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The Law (?) of the Lincoln Assassination

Martin S. Lederman
Georgetown University Law Center, msl46@law.georgetown.edu

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Abstract

Shortly after John Wilkes Booth killed Abraham Lincoln on April 14, 1865, President Andrew Johnson directed that Booth’s alleged coconspirators be tried in a makeshift military tribunal, rather than in the Article III court that was open for business just a few blocks from Ford’s Theater. Johnson’s decision implicated a fundamental constitutional question that was a subject of heated debate throughout the Civil War: When, if ever, may the federal government circumvent Article III’s requirements of a criminal trial by jury, with an independent, tenure-protected presiding judge, by trying individuals other than members of the armed forces in a military tribunal?

The political branches and others have debated this Article III question in several of the nation’s major wars, yet it remains unresolved, particularly with respect to the trial of domestic-law offenses. Moreover, that question is especially significant in the United States’ current armed conflicts against nonstate terrorist organizations, such as al Qaeda, because although members of such enemy forces, who lack international law “combatant immunity,” can often be tried in Article III courts for violation of U.S. criminal laws, Congress has recently authorized military commissions to try such enemy forces for certain domestic-law, war-related offenses. Moreover, during the recent campaign, President Trump indicated that he intends to increase the use of military tribunals—including even to try United States citizens.

In attempting to justify the constitutionality of such military trials, the government and several judges on the U.S. Court of Appeals for the D.C. Circuit have turned to the Lincoln assassination commission as a leading precedent, one that is said to help establish a political branch practice that should inform our current constitutional understandings of the proper scope of military jurisdiction. Such reliance on the Lincoln trial as legal authority is, in one sense, understandable, because that proceeding was, in Judge Kavanaugh’s words, “the highest-profile and most important U.S. military commission precedent in American history,” and thus it would be striking—indeed, a significant constitutional embarrassment—to conclude that the trial was unlawful.

As this Article demonstrates, however, such respect for the Lincoln assassination trial as a canonical constitutional precedent would itself be historically anomalous. For almost 150 years it was virtually unthinkable for anyone to rely upon that proceeding as venerated legal authority: as one esteemed expert wrote, the Lincoln trial was a case of military jurisdiction that “no self-respecting military lawyer [would] look straight in the eye.”
There is a rich and familiar literature on many of the great constitutional questions raised during the Civil War—on issues such as secession, habeas suspension, emancipation, and presidential prerogatives. This is, however, the first comprehensive account of one of the most important and most dramatic of the constitutional debates of that war and its aftermath, involving the permissible scope of military justice and whether certain wartime exigencies might justify circumvention of Article III’s guarantees. All three branches engaged on this difficult question during and after the war, but it resisted resolution; indeed, it was the rare constitutional problem that flummoxed even Lincoln himself. At war’s end, the President and many of his congressional allies appeared to be on the verge of repudiating the system of military tribunals that Lincoln himself had superintended. His assassination, however, prompted his successor to convene the most controversial military trial of them all, an audacious proceeding that not only revived the heated debate over the constitutional question, but also precipitated one of the only instances in the nation’s history in which the Executive actually disregarded a judicial order—an action to prevent the Article III courts from adjudicating a challenge to their own displacement. The Article uncovers this fascinating but long-neglected chapter in the history of constitutional war powers.

The article also carefully examines the place of the Lincoln trial in the nation’s constitutional discourse over the past century and a half—the ways in which that proceeding, and other Civil War military trials, have been accorded authority, or dismissed as nonauthoritative, by later generations. This broader historical narrative is not only of direct significance to the ongoing constitutional litigation challenging such military trials, but can also inform current academic and judicial debates about whether and under what circumstances political branch practice, especially high-profile precedents, ought to inform, or “liquidate,” the meaning or proper application of the Constitution.

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PROLOGUE

“The cause of such mighty changes in the world’s history
as we may perhaps never realize”

The most notorious and consequential crime in American history happened just eight blocks from where I sit, in the heart of the nation’s capital.

An attempt on the President’s life was hardly unforeseeable; Abraham Lincoln had been living in the shadow of such threats for more than four years, ever since the final leg of his train journey from Illinois to Washington in February 1861 was scheduled for the dead of night in order to avoid assassins thought to be lying in wait in Baltimore. Even so, the assassination in Ford’s Theater, on Good Friday 1865, stunned the nation, by virtue of both its timing and circumstance.

It had only been a fortnight since Grant took Richmond, and only five days since General Lee surrendered on behalf of the Army of Northern Virginia at the McLean residence in Appomattox Courthouse, on Sunday, April 9. Finally, the elusive peace was at hand. And just a few weeks earlier, the President himself set the tone for the imminent reconciliation: in a brief and solemn inaugural address, marked by equanimity and humility—and recognizing that the warring sides were bound together by a shared fate according to God’s unknowable design—Lincoln abjured any hint of triumphalism, declaring instead that now was the time to “bind up the nation’s wounds . . . [w]ith malice toward none; with charity for all.”

And so it was that on Thursday evening, April 13, just before the start of the Easter weekend, the District of Columbia was in a state of reverie and wonder, swathed in a gentle, mystical light:

The very heavens seemed to have come down, and the stars twinkled in a sort of faded way, as if the solar system was out of order, and earth had become the great illuminary. Everybody illuminated. Every flag was flung out, windows were gay with many devices, and gorgeous lanterns danced on their ropes along the walls in a fantastic way, as if the fairies were holding holiday inside.\(^1\)

\(^1\) See Garry Wills, “Lincoln’s Greatest Speech,” THE ATLANTIC (Sept 1999) (“Lincoln had learned to have a modest view of his ability to know what ultimate justice was, and to hesitate before bringing down the whole nation in its pursuit. He asked others to recognize in the intractability of events the disposing hand of a God with darker, more compelling purposes than any man or group of men could foresee. This lesson, learned from the war, he meant to apply to the equally intractable problems of the peace.”).

\(^2\) WASHINGTON EVENING STAR, Apr. 14, 1865, at 1. At the War Department, an elaborate fixture of gas jets contributed to the otherworldly nature of the evening: “[H]igh over all, as if suspended by unseen hands from above, in letters of softly subdued light, hung the sweet and healing word, ‘PEACE.’” Frank Abial
How incongruous it was, then, that the devastating blow should be drawn the next day, at that very moment of collective relief, after unending years of uncertainty and dread.

Even more unimaginable—inexplicable, even—was that the blow should come not from what remained of the Confederate Army, in a theater of war, but instead under the most banal of circumstances, in a theater of a much more ordinary kind, and at the hand of an undistinguished actor, not yet 27 years of age. While no one was paying him any mind, John Wilkes Booth crept from behind the President, brandishing a tiny derringer to terrifying effect—the fatal shot timed to coincide with the audience’s anticipated response to a corny punch line. Few could have imagined, on that peaceful spring evening, that a “little black mass no bigger than the end of [a] finger—dull, motionless and harmless,” might be “the cause of such mighty changes in the world’s history as we may perhaps never realize.”


3 The quotation is from a remarkable passage penned by a 26-year-old Army surgeon who assisted the President’s autopsy the next morning. In a letter to his mother, Edward Curtis described the scene:

The room… contained but little furniture: a large, heavily curtained bed, a sofa or two, bureau, wardrobe, and chairs…. Seated around the room were several general officers and some civilians, silent or conversing in whispers, and to one side, stretched upon a rough framework of boards and covered only with sheets and towels, lay—cold and immovable—what but a few hours before was the soul of a great nation.

The Surgeon General was walking up and down the room when I arrived and detailed me the history of the case. He said that the President showed most wonderful tenacity of life, and, had not his wound been necessarily mortal, might have survived an injury to which most men would succumb…. Dr. Woodward and I proceeded to open the head and remove the brain down to the track of the ball. The latter had entered a little to the left of the median line at the back of the head, had passed almost directly forwards through the center of the brain and lodged. Not finding it readily, we proceeded to remove the entire brain, when, as I was lifting the latter from the cavity of the skull, suddenly the bullet dropped out through my fingers and fell, breaking the solemn silence of the room with its clatter, into an empty basin that was standing beneath. There it lay upon the white china, a little black mass no bigger than the end of my finger—dull, motionless and harmless, yet the cause of such mighty changes in the world's history as we may perhaps never realize….

[S]ilently, in one corner of the room, I prepared the brain for weighing. As I looked at the mass of soft gray and white substance that I was carefully washing, it was impossible to realize that it was that mere clay upon whose workings, but the day before, rested the hopes of the nation. I felt more profoundly impressed than ever with the mystery of that unknown something which may be named 'vital spark' as well as anything else, whose absence or presence makes all the immeasurable difference between an inert mass of matter owning obedience to no laws but those covering the physical and chemical forces of the universe, and on the other hand, a living brain by whose silent, subtle machinery a world may be ruled.

The weighing of the brain…gave approximate results only, since there had been some loss of brain substance, in consequence of the wound, during the hours of life after the shooting. But the figures, as they were, seemed to show that the brain weight was not above the ordinary for a man of Lincoln's size.
As dramatic and consequential as the assassination may have been, however, it was—both in form and as a matter of law—a run-of-the-mill homicide, of the sort the criminal justice system routinely handled. In the ordinary course, then, those alleged to be responsible for the crime would have been tried before a local jury, for violations of standard-issue federal criminal law offenses, in a building less than five blocks from Ford’s Theater: the magisterial Old City Hall at 5th and E Streets, NW, which housed the Supreme Court of the District of Columbia, a federal court established pursuant to Article III of the Constitution. Such a federal criminal trial for an attack on a president would not have been unprecedented. Thirty years before, Old City Hall had been the site of the trial of Richard Lawrence, who had attempted to assassinate President Andrew Jackson as he emerged from the Capitol Rotunda. In the days immediately following Lincoln’s tragic death, there was little reason to doubt that the same courthouse would once again host such a trial, before pro-Union Article III judges of the D.C. Supreme Court whom President Lincoln himself had hand-picked less than two years earlier, when that court was established to replace the old Circuit Court of the District of Columbia.

Yet instead of seeking criminal court indictments against those thought to be responsible for Lincoln’s killing, the nascent Johnson Administration turned its sights two miles southward, to a thin peninsula bisecting the Potomac and Anacostia Rivers. At the tip of that peninsula, Greenleaf Point, lay the old, underutilized United States Arsenal, which had once been a federal penitentiary. The Administration chose that imposing, nondescript building as the site of a most extraordinary, unorthodox adjudicatory proceeding, one that raised fundamental constitutional questions concerning the proper balance between civil and military authorities.

John Wilkes Booth died in a stand-off with the Union Army at Garrett’s Farm in Virginia, twelve days after he murdered the President. The next day, April 27, 1865, the assassin’s body was brought to the Arsenal in the dead of night, and ignominiously buried beneath a storage room, where it would remain until being transferred to the Booth family plot in Baltimore four years later. Within two weeks of the crime, eight suspected confederates of Booth, including Lewis Powell (a/k/a Paine), the assailant of Secretary of State William Seward, were arrested and placed in military custody—some in the Old Capitol Prison in the District of Columbia (at First and A Streets NE), others on two ironclad ships, the U.S.S. Montauk and the U.S.S. Saugus, docked on the Anacostia River

4 In particular, they might have been charged with abetting “wilful murder” in a “district . . . under the sole and exclusive jurisdiction of the United States,” an offense established by the first Congress in section 3 of the Crimes Act of April 30, 1790, 1 Stat. 112, 113.


6 See infra note ___.

7 In 1862, Lincoln had ordered that the Arsenal be transferred to the War Department for the warehousing of military supplies; virtually all of its prisoners were sent elsewhere. Today, Greenleaf Point is the site of Army post Ft. McNair, which hosts the National Defense University.
just outside the District. On April 30, the Army transferred the alleged accomplices to an area of the Arsenal penitentiary that had been closed for years, where they were detained in squalid conditions, most of them forced to wear stifling canvas hoods.

The next day, May 1, 1865, President Johnson signed an order authorizing trial of the alleged accomplices in a makeshift military commission. Commission proceedings commenced on May 9, less than four weeks after the shooting. The two principal conspirators were absent: Booth was dead; and John Surratt, one of Booth’s most trusted confidants, had fled to Canada, and from there to England and then Italy, where he served as a papal zouaves. (Surratt was later arrested in Egypt and returned to the United States, where he was tried before a federal civilian jury in the D.C. Supreme Court in 1867.9) The eight individuals who appeared before the military commission were a motley collection of secondary figures, with a variety of actual or alleged connections to the crime:

- Lewis Powell (alias Paine) brutally attacked Secretary of State Seward at the same hour that Lincoln was killed.
- George Atzerodt was assigned to kill Vice President Johnson, but he never got further than the bar of the hotel where Johnson was staying before his conscience, or more likely his fear, held him back.
- David Herold was Booth’s aide, with whom he fled the capital; Herold surrendered to the army troops at Garrett’s Farm, where Booth was killed, on April 26.
- Michael O’Laughlen and Samuel Arnold had furtively plotted with Booth several months earlier to kidnap (not kill) the President and to take Lincoln to Richmond, where the President was to be used as leverage to secure a prisoner exchange that might result in General Grant freeing some Confederate prisoners. The plotters had abandoned that absurd idea some weeks earlier, and Arnold and O’Laughlen had nothing more to do with the events of April 14.
- Edwin Spangler, a stagehand at Ford’s Theater, held Booth’s horse in an alley while the actor was inside the theater, without knowledge of what Booth was up to.10

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8 The Assassination of President Lincoln and the Trial of the Conspirators 17 (compiled and arranged by Benn Pitman, 1989 ed.) [hereafter “Pitman”]. In Part II-B of this Article, I describe the cabinet debates and the one-sentence opinion of the Attorney General that preceded Johnson’s decision.

9 See infra at ____.

10 There was one piece of evidence suggesting that Spangler had abetted Booth’s flight from justice: A carpenter at the theater, who had briefly chased after Booth, testified that Spangler implored him not to reveal which way the culprit had fled. Pitman, supra note ___, at ___.

4
• Mary Surratt, John’s mother, owned a meetinghouse on H Street in Washington (where the Wok ‘n’ Roll restaurant now sits), as well as a tavern in Surrattsville (now Clinton), Maryland. The principal conspirators met and plotted at both of Surratt’s establishments, and she likely knew that something nefarious was up, although to this day it is uncertain whether she was aware of the details.

• Finally, Samuel Mudd was a Charles County, Maryland physician, slave owner and staunch Confederate supporter, who had had several previous, suspicious dealings with Booth and Surratt. Booth and Herold stopped at Mudd’s farm on the evening of their escape, where Mudd set Booth’s broken leg and offered the two men food and shelter for the night. He also showed them a little-known swamp route that would lead them to the Potomac so that they could cross into Virginia. (It is vigorously disputed, to this day, whether and to what extent Mudd knew what Booth had done that evening.)

The tribunal that stood in judgment of these eight individuals bore little resemblance to the D.C. Supreme Court open for business two miles to the north. It was a makeshift court, convened in an ersatz courtroom, measuring approximately 27 feet by 40, on the third floor of the Arsenal. Most importantly, the entity that would resolve the fate of the accused was entirely the creation of, and was administered by, the War Department. There was no judge. A panel of nine military officers, none of whom had legal training, served as “members” of the commission. They were chosen and detailed to the court by another military officer, Assistant Adjutant-General W.A. Nichols, who almost surely was acting at the direction of the Secretary of War, Edwin Stanton, and/or the esteemed Judge Advocate General, Joseph Holt.

Secretary Stanton himself helped draft the single, elaborate charge against the defendants. Judge Advocate General Holt “preferred” the charge, prosecuted the case, and effectively controlled the trial, assisted by two Assistant Judge Advocates, John Bingham and Henry Burnett. The commission itself nominally decided legal questions that arose at trial, following confidential deliberations in which the members were advised by none other than Holt, Bingham and Burnett—i.e., by the prosecutors themselves. This was, in other words, an Executive proceeding, through and through—

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11 Today, most of the old Penitentiary is long gone, but the portion that held the trial remains, as a smaller building known as Grant Hall. The trial courtroom has recently been recreated on the third floor and is open to public viewing four times a year.

12 One of them, Major General Lew Wallace, would later become Governor of the New Mexico territory, and then the U.S. Minister to the Ottoman Empire. He is most famous for having written the historical adventure story BEN-HUR: A TALE OF THE CHRIST, in 1880.

13 Burnett had been the chief prosecutor of the military commission trial of “copperheads” Lambdin Milligan and others in Indiana—a proceeding that will play a prominent role in our story. See infra at __. Bingham went on to become a member of the House of Representatives, in which capacity he was the principal author of Section 1 of the Fourteenth Amendment, and chief prosecutor in the impeachment trial of President Johnson after the President removed Stanton as Secretary of War in violation of the Tenure in Office Act.
indeed, one in which military officers played all the governmental roles, and in which there was very little separation between the prosecution and the finders of fact.

On June 30, after more than seven weeks of trial and almost 400 witnesses, the commission found all eight defendants guilty of at least some involvement in the events of April 14. The commission recommended that three of the defendants—Arnold, O’Laughlen and Mudd—be sentenced to life imprisonment at hard labor; that Spangler serve a term of six years at hard labor; and that the other four accused be executed.¹⁴

One week later, after President Johnson had approved the verdicts, four of the defendants—Powell, Atzerodt, Herold and Surratt—were executed on a gallows built just outside the Arsenal courthouse. Today, a desultory tennis court occupies the site of the hanging; a nondescript plaque is the only reminder of the solemn events that occurred there.

**INTRODUCTION**

The Lincoln assassination has spawned a veritable library of writings over the past 150 years. Indeed, an actual Lincoln assassination library, the James O. Hall Research Center, sits a few miles from the scene of the crime, adjacent to the Surratt House Museum in Clinton, Maryland—what Sarah Vowell has appropriately dubbed the “Vatican of the Lincoln assassination subculture.”¹⁵ As with most great crimes, this one has engendered countless debates, controversies and conspiracy theories, sustaining what one might fairly call “Lincoln assassination studies.” The majority of accounts have been written by amateur sleuths and obsessives—nonacademic, nonprofessional authors who have devoted a remarkable portion of their lives, and their energies, to the subject.¹⁶ Having spent some time poring over the materials at the museum, and paid my nominal dues, I, too, am now a card-carrying member of the Surratt Society (which collects much of its revenue by hosting regular, twelve-hour-long John Wilkes Booth Escape Route tours). Every month, I receive “The Surratt Courier,” a newsletter chock full of new discoveries, revelations, artifacts, and fighting words.

Of course, just as the assassination literature itself is only a sliver of the much larger phenomenon of Lincoln scholarship, so, too, only a small percentage of the assassination literature concerns the trial of the conspirators. Even so, that relatively modest slice amounts to several heavily weighted shelves of books and other materials. Most of those sources offer detailed accounts (with varying degrees of accuracy) of the

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¹⁴ Pittman, *supra* note __, at 248-49.

¹⁵ Sarah Vowell, *Assassination Vacation* 54 (2005). Mary Surratt, one of the commission defendants, owned a tavern in Clinton—then known as Surrattsville—and it was there, in part, that the plot was hatched, and there that Booth and his accomplice, David Harold, first stopped for sustenance and munitions as they fled Washington on the night of April 14.

¹⁶ Such writings have become so voluminous that a Lincoln assassination historiography of sorts has even begun to sprout up. *See, e.g.*, William Hanchett, *The Lincoln Murder Conspiracies* (1983).
trial itself. Many overflow with seemingly endless debates about the guilt or innocence of the defendants—especially of Samuel Mudd, the Charles County, Maryland physician and slave owner who set Booth’s broken leg and allowed Booth and Herold to sleep at his house several hours after the assassination, and of Mary Surratt, who owned the meetinghouse and tavern where the conspirators plotted.\textsuperscript{17}

Other accounts of the trial focus upon the many significant shortcomings of the military proceedings,\textsuperscript{18} among which are the following:

- That the defendants were detained in horrifying conditions, first on the ironclad ships and then at the Arsenal—especially the requirement that most of them spend virtually all their waking hours, day after day, wearing heavy canvass hoods that made breathing and sight quite difficult, and that some of them be chained in excruciating iron ankle and wrist restraints.

- That at the outset of trial the defendants were paraded before the commission “with black linen masks covering all their faces except tip of nose & mouth, heavily chained & each led staggering & clanking in, by his keeper. It was a horrid sight.”\textsuperscript{19}

- That the charges against the defendants were of extraordinary breadth and vagueness—Chief Justice Rehnquist would later describe them as, “to put it mildly, . . . ambitious.”\textsuperscript{20}

- That the accused were not offered counsel until after they were arraigned before the commission, and then only the day before testimony began, with no time to prepare for trial.

- That prosecutor Holt chose to hold the proceedings in secret (a decision he promptly reversed when it became a public embarrassment).

- That at least one of the commission members, Thomas Harris, who would later write a volume accusing the Catholic Church of responsibility for the

\textsuperscript{17} Chief Justice Rehnquist’s short chapter on the evidence against each of the defendants is about as fair and balanced an account as one could hope for. \textit{See} William H. Rehnquist, \textit{ALL THE LAWS BUT ONE} 155-69 (1998). Rehnquist concluded that although all of the defendants were likely guilty of \textit{something}, such as conspiring to commit other offenses or being an accessory to Booth after the fact, few of them other than Powell and Herold had clearly conspired to murder the President or other officials, which was the principal basis for the charge before the commission.

\textsuperscript{18} Some of these problems are well summarized in Rehnquist, \textit{supra} note __, at __, and in Joshua E. Kastenberg, \textit{LAW IN WAR, WAR AS LAW} 362-70 (2011).

\textsuperscript{19} Diary of Cyrus B. Comstock (on that date a member of the Commission), May 9, 1865, \textit{PAPERS OF CYRUS B. COMSTOCK}, Library of Congress.

\textsuperscript{20} Rehnquist, \textit{supra} note __, at 147. The charge is described in further detail \textit{infra} note __.
assassination,\textsuperscript{21} tried (unsuccessfully) to deny Mary Surratt the services of esteemed Maryland Senator Reverdy Johnson as her counsel by accusing Johnson of disloyalty to the Union.\textsuperscript{22}

- That the prosecution unduly influenced the commission members, particularly on matters of law.
- That a substantial portion of the trial was devoted to testimony about alleged plots against the President by Confederate agents in Canada—what one of the defense counsel called a “wild jungle of testimony.”\textsuperscript{23}
- That the three principal witnesses who testified about supposed connections between the Canadian operation and Booth were revealed to be perjurers at best, if not outright charlatans.
- That the prosecution produced almost no evidence that the eight accused themselves were even aware of any connection between Booth and the unindicted coconspirators in Canada.
- That the prosecution failed to produce Booth’s diary—a document that might have helped support the defense allegations that the conspiracy, if any, was merely to kidnap Lincoln, and that Booth had decided to kill Lincoln only at the very end, without the knowledge of most of the defendants.
- That the evidentiary rulings were, by most accounts, imbalanced in the prosecution’s favor.
- That, after the trial, Holt may have deliberately failed to present President Johnson with a petition signed by five of the nine commission members, asking him to commute Mary Surratt’s sentence to life in prison.

Many of these problems and irregularities were the direct result of Johnson’s decision to convene a military commission. It is hard to imagine most of them occurring, at least not to the same degree, if the conspirators had been tried before a civilian jury in the D.C. Supreme Court, with an Article III judge presiding.

Nevertheless, this Article does not focus upon, or attempt to adjudicate disputes concerning, this familiar array of controversies attending the Lincoln commission, for several reasons. For one thing, there’s not much more to add: Those issues have been

\textsuperscript{21} Thomas Harris, \textit{ROME’S RESPONSIBILITY FOR THE ASSASSINATION OF ABRAHAM LINCOLN} (1897).

\textsuperscript{22} Pitman, \textit{supra} note __, at 22.

\textsuperscript{23} Pitman, \textit{supra} note __, at 265 (Thomas Ewing, Jr.); see also Rehnquist, \textit{supra} note __, at 148 (much of the testimony was “wide-ranging and immaterial”).
dissected and debated, in sometimes excruciating detail, for several generations.\textsuperscript{24} Moreover, there is a rough consensus about the inadequacies of the Lincoln commission itself. To be sure, many disputes continue to fester, among the self-appointed Lincoln assassination “experts,” on particular points of contention, especially with regard to what, if anything, Mudd and Surratt were guilty of. Yet even those who defend the verdicts typically concede that the commission proceedings were shot through with structural, procedural and evidentiary flaws. In the century and a half since it was convened, virtually no one, no matter how sympathetic to Johnson, Stanton and Holt, has looked to the Lincoln assassination commission as a model of procedural justice. It would be difficult to find another example in American history that better illustrates the quip often attributed to Clemenceau: “La justice militaire est a la justice ce que la musique militaire est a la musique.” (“Military Justice is to justice what military music is to music.”)

More importantly, most of the particular, case-specific problems in the Lincoln assassination trial are unlikely to recur in the future, even in deeply contested military criminal tribunals such as the current military commissions at the Guantánamo Bay Naval Base. In recent decades Congress has substantially reformed, and “civilianized,” the systems of military justice, in order to conform them much more closely to the processes of civilian courts.\textsuperscript{25} There is, of course, a great deal of continuing debate about whether these reforms are sufficient; modern courts-martial and (especially) military commissions certainly remain deeply controversial. Not even their harshest critics, however, think we are likely to ever again see anything resembling the Lincoln assassination commission.

The principal subject of this Article, then, is not the particular irregularities and flaws of the Lincoln assassination trial itself, but instead the more fundamental constitutional question at its heart—a question that was a constant source of contestation throughout the Civil War and into Reconstruction, that has been the subject of debate and analysis in many of the nation’s other major wars, and that has not yet been resolved: When, if ever, it is constitutional for the federal government to try persons other than members of the armed forces in a military “war” tribunal for alleged offenses under domestic (as opposed to international) law?

* * * *

\textsuperscript{24} Perhaps the most balanced—and certainly the most thorough and detailed—contemporary account is in Elizabeth D. Leonard, \textit{LINCOLN’S AVENGERS: JUSTICE, REVENGE, AND REUNION AFTER THE CIVIL WAR} 67-113 (2004). Leonard’s book has the additional virtue of placing the Lincoln trial in its broader context, including the ways in which it augured the coming struggles over how the Union would reconstruct, and reconcile with, the vanquished South.

\textsuperscript{25} See Martin S. Lederman, \textit{If George Washington Did It, Does that Make It Constitutional?: History’s Lessons for Wartime Military Tribunals}, 105 GEO. L.J. ___ (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2840948, at ___ [hereinafter “Washington article”]. Moreover, in the unlikely event Congress were to renege on these modern reforms, the Supreme Court would likely insist upon them as a matter of due process.
Article III of the Constitution provides two guarantees with respect to federal criminal trials: that a civilian jury will adjudicate guilt of “all crimes” (a protection so important to the Founders that it reappears in the Sixth Amendment), and that an independent judge—someone not in any way subservient to the political branches—will oversee the proceedings and render rulings of law. As Chief Justice Roberts has recently explained with respect to the latter feature of Article III, “[b]y appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the ‘[c]lear heads ... and honest hearts’ deemed ‘essential to good judges.’”

The concerns about disregarding these two Article III guarantees are especially acute when it comes to military tribunals, because even “conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.” Military judges, for instance, not only lack lifetime salary and tenure protections; they are also assigned to judicial duty by other executive officers, and commanding officers can remove or reassign them at will. What is more, the future prospects for promotion and reassignment of both military judges and military panel “members” are in the hands of their superior officers; and, because promotion to a higher rank is appointment to a new office, which requires Senate consent, such officers have reason and incentive to avoid doing anything that might antagonize or disappoint the legislative branch, as well.

Despite these concerns, the Supreme Court has recognized three distinct contexts in which the Constitution permits criminal trials in military courts: (i) for the court-martial of individuals within, or in some cases employed by, the armed forces themselves; (ii) when the military is occupying a foreign territory and therefore no

26 Id. at ___.

27 Stern v. Marshall, 564 U.S. 462, 484 (2011) (quoting 1 WORKS OF JAMES WILSON 363 (J. Andrews ed. 1896)); see also THE FEDERALIST NO. 78, at 466 (C. Rossiter ed. 1961) (A. Hamilton) (“'[T]here is no liberty if the power of judging be not separated from the legislative and executive powers. . . . The standard of good behavior for the continuance in office of the judicial magistracy . . . is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.” (quoting 1 Montesquieu, SPIRIT OF LAWS 181).


29 See Lederman, Washington article, supra note __, 105 GEO. L.J. at ___.

civilian courts are available; and, most significantly, (iii) when the trial is for offenses against the international laws of war.\textsuperscript{31}

The question at issue in the Lincoln assassination trial—a question that was intensely debated throughout the Civil War, and that has engendered significant confusion and disagreement in several other wars, as well—is whether there is, or ought to be, a fourth military exception, for the military adjudication of \textit{domestic-law} offenses in wartime.

As I explain at greater length elsewhere, this Article III question has become increasingly important in the United States’ current armed conflicts against nonstate armed terrorist organizations, such as al Qaeda and the Islamic State in the Levant (ISIL).\textsuperscript{32} Such nonstate enemies regularly engage in conduct—such as targeting U.S. forces, providing material assistance to terrorism, or conspiring to commit law-of-war offenses—that violates U.S. \textit{domestic} law but that international law neither prohibits nor privileges against prosecution. And Congress has recently authorized military commissions to try many such domestic-law offenses. Therefore, as a matter of statute, a substantial number of terrorism-related activities now constitute offenses that can be tried either by a military tribunal \textit{or} in an Article III court. Moreover, as to some defendants—those detained at the Guantánamo Bay Naval Base—a military commission is the only possible venue, because Congress has precluded the President from trying them in ordinary Article III courts.

Not surprisingly, then, the Article III question is now being litigated, for the first time in many decades, and the Supreme Court might consider it as soon as this Term, in a case involving Ali Hamza Ahmad Suliman al Bahlul.\textsuperscript{33} A military commission at Guantánamo convicted al Bahlul of several war-related offenses under the Military Commissions Act of 2006 that are not violations of the international laws of war—such as providing material support to terrorism. The United States Court of Appeals for the District of Columbia Circuit overturned all but one of those convictions on other constitutional grounds,\textsuperscript{34} leaving only a single, remaining conviction, for an inchoate conspiracy.

The United States concedes that such a conspiracy is not a violation of the international laws of war.\textsuperscript{35} The government nevertheless argues that it was

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\textsuperscript{31} See Lederman, Washington article, \textit{supra} note \( __ \), 105 GEO. L.J. at \( ___ \) (discussing \textit{Ex parte Quirin}, 317 U.S. 1 (1942)).

\textsuperscript{32} See id. at \( __ \).

\textsuperscript{33} See al Bahlul v. United States, 840 F.3d 757 (D.C. Cir. 2016) (en banc).

\textsuperscript{34} al Bahlul v. United States, 767 F.3d 1 (D.C. Cir. 2014) (en banc).

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constitutional for Congress to authorize a military tribunal to try al Bahlul for such a domestic-law offense, even though the case could (if Congress allowed it) be tried in an Article III court. And in the court of appeals’ recent en banc decision, a four-judge plurality agreed. That decision will likely be appealed to the Supreme Court shortly.

The Article III question has recently taken on even greater significance in light of the recent presidential election. During the campaign, President Trump expressed disdain for Article III trials of terrorist suspects, and signaled that he intends to try even more detainees, including even United States citizens, in military commissions. Although the current version of the Military Commissions Act does not authorize the trial of U.S. citizens by military commission, the President and the Republican Congress could well seek to amend that statute; and, in any event, another longstanding provision of the Uniform Code of Military Justice already authorizes the trial in military tribunals—with a potential penalty of death—of U.S. persons who attempt to aid the enemy in certain ways or to correspond with the enemy.40 The government convicted a U.S. citizen in a military tribunal for violation of an earlier iteration of that provision as recently as the Second World War.41

Such a military prosecution would appear to be in direct conflict with the

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36 840 F.3d at 759-74 (opinion of Kavanaugh J., joined by Brown and Griffith, JJ., concurring) (D.C. Cir. en banc 2016); id. at 759 (Henderson, J., concurring, and incorporating by reference her dissenting opinion in the panel proceeding, al Bahlul v. United States, 792 F.3d 1, 27-72 (D.C. Cir. 2015) (Henderson, J., dissenting)). Four other judges concluded that Article III does bar such a prosecution. See id. at 809-26, 835-37 (joint opinion of Rogers, Tatel and Pillard, JJ., dissenting); id. at 800 (opinion of Wilkins, J., concurring) (stating that if he were to reach the merits, “I would be inclined to agree with the dissent”). The remaining three judges on the court of appeals either did not reach the merits question or were recused. Judge Millett concluded that the conviction could be affirmed because it was not “plain error.” Id. at 788-95. Chief Judge Garland and Judge Srinivasan did not participate in the decision.


39 See 10 U.S.C. § 948c (limiting the personal jurisdiction of military commissions to offenses committed by “alien unprivileged enemy belligerents”).

40 10 U.S.C. § 904 (“Any person who—(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or (2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly; shall suffer death or such other punishment as a court-martial or military commission may direct.”). I discuss the history of this provision in greater detail in Lederman, Washington article, supra note __.

41 See id. at ___ (explaining that the Supreme Court in Quirin declined to opine on whether that conviction was constitutional).
terms of Article III (“all crimes”) and the Sixth Amendment (“all criminal prosecutions”). As the Court stated in the landmark *Milligan* case, these are “provisions . . . too plain and direct to leave room for misconstruction or doubt of their true meaning”; they are “expressed in such plain English words, that it would seem the ingenuity of man could not evade them.” As Judge Kavanaugh conceded in his recent plurality opinion in *al Bahlul*, “[b]ased solely on the text of Article III, Bahlul might have a point.” Nevertheless, the government insists—and, in *al Bahlul*, Judge Kavanaugh and three of his colleagues agreed—that *history* resolves the constitutional question in favor of the authority to adjudicate such charges without the judge and jury protections of Article III.

The government and Judge Kavanaugh rely upon historical antecedents of two distinct sorts. First, the government invokes precedents from the Revolutionary War, in which the Continental Congress approved, and General George Washington implemented, military trials against spies and, in at least one case, a civilian charged with aiding the British. Citing the Court’s understanding in *Ex parte Quirin* that “it was not the purpose or effect of § 2 of Article III . . . to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right,” the government argues that the pre-constitutional history, or “backdrop” against which the Constitution was drafted and ratified, demonstrates that the Constitution does not bar military trial of war-related domestic-law offenses. Judge Kavanaugh further argues that the early Congresses in effect ratified that constitutional understanding. In a companion article, I explain why these Founding-era precedents offer little support for the constitutionality of military trials for war-related domestic-law offenses.

Second, taking a cue from recent Supreme Court admonitions that “a regular course of practice” by the political branches—even one that “began after the founding era”—can, in Madison’s words, “liquidate & settle the meaning” of contested

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42 *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 119-20 (1866). Moreover, as I explain elsewhere, the government and the judges who have ruled in its favor have opted not to rely upon functional, pragmatic or normative justifications for abandoning civilian judges and juries in such cases—the sorts of justifications that the Supreme Court has relied upon to recognize most of the small handful of other exceptions to Article III’s criminal trial guarantees. The government apparently has concluded, with good reason, that no such functional or normative justifications would be compelling enough to warrant an atextual exception for military trials of domestic-law offenses, at least not in the context of our current armed conflicts. *See* Lederman, Washington article, *supra* note __, 105 GEO. L.J. at __.

43 840 F.3d at 768.

44 317 U.S. 1, 39 (1942) (internal citation omitted); *see also* Miller v. United States, 78 U.S. 268, 312 (1870) (reasoning that, with few exceptions, the Constitution was designed to give the government “the power of carrying on war as it had been carried on during the Revolution”).


46 *See*, e.g., U.S. 2015 *Bahlul* Br. at 33-34.

47 *al Bahlul*, 840 F.3d at 765 (plurality opinion).
constitutional text, the government argues that “‘longstanding practice of the government can inform our determination of what the law is’” on the Article III question. This theory is at the heart of Judge Kavanaugh’s recent opinion. He emphasized that in two of the nation’s most important wars—the Civil War and the Second World War—the Executive branch used military tribunals to try individuals for offenses (including conspiracy) that were not violations of the international laws of war. Citing the Supreme Court’s recent decision in Noel Canning v. NLRB, Judge Kavanaugh concluded that “we must be ‘reluctant to upset this traditional practice where doing so would seriously shrink the authority that Presidents have believed existed and have exercised for so long.’”

