No. 08-368

IN THE

Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,
Petitioner,

v.

COMMANDER DANIEL SPAGONE,
U.S.N., CONSOLIDATED NAVAL BRIG,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* CIVIL WAR HISTORIANS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICI CURIAE*

Amici Curiae are scholars who have studied and taught the history of the United States, our government, and our legal institutions in the Civil War era. Those studies persuade us that the questions presented here bear a striking resemblance to those decided over a century ago in *Ex parte Milligan*, 71 U.S. (4 Wall) 2 (1866), which held that legal residents of this country who planned terrorist activity could not be denied a jury trial in civilian courts so long as those courts were open. The historical context of the *Milligan* decision underscores its significance for this case.

SUMMARY OF ARGUMENT

Al Qaeda is not the first terrorist organization to threaten the United States, nor is Petitioner Al-Marri the first lawful U.S. resident to be arrested and held in military custody as an alleged member of such an organization. In October of 1864, in the midst of the Civil War, military authorities arrested Lambdin Milligan at his home in Huntington, Indiana. Within two months, a military tribunal convicted Milligan, along with several others, of belonging to a "secret military organization" that engaged in and was planning acts of belligerency

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* All parties consent to the filing of this *Amicus Curiae* brief. Pursuant to Rule 37.6, the *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

against the United States.[1] Milligan sued in federal court to challenge the legality of his military detention. In December 1866, this Court unanimously rejected the Government's claim that the army could detain and try Milligan and his co-petitioners.

The parallels between *Milligan* and this case include both the illegal conduct charged and the statutory framework that applied to each case. Moreover, just as Al-Marri's petition has attracted support from accomplished advocates and distinguished *amici curiae* from the legal, military, and academic worlds, Milligan received critical aid from unlikely allies. Indeed, some who were instrumental to Lambdin Milligan's triumph were also vigorous proponents of an aggressive war policy. Then, as now, insistence on the rule of law was entirely consistent with a stern commitment to national security.

ARGUMENT

I. Factual And Legal Parallels Between *Ex Parte Milligan* And This Case

The autumn of 1864 was a tense time in Indiana. Many in the state had emigrated from Kentucky, Virginia, Tennessee, and the Carolinas, and were "Southern in kinship, sympathies, and

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[1] *See* Brief for United States at 2, *Ex parte Milligan*, 71 U.S. 2 (1866).

political ideas."[2] The state's largely agrarian economy depended heavily on the Mississippi River to transport its goods to market. Like neighboring Ohio and Illinois, Indiana was home to a large number of Confederate sympathizers known as "Copperheads" or "Butternuts."[3] In 1862, Democrats running on a peace platform controlled the state legislature.[4] Local Democratic parties adopted "peace resolutions,"[5] while some Democratic politicians openly discussed establishing a "Northwest Confederacy" that would span Indiana, Ohio, Illinois, Missouri, and Kentucky.[6] More troubling to Union officials, secretive Copperhead groups might come to the aid of Confederate forces in the event of a military invasion by the South. To

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[2] James A. Woodburn, *Party Politics in Indiana During the Civil War*, *in* Annual Report of the American Historical Association for the Year 1902, Vol. I at 226 (1903) (hereafter "Woodburn") (calling Indiana the most "pro-slavery" of the Northern states).

[3] *See generally* Jennifer L. Weber, Copperheads: The Rise and Fall of Lincoln's Opponents in the North (2006) (hereafter "Weber"); Frank L. Klement, Copperheads in the Middle West (1960); Wood Gray, The Hidden Civil War: The Story of the Copperheads (1942).

[4] Woodburn at 251.

[5] James M. McPherson, Battle Cry of Freedom 762 (1988) (hereafter "McPherson").

[6] Woodburn at 239. *See generally* Benn Pitman, The Trials for Treason at Indianapolis: Disclosing the Plans for Establishing a North-Western Confederacy, Official Record of the Trials before the Military Commission convened by Special Order No. 129, Headquarters District of Indiana (1865) (hereinafter "O.R.").

secure the state, the Lincoln Administration organized it as a military district in March of 1863.

In July 1863, Confederate cavalry commanded by John Morgan stampeded across southern Indiana and into Ohio, looting towns and spreading terror.[7] By the following summer, Morgan's cavalry was raiding towns in neighboring Kentucky, threatening more raids into Indiana.[8] In this climate of fear, the commander of the District of Indiana, General Henry B. Carrington, launched the investigation that led to the arrest of Lambdin Milligan and several others.

A. The Sons Of Liberty Posed Threats To The Nation Comparable To Those Posed By Al-Qaeda

1. The Case Against Lambdin Milligan

General Carrington feared that if Confederate forces invaded Indiana, Copperhead groups would lead thousands of Indianans into their ranks or would assist the Confederates through sabotage and espionage.[9] He quickly focused on the Order of the Sons of Liberty, a secret society divided into "temples" or "lodges" that employed secret passwords

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[7] *See* Edison H. Thomas, John Hunt Morgan and His Raiders 77-82 (1985).

[8] *Id.* at 95-97.

