political activist, dressed in well-cut and tailored frock coat.*

Defense Counsel—*attorney representing Milligan in the trial court, dressed in well-cut and tailored frock coat.*

Joseph Ewing McDonald—*Milligan's attorney who filed the petition for a writ of habeas corpus and who represented Milligan before the United States Supreme Court dressed in well-cut and tailored frock coat.*

Judge David McDonald—*60-year-old Judge of the United States District Court of the District of Indiana.*

Justice David Davis—*50-year-old Justice of the United States Supreme Court.*

[Note: This presentation was first performed in the fully restored 1905 ceremonial Steckler Courtroom of the United States District Court for the Southern District of Indiana on October 18, 2003, as part of the Centennial Celebration for the Birch Bayh United States District Courthouse. For a smaller production, the Military Tribunal could be eliminated or reduced to three members. Also, although the judges in our production wore judicial robes, during the 1860's, federal judges did not wear robes on the bench.]

*Setting*

Using a large courtroom, three "bench" areas are set up: one upstage and center for the U.S. Supreme Court, a second stage left for the military tribunal, and a third stage right for the circuit court. A single counsel table is set in the middle of the well with a movable podium in one corner. Three chairs are set upstage behind the counsel table. A standing desk is set downstage right and a small table with two chairs is set down stage left.

*Time*

The action takes place between December, 1864 and April, 1866, in Indianapolis, Indiana, and Washington, D.C.

## EX PARTE MILLIGAN

## SCENE ONE

*JOSEPH EWING MCDONALD is seated in the front row of the gallery. NEWSBOY enters and makes his pitch to the audience.*

## NEWSBOY

Extra! Extra! Read all about it! Milligan treason trial scheduled to conclude today! Former famed attorney, Lambdin Milligan claims that he was unaware of any nefarious intent of the Sons of Liberty. The prosecution's final rebuttal argument is set to begin any moment!

*NARRATOR enters, buys a paper from the NEWSBOY, and considers the front page.*

## NEWSBOY

*(as he exits)*

Extra! Extra! Read all about it!

*NARRATOR—steps forward. Her tone is that of a chatty neighbor who is well informed about goings on in Indianapolis of the 1860's. She remains on stage for the entire presentation moving off to the side during scenes but keenly interested in what is going on at all times.*

## NARRATOR

Why is the case, *Ex Parte Milligan*, so important? Well, to understand its importance, and the reasons for its existence at all, we must understand the events that surround it. You see, at the time the case began, the North had not been faring very well in the great conflict with the South. In states that were then-known as the Northwest, that is: Ohio, Indiana, and Illinois, there was strong resentment and opposition to the war. Many of the folks in the Northwest had southern roots since the settlers of those states came from Kentucky, Maryland, Virginia, and North Carolina. In fact, a lot of the most prominent men in the Northwest states were actually Southerners by birth or marriage.

There were also strong economic and agricultural bonds between Indiana, Ohio, Illinois, and the Southern states. Throughout the war, a thriving (and somewhat clandestine) trade took place between the Northwest and the South along the Mississippi River. The North needed cotton and the South needed money.

Given this background, it shouldn't be surprising that there were a group of people in the North that supported the existence of the Union, but were strongly opposed to the war to preserve it. These people were known as the Copperheads and they wanted peace with the South. Politically speaking, they were also Democrats.

Not only did the Northwest and the border states have the Copperheads, but there were also constant rumors of secret societies whose purposes were treasonable. The best known of these were the "Order of the American Knights" and the "Sons of Liberty." The secret societies had elaborate rituals and, in general, their aims were: to render powerless the Union's ability to draft young men for the war; to cooperate with the rebels in the South; and to overthrow the Federal Government.

In order to preserve the Union at any cost and stem the tide of such treasonous sentiments, President Lincoln turned a blind eye to extraordinary arrests and trials by military commission. This meant that with no particular formalities, a person could be taken from his home in the middle of the night and sent to jail in a military fortress. Arrests were made on the slightest of suspicions and the power of little men became great. During this time, William Seward, President Lincoln's Secretary of State, even said to the British Ambassador: "My lord, 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 arrest 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?" Such was the climate in the early to mid 1860s.