As it happens, this “traditional practice” is not terribly extensive: The government, for instance, cites only a smattering of executive branch precedents—principally, five trials involving charges of “conspiracy” and other domestic-law offenses—during the Civil War and the Second World War. And of those five, Judge Kavanaugh’s historical case rests upon only three. Two of those three were military trials of Nazi saboteurs in the Second World War, including in the Quirin case. As I explain later in this article, however, those saboteur cases can hardly begin to describe a well-established practice that might be thought to “liquidate” an implied exception to Article III’s plain words, not least because the Supreme Court in Quirin expressly declined to sustain the convictions on the charges in that case—including a charge of aiding the enemy—that did not describe what the Court viewed as international law-of-war violations.

That leaves just one other historical precedent, on which the “liquidation” argument crucially depends: the Lincoln assassination proceeding, which Judge

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49 U.S. 2015 Bahlul Br. at 32 (quoting Noel Canning, 134 S. Ct. at 2560).

50 Id. (quoting Noel Canning, 134 S. Ct. at 2573); see also al Bahlul v. United States, 792 F.3d 1, 62 (D.C. Cir. 2015) (Henderson, J., dissenting) (relying upon a “robust history” of wartime military trials of domestic-law offenses).

51 See U.S. 2015 Bahlul Br. at 36-44. During the Civil War, to be sure, the military tried thousands of individuals for a wide variety of domestic offenses, and Abraham Lincoln himself was deeply involved in that practice (even though, as I will explain, he never did quite reconcile himself to the legality of the military commissions, nor was he able to offer an adequate answer to critics who complained that such commissions were unconstitutional). The court of appeals, however, has already expressed a warranted “skepticism” that such trials could offer much constitutional guidance, because “[u]nlike the Lincoln conspirators’ and Nazi saboteurs’ cases, which attracted national attention and reflected the deliberations of highest-level Executive Branch officials, the field precedents are terse recordings of drumhead justice.” al Bahlul, 767 F.3d at 27. The government, accordingly, relies primarily on only three Civil War trials, the Lincoln proceeding foremost among them.

52 See infra at ___.
Kavanaugh refers to as one of the two “most well-known and important U.S. military commissions in American history” (along with the *Quirin* saboteurs case).\(^{53}\) As Kavanaugh notes,\(^ {54}\) the en banc court of appeals, in an earlier opinion in *al Bahlul* joined by six judges, described the Lincoln trial as “a particularly significant precedent” because it was “a matter of paramount national importance [that] attracted intense public scrutiny” and “the highest-level Executive Branch involvement.”\(^ {55}\)

The constitutional fate of this “particularly significant precedent” is certainly at stake in the current litigation. If the courts ultimately hold that Congress cannot authorize a military commission to try al-Bahlul and other commissions defendants for domestic-law charges, it would follow almost *a fortiori* that the Lincoln trial, too, violated the Constitution—for, unlike al-Bahlul, the Lincoln defendants were not even members of an enemy armed force: they were U.S. citizens (most of whom resided in Union territory), captured and tried in the United States, for crimes that occurred in the Nation’s capital, and without congressional authorization of the military proceeding. Thus, if the courts were to reject al-Bahlul’s Article III argument, they would almost certainly have to repudiate—in Judge Henderson’s words, “retroactively undermine”—a landmark event in our national legal and political narrative.\(^ {56}\) Arguably, such a result should be disfavored or, at the very least, viewed with considerable skepticism.

Or so Judge Kavanaugh has suggested: In an earlier iteration of the *al Bahlul* case, he expressed doubts about al-Bahlul’s constitutional argument precisely because it “would render the Lincoln conspirators and Nazi saboteur convictions for conspiracy illegitimate and unconstitutional.”\(^ {57}\) And in his most recent plurality opinion for four judges, Judge Kavanaugh concluded that this is something courts should not do, because the Lincoln trial (together with *Quirin*) is “at the core” of historical military practice, which “cannot be airbrushed out of the picture.”\(^ {58}\)

As this article demonstrates, however, such respect for Lincoln assassination trial as an important constitutional precedent would itself be an historical anomaly. To be sure, that proceeding might, indeed, be the “highest-profile and most important” military trial in the nation’s history. Prominence does not necessarily equal precedent, however—not precedent worthy of respect, anyway. Until very recently it was folly—virtually unthinkable—for anyone to rely upon the conspirators’ proceeding as a venerated

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\(^{53}\) 840 F.3d at 767.

\(^{54}\) Id. at 766.

\(^{55}\) *al Bahlul*, 767 F.3d at 25.

\(^{56}\) See *al Bahlul*, 792 F.3d at 60-61 (Henderson, J., dissenting) (“My colleagues, then, would retroactively undermine the constitutionality of at least two of the Lincoln conspirators’ convictions.”).

\(^{57}\) 767 F.3d at 72 (Kavanaugh, J., concurring in the judgment in part and dissenting in part); *see also* id. at 52 (Brown, J., concurring); *al Bahlul*, 792 F.3d at 69-71 (Henderson, J., dissenting).

\(^{58}\) *al Bahlul*, 840 F.3d at 768.
example that might *support*, rather than undermine, the argument that domestic law offenses in wartime can be tried in military commissions rather than in Article III courts.

Indeed, even at the time of the trial itself, the constitutionality of the military court was deeply contested. Members of Lincoln’s own cabinet, and at least one member of the commission itself, thought it was unconstitutional. Much of the pro-Union press inveighed against the constitutionality of the trial, as well. And an esteemed New York judge, noting “grave” constitutional doubts, went so far as to invite a grand jury to issue a “presentment” concerning the unlawfulness of the Lincoln commission. Shortly thereafter, the Supreme Court’s 1866 decision in *Ex parte Milligan* was widely viewed as the death knell for the sorts of military courts that had become ubiquitous during the Civil War—including the Lincoln conspiracy tribunal itself—because all of the Justices in that case rejected the government’s central arguments for passing over the civilian courts.

Accordingly, when Booth’s primary accomplice, John Surratt, was extradited to the United States several months after the *Milligan* decision, the government tried him in the local Article III court, where he was eventually freed after the jury was unable to reach a verdict.

As far as the legal world was concerned, that was just about the last anyone heard of the constitutionality of the Lincoln assassination trial for well over a century, even though the constitutional question (whether Article III and the Sixth Amendment preclude such wartime military tribunals) was the subject of substantial debate in both World Wars. The Lincoln case disappeared from the leading treatises and academic accounts of military jurisdiction—so much so that the author of the most recent law review article devoted to the question of the trial’s constitutionality, published in 1933, described the Lincoln commission precedent as having been “relegated to the museum of legal history.”

That was eighty-three years ago; and the constitutional questions raised by the Lincoln assassination trial have received virtually no scholarly attention ever since. As one of the nation’s leading experts on military law wrote to Justice Frankfurter in 1942, the Lincoln assassination tribunal is an example of military jurisdiction that “no self-

\[59\] See infra at ___.

\[60\] See infra at ___.

\[61\] See infra at ___.


\[63\] John Fabian Witt’s recent, brief account of how the jurisdictional question was considered at the trial itself, see John Fabian Witt, *LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 289-94 (2012), is a rare and welcome exception.
respecting military lawyer will look straight in the eye.”  The trial of the Lincoln conspirators had, in effect, become the Case That Must Not Be Named.

Until recently. Virtually out of the blue, Justice Thomas cited the assassination trial as a relevant precedent (albeit for a statutory argument) in his dissenting opinion in Hamdan v. Rumsfeld65—thereby signaling that the Lincoln trial might, for the first time since 1865, serve as a possible source of legal authority. Shortly thereafter, the en banc federal court of appeals in the al Bahlul case went further still, insisting that it is “a particularly significant precedent”66; and four judges on that court have now pointed to that proceeding as the principal basis for turning aside al Bahlul’s constitutional objections. This completes an extraordinary about-face: All of a sudden, the Lincoln trial is no longer a dusty museum relic, let alone an anti-precedent—a case so palpably unconstitutional and unlawful that no one dare cite it for over a century; instead, it “looms as an especially clear and significant precedent,”67 one that “cannot be airbrushed out of the picture” because it lies “at the core” of our constitutional tradition.68

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This article is a study of the Lincoln assassination trial and its place in our constitutional narrative. The most immediate reason for revisiting the 1865 commission is that a fair assessment of the constitutional arguments associated with that trial may bear heavily on the pending military commissions litigation testing the limits of Article III—a question that has bedeviled courts and commentators throughout the nation’s history, and one that remains unresolved. Indeed, the Lincoln precedent looms especially large now, given the new President’s professed desire to do what President Johnson did then—namely, to use military courts to try U.S. citizens alleged to have assisted the enemy.

Moreover, and wholly apart from how modern courts might settle that particular constitutional controversy, the Lincoln assassination trial was a signal event in our constitutional history, and the centerpiece of a fascinating constitutional debate about military justice that raged throughout the Civil War and into Reconstruction. There is a rich academic literature on many of the great constitutional questions raised during the

64 Letter of Frederick Bernays Wiener letter to Felix Frankfurter, Nov. 5, 1942, at 9; accord Frederick Bernays Wiener, A PRACTICAL MANUAL OF MARTIAL LAW 138 (1940) (“military men generally have hesitated to regard the occasion as a sound precedent or, indeed, as anything more than an indication of the intensity of popular feeling at the time”).

65 548 U.S. 557, 699 (2006) (Thomas, J., dissenting); see also id. at 693-94 (relying upon Attorney General Speed’s after-the-fact legal opinion in support of the Lincoln trial’s constitutionality).

66 al-Bahlul, 767 F.3d at 25 (quoting Hamdan, 553 U.S. at 597) (emphasis added); accord id. at 52 (Brown, J., concurring).

67 Id. at 69 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

68 al Bahlul, 840 F.3d at 768 (plurality opinion).
Civil War, such as secession, habeas suspension, emancipation, and presidential prerogatives. Yet, until now, there has not been any comparable, comprehensive account of the ways in which all three branches engaged repeatedly on the difficult question of the permissible scope of military justice and whether certain wartime exigencies might justify circumvention of Article III’s guarantees. As this Article will show, the question was so vexing throughout the war that even Lincoln himself—the greatest constitutional thinker of his time—appeared to be singularly uncertain of how to resolve it. Finally, at war’s end, the President and many of his congressional allies appeared to be on the verge of repudiating the system of military tribunals that Lincoln himself had superintended. His assassination, however, prompted the new President, Andrew Johnson, to convene the most controversial military trial of them all, in the name of avenging Lincoln’s death. That controversial and audacious proceeding revived the heated debate over the constitutional question in acute form. It also offered the occasion for the Article III courts themselves to resolve the question—only to have that opportunity cut off at the pass, when Johnson dramatically suspended the habeas jurisdiction of the court hearing Mary Surratt’s petition, one of the only instances in the nation’s history in which the Executive has actually disregarded a judicial order.

This story of constitutional contestation during the Civil War is certainly worth recovering and conveying to new generations, if only as a cautionary tale, on the occasion of the trial’s sesquicentennial. This article is the first detailed academic treatment of the legal debates surrounding the system of Civil War military tribunals.

The article also contributes to the current, robust academic interrogation of the use of custom, or practice, as an interpretive guide to questions involving the separation of powers. In particular, the article explores the place of the Lincoln trial in constitutional discourse after 1868—the ways in which that proceeding, and other Civil War military trials, have been accorded authority, or dismissed as nonauthoritative, in subsequent generations. This historical exhumation might help to inform current debates about whether and under what circumstances political branch practice, especially high-profile precedents, ought to inform, or “liquidate,” the meaning or proper application of the Constitution, and about how particular precedents come to be established as


70 See Zivotofsky v. Kerry, 135 S. Ct. 2076, 2091 (2015); Noel Canning, 134 S. Ct. at 2559-60; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring); Letter to Spencer Roane from James Madison (Sept. 2, 1819), in 8 WRITINGS OF JAMES MADISON 450 (G. Hunt ed. 1908) (it “was foreseen at the birth of the Constitution, that difficulties and differences of opinion
canonical or as “anticanonical”\textsuperscript{71}—and perhaps, as in this case, how they might move, back and forth, between the anticanon and the canon.

Part I of the Article sets the stage for the events of 1865. It recounts the sudden proliferation, during the Civil War, of military trials of persons who were not part of the Union armies, and the considerable constitutional debates surrounding that practice in the military proceedings themselves and in both of the political branches. In Part II, the heart of the article, I then examine the ways in which the constitutional question was contested and resolved in connection with the Lincoln assassination trial itself.

In Part III, I turn to the effects of the postwar \textit{Milligan} decision, and how the generation immediately after the war came to view both the Lincoln trial, in particular, and the constitutionality of military criminal adjudication generally. In Part IV, I show how the Lincoln trial virtually disappeared as a constitutional precedent during wartime debates of the constitutional question in the two World Wars. That Part also briefly examines the cases from World War II upon which the government and Judge Kavanaugh rely, and the furtive revival of the Lincoln trial as legal authority since September 11, 2001. Finally, in Part V, I offer some thoughts on what this history of the Lincoln trial might demonstrate, not only about the merits of the Article III question currently at issue in the courts, but also, and more broadly, about the use of high-profile historical practices as a source of constitutional authority.

\section*{1. Consideration of the Constitutional Question During the Civil War}

Long before the terrible events of April 14, 1865, criminal trials by military commission had become commonplace in the Civil War. In the 40 or so months that preceded Lincoln’s assassination, the War Department instituted an elaborate system of such commissions (and some courts-martial) throughout the land—military courts that, in many places, virtually displaced ordinary civilian courts. These military tribunals occasionally tried members of the Union and Confederate armed forces for violations of the laws of war. But that was just the tip of the iceberg. Much more frequently, Judge Advocate General Joseph Holt and his august team of prosecutors\textsuperscript{72} brought a wide range

\textsuperscript{71} See Jamal Greene, \textit{The Anticanon}, 125 HARV. L. REV. 379 (2011); see also Jack M. Balkin, \textit{Constitutional Redemption} 119 (2011) (arguing that “attempting to move arguments from off-the-wall to on-the-wall is the process of constitutional development in America”).

\textsuperscript{72} See Witt, \textit{supra} note \_\_, at 264-65 (describing how Holt pulled together a cadre of extraordinary, talented judge advocates, including former Representative John Bingham, John and Henry Knox, John Chipman Gray, and William Winthrop).
of charges against persons who were unconnected to military forces, in most cases for conduct that did not violate the international laws of war.\textsuperscript{73}

Commissions proceedings began early in the war in the border states of Missouri and Kentucky, primarily against organized “guerrilla” groups and other marauders—persons sympathetic to, but not formally in league with, the Confederate cause, who endeavored to undermine the Union cause by sabotage, including the destruction of railroads, bridges, and telegraph lines. After President Lincoln appointed Holt as Judge Advocate General in September 1862, however, the cases quickly expanded to other jurisdictions, including the District of Columbia and some northern states, and to what John Witt accurately characterizes as a “staggeringly wide array of conduct.”\textsuperscript{74} Some cases involved ordinary crimes—often with only a very attenuated or nonexistent connection to the war—while others involved a wide array of activities that the military viewed as harmful to the Union war effort, including expressions of sympathy for the Confederacy or criticizing the Union war effort. William Winthrop, a member of Holt’s team of judge advocates, later listed many of the charges tried in commissions, roughly corresponding to these two categories of charges. Winthrop’s enumeration is, indeed, staggering:

- murder, manslaughter, robbery, larceny, burglary, rape, arson, assault and battery, attempts to commit the same; criminal conspiracies, riot, perjury, bribery, accepting bribes, forgery, fraud, embezzlement, misappropriation or other illegal disposition of public property, receiving stolen goods, obtaining money or property under false pretences, making or uttering counterfeit money, uttering false Treasury notes, breaches of the peace and disorderly conduct, keeping a disorderly house, selling obscene books, &c., malicious mischief or trespass, carrying concealed weapons, abuse of official authority by civil officials, resisting or evading the draft, discouraging enlistments, purchasing arms, clothing, &c., from soldiers, . . . aiding desertion, &c., . . . breaches of the law of non-intercourse with the enemy, such as running or attempting to run a blockade; unauthorized contracting, trading or dealing with, enemies, or furnishing them with money, arms, provisions, medicines, &c.; conveying to or from them dispatches, letters, or other communications, passing the lines for any purpose without a permit, or coming back after being sent through the lines and ordered not to return; aiding the enemy by harboring his spies, emissaries, &c., assisting his people or friends to cross the lines into his country, acting as guide to his troops, aiding the escape of his soldiers held as


\textsuperscript{74} Witt, \textit{supra} note \textsuperscript{___}, at 268.
prisoners of war, secretly recruiting for his army, negotiating and circulating his currency or securities as confederate notes or bonds . . . , hostile or disloyal acts, or publications or declarations calculated to excite opposition to the federal government or sympathy with the enemy, &c.; engaging in illegal warfare as a guerilla, or by the deliberate burning, or other destruction of boats, trains, bridges, buildings, &c.; acting as a spy, taking life or obtaining any advantage by means of treachery; abuse or violation of a flag of truce; violation of a parole or of an oath of allegiance or amnesty, breach of bond given for loyal behaviour, good conduct, &c.; resistance to the constituted military authority, bribing or attempting to bribe officers or soldiers or the constituted civil officials; [and] kidnapping or returning persons to slavery.  

Winthrop added that even “treason,” as such, was “not infrequently charged.” John Witt and Mark Neely also recount cases in which individuals were charged with traveling into the South without a pass; permitting rebels to lurk in a neighborhood without reporting them; corresponding with a child in the Confederate army; stealing horses; and simply speaking aloud “I am a Jeff Davis man.” In addition to all this, courts-martial—which, unlike commissions, were statutorily authorized—also tried individuals for spying and for providing forms of aid to the enemy specified in the Articles of War, neither of which were offenses that violated the laws of war.

Even early in the war, this practice induced one shocked Senator to remark that Secretary of State Stanton was “prone to bring every person and every act within military law and military courts.” Similarly, Lincoln’s Attorney General himself wrote that “[t]here seems to be a general and growing disposition of the military, wherever stationed, to engross all power, and to treat the civil Government with contumely, as if the object were to bring it into contempt.” By the time of the Lincoln assassination trial, such characterizations were hardly an exaggeration.

A. The War Department’s Justifications for the Constitutionality of Military Adjudication of Domestic-Law Offenses

The constitutionality of these tribunals was a common subject of public debate, and occasionally the issue was litigated, mostly inside the military justice system itself. During the course of the war, the military lawyers and officers who defended the legality

75 William Winthrop, MILITARY LAW AND PRECEDENTS 839-40 (2d ed. 1920).

76 Id. at 839.

77 Witt, supra note __, at 268-69; Neely, supra note __, at 171-72.

78 I discuss this courts-martial practice in [Washington article], supra note __, 105 GEO. L.J. at __.


of the tribunals did not settle upon a single rationale in justification. Instead, they invoked a smattering of different theories, in various combinations. Prior to the Milligan and Lincoln cases, the military relied primarily on three theories. One of them—an argument of “necessity” by virtue of the alleged inadequacy of civilian courts—did not withstand the Supreme Court’s subsequent decision in *Milligan*. The second argument, which only fully flowered after the Lincoln trial itself, rested on a rationale that the Supreme Court would later endorse in *Quirin*—namely, that Congress may authorize military tribunals to adjudicate offenses against the international laws of war. The third rationale, which took various forms and was somewhat undertheorized, was that the constitutional trial guarantees simply did not apply to certain forms of belligerent conduct, an argument that the courts never endorsed when it came to trial guarantees and that, more broadly, has not survived to the modern era.

1. The “Martial Law” argument from necessity

The most common and prominent explanation the War Department offered to justify its use of military commissions was one of exigency—namely, that military tribunals were necessary because the defendants could not be tried in ordinary civilian courts. Early in the Civil War, for example, both the President and his generals,

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81 Moreover, that argument is inapposite in today’s armed conflicts (and the government therefore does not invoke it), because Article III courts obviously can be, and since 2001 have been, used to try many terrorism-related cases against the enemy and its supporters.

82 That, too, is by definition not a ground for the military trial of domestic-law offenses in the Nation’s current conflicts with nonstate terrorist organizations.

83 In addition to the three theories described in the text, Holt also sometimes proffered a quasi-textual argument for an Article III exception predicated on an express exception in the Grand Jury Clause of the *Fifth Amendment* ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces."). This argument had two constituent parts: First, Holt assumed that if a case “arises in” the land or naval forces, it is exempt not only from the grand jury guarantee, but also from the petit jury guarantees of the Sixth Amendment and Article III, and (implicitly) from the Article III guarantee of an independent, life-tenant judge. The second component of the argument was a very capacious notion of how to identify cases “arising in” the armed forces: according to Holt, that category included not only cases alleging offenses committed by persons in or accompanying the armed forces, and persons doing business with the armed forces, but also any case involving conduct that “directly connects itself with the operation and safety of th[e] forces, whose overthrow and destruction it seeks.” Report of the Judge Advocate General, *Case of William T. Smithson*, 5 O.P.S. J.A.G. RECORDS 287, 293 (Nov. 13, 1863). On this view, any aid to the enemy that was likely to undermine the Union war effort would “arise in” the armed or naval forces and would, for that reason, permit military adjudication, even when the conduct could also be tried in an Article III court. As I explain in detail in Lederman, [*Washington article*, * supra* note __, 105 GEO. L.J. at ___, this argument never took root in the courts, presumably because it was flawed in multiple respects, and the Supreme Court finally put it to rest in a series of cases in the middle of the Twentieth Century.

84 The Supreme Court would later endorse the use of military courts in certain other settings where Article III courts are unavailable, such as foreign places of occupation, “where civilian government cannot and does not function.” Duncan v. Kahanamoku, 327 U.S. 304, 314 (1946); *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 595-96 (2006) (plurality opinion) (referring to the commissions established to apply the German Criminal Code in occupied Germany following the end of World War II). “The limitations on these
including most importantly General Henry Halleck, declared “martial law” in particular areas where the civil justice system was said to be unavailable or ineffective—and in such areas, the Army then used military commissions regularly, as a substitute for civilian justice.\textsuperscript{85} Looking back upon the use of military commissions as the war was ending, Judge Advocate General Holt wrote that the commissions “originat[ed] in the necessities of the rebellion,” and were employed “in regions where other courts had ceased to exist, and in cases of which the local criminal courts could not legally take cognizance, or which, by reason of intrinsic defects of machinery, they were incompetent to pass upon.”\textsuperscript{86}

The difficulty with this justification, however, was that the civilian courts had not actually “ceased to exist” in those areas where President Lincoln and his generals declared martial law and began to regularly use military commissions in the Civil War; nor were the civil courts unable to “take cognizance” over most of the dangerous conduct that was adjudicated in military commissions. In fact, and not surprisingly, the true reason the War Department turned to military commissions was not out of necessity, but because it was understandably eager to deliver “justice” that was much swifter and more unconstrained than in the ordinary course of trials in Article III (and state) courts—and, in some places, because the military officials feared that lay juries might acquit, due to the presence of Confederate sympathizers within the relevant jury pools.

This can be seen by looking closely at the two most dramatic declarations of martial law early in the war: Major General Henry Halleck’s declarations in Missouri in 1861-62, and then President Lincoln’s own, extraordinary nationwide declaration in September 1862.

\textbf{a. Halleck, December 1861.} Henry Halleck was a lawyer and a scholar, in addition to an army officer. Just before the war, Halleck published one of the first comprehensive international law treatises in the United States that focused on the law of war.\textsuperscript{87} Lincoln appointed him commander of the Western Department in November 1861. In Missouri, Halleck confronted a state overrun by persons who were not part of the Confederate army but who nonetheless worked assiduously to undermine the Union war effort. There were “numerous rebels and spies within our camps and in the territory occupied by our troops, who give information, aid, and assistance to the enemy,” he

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\textsuperscript{85} Martial law is often and aptly described as “the public law of necessity.” “Necessity calls it forth, necessity justifies its exercise, and necessity measures the extent and degree to which it can be employed.” Frederick Bernays Wiener, \textit{A PRACTICAL MANUAL OF MARTIAL LAW} 16 (1940).

\textsuperscript{86} Letter from Joseph Holt to Edwin Stanton, Secretary of War, Nov. 13, 1865, in United States Department of War, \textit{The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies}, Series III, vol. 5, at 490, 493 (1899) [hereinafter \textit{OFFICIAL RECORDS}].

\textsuperscript{87} Henry W. Halleck, \textit{INTERNATIONAL LAW; OR, RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR} (1861).
wrote. “[R]ebels scattered through the country threaten and drive out loyal citizens and rob them of their property; . . . they furnish the enemy with arms, provisions, clothing, horses, and means of transportation; and . . . insurgents are banding together to rob, to maraud, and to lay waste the country.”

On November 20, 1861, his very first day in command, Halleck wrote to General McClellan, seeking the President’s written authority to declare martial law within his department. Receiving no response, Halleck wrote in greater detail five days later. He began by ensuring McClellan and Lincoln that it was not his intent to enforce martial law “in any place where there are civil tribunals which can be intrusted with the punishment of offenses and the regular administration of justice,” and that he “intend[ed] to restrict it [martial law] as much as possible.” Halleck did not say, however, that the state and federal courts in St. Louis were closed, or unavailable. Instead, he obliquely suggested that there were “no civil authorities” to prosecute frauds against the government due to an “absence of the proper civil tribunals.” Halleck did not specify what was “improper” about the existing courts, or why they could not be “intrusted.” His thinking probably did not need to be spelled out for his commanding officers.

The next day, still having received no answer, Halleck pleaded again for the presidential authority that was, he said, “absolutely necessary to enable me to procure evidence” of frauds against the government. “If this authority is refused,” wrote Halleck, “I shall not exercise it, no matter how much the public service may suffer.” In fact, unbeknownst to Halleck, McClellan had already sent a response to the previous request. (Presumably the missives crossed in the proverbial mail.) McClellan—perhaps reflecting some uncertainty in Washington about whether displacement of civilian courts in Missouri was truly necessary—requested Halleck to “give your views more fully as to the necessity of enforcing martial law in your department.” On November 30, then, Halleck offered a more desperate—but still not very specific—plea, this time not as


89 Id.

90 Telegram from Henry W. Halleck to General McClellan, Nov. 20, 1861, in OFFICIAL RECORDS, Series I, vol. 8, at 817.


92 Id.


94 Id.

95 Letter from Adjutant-General Lorenzo Thomas to Halleck, Nov. 25, 1861, in OFFICIAL RECORDS, Series II, vol. 1, at 231.
focused on fraud in particular: Missouri, he wrote, was “in a state of insurrection,” but
the threat was diffuse, such that there was no “large gathering in any one place so that we
can strike them.” Instead, Halleck needed to “punish these outrages” individually—
something that was necessary because “there is no civil law or civil authority to reach
them.” Once again, he did not explain why the civil law and authority were inadequate to
punish wrongdoers.  

On December 2, Lincoln finally authorized Halleck not only to suspend the writ
of habeas corpus in Missouri, but also “to exercise martial law as you find it necessary in
your discretion to secure the public safety and the authority of the United States.”  
Two days later, Halleck issued General Orders No. 13, directing commanding officers within
the Department of the Missouri not only to arrest and confine “all persons in arms against
the lawful authorities of the United States, or who give aid, assistance, or encouragement
to the enemy,” but also to order military commissions for the trial “of persons charged
with aiding and assisting the enemy, the destruction of bridges, roads, and buildings, and
the taking of public or private property for hostile purposes.”

In a follow-on General Order four weeks later, Halleck prescribed how such
commissions would work. In that January 1, 1862 Order, he nominally guaranteed that
“[c]ivil offenses cognizable by civil courts whenever such loyal courts exist will not be
tried by a military commission.” Halleck then proceeded, however, to render this an
empty promise, by adding that “many offenses which in time of peace are civil offenses
become in time of war military offenses and are to be tried by a military tribunal even in
places where civil tribunals exist.” In other words, by recharacterizing conduct,

96 Telegram from H.W. Halleck to Maj. Gen. George B. McClellan, Nov. 30, 1861, in OFFICIAL RECORDS, Series II, vol. 1, at 232, 232. As Halleck described it, he only wished to be given the authority to continue
a form of martial law that his predecessor, John C. Frémont, had been exercising without authority for
months. Halleck was a stickler for proper process—and he was wary of being blamed for either unlawful
actions or a failure to deal with the problem of the disloyal violence if he acted unilaterally. “I mean to act
strictly under authority and according to instructions and where authority will not be granted the
Government must not hold me responsible for the result,” he wrote. Id. at 233. Accordingly, he added that
if Lincoln was not willing to entrust him with the authority to enforce martial law, “he should relieve me
from the command.” Id. at 232.

97 Telegram from Abraham Lincoln (sent by Secretary of State Seward) to Halleck, Dec. 2, 1861, in id. at
233.

98 General Orders, No. 13, Headquarters of the Department of the Missouri, Dec. 4, 1861, in OFFICIAL
RECORDS, Series I, vol. 8, at 405, 405. Halleck would later suggest that this order applied only in St. Louis,
rather than across the State. General Orders No. 2, March 13, 1862, in OFFICIAL RECORDS, Series II, vol. 1,
at 270, 270. The text of the December 4th order, however, is not so limited.

99 General Orders, No. 1, Headquarters of the Department of the Missouri, Jan. 1, 1862, in OFFICIAL

100 General Orders, No. 1, Headquarters of the Department of the Missouri, Jan. 1, 1862, in OFFICIAL

101 Id. at 248.
ordinarily condemned as a civil crime, as a so-called “military” offense, the War Department could ensure that the offense was “not within the jurisdiction of any existing civil court”—and in that case, the argument went, necessity required military adjudication. For example, although Halleck’s order acknowledged that treason, as such, was “a distinct offense . . . defined by the Constitution [that] must be tried by courts duly constituted by law,” nevertheless “certain acts of a treasonable character,” such as conveying information to the enemy, were “military offenses triable by military tribunals and punishable by military authority.”

This barely disguised slight-of-hand did not, of course, offer a reason why the criminal conduct could not simply be characterized in the traditional manner (e.g., as treason), and then be tried in a civilian court. The December 4 Order, however, was unusually candid in explaining why Halleck was so eager to use military commissions: not because Missouri courts were literally unavailable, or without jurisdiction to punish the conduct in question—as one federal judge would later note, “the process of the courts [in the state] had never been interrupted”—but because they were insufficiently harsh, and their structures and procedures were not designed for the purpose of winning a war: “The mild and indulgent course heretofore pursued toward this class of men has utterly failed to restrain them from such unlawful conduct.” A “more severe policy” therefore was necessary—one in which the miscreants were not afforded “the rights of peace.” Halleck wrote more along these lines in a letter to General Thomas Ewing on January 1, 1862, explaining his resort to martial law in Missouri: Bridge-burners, wrote Halleck, are not “armed and open enemies but . . . pretended quiet citizens living on their farms, who are back “quietly plowing or working in [the] field” a mere hour after the sabotage. The civil courts, Halleck explained, “are very generally unreliable” in dealing with this problem; therefore he had “determined to put down these insurgents and bridge-burners with a strong hand.”

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102 Id. at 247.

103 Halleck would later disapprove of some treason convictions in military commissions. See, e.g., General Orders No. 20, Jan. 14, 1862, in OFFICIAL RECORDS, Series II, vol. 1, at 402, 405 (charges against George H. Cunningham).


105 In re Murphy, 17 F. CAS. 1030, 1031 (C.C.D. Mo. 1867).


107 Id. In a related declaration that martial law would be enforced “in and about all railroads in this State,” Halleck likewise wrote that resort to civil courts would be the default rule where they adequately served the military’s purposes: “It is not intended by this declaration to interfere with the jurisdiction of any civil court which is loyal to the Government of the United States and which will aid the military authorities in enforcing order and punishing crimes.” General Orders No. 34, Dec. 26, 1861, in OFFICIAL RECORDS, Series II, vol. 1, at 155 (emphasis added).

some of the accused in the Lincoln conspiracy trial, and in that capacity offer an eloquent
attack on the constitutional authority of the military court. 109)

In fact, and contrary to Halleck’s suggestion, the military did not need military
tribunals to restrain the individuals who were committing such crimes: many of them
would have been convicted in civilian courts, and the military was arresting most of the
others and asserting the authority to preventively detain them for the duration of the war.
Accordingly, Halleck here was admitting, in effect, that the principal purpose of the
tribunals was not so much to incapacitate the particular defendants who had been arrested,
but instead to deter others with the prospect of harsh and unrelenting military justice,
unencumbered by due process or other constitutional protections. As Judge Advocate
Holt would put the point in his argument for court-martial jurisdiction to try an alleged
Confederate abettor in 1863, “[p]roceedings in the ordinary criminal courts, by
indictment and jury trial, would have no terror for such traitors”; if offenses are not
“promptly and unsparingly punished,” there “can be no successful prosecution of
hostilities.” 110 This sort of argument—that the use of severe military justice is necessary
in order to terrorize citizens sympathetic to the enemy—is not one that the government
ever could, or did, offer forthrightly to any reviewing, civilian court assessing the
constitutionality of the tribunals (such as the Supreme Court in Milligan a few years later).
It would not do to say, in such a setting, that the judge and jury protections of Article
III—the “rights of peace,” or, as Holt would later characterize them dismissively, the
“intrinsic defects of machinery” of such courts—111 were inadequate because they
undermined the in terrorem impact that might be realized by the use, and threat, of
summary and unforgiving military justice.

b. Stanton and Lincoln, August/September 1862. In August 1862, Secretary
of War Edwin Stanton issued an order entitled “Authorizing Arrests of Persons
Discouraging Enlistments.” Its authority to arrest was not limited, however, to conduct
involving military enlistment; nor was it geographically cabined. It directed all U.S.
marshals, and the superintendents or chiefs of police of “any town, city, or district,” to
“arrest and imprison any person or persons who may be engaged, by act, speech, or
writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to
the enemy, or in any other disloyal practice against the United States.” Stanton’s decree,
like Lincoln’s a few weeks later, is primarily remembered today for its authorization to
arrest and detain those who urged resistance to the new conscription laws, and other
critics of the Union cause. Stanton’s order, however, went further still: It ordered the
civilian officials in question to report the arrested offenders “to Major L. C. Turner,
judge-advocate, in order that such may be tried before a military commission.” 112 Seven

109 See infra at ___.

110 Case of William T. Smithson, supra note __, 5 Ops. J.A.G. RECORDS at 292.

111 Letter from Joseph Holt to Edwin Stanton, Secretary of War, Nov. 13, 1865, in OFFICIAL RECORDS,

112 Order Authorizing Arrests of Persons Discouraging Enlistments, Aug. 8, 1862, in OFFICIAL RECORDS,
weeks later, President Lincoln himself followed suit, “order[ing]” that every person throughout the United States who was “guilty of any disloyal practice, [or] affording aid and comfort to rebels against the authority of the United States,” was “subject to martial law, and liable to trial and punishment by courts-martial or military commission.”

Lincoln’s nationwide order on its face offered a purported justification for such an extraordinary assertion of military jurisdiction: “disloyal persons are not adequately restrained by the ordinary processes of law from [calling volunteers and draftees into service] and from giving aid and comfort in various ways to the insurrection.” This was, however, a gross overstatement (at least absent any further elaboration). As one state judge would shortly remark, the President’s order made little sense, at least in those states, such as Wisconsin, where the ordinary Article III and state courts were entirely adequate to the task of adjudicating cases involving aid to the enemy; indeed, in July 1862, Congress had enacted a new treason law predicated on the assumption that such civilian trials were the proper means of dealing with the problem. Obviously, then, Lincoln, like Halleck and Stanton, had turned to “martial law,” and to military tribunals, not because civilian courts and other mechanisms (including military detention) were unavailable to incapacitate and punish wrongdoers, but instead because such civil processes did not, in Lincoln’s words, adequately “restrain,” or deter, others. As I explain below, this reasoning, a very aggressive notion of the “necessity” that required circumvention of ordinary civilian courts, did not survive the Supreme Court’s decision in Milligan.