[9] *See* Official Report of the Judge Advocate General on the Sons of Liberty (Oct. 8, 1864), *reprinted in* O.R. at 323-339 (hereafter "JAG Report").

and elaborate rituals.[10] In Missouri, the Order had joined Confederate guerillas to cause significant damage and tie up tens of thousands of Union forces who were desperately needed elsewhere.[11] Historical estimates put the group's Indiana membership at around 18,000 in 1864.[12] In his report to the Secretary of War, the Judge Advocate General for the tribunal that tried Milligan estimated that the Order numbered 500,000 nationwide, with as many as 75,000 in Indiana alone.[13] Lambdin Milligan was one of four "Major Generals" in the Indiana chapter.[14]

Employing a network of spies, General Carrington unearthed a dangerous plot. Leaders of the Sons of Liberty had met with Confederate agents in Canada to plan operations in the Northwestern states.[15] They proposed that Confederate soldiers from Canada join Sons of Liberty in Chicago during the 1864 Democratic National Convention and

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[10] *See* William Dudley Foulke, Life of Oliver P. Morton 387-90 (1899) (hereafter "Foulke"); *see also* JAG Report, O.R. at 323-26. The group went by a number of names, including the Knights of the Golden Circle and the Order of American Knights, but by the time of Milligan's arrest in 1864, they called themselves the Sons of Liberty. *Id.* at 323-24.

[11] McPherson at 274.

[12] Weber at 148.

[13] JAG Report, O.R. at 326.

[14] Testimony of Felix Stidger, O.R. at 112, 118; Testimony of Horace Heffren, O.R. at 125.

[15] *See* McPherson at 216

attack Camp Douglas, which held over 5000 Confederate prisoners. Together with the freed prisoners, they could then seize the nearby federal arsenal and march to Kentucky and Missouri to join Confederate forces.[16] Simultaneously, other Sons of Liberty chapters were to attack Union prison camps in Indiana and Ohio, releasing Confederate prisoners and seizing arsenals before moving South. This scheme foundered for several reasons, including shifts in the date of the Democratic Convention, the intercession of federal authorities, and an apparent lack of will on the part of some within the Order.[17]

Historians debate whether the plan had a realistic prospect of success,[18] but the leaders of the Sons of Liberty, the Confederacy, and the Union forces took it seriously at the time. The Confederate government distributed at least a half a million dollars to the Order's leaders to finance the operation.[19] An Indiana publisher named Harrison H. Dodd – the "Grand Commander" of the Indiana Sons of Liberty – received at least $100,000 to buy weapons and plan an attack on Camp Morton in

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[16] Weber at 149-51, 166; Foulke at 413.

[17] Weber at 149, 166; Foulke at 413-14.

[18] The same might be said about the government's allegations against Al-Marri as set forth in the Rapp Declaration, particularly the supposed plan to "hack into the main-frame computers of banks with the objective of wreaking havoc on U.S. banking records and thus damaging the country's economy." Pet App. 472a.

[19] Foulke at 401-02; Weber at 166. This would be equivalent to more than $10 million in current dollars.

Indiana.[20] Acting on an informant's tip, General Carrington ordered a raid on Dodd's print shop on August 20, 1864.[21] Soldiers found a large cache of recently purchased firearms and ammunition, a Sons of Liberty seal, a membership list, and incriminating correspondence with prominent figures in the state, including Lambdin Milligan.[22] Armed with this evidence and reports from various informants, military authorities arrested Dodd and speedily convened a military tribunal to try him in Indianapolis on September 17, 1864. While the Dodd hearing proceeded before a commission of eight army officers, troops arrested five more leaders of the Indiana Sons of Liberty, including Milligan.[23] Two days later, Dodd escaped from custody and fled to Canada. The remaining five were tried together by the same military commission – augmented by four additional officers – that had been convened to decide Dodd's case.[24]

The defendants faced five charges: (1) conspiracy against the Government of the United States, (2) affording aid and comfort to rebels, (3) inciting insurrection, (4) disloyal practices, and (5)

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[20] O.R. at 112; Weber at 120, 149, 166.

[21] O.R. at 119; Foulke at 489.

[22] Foulke at 489; O.R. at 88, 119.

[23] O.R. at 10. The four others were William Bowles, Horace Heffren, Andrew Humphreys and Stephen Horsey.

[24] Foulke at 419-420, 424. Dodd escaped on October 7, 1864. *Id.*; *see also* O.R. at 50.

violating the Laws of War.[25] Each charge included "specifications," such as the following:

> *Charge First, Specification Fourth*:
>
> [That they] did conspire and agree to seize by force the United States and State Arsenals at Indianapolis, Indiana, Columbus, Ohio, and Springfield, Illinois, to release by force the rebel prisoners held . . . at Camp Douglas, Illinois, Camp Morton, Indiana, and Camp Chase, Ohio, and the Depot of Prisoners of War on Johnson's Island; and arm those prisoners with the arms seized, and . . . with all the forces they were able to raise in the secret order above-named, were, in conjunction with the rebel prisoners thus released and armed, to march into Kentucky and Missouri, and co-operate with the rebel forces to be sent . . . against the Government and authorities of the United States.
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> *Charge Second, Specification First:*
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> [That they] did design and plot to communicate with the enemies of the United States, and did communicate with the enemies of the United States, with the intent that they should, in large force, invade the territory of the United States . . . with the further intent, that the so-called secret, unlawful society, or order, aforesaid, should then and there co-

[25] O.R. at 73-77.