Lambdin P. Milligan was a prominent lawyer from Huntington, Indiana. He placed second in the race for the Democratic nomination for governor of Indiana in 1864. Mr. Milligan was also a leader in the Sons of Liberty. On October 5, 1864, Lambdin Milligan, a civilian and citizen of the State of Indiana, was seized and arrested by the military power of the United States under the authority of Brevet Major General Alvin P. Hovey. Mr. Milligan was not indicted by a grand jury, nor charged and found guilty in a court of law, he was simply taken by General Hovey's men and imprisoned.

*The BAILIFF enters, followed by the MILITARY TRIBUNAL, the PROSECUTOR, MILLIGAN, and his DEFENSE COUNSEL. The PROSECUTOR, MILLIGAN and the DEFENSE COUNSEL sit at the counsel table, and the BAILIFF and the MILITARY TRIBUNAL assume their positions at the bench.*

#### NARRATOR

Milligan and other Indiana Sons of Liberty were charged with conspiracy against the United States by denying the authority of the Government to draft men into the army, and by plotting to overthrow the Government by seizing arsenals in Indianapolis, Indiana and two other locations in the Northwest and simultaneously releasing Confederate prisoners held in prisons in those states and arming them to march into Kentucky and Missouri and cooperate with rebel

forces. They were further charged with affording aid and comfort to the rebels; inciting insurrection in Indiana, a state which had been and was constantly threatened to be invaded by the enemy; disloyal practices; and violation of the laws of war. The military wanted Milligan's neck for these crimes. It's now December in the year 1864.

## SCENE TWO

### PROSECUTOR

Thank you, General Hovey and members of the commission. It seems to be admitted by the counsel for the accused that Mr. Milligan was a member of the Sons of Liberty, had attended their Grand Council, and, therefore, was a third degree member. In addition, he was appointed the rank of major-general in their treasonous rebel military. Upon these points there is no difference of opinion.

The evidence of Mr. Milligan's friends, the witnesses he has introduced upon the stand, have been harmonious upon this one fact, that Mr. Milligan was a bitter partisan, a hater of the Administration, and a leader of the ultra peace wing of the Democratic party. He then enters the Sons of Liberty, an organization that harmonizes with his own sentiments, with his peculiar views as to State rights, State sovereignty, the usurpations of the Administration and the different departments of the Government, and the unconstitutionality of the war, and whose members are the bitter opponents of all the measures to aid in efficiently carrying forward that war.

The only question now, in considering the evidence, is to find the degree of guilt of the accused. That Mr. Milligan is guilty is established the moment you prove that he was a member of the Sons of Liberty; that he assented to the principles and took the obligation of the order. The plea of ignorance, of want of knowledge, and want of assent on the part of the counsel for Mr. Milligan, will not suffice in the case of a man of Mr. Milligan's nerve, energy and intelligence. It is asking this commission to believe an unreasonable thing, to ask it to believe that this man would enter any organization, ascend to its highest degrees, and be endowed with its highest honors, without studying thoroughly the cardinal principles upon which it was based. An ignorant man might; an intelligent man never would.

I now desire to call the attention of the commission particularly to the dangers presented by the Sons of Liberty. Here was the scheme for the uprising, the insurrection, laid down to the members of this order, as early as November, 1863—the Grand Commander of the Sons of Liberty summoned his military chieftains about him, including Milligan, to have a council of war, as to when and how they should put their forces into the field. The object of this council of war was to set the time, the exact day, on which the revolution should take place in this State of Indiana.

Now let us see whether Mr. Milligan's action was consistent with his knowledge of the plans and schemes of the Sons of Liberty. On the 18th of August, 1864, Milligan addressed a convention of 5000 men at Fort Wayne. In that speech, he made the following statements:

He referred to this country as . . .

*The PROSECUTOR and MILLIGAN speak the following line together, and then MILLIGAN takes up the speech speaking in a fiery manner, trying to rouse the crowd. This is a flashback of when he delivered the speech.*

#### PROSECUTOR AND MILLIGAN

. . . desolated by war and the oppressions of the Administration.