2. Alleged violations of the “laws of war”

As John Fabian Witt has recently documented, as the Civil War progressed the War Department increasingly began to allege that many of the accused on trial in commissions who were not members of either the Union or Confederate forces had violated the “laws of war.” There were some such charges in Missouri, even before


114 Id.

115 See In re Kemp, 16 Wis. 359, 367 (1863) (“The civil authorities here maintain themselves. Justice is dispensed by the courts; the laws are administered without difficulty, and no necessity can exist for subjecting the citizen to the control of military power. In this state of things can it be said that martial law can be declared or becomes necessary here? It seem to me not.”). But cf. Ex parte Field, 9 F. Cas. 1, 8 (C.C.D. Vt. 1862) (“[I]t may be argued that Vermont is a loyal state, more than five hundred miles from the seat of war; that the people are patriotic and law abiding; that the enforcement of civil law has not been interfered with within her borders; and that, therefore, there is nothing to justify martial law. But . . . this is a question for the president, not for the court, to determine.”).


117 See infra at ___.

118 Witt, supra note ___, at 267-71.
Lincoln’s martial-law declaration in September 1862. The incident of such “law of war” charges increased dramatically, however, late in 1862 and into 1863; by the end of the war, nearly 1000 individuals had been so charged, by Witt’s count. Because the defendants in these cases were overwhelmingly civilians, these “law of war” charges were not usually what we have come to think of today as violations of the jus in bello—the rules that govern the conduct of armies—such as targeting civilians, torture, perfidy, or the use of prohibited weapons. Instead, as Witt describes, the so-called “law-of-war” charges in Civil War commissions covered a “stunningly wide array of conduct,” much of it involving private violence and alleged disloyal conduct (including speech) that, directly or indirectly, was thought to affect the Union war effort.

As we will see, this became the primary basis the Attorney General offered, in mid-1865, to justify the constitutionality of the Lincoln assassination trial. It is not clear, however, that the War Department ever placed much weight on it to justify the constitutionality of commissions earlier in the war. The closest instance I have found is an offhand claim made by General Halleck in a memorandum he wrote in 1864, which was not published until many decades after his death. Because the offenses in question were “against the common laws of war,” Halleck wrote, “the civil courts could impose no punishment.” This assertion would not have been very persuasive, even if the military had relied upon it openly. Although it is true that, during the Civil War, Congress had not enacted any laws making law-of-war violations subject to civilian prosecution, certainly Congress could have done so, as it done in modern times pursuant to its power to define and punish offenses against the law of nations.

There would have been a more fundamental problem with this argument, too, as Halleck well knew—namely, that most if not all of the offenses tried in military commissions were not violations of the laws of war, notwithstanding the characterizations of the War Department. As Professor Witt explains, this confusion arose, in large measure, from the way in which the famous “Lieber Code” treated certain hostile conduct by persons who are not part of enemy forces.

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119 See Neely, supra note ___, at 42-43; Hart, supra note ___, at 16.
120 Witt at 267.
121 Id. at 268-69.
122 Infra at ___.
123 Henry Wager Halleck, Military Tribunals and Their Jurisdiction, 5 Am. J Int’l L. 958, 964 (1911); see also id. at 958 n.1 (editor’s note explaining that the memorandum was found among Halleck’s papers at his death).
124 See, e.g., 18 U.S.C. § 2441 (making it a crime under federal law for a U.S. national or member of the armed services to “commit[] a war crime”).
125 U.S. CONST. Art. I, 8, cl. 10.
In 1862, at Halleck’s urging, Professor Francis Lieber completed a study of the problem that Halleck confronted in Missouri—how the law treats so-called “guerrilla” parties who engaged in actions to sabotage the nation’s war effort even though they were not formally affiliated with the enemy. The subject matter, Lieber noted in the first sentence of his paper, “has rarely been taken up by writers on the law of war,” and was “substantially a new topic in the law of war.” But not quite unprecedented: In fact, Halleck himself had dealt with the issue briefly the preceding year, in his international law treatise. Halleck explained that, unlike the belligerent acts of members of a nation’s armed forces, which are privileged by international law against prosecution (such fighters can, wrote Halleck, “plead the laws of war in their justification”—what we today call the combatant’s privilege), the hostile acts of bands of men who riot and plunder and destroy without the sanction of their government, even in support of a war, “are not legitimate acts of war, and, therefore, are punishable according to the nature of character of the offense committed.” So, for example, if such persons take property by force in offensive hostilities it is not an act “authorized by the law of nations, but a robbery”; and the killing of the state’s armed forces by such bands of private parties likewise is not a privileged act of war, “but a murder.” Halleck explained that such persons, when captured, are not treated as prisoners of war, but instead “as criminals, subject to the punishment due to their crimes.” Lieber’s paper on guerrilla parties was to similar effect: Guerrillas, banditti, and the like, he reasoned, do not receive the benefits of the law of war; they are “answerable for the commission of those acts to which the law of war grants no protection.” Brigands, prowlers, bushwackers, private assassins: none can “expect to be treated as a fair enemy of the regular war,” entitled to the “regular privileges” that attach to authorized forces. This, then, was Lieber’s effort “to

126 For a compelling account of Halleck, Lieber and the problem of “guerrilla” warfare, see Witt, supra note __, at 188-95.

127 Id.

128 Id.

129 Halleck, INTERNATIONAL LAW, supra note __, at 386.

130 Id.

131 Id. at 386-87. A letter from Halleck on December 31, 1861, reporting the proceedings of an early Missouri military commission, included the same distinction: whereas a soldier “duly enrolled” in an enemy’s service by “proper authority” cannot be prosecuted for “taking life in battle or according to the rules of modern warfare,” by contrast “it is a well-established principle that insurgents and marauding, predatory, and guerrilla bands are not entitled to this exemption,” and “are, by the laws of war, regarded as no more nor less than murderers, robbers, and thieves,” whose military garb “cannot change the character of their offenses nor exempt them from punishment.” Letter from Halleck to Brigadier-General John Pope, Dec. 31, 1861, in OFFICIAL RECORDS, Series I, vol. 8, at 822, 822.


133 Id. at 291.
ascertain what may be considered the law of war, or fair rules of action toward so-called guerrilla parties,”—their misdeeds will not go “unpunished,” for the law of war does not protect them. Importantly, however, Lieber did not argue that the law of war proscribes their unauthorized conduct, or that it insists upon their punishment, in the way that subset of the law of nations forbids certain practices of war.

This same, altogether accurate perspective is reflected in much of the “Lieber Code”—the regulations, largely written by Lieber, that the Adjutant General’s Office issued in April 1863 to the Union armies. The Lieber Code addressed a “dazzling array of questions.” In light of Lieber’s expertise in international law, much of the Code consists of descriptions of the “limitations and restrictions” that the customary laws of war impose on the conduct of war, including, for instance, that parties may not engage in cruelty or break “stipulations solemnly contracted by the belligerents in time of peace”; use poison in any manner; harm prisoners “in order to extort the desired information or to punish them for having given false information”; or punish a “successful spy” who returns to his own army. Other parts of the Code, however, explain what belligerents can do, without transgressing the laws of war—including which law-of-war privileges they are not required to provide to those they capture. Most importantly for present purposes, Article 82 stated that individuals “who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers . . . are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war.” Likewise, Article 84 provided that “[a]rmed prowlers, by whatever

134 Id.

135 Id. at 292.


137 Witt, supra note ___ at 231.

138 Id. art. 30, at 253.

139 Art. 11, id. at 249.

140 Art. 70, id. at 260.

141 Art. 80, id. at 262.

142 Art. 104, id. at 266.

143 Id. at 262-63 (emphasis added).
names they may be called, or persons of the enemy’s territory, who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war.”

So far, so good: The vast majority of the Lieber Code distinguished between conduct that the law of war prohibited, and conduct that it simply did not immunize. Unfortunately, a few stray remarks in the Code suggested the further, and mistaken, idea that the laws of war not only fail to privilege the belligerent conduct of persons outside the armed forces (such as “banditi”)—so that it can be subjected to ordinary criminal prosecution—but that the law of nations affirmatively proscribed such conduct, or prescribed a penalty for it. Article 82, for example, stated not only that the individuals committing war-related violence without authorization “are not entitled to the privileges of prisoners of war” (which was correct), but also that such persons “shall be treated summarily as highway robbers or pirates.”

Similarly, Article 98 stated that “[a]ll unauthorized or secret communication with the enemy is considered treasonable by the law of war.”

Here, Lieber erred. Secret communication with the enemy could be, and often is, “considered treasonable,” and states severely punished it; but such treatment is a function of a state’s domestic law, not the law of war itself. Likewise, individuals unaffiliated with the enemy military could be “treated summarily” (at the time, anyway)—unlike members of enemy forces, they were not entitled to the combatant’s privilege—but such treatment would be a function of municipal law, not “by the law of war.” Indeed, the law of war is generally indifferent as to how a state treats such unprivileged conduct, and whether particular procedural protections will apply; those are matters for domestic law, which can vary from state to state. In the United States, such questions are determined by the corpus of federal statutes, and by Article III and the Bill of Rights in the Constitution—bodies of law that the Lieber Code did not purport to describe (and concerning which Lieber himself was hardly an expert).

Unfortunately, this mistaken conflation between conduct that the laws of war prohibits and conduct that it does not privilege, reflected in a few stray remarks in the Lieber Code, would later infect the Attorney General’s analysis of the Lincoln assassination trial, many treatises on the laws of war, and the Supreme Court’s reasoning in the landmark Quirin opinion in 1942.

144 Id. at 263 (emphasis added).

145 Id. at 263; see also art. 83, id. (“Scouts, or single soldiers, if disguised in the dress of the country or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death.”) (emphasis added).

146 Id. at 265 (emphasis added).

147 See infra at ___.

148 See infra at ___; Lederman, Washington article, supra note __, 105 GEO. L.J. at __.
3. “The power to make war . . . without limitations”

The third, and most extreme, of the government’s principal arguments in support of the constitutionality of military commissions was fully vetted for the first time in the most notorious and controversial commission case prior to the Lincoln assassination.

Clement Vallandigham, a leader of the “Copperhead” faction of anti-war Democrats, was a member of the House of Representatives from 1858 until March 3, 1863, in which capacity he was a prominent opponent of the war. On March 16, just after Vallandigham left Congress, Lincoln appointed General Ambrose Burnside to be commanding general of the Department of the Ohio. The next month, Burnside issued General Order No. 38, designed to address the increasingly prominent opposition to the war being voiced by Copperheads and other northern Democrats. Burnside feared that such public attacks on the Union cause were grievously injuring the army’s efforts, such as by inspiring or even encouraging disregard of the compulsory service laws. His order not only announced that anyone committing acts “for the benefit of the enemies of our country” would be “tried as spies or traitors, and, if convicted, will suffer death”; it also went much further, declaring that “[t]he habit of declaring sympathies for the enemy will not be allowed in this department,” and that persons “committing such offences will be at once arrested, with a view to being tried as above stated, or sent beyond our lines into the lines of their friends.”

Vallandigham, understandably outraged by Burnside’s decree, delivered an especially inflammatory speech in Mount Vernon, Ohio, on May 1. In it, Vallandigham described the war as “wicked, cruel and unnecessary,” and alleged that it was being prosecuted “for the purpose of crushing out liberty and erecting a despotism.” He also decried General Orders No. 38 as “a base usurpation of arbitrary authority,” adding that “the sooner the people inform the minions of usurped power that they will not submit to such restrictions upon their liberties, the better,” and that he was “resolved to do what he could to defeat the attempts now being made to build up a monarchy upon the ruins of our free government.” Predictably, this speech prompted Burnside to order Vallandigham’s arrest, on May 5; the Democrat was accused of making a public speech that “he well knew did aid, comfort, and encourage those in arms against the government, and could but induce in his hearers a distrust of their own government, sympathy for those in arms against it, and a disposition to resist the laws of the land.”

The next day, Vallandigham was arraigned before a military commission, which proceeded to find him guilty of most of the specifications of the charge, and sentence him to close military confinement for the duration of the war. Burnside confirmed the

149 Department of the Ohio, GENERAL ORDERS NO. 38, Apr. 13, 1863, by Lewis Richmond, Assistant Adjutant-General (by order of Major-General Burnside), in OFFICIAL RECORDS, Series II, vol. 5, at 480.

150 Ex parte Vallandigham, 28 FED. CAS. 874, 875 (C.C.D. Ohio 1863).
sentence on May 16, designating Fort Warren as the place of Vallandigham’s imprisonment.\textsuperscript{151}

Even before the commission issued its sentence, Vallandigham petitioned a federal court for a writ of habeas corpus, arguing that the military lacked authority to detain him. Judge Humphrey Leavitt denied the petition, reasoning that the question was controlled as a matter of \textit{stare decisis} by an earlier decision of the court that he was powerless to second-guess.\textsuperscript{152} The judge was careful to stress, however, that he was only ruling on the legality of Vallandigham’s arrest (i.e., his detention), and was \textit{not} opining on whether the military trial was lawful: “Whether the military commission for the trial of the charges against Mr. Vallandigham was legally constituted, and had jurisdiction of the case, is not a question before this court. . . . The sole question is whether the arrest was legal . . . .”\textsuperscript{153}

Before Judge Leavitt ruled, however, counsel for the parties did offer him their arguments on the constitutionality of the commission. Counsel for Vallandigham, for instance, contended that the military trial was precluded by a 1863 congressional enactment (on which more below), and that it violated Article III of the Constitution.\textsuperscript{154} The government’s lead counsel was Aaron Fyfe Perry, a private lawyer who in had declined President Lincoln’s 1861 offer for an appointment to the Supreme Court. Perry’s argument was long and disjointed, weaving together several different themes. For example, he somewhat melodramatically suggested that civilian juries were inappropriate for such cases because they were apt to be either too harsh or too lenient with such defendants in the heat of a war, when “the entrails of the volcano, covered for a while, have at length broken forth, . . . and [s]moke and ashes obscure the sky.”\textsuperscript{155} Perry

\textsuperscript{151} See Ex parte Vallandigham, 68 U.S. (1 Wall.) 243, 244-48 (1864).

\textsuperscript{152} 28 Fed. Cas. at 920.

\textsuperscript{153} Id. at 923.

\textsuperscript{154} Id. at 878-79, 888-91.

\textsuperscript{155} It was a remarkable, florid argument. See id. at 894: “If they should be put upon trial before a jury in such moments of overwhelming excitement, one of two results would follow. If the jury should not be so divided by the passions raging through the whole population as to disagree, and thus bring the law into contempt, their passions would take them to one side or the other. Men might be let loose, and certainly would be, whom the safety of the state required to be restrained, or more probably convicted and executed without sufficient evidence. When society is imperiled by intestine war, the passions rage which occasioned the war, the entrails of the volcano, covered for a while, have at length broken forth. Smoke and ashes obscure the sky. Fiery floods pour along the earth. No good man could be impartial. Who claims to be impartial impeaches himself. Believing his government to be in the right, interest, feeling, lawful duty, compelled him to uphold it with all his power. He has no decent pretext, certainly no lawful excuse, for throwing on others a duty to uphold the government which he shrinks from. It is each man's duty as much as any other's. Its enemies are, and in the nature of the case must be, his enemies; its friends his friends. The law allows him no other position. On the other hand, he who believes the government to be wrong has no choice but to sympathize with its enemies. He must assist them, and will assist them, either openly or by secret and suppressed sympathy. On one side or the other, men go to the jury box under the influence of deep feeling.”
also made some effort to argue the exigency defense of marital law—a tough argument to sustain, given that the ordinary operations of law prevailed in Ohio, and Burnside had not specifically ordered martial law there.

At the heart of Perry’s case, however, was a more fundamental argument—namely, that in the midst of an armed conflict, the laws of peacetime, including constitutional guarantees, are effectively displaced by the executive’s “rights of war,” at least as applied to those actions taken in the service of defeating the enemy:

War is the last resort, but when properly appealed to, its processes are due and reasonable processes, and, like the rest, must be allowed to work out results exclusively by its own rules. . . . The power to make war is given without limitations. So far as war may be a means of preservation, or for warding off imminent danger, and keeping at a distance whatever is capable of causing its ruin, the nation is safe. The rights of war are as sacredly guaranteed as trial by jury, or personal liberty, or any other right whatever. The president cannot claim to have preserved, protected, and defended the constitution, to the best of his ability, until he shall have used all the ability given him by the utmost rights of war. . . . The constitution does not define the meaning of habeas corpus, or trial by jury, or liberty, or war. They were to be ascertained elsewhere. . . . By war was intended not a hollow pretext of war, but a lifting high of the red right hand of avenging justice. A thorough, condign, effectual laying hold of enemies, a summary breaking-up of their hiding places, and a terrifying deathly pursuit, until they shall cease to exist, or cease to be enemies. In Scott’s Military Dictionary, a recent work, which, he says, was not prepared in view of existing disturbances, he states the following rule (page 273): “With regard to the requisition of military aid by the civil magistrate, the rule seems to be that when once the magistrate has charged the military officer with the duty of suppressing a riot, the execution of that duty is wholly confided to the judgment and skill of the military officer, who thenceforward acts independently of the magistrate until the service required is fully performed. The magistrate cannot dictate to the officer the mode of executing the duty; and an officer would desert his duty if he submitted to receive any such orders from the magistrate. . . .”

This argument, too, would be undermined by the Supreme Court’s decision, three years later, in Milligan.

B. The Views from the Political Branches

156 Id. at 903-06.

157 Professor Witt notes that Perry also invoked the laws of war. Witt, supra note __, at 272. That is true, but Perry did not suggest that Vallandigham himself had violated the laws of war. Instead, he simply argued that the laws of war, which on Perry’s view governed the case, did not forbid Burnside from having Vallandigham arrested, 28 Fed. Cas. at 894, and detained, id. at 895.

158 28 Fed. Cas. at 902-03 (emphasis added).
Before turning to the Lincoln assassination trial itself, it is important to understand how these arguments on behalf of the War Department—and the constitutionality of the military commissions practice—were treated throughout the rest of the federal government before the assassination in April 1865. The Supreme Court itself did not have an opportunity to opine on the substantive constitutional question, including in the Vallandigham case itself. The President and his Attorney General, however, did have occasion to consider the question; and it was a recurrent topic of debate in Congress, too.

1. Attorney General Bates

Lincoln’s first Attorney General, Edward Bates, was not shy about defending the President’s more aggressive assertions of constitutional authority—including, most famously, the unilateral suspension of the privilege of the writ of habeas corpus. He drew the line at the War Department’s military commissions, however. Writing in his diary in March 1865, after civil law in Missouri was finally restored, Bates recounted that he had been an insistent opponent of the commissions, which he viewed as a “manifest wrong” aggravated by a “false pretense of lawful authority”:

I have, constantly and openly, held—Officially at Washington and personally, every where—that martial law was not established in Mo. That the military and provotal government,, actually used here, was a bald usurpation of power—and every instance of its exercise, which concerned the civil rights of individuals and the jurisdiction of the Courts, was a manifest wrong, aggravated by the false pretense of lawful authority.

According to Bates, he had “always contended that the Law, rightly administered, has amble [sic] power to protect itself, to vindicate the constitution, to uphold the Government and to subdue and punish the public enemy,” and that therefore it was “not only a crime, but a gross folly, to break the law, in order to serve or save the country!”

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159 Three days after Judge Leavitt’s decision, Lincoln commuted the sentence, directing Burnside to send Vallandigham to the South, beyond the Union lines, for the duration of the conflict. This temporary banishment ended Vallandigham’s detention, and thus mooted his habeas case. Vallandigham’s counsel then sought to directly challenge his military conviction in the Supreme Court, asking the Court to issue a writ of certiorari to the Judge Advocate General of the Army to bring before the Court the record of the trial and judgment. The merits of the constitutional challenge, however, were never fully briefed, let alone decided, because the Court held that it lacked constitutional and statutory jurisdiction to review the judgment of the military tribunal. Vallandigham, 68 U.S. (1 Wallace) at 251-53.


161 Entry for Mar. 9, 1865, in The Diary of Edward Bates, 1859-1866 at 457 (Howard K. Beale, ed. 1933) (emphasis in original).

162 Id. (emphasis in original).
It is not clear how Bates conveyed his legal views to the President, or to the rest of the Cabinet, in the preceding years, while the use of commissions became commonplace. There is no record of any official opinion by the Attorney General on the question; perhaps it is fair to assume that others assiduously avoided asking him for his formal views. He did make his views publicly known on at least one instance, however: In February 1864, the *New York Times* published a letter Bates had written five months earlier, to a judge in New Mexico, Associate Justice Joseph G. Knapp, in which Bates opined that certain “arbitrary” military proceedings “ought to be suppressed”:

SIR: Your letter of the 4th August, complaining of military arrests, was slow in reaching me, and then such was the urgent and continued occupation of the President in the great affairs of the Government, that I have not been able until now to fix his attention upon the particular outrage upon you, as your letter makes me believe it to be.

There seems to be a general and growing disposition of the military, wherever stationed, to engross all power, and to treat the civil Government with contumely, as if the object were to bring it into contempt.

I have delivered my opinion very plainly to the President, and I have reason to hope that he, in the main, concurs with me in believing that those arbitrary proceedings ought to be suppressed.\(^\text{163}\)

2. President Lincoln

As noted above, Lincoln’s September 1862 order expressly authorized the trial by military commission of “any person or persons who may be engaged, by act, speech, or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or in any other disloyal practice against the United States.” The commissions system therefore unquestionably enjoyed Lincoln’s formal imprimatur, at least at that high level of generality. There is reason to believe, however, that Lincoln was never entirely comfortable with the constitutional basis for the way in which those commissions operated in many cases.

For one thing, in his 1863 public letter (quoted above), Attorney General Bates stated that after meeting with the President he had “reason to hope” that Lincoln, “in the main,” shared Bates’s view that at least some “arbitrary” proceedings “ought to be suppressed.” Less ambiguously, in September 1866, after Lincoln’s death, Supreme Court Justice David Davis, the author of the Court’s decision in *Milligan*, told a Lincoln biographer that he and others had advised Lincoln that the various military trials in the northern and border states, “where the Courts were free and untrammeled, were unconstitutional and wrong,” and that the Supreme Court would not sustain them. Davis

further represented that he was “satisfied . . . that Lincoln was opposed to these military commissions, especially in the Northern States, where everything was open and free.”\textsuperscript{164}

Such second-hand accounts must, of course, be treated with some caution; after all, even if they fairly represented Lincoln’s views, the President was not willing to express those positions publicly.\textsuperscript{165} More telling, then, were Lincoln’s very public responses to the Democratic critics of Vallandigham’s detention and prosecution.

A group of prominent pro-Union New York Democrats wrote to Lincoln in May 1863, enclosing a series of resolutions adopted at one of the “most earnest [meetings] in support of the Union ever held in [Albany].” Those resolutions “denounce[d]” General Burnside’s treatment of Vallandigham and “demand[ed]” that the Administration “be true to the Constitution” and “exert all its powers to maintain the supremacy of the civil over military law” everywhere outside of the lines of “necessary military occupation and the scenes of insurrection.” The Albany resolutions complained not only about the suspension of habeas corpus, “arbitrary arrests,” and the infringement of freedom of speech, but also the denial of the civilian trial guarantees of Article III and the Fifth and Sixth Amendments.\textsuperscript{166}

Lincoln’s response—the famous “Corning Letter” of June 12, 1863, published in many newspapers\textsuperscript{167}—was, according to Horace Greeley, editor of the \textit{New York Tribune}, “the most masterly document that ever came from his pen.” The Corning Letter is, perhaps, best known for two things: First, Lincoln offered a subtle distinction between protected and unprotected speech. If, as the New York Democrats alleged, Vallandigham was seized and tried “for no other reason” other than that he criticized the government and condemned Burnside’s order, “then I concede that the arrest was wrong,” wrote Lincoln; in that case, “his arrest was made on mistake of fact, which I would be glad to correct, on reasonably satisfactory evidence.” As Lincoln understood the case, however, Burnside arrested Vallandigham because he “was laboring, with some effect, to prevent the raising of troops, to encourage desertions from the army, and to leave the rebellion without an adequate military force to suppress it.” If \textit{that} was his aim, reasoned Lincoln, then “[h]e was warring upon the military; and this gave the military constitutional jurisdiction to lay hands upon him.”\textsuperscript{168}

\textsuperscript{164} William H. Herndon & Jessie W. Weik, \textsc{Herndon’s Lincoln: A True Story of a Great Life} 556 n.* (2009 ed.).

\textsuperscript{165} Davis’s representation might well have been based on an incident in 1864, when Lincoln ordered prisoners released from military custody before trial after Davis had informed Lincoln of his view that military custody and trial were unlawful. \textit{See infra} at ___ (discussing case of Coles County rioters).

\textsuperscript{166} Letter to Lincoln from Erastus Corning, et al., May 19, 1863.

\textsuperscript{167} Letter from Abraham Lincoln to Erastus Corning and Others, June 12, 1863 [“Corning Letter”], in \textit{6 The Collected Works of Abraham Lincoln}, at 260.

\textsuperscript{168} \textit{Id.} at 266.
Second, Lincoln made an impassioned defense of the view, which he had been asserting since early in the war, that the constitutional power to suspend the writ of habeas corpus, when “in Cases of Rebellion or Invasion the public Safety may require it,” also includes the ancillary power to detain those who may lawfully not petition the courts for relief from military detention. “[S]uspension is allowed by the constitution on purpose that, men may be arrested and held, who can not be proved to be guilty of defined crime, ‘when, in cases of Rebellion or Invasion the public Safety may require it.’” Moreover, according to Lincoln the Suspension Clause permits such arrests to be “made, not so much for what has been done, as for what probably would be done”—for “preventive” rather than “vindictive” purposes, and thus before the commission of any offense. “Of how little value the constitutional provision I have quoted will be rendered, if arrests shall never be made until defined crimes shall have been committed.”

Whatever the merits of these arguments about free speech and the office of the suspension power, they were unresponsive to another aspect of the Democrats’ objections—the fact that Vallandigham not only was arrested and detained, but also subjected to a military trial, sentenced for his delicts, and ultimately banished, on Lincoln’s order, to the South. In his Corning letter, Lincoln acknowledged that the Albany resolutions had also complained about the circumvention of the Treason Clause, and of the denial of the jury protections of the Constitution; and he proffered a modest, but hardly compelling, response: Civil courts, wrote Lincoln, were inadequate to adjudicate crimes in wartime cases involving enemy “sympathizers [who] pervaded all departments of the government, and nearly all communities of the people.” “Nothing is better known to history,” he wrote, “than that courts of justice are utterly incompetent to such cases.” Juries in such a heated environment, he complained, “too frequently have at least one member, more ready to hang the panel than to hang the traitor.”

Lincoln presumably recognized that this basic distrust in the jury system was hardly an adequate justification for a military criminal trial—especially if the arrested individuals could be detained in any event. Thus, he fell back on a remarkable, alternative argument—that the arrests were not made “to hold persons to answer for any capital, or otherwise infamous crimes,” and that the military commission proceedings were not, “in any constitutional or legal sense, ‘criminal prosecutions’” at all!

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169 Three years later, in Milligan, the Justices divided amongst themselves on this question, in dicta. Compare 71 U.S. (4 Wall.) at 115 (“The suspension of the writ does not authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty.”), with id. at 137 (Chase, C.J., concurring) (“when the writ is suspended, the Executive is authorized to arrest as well as to detain”). See also Trevor W. Morrison, Suspension and the Extrajudicial Constitution, 107 COLUM. L. REV. 1533, 1566-67 (2007).


171 Id. at 263-64.

172 Id. at 262.
Lincoln left that thought hanging—in the Corning Letter he did not further elaborate on the purpose of the commission trial if it was not for criminal prosecution and punishment.

At this point, Democrats in Ohio, meeting in Columbus, actually nominated the exiled Vallandigham as their candidate for governor; and, like the New York Democrats, they passed resolves condemning his military trial and punishment, including his banishment. The Ohio Democrats took sharp issue with Lincoln’s view, in the Corning Letter, that the authority to suspend habeas includes a power to arrest and detain: Even where there is a habeas suspension, they insisted, “the other guaranties of personal liberty . . . remain unchanged.” Lincoln agreed to meet with the Ohio Democrats when they visited Washington on June 25. On June 29, he wrote them a letter—commonly known as the “Birchard Letter”—responding to the points they had made at the meeting.

It appears that the Ohio Democrats pressed Lincoln, at their meeting, on how he could justify a military trial, in addition to the arrest and detention, of Vallandigham and similar military defendants, for Lincoln devoted a full paragraph of the Birchard Letter to the question. In that paragraph, Lincoln elaborated on what the Corning Letter had only implied:

The earnestness with which you insist that persons can only, in times of rebellion, be lawfully dealt with, in accordance with the rules for criminal trials and punishments in times of peace, induces me to add a word to what I said on that point, in the Albany response. You claim that men may, if they choose,

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173 In a later letter to Lincoln, sent July 1, 1863, the Ohio Democrats elaborated: “[T]he denial of [the habeas petition] did not take away [Vallandigham’s] right to a speedy public trial by an impartial Jury, or deprive him of his other rights as an American Citizen—Your assumption of the right to suspend all the Constitutional guaranties of personal liberty, and even of the freedom of Speech and of the press, because the summary remedy of Habeas Corpus, may be suspended is at once startling and alarming, to all persons desirous of preserving free government in this Country.” Letter from Matthew Birchard, et al., to Abraham Lincoln, July 1, 1863, in 7 THE REBELLION RECORD: A DIARY OF AMERICAN EVENTS 376, 377 (F. Moore, ed. 1864). This echoed the response that the New York Democrats themselves made to Lincoln one day earlier: “[A] suspension of the writ of habeas corpus merely dispenses with a single and peculiar remedy against an unlawful imprisonment; but if that remedy had never existed, the right to liberty would be the same, and every invasion of that right would be condemned not only by the Constitution, but by principles of far greater antiquity than the writ itself. . . . It seems to us, moreover, too plain for argument that the sacred right of trial by jury, and in courts where the law of the land is the rule of decision, is a right which is never dormant, never suspended, in peaceful and loyal communities and States. Will you, Mr. President, maintain, that because the writ of habeas corpus may be in suspense, you can substitute soldiers and bayonets for the peaceful operation of the laws, military commissions and inquisitorial modes of trial for the courts and juries prescribed by the Constitution itself? And if you cannot maintain this, then let us ask, where is the justification for the monstrous proceeding in the case of a citizen of Ohio, to which we have called your attention?” Letter from Erastus Corning, et al., to Lincoln, June 30, 1863, PAPERS FOR THE SOCIETY FOR THE DIFFUSION OF POLITICAL KNOWLEDGE, NO. 10 (New York, 1863).

174 Letter from Abraham Lincoln to Matthew Birchard and Others, June 29, 1863, in 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN, at 300.
embarrass those whose duty it is, to combat a giant rebellion, and then be dealt with in turn, only as if there was no rebellion. The constitution itself rejects this view. The military arrests and detentions, which have been made, including those of Mr. V. which are not different in principle from the others, have been for prevention, and not for punishment—as injunctions to stay injury, as proceedings to keep the peace—and hence, like proceedings in such cases, and for like reasons, they have not been accompanied with indictments, or trials by juries, nor, in a single case by any punishment whatever, beyond what is purely incidental to the prevention. The original sentence of imprisonment in Mr. V.’s case, was to prevent injury to the Military service only, and the modification of it [i.e., Lincoln’s banishment order] was made as a less disagreeable mode to him, of securing the same prevention.  

Lincoln argued, in other words, not only that “military arrests and detentions” were preventive rather than punitive, but that the commission proceedings and sentences were, too; he insisted that the function of such trials was merely to identify persons who, like prisoners of war, should be incapacitated for the duration of the war, so that they could no longer undermine the war effort.

There was at least a smidgen of truth in what Lincoln suggested: In many commissions cases, Vallandigham’s included, the sentences appeared to be crafted for the purpose of wartime incapacitation, such as a term of confinement (or, here, banishment) limited to the duration of the conflict. Even so, the idea that the military commission proceedings were not punitive in nature, designed to impose punishment for criminal wrongdoing, was untenable, as Lincoln must have known, and as the Ohio Democrats pointedly noted in their response on July 1. The War Department regularly referred to the punitive nature of the proceedings, beginning in Halleck’s very first order in December 1861, in which he wrote that those committing hostilities “will be held and punished as criminals,” and continuing right through to Holt’s final, extended defense of the commissions in November 1865, where he explained that they were “indispensable for the punishment of public crimes” and had been a “powerful and efficacious instrumentality . . . for the bringing to justice of a large class of malefactors . . . who

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175 Id. at 304 (emphasis added).

176 “You claim that the military arrests made by your administration, are merely preventive remedies, ‘as injunctions to stay inquiry, or proceedings to keep the peace and, not for punishment.’ . . . If the proceeding be merely preventive, why not allow the prisoner the benefit of a bond to keep the peace? But if no offence had been committed, why was Mr. Vallandigham tried, convicted and sentenced by a Court martial? And why the actual punishment by imprisonment or banishment, without the opportunity of obtaining his liberty in the mode usual in preventive remedies, and yet say it is not for punishment?” Letter from Birchard, et al., to Lincoln, supra note __, in 7 THE REBELLION RECORD: A DIARY OF AMERICAN EVENTS at 378.

otherwise would have altogether escaped punishment.” More importantly, Lincoln’s own actions betrayed his understanding that the commission trials were, indeed, punitive in character: Although Lincoln himself sometimes commuted death sentences to confinement until the “end of war,” he also regularly approved death sentences, as well as fixed terms of confinement that might have easily extended beyond the conflict’s end.

Lincoln, then, was undoubtedly aware that the military commissions proceedings were, at least in part, punitive in nature, adjudicating whether the accused was guilty of an offense. That Lincoln had to deny, or obscure, such an obvious truth in order to offer even a superficially plausible account of why such military justice fell outside the guarantees of Article III and the Bill of Rights, speaks volumes about his probable doubts of the commissions’ constitutionality. Lincoln was one of the greatest constitutional lawyers of his (or any) time. The fact that even he could not justify military courts except by denying their punitive nature—in the course of his otherwise robust and unapologetic public defenses of the military’s role in suppressing disloyal conduct in the North—suggests that perhaps Bates and Davis were correct: maybe Lincoln was “opposed to these military commissions, especially in the Northern States, where everything was open

Undoubtedly the President, in passing upon the sentence of a court martial, and giving to it the approval without which it cannot be executed, acts judicially. The whole proceeding from its inception is judicial. The trial, finding, and sentence, are the solemn acts of a court organized and conducted under the authority and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are even placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor entitled to protection from the uncontrolled will of any man, but which must be adjudged according to law. And the act of the officer who reviews the proceedings of the court, whether he be the commander of the fleet or the President, and without whose approval the sentence cannot be executed, is as much a part of this judgment, according to law, as is the trial or the sentence. When the President, then, performs this duty of approving the sentence of a court martial dismissing an officer, his act has all the solemnity and significance of the judgment of a court of law. As it has to be performed under the same sanctions, so it draws with it the same consequences.

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178 Report of the Judge Advocate General, Letter from Joseph Holt to Edwin Stanton, Secretary of War, Nov. 13, 1865, in OFFICIAL RECORDS, Series III, vol. 5, at 490, 493. To similar effect, in the context of courts-martial, was a formal opinion of Lincoln’s Attorney General, Edward Bates, in 1864, that a President’s approval of a court-martial verdict establishes the “guilt” of the accused. President’s Approval of the Sentence of a Court Martial, 11 OP. ATT’y GEN. 19, 22 (1864); see also id. at 21:

179 See Witt, supra note ___, at 196.

and free,” although he did not have the courage or wherewithal to say so while the war was in full flower. As Mark Neely has surmised, “[h]e must have hoped [the military commission system’s] disappearance at war’s end would erase the military trials of civilians from national memory.”

In any case, Lincoln’s sweeping 1862 authorization of military tribunals for civil offenses, and his own personal complicity thereafter in the machinery of such Article I courts, has hardly withstood the test of time as an Executive precedent worthy of respect, even among those who generally admire Lincoln.

3. Congress

On at least three occasions between March 1863 and March 1865, Congress confronted the question of the legality of the War Department’s system of military commissions. The legislature, not surprisingly, was not of a single mind about the constitutional question, and the results of its debates were decidedly ambiguous. At a minimum, however, it is fair to say that the Thirty-Seventh and Thirty-Eighth Congresses recognized, and agonized about, the seriousness of the constitutional concerns, even if they did not ultimately resolve them.


182 Neely, supra note __, at 175.

183 See, e.g., id. at 49 (the profligate use of commissions “dealt a blow to Lincoln’s reputation as a steward of the Constitution from which he never recovered in the history books”); Randall, CONSTITUTIONAL PROBLEMS UNDER LINCOLN, supra note ____, at 152 (it “is of course evident” that the 1862 order was “arbitrary”); id. at 183 (“All this was out of keeping with the normal tenor of American law.”); Daniel Farber, LINCOLN’S CONSTITUTION 20 (2003) (“What authoritarian government could have asked for a broader charter?”).