> operate with the said armed forces of the said rebellion against the authority of the United States.
>
> *Charge Fifth, Specification First:*
>
> [That they] did, while the Government of the United States was carrying on a war . . .[and] while pretending to be peaceable loyal citizens of the United States, . . . attempt to introduce said enemies of the United States in to the loyal States . . . [to] destroy the authority of the United States.[26]

During the nearly six week trial, evidence showed that the Sons of Liberty divided the state into four military districts, with Lambdin Milligan the "Major General" of the Northeastern district.[27] As part of the Order's "military affairs committee," Milligan was to assemble a military organizational plan.[28] An informant, Felix Stidger, described Dodd's plot to attack Camp Morton, adding that that the group was experimenting with "Greek fire," a flammable liquid that could be placed in grenade-like devices to start fires that were difficult to extinguish. When connected to a "clock machine," the devices could be "put into a box or trunk, and without exciting any suspicion, be left on board a

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[26] O.R. at 74-77.

[27] Testimony of Felix Stidger, O.R. at 112, 118; Testimony of Horace Heffren, O.R. at 125.

[28] Testimony of Felix Stidger, O.R. at 111, 117.

steamer, or in a building, which would be set on fire at any time at which the clock might be set."[29] Stidger testified that the devices had been used to destroy two Union boats in Kentucky and that the group intended to use them against other Union targets.[30]

Milligan's military trial began in Indianapolis within three weeks of his arrest. He enjoyed unfettered access to counsel throughout his detention. The trial was open to the public, with transcripts published daily in the local paper.[31] In addition to raising jurisdictional objections to the proceeding, defense counsel conducted lengthy cross-examinations of government witnesses and called rebuttal and character witnesses of their own. (By contrast, Al-Marri was transferred into military custody on the eve of a suppression hearing and less than a month before trial in his criminal case – after already spending eighteen months in jail – and was held incommunicado for the next sixteen months. Since being placed in military custody in 2003, Al Marri has been held in solitary confinement and has not been afforded even a military hearing. The only evidence publicly presented against him is a partially redacted, hearsay declaration that was released over the Government's objection.)

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[29] *Id.* at 108, 118.

[30] *Id.* According to Stidger, Jefferson Davis had promised to pay the Order "ten per cent for all the property destroyed, taking the estimate, as given in the Northern papers."

[31] *See Indianapolis Daily Journal*, Oct. 22, 1864-Dec. 1, 1864.

The military tribunal in 1864 convicted all of the defendants and sentenced all but one to death by hanging.[32] Claiming the right to be tried by a jury in civilian courts, Milligan and two others petitioned for habeas relief from the Circuit Court in Indianapolis, which referred the case to the Supreme Court. This Court ruled in the petitioners' favor on April 3, 1866. In December of 1866, the Court released two opinions: a majority opinion endorsed by five justices and a concurring opinion for the other four.

Writing for the Court, Justice David Davis did not question the gravity of the charges against Milligan, noting that he was accused of "seek[ing] by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war, and thus overthrow the power of the United States." 71 U.S. at 130. Davis conceded that "[c]onspiracies like these, at such a juncture, are extremely perilous; and those concerned in them are dangerous enemies to their country, and should receive the heaviest penalties of the law." *Id.* He explained that if Milligan's "guilt had been ascertained by an established court and impartial jury, he deserved severe punishment." *Id.* But because the courts were open and functioning in

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[32] One defendant, Horace Heffren, turned state's evidence halfway through the trial in exchange for having the charges against him dropped. Foulke at 425. Another was sentenced to hard labor but was released in January of 1865. Only Milligan, William Bowles, and Stephen Horsey petitioned in federal court for habeas relief. *Id.* at 427.

Indiana in 1864, the Court held that he could not be detained or tried by the military. Davis wrote that this conclusion was mandated both by the Habeas Corpus Act of 1863, and by the guarantee of a criminal jury trial in the Constitution. *Id.* at 122 (if Milligan had been tried in a civil court, "the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended").[33] Davis warned that only "[b]y the protection of the law, human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people." *Id.* at 119.

The concurring justices agreed that Congress had not provided for the military detention and trial of Milligan and his co-petitioners, but believed that "when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals." *Id.* at 140 (Chase, C.J., concurring).