#### MILLIGAN

Freedom of speech is nothing more in this country today than the freedom allowed by Lincoln and his mob. It is a freedom in name rather than in fact.

If the war was right and the draft was right, and if good citizens believed the war was right, they would not grumble about the draft. The war is not right. And under the Constitution, the President has no power to coerce a State. I ask you: will those who have entered the army look in the future, for their laurels, to battles such as Bull Run, Chickamauga and Red River? I implore you to consider the condition of your wives and children at home—destitute and dependent on the charity of their neighbors. Do you consider it your duty to make such a sacrifice?

President Lincoln is a tyrant. The war itself is disunion, and the Union itself cannot be restored by war. The war has made the Government a despotism. The war is itself a dissolution of the Government. The Government is a confederation of the several States, not a union.

Does the Government of the United States have the right to make war upon the rebels, or those in rebellion against the General Government?

#### PROSECUTOR AND MILLIGAN

I deny that right.

*MILLIGAN sits back down at the counsel table and the PROSECUTOR concludes his argument to the MILITARY TRIBUNAL.*

#### PROSECUTOR

Here we have from Mr. Milligan's own lips a reiteration to a public assemblage of the cardinal principles of the order itself. Here we have him trying to educate the masses of the Democratic party up to the disloyal standard of this order. The only difference between Mr. Milligan and the most bitter rebel of them all, was

that one was using his arms to enforce his principles, the other his voice and pen attempted to sustain their armies in that cause, weakening the cause of the Government, and adding numbers to the rebel ranks. What more could he do? What would tend more effectually to stir up to insurrection a brave people, than to teach them that their Government was waging an unjust war; that it was forcing them to fight its battles of tyranny and oppression; that this Government was forcing them into her armies by legions, and slaughtering them by thousands, and then citing them to the battle-fields where that Government had been defeated: I ask what more effective mode could have been chosen to give aid and sympathy to the enemy?

I say then, this speech was in entire keeping with the fact that Mr. Milligan must have known of the intentions and plan of the Sons of Liberty for revolution. He was aiding that scheme as effectually as he possibly could. He was sowing the seeds of bitterness in the hearts of the masses, the harvest of which was to be the garnering of the dead bodies of the peaceful citizens, defenseless women and little children of your land.

This is the evidence in reference to Mr. Milligan, for and against him. It all shows that he was really the right arm of this conspiracy in this State; the active, energetic, and venomous leader. A man of unquestioned ability and determination, and with a heart full of hatred, envy and malice, he moved forward in this scheme of revolution with a coolness and intensity of purpose, not exceeded by any other member of the conspiracy. His intelligence and ability gave him a powerful influence for evil, and he used that power to the utmost. Mr. Milligan is nothing short of a conspirator and a traitor.

Thank you, General Hovey, members of the commission.

*The MILITARY TRIBUNAL, including GENERAL HOVEY, takes a short time to deliberate. GENERAL HOVEY nods at the BAILIFF, who brings MILLIGAN over to face the MILITARY TRIBUNAL.*

*TRIBUNAL MEMBER bangs a gavel.*

#### GENERAL HOVEY

Milligan, this commission having maturely considered the evidence introduced finds the accused Lambdin P. Milligan, a citizen of the State of Indiana as follows:

In the case of Lambdin P. Milligan :

- Charge 1, Conspiracy against the government of the United States—guilty;
- Charge 2, Affording aid and comfort to rebels against the authority of the United States—guilty;
- Charge 3, Inciting insurrection—guilty;
- Charge 4, Disloyal practices—guilty; and
- Charge 5, Violation of the laws of war—guilty.

And the commission does therefore sentence Lambdin P. Milligan, citizen of the State of Indiana as follows: He is to be hanged by the neck until he be dead, at such time and place as the commanding general of this district shall designate; 2/3 of the members of the commission concurring therein.