184 In addition to the three initiatives discussed in the text, Congress enacted two laws of possible relevance in 1862. First, on January 31, 1862, Congress authorized courts-martial to punish any persons who attempted to interfere with the government’s “unrestrained use” of telegraph and railroad lines. That authority only extended, however, to states or districts in which federal law was “opposed” (i.e., the Confederate South), or in which federal law-execution was obstructed by insurgents and rebels “too powerful to be suppressed by the ordinary course of judicial proceedings.” Act of Jan. 31, 1862, ch. 15, § 2, 13 Stat. 334, 334 (1862). In other words, Congress expressly provided for military jurisdiction only in cases of necessity, where ordinary proceedings were obstructed. I have not found any instances in which courts either construed the scope of the “necessity” condition of this Act, or had any occasion to opine on the circumstances in which it could be constitutionally applied.

Second, on July 17, 1862, Congress enacted a law authorizing courts-martial to impose punishment for fraud or willful neglect of duty by military contractors in their dealings with the army and navy. That law contained within its very terms a recognition of the constitutional problem: It further provided that such contractors “shall be deemed and taken as a part of the land and naval force of the United States, . . . and be subject to the rules and regulations for the government of the land and naval forces of the United States.” Act of July 17, 1862, ch. 200, § 16, 13 Stat. 594, 596 (1862). In other words, Congress purported to “deem” military contractors as “part of” the land and naval forces, so as to ostensibly bring them within the reach of the Article III exception, recognized by the Supreme Court four years earlier, that allows the military trial of such forces (see Lederman, Washington article, supra note __, 105 GEO. L.J. at ____; Dynes v. Hoover,
a. The Habeas Act of 1863. The Habeas Act of 1863 is best remembered for Congress’s ratification of President’s Lincoln’s authority to suspend the privilege of the writ of habeas corpus “whenever, in his, judgment, the public safety may require it, . . . in any case throughout the United States, or any part thereof.” Less well known, perhaps, is that the Act was a compromise, of sorts: On the one hand, it permitted the President to suspend habeas, and thereby (at least) remove judicial supervision of the individuals who were being preventively detained by the military on a temporary basis. Its other provisions, however, were designed to guarantee that such detention would not be unregulated, unreviewable, or indefinite, and to further guarantee the primacy of civilian courts for any criminal prosecutions. Section 2 of the Act directed the Secretaries of State and War to furnish to federal courts a list of all persons within their jurisdictions who were “citizens of states in which the administration of the laws has continued unimpaired in the said Federal courts” and who were being held by the military “otherwise than as prisoners of war.” If the grand jury in a particular federal court then terminated its session without indicting a person whose name appeared on one of those prisoner lists, the Act required a judge of that court to discharge the person, so long as he first took an oath of allegiance to the Union. Section 3 of the Act further provided that if the Secretaries, for whatever reason, failed to supply the court with the list of prisoners’ names, a detainee could petition the court for the same relief, on the same grounds.

Thus, the 1863 Act was designed to afford the President an authority to secure temporary detention of dangerous persons, but only on the condition that “there should be this provision for the safety of the citizen”—the President’s “great discretionary power over the liberty of the citizen” was not to be a “substitute for the administration of the

61 U.S. (20 How.) 65 (1858). In 1866, a federal judge held that this law was “clearly unconstitutional” under Article III, Ex parte Henderson, 11 F. Cas. 1067, 1075 (C.C.D. Ky., reported 1878), and that its constitutionality could not be salvaged by the “deeming” clause, which “no more places the contractor] in the land or naval forces than he would be without such declaration,” id. at 1078. Much later, in Reid v. Covert, 354 U.S. 1, 20-21 (1957), the governing plurality opinion rejected the theory by which “Congress once went to the extreme of subjecting persons who made contracts with the military to court-martial jurisdiction with respect to frauds related to such contracts,” favorably citing Henderson as the “only judicial test” of the 1862 statute, in which “a Circuit Court held that the legislation was patently unconstitutional.” See also Frederick Bernays Wiener, Courts-Martial and the Bill of Rights: The Original Practice II, 72 HARV. L. REV. 266, 285 & n.460 (1958) (calling the 1862 provision “plainly unconstitutional”).


Id. § 2, 12 Stat. at 755.

Id. at 755-56.

Id. § 3, 12 Stat. at 756.

criminal law.” As Chief Justice Chase would later explain in the *Milligan* case, “the act seems to have been framed on purpose to secure the trial of all offences of citizens by civil tribunals in states where these tribunals were not interrupted in the regular exercise of their functions.” Accordingly, as James Randall would later recognize, “[h]ad this law been complied with, the effect would have been to restore the supremacy of the civil power.” On its face, then, the 1863 Act was a significant congressional rebuke—or constitutional corrective—to the War Department’s expanding practice of using military tribunals to try individuals for civil offenses.

Alarmingly, however, Holt and his colleagues in the War Department rarely complied with the law, and they continued with impunity to initiate military adjudications, without providing the required lists of names to the courts for the consideration of grand juries. What happened? The answer was simple, even if it was not widely appreciated at the time: Holt quietly determined that he would construe the provisions of the 1863 Act “strictly,” so as not to cover “those cases which are clearly triable by court-martial or military commission and which are being every day thus tried and readily and summarily disposed of.” Making felicitous, double use of the passive voice, Holt wrote to Stanton that “[i]t is not believed that it was intended in the act to invite attention to cases of persons charged with purely military offenses or of persons suffering under sentences of military tribunals.”

In this way, the War Department was able to disregard the significant constraints Congress had imposed, and the reign of military commissions continued. Holt’s tendentious statutory interpretation would not be challenged for another two years, and it was not corrected until the Court’s decision (unanimous on this point) in *Milligan*, after the Lincoln assassination trial was long over.

b. The 1864 guerilla sentencing provision. In 1864, General William Tecumseh Sherman reportedly wrote to Holt, asking him to secure legislation that would permit execution of military commission sentences without presidential approval, so as to avoid undue delay of sentences against so-called “guerillas.” Holt prepared such legislation and offered it up to the House. The House approved the bill without

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190 Id. at 318 (Jan. 18, 1865) (remarks of Rep. Davis).
192 Randall, *supra* note ___, at 164.
193 See id. at 166 & n.50.
195 See infra at ___.
substantial debate, but only after Representative James Garfield (who would later represent Lambdin Milligan in his Supreme Court challenge to military jurisdiction) assured fellow Ohio Representative Francis Le Blond that the bill would not provide for punishment of civilians and would “have no effect where civil courts are established” (although neither of those limitations appeared on the face of the bill itself).

When the other chamber took up the legislation, two Senators from border states where such commissions were becoming increasingly common—Reverdy Johnson of Maryland and Garrett Davis of Kentucky—raised objections: Johnson argued that if the bill were construed to apply to civil parties in those states, as its plain language appeared to provide, it “would be a clear violation of the Constitution” by “substituting in Maryland military authority for the civil authority,” and Davis called it a “strange and absurd” bill that was plainly unconstitutional. One of the chief Senate sponsors of the bill, Lyman Trumbull of Illinois, assured the objecting Senators that although the constitutional objection to such jurisdiction “may or may not be a very good one,” the legislation did not establish any such jurisdiction, or “authorize[e] the trial of anybody.” According to Trumbull, it left the tribunals’ jurisdiction where it already was (wherever that was), and merely authorized the execution of sentences without presidential approval—an assurance he repeated just before the Senate approved its version of the legislation on June 30.

As enacted, the legislation stated that the “commanding general in the field, or the commander of the department, as the case may be, shall have power to carry into execution all sentences,” of military commissions and courts-martial, “against guerilla marauders for robbery, arson, burglary, rape, assault with intent to commit rape, and for violations of the laws and customs of war, as well as sentences against spies, mutineers, deserters, and murderers.” On its face, this provision did not authorize any military jurisdiction or establish any offense (as Senator Trumbull had assured); even so, unless the House was relying upon Representative Garfield’s representation about implied limits, the legislation did appear to reflect—at a minimum—congressional knowledge that such trials were continuing, and it was certainly vulnerable to the stronger reading that Congress had, at least implicitly, blessed such trials.

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197 Id. at 2772 (June 6, 1864).

198 Id. at 2771 (colloquy between Reps. Le Blond and Garfield).

199 Id. at 3003 (June 16, 1864) (remarks of Sen. Johnson).

200 Id. (remarks of Sen. Davis); id. at 3029-30 (June 17, 1864) (remarks of Sen. Davis).

201 Id. at 3030 (June 17, 1864) (remarks of Sen. Trumbull).

202 Id. at 3416-17 (June 30, 1864) (remarks of Sen. Trumbull).

203 An Act to provide for the more speedy Punishment of Guerilla Mauraders, and for other Purposes, ch. 215, § 1, 13 Stat. 356, 356 (1864).
c. The eleventh-hour initiative in March 1865 to prohibit commission trials in places where civil courts were open.

At the outset of 1865, when Union victory was finally within sight, Representative Henry Winter Davis of Maryland took to the House floor to inquire about the apparent failure of the War Department to comply with the provisions of the 1863 Habeas Act. Davis, a cousin of Supreme Court Associate Justice David Davis, had by this time become a radical Republican, one who thought Lincoln’s plans for reconstruction were far too lenient.\(^{204}\) Even so, Davis was very concerned that the forthcoming victory, and the Republicans’ legacy, would be bitterly tainted by the aggressive and constitutionally dubious practices of the War Department in northern states, especially the system of military commissions. He explained that the “great discretionary power” Congress had afforded Lincoln in 1863 “over the liberty of the citizen”—the power to suspend habeas—was not a “substitute for the administration of the criminal law,” and that it was “a grave abuse to use it for any such purpose.” Davis accused the War Department of “continued, perpetual, and reiterated disobedience” of the 1863 law requiring the submission of detainees’ names to the civil process, and inveighed against the “illegal convictions by military commissions” for offenses “punishable by the laws of the United States upon indictment before the courts of the United States.”\(^ {205}\)

The House proceeded to vote 136 to 5 to authorize an inquiry into the War Department’s practices;\(^ {206}\) and on February 14, the Senate followed suit, unanimously passing a resolution directing Secretary of War Stanton to inform the Senate whether he had been providing courts with the lists of prisoners, as the 1863 Act required.\(^ {207}\) Stanton responded on February 18 by providing the Senate with Joseph Holt’s report from 1863,\(^ {208}\) in which the Judge Advocate General had defanged the requirement of the 1863 Act by construing it not to apply to “cases which are clearly triable by court-martial or military commission.”\(^ {209}\) At this point it became clear to Congress—if it was not already—that “no attention whatever has been paid to this important provision of law,”\(^ {210}\)

\(^{204}\) A year earlier, Davis had sponsored legislation that would have given Congress more control over reconstruction, and that would have required the Confederate states to disfranchise their officers, and abolish slavery, as a condition of re-entry into the Union. Lincoln pocket-vetoed the legislation, which prompted Davis, together with Senator Benjamin Wade of Ohio, to issue a famous manifesto, strongly denouncing Lincoln for not being tough enough on issue of slavery. See “The War Upon the President.; Manifesto of Ben. Wade and H. Winter Davis against the President’s Proclamation,” N.Y. TIMES, Aug. 9, 1864.


\(^{206}\) Id. at 320.

\(^{207}\) Id. at 784 (Feb. 14, 1865) (remarks of Sen. Powell).

\(^{208}\) Letter from Secretary of War Stanton to the President of the Senate, Feb. 18, 1865, Senate Ex. Doc. No. 23, 38th Cong., 2d Sess., reprinted in OFFICIAL RECORDS, Series II, vol. 8, at 255.

\(^{209}\) See supra at ___.

and that the practice of using military tribunals to try civil law offenses was continuing unabated throughout the north, including in many places where civilian courts were open and available. The War Department, in other words, was effectively disregarding the 1863 Act.

Henry Winter Davis then set out to put an end to what he saw as a constitutional black mark. Thursday, March 2, 1865, was the penultimate day of the Thirty-Eighth Congress, which would cease to exist at noon that Saturday. The legislature’s agenda was full, as one might expect; in particular, Congress had yet to approve a general appropriations bill, in order to keep the government running—the “grand omnibus on which everything rides, not otherwise provided for.”211 Davis saw this as his opening. He rose to offer an amendment to the appropriations bill, one having nothing to do with funding:

_And be it further enacted_, That no person shall be tried court-martial, or military commission, in any State or Territory where the courts of the United States are open, except persons actually mustered, or commissioned, or appointed in the military or naval service of the United States, or rebel enemies charged with being spies; and all proceedings heretofore had contrary to this provision are declared vacated; and all persons not subject to trial, under this act, by court-martial or military commission, now held under sentence thereof, shall be forthwith discharged or delivered to the civil authorities to be proceeded against before the courts of the United States according to law. And all acts inconsistent herewith are hereby repealed.212

Davis was quick to stress that his intent was not to indict Stanton, or the War Department, but instead to correct an “error” that had collectively been made by all the people and the Government as a whole, in the heat of war:

I do not think it is exclusively, perhaps not chiefly, the fault of those in authority that military commissions have tried, contrary to the Constitution and laws of the United States, many of its citizens. It began first in the rebel States, then spread to the border States, the theater of armed conflicts, then invaded Pennsylvania, Indiana, and New York, amid the general acclaim of the people; and now that it reaches as far north as Boston we hear the first murmur of its advocates or instigators. What [my] amendment contemplates is, not to cast imputation upon any administration or any officer, but recognizing the error which the people as well as the Government have in common committed against the foundation of their own safety, now, before the very idea of the supremacy of the law has faded from the country, to restore it to its power.213


213 _Id._ at 1324; _see also id._ (remarks of Rep. Kernan) (“We owe it to the cause of constitutional liberty and to the preservation of republican government to enact a law that shall abrogate the system of arbitrary
Representative George Yeaman of Kentucky moved to amend Davis’s amendment to exclude (i.e., not to prohibit) the trial of so-called violations of the laws of war by “guerrillas,” invoking the military commission convictions of “vagabonds, cut-throats, and robbers, who have today become the greatest scourge to the States of Missouri, Tennessee, and Kentucky,” and who allegedly had themselves prevented the workings of the ordinary, civilian courts of justice: “[I]n three fourths of Kentucky we have no courts of justice, because from the acts of these men we cannot hold them,” said Yeaman. “In eight counties of my own district they have burned our court-houses, and the officers of the law cannot go there, juries cannot be summoned, and witnesses cannot testify.” Davis strongly opposed Yeaman’s amendment; his rebuke went to the heart of the underlying dispute that had been brewing for the past four years:

[I]f three fourths of the State of Kentucky are subject to incursions of guerrillas, the other fourth is not, and that will furnish jurors enough. If there is room to hold a military court there is room to hold a civil court. If men are not afraid to go to testify before a military court they will not be afraid to go before a civil court. If bayonets are needed to protect them before a military court, bayonets can protect them before a civil court. Sir, this hankering after military courts is not because they cannot be tried and convicted before the courts of the United State if guilty; but men mad with civil war want a sharper and easier way to deal with criminals as enemies. It is the cry for vengeance and not justice! That is what it is and nothing else.

Davis ended his long oration with an impassioned plea: “[I]f the House will now say that the liberty of the American citizen is of equal moment with the miscellaneous appropriation bill, . . . every man in the United States will breathe freer and bear himself more loftily, and look with assured joy to the day when armed rebellion shall be destroyed, to be followed not by armed despotism, but by the peaceful reign of liberty and law, by submission but not by servitude.” The Congressional Globe reports that “[a]pplause on the floor and in the galleries” broke out when Davis finished.

According to the New York Times, Davis was congratulated “by both sides of the House” after his “powerful and eloquent speech.”

imprisonments and trials by military commissions which has been inaugurated, and which shall secure to every citizen the protection guaranteed by the Constitution against these weapons of despotism. If, during the excitement of this civil war, by reason of the real or supposed exigencies of the times, the practice of arbitrary arrests and trials of civilians by military tribunals has grown up, it is our right and our duty now, when it cannot truthfully be claimed that there is any need of proceedings of the kind, to enact a law which shall forbid them in the future, and which shall restore to the jurisdiction of the civil tribunals those who are now in prison.”

214 Id. at 1327 (remarks of Rep. Yeaman).

215 Id. at 1327 (remarks of Rep. Davis).

216 Id. at 1328.

Later that evening, Davis himself successfully moved to strip out the retroactive part of his proposal, so that his amendment would only preclude future military tribunals—presumably a concession to some legislators who said they would only support a prospective provision. The House then voted to approve the Davis amendment by a vote of 79 to 64.

The next day, March 3—the second anniversary of the 1863 Habeas Act and the final day of the term of the Thirty-Eighth Congress—the Senate was confronted with the Davis amendment to the appropriations bill. Senator Henry Lane of Indiana was incredulous that such a controversial substantive provision was tacked on to an appropriations law at the last minute: “[H]ere is a regular appropriation bill, every item of which is to carry out an express provision of law or is recommended by one of the Departments of the Government; and upon that bill in the last hours of the session is introduced this provision calculated to revolutionize and change the whole military jurisprudence of the country for the last four years. What business has this proposition upon such an appropriation bill? I fail utterly to see that it has any connection with the bill before the Senate.”

Lane and Jacob Howard of Michigan both raised substantive objections, too. “[A]way with this mawkish, affected sensibility in regard to courts-martial,” exclaimed Howard. “If there be any fault connected with them, and connected with the Administration on account of them, it is that they have not been used with sufficient vigor and vigilance. That is my opinion. The rigors belonging to martial law are in a moment of war and public danger the only restraining power sufficient to compel obedience to law and order.” Other Senators, however—including Lyman Trumbull of Illinois, Reverdy Johnson of Maryland, Thomas Hendricks of Indiana, and Edgar Cowan of Pennsylvania—offered extended defenses of the Davis amendment. Johnson stressed that the problem would not exist but for the fact that the 1863 Act had been “utterly disregarded”; and Hendricks likewise pleaded with his fellow Senators to “stand by this [1863] law” by approving the Davis amendment.

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219 See, e.g., id. at 1325 (remarks of Rep. Schenck).
220 Id. at 1333.
221 Id. at 1369 (Mar. 3, 1865) (remarks of Sen. Lane).
222 Id. at 1374 (remarks of Sen. Howard).
223 See, e.g., id. at 1372 (remarks of Sen. Johnson); id. at 1373, 1379-80 (remarks of Sen. Trumbull); id. at 1374-75 (remarks of Sen. Hendricks); id. at 1375-77 (remarks of Sen. Cowan).
224 Id. at 1372 (remarks of Sen. Johnson).
225 Id. at 1375 (remarks of Sen. Hendricks).
At this point, the hour was getting very late—it was 1:30 in the morning of March 4—and the Senate still had several other important pieces of legislation to take up. There was hardly time to debate such a contentious, substantive question. The Senate therefore voted 20 to 14 to strike the Davis amendment. At 6:35 a.m., the Senate finished its consideration of the omnibus appropriations bill, loading it up with new amendments that would make the conference committee’s labors over the next few hours “herculean.” Just before 7:00 in the morning, the House and Senate each selected three representatives to a conference committee, to iron out their differences. Henry Winter Davis was one of the House emissaries. At ten o’clock in the morning, the Houses reconvened, the members having spent the interim, early morning hours “refresh[ing] themselves for the duties of the day.” In the Senate, the chamber was filling with dignitaries, including Supreme Court Justices, for the swearing in of the new Vice-President. The Senate conferees on the omnibus bill reported that they had reached agreement on every one of their disputes . . . except one—the Davis amendment. The Senate representatives told Davis that although a majority of Senators concurred “in the principle” of his amendment, they would not support it as an appropriations amendment—and it was too late in the day to initiate a stand-alone bill. With the conferees still at stalemate, Senator Sherman predicted that the House would recede from its insistence on keeping the amendment, and so the Senate decided to stick to its guns. The ball was now in the House’s court, as the clock ran down.

Henry Winter Davis took the floor just minutes before noon. One of the three House conferees, DeWitt Littlejohn, thought that they should capitulate, but Davis and James Rollins were resolute: faced with a choice between “the great result of losing an important appropriation bill,” on the one hand, and permitting the military trial amendment to be struck, even after they had raised a “question of this magnitude touching so nearly the right of every citizen to his personal liberty and the very endurance of republican institutions,” on the other, Davis and Rollins regretfully concluded that “their duty to their constituents, to the House, and to themselves, would not allow them to

226 See id. at 1374 (remarks of Sen. Grimes).

227 Id. at 1380.

228 “Adjournment of Congress.; Both Houses in Session All Night,” N.Y. TIMES, Mar. 5, 1865.


232 Id. at 1421 (remarks of Rep. Davis).

233 Id.

234 Id. at 1422 (remarks of Rep. Littlejohn).
provide for any pecuniary appropriations at the expense of so grave a reflection upon the fundamental principles of the Government.” Representative Kasson pleaded with his colleagues to at least pass a separate bill to pay for support of patients at an insane asylum, to provide for the deaf and dumb, and to furnish critical oil to illuminate lighthouses, but Davis—and the House more broadly—would not budge on sacred principle.\footnote{Id. at 1421 (remarks of Rep. Davis); see also id. at 1422 (conceding that the “situation is a grave one”).}

The clock then struck twelve, and the Thirty-Eighth Congress (and Davis’s tenure in Congress) came to an end. Because of the struggle over Davis’s amendment to prohibit military commissions, the House failed to approve the funding for the following year of government operations.\footnote{Id. at 1423 (remarks of Reps. Kasson, Davis and Littlejohn).}

Meanwhile, over in the Senate, Andrew Johnson was sworn in as Vice-President, and proceeded to give a singularly embarrassing speech—slurred and melodramatic, virtually confessing that he was a simpleton not up to the job.\footnote{It appears that at least some executive departments proceeded thereafter to expend funds “on the faith” of both Houses having passed an appropriations bill and been stymied “only . . . in consequence” of the failure to reach agreement on the Davis amendment. See CONG. GLOBE, 39th Cong., 1st Sess. 856 (Feb. 15, 1866) (remarks of Rep. Stevens).} Minutes later, by contrast, on the East Portico of the Capitol, President Lincoln solemnly offered a succinct four paragraphs that were the greatest of his distinguished career—\footnote{CONG. GLOBE, 38th Cong., 2d Sess. 394-95 (Mar. 3 (actually Mar. 4) 1865).}—what Frederick Douglass, later that day, referred to as a “sacred effort.” The differences between the two officers could not have been more pronounced.

As Lincoln delivered his inaugural address, John Wilkes Booth stood watching on a Capitol balcony, perched just several yards above the President as he implored the Union to bind up the wounds of the Nation, “with malice toward none, with charity for all.”

\section*{II. THE CONSTITUTIONAL DEBATES IN THE CONTEXT OF THE LINCOLN ASSASSINATION TRIAL}

In late April 1865, as the War Department was rounding up and interrogating the suspects in the assassination plot against Lincoln, the Johnson cabinet debated the question of what sort of trial to convene. Secretary of the Navy Gideon Welles and Treasury Secretary Hugh McCulloch favored an ordinary trial in the local Article III court, which was open and operating normally, and which Lincoln and the Congress had

\footnote{CONG. GLOBE, 38th Cong., Special Senate Sess. 1424-25 (Mar. 4, 1865).}
taken extraordinary steps to ensure would remain under the supervision of judges who were scrupulously loyal to the Union cause.\textsuperscript{240}

Secretary of War Stanton, however, emphatically urged Johnson to authorize a military commission.\textsuperscript{241} Within hours of the assassination, Stanton and Judge Advocate General Holt had aggressively taken charge of the investigation, to the virtual exclusion of civil authorities. Not surprisingly, then, they lobbied to retain control as the case moved to the trial phase. Stanton argued that he and Holt had already developed

\textsuperscript{240}The creation of the new court, in 1863, raised a serious Article III question in its own right, in that it was an extraordinary example of a sharp rebuke to judicial independence by the political branches. As Susan Bloch and Justice Ginsburg have recounted, see Susan Low Bloch & Ruth Bader Ginsberg, Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia, 90 GEO. L.J. 549, 552-56 (2002), in 1861 one of the D.C. Circuit Court judges, William Matthew Merrick, entertained habeas corpus petitions of two sets of parents seeking release of their teenaged sons, who had been compelled to enlist in the Union Army, allegedly in violation of federal law. The army argued that civil law had been superseded by military law, under which infancy was not a defense to enlistment; but Judge Merrick rejected that argument and ordered the first teenager to be discharged. Two weeks later, he tried to do the same for another underage enlistee, but Lincoln made sure that would not happen: The President not only commanded the military officer to ignore the writ, but also ordered the military to station a guard in front of the judge’s house, so that he could not attend court! Chief Judge James Dunlop understandably complained that “the case presented is without a parallel in the judicial history of the United States .... The president, charged by the constitution to take care that the laws be executed, has seen fit to arrest the process of this court, and to forbid the deputy marshal to execute it.” United States ex rel. Murphy v. Porter, 27 F. Cas. 599, 602 (C.C.D.C. 1861) (No. 16,074a) (Dunlop, C.J.).

Subsequently, Lincoln determined that he should replace the judges altogether—but of course he could not do so directly, because Article III protected them with life tenure, designed to preclude precisely such political manipulation of the judicial process. Therefore the President urged Congress simply to disband the Circuit Court and to replace it with the new D.C. Supreme Court, to which he would appoint judges “of national reputation with positive and strong convictions in accord with the policies of the administration on all important questions then disturbing the country.” Bloch & Ginsburg, supra, 90 GEO. L.J. at 555 (quoting Matthew F. McGuire, An Anecdotal History of the United States District Court for the District of Columbia, 1801-1976, at 45 (1977)). After a floor debate on whether such a substitution would violate Article III, Congress acceded to Lincoln’s plan on the final day of its term. The new law replaced the Circuit Court, as well as the local criminal court (which had been established in 1838, with judges who were not tenured, see Act of July 7, 1838, ch. 192, § 1, 5 Stat. 306), with the new Supreme Court for the District of Columbia, empowered to hear both civil and criminal cases. Act of Mar. 3, 1863, ch. 91, § 3, 12 Stat. 762, 763. Eight days later, Lincoln appointed four judges to the new court. Two of those new judges had been members of the House of Representatives one week earlier, and had voted in favor of the court-switching legislation.

This displacement echoed the more well-known actions of the Republican Congress in 1802, which eliminated circuit court judgeships that the lame-duck Federalist Congress had established the previous year, thereby effectively terminating the service of sixteen “midnight” Federalist judges. Act of Mar. 8, 1802, ch. 8, §§ 1, 3, 2 Stat. 132, 132. The constitutionality of this effective “tenure-stripping” was challenged in Stuart v. Laird, see 5 U.S. (1 Cranch) at 304-05 (argument of Mr. Lee); see also 3 J. Story, Commentaries On The Constitution of the United States 494-95 (Boston 1833) (arguing that the 1802 Act “prostrates in the dust the independence of all inferior judges, . . . and leaves the constitution a miserable and vain delusion”). The Supreme Court, however, did not say a word about the question in its opinion in Stuart.

\textsuperscript{241}2 DIARY OF GIDEON WELLES 303 (1911).
evidence that the crimes of April 14 were part of a vast conspiracy to slaughter most of the cabinet—the work of none other than Jefferson Davis himself, along with Alabama Senator Clement C. Clay and other Confederate officials scheming in Canada to effect a spree of sabotage and terror in northern cities.\textsuperscript{242} Stanton’s apparent argument for the military commission was that the plot was part of the South’s war effort itself, and that therefore it was only appropriate that it should be met with a military response, and military justice.

On May 1, President Johnson signed an order authorizing the military commission, commanding Holt to prefer the charges and conduct the trial.\textsuperscript{243}

\textbf{A. The Policy Arguments for a Military Tribunal in the Assassination Case}

There is no direct record of Johnson’s policy reasons (nor Stanton’s) for deviating from the constitutional norm by choosing the military option. Holt, however, did offer a defense of the commission later in 1865; and from that and other sources, one can discern at least three principal incentives that likely influenced the President’s decision:

First, Stanton and Holt had become very familiar with, and deeply committed to, the elaborate system of military commissions the War Department had used throughout the war to try thousands of civilians, for all manner of offenses.\textsuperscript{244} Holt, in particular, had stubborn pride in this new institution, which he considered a critical complement to the nation’s tools of war. “[T]he experience of three years,” wrote Holt, had “proved” the commissions to be “indispensable for the punishment of public crimes.” “These tribunals had long been a most powerful and efficacious instrumentality in the hands of the Executive for the bringing to justice of a large class of malefactors in the service or interest of the rebellion, who otherwise would have altogether escaped punishment.”\textsuperscript{245}

As we have seen, however, by 1865 there was widespread concern about, and sharp criticism of, the commissions, including even by some staunchly pro-Union Republicans in Congress, who thought they had become a singular stain on the legacy that Lincoln and the Radical Republicans were establishing. Holt and Stanton thus had reason to think that the Lincoln assassination might be a rebuke to such critics—the crown jewel in their innovative mode of wartime justice, which would confirm the legitimacy and necessity of their ambitious program.

Second, Stanton and Holt knew that Holt himself, not a federal judge, would effectively be in charge of the military proceedings, which meant that the prosecution would have far greater leeway to offer whatever evidence it wished. In particular, they

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\item \textsuperscript{242} \textit{Id.} at 296 n.1.
\item \textsuperscript{243} Pittman, \textit{supra} note __, at 17.
\item \textsuperscript{244} \textit{See supra} at ___.
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had in mind to use the trial not only to demonstrate the guilt of the eight defendants in the dock but, far more importantly, to spin out a much broader narrative about the plotting and crimes of Jefferson Davis and his Confederate “Secret Service” in Canada. The efficacy of the commission in this case, explained Holt, was “chiefly illustrated” by the “extended reach which it could give to the investigation, and in the wide scope which it could cover by testimony”: The nefarious plot of the Confederate leaders was “published to the community and to the world.” “By no other species of tribunal, and by no other known mode of judicial inquiry,” reasoned Holt, “could this result have been so successfully attained; and it may truly be said that without the aid and agency of the Military Commission one of the most important chapters in the annals of the rebellion would have been lost to history, and the most complete and reliable disclosure of its inner and real life, alike treacherous and barbaric, would have failed to be developed.” The proceedings were, in other words, designed to be a show trial, for purposes reaching far beyond a simple, dispassionate assessment of the defendants’ legal culpability. For that purpose, Holt and his colleagues were in need of, and they did in fact exercise, “a latitude that no civil court would allow.”

Finally, and perhaps most importantly for present purposes, Stanton—and presumably Johnson, as well—had reason to fear what the outcome might be if the case were entrusted to a jury in the D.C. federal trial court, where unanimity was required for a guilty verdict. A significant percentage of adult men in the District were still off at war, and the remaining, winnowed jury pool included an unusually large number of Confederate sympathizers, any one of whom would have the capacity to prevent a guilty verdict. By contrast, obtaining a mere majority vote of nine military officers, all of whom were devoted to the Union war effort and revered their fallen Commander in Chief,

246 According to witnesses, in 1864 the Confederate Congress appropriated five million dollars to support covert actions in the north, including against civilian targets, with operations to be coordinated by unindicted co-conspirators Jacob Thompson (who had been President Buchanan’s Secretary of the Interior) and Clement Clay (a pre-secession Senator from Alabama). Witnesses testified of plots to burn down buildings and boats, to poison the New York water supply, and even, in the words of prosecutor John Bingham, “an infamous and fiendish project of importing pestilence” by distributing to Union soldiers clothing infected with yellow fever, smallpox, and other contagious diseases. Pittman, supra note __, at 373. The same Confederate officials in Canada were said to have conspired with Booth on a plan to kill Lincoln and other U.S. government officials.

247 Report of the Judge Advocate General, supra note __, at 1005-06.

248 See Witt, supra note __, at 294 (“The military commission placed virtually no constraints on the scope of the conspiracy theory that Holt’s team proposed.”).

249 Pitman, supra note __, at 259 (statement of Reverdy Johnson, counsel for Mary Surratt, toward the end of the trial). The New York Times identified the trial for what it was—a cross between a fishing expedition and a grand inquest: “The trial now in progress is not a trial for simple murder. Its object is not merely to punish one or more individuals for a specific act of crime. The government seeks to unravel a conspiracy—to follow every clue that may be offered for the detection and arraignment of every person in any way connected, directly or indirectly, with the extended and formidable conspiracy, in which the assassination of the President was only one of the objects sought.” N.Y. TIMES, May 15, 1865, p.4. It is noteworthy that the Times, like Holt, considered this as a feature, not a (constitutional) flaw. See infra note __.
was a much safer bet. The Commission was, in this respect, “unencumbered” by what Holt dismissively called “the technicalities and inevitable embarrassments attending the administration of justice before civil tribunals.”

B. Addressing the Constitutional Question

Whatever the policy reasons might have been for a military trial, however, there remained the question whether it would be constitutional. Accordingly, Johnson turned to his Attorney General, James Speed, for an opinion on that question. As Secretary Welles later recounted the internal dynamic, Speed was inclined against such a proceeding, but the new Attorney General was weak, and prone to adopt and echo “the jealousies and wild vagaries of Stanton.” Speed eventually came around to the War Secretary’s view. The Attorney General produced a formal opinion for the President on April 28. It reads in its entirety:

SIR:

I am of the opinion that the persons charged with the murder of the President of the United States can be rightfully tried by a military court.

I am, sir, very respectfully, Your obedient servant,

JAMES SPEED.

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250 Report of the Judge Advocate General, supra note ___, at 1005.

251 See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 (assigning the Attorney General the duty “to give his advice and opinion upon questions of law when required by the President of the United States”). As noted above, Lincoln apparently never asked for such a formal opinion on military commissions from Attorney General Bates, perhaps fearing he would not like the answer Bates was prepared to offer.

252 2 DIARY OF GIDEON WELLES 297 (1911).

253 Murder of the President, 11 Op. Att’y Gen. 215 (1865). Many years later, the Chief Justice of the United States would remark of this formal opinion: “The arguments for and against this position . . . were very much bruited about at the time, and Speed’s failure to deal with them at all is . . . evidence of his lack of professional ability.” William H. Rehnquist, ALL THE LAWS BUT ONE 145 (1998). A few weeks after Speed opined, his predecessor, Edward Bates, wrote that Speed was in effect an empty suit, with “no strong confidence in his own opinions,” who had been “caressed and courted by Stanton and [Secretary of State] Seward, and sank, under the weight of their blandishments, into a mere tool—to give such opinions as were wanted;” thereby corrupting and degrading Bates’s beloved law department. Although Speed “must know better,” Bates surmised, he was “wheedled out of an opinion, to the effect that such a trial is lawful.” THE DIARY OF EDWARD BATES, 1859-1866 at 483 (Howard K. Beale, ed. 1933). Secretary of the Navy Welles, who was impressed by Stanton’s skills and energy, was nonetheless often at odds with the War Secretary, and troubled by his “mercurial” and “impulsive” nature, WELLES DIARY, supra note ___, at 309—never more so than in this instance: “The rash, impulsive, and arbitrary measures of Stanton are exceedingly repugnant to my notions, and I am pained to witness the acquiescence they receive. He carries others with him, sometimes against their convictions as expressed to me.” Id. at 304.
Apparently that work product was good enough for Johnson: In his order, the President expressly relied upon Speed’s opinion that the alleged conspirators and abettors were “subject to the jurisdiction of, and lawfully triable before, a Military Commission.”

For obvious reasons, that conclusory Attorney General opinion did not quell anxieties about the legality of the military tribunal. Allies of the President expressed grave doubts about it. Henry Winter Davis, for instance, who had come very close three months earlier to persuading Congress to expressly prohibit such trials, wrote Johnson that the tribunal was “in the very teeth of the express prohibition of the constitution & not less in conflict with all our American usages & feeling respecting criminal proceedings.” Davis assured the President that not a single one of his acquaintances thought otherwise, and that the military proceeding would likely do damage to the Republic—and would surely be the ruin of his administration. Similarly, during the trial itself, David Dudley Field—a renowned Republican lawyer and brother of Supreme Court Justice Stephen Field—wrote Johnson that the trial was “a matter of great embarrassment to all of us who have been educated to dread encroachments upon the Constitution. We think a military trial is, to say the least, of questionable legality.”