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[33] That Milligan was a U.S. citizen – not a legal resident like Al-Marri – provides no basis for distinguishing the Court's holding from this case. The Court relied on the due process rights afforded defendants under the Fifth and Sixth Amendments, which apply with equal force to lawful resident aliens like al-Marri. *See, e.g.*, *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350 (2006)

2. *The Factual Parallels Between The Two Cases Reinforce The Application Of* Ex Parte Milligan *Here*

Although scholars disagree over the sufficiency of the trial evidence, the *Milligan* petitioners plainly were charged with activities as threatening to the nation's security as anything alleged against Al-Marri: violent insurrection, plans to attack federal facilities, and assistance to foreign belligerents. That some still debate Milligan's guilt is due in no small part to the irregular nature of the process by which he was tried. Had the Milligan petitioners received a full jury trial, as this Court held they should have been, history's verdict would likely be clearer.[34]

Ascertaining the truth of the Government's allegations against Al-Marri is no easier despite his many years in prison. The only public evidence of Al-Marri's alleged activities appears in the hearsay declaration of intelligence official Jeffrey N. Rapp, which asserts that Al-Marri is a "sleeper agent" of al

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[34] Despite questions about the sufficiency of the evidence against Milligan, the case against William Bowles – whose habeas petition was also granted by this Court – was considerably stronger. In a 1996 speech, then Chief Justice William Rehnquist opined that the evidence against Bowles "would very likely have been sufficient to convict him in a civil court." *See* William Rehnquist, *Civil Liberty and the Civil War; the Indianapolis Treason Trials*, 72 Ind. L.J. 927, 933-34 (1997) (hereafter "Rehnquist") (reprinting remarks delivered on October 28, 1996 to the Indiana School of Law).

Qaeda.[35] After training with al Qaeda, according to Rapp, Al-Marri was instructed to act as a "point of contact for al Qaeda operatives arriving in the United States" and "to explore possibilities for hacking into the main-frame computers of banks with the objective of wreaking havoc on U.S. banking records."[36] The Declaration also states that Al-Marri had suspicious and possibly incriminating material on his laptop computer.[37]

But for advances in technology, Al-Marri's alleged activities are little different from those charged against Milligan and his co-defendants. Both were accused of being members of secretive groups that were organized in a paramilitary structure to engage in violent acts against the United States. Al-Marri is accused of being a "sleeper agent," while Milligan and his co-petitioners supposedly "pretend[ed] to be peaceable, loyal citizens" while seeking to "introduce said enemies of the United States into the loyal States."[38] Al-Marri allegedly plotted cyber attacks and researched dangerous chemicals, while Milligan and his co-petitioners were accused of planning armed attacks and experimenting with Greek fire.

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[35] Declaration of Mr. Jeffrey N. Rapp, Director, Joint Intelligence Task Force for Combating Terrorism (Sept. 9. 2004) (declassified version), Pet. App. at 468a, 472a, 483a.

[36] *Id.* at 474a.

[37] *Id.* at 475a-476a.

[38] O.R. at 77.

There is no historical basis for the government's attempt to argue that Lambdin Milligan, unlike Al-Marri, "did not associate himself with the enemy forces."[39] After the attacks of September 11, 2001, Congress authorized the president to use force against "those nations, organizations or persons" responsible, which included both the Taliban government and al Qaeda; during the Civil War, Congress authorized the president to use force to combat "unlawful obstructions, combinations, or assemblages of persons, or rebellion," a description which certainly encompassed the Sons of Liberty.[40] Throughout the war, Lincoln *did* use force against the Sons of Liberty and similar groups, particularly in border states.[41] Although Milligan was not a member of the Confederate military, he – like Al-Marri – was accused of belonging to an "enemy" organization against which the president could use military force.

Moreover, Milligan and his co-petitioners *were* accused of "associating themselves" with the Confederacy,[42] and of "affording aid and comfort to

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[39] Petition for Rehearing and Rehearing En Banc at 13 (June 27, 2007), *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007) (No. 06-7427).

[40] Act of July 29, 1861, ch. 25, 12 Stat. 279. For comparison of force authorization statutes see Part I.B, *infra*.

[41] McPherson at 274.

[42] *See* Curtis A. Bradley, *The Story of Ex Parte Milligan: Military Trials, Enemy Combatants, and Congressional Authorization in* Presidential Power Stories, at 25 (2008) ("The petitioners in Milligan were in fact alleged to be 'associated

Rebels against the authority of the United States." According to one specification, Milligan and his co-petitioners actively worked to induce a Confederate invasion and intended to cooperate with the invaders.[43] At trial, evidence showed that Dodd's plot to take Camp Morton was financed by large sums of Confederate money and that both Dodd and William Bowles had significant associations with Confederate agents.[44]

The similarity between the allegations against Milligan and those against Al-Marri is underscored by the Fourth Circuit's various attempts to define "enemy combatant." Though a five-judge majority of that court agreed that Al-Marri was an "enemy combatant," they could not agree on what that term meant. In three separate opinions, those five judges offered alternative definitions. What all three definitions have in common, however, is that they plainly would include Lambdin Milligan and his co-petitioners, who stood accused of conduct every bit as "war-like" and "belligerent" as anything of which Al-Marri stands accused. These include:

- An enemy combatant "attempts or engages in belligerent acts against the United States, either domestically or in a foreign combat zone

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with' enemy armed forces, and they were specifically charged with (and convicted by a military commission of) violating the laws of war.").