Mr. Milligan, I have considered the evidence here presented, and I only regret that you have but one life that I may take for my Country. Nathan Hale and other patriots did not die to establish the kind of country in which traitors, like yourself, are free, without just recourse and reprisals, to twist the minds of the impressionable against our government. You have received a just and fair trial, and may God have mercy on your soul.

*TRIBUNAL MEMBER bangs a gavel.*

*The MILITARY TRIBUNAL, including GENERAL HOVEY, rises and exits. The BAILIFF handcuffs MILLIGAN and leads him to the down stage left table, which represents a visiting room in the Jail. MCDONALD enters from the audience and approaches MILLIGAN and DEFENSE COUNSEL.*

#### DEFENSE COUNSEL

Mr. Milligan, Mr. Joseph Ewing McDonald was in the Courtroom during your trial and has agreed to take your case from this point forward.

*MILLIGAN and his DEFENSE COUNSEL shake hands. MILLIGAN and MCDONALD shake hands. DEFENSE COUNSEL exits.*

#### MCDONALD

Mr. Milligan, I am sorry for the judgment that was just passed down on you.

#### MILLIGAN

Bloody hell! I can't believe this is happening!

#### MCDONALD

I think that this entire trial was a travesty. I don't want to create false hope in you or make you wrongfully optimistic, but, President Lincoln has already agreed to speak to me in the event that you received this sentence. The President and I practiced law together for many years in Illinois. We were partners.

#### MILLIGAN

I don't understand.

#### MCDONALD

I am going to visit President Lincoln and ask that he overturn your sentence. Milligan, I don't agree with your beliefs, but this country is founded upon the idea that you are free to believe whatever you want. Furthermore, you are a civilian. You shouldn't have even been tried before this military commission.

I'm sure that I can make President Lincoln understand that. Even if the President will not change your sentence, we will sue out a writ of habeas corpus, demanding that you be set free because a military commission has no power over a private citizen.

MILLIGAN

Thank you, Mr. McDonald.

MCDONALD

You are welcome.

*MILLIGAN sits at the table conferring with MCDONALD. The BAILIFF remains standing slightly behind MILLIGAN.*

### SCENE THREE

NARRATOR

As you've seen, Milligan's attorney had two possible courses of action: (1) to seek clemency from President Lincoln; or (2) to seek a writ of habeas corpus. Clemency is a pardon issued by the President. A writ of habeas corpus allows a prisoner to be brought before a court to determine whether he has been subjected to unlawful imprisonment.

Early during the war in 1862, President Lincoln formally suspended the privilege of the writ of habeas corpus to keep control over dissent in the Union population. Many disagreed that the President could do such a thing, but whether he could or couldn't didn't really matter. During the war, even if a judge issued a writ of habeas corpus, the military simply disregarded it and the prisoners were not allowed to go free.

But things in the North were starting to change. In November 1864, President Lincoln was reelected by a wide margin. The Northwest Confederacy movement collapsed and the Sons of Liberty were bankrupt. The Union troops were scoring victories over the rebels and an end to this bitter war was believed to be in sight. The President, it was thought, wanted to start the healing process and bind the country, rather than punish its potential dividers. Thus, many hoped that he would reconsider his position on the issuance of writs of habeas corpus and this change of heart would benefit Mr. Milligan. Unfortunately, this never came to pass.

### SCENE FOUR

*NEWSBOY enters and again shouts to audience.*

NEWSBOY

Extra! Extra! Read all about it! President Lincoln assassinated last night. Vice President Andrew Johnson immediately sworn in as President. Extra! Extra! Read

all about it!

*MCDONALD approaches the newsboy, buys a paper, and considers the headline.*

NEWSBOY

*(as he exits)*

Extra! Extra! Read all about it!

MCDONALD

Oh my God! What is to become of us now? I pray for the salvation of this nation. And what will this mean for my plea that President Lincoln reverse General Hovey's order? Our chances are dashed! I must let Mr. Milligan know of this change in events immediately.

*MCDONALD returns to MILLIGAN, who is still seated in the jail's visiting room.*

MCDONALD

Mr. Milligan, have you heard the news? The President has been assassinated.