The decision to use a military tribunal was also excoriated in many segments of the press, including even by some journals ordinarily sympathetic to the Union and to the administration. The New York Times, for example, opined that the commission was “repugnant to the spirit of our institutions,” a tribunal “for which no precedent is to be found in the history of any free country, and one to which the worst European despotisms have rarely ventured, even in Poland or Hungary, to resort.” Although the Times was quick to add, the next day, that it did not mean to impugn the motives of the relevant government officials, even so, “[i]t would have been far better every way if these trials could have been held before the ordinary civil tribunals of the land, and in presence of the public.”

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254 Pittman, supra note __, at 17.

255 Letter from Henry Winter Davis to the President, May 13, 1865, in 8 The Papers of Andrew Johnson 65, 65-66 (P. Bergeron ed. 1989); see also Letter from Carl Schurz to President Johnson, May 13, 1865, in id. at 67, 67 (submitting the case to a military commission was “perhaps the utmost stretch of power upon which the Government could venture without laying itself open to an imputation of foul play”).

256 Excerpt from Letter of David Dudley Field to the President, June 8, 1865, in id. at 201.

257 See generally Thomas Reed Turner, Beware the People Weeping: Public Opinion and the Assassination of Abraham Lincoln 140-41 (1982); see also Entry for May 25, 1865, in The Diary of Edward Bates, 1859-1866, at 483 (Howard K. Beale, ed. 1933) (remarking that the “three leading Republican papers in New York,—the Post, the Tribune and the Times,—come out boldly, against the trial of the assassins of the President and the Seward, by a Military Commission”).

258 “Secret Court.—The Trial of the Assassins,” N.Y. Times, May 11, 1865.

259 “The Trial of the Assassins,” N.Y. Times, May 12, 1865. Other, more vociferous opponents of Stanton and Johnson were pleasantly surprised that the Times had joined in the opposition to the military court. Interestingly, this prompted the Times to do an about-face; by May 13, it was apologizing for “the ill-judged language of an article accidentally inserted in these columns, a day or two since,” which had given
During the actual proceedings of the Lincoln assassination commission, the constitutional question was raised at least five times . . . and then again, at much greater length, Attorney General Speed himself addressed the question in another, much more extensive, formal opinion that he signed in July 1865, after four of the accused had already faced the gallows.

1. Comstock’s Doubts. Before the trial even began, at least one of the nine members of the Commission itself—Brevet Brigadier-General Cyrus Comstock—thought the accused “ought to be tried by civil courts,” and he raised the question of the commission’s jurisdiction with the President of the Commission during proceedings the next day. Holt replied that Attorney General Speed had already decided the jurisdictional question, implying that it was not Comstock’s place to second-guess that decision; but Comstock continued to express his doubts (about that and other matters)—with no success. The next day, May 10, Comstock and Brevet Colonel Horace Porter were relieved from duty on the Commission; the reason they were offered was that they were aides to General Grant, who was alleged to have been one of the targets of the conspiracy.

the New York World “some color of justice in claiming the TIMES as among the journals which concur in its opinions on this subject.” “The Trial of the Assassins—Action of the Government, N.Y. TIMES, May 13, 1865 (emphasis added). In the span of just 48 hours, the Times had switched gears and become an unapologetic defender of the legality of the military commission proceedings:

The assassination of Mr. LINCOLN was the murder of a military officer, in actual command, during actual war, in a fortified camp, and for the purpose of aiding the enemy; what more was needed to give the military tribunals complete cognizance of the case? . . . [D]oes not every consideration of justice to the public welfare demand that they should be tried by the most summary, rigorous and inflexible tribunals provided by the constitution and laws of the land for such dread emergencies? Is it wise to give to such criminals, as a special favor, the chance of packing a jury or securing upon it one man who will screen them at all hazards? . . . . It is well to remember that the purpose of the government is not simply, to punish a criminal, but to unravel a conspiracy; to detect the threads and connecting links of a vast and powerful organization, aiming at anarchy and the overthrow of the government by secret assassinations.

After reading this remarkable turn-about, former Attorney General Bates wrote in his diary that the Times, “scared, perhaps, at his own boldness, in daring to assert a principle contrary to the dictatorship of the war office,” was “easing off and backing down, into its normal condition of abject dependence upon power.” Times co-founder Henry J. Raymond, wrote Bates, “has capacity, and would rather be a statesman, and a good citizen than a sycophant”—but only where it was “convenient, and consistent with the pecuniary interest of his paper.” Entry for May 18, 1865, in DIARY OF EDWARD BATES, supra note ___, at 481.


261 Id., May 9, 1865.

262 Id., May 10, 1865.

263 Pitman, supra note ___, at 18.

2. The Jurisdictional Pleas. On May 12, the first day on which the accused were represented by counsel, they each formally pled the absence of court jurisdiction, on grounds that they were not in military service and that “loyal civil courts, in which all the offenses charged are triable, exist, and are in full and free operation in all the places where the several offenses charged are alleged to have been committed,” including “in the City of Washington.” Holt’s entire response to this jurisdictional challenge was the following: “[T]his Commission has jurisdiction in the premises to try and determine the matters in the Charge and Specifications alleged and set forth against the said defendant[s].” The court was cleared for the commission’s deliberation of the jurisdictional objection, after which Holt “announced that the pleas of the accused had been overruled by the Commission.”

3. Ewing’s Request for Specification of the Charge. The third challenge was more indirect, but it went to the important question of which offenses can be tried by a military commission. On June 14, 1865, well into the trial, Thomas Ewing, Jr., the former Chief Justice of the Kansas Supreme Court (and William Tecumseh Sherman’s brother-in-law), serving as counsel for Mudd, Spangler and Arnold, moved to require the prosecution to clarify the charge against the accused, so that Ewing and his fellow counsel would be able to offer a coherent defense. Ewing complained that it was impossible to tell from the written charge exactly what offenses the defendants were accused of committing, and, perhaps more importantly still, what the legal source of those offenses might be.

Ewing was right: The charge itself was remarkably undifferentiated and indistinct. It appeared to accuse each defendant of having done two things: The first was an unlawful agreement—conspiring with Booth, John Surratt, Jefferson Davis and other Confederate officials, “maliciously, unlawfully, and traitorously, and in aid of the existing armed rebellion,” to kill the President, the Vice President, the Secretary of State, and General Grant. The second was the substantive offense corresponding to that alleged plot—acting, together with Booth and Surratt, to maliciously, unlawfully, and traitorously murder the President, assault the Secretary, and lie in wait with intent to murder Johnson and Grant. As Chief Justice William Rehnquist would later write, it was, “to put it mildly,” an “ambitious charge.”

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265 Pitman, supra note ___, at 22-23.
266 Id. at 23.
267 Id. Holt later reported to the President that the Commission overruled the jurisdictional plea “after mature deliberations.” Report of Joseph Holt to the President at 2, July 5, 1865.
268 Pitman at 244-47.
269 Id. at 18-21. The “Charge” paragraph, in its entirety, read as follows:

For maliciously, unlawfully, and traitorously, and in aid of the existing armed rebellion against the United States of America, on or before the 6th day of March, A.D. 1865, and on divers other days
Ewing noted, for instance, that the defendants were each alleged to have “traitorously” murdered the President. This raised at least two questions: First, how could any of these individuals be charged with the murder, since none of them was with Booth in Ford’s Theater? And second, what was the offense, anyway? Murder *simplicitur* was defined by statutory and common law, explained Ewing, but what was this thing called “traitorous murder,” which sounded suspiciously similar to the crime of treason, which is specifically treated in Article III, and conviction for which requires heightened proof?\(^{271}\)

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between that day and the 15th day of April, A. D. 1865, combining, confederating, and conspiring together with one John H. Surratt, John Wilkes Booth, Jefferson Davis, George N. Sanders, Beverly Tucker, Jacob Thompson, William C. Cleary, Clement C. Clay, George Harper, George Young, and others unknown, to kill and murder, within the Military Department of Washington, and within the fortified and intrenched lines thereof, Abraham Lincoln, late, and at the time of said combining, confederating, and conspiring, President of the United States of America, and Commander-in-Chief of the Army and Navy thereof; Andrew Johnson, now Vice-President of the United States aforesaid; William H. Seward, Secretary of State of the United States aforesaid; and Ulysses S. Grant, Lieutenant-General of the Army of the United States aforesaid, then in command of the Armies of the United States, under the direction of the said Abraham Lincoln; and in pursuance of in prosecuting said malicious, unlawful and traitorous conspiracy aforesaid, and in aid of the said rebellion, afterward, to wit, on the 14th day of April, A. D. 1865, within the Military Department of Washington, aforesaid, and within the fortified and intrenched lines of said Military Department, together with said John Wilkes Booth and John H. Surratt, maliciously, unlawfully, and traitorously murdering the said Abraham Lincoln, then President of the United States and Commander-in-Chief of the Army and Navies of the United States, as aforesaid; and maliciously, unlawfully, and traitorously assaulting, with intent to kill and murder, the said William H. Seward, then Secretary of State of the United States, as aforesaid; and lying in wait with intent maliciously, unlawfully, and traitorously to kill and murder the said Andrew Johnson, then being Vice-President of the United States; and the said Ulysses S. Grant, then being Lieutenant-General, and in command of the Armies of the United States, as aforesaid. (Emphasis added.)

*Id.* at 18–19. The charging document then proceeded to include ten more paragraphs, with further specifications for each of the defendants, many of which sounded in accessorial culpability. *Id.* at 19–21. The paragraph respecting Samuel Mudd, for instance, alleged that

in further prosecution of said conspiracy, the said Samuel A. Mudd did, at Washington City, and within the military department and military lines aforesaid, on or before the 6th day of March, A. D. 1865, and on divers other days and times between that day and the 20th day of April, A. D. 1865, advise, encourage, receive, entertain, harbor, and conceal, aid and assist the said John Wilkes Booth, David E. Herold, Lewis Payne, John H. Surratt, Michael O’Laughlin, George A. Atzerodt, Mary E. Surratt, and Samuel Arnold, and their confederates, with knowledge of the murderous and traitorous conspiracy aforesaid, and with the intent to aid, abet, and assist them in the execution thereof, and in escaping from justice after the murder of the said Abraham Lincoln, in pursuance of said conspiracy in manner aforesaid.

*Id.* at 20–21.


\(^{271}\) See U.S. Const. art. III, cl. 3, discussed *infra* note __.
Judge Advocate Holt responded that the “general allegation” was a conspiracy—to murder Lincoln, in particular—but that the defendants were also charged with “the execution of the conspiracy as far as it went.” As for the law, Holt conceded that “[w]e have no special statute to which we can point,” but “[w]e have the great principles of jurisprudence, which regulate this trial.” The adverb “traitorously” was included in the charge, said Holt, to specify that the conduct was “in aid of the rebellion”—without explaining why that objective might be legally significant.\textsuperscript{272} Assistant Judge Advocate Bingham interjected that each of the defendants was alleged to have committed the assaults themselves because “the act of any one of the participants to a conspiracy in its execution, is the act of every party to that conspiracy,” such that when the President was slain by the “hand of Booth,” he was “murdered by every one of the parties to this conspiracy.”\textsuperscript{273} Even so, Bingham added, although there were charges of both making and executing the conspiracy, “it is all one transaction.”\textsuperscript{274}

Ewing, by now even more exasperated—“I get no answer intelligible to me”—probed once more for the “code or system of laws” that condemns “traitorously” murdering, assaulting and lying in wait. Holt’s cryptic response: “I think the common law of war will reach that case.”\textsuperscript{275}

\textbf{4. The Oral Arguments on Jurisdiction.} The fourth and most extensive attack on the jurisdiction of the Commission came in the form of long disquisitions on the subject offered by Ewing on June 23\textsuperscript{276} and by Mary Surratt’s attorney, Reverdy Johnson, a week earlier, on June 16.\textsuperscript{277}

Surratt had retained Johnson, a Democratic Senator from Maryland who had both defended the slave-owner in \textit{Dred Scott v. Sandford} and served as one of President Lincoln’s pallbearers, especially for the purpose of the jurisdictional challenge. Johnson proffered several jurisdictional arguments, including that no statute or constitutional power afforded the Executive affirmative authority to unilaterally establish the commission; that the commission could not be defended on the theory that martial law had been declared; and that the charges appeared to be allegations of treason in the guise of other “traitorous” offenses, and therefore had to be tried in an Article III court.\textsuperscript{278}

\begin{footnotesize}
\begin{enumerate}
\item Pitman, \textit{supra} note \textsuperscript{___}, at 245-46.
\item \textit{Id.} at 246.
\item \textit{Id.} at 247.
\item \textit{Id.}
\item \textit{Id.} at 264-67.
\item \textit{Id.} at 251-62.
\item Section 3 of Article III provides that “Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.” The defendants before the commission certainly appeared to be charged with adhering, and
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Most pointedly, Johnson argued that whereas military judges “are absolutely dependent” on Executive power, Article III guaranteed Surratt a trial before a judge who is independent of the Executive power. Johnson stressed that this view of constitutional limits on military jurisdiction was “the almost unanimous opinion of the profession and certainly is of every judge or court who has expressed any.”

Johnson then quoted at length from a remarkable contemporary charge to a grand jury by New York Judge Rufus Peckham (father of the Supreme Court Justice), inveighing against the misuse of military commissions: The constitutional protections in question, instructed Peckham, “were made for occasions of great excitement, no matter from what cause, when passion rather than reason, might prevail.” Peckham then took aim at the Lincoln conspirators’ commission itself:

A great crime has lately been committed, that has shocked, the civilized world. Every right-minded man desires the punishment of the criminals; but he desires that punishment to be administered according to law, and through the judicial tribunals of the country. No star-chamber court, no secret inquisition in this nineteenth century, can ever be made acceptable to the American mind.

Grave doubts, to say the least, exist in the minds of intelligent men as to the constitutional right of the recent military commissions at Washington to sit in judgment upon the persons now on trial for their lives before that tribunal. Thoughtful men feel aggrieved that such a commission should be established in this free country when the war is over, and when the common-law courts are open and accessible to administer justice according to law without fear or favor.

The unanimity with which the leading press of our land has condemned this mode of trial ought to be gratifying to every patriot.

Every citizen is interested in the preservation, in their purity, of the institutions of his country; and you, gentlemen, may make such presentment on this subject, if any, as your judgment may dictate.

Ewing, for his part, homed right in on the specific protections of Article III, including not only the right to a trial by jury, but also the importance of an independent Article III giving aid and comfort, to the enemy. Section 3 does not say in so many words that treason charges must be adjudicated in Article III courts; however, Attorney General Speed himself opined several months later, with respect to a potential treason trial of Jefferson Davis, that “I have ever thought trials for high treason cannot be had before a military court. The civil courts have alone jurisdiction of that crime.” Case of Jefferson Davis, 11 Op. ATT’Y GEN. 411, 411 (1866); accord Quirin, 317 U.S. at 38 (suggesting that the crime of treason is not a violation of the laws of war that can be tried before a military commission).

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279 Pitman, supra note ___, at 261.

280 Id. at ___.

281 Id. at 261 (quoting Judge Peckham’s charge to a New York grand jury).
judge, who would be much more adept at keeping the trial within proper legal bounds, a function beyond the commission’s ken:

Inexperienced as most of you are in judicial investigation, you can admit evidence which the courts would reject, and reject what they would admit, and you may convict and sentence on evidence which those courts would hold to be wholly insufficient. Means, too, may be resorted to by detectives, acting under promise or hope of reward, and operating on the fears or the cupidity of witnesses, to obtain and introduce evidence, which cannot be detected and exposed in this military trial, but could be readily in the free, but guarded, course of investigation before our regular judicial tribunals.282

Ewing repeated Johnson’s claim that “a large proportion of the legal profession think now, that your jurisdiction in these cases is an unwarranted assumption,” and he warned that if and when the established judicial tribunals would one day hold that this sort of commission was invalid through and through, history would not look kindly on the assassins’ commission, no matter the outcome of the trial: “In that event, however fully the recorded evidence may sustain your findings, however moderate may seem your sentences, however favorable to the accused your rulings on the evidence, your sentence will be held in law no better than the rulings of Judge Lynch’s courts in the administration of lynch law.”283

The duty of responding to Johnson and Holt on the jurisdictional questions fell to Special Judge Advocate Bingham, who would later gain renown as the drafter of Section One of the Fourteenth Amendment. Bingham’s lengthy jurisdictional lecture to the Commission, part of his closing argument, included several different strands of argument, most of which had become familiar during the war, as military officials such as Holt and Henry Halleck had endeavored to give legal support to their expansion of military jurisdiction.284 Bingham contended, for example, that because President Lincoln had declared martial law for all of the union states, the ordinary rules of civilian life were simply inapposite, and were displaced by “military law”; indeed, Bingham argued, the provisions of the Constitution invoked by counsel for the accused “are * * * silent and inoperative in time of war when the public safety requires it.”285

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282 Id. at 266. Ewing acknowledged that Judge-Advocate Holt was “learned in the law,” but that was cold comfort, because “from his position he can not be an impartial judge, unless he be more than a man.” Id.

283 Id.

284 Id. at 351-72.

285 Id. at 361. Bingham reasoned that if it was permissible for the Army to have chased down and killed Booth himself, without “civil process,” it stood to reason that the military could try his coconspirators. Id. at 352. At one point, Bingham invoked a well-known argument offered by then-Representative John Quincy Adams in 1836, to the effect that when the executive exercises war powers, municipal laws are displaced by the law of war—a sharp distinction between the laws that govern “war powers” and peace powers.” Id. at 365. As I discuss in greater detail in Lederman, Washington article, supra note __, 105 GEO. L.J. at __, this argument had some traction with the Supreme Court in the context of constitutional
In their jurisdictional challenges, Ewing and Johnson had stressed that the civilian courts in the District of Columbia were open and available. They also hinted at an important point that the Supreme Court would recognize several decades later—namely, that the protections of Article III are, if anything, even more important within the District than elsewhere in the nation, because of the increased risk that Article I adjudicators, without the protections of tenure and emoluments, might be swayed by pressures from the political branches (something that would be equally if not more true with respect to military commission panels): “[T]he reasons . . . that impelled the adoption of the constitutional limitation[] apply with even greater force to the courts of the District than to the inferior courts of the United States located elsewhere,” the Court would write, “because the judges of the former courts are in closer contact with, and more immediately open to the influences of, the legislative department, and exercise a more extensive jurisdiction in cases affecting the operations of the general government and its various departments.”

Bingham attempted to respond to this, throughout his jurisdictional argument, by reminding the commission that the District of Columbia was, in a sense, subject to what one might call martial law, even after the surrender at Appomattox Courthouse. True enough, Bingham conceded, the civil courts were open in the District—but “only . . . by force of the bayonet.” This retort might have had some intuitive appeal, but it was nonresponsive to the legal point that Ewing and Johnson had pressed. To be sure, the District was heavily guarded by military forces; the military governor was authorized to direct the police force; and the President had even decided to suspend habeas. These things did, not, however, operate to establish martial law, “which, in the proper acceptation of the term, was not at any time fully established over the District.” Indeed, the very military protection that Bingham identified (the “force of the bayonet”), by guaranteeing that the courts would remain open and running, made it unnecessary to impose martial law. As one military treatise writer would later summarize: “The civil magistracy of the District exercised their vocations as usual. Civil officers were chosen, they entered upon or surrendered their duties as in times of peace. To this extent the military, instead of supplanting the civil authorities, rendered it possible for the latter to exercise their functions. Without the former the latter would have been powerless to protect and render secure either life or property. Yet in doing this the military did not act in subordination to the civil power. It strengthened the latter, but in its own way.”

property rights, but it was never successfully applied to displace the rights the Constitution guarantees with respect to criminal trials.


287 Pitman, supra note ___, at 352.

288 William E. Birkhimer, MILITARY GOVERNMENT AND MARTIAL LAW 480 (3d ed. 1914).

289 Id. (emphasis added).
Bingham offered other arguments, as well. Some of them sounded textual or structural themes. He insisted, for instance, that because the power to create the Court emanated from an Article I authority (even though Congress did not create it!), the commission’s trial of military offenses was not part of the “judicial power” of Article III—an argument that begs the question at issue, which is if and when the political branches can create Article I courts to perform criminal trial functions ordinarily restricted, at the federal level, to Article III courts. Bingham also suggested that just as Congress has the power to subject service-members to courts-martial based upon its authority to make rules for the government and regulation of the land and naval forces, together with the exception to the Fifth Amendment grand-jury clause for cases “arising in the land or naval forces,” so, too, should those same constitutional provisions empower the federal government to use military tribunals to try persons outside the armed forces who, in a time of war, commit offenses “in the interests of, or in concert with, the enemy.” It would be deeply unfair, reasoned Bingham, to provide constitutional protections to those who would conspire with the enemy to commit murder, but to deny those same protections to the lowly soldier who falls asleep at his post.

Although none of these arguments has withstood the test of time, Bingham offered one other rationale, as well—an argument rooted firmly in practice and understandings at the Founding. Bingham explained that, notwithstanding provisions in virtually all of the state constitutions shortly after independence guaranteeing jury trials for all crimes, the Continental Congress had passed resolutions during the war prescribing military tribunals for persons who had aided the British enemy. In particular, Bingham pointed to the following resolution that the Continental Congress adopted on February 27, 1778:

Resolved, That whatever inhabitant of these States shall kill, or seize, or take any loyal citizen or citizens thereof and convey him, her, or them to any place within the power of the enemy, or shall enter into any combination for such purpose, or attempt to carry the same into execution, or hath assisted or shall assist therein; or

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290 In addition to the substantive arguments listed in the text, he argued that the commission lacked the power to declare that it lacked jurisdiction: “[T]his Court has no power, as a Court, to declare the authority by which it was constituted null and void, and the act of the President a mere nullity, a usurpation. . . . How can it be possible that a judicial tribunal can decide the question that it does not exist . . . ?” Pitman, supra note __, at 353-54.

291 Id. at 354.

292 See supra note ___ (discussing a similar argument that Holt had made in 1863).

293 Pitman, supra note __, at 360-61.

294 Indeed, a year later, in *Ex parte Milligan*, 71 U.S. 2 (1866), the Supreme Court vigorously rejected Bingham’s arguments premised upon the existence of martial law and the displacement of civil law. See infra at __.

295 Pitman, supra note __, at 361-62.
shall, by giving intelligence, acting as a guide, or in any manner whatever, aid the enemy in the perpetration thereof, he shall suffer death by the judgment of a court-martial as a traitor, assassin, or spy, if the offence be committed within seventy miles of the headquarters of the grand or other armies of these States where a general officer commands.\(^ {296}\)

What is more, added Bingham, none other than General George Washington himself, “the peerless, the stainless, and the just, with whom God walked through the night of that great trial,” attempted to enforce that resolution in 1780 against Joshua Hett Smith. Smith was, on Washington’s orders, arraigned by court-martial for having allegedly abetted Benedict Arnold in his traitorous scheme to surrender the army garrison at West Point to the British.\(^ {297}\) How could the jurisdictional arguments of Ewing and Johnson be correct, asked Bingham, if the Continental Congress had passed such a resolution, and Washington had enforced it, “when the constitutions of the several States at that day as fully guaranteed trial by jury to every person held to answer for a crime, as does the Constitution of the United States at this hour”?\(^ {298}\)

This was probably Bingham’s most effective response to the accused’s jurisdictional challenges, but it did not receive much attention during the trial itself. It appears that Johnson and Ewing did not anticipate or countermand this quasi-originalist line of argument, and it was not mentioned further.\(^ {299}\)

It is not reported whether the Lincoln commission members deliberated any further on the question of the tribunal’s jurisdiction or whether, instead, they merely deferred to Holt’s and Bingham’s insistence that the proceedings were constitutional, as Attorney General Speed had already determined. Obviously, the panel was not persuaded by Johnson and Ewing, since it proceeded to render its verdicts later that month.

5. **Mary Surratt’s Habeas Petition.** The final, and most dramatic, constitutional challenge to the tribunal’s jurisdiction occurred after the panel rendered its verdicts. The case finally did reach the Supreme Court of the District of Columbia, at 5th and E Streets . . . only to have the President himself refuse to recognize the authority of the first Article III judge who had an opportunity to consider the constitutional question.

On June 30, the commission sentenced Mary Surratt to be hung.\(^ {300}\) Five of the nine members recommended that President Johnson reduce her sentence to life

\(^{296}\) 2 JOURNALS OF CONGRESS 459, 460.

\(^{297}\) I discuss the Smith case, and the 1778 resolution, in greater detail in Lederman, Washington article, supra note __, 105 GEO. L.J. at __.

\(^{298}\) Pitman, supra note __, at 362.

\(^{299}\) This argument is the principal subject of Lederman, Washington article, supra note __.

\(^{300}\) Id. at 248.
imprisonment, but if the President even saw that plea for clemency, he ignored it. On Wednesday, July 5, the President ordered Surratt, together with Atzerodt, Herold and Powell, to be put to death two days hence, between the hours of 10:00 a.m. and 2:00 p.m. on Friday, July 7, twelve weeks to the day after the tragic events of Good Friday.

At 2:00 a.m. that Friday morning, Surratt’s principal attorneys, Frederick Aiken and John C. Clampitt, acting upon the advice of Reverdy Johnson, appeared at the home of one of the judges on the D.C. Supreme Court, Andrew Wylie. Wylie was a deeply loyal Unionist: Of the 1620 persons who voted for president in Alexandria in 1860, his was one of only two ballots cast for Lincoln. His supplicants on that July night carried with them a petition for a writ of habeas corpus. Roused from his sleep and still in his dressing-gown, the bearded, stately Wylie received the petition and studied it carefully. It challenged the jurisdiction of the commission to try a private citizen such as Surratt for what the petition described as a simple “offense against the peace of the United States,” trialable in Wylie’s own civilian court, which “was and now is open for the trial of such crimes and offenses.” The Constitution, the petition argued, gave Surratt the right of public trial by jury in that Article III court, and thus her trial by commission, and execution of her impending sentence, was unconstitutional. The petition accordingly prayed for the court to order her jailer, General W.S. Hancock, to bring Surratt to the federal court that very morning, so that an Article III judge might, finally, consider the merits of the jurisdictional challenge before it was rendered forever moot sometime before 2:00 p.m.

Wylie repaired to his bed-chamber. A few minutes later he reemerged and is said to have addressed Aiken and Clampitt as follows: “Gentlemen, my mind is made up. I have always endeavored to perform my duty fearlessly, as I understand it. I am constrained to decide the points in your petition well taken. I am about to perform an act which before to-morrow’s sun goes down may consign me to the old Capitol Prison. I believe it to be my duty, as a judge, to order this writ to issue.” Wylie’s signature affixed, Aiken and Clampitt promptly had the writ served upon General Hancock.

At half-past-eleven, General Hancock did, indeed, appear in Judge Wylie’s courtroom, as ordered. He was accompanied, however, not by Mary Surratt, but instead by none other than the Attorney General of the United States, James Speed. And Speed

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301 Johnson later claimed that he had never seen the clemency request. Holt insisted that he presented it to the President; he informed Surratt’s lawyers and daughter that the President was “immovable,” and that “you might as well attempt to overthrow this building as to alter his decision.” John W. Clampitt, The Trial of Mrs. Surratt, 131 NORTH AMER. REV. 223, 235 (1880). It has never been definitively resolved whether Holt presented Johnson the panel majority’s clemency request for Surratt.

302 Pitman, supra note ___, at 249.

303 Clampitt, supra note ___, at 236.

304 Pitman, supra note ___, at 250.

305 Clampitt, supra note ___, at 236.
came bearing an order signed by President Johnson. That order declared that the President was “especially” suspending the writ of habeas corpus in Surratt’s case; it further directed Hancock to carry out the sentence upon Surratt as scheduled, and to hand over to Judge Wylie the President’s order in lieu of the detainee herself. Wylie’s response to this stunning turn of events was terse and to the point: He ruled that the court had no choice but to “yield to the suspension of the writ of habeas corpus by the President of the United States.”

Less than two hours later, beneath a scorching July sun, Mary Surratt ascended the steps of the hastily built gallows at the Old Arsenal, and was hung from the neck, alongside Lewis Powell, George Atzerodt and David Herold.

6. Attorney General Speed’s Legal Opinion. Recall that back on May 1, 1865, before President Johnson had decided whether to authorize a military commission, Attorney General Speed had issued the shortest formal opinion in the history of his office, the substance consuming only a single sentence: “I am of the opinion that the persons charged with the murder of the President of the United States can be rightfully tried by a military court.” Speed was well aware, however, that the constitutionality of the commission had thereafter been the subject of deep skepticism and withering critique, both inside the courtroom and without. Accordingly, now that the trial was over and the sentences had been executed, and “having given the question propounded the patient and earnest consideration its magnitude and importance require,” he set out to write a more elaborate defense of the institution he had blessed back in May. His finished opinion bears the imprecise date “July, 1865.”

Speed’s opinion began by describing the question presented as whether the persons charged “with the offense of having assassinated the President” could be tried before a military tribunal, “or must they be tried before a civil court.” Of course, the accused before the commission had not themselves “assassinated” the President; the prosecution had claimed that their culpability for that crime was based on vicarious liability, owing to the grand conspiracy they were alleged to have joined. In its 20

306 Pitman, supra note ___, at 250.
307 Clampitt, supra note ___, at 238.
308 See supra at ___.
310 Id. at 297. Once again, Speed’s predecessor, Edward Bates, was unsparing in his criticism of Speed’s work product. See Entry for Aug. 21, 1865, in THE DIARY OF EDWARD BATES, supra note ___, at 498-503.
312 See supra at ___.

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pages, Speed’s opinion never mentioned the defendants themselves, their conduct, or, with the exception of one glancing reference,\textsuperscript{313} the fact that they were convicted of a conspiracy.

One of the first notable things about Speed’s opinion is that he did not rely upon some of the more prominent arguments that Holt and others—including Bingham, during the trial just the month before—had set forth in defense of military commissions. For example, although Speed mentioned on the first page of his opinion that martial law had been declared in the District of Columbia, he immediately added that the civil courts nevertheless were open, held regular sessions, and transacted business “as in times of peace”; and therefore Speed did not rely on martial law, or necessity, as a justification for the military trial.\textsuperscript{314} Nor did Speed rely upon the formal, textual argument that Congress’s power to “make rules for the government of the land and naval forces” includes the power to create military commissions to try persons who are not part of such forces. To the contrary, he expressly repudiated that argument: “I do not think that Congress can, in time of war or peace, under this clause of the Constitution, create military tribunals for the adjudication of offences committed by persons not engaged in, or belonging to, such forces. This is a proposition too plain for argument.”\textsuperscript{315}

Speed even went out of his way to express reverence for the constitutional protections of Article III and the Fifth and Sixth Amendments, without so much as hinting at the argument that such constitutional guarantees are inapplicable in wartime:

These provisions of the Constitution are intended to fling around the life, liberty, and property of a citizen all the guarantees of a jury trial. These constitutional guarantees cannot be estimated too highly, or protected too sacredly. The reader of history knows that for many weary ages the people suffered for the want of them; it would not only be stupidity but madness in us not to preserve them. No man has a deeper conviction of their value or a more sincere desire to preserve and perpetuate them than I have.\textsuperscript{316}

Accordingly, he wrote, “[i]t must be constantly borne in mind” that military tribunals “cannot exist except in time of war”; furthermore, reasoned Speed, even in times of war such tribunals are impermissible “where the civil courts are open”... with one important exception: to try “offenders and offences against the laws of war.”\textsuperscript{317}

\begin{footnotesize}
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\item \textsuperscript{313} 11 Op. ATT’Y GEN. at 298 (“the conspirators not only may but ought to be tried by a military tribunal”).
\item \textsuperscript{314} Id. at 297. In retrospect, this omission is surprising, because Speed and his fellow government attorneys relied almost exclusively on the martial law rationale in defending the constitutionality of commissions before the Supreme Court several months later, in \textit{Milligan}. \textit{See infra} at ___.
\item \textsuperscript{315} Id. at 298.
\item \textsuperscript{316} Id. at 310-11.
\item \textsuperscript{317} Id. at 309 (emphasis added).
\end{itemize}
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Speed thereby made a move that the Supreme Court would later endorse, at least in part, in *Ex parte Quirin*—concluding that although military courts are constitutionally dubious, they are permissible in wartime when convened for prosecution of “offences against the laws of war.” Speed offered many examples of such offenses, such as the rule of distinction, which prohibits the targeting of noncombatants; the injunction against harsh or cruel treatment of prisoners and the wounded; the requirement to honor flags of surrender; and the prohibition on breaching terms of surrender. Speed was also crystal clear about the source of the “laws of war” to which he referred—they are a subset of the international law of nations; indeed, they constituted (at least at the time) “much the greater part of the law of nations.”

This left at least two major questions that Speed still had to answer: What was the source of this constitutional exception for military trials of offenses against the law of war? And how, exactly, had Booth’s coconspirators violated that international law?

As to the former question, Speed argued that by using the terms “offenses” rather than “crimes” to describe violations of the law of nations, the “Define and Punish” Clause of Article I of the Constitution suggests that such international law violations are not among the “crimes” to which Article III and the Fifth and Sixth Amendments refer. He further suggested that it is the laws of war themselves—international sources, to be sure, but laws “constitut[ing] a part of the laws of the land” nevertheless—that provide the affirmative authority for the jurisdiction of military tribunals to try violations of the laws of war, a development that Speed described as “in the interest of justice and mercy,” to save lives and to prevent cruelty.

Speed’s argument in this respect was not especially convincing. Even assuming Speed was correct concerning a constitutionally permissible law-of-war

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318 *Id.* at 302-04.

319 *Id.* at 299; *see also id.* at 300 (“war is required by the framework of our Government to be prosecuted according to the known usages of war amongst the civilized nations of the earth”); 310 (“the laws and usages of war as understood and practiced by the civilized nations of the world”); 316 (“law of nations”). Speed invoked international historical examples when canvassing many of the restrictions of the laws of war. *Id.* at 302-04.

320 *Id.* at 312.

321 *Id.* at 299.

322 *Id.* at 305, 308.

323 Speed repeatedly explained that the laws of war encourage or even require trials of such offenses because the alternative is savage butchery—punishment in the form of slaughter. *Id.* at 307-08. Military tribunals therefore “exert a kindly and benign influence in time of war.” *Id.* at 309; *see also id.* at 315-16 (“The object of such tribunals is obviously intended to save life, and when their jurisdiction is confined to offences against the laws of war, that is their effect. They prevent indiscriminate slaughter; they prevent men from being punished or killed upon mere suspicion.”). All that may be so—the laws of war may insist upon trial rather than summary execution of detained individuals who have breached the laws of war. But
jurisdiction of military war tribunals, however, his opinion was much more opaque on the ultimate question about the Lincoln case itself: In what way did Booth—or, more to the point, Booth’s alleged compatriots—violate the international laws of war by (allegedly) plotting to kill the Commander-in-Chief of the Union forces?

In May 2013, President Barack Obama delivered a landmark speech at the National Defense University, just across a parking lot from the spot at Ft. McNair where Powell, Atzerodt, Herold and Surratt were executed for their involvement in the killing of the Commander in Chief of U.S. forces. In that speech, Obama explained that targeting the operational leaders of enemy forces with lethal force does not, without more, violate international law. Indeed, the laws of war would in the ordinary course privilege such a killing of the leader of enemy forces, in the sense of immunizing members of state armed forces from culpability for what would otherwise be murder under the victim state’s domestic law. If that is right, then why did Attorney General Speed conclude that the individuals who were tried and executed just a couple of hundred yards from where Obama spoke had committed a law-of-war offense?

Speed’s opinion might be read to suggest, at least implicitly, that the defendants in question violated the law of war precisely because they were not members of the Confederate forces at the time of their conduct. At several places, Speed asserted that the alternative to military trials is not simple butchery of those within the commander’s custody: such persons can, after all, be detained during hostilities, and can be tried in civilian courts for any crimes they committed. (Indeed, the general rule under the laws of war is that prisoners, like other persons who are hors de combat, may not be harmed.) Nor, contrary to Speed’s suggestion, do the laws of war affirmatively authorize the use of military, rather than civilian, tribunals in a particular state’s legal system. The law of nations is generally indifferent as to the civilian or military nature of the tribunal a state may choose to use. At one point in his opinion, Speed claimed that “it would be . . . palpably wrong for the military to hand [law-of-war offenders] over to the civil courts.” Id. at 317. He did not defend that proposition, however; and the “wrongness” of civilian trials of law-of-war violations is certainly not “palpable,” at least not today. See, e.g., 18 U.S.C. § 2441 (providing that certain war crimes committed by U.S. nationals are criminal offenses).