[43] O.R. at 75.

[44] O.R. at 114.

. . . on behalf of an enemy force." Pet App. 163a-164a (Williams, C.J., joined by Duncan, J.), or

- An enemy combatant is "a member of . . . an organization or nation against whom Congress has declared war or authorized the use of military force, and . . . knowingly plans or engages in conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of the enemy nation or organization." Pet. App. 253a-254a (Wilkinson, J.), or
- Al-Marri is an "enemy combatant" because he is allegedly associated with al Qaeda and had the "purpose of committing hostile and war-like acts." Pet. App. 90a (Traxler, J., joined by Niemeyer, J.).

This parallel between the two cases is not lessened by the statement in *Milligan* that the petitioners were "in nowise connected with the military service," 71 U.S. at 121-22, or this Court's later characterization of Lambdin Milligan as a "non-belligerent." *Ex parte Quirin*, 317 U.S. 1, 45 (1942). In each instance, the Court did not assert that the alleged conduct of Milligan and the Sons of Liberty was neither war-like nor belligerent. Rather, the Court was noting that because Milligan was not a member of the military of an enemy nation, he was not a combatant under traditional law of war principles. The same is true of Al-Marri, who has no alleged association with an enemy nation. The alleged actions of both, however, fall

within the definitions of enemy combatant offered by the government and the judges of the court below. Wherever the line is drawn between combatants and civilians, Al-Marri and Milligan fall on the same side of that line.

B. The Statutes That Framed *Milligan* Parallel The Statutes That Frame This Case

Because Congress was not in session during the first three months of the Civil War, President Lincoln took several military steps unilaterally, including calling up troops and ordering a blockade of Southern ports.[45] When Congress convened in July 1861, it ratified Lincoln's actions[46] and approved a broad grant of authority to use military force to put down the rebellion. In the Act of July 29,[47] styled "An Act to provide for the Suppression of the Rebellion against the Resistance to the Laws of the United States," Congress provided that:

> . . . whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President of the United States, to enforce, by

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[45] *See* Proclamation Calling Militia and Convening Congress (April 15, 1861), *reprinted in* 4 The Collected Works of Abraham Lincoln 331-32 (1953)

[46] Act of August 6, 1861, ch. 63, 12 Stat. 326.

[47] Act of July 29, 1861, ch. 25, 12 Stat. 279.

> the ordinary course of judicial proceedings, the laws of the United States . . . it shall be lawful for the President of the United States to employ such parts of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States, or to suppress such rebellion . . . .

Like the Authorization for Use of Military Force[48] passed by Congress after the September 11, 2001 attacks (the "AUMF"), the 1861 Act was not a traditional declaration of war, but rather an authorization of military force against a broad class of persons who threatened rebellion or disruption of the rule of law, a category that included Milligan and the Sons of Liberty. But, also like the current AUMF, Congress did not unleash military power across the nation or provide for a new system of justice in areas where regular legal institutions were unimpaired.[49]

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[48] Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001)

[49] Former Senate Majority Leader Tom Daschle, who played a key role in negotiating the AUMF, has written the following about that negotiation:

> Literally minutes before the Senate cast its vote [on the AUMF], the administration sought to add the words 'in the United States and' after 'appropriate force' in the agreed-upon text. This last minute change would have given the president broad authority to exercise expansive powers not just overseas – where we all understood he wanted the authority to act – but right

In both crises, Congress adopted later legislation that defined the president's power to detain persons found in parts of the United States where the courts were open for regular business. For Milligan, the relevant statute was the Habeas Corpus Act of 1863.[50] After considering its response to Lincoln's unilateral suspension of the writ, Congress enacted a law that allowed the president to suspend habeas corpus, but with several limitations.[51] Sections 2 and 3 of that Act directed federal courts to discharge any military prisoners – other than prisoners of war – who were held in states where the "administration of the law continued unimpaired" and who were not indicted in a timely fashion by a grand jury. All nine Justices in *Ex parte Milligan* held that, under the Habeas Corpus Act, Milligan and his co-petitioners were

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> here in the United States, potentially against American citizens. I could see no justification for Congress to accede to this extraordinary request for additional authority. I refused.

Tom Daschle, Editorial, *Power We Didn't Grant*, Wash. Post, Dec. 23, 2005, at A21.

[50] Act of March 3, 1863, ch. 81, 12 Stat. 755. For discussion of legislative history of the Act, see Charles Fairman, History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-1868, Part One at 185-87 (1971) (hereafter "Fairman").

[51] *See* David J. Barron & Martin S. Lederman, *The Commander-in-Chief at the Lowest Ebb: A Constitutional History*, 121 Harv. L. Rev. 941, 1005-07 (2008); Paul Finkelman, *Limiting Rights in Times of Crisis: Our Civil War Experience – A History for Post 9/11 America*, 2 Cardozo Pub. L. Pol'y & Ethics 25, 31-41 (2003)

entitled to discharge from military custody. In his concurring opinion, Chief Justice Chase observed that they came "within the precise letter and intent" of this statute. 71 U.S. at 134.