MILLIGAN

Yes, what does that mean for my case?

MCDONALD

Well, there are rumors that John Wilkes Booth was one of your brothers in the Sons of Liberty so I am afraid President Andrew Johnson is going to be out for blood. You know General Hovey's execution order is still sitting on the President's desk to be approved. With the black mood of the country over this assassination, President Johnson will most assuredly not grant you clemency. He is going to have no choice but to sign the order to vindicate what happened to President Lincoln.

MILLIGAN

What do you think of our chances of success if we file a Petition for a Writ of Habeas Corpus?

MCDONALD

Not good. Since President Lincoln suspended habeas proceedings, others have petitioned the courts without much success. Even if a court granted the petition, the military commissions have generally ignored the courts' orders and have done what they please.

MILLIGAN

But I am a civilian. The military commission had no jurisdiction to try me!

MCDONALD

You are right and that will be our primary argument. The federal circuit court

begins its session in Indianapolis on May 1, 1865, so I will begin preparing the writ immediately. We will file it in open court and attempt to stop all of this nonsense before it gets out of hand.

*The BAILIFF leads MILLIGAN out, followed by MCDONALD.*

## SCENE FIVE

### NARRATOR

Notwithstanding Milligan's filing a writ of habeas corpus in the circuit court, excitement about his case was building. Never before had a military commission's sentence of death been carried out and it looked like, given President Andrew Johnson's sentiments, Milligan's might be the first. In Milligan's petition for the writ of habeas corpus, he argued that he, a civilian and a resident of Indiana, had been unconstitutionally tried by a military commission and he demanded release from military custody and a trial before a court of law.

Supreme Court Justice David Davis, the Justice assigned to this circuit, was to act as one of the circuit judges to hear Milligan's petition. The other circuit judge on the case was a newly-appointed District Judge, David McDonald. Even before the circuit court heard Milligan's petition, though, Justice Davis' thoughts on this matter were known. He thought it was clear that the military commission that tried Milligan was illegal since the courts of Indiana were open at that time and President Lincoln had not declared martial law.

*JUDGE MCDONALD enters and goes to standing writing desk. He picks up a quill pen to make a journal entry.*

### NARRATOR

But Davis and McDonald were afraid that even if they issued the writ, it would be ignored by General Hovey and Milligan would die. So they came up with a plan, let's listen to Judge McDonald as he records his thoughts on Milligan's case in his journal.

JUDGE MCDONALD  
*(writing in his journal.)*

Tuesday, May 9, 1865.

This morning Judge David Davis arrived and joined me in holding court.

Today it is said that the authorities have fixed on Friday, May 19 instant for hanging Milligan and the other Sons of Liberty tried last fall. I am sorry to hear it, not that they are not traitors but that there is too much doubt of their having been convicted by a court of competent jurisdiction. Justice Davis has the same fears I have on this topic.

But, the rage for blood, now that the war is over increases. And, the mob about town are greatly exercised lest Justice Davis and I release them. But so well

persuaded are we that the execution of Milligan would be impolitic if not illegal, that we will cheerfully take the risk of the popular clamor to do what we must when the application of Milligan is made for writ of habeas corpus.

For us to issue the writ may be fruitless, lest the military authorities ignore it, as they have other such writs issued by the civil courts.

Justice Davis thinks that if the case be brought before the Supreme Court of the United States, the administration would probably not dare to hang the prisoners. At the very least we will try to induce President Johnson to delay the execution till the Supreme Court shall pass on the question.

*JUSTICE DAVIS enters and the two judges prepare to take the bench. The BAILIFF enters behind JUSTICE DAVIS.*

JUDGE MCDONALD

Good morning, Justice Davis. It is an honor to have you joining me on the bench today.

JUSTICE DAVIS

Thank you, Judge McDonald. It is a pleasure to join you here in Indianapolis for this case that is so important to our nation. It threatens the very heart of the Constitution and the protection of our country's citizenry. Are we ready to proceed in court?

JUDGE MCDONALD

We are, sir.