325 See 11 Op. ATT’Y GEN. at 305-06 (referring to the combatant’s privilege); see also, e.g., Richard Baxter, So-called ‘Unprivileged Belligerency’: Spies, Guerrillas, and Saboteurs, 28 BRIT. Y.B. INT’L L. 323, ___ (1951); PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS Art. 43(2) (June 8, 1977) (hereinafter API) (“Members of the armed forces of a Party to a conflict . . . are combatants, that is to say, they have the right to participate directly in hostilities.”).

326 Powell had previously been in the Confederate army, and spent years as a Union prisoner, but he deserted from the army in January 1865 and had taken an oath of allegiance to the United States. During the trial, his counsel argued that his conduct—the attack on Secretary of State Seward—was morally indistinguishable from that of “the best rebel soldiers,” who had themselves “picked off high officers of the government.” Pitman at 310. Whatever the moral merits of that somewhat desperate plea might have been, Powell’s conduct differed from that of the rebel soldiers in question in at least two important legal respects: Most fundamentally, Powell was no longer a member of the Confederate Army, acting within the chain of command; thus the combatant’s privilege no longer protected him from an attempted murder prosecution under U.S. law. Second, he attacked not “the chief of the enemy,” id. at 311, but instead a civilian officer,
certain unprivileged forms of belligerency in wartime—such as killing without a commission from the state; “unit[ing] with banditti, jayhawkers, guerillas, or any other unauthorized marauders”; spying; and even communicating with the enemy—are themselves offenses against the law of nations. In this respect Speed fundamentally misunderstood the laws of war—in particular, the critical distinction between belligerency that violates those laws (such as targeting civilians or torture), and belligerent acts that international law does not prohibit but that the laws of war also do not privilege (i.e., belligerent conduct that can be punished pursuant to a state’s domestic law). As we have seen with respect to a similar conflation in the Lieber Code, this was and is a common mistake—indeed, one to which the Supreme Court later fell prey in Quirin.

This error probably was not of great consequence for Speed’s opinion itself, however, because the Attorney General never did quite come out and argue that the Lincoln conspirators violated any of those alleged law-of-war prohibitions on unprivileged belligerency. Instead, at the very end of his opinion, Speed suggested a different theory for why Booth “and his associates” had violated the laws of war: by virtue of the fact that they were “secret active public enemies.” Citing the great law-of-war theorist Emer de Vattel, Speed intimated that what made Booth’s killing of Lincoln an “assassination” that violated the law of nations rather than an ordinary domestic-law murder was a combination of two things: (i) that Booth acted as a “public foe,” i.e., with the objective of harming the state as such (rather than, e.g., for private gain); and (ii) that the killing of Lincoln was “treacherous.”

the Secretary of State—conduct that is presumptively a violation of the laws of war when committed by enemy forces. (Powell’s counsel tried to justify the attack on Seward by describing the Secretary as “an advisor in oppression, and a slippery advocate of an irrepressible conflict.” Id. It is unclear, even today, whether such a military advice function, performed by a civilian official, would make that official a permissible target by legitimate armed forces.)

328 Id. at 312.
329 Id. at 312, 313.
330 Id. at 312.
332 See supra at ___.
333 See infra at ___.
335 Id. at 316 (quoting 3 Emer de Vattel, THE LAW OF NATIONS ch. 8, § 155, at 559 (B. Kapossy & R. Whitmore eds. 2008)).
The first factor—Booth’s motive to harm the state—does not establish a law-of-war offense: After all, that is what enemy soldiers try do every day, and it does not violate the law of war. But what about the alleged “treacherous” nature of the killing? Treachery is, indeed, a violation of the laws of war. The most familiar variant of the offense of treachery is what we know today as perfidy. Not all secret attacks in war are perfidious—and Booth’s was not. Perfidy requires a particular form of deceit (not simply stealth)—namely, the feigning of a protected status under the laws of war in order to induce the deceived party to forebear its own use of force, and thereby to gain an advantage that empowers the deceiving party to attack the deceived party. The modern formulation of the offense is described in Article 37(1) of Protocol I to the Geneva Conventions:

It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy.

Article 37(1) offers examples of perfidious conduct, including, of most pertinence, “the feigning of civilian . . . status.”\(^{336}\) Importantly, however, a feigned civilian status is not sufficient, standing alone, to establish an unlawful perfidious killing. What is required, in addition, is that the perpetrator cause the other party to believe that he is a protected civilian, not a belligerent, and thereby induce the victim to let down his guard, only to betray that induced confidence as a means of committing the belligerent attack. That is to say, perfidious killing requires proof that the victim target \textit{exercised forbearance} in reliance upon the killer’s feigned civilian status, and that the killing occurred by virtue of that forbearance.

There is no reason to believe—and neither Speed nor the prosecution argued—that Booth’s killing of Lincoln was perfidious. There was no evidence, for instance, that Booth was able to enter the President’s box in Ford’s Theater by deceiving Army officers into thinking that he was an ordinary civilian rather than a part of enemy forces.\(^{337}\) Indeed, Booth \textit{was} a civilian, not a member of the Confederate army. He didn’t feign any status at all, let alone induce any reliance by the Union army on any such feigned status.

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\item \textit{API}, supr\textsuperscript{a} note \textnormal{___}, art. 37(1)(c).
\item Lincoln was not protected that evening by a military guard. Of course, others in Ford’s Theater that evening, include off-duty officers, paid Booth no mind precisely because he was a well-known actor who did not appear to be doing anything out of the ordinary. Presumably someone in the vicinity, even if not Army personnel, might have done something to try to interdict him had he revealed his true intentions—what Speed called his role as a “public foe”—upon entering the theater. But that fact does not establish that the killing was in violation of the laws of war.
\end{enumerate}
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party to “hir[e] a traitor to assassinate an enemy,” including, in particular, a “subject of the party whom we cause to be assassinated.”

This particular ancient corner of the customary law of treachery—a prohibition on inducing or soliciting an enemy’s subject to kill his leader—does not appear often, if at all, in modern codes. Yet perhaps it was understandable for Speed to refer to it. Vattel, after all, did describe it, as did one of the leading international law treatises of the day, written by the esteemed international law scholar Henry Halleck, who was also General-in-Chief of the Union Armies at the outset of the war. This obscure subset of the law of treachery described the conduct implied in the first part of the charge against the Lincoln defendants: Recall that they were accused of “traitorously” “combining, confederating, and conspiring” with not only Booth and John Surratt, but also with Jefferson Davis and other Confederate officers and agents, “to kill and murder” Lincoln, Johnson, Seward and Grant. That charge, to be sure, might have suggested a violation of the law-of-war prohibition on treachery, as described by Vattel, committed by Davis and the other Confederate officers.

Even on this theory, however, it is difficult to see how the actual defendants in the Commission might have committed a law-of-war violation (and Speed did not even make an effort to establish the case against them). After all, they were the disloyal subjects who allegedly agreed to betray Lincoln, rather than the enemies who induced such subjects to betrayal. Moreover, the prosecution introduced very little evidence—as to some of the defendants, none—that the accused themselves (as opposed to Booth and John Surratt) were induced to act by Confederate officers and agents. Speed was, therefore, almost certainly wrong in his assumption that the defendants had violated the international laws of war.

Most importantly for present purposes, however, even if Speed were correct that some or all of the alleged conspirators were charged with a law-of-war violation of an attempted “treacherous killing” by virtue of the alleged Confederate inducement, it would only mean—per the Court’s later decision in Quirin—that the military commission had


339 Henry W. Halleck, INTERNATIONAL LAW; OR, RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 400 (1861).

340 See supra note ___.

341 Vattel wrote that the attempted killing by the induced subject would be “infamous execrable, both in him who executes and in him who commands it.” 3 Emer de Vattel, THE LAW OF NATIONS ch. 8, § 155, at 559 (B. Kapossy & R. Whitmore eds. 2008). But Vattel did not say directly whether the subject (as opposed to the enemy inducer) would thereby violate the law of war. Halleck, to similar effect, characterized famous cases of killings by loyal subjects as “infamous and execrable,” and added that the “detestation of the civilized world is not confined to the perpetrators of such acts; those who command, encourage, countenance, or reward them, are equally execrated.” Halleck, supra note __, at 400. Like Vattel, however, Halleck did not specify whether the loyal subjects who were induced to kill their leader would thereby violate international law.
constitutional jurisdiction to try the defendants for those law-of-war violations. But to the extent the defendants were also charged with domestic-law offenses, such as the allegation of a “traitorous” killing, or the portion of the charge that alleged a conspiracy, Speed’s opinion did not establish the commission’s proper jurisdiction—indeed he did not endeavor to do so. To the contrary, Speed opined that where civil courts are open, military tribunals “cannot exist except in time of war” to try “offenders and offences against the [international] laws of war.”

* * * *

In sum, Attorney General Speed’s post-hoc opinion, whatever its flaws, actually undermines rather than supports the notion that military commissions can be used to try wartime defendants for offenses that are not violations of the international laws of war. Moreover, almost all of the arguments offered by the prosecution during the assassins’ trial itself do not withstand scrutiny, and the Supreme Court expressly rejected the principal such argument shortly thereafter, in Milligan.

III. MILLIGAN AND ITS AFTERMATH

After Vallandigham’s exile, factions of the so-called “Peace Democrats,” or “Copperheads,” began to form secret societies across the Midwest, some of which became, in effect, military arms of the northern anti-war movement, dedicated to sporadic violent interventions designed to weaken the Union army. By early 1864, they called themselves the Sons of Liberty; Clarence Vallandigham was (nominally) the Supreme Commander.

A. Precursor to Milligan: The Coles County Riot, and Justice Davis’s Advice to Lincoln

On March 28, 1864, a riot between Union soldiers on leave and a band of Peace Democrats broke out at a courthouse in Charleston, Illinois. Six soldiers and three civilians were killed. A grand jury in Coles County returned indictments for murder and riot against several of those alleged to have targeted Union soldiers in the fight. It was military, rather than civilian, authorities, however, that rounded up and arrested 16 individuals (only some of whom had been indicted by the grand jury). In his report to Washington on the riot and the arrests, Lieutenant-Colonel James Oakes wrote that “I fear it would be useless to turn [the detainees] over for trial by the civil tribunals, whether State or Federal, to whose jurisdiction they would belong”; instead, “[p]rompt and

342 See supra at ___.

vigorously dealing by military law could not fail to be of salutary and lasting effect." A military commission for the case was presently appointed, to sit in Cincinnati.

Counsel for the prisoners filed a request for a writ of habeas corpus in the Fourth Circuit federal court in Illinois, seeking to be discharged from military custody. A pair of jurists—Judge Samuel Treat and Supreme Court Justice David Davis—granted the writ. The latter was a longtime friend of the President—he effectively managed Lincoln’s campaign in 1860—and they had both practiced in the Coles County courthouse where the riot occurred. In 1862, Lincoln appointed Davis to serve on the Supreme Court. In 1864, however, the President suspended the privilege of the writ of habeas corpus for the alleged Charleston rioters—in other words, he authorized the military to disregard Judge Davis’s discharge order—and the judges therefore had no choice but to dismiss the case, paving the way for a military adjudication.

Even though he had undermined the court’s jurisdiction, apparently Lincoln was concerned about the case, because on July 2 he wrote to Justice Davis, asking for his views on it. Davis promptly wrote back that he would “very cheerfully give you my impression of the case,” which was, quite simply, that the government “ought not to have taken these men out of the hands of the law.” Presaging what the Court would do in Milligan (in an opinion that Davis himself would write), Davis focused mainly on Section 2 of the 1863 Habeas Act: Because the Secretary of War had failed to furnish a list of the detainees to the court, they had to be discharged from military custody once the local grand jury had adjourned (which it had done after issuing indictments in the case). To continue to hold them, explained Justice Davis, was not only “oppression” but also a violation of the “purpose and intention of the act of Congress.” Wholly apart from the statutory problem, Davis also noted that although the prisoners might have committed horrible crimes, they had not violated any federal law, and certainly could not be “tried by military law,” because they had “violated no military law.”

Davis apparently persuaded Lincoln. The President decided that the prisoners should not be subject to military jurisdiction. Although he delayed issuing his order until

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345 See Report from Major A.A. Hosmer to the President, July 26, 1864, in OFFICIAL RECORDS, Series I, vol. 32, part 1, at 635, 643 (referring to the “express order” of the President that the writ be disregarded and the prisoners retained by the military).

346 Letter from Justice David Davis to the President, July 4, 1864, in Peter J. Barry, “I’ll keep them in prison awhile . . .”: Abraham Lincoln and David Davis on Civil Liberties in Wartime, 28 J. OF THE ABRAHAM LINCOLN ASS’N 20, 28 (2007).

347 See supra at __.

348 Id. at 29.

349 Id. at 28.
November 4,\(^{350}\) some of the prisoners were eventually transferred to the civilian justice system and the others were released, before any military trial could take place.\(^{351}\)

**B. The Supreme Court Finally Weighs In: Milligan**

Contemporaneous with Davis’s exchange with Lincoln in July 1864, a number of leaders of the Sons of Liberty hatched a plan to release Confederate prisoners at army camps throughout the Midwest, and to arm them with weapons seized from government arsenals.\(^{352}\) The government, however, had a source on the inside, and interdicted the plan before it became operational, arresting several of the participants, including Lambdin Milligan. The detainees were charged with five vaguely identified offenses before a military commission: conspiracy against the government; affording aid to rebels; inciting insurrection; disloyal practices; and an alleged “violation of the laws of war,” namely, endeavoring to aid the enemy “while pretending to be peaceable loyal citizens of the United States.”\(^{353}\) The commission found four of the defendants guilty, and sentenced three of them (Milligan, William Bowles and Steven Horsey) to hang.

One of the condemned’s counsel, who knew Lincoln well, had a meeting with the President at which he asked Lincoln to review the case. Reportedly, at their meeting the President identified “errors and imperfections” in the record that would have to be corrected—a process, the President noted with a “pleased expression,” that would take a considerable amount of time, by which point the war might well be over, thus mooting out the case.\(^{354}\) This is yet further evidence that the President was deeply uncomfortable with the legality of the commissions—or, at a minimum, that Lincoln was not eager to press the point, or to tee up the question to the Supreme Court, especially given Justice Davis’s warnings that the Court would likely declare the tribunals to be unlawful.

After Lincoln was killed, however, the new President had no such qualms. Johnson approved the verdicts against Milligan, Bowles and Horsey on May 2, the day after he established the Lincoln assassination commission. Execution was set for May 19, in the midst of the assassination trial.\(^{355}\) Milligan’s counsel then filed a habeas petition in Circuit Court in Indianapolis. Once again, as in the 1864 Coles County case, Justice Davis was one of the two judges who considered the petition; and, once again, Justice Davis (joined by the other judge, District Judge David McDonald) wrote an extraordinary

\(^{350}\) Order of President Lincoln, Nov. 4. 1864, in OFFICIAL RECORDS, Series I, vol. 32, part 1, at 643.

\(^{351}\) See Barry, *The Charleston Riot and its Aftermath*, supra note __, at 98-103.

\(^{352}\) See *The Milligan Case* 68-69 (S. Klaus ed. 1929) (first charge, third specification in the military commission proceeding).

\(^{353}\) See *id.* at 67-73.


\(^{355}\) *The Milligan Case*, supra note ___, at 39.
letter to the President. The judges explained that it was their “duty as your friends, as judicial officers, and as citizens, in all good faith and good will to lay [these] suggestions before you.” It would be a “safe and wise policy,” they explained, not to execute the prisoners until the judicial challenges were completed: “We would most respectfully but earnestly urge the wisdom and justice of giving [the prisoners] time to be heard before [the Supreme Court],” because if they were executed and then the Court were to hold that the tribunal was without jurisdiction, it would be a “stain on the national character,” and “the government would be justly chargeable with lawless oppression.” Although purporting not to express an opinion on the merits, the judges pointedly added that the military commission “is a new tribunal unknown to the Common Law,” and that “[t]here is no denying the fact that many learned lawyers doubt its jurisdiction over citizens unconnected to the military, as these men were”—a fairly audacious suggestion, in light of the fact that Johnson had just authorized the assassination trial that was just then commencing. 356

Once again, the judges’ letter had its intended effect: Later that month, Johnson commuted the sentences to life at hard labor. Meanwhile, the two judges certified that they were split on the merits of the habeas petition, a result that arguably permitted a form of certification of the merits questions to the Supreme Court, which the judges then made. The record was not filed in the Court until December 1865. The Court allotted three hours apiece to seven lawyers in the case for oral argument; argument was heard over the course of six days in March 1866.

On April 2, 1866, President Johnson declared the insurrection—the Civil War—to be at an end in all of the Confederate States other than Texas. 357 The very next day, the Court issued its preliminary, summary decision in Milligan, sustaining the prisoners’ petition for a writ of habeas corpus. The Court held that Milligan and his codefendants “ought to be discharged from custody” pursuant to the Habeas Act of March 1863, and that the military commission “had no jurisdiction legally to try and sentence [them].” 358 The Court promised to issue its opinions in due course, which it finally did at the beginning of its next Term, on December 17, 1866. 359 The author of the majority opinion was none other than David Davis. Not surprisingly, his opinion reflected the advice he had offered to Lincoln, on both the 1863 Habeas Act and the Constitution, in relation to the Coles County prisoners two years earlier.


357 Andrew Johnson, PROCLAMATION NO. 153, DECLARING THE INSURRECTION IN CERTAIN SOUTHERN STATES TO BE AT AN END, Apr. 2, 1866.

358 THE MILLIGAN CASE, supra note ___, at 224.

359 71 U.S. (4 Wall.) 2 (1866).
Details of the *Milligan* briefs, the fascinating oral arguments, and the Court’s resolution, are well-recounted elsewhere.\(^{360}\) For present purposes, three aspects of the case are most salient:

First, the petitioners not only argued that the military commission violated Article III and the Sixth Amendment, but also that Milligan was entitled to his freedom by virtue of Section 2 of the 1863 Habeas Act.\(^{361}\) The government’s response to this argument was simply to repeat Joseph Holt’s unconvincing construction of the Act—i.e., that it did not cover the case of prisoners undergoing military trial.\(^{362}\) The Court unanimously rejected that construction; it held that Milligan was entitled to release under the 1863 Act.\(^{363}\) As Chief Justice Chase explained, the question wasn’t even a close one:

> [T]he act seems to have been framed on purpose to secure the trial of all offences of citizens by civil tribunals, in states where these tribunals were not interrupted in the regular exercise of their functions. . . . [Its] provisions obviously contemplate no other trial or sentence than that of a civil court, and we could not assert the legality of a trial and sentence by a military commission, under the circumstances specified in the act and described in the petition, without disregarding the plain directions of Congress.\(^{364}\)

Second, the government did not so much as mention the Lincoln assassination commission, let alone rely upon it as relevant precedent, although it must have been evident to all concerned that the Court’s decision in the *Milligan* case would likely be seen as a judgment upon the latter case, as well. The government’s avoidance of the Lincoln case presumably reflected the fact that David Dudley Field was right: although that proceeding had ended less than one year earlier and had gripped the nation, it had already become something of an embarrassment, at least in legal circles—a trial that was widely thought to be “of questionable legality.”\(^{365}\) Tellingly, at oral argument in *Milligan*, only former Attorney General Jeremiah Black, representing Milligan, alluded to the case of the assassination conspirators—and then only to viciously excoriate Attorney General

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\(^{361}\) See Brief for Petitioner at 8, *Ex parte Milligan*, No. 350, Dec. 1866 Term; *Milligan*, 71 U.S. (4 Wall.) at 59 (argument of James Garfield on behalf of petitioner).


\(^{363}\) 71 U.S. (4 Wall.) at 131 (majority opinion); *id.* at 133-36 (Chase, C.J., concurring).

\(^{364}\) *Id.* at 136.

\(^{365}\) *See supra* at ____. 
Speed’s formal opinion\textsuperscript{366} that he had issued in July 1865, defending the constitutionality of the Lincoln tribunal.\textsuperscript{367} Black saved special contempt for Speed’s idea that the use of military commissions was merciful, in comparison to the alternative:\textsuperscript{368}

The Attorney General thinks that a proceeding which takes away the lives of citizens without a constitutional trial is a most merciful dispensation. His idea of humanity as well as law is embodied in the bureau of military justice, with all its dark and bloody machinery. For that strange opinion he gives this curious reason: That the duty of the Commander in Chief is to kill, and unless he has this bureau and these commissions he must “butcher” indiscriminately, without mercy or justice. I admit that if the Commander in Chief or any other officer of the Government has the power of an Asiatic king, to butcher the people at pleasure, he ought to have somebody to aid him in selecting his victims, as well as to do the rough work of strangling and shooting. But if my learned friend will only condescend to cast an eye upon the Constitution, he will see at once that all the executive and military officers are completely relieved by the provision that the life of a citizen shall not be taken at all until after legal conviction by a court and jury.\textsuperscript{369}

Presumably, Black would not have been so bold as to call out, and to so sharply condemn, the rationale supporting the Lincoln case—written by the Attorney General sitting right there in the Courtroom—were he not fairly confident that the Justices themselves would be more inclined to condemn that proceeding than to ratify it.

Third, with respect to the petitioners’ constitutional arguments, the government relied predominantly on two contentions, neither of which was Attorney General Speed’s argument that military courts can try offenses against the laws of war. Attorney General Speed and Benjamin Butler first argued that the vast majority of the guarantees of the

\begin{itemize}
  \item \textsuperscript{366} \textit{See supra} at ___ (discussing Speed’s opinion).
  \item \textsuperscript{367} \textit{See THE MILLIGAN CASE, supra} note ___, at 124; \textit{see also id.} at 132 (“The truth is that no authority exists anywhere in the world for the doctrine of the Attorney General. No judge or jurist, no statesman or parliamentary orator, on this or the other side of the water, sustains him. Every elementary writer from Coke to Wharton is against him. All military authors who profess to know the duties of their profession admit themselves to be under, not above, the laws. No book can be found in any library to justify the assertion that military tribunals may try a citizen at a place where the courts are open.”); \textit{id.} at 143 (“You assert the right of the Executive Government, without the intervention of the judiciary, to capture, imprison, and kill any person to whom that Government or its paid dependents may choose to impute an offence. This, in its very essence, is despotic and lawless. It is never claimed or tolerated except by those governments which deny the restraints of all law. It has been exercised by the great and small oppressors of mankind ever since the days of Nimrod. It operates in different ways; the tools it uses are not always the same; it hides its hideous features under many disguises; it assumes every variety of form; ‘It can change shapes with Proteus for advantages, And set the murderous Machiavel to school.’” (quoting Shakespeare, \textit{HENRY VI}, \textit{PART 3}, Act 3, Scene 2).
  \item \textsuperscript{368} \textit{See supra} at ___ & note __.
  \item \textsuperscript{369} \textit{THE MILLIGAN CASE, supra} note ___, at 146.
\end{itemize}
Constitution (all but the Third Amendment, which expressly applies to wartime), as well as “all other conventional and legislative laws and enactments,” are simply “silent amidst arms,” and that therefore there are no constitutional limitations on the “war-making and war-conducting powers of Congress and the President.” As Charles Fairman would later write, a “competent Attorney General would never have permitted such an outlandish argument to be made.” Not surprisingly, the Court turned aside this argument in no uncertain terms: “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 authority.”

The government’s second principal defense of the military commission was the “martial law” argument of “necessity” that the War Department had so prominently advanced throughout the war. The Court actually agreed with the government that necessity might, in extreme circumstances, justify military justice: “If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course.” The necessity, however, “must be actual and present; the invasion real, such as effectively closes the courts and deposes the civil administration.”

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370 **Milligan,** 71 U.S. (4 Wall.) at 20-21 (argument for the United States).

371 Fairman, *supra* note __, at 201.

372 **Milligan,** 71 U.S. (4 Wall.) at 121. In his rebuttal argument for the United States, *id.* at 104, Benjamin Butler offered the somewhat more sophisticated argument (propounded by John Quincy Adams) that when the political branches are exercising their war powers, municipal constraints, including the constitution, are displaced by the distinct limitations of the law and usages of nations. The Court did not accept that argument, either, because it assumed that the laws of war did not apply to the Peace Democrats, who were not part of an armed force. *Id.* at 121.

373 *Id.* at 127 (emphasis in original).

374 *Id.* Chief Justice Chase’s concurrence agreed that the political branches’ power to authorize military trials against such civilians was limited by necessity, although he would have allowed Congress more leeway to authorize military trials if and when the legislature determined that the civil courts were “wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty.” *Id.* at 140-41 (concurring opinion). For the modern Court’s take on the question, see Duncan v. Kahanamoku, 327 U.S. 304, 330 (1946): “There must be some overpowering factor that makes a recognition of [the jury right and other constitutional trial rights] incompatible with the public safety before we should consent to their temporary suspension. . . . In other words, the civil courts must be utterly incapable of trying criminals or of dispensing justice in their usual manner before the Bill of Rights may be temporarily suspended.” (Emphasis added.)
Milligan the government made no effort whatsoever to explain why the condition of necessity was satisfied in Indiana—why Milligan, et al., could not have been tried in civilian courts there. The Court, therefore, firmly rejected this argument, too:

It is difficult to see how the safety of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law.375

Having thus rejected the government’s primary arguments,376 the Court held not only that the continued detention violated the statute, but also that the military trial of Milligan and his co-defendants violated both the Article III guarantee of a trial superintended by independent judges “appointed during good behavior,” and the right, found in both Article III and the Sixth Amendment, to be tried by a jury.377

As noted above, the final charge against the defendants in the commission proceedings had alleged a (vaguely described) “violation of the laws of war.” One thus would have expected the government to argue that the military commission had at least the jurisdiction to adjudicate that charge, based upon Attorney General Speed’s opinion eight months earlier respecting the Lincoln trial. Yet not only did the government not rely upon the law-of-war charge; Speed’s own brief affirmatively abandoned—expressly repudiated—his earlier argument: “Infractions of the Laws of War,” Speed wrote for the United States, “can only be punished or remedied by retaliation, negotiation, or an appeal to the opinion of nations,”378 and thus military commissions are only appropriate to

375 Id. at 127 (majority opinion); see also id. at 122 (“[S]oon after this military tribunal was ended, the Circuit Court met, peacefully transacted its business, and adjourned. . . . It was held in a state, eminently distinguished for patriotism, by judges commissioned during the Rebellion, who were provided with juries, upright, intelligent, and selected by a marshal appointed by the President. The government had no right to conclude that Milligan, if guilty, would not receive in that court merited punishment; for its records disclose that it was constantly engaged in the trial of similar offences, and was never interrupted in its administration of criminal justice.”).

376 Benjamin Butler, arguing for the United States on rebuttal, also relied upon history, namely, an account of the military trials approved by General George Washington during the Revolutionary War—especially the court-martial of Joshua Hett Smith for his involvement in the treasonous plot of Benedict Arnold to sacrifice West Point to the British. Milligan, 71 U.S. (4 Wall.) at 99-101 (argument for Butler on behalf of the United States). I discuss this argument in greater detail in Lederman, Washington article, supra note __, 105 GEO. L.J. at ___. The Court in Milligan did not refer to this argument in its opinions.

377 Id. at 122-23; see also id. at 119 (stating that the Article III jury guarantee for the “trial of all crimes” is “too plain and direct, to leave room for misconstruction or doubt of [its] true meaning”).

378 Brief for the United States at 5, Ex parte Milligan, No. 350, Dec. 1866 Term; see also Milligan, 71 U.S. (4 Wall.) at 14 (argument for the United States).
adjudicate acts that are the proper subject of martial-law restraint, “not breaches of the common laws of war by belligerents.”

There is no record of why Speed thus “waiv[ed] off what was probably [the government’s] strongest argument for the use of the commission in this case.” Perhaps he thought it would be difficult to persuade the Court that these defendants had actually done anything to violate the laws of war, notwithstanding his (mistaken) assumption, in the assassination trial opinion, that uniting with “banditti, jayhawkers, guerillas, or any other unauthorized marauders is a high offense against the laws of war.” Or, perhaps, by the time of the Milligan argument, the government’s principal concern was not so much to sustain sentences of Civil War military tribunals, as it was to preserve the prospect of using military courts in the South in the coming reconstruction. A government victory in Milligan on a “law of war offense” theory would hardly have justified those anticipated reconstruction trials, because the charges in those reconstruction tribunals—especially for crimes of violence against free blacks—would rarely, if ever, allege offenses against the law of nations. Instead, the government apparently hoped that the Court would pay great deference to executive assessments of the inadequacies of civil courts, and of the necessity of using military courts in lieu of civil proceedings—because that was the only theory that might possibly justify the coming military justice system throughout the South.

C. Milligan’s Impact

The Court’s decision in Milligan had a dramatic effect on the way in which the Civil War commissions would thereafter be viewed—and, as we shall see, on the way in which the government dealt with Booth’s primary coconspirator, John Surratt, when he was captured. Even before the Court issued its decision, however, the fact that it had agreed to hear the Milligan case loomed large over the government’s decision about how to proceed with the most important military prisoner of them all, Jefferson Davis.


380 Bradley, supra note ___, at ___.

381 11 Op. ATT’Y GEN. at 312.

382 Even so, this would not explain why the government went so far as to disclaim the jurisdiction of military commissions that Speed had recognized the previous July—namely, to adjudicate “breaches of the common laws of war.”

383 See Witt, supra note ___, at 311. As Charles Fairman explains, the differences between Justices Davis and Chase in Milligan about Congress’s power to make determinations of necessity can only be understood—and were widely understood—to be a debate not about the completed wartime commissions (which were not legislatively authorized), but instead about whether and how Congress could authorize the use of military tribunals in the South if and when civil courts there were deemed ineffective to quell ordinary violence unrelated to a war. See Fairman, supra note ___, at 214-22.
1. The Case of Jefferson Davis. May 10, 1865 was an auspicious day, owing to a confluence of three distinct events related to military justice. The accused in the Lincoln assassination proceeding were arraigned before the new military commission. Lambdin Milligan filed his petition for a writ of habeas corpus, challenging the jurisdiction of the military commission that had convicted him. And, perhaps most important of all, Union army forces captured Confederate President Jefferson Davis in Irwin County, Georgia.

A few days earlier, President Johnson had publicly offered a $100,000 reward for Davis’s capture, so that he could “be brought to trial . . . to the end that justice may be done.” In his call for capture, Johnson alleged, based upon “evidence in the bureau of military justice, that the atrocious murder of the late president, Abraham Lincoln, and the attempted assassination of the Honorable William H. Seward, secretary of state, were incited, concerted, and procured by and between Jefferson Davis, . . . and other rebels and traitors against the government of the United States, harbored in Canada.” Indeed, the charges in the pending Lincoln conspirators’ military commission even alleged that the eight accused individuals had conspired with Davis and other Confederate officials to kill the President. In theory, therefore, Davis might have been joined to the pending trial proceedings in the Old Arsenal. Instead, the military held him as a prisoner of war, so that Johnson could decide how to deal with him after the Lincoln trial ended.

In the conspirators’ trial, the prosecution’s case for Davis’s involvement with the assassination turned out to be far more uncertain than Holt and Stanton had promised; and in the months that followed, the case became flimsier still, as one witness after another was revealed to be duplicitous. The prospect of trying Davis for Lincoln’s murder—or some law-of-war offense related to the killing—therefore rapidly dissipated. In any event, Johnson was inclined to try Davis for treason, in order to demonstrate to the nation that the secession itself was a fundamental criminal act. Johnson’s cabinet, however, was deeply split on the question of whether to try Davis and, if so, whether the trial should be in a civilian or a military tribunal.

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384 See supra at ___.

385 See, e.g., Leonard, supra note __, at 217-18. Secretary Stanton even asked Francis Lieber to scour the Confederate archives to find evidence of Davis’s complicity in the Lincoln killing or in other violations of the laws of war. That effort came to naught, however. See Witt, supra note __, at 319-20.

386 See supra at ___ (discussing Speed’s theory of treachery-by-inducement).

387 The cabinet debates are detailed in 2 WELLES DIARY, supra note __, at 335-39, and nicely summarized in Cynthia Nicoletti, Did Secession Really Die at Appomattox?: The Strange Case of U.S. v. Jefferson Davis, 41 U. TOL. L. REV. 587, 593-96 (2010); see also Witt, supra note __, at 318. Francis Lieber advised cabinet officials against a military trial, in part because the people had become “jealous” of military trials (perhaps owing to the taint of the Lincoln assassination proceeding), in part because Davis had “committed plain, broad and wide treason, and trying him for any special military crime (or rather for a crime at the common law of war,) would [be] avoiding the main question,” and also because such a choice would connote a “positive distrust in our law as it stands.” Memorandum from Francis Lieber to Attorney General Speed, re: REASONS WHY JEFFERSON DAVIS OUGHT NOT TO BE TRIED BY MILITARY COMMISSION FOR COMPLICITY IN THE UNLAWFUL RAIDING, BURNING, ETC., July 15, 1865, FRANCIS LIEBER PAPERS, folder 33, box 2 (Johns Hopkins Univ.).
Finally, on January 6, 1866, Attorney General Speed opined that it would be unconstitutional to try Davis in a military court for “high treason,” and thus that the military was obliged to transfer him to civil custody. Speed’s opinion appeared to presage the Court’s decision several months later in *Milligan*: he did not so much as entertain the notion that “martial law” or “necessity” might justify a military trial of Davis for a domestic-law crime (treason), even though he found that a “state of war still exist[ed].” After Speed’s decision, a grand jury returned a treason indictment against Davis. A “series of maddening obstacles” precluded the case from going forward, however, and eventually Davis was released on bail, joined family members in Montreal, and was subject to Johnson’s blanket pardon in December 1868 of all those who participated in the insurrection or rebellion. Davis never stood trial.

When the Court issued its opinions in *Milligan* in December 1866, it triggered a heated public and political-branch debate about the future prospects, and legality, of using military courts in reconstruction, if and when local courts were found to be unable to quell violence, especially against freed blacks.

In late February, 1867, both Houses of Congress voted to approve a reconstruction act that, among other things, directed army officers who were detailed to military districts in the South to “protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals,” and authorized such officers “to this end both to “allow local civil tribunals to take jurisdiction of and to try offenders,” and “to organize military commissions or tribunals for that purpose,” when, in the officer’s judgment “it may be necessary for the trial of offenders.” In his veto statement,

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389 *Id.* at 413.

390 *Id.* at 411. Speed mentioned in passing that if Davis had been tried and convicted for offenses against the laws of war, as Speed’s opinion of the previous July suggested he might have been, he could remain in military custody. *Id.* But Speed’s opinion appeared to assume that no law-of-war offense could be proved, and therefore a civilian treason trial was the only prosecutorial option. Speed’s reasoning in this January 1866 opinion—that Davis could in theory be tried for law-of-war offenses in a military court, but not for the domestic-law offense of treason—was consistent with his Lincoln trial opinion from the preceding July, yet it contradicted what Speed himself would write several weeks later in the government’s brief in *Milligan*, see supra at ___, i.e., that military commissions could only be predicated on martial law, and could not try law-of-war offenses.

391 Witt, supra note __, at 321.

392 See *id.* at 321-23; Nicoletti, supra note __, at ___.

393 As enacted, this provision appeared as Section 3 of An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, § 3, 14 Stat. 428, 428 (1867).
President Johnson wrote that this section of the Reconstruction Act, if implemented, would “deny a trial by the lawful courts and juries to 9,000,000 American citizens and to their posterity for an indefinite period. It seems to be scarcely possible that anyone should seriously believe this consistent with a Constitution which declares in simple, plain, and unambiguous language that all persons shall have that right and that no person shall ever in any case be deprived of it.” Congress overrode the veto, however, and the provision became law on March 2. (It is an irony, of sorts, that Reverdy Johnson, Mary Surratt’s attorney who had offered such a strong objection to the jurisdiction of the Lincoln commission, was the lone Democratic Senator to vote for the Act.)

In June 1867, the new Attorney General, Henry Stanbery (who had argued a jurisdictional point for the government in Milligan), issued an opinion expressing doubt about the constitutionality of Section 3, even under the concurring rationale of Chief Justice Chase in Milligan, because that provision allowed military officers, rather than Congress, to assess the requisite “necessity,” and to do so “in a time of peace, when all the courts, State and federal, are in the undisturbed exercise of their jurisdiction,” thereby giving such an officer discretion to try, condemn and even execute a citizen. Stanbery reasoned that, at best, the provision should be very narrowly construed, such that “nothing short of an absolute or controlling necessity would give any color of authority for arraigning a citizen before a military commission.” Nevertheless, the army proceeded to initiate approximately 1400 military commissions throughout the South from 1867-1869.