In this case, too, a later congressional enactment is directly on point. Shortly after approving the AUMF, Congress turned to what became known as the USA PATRIOT Act ("Patriot Act").[52] The purpose of the legislation was to "Provide Appropriate Tools Required to Intercept and Obstruct Terrorism" within the United States. According to numerous published reports, the Executive Branch initially sought a provision that would allow for the indefinite detention of "terrorist aliens" found within the United States.[53] That provision was rejected in the final version of the Patriot Act.[54] As with the Habeas Corpus Act in

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[52] Pub. L. No. 107-56, 115 Stat. 272 (2001)

[53] *See* Neil A. Lewis & Philip Shenon, *Senate Democrat Opposes White House's Antiterrorism Plan and Proposes Alternative*, N.Y. Times, Sept. 20, 2001 ("[I]f we change from 24 to 48 hours before deciding whether to charge someone, well, I can understand that," Mr. Leahy said. "But I don't think we need to talk about indefinite detention."); Robin Toner, *Bush Law Enforcement Plan Troubles Both Right and Left,* N.Y. Times, Sept. 28, 2001 ("Senator Arlen Specter, Republican of Pennsylvania, is worried about the administration's proposal to allow the indefinite detention of immigrants if they are deemed to be threats to national security. Senator Edward M. Kennedy, Democrat of Massachusetts, shares those objections.").

[54] Neil A. Lewis & Robert Pear, *Negotiators Back Scaled-Down Bill to Battle Terror*, N.Y. Times, Oct. 2, 2001 ("[T]he compromise bill . . . omits or scales back some of the measures

1863, Congress denied the president some of the powers he sought. In the final bill, Section 412(a) allows for extended, but not unlimited, detention of aliens suspected of engaging in terrorist activity or affiliating with a terrorist organization.[55] Under that Act, "terrorist aliens" may be held without charges for up to seven days. At that time, either criminal or removal proceedings must commence.[56] This provision applies to resident aliens like Al-Marri, who are suspected of being terrorists. Like Lambdin Milligan, Al-Marri fits "within the precise letter and intent" of a statute enacted after a generally worded authorization of military force. In both instances, the later limitation controls the procedures that apply to the individual detained.

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the Bush administration sought, notably the authority to detain immigrants suspected of terrorism indefinitely without charges. . . . The proposal for indefinite detention of immigrant suspects engendered the greatest opposition from civil libertarians both inside and outside of Congress."); Robin Toner & Neil A. Lewis, *Bill Greatly Expanding Surveillance Power in Terrorism Fight Clears Senate*, N.Y. Times, Oct. 12, 2001 ("[The Senate compromise bill] would also strengthen the authorities' ability to detain terrorism suspects, although it would not provide the indefinite detention the administration originally sought.").

[55] 8 U.S.C. §1226a(a)(1), (3).

[56] 8 U.S.C. §1226a(a)(5).

II. The Individuals Who Vindicated Lambdin Milligan's Rights Vigorously Supported An Aggressive War Policy

Many who defended Milligan's legal rights as a U.S. resident despised his subversive activities. Those individuals – especially future president James A. Garfield and Justice Davis – illustrated that a commitment to the rule of law is entirely consistent with a stern defense of the nation.[57]

A. The Role Of Future President James A. Garfield

When Milligan's case reached the Supreme Court in March of 1866, his legal team was ideologically diverse. Jeremiah Black, his principal counsel, was a Pennsylvania Democrat who served

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[57] Several prominent military officials – including Brigadier General Henry B. Carrington, and his commanding officer, General Samuel Heintzelman, the commander of the Department of Ohio – thought Milligan and the others should be tried in civilian court. *See* Foulke at 419; Fairman at 195-96 n.54. Though he doggedly pursued the Sons of Liberty, Carrington saw his role as gathering sufficient evidence to indict them in Federal Court and resisted intense pressure from Indiana's Governor Oliver Morton to use the military to arrest and try the Order's leaders. He wrote that he "believ[ed] that the Federal Courts, then open, backed by Military Authority, could more wisely adjudicate the case, and with less political excitement." Fairman at 196-196 n.54. Only after both Carrington and Heintzelman were removed from command were Milligan and the others arrested and tried by military commission. Gilbert Tredway, Democratic Opposition to the Lincoln Administration in Indiana 222 (1973).

as Attorney General and Secretary of State under President James Buchanan.[58] David Dudley Field was a New York Republican and the brother of then-Justice Stephen J. Field, a Lincoln appointee who would join Justice Davis' opinion for the Court. The most notable of Milligan's advocates, however, was Republican Congressmen James A. Garfield of Ohio, a strident advocate of an aggressive war policy throughout the Civil War.