*JUSTICE DAVIS turns to the BAILIFF.*

JUSTICE DAVIS

Bailiff, bring in the Petitioner.

*JUDGE MCDONALD and JUSTICE DAVIS take the bench. The BAILIFF enters, escorting MILLIGAN to his seat. MCDONALD follows and sits beside MILLIGAN.*

BAILIFF

All rise.

*MILLIGAN and MCDONALD rise.*

BAILIFF

Hear Ye, Hear Ye, on this 10th day of May in the year 1865, the United States Circuit Court for the District of Indiana is now in session. The Honorable David Davis, Associate Justice of the United States Supreme Court and The Honorable David McDonald, District Judge of this Circuit now presiding. All ye who have causes to be heard or claims to be made shall come forward, and you shall be

heard. You may now be seated.

*MILLIGAN and MCDONALD sit.*

BAILIFF

The first matter on the docket to be heard today is Cause No. 684, *In the Matter of Lambdin P. Milligan*. All those present for Mr. Milligan please come forward and present your case.

*MCDONALD stands and goes to the podium.*

MCDONALD

May it please the Court.

*JUSTICE DAVIS and JUDGE MCDONALD nod in acknowledgment.*

MCDONALD

I am Joseph Ewing McDonald from the law firm of McDonald and Roche, and it is my privilege to represent the petitioner Lambdin P. Milligan.

My client, a respected lawyer and well known member of his community, was sound asleep in his bed at his home in Huntington County in the early morning hours of the 5th day of October, 1864, when he and his wife were suddenly awakened by a loud pounding on their door. When Mr. Milligan went to answer the door, despite his wife's desperate protests, he was arrested by the military power of the United States under the authority of the President and was taken into military custody. After his arrest, Mr. Milligan was conveyed from his home in Huntington County to the City of Indianapolis and was placed in prison under a military guard, tried by a military commission, and sentenced to be hanged by the neck until dead, nine days from today, on Friday, the 19th day of May, 1865, between the hours of noon and 3:00 p.m.

Mr. Milligan respectfully represents to you that his Court Martial is a travesty of such significant proportions that it threatens the freedom of all citizens of our great nation and contravenes the intent of our ancestors in drafting our nation's Constitution. Mr. Milligan is a natural born citizen of the United States and has for nearly 20 years been a citizen of this District and the State of Indiana. As such, he is entitled to all the rights, privileges and immunities of citizens of the United States. Mr. Milligan has not been in the military service of the United States at any time.

Be it known that through this Petition for Writ of Habeas Corpus, Mr. Milligan questions the jurisdictional authority of the military commission that entered Court Martial Order No. 214. We maintain that the commission was without jurisdiction to enter any order against my client as he was not serving in the military of the United States government at the time the court martial was issued

and marshal law had not been imposed upon the State, it not being a theater of war. To order death by hanging, not by a unanimous decision, but by a 2/3 vote, after a trial by a military commission without any civil court intervention and judgment by a jury of his peers is a violation of Mr. Milligan's constitutional rights as a citizen of this great democracy.

Although the facts upon which Mr. Milligan was tried before the military commission have been long known to the lawmen of this state and judicial circuit, this civil court has yet to see the necessity of charging Mr. Milligan with any unlawful acts, much less conspiracy to commit treason against his own government. After Mr. Milligan was found guilty by the military commission, this Circuit Court, on the 2nd day of January, 1865 convened in this very courthouse a legal and proper grand jury. The grand jury was duly impaneled, sworn and charged to inquire within and for the District of Indiana and make presentment of all crimes and misdemeanors committed by Mr. Milligan against the laws of the United States and this country's peace and dignity.

When the term of this Court ended on the 27th day of January, 1865, the grand jury had not found any bill of indictment or made any presentment whatever against Mr. Milligan for any offense; and no bill of indictment or presentment has ever been found or made against Mr. Milligan since his imprisonment. Today in the eyes of the civil court he remains a free man. Would such a court let a man go free if he had engaged in the reprehensible conduct as prescribed?

In his humble Petition to this honorable Court, Mr. Milligan prays that he be delivered from military custody and imprisonment and turned over to the proper civil commission for inquiry and punishment according to law, or for discharge from custody altogether.