The constitutionality of such courts, under Milligan, was famously challenged in Ex parte McCardle, which involved a newspaper man convicted by military commission for publishing articles challenging the legitimacy of reconstruction and of black suffrage, and urging Mississippi residents to boycott an election to authorize a state constitutional convention. A district judge denied McCardle’s habeas petition, distinguishing Milligan on the ground that Mississippi lacked a “practical state government” (because Congress had refused to recognize the government). On appeal to the Supreme Court, Attorney General Stanbery refused to represent the United States, because he had already called into question the constitutionality of the commissions; two northern Senators

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396 Id. at 199.


therefore stepped in to defend the legislation. The case was briefed and argued; but then in April 1868 Congress repealed the Supreme Court’s statutory jurisdiction to hear the case, after which the Court concluded that it had no choice but to dismiss the appeal. 399

There is no way to know for certain, of course, how the Court would have resolved the merits of the constitutional challenge. For what it is worth, however, Chief Justice Chase later wrote that “had the merits of the McCardle case been decided, the Court would doubtless have held that his imprisonment for trial before a military commission was illegal.”400

3. Cases Involving the Alleged Lincoln Conspirators Themselves.

Whatever Milligan might have portended for the constitutionality of the legislatively approved Reconstruction Act military trials, there appeared to be little question but that the decision condemned the military trials, and judgments, of conduct occurring during the Civil War itself—at least in those cases that did not involve actual offenses against the international laws of war. So, for example, Attorney General Stanbery opined that there could “be no doubt,” in light of Milligan, that a military commission that had tried a New York citizen (John Devlin) for forging enlistment papers and selling them to draft evaders “had no jurisdiction of the subject-matter or of the party.”401

a. John Surratt. Perhaps most tellingly in this respect, not only did the Johnson administration choose not to try Jefferson Davis in a military court (a decision made even before the Court’s decision in Milligan), it also declined, after Milligan, to use a commission to try John Surratt, Mary’s son, who was alleged to have been Booth’s most trusted confidant in the Lincoln assassination plot. Surratt had been in Elmira, New York, on April 14, 1865; after the assassination, he fled to Canada, and from there to Liverpool, London, and Rome, where he served as a papal zouaves. Therefore he was not tried along with his alleged coconspirators in 1865. U.S. forces finally apprehended Surratt in Alexandria, Egypt in late 1866 and brought him to the United States to face justice.402

Upon Surratt’s arrival in Washington in February 1867, a federal judge issued a warrant to remand him to the civilian authorities in the District, to be tried on an indictment recently returned by a grand jury. That indictment alleged that Surratt, “being moved and seduced by the instigation of the devil,” had plotted with Booth and others to violate ordinary criminal statutes proscribing murder and conspiracy.403

399 Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869).


401 Devlin’s Claim, 12 Op. Att’y Gen. 128, 128 (1867); see also Leonard, supra note __, at 213-14 (recounting that shortly after Milligan, Johnson began to release military prisoners awaiting military commission trial).

402 On Surratt’s apprehension and trial generally, see the rich account in Leonard, supra, at 235-43, 252-63.

403 2 TRIAL OF JOHN H. SURRETT IN THE CRIMINAL COURT FOR THE DISTRICT OF COLUMBIA 1380-83 (1867).
The Surratt trial lasted over two months. At the close of evidence, Judge George Fisher instructed the jury that if they were convinced Surratt was not guilty, their verdict would provide a “lesson of assurance that a court of justice is the asylum of innocence.” On the other hand, if the jury concluded that he was guilty, its verdict would be a “testimonial to the country and the world that the District of Columbia . . . gives the judicial guarantees essential to the protection of the persons of the public servants commissioned by the people of the nation to do their work, safe and sacred from the presence of unpunished assassins within its borders.” The jury chose to offer the nation neither of those lessons: It was “nearly equally divided” throughout its more than 70 hours of deliberations, and failed to reach a verdict. Surratt was eventually released on bail, and was never re-tried.

b. Mudd, Arnold and Spangler. In his instruction to the jury in the John Surratt trial, Judge Fisher asked a rhetorical question: If, as many argued (including Surratt’s lawyers), the Court’s decision in Milligan condemned the constitutionality of the 1865 Lincoln military commission, why hadn’t the military released the four prisoners from that trial serving terms of incarceration in the Dry Tortugas—Samuel Arnold, Michael O’Laughlen, Samuel Mudd and Edwin Spangler?

It was a good question—indeed, one that Mudd himself wondered about. Upon reading the Supreme Court’s decision in Milligan, Mudd wrote from prison to his wife that “[i]t is vexatious to see how partial the laws are . . . administered. . . . If the trial of Milligan was wrong, certainly ours was more so, and no necessity can be pleaded in palliation.” As it happens, Mudd’s brother-in-law Andrew Ridgely, an attorney, had recently petitioned Chief Justice Chase on Mudd’s behalf for habeas relief. Chase responded only after the Court’s decision in Milligan was issued: Without reaching the jurisdictional or merits questions, the Chief Justice opted to deny the habeas application “in the proposition that the petition should be addressed to a Court or Judge of the United States in the District within which the prisoner is held.”

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405 2 Trial of John H. Surratt, supra note 9, at 1378. Fisher was a close ally of Stanton’s, and hardly the best example of the virtues of an Article III judge. His instruction to the jury was a barely disguised, fiery sermon inveighing against the “most foul and wicked conspiracy the record of which has ever stained the pages of history,” id. at 1369, and he actually defended both the legitimacy and the constitutionality of the military commission two years earlier, arguing that it was not called into question by Milligan, id. at 1370-71.

406 Id. at 1379.

407 Id. at 1370.

408 Letter from Samuel Mudd to Sarah Frances (“Frank”) Mudd, Jan. 15, 1867, in The Life of Dr. Samuel A. Mudd 219, 219 (N. Mudd, ed. 1906).

409 Letter from Chief Justice Chase to Andrew Sterrett Ridgely, Jan. 3, 1867 (Chase Papers, Historical Soc. of Penn.).
Well over one year later, in mid-1868, Mudd finally took up the Chief Justice on his suggestion: Along with his co-defendants Samuel Arnold and Edwin Spangler, he filed a habeas petition with Judge Thomas Boynton of the Southern District of Florida, seeking release from prison. In September 1868, Judge Boynton denied the petition. Boynton explained that in killing Lincoln, Booth had been motivated not by “private animosity,” but instead by a design to “impair the effectiveness of military operations, and enable the rebellion to establish itself into a government.” Because the offense was, in this sense (i.e., based upon its alleged motive), a “military one,” it was proper to try it in a military forum, notwithstanding Milligan, according to Judge Boynton.

Boynton’s opinion was unconvincing in virtually every respect: For one thing, the military trial did not establish that Booth killed Lincoln in order to “impair the effectiveness of military operations, and enable the rebellion to establish itself into a government.” The assassination was almost certainly far too late in the day to have any such expected effect. More fundamentally, Milligan did not turn on any such test of whether the offense had a civil or a “military” motive; indeed, if that had been the ground of decision, Milligan itself would have come out the other way, because Milligan, unlike Booth, did plot to “impair the effectiveness of [Union] military operations.” More broadly, the Court in Milligan did not identify any vaguely defined category of so-called “military cases” that could be tried in military courts.

Having met with resistance from Judge Boynton, the three prisoners in the Dry Tortugas then filed habeas petitions directly in the Supreme Court, asking that Court to hold that the military commission lacked jurisdiction. On February 8, however, President Johnson pardoned Mudd, citing both some “room for uncertainty as to the true measure and nature of [his] complicity” with Booth, and also the fact that Mudd had “devoted himself to the care and cure” of those who were ill with yellow fever at the Dry Tortugas, and “saved many valuable lives and earned the admiration and the gratitude of all who observed or experienced his generous and faithful service to humanity.” The pardon effectively mooted Mudd’s case in the Supreme Court; but on February 15, 1869, the Chief Justice announced that the Court would hear argument eleven days later on the remaining petitions filed by Arnold and Spangler.

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410 The fourth prisoner from the Lincoln trial, Michael O’Laughlen, died of yellow fever in the Fort Jefferson prison in the Dry Tortugas in September 1867.

411 Id.

412 Nos. 12-14, Orig., Dec. Term 1868. Under governing Supreme Court doctrine, they could not appeal directly from Judge Boynton’s denial of their petitions, which he had issued at chambers. See Fairman, supra note ___, at 490 (citing In re Metzger, 46 U.S. (5 How.) 176 (1847)).

413 Presidential Pardon of Dr. Samuel A. Mudd, Feb. 8, 1869.

414 Chase’s order noted that the parties should address whether the Court had jurisdiction to allow the habeas writs and, if so, whether it was appellate or original jurisdiction. It is uncertain whether the merits were also yet at issue.
Phillips argued the cause for the petitioners; Assistant Attorney General J. Hubley Ashton argued for the government. The Court never had an opportunity to opine, however, on either its jurisdiction or the merits: On one of his last days in office, President Johnson pardoned Arnold and Spangler, too, and thus their petitions were dismissed.

4. Military Trials for Violations of the Laws of War

As noted above, in Milligan the government surprisingly chose not to argue that the commission had jurisdiction, at a minimum, to try the one charge alleging a violation of the laws of war. Indeed, the government appeared to disclaim any such possible military jurisdiction. Therefore the Milligan Court did not have occasion to opine on whether Speed had been right, in his July 1865 opinion, that military courts can try allegations of offenses against the laws of war committed by members of belligerent forces.

The most famous case of this sort in the Civil War was a trial that occurred just after the conclusion of the Lincoln assassination trial—the military commission proceedings against Confederate Army Captain Henry Wirz, who was commander of the Confederate camp for prisoners of war in Andersonville, Georgia, where the horrifying conditions of confinement resulted in the deaths of over 12,000 Union soldiers. Like the Lincoln conspirators, Wirz was charged with both a substantive count, namely, murder of prisoners “in violation of the laws and customs of war,” and a conspiracy (“to injure the health and destroy the lives of soldiers in the military service of the United States, then held and being prisoners of war within the, lines of the so-called Confederate States and in the military prisons thereof”). The substantive charge was certainly an allegation of a violation of the law of war, which prohibits the abuse of, and violence against, prisoners rendered hors de combat. The second charge, too, although characterized in terms of “conspiracy,” was in effect an allegation that Wirz had failed to exercise his command to prevent the prisoner abuse at Andersonville, a breach of duty that the Supreme Court would later determine is itself a violation of the laws of war. Wirz was found guilty of

415 Unfortunately, the oral argument apparently was not transcribed.

416 In his opinion for the Court, Justice Davis did state, somewhat cryptically, that the “laws and usages 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.” 71 U.S. (4 Wall.) at 121. It appears, however, that Davis was there simply responding to the government’s argument that the laws and usages of war permitted the use of military tribunals where martial law applied; he was not addressing any argument that law-of-war offenses could be subject to military adjudication. In the Quirin case, however, Chief Justice Stone read the Court in Milligan to have held that the laws of war themselves do not regulate the conduct of persons in Milligan’s situation, who act independently of any direction or control of an organized belligerent force. 317 U.S. at 45.


418 See In re Yamashita, 327 U.S. 1, 13-18 (1946). In the present al Bahlul litigation, the government has cited the Wirz trial as a relevant precedent because the charge in that case described the alleged conspiracy as being “in violation of the laws and customs of war.” Trial of Henry Wirz, Ex. Doc. No. 23, 40th Cong., 2d Sess. 3 (1868). See U.S. 2015 Bahlul Br., supra note __, at 40-42. It is not clear why the government
the substantive offense and of most of the specifications of the conspiracy charge, and he was hung on November 10, 1865; his body was interred in the Old Arsenal grounds next to that of George Atzerodt, who had suffered the same fate that July. The Milligan decision neither confirmed nor called into question the constitutionality of the Wirz commission, which did involve genuine law-of-war offenses.

An 1873 opinion of Attorney General George Williams concerning a conflict between the Army and the Modoc Indian tribe is to similar effect. After extended hostilities between United States troops and the Modoc Indians, the parties arranged for peace negotiations under a so-called “flag of truce.” At the place designated for negotiations, the tribe ambushed the U.S. forces and killed an army general and two others in the U.S. delegation. This violation of the flag of truce violated the common law of war. President Grant asked Attorney General Williams whether a military tribunal could try the malefactors. Williams answered in the affirmative; he prominently cited the


420 Id. at 815.
Wirz precedent and liberally quoted from Speed’s 1865 opinion. The Modocs responsible for the ambush were tried and four of them were hung.

Military commission jurisdiction to try (genuine) offenses against the international laws of war thus arguably survived Milligan—or, in any event, the question remained open. Even so, there were few if any such trials after the Modoc trial of 1873; the question was not renewed again until the Second World War, in the case of the military trial of eight Nazi saboteurs (about which more below).

IV. THE LINCOLN TRIAL LEGACY (OR LACK THEREOF), 1886-1940

In 1886, Colonel William Winthrop, later known as the “Blackstone of Military Law,” published the first edition of his comprehensive treatise on military law. That landmark work—both the first edition and the now-canonical second edition (published in 1920)—cited the Lincoln assassination trial on a handful of occasions, but almost always for a discrete, uncontroversial procedural point, or a point about the role of various military officers in trials. Winthrop never once cited the Lincoln trial as affirmative authority for the jurisdiction of wartime military tribunals, or even as among the sources supporting the treatise’s proposition that it is against the law of war to employ assassins. Indeed, on at least two occasions Winthrop appeared to go out of his way to suggest that the Lincoln trial is not a valid or accepted precedent for any jurisdictional authority. First, in a footnote Winthrop contrasted John Bingham’s jurisdictional

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421 The Modoc Indian Prisoners, 14 Op. ATT’Y GEN. 249, 251-52 (1873). The only issue that gave Williams any pause was whether the Modoc Indians were bound by the customary laws of war. He concluded that they were. Id. at 253. Williams distinguished Milligan primarily on the ground that civilian courts lacked any jurisdiction to adjudicate violations of the laws of war. Id. at 252. Indeed, Williams, following Speed, see supra note __, assumed that civilian courts could not try such offenses. He might have been wrong about that; but he was certainly correct that Milligan had not decided whether law-of-war offenses can be tried in military commissions.

422 Witt, supra note ___ at 334-35. Professor Witt notes that the military commission in this case was actually a humanitarian improvement; previously, Indian captives had often been summarily executed. Indeed, Witt suggests that the reason President Grant put the question to Attorney General Williams was in order to stave off the summary justice the army was otherwise prepared to enforce. See id. at 329-35.

423 In the 1920 edition of his comprehensive treatise on military justice, William Winthrop did not cite any cases after the Civil War in his litany of examples of military tribunals being used to try offenses against the laws of war. William Winthrop, MILITARY LAW AND PRECEDENTS 840 & nns. 7-17 (2d ed. 1920).


425 William Winthrop, MILITARY LAW (1886) (two volumes).

426 William Winthrop, MILITARY LAW AND PRECEDENTS (2d ed. 1920).

427 See 2 William Winthrop, MILITARY LAW 13 n.1 (1886); William Winthrop, MILITARY LAW AND PRECEDENTS 836 & n.90 (2d ed. 1920).
argument during the trial with what he referred to in the text as the holding of the “leading case” of Milligan that a commission may not assume jurisdiction over offenses committed in a locality “not involved in war nor subject to any form of military dominion.”

Second, Winthrop listed the Lincoln trial as among those held during the Civil War to adjudicate ordinary crimes or statutory offenses, cognizable in civilian courts, “which would properly be tried by such courts if open and acting.”

Winthrop was a trusted protégé of Holt who held his former supervisor in very high esteem. His treatise liberally cites Holt precedents from the war as honored authority. Winthrop’s failure, therefore, to “say a single word about the legality” of the Lincoln assassination commission (apart from his implied critique of Bingham’s arguments) is, in the words of one of the premiere judge advocates of the past century, “positively deafening.” “The only inference possible,” concluded Frederick Bernays Wiener in 1995, “is that Colonel Winthrop, like all contemporary military lawyers a century later, deemed utterly illegal the trial of the Assassination Conspirators by military commission.”

Nor was Winthrop alone in this regard. Other leading treatises on military law either disregarded the Lincoln trial altogether, or cited it only for discrete procedural points unrelated to military jurisdiction. The esteemed Judge Advocate General Norman Lieber, Francis’s son, did not cite it in his pamphlet on martial law. And even the constitutional law treatise that adopted the broadest view of the wartime jurisdiction of military courts failed to cite the 1865 trial as authority. These authors all knew, of course, that “the Lincoln conspirators’ trial was a matter of paramount national importance and attracted intense public scrutiny.” Some of them had lived through it. Yet they chose not to rely upon it or, in most cases, not to mention it at all.

428 See supra at __.

429 See 2 William Winthrop, MILITARY LAW 66 & n.3 (1886) (“Compare, in this connection”); William Winthrop, MILITARY LAW AND PRECEDENTS 785 & n.67 (2d ed. 1920) (same).

430 See 2 William Winthrop, MILITARY LAW 70 & n.5 (1886); William Winthrop, MILITARY LAW AND PRECEDENTS 839 & n.5 (2d ed. 1920).

431 Frederick Bernays Wiener, His Name Was Mudd, in DR. MUDD AND THE LINCOLN ASSASSINATION: THE CASE REOPENED 117, 162 (J.P. Jones ed. 1995).


433 E.g., George B. Davis, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 33 n.3 (1898) (citing the Lincoln trial as one of last occasions on which a civilian (Bingham) as appointed as a prosecuting judge advocate); see also id. at 131 n.1 (another procedural point).


436 al Bahlul, 767 F.3d at 25.
During the First World War, there was an important, contentious debate within the political branches about proposed legislation that would have authorized military trials of “any person, whether citizen or subject of the enemy country or otherwise,” who engaged in any conduct States (including any publication opposing the U.S. war cause), anywhere in the United States, that would “endanger or interfere with the good discipline, order, movements, health, safety, or successful operations of the land or naval forces of the United States.”

Notably, the ghostwriter and intellectual progenitor of this legislation, Assistant Attorney General Charles Warren—acting in his personal capacity, without Department of Justice approval—aggressively invoked alleged historical analogues in support of the legislation. Yet Warren breathed not a word about the Lincoln tribunal. Nor did the congressional proponents of the legislation, such as Senators Chamberlain, Lodge and Overman. Moreover, both President Wilson and Attorney General Gregory concluded that such legislation would be unconstitutional; and Gregory formally opined that even a member of enemy forces, captured in an effort to commit sabotage in the United States, could not constitutionally be tried by a military court for a domestic-law spying offense unless his conduct fell within a very circumscribed historical exception for certain forms of spying that are not privileged by the international laws of war.

Nowhere in these important debates did anyone so much as mention the Lincoln assassination commission.

The questions raised in the First World War also precipitated a (relative) outpouring of scholarship on the constitutional parameters of military jurisdiction, in addition to the Second Edition of Winthrop, during and shortly after the war. That corpus of work did not even bother to contend with the well-known Lincoln trial, let alone cite it as relevant authority. Finally, in 1933, John W. Curran wrote a short article devoted specifically to the constitutionality of the Lincoln proceedings. His stark

437 I discuss this initiative in Lederman, Washington article, supra note __, 105 GEO. L.J. at __.

438 See id. at __.

439 See id. at __ (discussing Administration’s constitutional objections to the legislation); id. at ___ (discussing Trial of Spies by Military Tribunals, 31 Op. ATT’Y GEN. 356 (1918)).

440 See, e.g., Henry J. Fletcher, The Civilian and the War Power, 2 MINN. L. REV. 110 (1918); Hayes McKinney, Spies and Traitors, 9 ILL. L. REV. 591 (1918); Charles Warren, Spies, and the Power of Congress to Subject Certain Classes of Civilians to Trial by Military Tribunal, 53 AM. L. REV. 195 (1919); Edward M. Morgan, Court-Martial Jurisdiction over Non-Military Persons under the Articles of War, 4 MINN. L. REV. 79 (1920); L.K. Underhill, Jurisdiction of Military Tribunals in the United States Over Civilians, 12 CAL. L. REV. 75 (1924); Charles Fairman, THE LAW OF MARTIAL RULE (1930).

441 A minor exception is that Charles Fairman made passing reference to Attorney General Speed’s opinion in his 1930 volume on martial law. That citation, however, was hardly favorable. Fairman himself wrote that “[c]ertainly in time of war a commander may seize those who engage in operation against his forces.” Id. at 166 (emphasis added). In a footnote, Fairman then added that Speed “carried the principle to the point of sustaining the trial by military commission of persons charged with the assassination of President Lincoln.” Id. at 166 n.12.
conclusion, however, was hardly that the Lincoln Commission was an important legal precedent: “As the trials of the Lincoln conspirators have been relegated to the museum of legal history,” Curran wrote, “the most charitable view is to consider them the result of the hysteria of the war.”  

The view within the military justice system itself, by all that appears, was even more damning. For example, Frederick Bernays Wiener recalled that in the very first training session he received as a judge advocate, in 1936, Lieutenant Colonel Henry A. Auer instructed the class “that no one currently regarded the military tribunal of the Assassination Conspirators as a precedent that would or should be followed.”  

In his own manual on martial law, which he published in 1940, Wiener wrote that “military men generally have hesitated to regard the occasion as a sound precedent or, indeed, as anything more than an indication of the intensity of popular feeling at the time.” And Wiener even went so far as to tell Justice Frankfurter, in private correspondence following the Quirin case in 1942, that the Lincoln commission was a precedent that “no self-respecting military lawyer will look straight in the eye.”

V. MODERN DEVELOPMENTS

The relevant historical narrative is much sparser in the past century, if only because wartime military trials of persons unconnected with the U.S. armed services were almost unheard of between 1873 and 2002. There were, however, at least three such trials in or just after World War II, including the landmark trial of eight Nazi saboteurs. The Lincoln assassination tribunal was barely mentioned in those proceedings, either. In the early 1990’s, however, the constitutionality of the Lincoln trial itself actually became a live issue again, in a very unusual proceeding initiated by a descendant of Samuel Mudd. And finally, after the attacks of September 11, 2001, the Lincoln commission, and Attorney General Speed’s opinion about its constitutionality, began to be cited—for the first time ever—as pertinent legal authority, both within the Executive branch and the federal judiciary.

A. The Nazi Saboteurs Case (Quirin)

In the summer of 1942, the Federal Bureau of Investigation apprehended eight individuals who had been paid and directed by the German Army to commit acts of

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443 Wiener, *His Name Was Mudd*, supra note __, at 179 n.273.

444 Frederick Bernays Wiener, A *PRACTICAL MANUAL OF MARTIAL LAW* 138 (1940); *see also id.* (“the assassination of the President was murder, pure and simple”).

445 Letter of Frederick Bernays Wiener letter to Felix Frankfurter, Nov. 5, 1942, at 9. Indeed, the Lincoln trial was such a legal anathema that Wiener suggested it should not even be cited as authority for the modest proposition that the Judge Advocate General could be employed as prosecutor of a commission case. *Id.*
sabotage against war industries and facilities in the United States. Two of them were American citizens.\textsuperscript{446} The federal courts in the District of Columbia were available for a trial of these men, presumably for conspiring to commit sabotage against federal facilities. Attorney General Francis Biddle, however, recommended to President Roosevelt that the detainees be tried in a military commission, principally because it would be difficult to prove attempted sabotage in an Article III court (as the prisoners had not gotten very far in their activities—they were under instructions not to commit any acts of sabotage for 90 days after their arrival). Although it might have been easier to prove a \textit{conspiracy} to commit sabotage, the penalty for such an offense was modest—as few as three years.\textsuperscript{447} Biddle thus assumed that the law of war offered a better opportunity for “swifter” and “severer” penalties. He advised Roosevelt that the defendants had committed a “major violation of the law of war [by] crossing behind the lines of a belligerent to commit hostile acts without being in uniform”—an alleged offense that could be prosecuted by a military commission, and for which death was the penalty.\textsuperscript{448} Biddle further advised the President that because enemy forces (allegedly) lacked any constitutional rights of access to courts in wartime, Roosevelt should issue an order precluding state and federal courts from hearing any claims by the prisoners.\textsuperscript{449}

The President took Biddle’s advice, even though he recognized that the two U.S. citizens were “guilty of high treason,” which would ordinarily be tried in a federal civilian court. “This being wartime,” Roosevelt wrote to Biddle, “it is my inclination to try them by court martial.”\textsuperscript{450} On July 2, 1942, the President issued two documents. The first was a proclamation establishing both the primacy of military tribunals and the denial of access to civil courts for a defined group of offenders:

\begin{quote}
\textit{The President took Biddle’s advice, even though he recognized that the two U.S. citizens were “guilty of high treason,” which would ordinarily be tried in a federal civilian court. “This being wartime,” Roosevelt wrote to Biddle, “it is my inclination to try them by court martial.” On July 2, 1942, the President issued two documents. The first was a proclamation establishing both the primacy of military tribunals and the denial of access to civil courts for a defined group of offenders:}
\end{quote}

\begin{footnotes}
\item[447] See Francis Biddle, \textit{In Brief Authority} 328 (rev. ed. 1976); Memorandum from Attorney General Biddle to the President, \textit{Re: German Saboteurs} 1 (June 30, 1942), Official File 5036, \textit{Franklin D. Roosevelt Papers} (Franklin D. Roosevelt Presidential Library and Museum).
\item[448] Id. In fact, the saboteurs had been in uniform when they stealthily “crossed” the relevant military lines—the beach patrols along the coasts in Long Island and Florida. See \textit{Quirin}, 317 U.S. at 22 n.1 (describing military patrols). It was only once they had evaded the military patrols at night that they shed their uniforms and went off into the interior of the country in civilian dress.
\item[449] Biddle Memorandum to the President, \textit{supra} note __, at 2.
\item[450] Memorandum from the President to the Attorney General, June 30, 1942, at 1, \textit{Papers of Franklin D. Roosevelt}, Presidential Secretary’s File, Box 56, Folder “Justice, 1940-44” (Franklin D. Roosevelt Presidential Library and Museum), \textit{quoted in} Biddle, \textit{In Brief Authority, supra} note __, at 330.
\end{footnotes}
[A]ll persons who are subjects, citizens, or residents of any Nation at war with the United States or who give obedience to or act under the direction of any such Nation and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law or war, shall be subject to the law of war and to the jurisdiction of military tribunals; and that such persons shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States, or of its States, territories, and possessions, except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe.  

The second of Roosevelt’s directives was denominated an order of the “Commander in Chief of the Army and Navy.” In that order, the President appointed an eight-member military commission to try the eight prisoners “for offenses against the law of war and the Articles of War.” Roosevelt authorized the commission to admit evidence if the President of the commission deemed that it would “have probative value to a reasonable man,” and he ordered that “[t]he concurrence of at least two-thirds of the members of the Commission present shall be necessary for a conviction or sentence.”

Note that the President’s Proclamation and Order authorized trial not only for violations of (or “offenses against”) the law of war, but also for offenses under the Articles of War, and for “committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts.” Roosevelt therefore specifically contemplated that the saboteurs might be tried for some domestic-law offenses. And that is what happened. The Department of the Judge Advocate General presented four charges to the commission. Charge I purported to allege a “violation of the law of war,” described as secretly passing, and appearing behind, military and naval lines and defenses, in civilian dress, for the purpose of committing acts of sabotage and espionage on behalf of the German Reich—in particular, the destruction of certain war industries, utilities and materials within the United States. The other three charges did not purport to describe violations of the law of war. Charge II alleged a violation of Article 81 of the Articles of War, in that the saboteurs allegedly “relieving or attempting to relieve” the enemy with arms, ammunition, supplies, money and other things, and allegedly “gave intelligence to

451 Presidential Proclamation 2561, Denying Certain Enemies Access to the Courts, 7 FED. REG. 5101 (July 2, 1942).
452 Franklin D. Roosevelt, Appointment of a Military Commission, 7 FED. REG. 5103 (July 2, 1942) (emphasis added).
453 Id.
the enemy.\textsuperscript{455} Charge III alleged a violation of Article 82, the age-old prohibition on spying under certain circumstances.\textsuperscript{456} Finally, Charge IV alleged that the accused conspired with one another and with the German Reich to commit the first three offenses.\textsuperscript{457}

In the midst of the commission proceedings, the defendants filed both a habeas petition and a petition for certiorari with the Supreme Court. The Court entertained extensive briefing and argument on the case in a special session at the end of July. On July 31, the Court granted the petition for certiorari and, in a brief per curiam opinion, held that the petitioners were not entitled to release and, in particular, that the “charges preferred against petitioners on which they are being tried by military commission appointed by the order of the President of July 2, 1942, allege an offense or offenses which the President is authorized to order tried before a military commission.”\textsuperscript{458} A few days later, the military commission convicted the individuals of all four charges; six of the saboteurs were executed, the other two sentenced to prison terms of 30 years and life, respectively.

In the Supreme Court briefing, the Lincoln trial did not get very much attention; Attorney General Biddle, however, did cite it, or Attorney General Speed’s opinion, three times in his brief. First, he cited the 1865 Attorney General opinion, among other authorities, for the modest proposition that military commissions (as opposed to courts-martial) had historically been recognized by the political branches.\textsuperscript{459} Next, in an Appendix, Biddle’s brief referred to the assassination trial itself, along with the Milligan, Vallandigham, Grenfel, and other trials, as examples of Civil War military commissions.\textsuperscript{460} Finally, and most notably, in another Appendix the brief cited the Lincoln conspirators’ trial as a “cf.” authority for the proposition that Charge IV against the saboteurs, the charge of a conspiracy to commit the other three charges, was itself “contrary to the law of war.”\textsuperscript{461} Biddle’s brief did not really make any effort, however, to demonstrate that such a conspiracy (especially with respect to the two non-law-of-war charges) was in fact a violation of the law of war, except to assert, without elaboration,

\textsuperscript{455} Id. at 6, in 39 LANDMARK BRIEFS at 311. The theory underlying this charge was a stretch of Article 81—it was not so much that the eight prisoners were conveying goods or information back to Germany, but that they planned to supply \textit{one another} with such supplies and information, in the service of their sabotage plan. \textit{Id.}

\textsuperscript{456} Id. at 7, in 39 LANDMARK BRIEFS at 312.

\textsuperscript{457} Id. at 7-8, in 39 LANDMARK BRIEFS at 312-13.

\textsuperscript{458} Quirin, 317 U.S. at 18-19 (footnote) (emphasis added).


\textsuperscript{460} Id. at 73-76 (App. II), in 39 LANDMARK BRIEFS at 474-77.

\textsuperscript{461} Id. at 83 (App. III), in 39 LANDMARK BRIEFS at 484.
that the “principle” that a conspiracy to commit an offense is itself an offense “is a part of the laws of war.”

In an opinion filed several months after the executions, the Court effectively rejected Roosevelt’s effort to deny the saboteurs’ right of access to courts. “[N]either the [President’s] Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners’ contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.” On the merits, however, the Court held that it was constitutional for Congress to have authorized such use of a military commission, even where civilian courts were “open and functioning normally,” to try persons who were part of, or directed by, enemy armed forces, for at least some offenses against the laws of war, a “branch of international law.” In other words, the Court affirmed Attorney General Speed’s basic theory, from his July 1865 opinion, of a circumstance in which military adjudication is constitutionally permissible, distinct from the theory of “necessity” and martial law that the Court had rejected in its decision in Milligan.

As I have explained elsewhere, Chief Justice Stone might have, but did not, offer a fairly compelling functional argument in support of this new Article III exception—namely, that there would be good reason for Congress to prefer that military officers, rather than civilian juries, adjudicate questions involving the customary international laws of war by which all forces, including U.S. forces, must abide. Instead, Stone

462 Id.


464 317 U.S. at 24.

465 Id. at 29; see also id. at 40 (“we must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts”). The Court indicated that the law-of-war-offense exception is not absolute: some violations of the laws of war, wrote the Chief Justice, might be in a “class of offenses constitutionally triable only by a jury.” Id. at 29. The Chief included this caveat at the insistence of Justice Black, who had written Stone an internal note declaring his reluctance to issue a categorical judgment: “I seriously question whether Congress could constitutionally confer jurisdiction to try all such violations before military tribunals. . . . [T]o subject every person in the United States to trial by military tribunals for every violation of every rule of war which has been or may hereafter be adopted between nations among themselves, might go far to destroy the protections declared by the Milligan case.” Memorandum of Justice Black to Chief Justice Stone, Oct. 2, 1942, HUGO L. BLACK PAPERS, Box 269 (Library of Congress). The Court did not offer any hint, in its opinion, about which law-of-war offenses must be tried in an Article III court.

466 The Court reaffirmed this holding that military courts could try charges of international law-of-war violations in Yamashita, 327 U.S. at 7-8, 11, 14, and in Duncan v. Kahanamoku, 327 U.S. 304, 313-14 & n.8 (1946) (citing Quirin and Yamashita for proposition that military has jurisdiction to try “enemy belligerents, prisoners of war, or others charged with violating the laws of war”).

467 See Lederman, Washington article, supra note __, 105 GEO. L.J. at ____. Cf. THE FEDERALIST No. 83 (Hamilton) (trial by jury should not be afforded in civil cases “where the question turns wholly on the laws
rested his case on an argument from historical authority. Notably, however, Stone did not rely on the Lincoln trial, or on any other Civil War trials, even though Speed’s opinion would have been the most obvious, and famous, citation favoring an “offenses against the laws of war” theory of military jurisdiction. Instead, Stone relied exclusively on Revolutionary War precedents that he thought demonstrated a early practice of trying law-of-war offenses in military tribunals, together with an assumption that the Framers did not intend “to bring within the sweep of the [Article III and Sixth Amendment] guarant[ees] those cases in which it was [at the Founding] well understood that a jury trial could not be demanded as of right.”

Stone then proceeded to apply his holding to affirm the commission’s jurisdiction over a single specification of one of the four charges at hand: Specification 1 of Count One, which nominally alleged a violation of the law of war. Stone assumed that “unprivileged” belligerency of the sort described in that specification—crossing enemy lines in civilian dress with aims to attack military targets—violated the law of war.

In the recent al Bahlul litigation, Judge Kavanaugh has argued that the Nazi saboteurs’ conspiracy, in Count Four (together with the conspiracy charge in the Lincoln case), is an historical example that supports military jurisdiction over domestic-law conspiracy charges under the MCA, not only because it was personally

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317 U.S. at 41-44 & n.14.

Id. at 39. I argue in my companion article that Stone misunderstood the Founding-era history. Nevertheless, whether he described that history accurately or not is not germane to the questions at issue in this Article.

Id. at 36-37. As he was writing the opinion, Stone was chagrined to discover that international law authorities did not support this assumption; as he wrote to his law clerk, he had drafted the opinion to include the law “as I think it ought to be,” hoping that he would find authority for it. Letter from Chief Justice Stone to Bennet Boskey and “Morrison,” at 1 (Aug. 14, 1942), in PAPERS OF HARLAN FISKE STONE, Box 69; folder marked “July Special Term 1942 Ex Parte Quirin et al.” (Manuscript Div., Library of Congress); see also Danelski, supra note __, at 72-73. As I explain elsewhere, Lederman, Washington article, supra note __, 105 GEO. L.J. at __, Stone’s assumption was mistaken; like some of the stray remarks in the Lieber Code, see supra at __, it reflected a “fundamental confusion between acts punishable under international law and acts with respect to which international law affords no protection.” Richard R. Baxter, So-Called “Unprivileged Belligerency”: Spies, Guerillas, and Saboteurs, 28 BRIT. Y.B. INT’L L. 323, 342 (1951). Stone was therefore wrong to assume that the conduct alleged against the saboteurs in Charge 1—going behind enemy lines in civilian dress with aims to attack military targets—violated the law of war. Such conduct might not be privileged—i.e., international law may permit states to punish it under their domestic law—but international law does not itself prohibit the conduct. For present purposes, however, what is important is simply the Court’s holding—and its refusal to decide whether the commission had jurisdiction over the other three charges, which plainly did not allege offenses against the law of war.
prosecuted by the Attorney General (Francis Biddle) and approved by President Franklin Roosevelt, but also because “[t]he Supreme Court affirmed the legality of the trial, and in doing so, did not disturb the conspiracy charge.”