An ardent abolitionist, Garfield was an Ohio state senator when hostilities began in 1861. After volunteering for military service, he won command of the 42nd Ohio Volunteer Infantry. Garfield distinguished himself in combat in Kentucky, rising to the rank of Colonel and then Major General, seeing extensive fighting in Kentucky and Tennessee. In 1862, while still in the army, he was elected to represent a staunchly Republican district in northeastern Ohio.[59] Garfield expected the war to be over by the time he would take office in December 1863, but the war was then still raging. He nearly resigned his seat so he could continue on the battlefield, but President Lincoln advised him that

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[58] As adviser to President Buchanan, Black had publicly denied the constitutionality of secession and urged the defense of Fort Sumter. For insight into Black's views of the War, see Speech of Honorable Jeremiah S. Black at the Democratic Mass Convention, in Lancaster city (Sept. 17, 1863), *available at* http://www.accesspadr.org:2005/cdm4/document.php ?CISOROOT=/sstlp-cw&CISOPTR=142&REC=8.

[59] *See* Allan Peskin, Garfield: A Biography 146 (1978) (hereafter "Peskin").

he needed pro-administration legislators more than he needed generals.[60] Garfield resigned his military commission and moved to Washington.

In Congress, Garfield joined the House Military Affairs Committee and established a reputation as a militant Republican.[61] Garfield later told a friend, "I have never been anything else but a radical on all these questions of Freedom and Slavery, rebellion and the war."[62] According to his biographer, Garfield "had only contempt for those who advocated a negotiated peace" and "insisted on relentless prosecution of the war to total victory." He urged aggressive measures against the South, including the confiscation and redistribution of Southern property and the execution of Confederate leaders. Garfield warned in a speech that "not by smiles, but by thunderous volleys must the rebellion be met, and by such means alone." He concluded that "the South must be beaten to its knees, and to ensure its eternal submission, the twin props of the Rebellion – slavery and landed estates – must be abolished."[63] In another controversial speech, Garfield singled out two Democratic colleagues, by name, and called them traitors.[64] He publicly flirted with the idea of supporting a more militant

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[60] *Id.* at 219.

[61] *Id.* at 228-29.

[62] *Id.* at 232.

[63] *Id.* at 233.

[64] *Id.*

Republican challenger to Lincoln in the 1864 election.[65]

Despite his pro-war views, Garfield expressed disquiet over the use of military tribunals in the loyal states of the North.[66] Because of that stand, he was approached to argue Milligan's case.[67] Though Garfield had only contempt for people like Milligan and his co-petitioners, he agreed that they were entitled to a jury trial. He accepted the challenge as a matter of conscience, without compensation.[68]

Garfield argued that the president's power to prosecute the war derived from Congressional authorization and was limited by legislation. "In sixteen carefully considered laws," he told the Court, "the national legislature undertook to provide for every contingency, and arm the executive at every

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[65] *Id.* at 237.

[66] Garfield was not alone among militant Republicans in questioning the use of military commissions in the loyal states. His views were echoed by an editorial in the staunchly Republican *Indianapolis Daily Journal* published just three days after the highly-publicized raid on Harrison Dodd's print shop. *See* Editorial, The Indianapolis Daily Journal, Aug. 23, 1864, *reprinted in* Elisheva R. Coleman, *Call it Peace or Call it Treason: The Milligan Case and the Meaning of Loyalty in the Civil War*, at 39 (2005) (thesis, Princeton University), *available at* http://web.princeton.edu /sites/jmadison/awards/2005-Coleman_Thesis.pdf.

[67] Peskin at 270-71; *See also* Fairman at 204 (describing Garfield's performance as "pertinent, persuasive, and candid").

[68] Peskin at 271; Fairman at 596.

point with the solemn sanction of law."[69] He added that "[t]hroughout the eleven rebellious States, [Congress] clothed the military department with supreme power and authority," but in the loyal states, it gave the military significant but not unfettered powers.[70] Garfield insisted that despite "all these capacious powers . . . conferred on the military department . . . there is no law on the statute book, in which the tribunal that tried the petitioner can find the least recognition."[71]

As Garfield made this argument, he was also supporting legislation to authorize the use of military tribunals in the formerly Confederate States.[72] He insisted that Congress "must lay the heavy hand of the military authority upon these rebel communities, and hold them in its grasp" in order to establish "law and peace where anarchy and violence now reign."[73] Garfield explained that the bill was "not a proposition to commit the liberties of the Republic into the hands of the military," but rather "commanding the Army to return to its work of putting down the rebellion." That Garfield could argue so strenuously for Milligan's right to a jury trial while supporting military commissions in the occupied South underscores a key aspect of the

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[69] 71 U.S. at 97.

[70] *Id.* at 99.

[71] *Id.* at 100.

[72] *See* Act to Provide for the More Efficient Government of Rebel States, ch. 153, 14 Stat. 428 (1867).

[73] Fairman at 596.