Earlier this year, prior to the untimely and tragic death of President Lincoln, I met with the President on my client's behalf. President Lincoln reviewed the order of the military commission and suggested certain errors and imperfections in the record. The President advised me the papers would be returned for correction and that he would send for me when he received the corrected papers. He then turned to me and said, "but I apprehend and hope there will be such a jubilee over yonder," pointing to the hills of Virginia just across the river, that "we shall none of us want any more killing done." It was apparent to me from the President's last words with me that he believed a great injustice had been rendered by the military commission. Although the President did not opine as to the guilt or innocence of Mr. Milligan, I believe it was his intent to disapprove the final order of General Hovey, nevertheless, the President indicated, "however, I will still keep them in prison awhile to keep them from killing the new government."

I ask you now to carry through with President Lincoln's intentions and do what he could not accomplish before his death: grant this man, Lambdin P. Milligan, freedom from his military captors, and afford Mr. Milligan his guaranteed due process rights, the right to have his actions considered by a grand jury, and if

indicted, the right to a subsequent civil trial by a jury of his peers, not members of the United States' military. And if Mr. Milligan is found guilty in a civil court, that he be found guilty by a unanimous decision, not a mere two-thirds vote. These are rights upon which this nation was based. For our government to dispense with these rights in a time of insurrection is a very sad and disheartening commentary on our true devotion to freedom and liberty. Therefore, we respectfully request that you grant Mr. Milligan's petition. Thank you gentlemen for your consideration today and God speed.

JUSTICE DAVIS

Thank you, counsel.

*JUSTICE DAVID and JUDGE MCDONALD confer. MCDONALD remains at the podium.*

NARRATOR

As you've heard, if the circuit judges agreed that an injustice had been committed and granted the writ of habeas corpus, they still had the problem that General Hovey could ignore the court's order. But Justice Davis thought that if the Supreme Court heard the case, the military would probably not hang poor Mr. Milligan. Under the law, if the two judges of the Circuit Court were opposed to each other on any question, they might present it to the Supreme Court and have it answered. Justice Davis had no problem convincing Judge McDonald to oppose him on the basic issue of the unconstitutionality of the military commission's jurisdiction.

JUSTICE DAVIS

Counsel?

MCDONALD

May it please the Court, on behalf of Lambdin P. Milligan, I move for certification of the question that has divided this Court to the Supreme Court of the United States.

JUSTICE DAVIS

The court being equally divided, on motion of Milligan, by counsel, it is ordered that the said petition, together with the following question, be certified to the Supreme Court of the United States for their decision:

Whether, upon the facts stated in the petition, the military commission had jurisdiction legally to try and sentence Lambdin P. Milligan.

It is so ordered, this 10th day of May, 1865. Court is adjourned.

*JUSTICE DAVIS bangs gavel.*

BAILIFF

All rise.

*JUDGE MCDONALD exits; JUSTICE DAVIS moves to the standing writing desk. MILLIGAN and MCDONALD are escorted to downstage left table by the BAILIFF. All three remain on stage.*

BAILIFF

You may be seated.

## SCENE SEVEN

NARRATOR

The Supreme Court took the case and heard several days of argument in 1866. Justice Davis wrote the opinion.

JUSTICE DAVIS

*(writing)*

Did the military commission have jurisdiction to try and sentence Milligan? Milligan did not reside in a rebel state nor was he a prisoner of war. Milligan was a private citizen of Indiana when he was arrested in his home by the United States Military. He was imprisoned, tried, convicted, and sentenced to be hanged by a military commission. Did this commission have the legal power and authority to try and punish this man?

No graver question has ever been considered by this Court because it involves the very framework of the government and the fundamental principles of American liberty.

*JUSTICE DAVIS moves from the writing desk and addresses the audience directly.*

JUSTICE DAVIS

During the Rebellion, the spirit of the time did not allow for calm deliberation and discussion which is so necessary for a correct conclusion of a purely judicial question. But the war is over and public safety is assured. Now we can consider without passion or politics the question before the Court.