Contrary to Judge Kavanaugh’s account, however, the Court in *Quirin* actually cast doubt on the constitutionality of using military tribunals to try individuals, unaffiliated with the armed forces, for war-related offenses (such as conspiracy) that are *not* violations of the law of war. For one thing, Chief Justice Stone distinguished *Milligan* on precisely that ground: He assumed that the laws of war were “inapplicable[le]” to Milligan’s conduct because he was not “part of or associated with the armed forces of the enemy.” Of perhaps even greater significance, Stone also stressed that the Court did *not* decide whether the Roosevelt-approved commission had constitutional jurisdiction to adjudicate any of the other charges in the case, apart from Specification 1 of Charge I. Stone apparently settled upon this odd quasi-disposition in *Quirin* because he recognized constitutional “difficulties” with military adjudication of claims that did not clearly allege law-of-war offenses. It also bears emphasis, in this regard, that just as Attorney General Speed did not discuss whether the conspiracy charge in the Lincoln case was constitutional in his comprehensive 1865 opinion defending that military commission, likewise Attorney General Biddle made no effort to argue that the conspiracy charge in *Quirin* was constitutional—apart from his unconvincing statement in passing, in an appendix to his brief, that such conspiracy *was*, in fact, a violation of the law of war (that is to say, his effort to bring that charge within the Court’s ultimate holding—an implied invitation that the Court carefully rebuffed).

**B. The Surprising Revival of the Case of Samuel Mudd**

In 1990, Samuel Mudd’s grandson Richard Mudd, an attorney in Washington, D.C., applied to the Army Board for Correction of Military Records (“ABCMR”),

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471 840 F.3d at 766-67 (plurality opinion).

472 317 U.S. at 45. Otherwise, of course, the charge against Milligan that *expressly* alleged a violation of the law of war would have been constitutional, per *Quirin*.

473 *Id.* at 46.

474 Letter from Harlan Fiske Stone to [Law Clerk] Bennett Boskey, Aug. 20, 1942, at 1, in *HARLAN FISKE STONE PAPERS*, Box 69, Folder marked “July Special Term 1942 Ex Parte Quirin et al.” (Manuscript Div., Library of Congress). As I discuss in Lederman, Washington article, *supra* note __, 105 GEO. L.J. at ___. Stone wrote this specifically about the Second and Third Charges, for spying and relieving the enemy, which as alleged by the government did not clearly make out law-of-war offenses. Stone did not specifically mention the conspiracy charge at all, in his memo to his clerk or in his ultimate description, in his opinion, of what the Court was and was not deciding. Presumably, if Stone had agreed with the government that the conspiracy charge alleged a law-of-war offense, the Court would have confirmed the constitutionality of that count, too, on the basis of Stone’s rationale for upholding Specification 1 of Count I. The fact that the Court did not do so suggests that Stone was uncertain about the legal source of the conspiracy charge, as well as Charges II and III.

475 See *supra* at __.
seeking to correct his grandfather’s military records by striking his conviction before the 1865 military commission. (The ABCMR is a civilian board that can recommend correction of Army records to the Secretary of the Army.) Richard Mudd cited two reasons for the requested correction: that his grandfather was not guilty of the offense (primarily because there wasn’t sufficient evidence that Mudd knew of Lincoln’s killing when he assisted Booth), and that the military commission lacked jurisdiction to try Dr. Mudd. As to the latter, jurisdictional claim, Mudd’s representatives stressed at an ABCMR hearing\textsuperscript{476} that Mudd was not charged with violating the law of war, and that therefore he should have been afforded a civilian trial, just as John Surratt received in 1867, and just as the government had prosecuted those alleged of assisting German agents (including the \textit{Quirin} saboteurs) in World War II.\textsuperscript{477}

The Army Board concluded that Mudd’s case was “analogous” to Milligan’s, and that Attorney General Speed’s opinion thus did not offer a justification for military jurisdiction. It concluded that the commission did not have jurisdiction to try Mudd, and that the trial was “such a gross infringement of his constitutionally protected rights, that his conviction should be set aside.”\textsuperscript{478} Six months later, however, the Acting Assistant Secretary of the Army, William D. Clark, denied the Board’s recommendation, and Dr. Mudd’s request, because he concluded it was “inappropriate” for a nonjudicial body such as the ABCMR to second-guess the decisions of Attorney General Speed and Judge Boynton in the 1860’s.\textsuperscript{479} Mudd’s grandson asked for reconsideration of the decision. Four years later, a new Assistant Secretary, Sara Lister, again denied the request to vacate the conviction, on the ground, earlier decreed by Speed, that the “assassination was an offense against the law of war.”\textsuperscript{480} Lister wrote that “[a]ny further Army action would be an ill-advised attempt to alter legal history by nonjudicial means.”\textsuperscript{481}

Richard Mudd then filed an action in federal district court, challenging the Army’s refusal to expunge his grandfather’s record of conviction. Judge Paul Friedman concluded that Lister’s action was arbitrary and capricious, because she had simply deferred to Attorney General Speed’s and Judge Boynton’s judgments, and had not independently addressed whether Mudd’s offense was, in fact, a violation of the law of war.\textsuperscript{482} On remand to the Army, yet a third Assistant Secretary, Patrick Henry, also

\textsuperscript{476} E.g., Transcript of Hearing at 46, \textit{In re Mudd}, No. 101.01 (ABCMR Jan. 22, 1992).

\textsuperscript{477} See, e.g., Cramer v. United States, 325 U.S. 1 (1945); United States v. Haupt, 136 F.2d 661 (7th Cir. 1943).


\textsuperscript{479} Memorandum to the Executive Secretary, ABCMR, from William D. Clark, Acting Ass’t Sec. of the Army, re: \textit{Dr. Samuel A. Mudd}, at 2 (July 22, 1992).

\textsuperscript{480} Letter from Sara E. Lister, Ass’t Secretary of the Army, to ___, at 2 (Feb. 2, 1996).

\textsuperscript{481} Id. at 3.

rejected the petition. Henry concluded that the commission had jurisdiction over Mudd because he was, in effect, charged with aiding and abetting Booth, who had violated the laws of war. Henry did not explain why Booth’s actions violated the laws of war. Nor did he examine whether aiding and abetting another’s law-of-war offense is itself a law-of-war offense. The case then went back up to Judge Friedman. The judge did not decide whether Mudd had committed an offense against the law of war, but he concluded that he “could not say that [Assistant] Secretary Henry’s decision was arbitrary, capricious or not in accordance with law.”

Richard Mudd then appealed to the U.S. Court of Appeals for the D.C. Circuit. Defending the Army’s decision, the federal government’s entire explanation for why Mudd had committed a law-of-war offense was to repeat Judge Boynton’s 1869 “reasoning” that Lincoln was killed not in his capacity as President but as Commander-in-Chief. Once again, however—as in 1869—Dr. Mudd’s case was dismissed without an ultimate resolution of the merits. The court of appeals concluded that Richard Mudd was not the heir of the sort of “claimant” contemplated by the military record corrections statute, because Samuel Mudd had not been a member of the armed forces. Accordingly, the court held, Richard Mudd was not within the “zone of interests” protected by the statute, and thus lacked so-called “prudential” standing.

C. After 2001: Resuscitating the Lincoln Case as Precedent

Meanwhile, while Mudd’s federal case was on appeal, the Department of Justice’s Office of Legal Counsel dusted off Attorney General Speed’s opinion in the Lincoln case, citing it as authority for the proposition that President George W. Bush had the power to establish commissions in wartime without statutory authorization. That particular question is, of course, distinct from the question of Article III limits; and it is unlikely to be relevant anytime in the near future: In the wake of Hamdan v. Rumsfeld, and enactment of the Military Commissions Act of 2009, it is almost certain that, going forward, military commissions will be convened pursuant to a statutory regime, not unilateral executive command. Even so, the 2001 OLC opinion brought the Speed

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483 Decision at 2, In re Mudd, Patrick Henry, Ass’t Sec. of the Army for Manpower and Reserve Affairs (Mar. 6, 2000).
484 Notably, even in the Nazi saboteurs case, when U.S. persons—including the father of one of the accused—were alleged to have given aid and comfort to two of the saboteurs, the government tried them for treason, in Article III courts, rather than for a law-of-war offense in a military court. See Cramer v. United States, 325 U.S. 1 (1945); United States v. Haupt, 136 F.2d 661 (7th Cir. 1943).
486 Brief for Appellees at 20, Mudd v. White, No. 01-5103 (D.C. Cir.).
487 Mudd v. White, 309 F.3d 819, 824 (D.C. Cir. 2002).
opinion out of the mothballs—it was the first time in well over a century that a published Department of Justice opinion had cited it.

The Lincoln assassination commission then became an unexpected flash point in the Supreme Court’s decision in Hamdan. The Court in that case assumed, based upon Quirin, that congressionally authorized military commissions could be used to adjudicate at least some offenses against the international laws of war. In dissent, Justice Thomas cited the Lincoln commission, and the Speed opinion, as authority for the proposition that conspiracy to commit a law-of-war offense is itself a violation of the laws of war: “[I]n the highest profile case to be tried before a military commission relating to [the Civil War], namely, the trial of the men involved in the assassination of President Lincoln, the charge provided that those men [sic] had ‘combin[ed], confederat[ed], and conspir[ed] ... to kill and murder’ President Lincoln.”

Further, Justice Thomas argued that, even apart from conspiracy, the petitioner, Salim Hamdan, could be tried in a military commission simply for having cast his lot with al Qaeda. In support of this notion, Thomas relied upon the Speed opinion as having established such a proposition as a matter of international law: “For well over a century it has been established that ‘to unite with banditti, jayhawkers, guerillas, or any other unauthorized marauders is a high offence against the laws of war; the offence is complete when the band is organized or joined. The atrocities committed by such a band do not constitute the offence, but make the reasons, and sufficient reasons they are, why such banditti are denounced by the laws of war.’”

Both of these citations were problematic, even on their own terms. Be that as it may, however, they served to revive the notion that the Speed opinion, and the Lincoln trial, might serve as possible sources of legal authority for the first time since 1865. And if the Lincoln case could be cited as authority for propositions about the content of international law, it stood to figure that it was only a matter of time before it would also be cited as authority with respect to the more fundamental constitutional question, too.

490 Id. at 699 (Thomas, J., dissenting).

491 Id. at 693-94 (quoting 11 Op. ATTY. GEN. at 312). Thomas elaborated: “In other words, unlawful combatants, such as Hamdan, violate the law of war merely by joining an organization, such as al Qaeda, whose principal purpose is the ‘killing [and] disabling ... of peaceable citizens or soldiers.’” Id. at 694 (citing, inter alia, 11 Op. ATTY. GEN. at 314 (“A bushwhacker, a jayhawker, a bandit, a war rebel, an assassin, being public enemies, may be tried, condemned, and executed as offenders against the laws of war”)).

492 As the United States has recently acknowledged, a stand-alone conspiracy to violate the laws of war is not itself a law-of-war violation. See Brief for the United States, al Bahlul v. United States, No. 11-1324, at 2 (D.C. Cir. filed Nov. 2, 2015). Moreover, the Lincoln case was not litigated on the theory that conspiracy—let alone an inchoate, unrealized conspiracy, which was not at issue there—is a violation of the international laws of war. Nor did Attorney General Speed opine on that question. Speed did opine that joining certain sorts of unprivileged belligerent groups violates the laws of war. See supra at ___. But he was mistaken about that, see supra at ____; and, in any event, the prosecution in the Lincoln commission did not allege that theory, either.
That time has now come. In his recent plurality opinion for four judges in *al-Bahlul*, Judge Kavanaugh relied heavily on the Lincoln trial as a basis for rejecting the defendant’s Article III objection to his conviction by military commission because that 1865 trial (along with the *Quirin* case) allegedly lies “at the core” of historical military practice, which “cannot be airbrushed out of the picture.”

**VI. THE USE OF LANDMARK MILITARY TRIALS AS A SOURCE OF CONSTITUTIONAL AUTHORITY**

“Arguments based on historical practice are a mainstay of debates about the constitutional separation of powers.” In two recent landmark cases, the Supreme court has confirmed that adage, by resolving longstanding interbranch disputes primarily on the basis of the Court’s reading of historical settlement within the political branches. Political-branch practice, the Court insists, can be “an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.” Not surprisingly, then, in the wake of *Noel Canning* and *Zivotofsky*, the government contends—and four judges of the D.C. Circuit agree—that such deference to established practice is the key to unlocking the question of whether there is, or should be, an Article III exception for the military adjudication of domestic-law crimes that are in some way related to the Nation’s prosecution of war.

**A. The Problems with Reliance on Political Branch Practice in This Context**

It is noteworthy, however, that in its long series of cases dealing with possible exceptions to Article III’s guarantees, in both the civil and criminal contexts, the

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493 *al Bahlul*, 840 F.3d at 768 (plurality opinion); see also *al-Bahlul*, 767 F.3d at 72 (Kavanaugh, J., concurring in the judgment in part and dissenting in part) (expressing doubts about al Bahlul’s constitutional argument precisely because it “would render the Lincoln conspirators and Nazi saboteur convictions for conspiracy illegitimate and unconstitutional”); *id.* at 52 (Brown, J., concurring); *al Bahlul*, 792 F.3d at 69-71 (Henderson, J., dissenting).


495 *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2091-94 (2015); *Noel Canning*, 134 S. Ct. at 2559-64.

496 *Id.* at 2560. *Noel Canning* was not, of course, the first such case in which the Court had relied heavily on such political branch practice. See, for example, *The Pocket Veto Case*, 279 U.S. 655, 688-91 (1929), in which the Court affirmed that a bill becomes law when it is submitted to the President less than ten days before a congressional adjournment at the end of a session, and the President neither signs nor returns it before that adjournment; pointing to 119 such examples over the course of about 70 years, the Court explained that “[t]he views which we have expressed as to the construction and effect of the constitutional provision here in question are confirmed by the practical construction that has been given to it by the Presidents through a long course of years, in which Congress has acquiesced. Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character.” Likewise, in *Ex parte Grossman*, 267 U.S. 87, 118-19 (1925), the Court reasoned that a “long practice” of presidential pardons of convictions for criminal contempt of court—27 instances over the course of 85 years—with virtually no congressional pushback, “sustain[ed]” a construction of the Pardon Clause to encompass such offenses. *See also*, e.g., The Laura, 114 U.S. 411, 416 (1885).
Supreme Court has rarely if ever looked to the practices of the political branches for guidance.\(^{497}\) Indeed, on at least one such occasion it brushed aside Civil War statutory precedents as worthy of no more than summary dismissal in a footnote.\(^{498}\)

There are at least two reasons why the Court might be reluctant to defer to political branch practice in this context. First, the Court typically has credited such practice when the constitutional text is vague or ambiguous—to “give meaning to the words of a text,” such as by treating practice “as a gloss” on the undefined term “executive Power” in Article II,\(^{499}\) or to effectively “supply” words when the Constitution is silent on a question of one branch’s power.\(^{500}\) Here, however, the words of Article III and the Sixth Amendment arguably are “too plain and direct to leave room for misconstruction or doubt of their true meaning.”\(^{501}\) Exceptions to that plain text, at least in theory, should thus be recognized only reluctantly, and only for very compelling reasons.\(^{502}\)

Second, the Article III question at issue here is not—as in \textit{Noel Canning}, \textit{Zivotofsky}, and similar cases—simply about the powers of the Executive, and the relationship of authorities between the two political branches. In cases such as those, it arguably makes some sense to inquire whether there has been “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before

\(^{497}\) But cf. \textit{Stern v. Marshall}, 564 U.S. 462, 504-05 (2011) (Scalia, J., concurring) (“in my view an Article III judge is required in all federal adjudications, unless there is a firmly established historical practice to the contrary”). It is unclear whether Justice Scalia here was referring to a pre-constitutional “historical practice,” or to a practice that might have crystallized after the Constitution was ratified.

\(^{498}\) \textit{Toth}, 350 U.S. at 14 n.8. In at least one case—\textit{Quirin}—the Court’s decision did rest upon a very different sort of historical argument, namely, that the Constitution was not designed to eliminate a practice that (allegedly) was commonly employed during the Revolutionary War, and that the early Congresses confirmed the legitimacy of that practice. See generally \textit{Lederman}, Washington article, supra note __. That decision did not, however, invoke post-constitutional wartime practices as precedent.


\(^{500}\) Id. at 610; see also \textit{Letter to Spencer Roane from James Madison (Sept. 2, 1819)}, in 8 \textit{WRITINGS OF JAMES MADISON} 450 (G. Hunt ed. 1908) (it “was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter ... and that it might require a regular course of practice to liquidate & settle the meaning of some of them”) (emphasis added).

\(^{501}\) \textit{Milligan}, 71 U.S. at 119-20; see also Transcript in En Banc Oral Argument at 21-22, \textit{al Bahlul v. United States}, No. 11-1324 (D.C. Cir. Dec. 1, 2015) (Judge Kavanaugh) (“because Article III . . . does not have an exception for Military Commissions, . . . under the plain language of Article III you [al Bahlul’s counsel] have a great case”).

\(^{502}\) See \textit{id.} at 66 (Judge Kavanaugh) (“The baseline, arguably, should be the text of Article III, which contains no exception for Military Commissions, and then the argument would go [that] \textit{Quirin} carved out an atextual exception to Article III, but we should narrowly construe it because it is an atextual exception.”); see also \textit{INS v. Chadha}, 462 U.S. 919, 944 (1983) (rejecting the authority of a frequent practice of the political branches that the Court thought was flatly inconsistent with the textual commands of bicameralism and presentment in Article I, section 7, clauses 2 and 3).
If the two political branches have, in effect, settled upon an equilibrium in allocating authority between themselves, perhaps there is good reason to defer to that settlement. Here, however, the guarantees in question, especially the jury right, are widely understood to be fundamental protections of individual liberty. Moreover, insofar as Article III is also seen as a structural protection to “safeguard[] the role of the Judicial Branch in our tripartite system by barring congressional attempts to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts,” then the military’s exercise of Article I adjudicatory power diminishes the authority of the very branch to which the Constitution assigns the “judicial power” of the United States. Accordingly, the fact that the two political branches might have “settled” upon a practice that weakens the otherwise exclusive authority of the judiciary should not be accepted as a reasonable gloss on “the judicial power of the United States” unless the judiciary itself has also acquiesced in its own “emasculat[ion].”

B. Views From the Three Branches on the Article III Question

It is, therefore, necessary—at a minimum—to look to the historical perspectives of all three branches in order to discern whether there has been the sort of “systematic, unbroken, executive practice” that might at least inform the question of whether to now recognize yet another Article III criminal trial exception. And when we look to whether and how the three branches have historically countenanced military trials of domestic-law

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503 Youngstown, 343 U.S. at 610 (Frankfurter, J., concurring).

504 To be sure, the Court has often understood the balance of powers between the President and Congress also to be a guarantee of individual liberty, in the sense that checks on the exercise of unilateral power help to prevent tyranny. The jury right, however, is a more direct protection of individual rights.


506 In this respect, the juxtaposition of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803), is instructive. In Marbury, the Court paid no deference at all to Congress’s—and George Washington’s—(purported) judgment, reflected in section 13 of the Judiciary Act of 1789, 1 Stat. 80, that Article III allowed Congress to afford the Court original jurisdiction to issue writs of mandamus to public officers. 5 U.S. (1 Cranch) at 176. Six days later, however, in Stuart, the Court held that Article III did not prohibit Congress from requiring the Justices to ride circuit, reasoning that the “practice and acquiescence” by the Justices themselves “for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.” 5 U.S. (1 Cranch) at 309. To similar effect, in Martin v. Hunter’s Lessee, 14 U.S. 304, 352 (1816), the Court affirmed its authority to entertain appeals from state court decisions on questions of federal law, in part because of the “historical fact, that the supreme court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important states in the union, and that no state tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the supreme court, until the present occasion.” [T]hese judicial decisions of the supreme court through so long a period,” wrote Justice Story, together with “contemporaneous exposition by all parties [at the time of ratification], [and] acquiescence of enlightened state courts,” “place[s] the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts.”
offenses, it turns out there is not much to be found there, even accounting for “the two most well-known U.S. military commission precedents, the landmark Lincoln assassin and Nazi saboteur cases.”

1. The Executive

Perhaps the single most revealing historical fact bearing on the Article III question is how infrequently the military has actually tried individuals for domestic-law offenses in the wars fought since Article III was ratified. Almost all such cases occurred during the Civil War, as part of an aggressive undertaking by Edwin Stanton’s War Department. And the War Department defended the constitutionality of those trials predominantly on two grounds—martial law “necessity” and the inapplicability of the Constitution—that did not survive the Milligan decision and that, in any event, would not be viable arguments today with respect to trials pursuant to the Military Commissions Act. Not surprisingly, then, since the Civil War the Executive has increasingly turned to civilian court trials to prosecute war-related domestic-law offenses such as “support” for the enemy, including especially during the current armed conflict against al Qaeda, in which Article III trials have become ubiquitous.

The two major exceptions to this historical trend are those on which the government and Judge Kavanaugh would place so much reliance—the 1865 Lincoln assassination trial and the 1942 Nazi saboteur trial. Indeed, those cases stand out not only due to the notoriety of the defendants and their offenses, but precisely because those military trials are such anomalies in our constitutional history. They are aberrant cases, noteworthy in large measure because they deviated so dramatically from the norm. What is more, both cases have also been viewed with deep skepticism over time. Various aspects of the Court’s decision (and process) in Quirin have been subject to sharp

507 al Bahlul, 767 F.3d at 71 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

508 See also Lederman, Washington article, supra note __, 105 GEO. L.J. at ___.

509 Three other less famous cases do not materially affect the basic thrust of the historical narrative. (1) In the War of 1812, General Andrew Jackson convened a court-martial to try a Louisiana State Senator for having written a letter to the editor of a newspaper. See Lederman, Washington article, supra note __, 105 GEO. L.J. at ___ n. __. That court-martial resulted in a quick acquittal; it was not authorized by President Madison (to the contrary, Madison indicated doubts about the legitimacy of such trials, see id. at ___); and it was predicated on a very aggressive understanding of martial law, of the sort the Court in Milligan rejected. (2) In the First World War, the military tried a German agent, Lieutenant Lothar Witzke, who was apprehended after crossing the Mexican border in disguise with plans to conduct acts of sabotage in the United States. The government defended that prosecution on the ground that it came within the traditional exception for spying within enemy encampments, unprivileged by the laws of war. See id. at __. Notably, however, Attorney General Gregory originally opined that that trial would not be constitutional if the facts did not bring the case within that traditional exception. Id. (3) In the Colepaugh case—one that closely resembled the Quirin saboteurs case—a military commission tried two German agents for both a law-of-war offense and domestic-law offenses. In asking the Supreme Court not to review the convictions, however, the government specifically argued that the (alleged) law-of-war offense was sufficient to sustain the judgment, and that the Court did not need to consider the other counts. See supra note ___.
criticism; Justice Scalia even referred to it as “not this Court's finest hour.”510 As for the Lincoln trial, its constitutionality was a deeply contested question even as it was being conducted. It was questioned by members of Congress, members of Lincoln’s own cabinet, at least one member of the military commission itself, and much of the press sympathetic to the Union. An esteemed New York judge, noting “grave” constitutional doubts, went so far as to invite a grand jury to issue a “presentment” concerning the unlawfulness of the Lincoln commission.511 As early as 1867, that trial was under such a dark constitutional shadow that when Booth’s primary accomplice, John Surratt, was extradited to the United States several months after the Milligan decision, the government did not use a military commission, but instead tried him in the local Article III court (where a jury refused to convict him).512 Thus, even taken together, these two very unusual military trials hardly establish the sort of “systematic” and “unbroken” practice that is ordinarily thought adequate to “liquidate” the meaning or proper application of a constitutional provision.513

Nor is there a robust, pre-2001 history of Presidents and/or Attorney Generals approving of the constitutionality of such military tribunals. To be sure, Franklin Roosevelt and Francis Biddle approved of the trial of the Nazi saboteurs, and Roosevelt even expressed an interest (in internal correspondence) in having a military tribunal try the U.S. citizens among them for treason.514 But FDR was the exception, not the rule. President Madison hinted at doubts in the War of 1812 (although the constitutional question there was not directly at issue, by virtue of an absence of statutory authority; Madison overturned the military conviction of a U.S. citizen who had spied upon U.S. army camps on behalf of the British, directing that he be tried instead in state court or released).515 President Wilson and his Attorney General, Thomas Gregory, flatly rejected the constitutionality of proposed legislation (drafted by Assistant Attorney General Charles Warren) that would have authorized military courts to adjudicate a wide swath of conduct because of its impact on military objectives.516 And, of greatest importance here, Attorney General Speed eventually defended the Lincoln conspirators’ prosecutions only

511 See supra at ___, ___, ___, ___.
512 See infra at ___.
513 See, e.g., Powell v. McCormack, 395 U.S. 486, 546-47 (1969) (“That an unconstitutional action has been taken surely does not render that same action any less unconstitutional at a later date.”); Michael J. Glennon, The Use of Custom in Resolving Separation of Powers Disputes, 64 B.U. L. Rev. 109, 130-31 (1984) (explaining that the Court has usually credited political branch custom only where it has been exercised repeatedly, not merely on occasion).
514 See supra at ___.
515 See Lederman, Washington article, supra note __, 105 GEO. L.J. at ___.
516 See id. at ___.

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on the theory that they had been convicted of offenses against the international laws of
war. 517

That leaves the fascinating, and uncertain, example of Abraham Lincoln himself. It is true, of course, that Lincoln formally authorized, and participated in, Stanton and Holt’s elaborate system of military trials, including in many cases that did not allege violations of the law of war. His friends and colleagues, however, suggested that Lincoln had doubts about the constitutionality of at least some such trials, and in at least one case—involving the Coles County rioters—Lincoln appeared to follow the advice of Justice David Davis, who had advised him that a military trial would be unconstitutional and unlikely to survive judicial scrutiny: Lincoln directed that the prisoners be released or turned over to civilian authorities before the military trial commenced. 518 Perhaps most revealingly, when a group of Ohio Democrats actually called out Lincoln specifically on the question of the tribunals’ constitutionality, in the context of the Vallandigham case, Lincoln could offer no answer other than to mischaracterize the military commissions as a means of wartime incapacitation, rather than as criminal tribunals designed to assess guilt and impose punishment, which they plainly were. The paucity of Lincoln’s legal response, such as it was, spoke volumes about whether he had resolved that the military commissions were constitutionally defensible: he obscured the issue in order to avoid it. 519 Lincoln was not reticent about offering robust defenses of the constitutionality of many of his most controversial wartime actions, including the suspension of habeas, detention of dissidents, and emancipation. There were, however, rare cases in which Lincoln acted in full knowledge that what he was doing was unlawful, or least dubious. 520 It appears that his involvement in, and approval of, certain military tribunal trials, was one such case.

2. Congress

The Civil War Congress was, at best, deeply ambivalent about the War Department’s military commissions. The legislature never expressly authorized them and,

517 See supra at ___. As I’ve explained, Speed was probably wrong about whether the accused did, in fact, violate the law of war, or that they were convicted of any such offense; but the important point is that Speed’s opinion hinged, critically, on the idea that they had, in fact, violated the law of war. It is true, as the plurality in al Bahlul noted, that President Johnson personally approved military adjudication of the case of the Lincoln assassination defendants. See 840 F.3d at 766 (Kavanaugh, J., concurring). Johnson did so, however, based upon a conclusory, one-sentence opinion of Attorney General Speed; and there is no way of knowing whether Johnson, like Speed, thought the military trial was permissible only because the charges (allegedly) described offenses against the international laws of war.

518 See supra at ___.

519 See supra at ___.

520 See, e.g., CONG. GLOBE, 37th Cong., 2d Sess. 2383 (1862) (message from the President to the Senate and House, confessing that he had in one instance expended funds for the raising of troops “without any authority of law,” in order to ensure that “the Government was saved from overthrow”). For discussion of this uncharacteristic episode, see David J. Barron & Martin S. Lederman, The Commander in Chief at the Lowest Ebb—A Constitutional History, 121 HARV. L. REV. 941, 1001-03 (2008).
in the 1863 Habeas Act, Congress took steps to effectively prevent such commissions except in cases where civil courts were truly unavailable.\(^{521}\) On the other hand, Congress did little to ensure enforcement of that statute for two years as Holt and the War Department circumvented it via an interpretive sleight-of-hand;\(^{522}\) and in 1864 Congress passed a statute drafted by Holt that expressly assumed the commissions’ continued operation (albeit only after a chief sponsor reassured that it would not authorize any such trials).\(^{523}\) In 1865, many members of Congress inveighed against such trials, and complained about the Executive’s noncompliance with the 1863 Act. Only minutes before Lincoln’s second term began, the legislature—led by staunch supporters of the President, who were of the view that the blight of commissions would tarnish his legacy—came within a hair’s breath of proscribing military commissions altogether, with the House even refusing to approve a government-wide appropriations bill unless the anti-commission provision were included in it; on the other hand, however, the Senate would not accede to that legislation, at least not as an appropriations rider mere hours before Congress’s adjournment.\(^{524}\) Like President Lincoln, then, the Civil War Congress appeared to be deeply concerned about the constitutionality of the military commissions, but not concerned enough (or perhaps too concerned about practical or political ramifications) to take the steps necessary to bring them to a halt.

After the Civil War, Congress did not authorize the use of military tribunals for domestic-war offenses by persons who were not a part of, or employed by, the armed forces, with one possible, minor exception—a statute the Executive virtually never used except in the case of the 1942 saboteurs.\(^{525}\) Senator Chamberlain’s initiative in World

\(^{521}\) See supra at __.

\(^{522}\) See supra at __.

\(^{523}\) See supra at __.

\(^{524}\) See supra at ____.

\(^{525}\) As I explain in Lederman, Washington article, supra note __, 105 GEO. L.J. at ___, in its reorganization of the Articles of War in 1916, Congress reenacted a provision (re-designated as Article 81) that had long authorized military trials of persons who provided particular sorts of aid to the enemy. Although the better reading of that law, before the 1916 reenactment, was that it did not cover persons who were not within or connected with the armed forces, the Judge Advocate General at the time characterized it as covering any other persons, as well, and thus it might be fair to attribute that broader understanding to the 1916 Congress.

In that same 1916 re-enactment, Article 15 provided that “[t]he provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals.” Act of Aug. 29, 1916, ch. 418, § 3, 39 Stat. 619, 653. In the al Bahlul litigation, Judge Kavanaugh has suggested that enactment of Article 15 amounted to a legislative ratification of the Lincoln assassination trial, because Congress “was aware of” that “significant precedent[],” and “[b]y stating that [Article 15] did not ‘deprive’ military commissions of their traditional authority, Congress necessarily incorporated the Lincoln assassins precedent for conspiracy.” 767 F.3d at 70 (Kavanaugh, J., concurring in the judgment in part and dissenting in part). Judge Kavanaugh is undoubtedly right that the 1916 Congress was “aware of” the Lincoln case—who wasn’t? It was probably “aware of” the Milligan case, too, and perhaps even the military trial of a state senator for having sent a letter to a newspaper editor in the War of 1812, see supra
War I, which would have given military tribunals much broader authority to try war-related offenses, was stopped in its tracks as soon as the President and Attorney General opined that it was unconstitutional.

3. The Court

Finally, we come to the branch of the federal government whose authority would be usurped by the claimed military jurisdiction. That branch has certainly not acquiesced in its own disempowerment. The Supreme Court in *Milligan* turned aside most, if not quite all, of the constitutional justifications for the Lincoln assassination military tribunal. There were at least two contemporary opportunities for the courts to opine on the constitutionality of the Lincoln conspirators’ trial itself, but President Johnson foreclosed those possibilities on both occasions—first with his remarkable habeas suspension on the morning of Mary Surratt’s execution, and then again when he pardoned Mudd, Arnold and Spangler while their petitions were pending in the Supreme Court early in 1869.

The Court in *Quirin* did finally ratify Speed’s argument that military courts can adjudicate at least some offenses against the law of war. That Court thus affirmed the judgment of a single specification of a single charge in the saboteurs’ case—one that Chief Justice Stone thought clearly described a law-of-war violation. The *Quirin* Court specifically declined, however, to address the constitutionality of the other counts in the case—for alleged spying, aiding the enemy and conspiracy, all of which were not, in fact, offenses against the law of war—in part, apparently, because Stone recognized constitutional “difficulties” with military adjudication of claims that did not clearly allege law-of-war offenses. Therefore the Supreme Court has never resolved the question at hand. And, until the current *al Bahlul* case, neither had any other Article III court, either.

CONCLUSION

There are compelling reasons to think that history can, and should, powerfully inform our constitutional understandings of how authority is, or should be, distributed in wartime. Even so, the historical treatment of any constitutional question worth asking is likely to be messy, ambiguous, and multivalent. As Professor Fallon has written, history does not often yield easy-to-identify or pellucid answers to the hardest questions: “no simple, algorithmic formula dictates how pertinent kinds of history fit together to

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note ___—and plenty of other legally dubious military trials throughout history, as well. But surely the 1916 Congress, in clarifying that its conferral of courts-martial jurisdiction did not “deprive” other military tribunals of “jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such [tribunals],” did not mean to ratify, let alone to express a view on the constitutionality of, every single military trial that had ever occurred in the nation’s history.

526 Barron & Lederman, *supra* note ___, at 1099-1101; *but cf.* id. at 1099 (“[W]e do not mean to suggest that history is dispositive. . . . Past practice does not, in our view, freeze constitutional meaning. Even (and perhaps especially) as to the separation of powers, our constitutional tradition has always been much more tolerant of dynamism.”).
yield determinate conclusions in many cases that provoke constitutional controversy.”

Professor LaCroix, likewise, is surely right to caution of the danger of presuming “an artificial degree of unity and coherence within institutions, and from one action to another. Whose historical practice matters, and which moment encompasses the relevant distillation of that practice, are complex questions. Messiness, unspoken accommodation, and explicit disagreement abound.”

That is especially true when it comes to practices developed in the proverbial fog—and intense pressures and anxieties—of war. And it is true, in particular, with respect to the use of wartime military courts: The history I have recounted here does not run in a straight line, nor has there been a firm and unbroken, consensus understanding of constitutional limits within or among the branches. Although the narrative certainly tends to point in a particular direction—a direction quite different from the received wisdom—there are undoubtedly anomalies, and thus plenty of room for continued contestation.

The Lincoln assassination commission is the most momentous, and the most famous, of those historical anomalies: It is, indeed, “the highest-profile and most important U.S. military commission precedent in American history.” Its prominence in our national narrative, however, is hardly reason to accord it a special pride of place in establishing the constitutional limits of military justice, as some judges and the government would have it. To the contrary: The fact that Johnson, Stanton and Holt convened the tribunal at a moment of heightened public passions and anxiety, and for the conceded purpose of putting on a sort of show trial designed to smoke out the alleged nefarious schemes of the leaders of a just-vanquished foe, make it an especially poor place to look for measured constitutional judgment, or as reflecting a constitutional settlement of a more lasting, and more generally applicable, kind. The assassination trial, in other words, might be a singular example of the lesson that landmark cases make bad law.

It is no accident that “military men generally have hesitated to regard the occasion as a sound precedent or, indeed, as anything more than an indication of the intensity of popular feeling at the time.” For that is exactly what it was. And thus, until very recently, not only for “military men” but for lawyers and historians, too, to cite the Lincoln tribunal as constitutional authority would have been akin to invoking Korematsu, Dred Scott, or Buck v. Bell as authoritative precedent: Like those cases, the Lincoln assassination tribunal has long been firmly ensconced in in the constitutional “anticanon.”

527 Fallon, supra note __, 90 NOTRE DAME L. REV. at 1758.
528 LaCroix, supra note __, 126 HARV. L. REV. F. at 78.
529 al Bahlul, 767 F.3d at 68 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).
530 Wiener, supra note __, at 138.
Of course, there is nothing inherently illegitimate in an effort to transform once discredited constitutional ideas or examples into tomorrow’s orthodoxy. The burden, however, is on those who would resuscitate the Lincoln trial—and use it to justify a deviation from Article III norms in a very different historical context, and in a starkly different armed conflict—to offer compelling reasons why that singular proceeding should, all of a sudden, emerge from its well-deserved century and a half of constitutional exile.

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531 See Jack M. Balkin, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 12 (2011) (“Through acts of persuasion, norm contestation, and social movement activism, people can eventually move ideas and positions from off-the-wall to on-the-wall.”); see also id. at 68-70, 177-83.