Milligan ruling. Military commissions, for Garfield and for this Court, were appropriate in an occupied, formerly belligerent state that refused to enforce the law, but not in a loyal state with free and functioning courts.[74]

B. The Role Of Justice David Davis

Of the nine Justices who ruled unanimously in favor of Milligan and his co-petitioners, five were appointed by President Lincoln.[75] Justice David Davis, a Republican and longtime friend of President Lincoln, drafted the more strongly worded of the two opinions, and the one that found that Milligan's discharge was compelled by the Constitution as well as by statute. Those joining the Court opinion included Justice Field (a Lincoln-appointee) and Justice Robert C. Grier, who wrote the majority opinion in *The Prize Cases*, 67 U.S. (2 Black) 635 (1862), which upheld Lincoln's action in ordering the Southern blockade without prior congressional authorization. The concurring opinion in *Milligan*, which rejected the Government's claimed detention authority on purely statutory grounds, was prepared

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[74] Justice Davis, author of the majority opinion in *Milligan*, emphasized this distinction: "Not a word is said in the opinion about Reconstruction and the power [to try people by military commission] is conceded in the insurrectionary States." Letter from Justice David Davis to Judge Julius Rockwell (Feb. 24, 1867), *reprinted in* Fairman at 232-34.

[75] Chief Justice Salmon P. Chase, Justice David Davis, Justice Noah H. Swayne, Justice Stephen J. Field, and Justice Samuel F. Miller. For a concise description of the entire *Milligan* Court, see Rehnquist at 6.

by Chief Justice Salmon P. Chase, an Ohio Republican and staunch abolitionist who served as Lincoln's Treasury Secretary and was a friend and mentor to Garfield.[76]

Justice Davis' pivotal role in the case included ensuring that Milligan's claim actually reached the Court. With Indiana District Judge David McDonald, Davis (as circuit justice) initially heard Milligan's habeas claim.[77] Both judges believed strongly in the merits of Milligan's petition, but knew that the case would automatically be referred to the Supreme Court only if they announced a split decision.[78] They therefore feigned disagreement and certified their supposed split decision to the Supreme Court. In order to prevent the case from being mooted by the petitioners' pending executions, Davis and McDonald together wrote a lengthy letter to President Andrew Johnson, asking that he stay the scheduled executions pending the outcome of the case.[79] Davis also visited Indiana Governor Oliver Morton to seek his support for the effort to stay Milligan's execution.[80] His efforts were successful. The Supreme Court heard oral arguments two

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[76] *See* Peskin at 154-57.

[77] Fairman at 197.

[78] Fairman at 200.

[79] Letter from Justice David Davis and Judge David McDonald to President Andrew Johnson (May 11, 1865), *reprinted in* Fairman at 198-99.

[80] Foulke at 428.

months later, giving the case priority over everything else on its docket.[81]

Justice Davis' central role gains resonance from his close relationship with President Lincoln. William Herndon, Lincoln's law partner, wrote that of Lincoln's many Illinois friends, the "oldest and most zealous and effective was David Davis. . . . It is not extravagance, taking their long association together in mind, to say that Davis had done more for Lincoln than any dozen other friends he had."[82] In 1860, Davis was Lincoln's manager and chief negotiator at the Republican National Convention and was instrumental in securing Lincoln's nomination.[83] After Lincoln died, Davis served as executor of his estate.[84]

His relationship with Lincoln did not color Davis' views of the legality of military commissions in loyal states. To the contrary, Davis told the president of his dismay over their use. In a letter to

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[81] Fairman at 200; Rehnquist at 6.

[82] William H. Herndon and Jesse W. Weik, Herndon's Lincoln 501 (1888) (hereafter "Herndon"); *see also* Albert A. Woldman, Lawyer Lincoln 263 (1936) ("[O]f all the men working on Lincoln's behalf, none were more sincere, tireless, resourceful, and faithful than his constant boon companion of the Eighth Circuit – Judge David Davis.").

[83] Herndon at 463; *see generally* Willard L. King, Lincoln's Manager: David Davis (1960).

[84] William Hanchett, Out of the Wilderness: The Life of Abraham Lincoln 81 (1994).

Herndon dated September 10, 1866,[85] Davis related what he told Lincoln during the war:

> Mr. Lincoln was advised, and I also so advised him, that the various military trials in the Northern and Border States, where the courts were free and untrammeled, were unconstitutional and wrong; that they would not and ought not to be sustained by the Supreme Court; that such proceedings were dangerous to liberty.

Davis added a remarkable additional claim: "I am fully satisfied therefore that Lincoln was opposed to these military commissions, especially in the Northern States, where everything was open and free."[86]

CONCLUSION

This Court should apply the teachings of *Milligan* to this case. At a time when a bloody civil war threatened the survival of the nation, *Milligan* held that the president could not impose military detention and trial on an alleged member of a terrorist organization in Indiana, a state that at the time "was a military district, was the theatre of military operations, had been actually invaded, and was constantly threatened with invasion." 71 U.S. at 140 (Chase, C.J., concurring). Today, a band of

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[85] Letter from Justice David Davis to William Herndon (Sept. 10, 1866), *reprinted in* Herndon at 556.

[86] *Id.*

foreign-based plotters can surely do great harm to Americans, but they pose far less risk to the integrity of the nation or its government. Under *Milligan*, both the Constitution and statutory law bar the president from detaining a legal resident who is alleged to belong to a terrorist organization at a time when no threat of invasion exists, in a place where no military operations are contemplated and while the courts remain open and functioning.

For all of these reasons, and those stated in the briefs of Petitioner and his supporting amicus curiae, the decision below should be reversed.

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