Our Constitution is a law for rulers and people alike, equally potent in war and in peace. It is the Constitution which guides our deliberation.

The Constitution provides that the trial of all crimes shall be by jury. The Fourth Amendment protects all Americans against unreasonable search and seizure. The Fifth Amendment provides that no one shall answer for a federal criminal charge without first being charged, indicted by a grand jury. The Fifth Amendment also provides that no person shall be deprived of life, liberty, or property without due process of law. And the Sixth Amendment guarantees to a criminal defendant the right to a speedy trial by an impartial jury.

Have any of these rights been violated in the case of Milligan? That answer must be yes.

*JUSTICE DAVIS' voice is heard on a recording as he takes the bench of the U.S. Supreme Court. Meanwhile, in the visiting room of the Jail, the BAILIFF hands MCDONALD an envelope containing the opinion of the Supreme Court. MCDONALD reviews it and shows it to MILLIGAN, who reads the Court's opinion while it is being delivered.*

JUSTICE DAVIS

Martial Law cannot be applied to citizens in states which upheld the authority of the Union and where the courts are open and their process unobstructed. In Indiana the Union was not opposed and the courts of Indiana were always open during the Rebellion to hear criminal trials under the laws of the United States.

Why wasn't Milligan brought before the Circuit Court of Indiana and prosecuted before that august body? There was no necessity to rush a trial. Soon after the military commission was ended, the Circuit Court of Indiana met, heard cases, and adjourned. The Circuit Court was held in a state, eminently distinguished for patriotism, by judges commissioned by our President, who were provided with upright and intelligent juries.

Thus, another guarantee of freedom was broken when Milligan was denied a trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away by any political necessity.

NARRATOR

Mr. Justice Davis delivered the opinion of the Court.

JUSTICE DAVIS

Martial law cannot arise from a threat of invasion and a threat of invasion is all that was asserted in this case. To allow martial law in such a case would destroy every guarantee of the Constitution. To allow martial law, the danger must be actual and present; the invasion real. It must be an invasion which closes the courts and the civil government. When Milligan was arrested, the courts were not closed in Indiana, nor the civil government suspended when Milligan was arrested. If any citizen of Indiana was plotting treason, the power of arrest by civil authorities could secure them, until the government was prepared for their trial, when the courts were open and ready to try them.

If the claim of martial law were sustained by this Court in this case, it could be said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so.

Therefore, on the question of whether the military commission had power and authority to try and sentence Milligan, this Court must answer no. The petitioner shall be discharged. It is so ordered.

*JUSTICE DAVIS bangs gavel.*

MCDONALD

*(shaking MILLIGAN's hand)*

Congratulations Mr. Milligan, you're a free man.

MILLIGAN

Thank you, Mr. McDonald.

NARRATOR

After Milligan was set free, he sued General Hovey for unlawful imprisonment. The jury awarded him \$5.00.

Milligan was tried for treason during a time of war by a military commission, not a court, at a time that the courts were open and functioning. This, the Supreme Court condemned. Is history doomed to repeat itself? You be the judge.

The End

## REFERENCES

Act of March 9, 1980, ch.29, sec. 6.

*Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

*Hoosier Justice: The Journal of David McDonald, 1864-1868*, IND. MAG. HIST., Volume LXII, No. 3, Sept. 1966, at 202-04.

WILLARD L. KING, LINCOLN'S MANAGER: DAVID DAVIS 250 (Harvard Univ. Press 1960).

SAMUEL KLAUS, THE MILLIGAN CASE 1-75 (Alfred A. Knopf Inc. 1929).

BENN PITMAN, TRIALS FOR TREASON AT INDIANAPOLIS DISCLOSING THE PLANS FOR ESTABLISHING A NORTH-WESTERN CONFEDERACY (Moore 1865).

WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 59-137 (Alfred A. Knopf 1998).

G.R. TREADWAY, DEMOCRATIC OPPOSITION TO THE LINCOLN ADMINISTRATION 209-55 (Ind. Hist. Bureau 1973).